No. 15-1366

IN THE

Supreme Court of the United States

COMMON SENSE ALLIANCE,

Petitioner,

v.

SAN JUAN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIEF OF CATO INSTITUTE, REASON FOUNDATION, AND NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, www.reason.com and www.reason.org, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues.

National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose

1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

mission is to enhance the climate for housing and the building industry. Chief among NAHB's mission is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes in the United States. NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party litigant and *amicus curiae* to safeguard the property rights and interests of its members.

This petition is important to *amici* because it affords the Court the opportunity to clarify that the "nexus" and "rough proportionality" test from *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to legislatively imposed permit conditions. If the Washington Court of Appeals' decision stands, then States and localities will continue to use legislatively imposed conditions to circumvent Takings Clause requirements in precisely the manner this Court sought to stop in *Dolan*, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013).

SUMMARY OF THE ARGUMENT

The Court has repeatedly recognized that governments often misuse land-use permits to circumvent their obligations under the Takings Clause. In response, the Court has prohibited, in most instances, conditioning a land-use permit on the landowner's surrender of an interest in property without just compensation. Applying the unconstitutional conditions doctrine in this setting,

the Court has explained that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In other words, government cannot accomplish indirectly through land-use permits what it cannot do directly by taking the property.

The test for determining whether a condition violates the unconstitutional conditions doctrine is straightfoward. The reviewing court must first determine whether the condition itself would be a taking if imposed outside the permitting context. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013). If so, the court must then ask whether "there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Id.* at 2591. This test ensures that governments do not circumvent the Takings Clause by extracting property interests at will, while also protecting their power to mitigate any harm the proposed development may cause.

As this case demonstrates, however, municipalities and counties have engineered a way to evade the prohibition on uncompensated takings. Here, Washington's San Juan County requires all landowners near wetlands to set aside buffer zones as a condition of obtaining approval for a new land-use permit. The state court of appeals held that such so-called "legislatively imposed" conditions are exempt from the unconstitutional conditions doctrine. Pet. App. A-16. The court reasoned that "[a]n ordinance requiring

a buffer zone is a legislative act, not a land use decision," so the heightened scrutiny required by *Nollan* and its progeny is inapplicable. *Id*. The court instead concluded that the county ordinance is no different than a standard land-use regulation. *Id*.

There is no basis in this Court's jurisprudence—or in logic—for treating legislatively imposed conditions in this manner. This Court has never distinguished between legislatively imposed conditions and *ad hoc* conditions; it has instead invalidated both under the unconstitutional conditions doctrine. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972). It would make little sense to treat the two types of conditions differently here, as "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of cert.). "A city council can take property just as well as a planning commission can." *Id.* at 1118.

A common response is that *ad hoc* conditions are more prone to abuse than their legislative counterparts because *ad hoc* conditions are typically insulated from democratic processes. *See, e.g.,* Pet. App. A-16; *San Remo Hotel L.P. v. City & Cty. of San Francisco,* 27 Cal. 4th 643, 671 (2002). This view is myopic. Legislators are just as capable as bureaucrats of imposing uncompensated conditions. They can score political points by targeting groups (such as developers) in legislation that a majority of their constituents support. And while *ad hoc* permitting conditions apply only to a single landowner, legislatively imposed conditions apply to broad categories of landowners. For that reason, legislatively imposed conditions are more

threatening to individual property rights than *ad hoc* conditions. Put simply, the need for rigorous application of the unconstitutional conditions doctrine to legislative conditions is *more* acute than with *ad hoc* permitting conditions.

Finally, there is an acknowledged split of authority on this issue. *See, e.g.*, *Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting from denial of cert.); *CBIA v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of cert.). That split has deepened over the last 20 years, with the majority of courts incorrectly exempting legislative conditions from the unconstitutional conditions doctrine. Without this Court's intervention, lower courts will likely continue trending in the wrong direction, allowing more States to circumvent their obligations under the Takings Clause.

For these reasons, *amici* respectfully request that the Court grant the petition.

ARGUMENT

I. Governments Evade Their "Just Compensation" Obligations When Courts Exempt Legislatively Imposed Conditions from the Unconstitutional Conditions Doctrine.

A. The Decision Below Violates the Court's Protection of Property Rights as Articulated in *Nollan*, *Dolan*, and *Koontz*.

The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "As its

text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power'" to pay "just compensation" for the taken property interests. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted).

This Court has long recognized that States often try to circumvent their obligations to pay "just compensation" through the land-use permitting process. In *Nollan*, for example, the California Coastal Commission conditioned a building permit on the landowners granting a public easement across their property to access a beach. *See* 483 U.S. at 827. The Court explained that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis ... , rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831.

That being true, the Court explained that conditioning a permit upon the grant of that same easement, which had no relationship to the permit request itself, is "an out-and-out plan of extortion." *Id.* at 837 (citation omitted). Compliance with the Takings Clause, the Court emphasized, is "more than an exercise in cleverness and imagination." *Id.* at 841. To ensure compliance with the "just compensation" requirement, the Court thus extended the "unconstitutional conditions" doctrine to attempts by States and localities to impose onerous conditions in the permitting process. *Dolan*, 512 U.S. at 385.

There are important reasons why this Court chose to restrict States' and local governments' permitting power in this manner. In particular, "land-use permit applicants

are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth more than property it would like to take." *Koontz*, 133 S. Ct. at 2594. The government can therefore force a landowner to sacrifice property in exchange for a valuable land-use permit. *Id.* "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation." *Id.* at 2595.

To prevent this "gimmickry," courts must apply heightened scrutiny to conditions embedded in land-use permits. *Dolan*, 512 U.S. at 387. When reviewing a permit, the court must first decide whether the proposed condition would be a taking if the government imposed it directly on the landowner outside the permitting process. *Koontz*, 133 S. Ct. at 2598 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing."); *see also Lingle*, 544 U.S. at 537-40 (explaining the test for finding a taking). If the condition would be a taking, then the state cannot impose it as a condition *unless* there is a "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the [landowner's] proposal." *Koontz*, 133 S. Ct. at 2595.

This test protects both the landowner's property rights and the government's regulatory interests. It balances (1) the reality that State and local governments often will attempt to coerce landowners into voluntarily giving up property interests and (2) the possibility that "proposed land uses threaten to impose costs on the

public that dedications of property can offset." *Koontz*, 133 S. Ct. at 2594-95. The Court's "precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out ... extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* at 2595 (quoting *Dolan*, 512 U.S. at 387). For example, if a landowner's "proposed development … somehow encroache[s] on existing greenway space in the city," then it would be permissible "to require the [landowner] to provide some alternative greenway space for the public either on her property or elsewhere" as a condition of obtaining the permit. *Dolan*, 512 U.S. at 394.

The Court's guidance unfortunately has not sufficiently deterred States and localities from trying to circumvent their "just compensation" obligations. Just as States and localities tried to use land-use permits to avoid those obligations altogether, they have increasingly accomplished that same end by gaming this Court's "nexus" and "rough proportionality" test.

Koontz is the perfect example of this "gimmickry." In *Koontz*, a Florida water management district conditioned the landowner's requested permit on the landowner paying for improvements on unrelated government-owned property. 133 S. Ct. at 2593. The government argued that the landowner's claim failed at the first step because "the exaction at issue here was the money rather than a more tangible interest in real property." *Id.* at 2599. But the Court recognized that "if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Id.* "[A] permitting authority wishing to exact an easement could

simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.* By rejecting the government's argument, the Court closed off another means of end-running the just compensation requirement.

The county ordinance at issue here is no different than prior attempts to dodge just compensation. San Juan County is a collection of islands in northwest Washington. These islands are covered in wetlands, many of which are adjacent to shoreline property. *See generally* San Juan County, Best Available Science Synthesis, Ch. 2 (May 2011), *available at* https://goo.gl/8cTlWS. For example, it is estimated that the county's two largest islands—San Juan Island and Orcas Island—are comprised of 43% and 30% wetlands, respectively. *Id.* at 8-9. This is significant because the ordinance imposes a number of one-size-fits-all regulations on San Juan residents that require "buffer zones" as a condition of granting land-use permits. *See* San Juan County Code § 18.35.005, *et seq.* For wetlands, the ordinance requires landowners to set aside "water quality buffers" as a condition of obtaining a building permit on land within 300 feet of wetlands. *Id.* §§ 18.35.085, 18.35.100(A)(1). Those buffer zones range up to 250 feet. *Id.* § 18.35.100(A) (Table 18.35.100-1). And within those buffer zones, the ordinance greatly restricts the landowner's ability to use or develop the land. *Id.* § 18.35.100(C) (Table 18.35.100-4).

Importantly, these buffer requirements apply without regard to whether the proposed development would impact the wetlands. To avoid the transparent problem that these buffer requirements will often target property lacking any relationship to wetland protection, the County took

the position that the buffers are exempt from heightened scrutiny. Because they originate in a legislative ordinance instead of the *ad hoc* permitting process, San Juan County contended, they are not subject to the "nexus" and "rough proportionality" test. The Court of Appeals agreed, holding that the ordinance was categorically excluded from heightened scrutiny because "[a]n ordinance requiring a buffer zone is a legislative act, not a land use decision." Pet. App. A-16. The court reached this conclusion even though there is little (if any) substantive difference between the San Juan ordinance and the *Dolan* condition, for instance. In sum, this most recent "exercise in cleverness and imagination" parallels past attempts at avoiding the just compensation requirement.

B. There Is No Doctrinal or Reasoned Basis for Exempting Legislative Permitting Conditions from Heightened Scrutiny.

"One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). A common justification for distinguishing between legislatively imposed conditions and *ad hoc* permitting conditions is that ad hoc conditions are more likely to be abused so as to impose public burdens on the few. Pet. App. A-16. "*Ad hoc* [conditions] deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape ... political controls." *San Remo*, 27 Cal. 4th at 671. According to some courts, "[t]he risk of [extortionate] leveraging does not exist when the exaction is embodied in

a generally applicable legislative decision." *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *see also San Remo*, 27 Cal. 4th at 668 (explaining that "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present" for legislative conditions).

Those courts are wrong. The notion that *ad hoc* conditions are more prone to abuse is overly simplistic. Indeed, the risk of abuse is *greater* for legislatively imposed conditions. The Supreme Court of Texas has recognized that legislatures can "'gang up' on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004). Legislative land-use decisions "reflect classic majoritarian oppression." Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 271 (2000). As the San Juan ordinance demonstrates, "developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored." *Id.* That is because the "single issue that characterizes the legislative process of many suburban communities in the United States is the antidevelopment issue." *Id.* As a result, "discrimination against a prodevelopment minority is quite likely given that they are so outnumbered." *Id.*

The potential for abuse is amplified by the fact that legislative conditions have sweeping application. The ordinance here applies to every inch of property adjacent to wetlands, which cover much of the land within the

county. Instead of a single administrative body extracting unconstitutional concessions from landowners one by one, San Juan County has accomplished that feat in one fell swoop. Other municipalities—in Washington and other states where courts immunize legislatively imposed conditions—are currently free to impose similar exactions in broadly applicable legislative enactments.

Perhaps this result would be acceptable if there were some other doctrinal basis for exempting legislatively imposed conditions. But there is not: treating these conditions differently is an act of hollow formalism rather than a logical conclusion. As two justices of this Court recognized more than 20 years ago, "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia*, 515 U.S. at 1117-18 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). "A city council can take property just as well as a planning commission can." *Id.* at 1118. Focusing on the governmental entity in this manner leads to absurd results. Under the Court of Appeals' decision, a municipality's decision is subject to heightened scrutiny if it conditions *one homeowner's* permit on an agreement to cede an easement over the land. But the same municipality can freely "*seize[] several hundred homes*" if that condition originates from legislation. *Id.* (emphasis added). There is simply no logical basis for this result, which is why "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.*

Those courts that have exempted these conditions may be driven by the mistaken belief that the unconstitutional

conditions doctrine cannot be applied in a facial challenge. *See, e.g.*, Pet. App. A-16 (noting that Petitioner "provides inadequate authority for an extension of the *Nollan/Dolan* test to a facial challenge of a critical areas ordinance."). Because the "nexus" and "rough proportionality" test requires an examination of how the permit's condition fits with a *particular* piece of property, the argument goes, courts cannot make that determination on a facial basis.

But the same is true for other unconstitutional conditions imposed by statute. Like the "nexus" and "rough proportionality" test, all unconstitutional conditions cases require some form of weighing the importance of the governmental interest against the nature of the condition. *See, e.g., South Dakota v. Neville*, 459 U.S. 553, 558-64 (1983). Despite that, this Court has repeatedly sustained facial challenges to legislative acts imposing unconstitutional conditions. For example, in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court invalidated a statute that conditioned the receipt of state-sponsored healthcare on living in that state for a year, *id.* at 251, 269-70; *see also Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (applying unconstitutional conditions doctrine to a federal statute without regard to its legislative origin); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (same); Petition 12 n.2 (collecting cases). Lower courts have shown that the same can be true in the property context. *See, e.g.*, *N. Illinois Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 388-90 (Ill. 1995) (invalidating a legislatively imposed condition under *Nollan* and *Dolan*). Of note, the Court in *Koontz* relied on the Court's analysis of the facial challenges in *Memorial Hospital*, *Regan*, and

Rumsfeld when it applied the unconstitutional conditions doctrine to land-use permits. *See* 133 S. Ct. at 2594. It is no answer, then, that real property is somehow unique in the unconstitutional conditions universe.[2]

The facts of this case demonstrate the need for keeping legislatively imposed conditions in the fold. The San Juan ordinance is indistinguishable from those conditions this Court has subjected to heightened scrutiny. Just as in *Dolan*—where the locality conditioned a permit on the landowner dedicating his property to improving drainage in a nearby floodplain—there is no question that the ordinance's requirement to set aside property for "buffers" would constitute a taking if imposed outside the permitting context. *See Dolan*, 512 U.S. at 380. But unlike the condition in *Dolan*, which applied to one landowner, the ordinance here cannot be challenged as an unconstitutional condition despite potentially applying to thousands of landowners. Absent this Court's intervention, there is nothing to stop other counties and municipalities in Washington from immunizing similar conditions by embedding them in statutes.

The Court of Appeals' decision also creates significant line-drawing problems. There is often little to distinguish

2. That is not to say a facial challenge to a legislatively imposed condition on property is simple. It is difficult to prevail on a facial challenge to any statute. *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully."). A plaintiff "must establish that no set of circumstances exists under which the Act would be valid." *Id.* So a plaintiff challenging a legislatively imposed land-use condition must show the required condition *never* could have a "nexus" and "rough proportionality" with the land it burdens.

between a condition that is legislatively imposed and one that is the result of an *ad hoc* permitting decision. While the San Juan ordinance is clearly a legislatively imposed mandate, "the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction." Reznik, *supra*, at 266. This has led some to conclude that "a workable distinction can[not] always be drawn between actions denominated adjudicative and legislative." *Town of Flower Mound*, 135 S.W.3d at 641.

Many courts thus refuse to apply the doctrine to legislatively imposed conditions not because there is any logical distinction, but simply because of their belief that this Court has never applied the doctrine outside the *ad hoc* process. In *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001), for example, the Colorado Supreme Court concluded that *Nollan* and *Dolan* arose only in the context of an *ad hoc* permit application, *id.* at 695-96. But that distinction is a shallow gloss on this Court's decisions. The conditions in *Nollan*, *Dolan*, and *Koontz* each arose from an overarching legislative regime and were thus arguably legislative conditions, *see* Petition 11-12, which has led some courts to recognize the difficulty of distinguishing between legislative and ad hoc conditions, *see, e.g.*, *Town of Flower Mound*, 135 S.W.3d at 641 (explaining how the exactions in *Nollan* and *Dolan* were imposed pursuant to a legislative scheme). The absence of a bright line between legislative conditions and adjudicative conditions is an additional reason why legislative conditions should be subject to the same scrutiny as adjudicative conditions.

II. The Deepening Split in States and Circuits Is Trending in the Wrong Direction.

For more than 20 years, there has been an acknowledged split between the States and circuits on whether legislatively imposed conditions are subject to the unconstitutional conditions doctrine. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.) ("The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature."). Unfortunately, this Court has revisited its jurisprudence in this context only once since 1995, *see Koontz*, 133 S. Ct. at 2586, but it did not then address the split. In fact, the *Koontz* dissent lamented the lack of guidance on whether heightened scrutiny applies to legislatively imposed exactions. *See id.* at 2608 (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.) ("Maybe today's majority accepts that distinction [between *ad hoc* and legislative conditions]; or then again, maybe not. At the least, the majority's refusal 'to say more' about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money."). So a majority of the Justices on the Court today have recognized the confusion sown by the lack of clarity in this area.

Perhaps the split of authority was not ripe for this Court's review in 1995. Other than the case that was on appeal, the dissent from denial of certiorari in *Parking Association of Georgia* highlighted only a single district court case that exempted legislative enactments 515 U.S. at 1117 (citing *Harris v. Wichita*, 862 F. Supp. 287 (D. Kan. 1994)). But the same cannot be said today; the split

has deepened significantly since then. *See* Petition 17-18. Justice Thomas was correct to note recently that the split of authority "shows no signs of abating." *CBIA*, 136 S. Ct. at 928 (Thomas, J., concurring in denial of cert.). Worse still, the majority of courts during this time period have followed the wrong path, choosing to exempt legislatively imposed conditions from heightened scrutiny. *See, e.g.*, *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinnell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003), *abrogated on other grounds by Hageland Aviation Servs. Inc. v. Harms*, 210 P.3d 444, 450 n.21 (Alaska 2009); *San Remo*, 27 Cal. 4th at 670-71; *Krupp*, 19 P.3d at 696; *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 999-1000; *see also* Petition 17-19.

Most immediately, this Court's review is necessary to resolve a conflict within the country's most populous circuit. States in the Ninth Circuit conflict with that court's view on whether legislatively imposed conditions are subject to heightened scrutiny. Washington, California, Alaska, and Arizona have held they are not, Pet. App. A-16; *San Remo*, 27 Cal. 4th at 670-71; *Spinnell Homes*, 78 P.3d at 702; *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 996, while the Ninth Circuit has held that they are, *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (applying the unconstitutional conditions doctrine to a legislatively imposed condition); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (holding that, under circuit precedent, legislatively imposed conditions are subject to the unconstitutional conditions doctrine). As a result, the validity of a legislative condition in these states depends on the court in which that condition is challenged.

If this Court does not clarify this area of the law, then "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can impose exactions that would not pass muster if done administratively." *CBIA*, 136 S. Ct. at 929 (Thomas, J., concurring in denial of cert.). At best, landowners' rights will continue to depend entirely on the state in which they live. At worst, those rights depend on whether their cases arise in state or federal courts.

This Court has "grant[ed] certiorari in takings cases without the existence of a conflict." *Parking Ass'n of Georgia*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of cert.). "Where, as here, there *is* a conflict, the reasons for granting certiorari are all the more compelling." *Id.* (emphasis added).

CONCLUSION

For the reasons set forth above, *amici* ask that the Court grant the petition.

Respectfully submitted,

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