No. _____

In The
Supreme Court of the United States

PEYMAN PAKDEL; SIMA CHEGINI,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO;
SAN FRANCISCO BOARD OF SUPERVISORS;
SAN FRANCISCO DEPARTMENT
OF PUBLIC WORKS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL F. UTRECHT
Utrecht & Lenvin, LLP
109 Stevenson St., 5th Floor
San Francisco, CA 94105
Telephone: (415) 357-0600
putrecht@ullawfirm.com

Thomas W. Connors
Black McCuskey Souers
& Arbaugh, LPA
220 Market Ave. S., Suite 1000
Canton, OH 44702
Telephone: (330) 456-8341
tconnors@bmsa.com

JEFFREY W. MCCOY*
**Counsel of Record*
DEBORAH J. LA FETRA
ROBERT H. THOMAS
ERIN W. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
jmccoy@pacificlegal.org
dlafetra@pacificlegal.org
rthomas@pacificlegal.org
ewilcox@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

Planning for their retirement home, Petitioners (the Pakdels) purchased a tenancy-in-common interest in a six-unit building in San Francisco, which gave them occupancy rights to one unit. In the meantime, they rented the unit to a tenant. The Pakdels' purchase agreement required them to cooperate with co-owners to convert their tenancy-in-common interests into separately owned condominiums. The City later amended its condo-conversion ordinance to require converting owners to offer a lifetime lease to any non-owning tenants. After the Pakdels applied for conversion, the City twice denied their request to be excused from the lifetime lease requirement. A divided Ninth Circuit panel affirmed the dismissal of the Pakdels' regulatory takings claim, holding that the City's decision was not "final" under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), because the Pakdels had not exhausted administrative remedies. The court also affirmed the dismissal of the Pakdels' unconstitutional conditions claim because the condition was imposed through legislation. With nine judges dissenting, the court denied rehearing en banc.

The questions presented are:

1. Whether a 42 U.S.C. § 1983 takings claim is ripe under *Williamson County*'s finality requirement when a city has definitively and unalterably imposed a land use regulation on a landowner?

2. Whether the unconstitutional conditions doctrine applies to legislatively-imposed permit conditions?

PARTIES TO THE PROCEEDING

Petitioners Peyman Pakdel and Sima Chegini were the plaintiffs-appellants below.

Respondents City and County of San Francisco, the San Francisco Board of Supervisors, and San Francisco Department of Public Works were defendants-appellees below.

STATEMENT OF RELATED PROCEEDINGS

Peyman Pakdel; Sima Chegini v. City and County of San Francisco; San Francisco Board of Supervisors; San Francisco Department of Public Works, No. 17-17504 (9th Cir.) (opinions issued March 17, 2020; rehearing en banc denied October 13, 2020; mandate stayed October 19, 2020).

Peyman Pakdel, et al. v. City and County of San Francisco, et al., No. 17-cv-03638-RS (N.D. Cal.) (judgment entered November 20, 2017).

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Appendix

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* San Francisco Ordinance 117-13 is reproduced in the appendix as it was adopted. San Francisco ordinances mark the changes from the previous version. *see* https://sfgov.legistar.com/View.ashx?M=F&ID=2556097&GUID

=307ABDC0-AA81-4ED1-B2BC-C11D3882974E. The Ordinance is included rather than sections of the municipal code because it contains uncodified sections.

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Rule

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners Peyman Pakdel and Sima Chegini (the Pakdels) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals, including Judge Bea's dissent, is published at 952 F.3d 1157 (9th Cir. 2020), and included in Petitioners' Appendix (App.) A. The panel's unpublished memorandum opinion affirming the dismissal of Petitioners' equal protection, due process, and unreasonable seizure claims is included at App. B. The court of appeals' denial of the petition for rehearing en banc, including the opinion of nine dissenting judges, is published at 977 F.3d 928 (9th Cir. 2020), and included at App. E. The decision of the district court is unpublished and included at App. C. The Ninth Circuit's order staying the issuance of the mandate is included at App. D.

JURISDICTION

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the defendants' motion to dismiss on November 20, 2017. The Pakdels filed a timely appeal to the Ninth Circuit. On March 17, 2020, a panel of the Ninth Circuit affirmed the dismissal of the district court. The Pakdels then filed a timely petition for rehearing en banc, which was denied on October 13, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

San Francisco Ordinance 117-13 is reproduced at App. F.

INTRODUCTION

Under a San Francisco ordinance, property owners with an existing tenant who convert their home into a condominium may *never* be permitted to reside there because they are required to offer the tenant a lifetime lease. The City imposes this lifetime lease requirement on all property owners seeking to change the form of ownership from a tenancy-in-common interest to a condominium interest. Moreover, the ordinance contains a poison pill: if any owner sues to challenge the constitutionality of this requirement, the City suspends the condo conversion

program entirely as to properties with even one tenant.

When they rented out the apartment purchased as their retirement home, the Pakdels did not imagine they would never live in it. They therefore sued in federal court to challenge the lifetime lease requirement as a taking of their property without just compensation and an unconstitutional condition forcing them to give up the right to compensation as a condition of converting their property into a condominium. Despite recognizing that the Pakdels have no further process available to them to contest this requirement, the Ninth Circuit affirmed the dismissal of the Pakdels' regulatory takings claim as "not final" because they had not exhausted administrative remedies by appealing the requirement through the City's review process. App. A-6. Additionally, the court affirmed the dismissal of the Pakdels' unconstitutional condition claim because the condition was imposed legislatively through an ordinance, rather than as an ad hoc adjudication. App. A-10 n.4.

The decision below flatly contradicts the "settled rule" that exhaustion of state remedies is not a prerequisite to an action under 42 U.S.C. § 1983. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019). In *Knick*, this Court stressed that Fifth Amendment takings claims, like all other constitutional claims, cannot be subject to an exhaustion requirement. *Id.* Notwithstanding this clear holding, the Ninth Circuit's opinion "imposes an impermissible exhaustion requirement" and puts "takings claims back into a second-class status, less than one year after the Supreme Court had squarely put them on the

same footing as other constitutional claims." App. E-15 (Collins, J., dissenting from denial of rehearing en banc).

Under the finality requirement in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186–94 (1985), a government must issue a final decision before a landowner can file a takings claim in federal court. But as this Court stated in that case, the finality requirement is *not* an exhaustion requirement. *Id.* at 194 n.13. Here, the Ninth Circuit distorted *Williamson County*'s finality requirement to impose an exhaustion requirement "pure and simple." App. E-10 (Collins, J., dissenting from denial of rehearing en banc). The Ninth Circuit's opinion thus sows confusion about the difference between finality and exhaustion. This Court should grant the petition to ensure that takings claims, like all other constitutional claims, are not subject to an impermissible exhaustion requirement under the guise of "finality."

The Ninth Circuit's opinion also adds to a longstanding and deepening nationwide split among state and lower federal courts on the question whether legislatively-imposed permit conditions are subject to review under the unconstitutional conditions doctrine articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Ninth Circuit held that the Pakdels could not bring an unconstitutional conditions claim solely because the condition on their change in property title was imposed by an ordinance rather than through an individualized adjudication. This Court should grant the petition to resolve the conflict among lower courts on this question.

STATEMENT OF THE CASE

A. Factual Background

1. Peyman Pakdel and Sima Chegini are a married couple living in Akron, Ohio. App. G-4. In 2009, planning for their retirement to San Francisco about a decade later, the Pakdels purchased a tenancy-in-common interest in a three-story Russian Hill home on Green Street, built in 1913 and containing six apartments. App. G-5. The tenancy-in-common interest gave the Pakdels the exclusive right to occupy a single unit in the building. *Id.*

San Francisco Planning Dep't, *Executive Summary: Condominium Conversion Subdivision* at 16 (Jan. 7, 2016).[2]

[2] https://commissions.sfplanning.org/cpcpackets/2015-004577CND.pdf

Not then ready to retire, the Pakdels rented out their apartment—a situation intended to be temporary—until they made their move to the West Coast. App. G-5. California's Ellis Act, adopted in 1985, reinforces property owners' rights to exit the rental business and move into their own homes. Cal. Gov't Code § 7060(a); App. G-8.

2. The Pakdels' purchase agreement required them to cooperate with their co-owners in any efforts to convert the owners' interests to condominiums. App. G-5–G-6. Such clauses are common in San Francisco because conversion allows co-owners to gain independent title to their respective units. App. G-6. When the Pakdels purchased their apartment, the City of San Francisco permitted only a limited number of conversions per year, selected by lottery. *See* App. F-24, § 1396.5. Under the lottery program, the City did not require owners to offer lifetime leases to their tenants as a condition for converting tenancy-in-common interests into condominiums. App. G-6. The Pakdels leased their apartment under this legal regime.

3. In 2013, the City replaced the conversion lottery with an "Expedited Conversion Program" (ECP), San Francisco Ordinance 117-13, under which the City would process conversion applications if each owner paid a $20,000 fee. App. F-16, § 1396.4(e). But there was a catch: any conversion under the ECP required owners to offer a lifetime lease to existing tenants (and former tenants if the tenant vacated before the conversion was complete) as a condition for approval. App. F-17, § 1396(g); San Francisco Public Works, *Department of Public Works Expedited Conversion Program Frequently Asked Questions*

(Oct. 29, 2014).[3] The City enacted the new program while aware that tenancy-in-common agreements typically require co-owners to pursue all necessary steps to convert to condominiums. App. G-5–G-6. Now, if the Pakdels' much-younger tenant[4] chooses to remain in the unit and outlives them, they will *never* get the opportunity to live in their own retirement home.

4. All non-owning tenants, regardless of need or income, are eligible for an offer of a lifetime lease under the ECP and have two years to decide whether to accept it. App. F-8, § 1396.4.[5] So long as the tenant remains in the apartment, the City will not accept any waiver of the lifetime lease. App. F-20, § 1396.4(g)(3). Both the offer of a lifetime lease, and the lease itself, are recorded against title to the property, together with a separate binding agreement between the City and the property owners. *Id.* Moreover, existing tenants may invite family to move into their units,

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[3] https://www.sfpublicworks.org/sites/default/files/4132-ECP%20Questions_FINAL_102914.pdf.

[4] The Pakdels' tenant is identified in the San Francisco Planning Department's Summary of the conversion application. San Francisco Planning Dep't, *Executive Summary: Condominium Conversion Subdivision* at 2 (Jan. 7, 2016), https://commissions.sfplanning.org/cpcpackets/2015-004577CND.pdf.

[5] Census data reveals that residents of the prosperous Russian Hill neighborhood (home of California governor Gavin Newsom) are well educated and working mostly in managerial and professional occupations. San Francisco Planning Dep't, *San Francisco Neighborhoods: Socio-Economic Profiles* at 70-71 (May 2011), https://sf-planning.org/sites/default/files/FileCenter/Documents/8501-SFProfilesByNeighborhoodForWeb.pdf.

establishing "co-tenant" status and thus becoming eligible for the lifetime lease. App. F-17. The expedited conversion program also contains a program-wide poison pill: *any* legal challenge from a single property owner suspends the program for all buildings containing even one tenant. App. F-32.[6]

5. The expedited conversion program did not change the Pakdels' contractual duty to work with the other owners to convert their property to condominiums. Since the time of purchase, they had applied for the lottery, but never been selected. In 2015, the Pakdels and their co-owners applied for condominium conversion under the ECP. App. G-7. The Pakdels knew that if they challenged the lifetime lease requirement before converting their unit, the City would halt all conversion applications, thereby subjecting the Pakdels to liability from their co-owners for breach of contract. App. G-7. Seeing no alternative, per the Ordinance's requirements and their contractual obligation, the Pakdels submitted an agreement with the City to offer a lifetime lease to the tenant residing in their unit at the time of the conversion, despite their objections to the lifetime lease requirement. App. G-17–G-18.

6. The condominium deeds for the building were recorded on March 25, 2017, App. G-8, and the Pakdels' tenant accepted the lifetime lease offer on or about May 5, 2017. App. G-8. On June 9 and again on June 13, 2017, the Pakdels asked the City to excuse them from executing and recording the lifetime lease, or alternatively, to compensate them for the taking caused by recording a lifetime lease against their

[6] The City continued to process some applications filed by May 1, 2013, for buildings with no tenants.

property. App. G-8–G-9. The City refused both requests and informed them that if they failed to execute and record the lifetime lease, they would be in violation of the Ordinance and subject to an enforcement action. App. G-9.

After the Pakdels filed suit on June 26, 2017, the City sent a letter to all owners citywide informing them of the Pakdels' identity and street address and that, as a result of their legal challenge, there is now a moratorium on all new condominium conversions in San Francisco. App. H-2 (letter from the city notes enclosure of the Pakdels' complaint with unredacted personal information).[7]

B. Legal Background

1. Caught between the City's penalties if they did not comply with the lifetime lease requirement, and their co-owners' breach of contract claim if they did not proceed with the condominium conversion, the Pakdels filed this lawsuit in federal court in 2017. App. G. The complaint alleged that the lifetime lease requirement violated the Takings Clause of the Fifth Amendment (incorporated through the Fourteenth Amendment), constituted an unreasonable seizure of their property under the Fourth Amendment, and violated the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. App. G-9–G-23. The complaint requested compensation, as well as injunctive and declaratory relief. App. G-24. The district court dismissed the complaint under then-controlling *Williamson County* because the Pakdels had not sought compensation in state court before filing the complaint in federal court.

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[7] The City did not reinstate the lottery.

App. C-9. The court also dismissed the Pakdels' Due Process and Equal Protection claims for failure to state a claim.[8] App. C-12–C-16. The Pakdels timely appealed the district court's dismissal. While that appeal was pending, this Court decided *Knick*, which overruled *Williamson County*'s requirement that property owners seek just compensation in state court before filing a federal takings claim in federal court. 139 S. Ct. at 2178. The Pakdels filed a supplemental brief with the Ninth Circuit, explaining that *Knick* overturned the basis for the district court's dismissal of the takings claims and requesting that the court vacate the dismissal and remand the case for a decision on the merits. Appellants' Supplemental Brief, Ninth Circuit case no. 17-17504, docket no. 38 (filed July 22, 2019). The court declined.

2. Instead, a divided panel of the Ninth Circuit affirmed dismissal of the Pakdels' takings claims because—looking backward—their previous failure to administratively appeal the lifetime lease requirement was dispositive despite—looking forward—no additional administrative procedures remaining available that could possibly provide relief from the lifetime lease requirement. App. A-6. Thus, the panel majority concluded that the City had not reached a "final decision," and the claim was unripe and indeed, will never ripen. App. A-15. Judge Bea dissented from this sleight of hand, opining that "[r]equiring [the Pakdels] to adhere to specific administrative procedures for requesting 'variances' from a regulation ... risks 'establish[ing] an

[8] The Pakdels brought several other state law and state constitutional claims, which were dismissed and were not appealed. *See* App. C-16–C-22.

exhaustion requirement for § 1983 takings claims,' something the law does not allow." App. A-27 (quoting *Knick*, 139 S. Ct. at 2173).

The Ninth Circuit also rejected the Pakdels' claim that the City's lifetime lease requirement is an unconstitutional condition, holding that the standards adopted in *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390; and *Koontz v. St. Johns River Water Mgmt. Dist*, 570 U.S. 595, 604 (2013), do not apply to legislatively-imposed conditions. App. A-10 n.4.[9]

3. The Pakdels timely filed a petition for rehearing en banc. On October 13, 2020, the Ninth Circuit denied the petition. Judge Collins, writing for the nine dissenting judges, would have granted review because the panel's "unprecedented decision sharply departs from settled law and directly contravenes the Supreme Court's decision in *Knick* …." App. E-4.

4. The Pakdels filed a motion to stay the issuance of the mandate,[10] arguing that a petition for a writ of certiorari "would present a substantial question" and "there is good cause for a stay." Fed. R. App. P. 41(d)(1). Three days later, the court granted the motion. App. D-1.

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[9] The court affirmed the dismissal of the Pakdels' Due Process, Equal Protection, and Unreasonable Seizure claims, not challenged here, in an unpublished memorandum opinion. App. B.

[10] Motion by Appellants for Stay of Mandate, Ninth Circuit case no. 17-17504, docket no. 71 (filed Oct. 16, 2020).

REASONS TO GRANT THE PETITION

I. Certiorari Should Be Granted Because the Decision Below Conflicts With This Court's Precedents and Sows Confusion Between Finality and Exhaustion in Section 1983 Claims.

A. Contrary to this Court's precedents, the Ninth Circuit created an exhaustion requirement for takings plaintiffs.

In *Knick*, this Court relied on settled law to reaffirm that a property owner need not exhaust administrative remedies before filing a section 1983 takings claim in federal court. *Knick*, 139 S. Ct. at 2167; *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 504 (1982). But here, the Ninth Circuit dismissed the Pakdels' takings claims because they did not exhaust administrative remedies, even though there are no longer any administrative procedures available. App. A-21–A-22. The Ninth Circuit's novel theory conflicts with both the language and purpose of the Civil Rights Act of 1871, and this Court's long-standing command "that suits under [42 U.S.C.] § 1983 are not subject to exhaustion." App. E-7 (Collins, J., dissenting from denial of rehearing en banc).

The Ninth Circuit's decision conflicts with both the holdings and rationales of this Court's controlling precedents. In *Patsy*, this Court held that a plaintiff does not have to exhaust administrative remedies before filing a lawsuit under section 1983. 457 U.S. at 516. In reaching this holding, the Court examined the legislative histories of both section 1983 and its precursor, section 1 of the Civil Rights Act of 1871.

The Court determined that, with these statutes, Congress intended to "throw open the doors of the United States courts to individuals who" have suffered a deprivation of constitutional rights and "provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary." 457 U.S. at 504 (citation omitted).

Even before *Patsy*, the Court had "on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." *Patsy*, 457 U.S. at 500. "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against" unconstitutional actions taken under the color of state law. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Requiring a plaintiff to exhaust administrative remedies would frustrate the purposes of section 1983. *Patsy*, 457 U.S. at 511.

Consistent with *Patsy*'s application of the ripeness doctrine, *Williamson County* reaffirmed that exhaustion of administrative remedies is not a prerequisite to filing a section 1983 takings claim in federal court. 473 U.S. at 193, 194 n.13 (citing *Patsy*, 457 U.S. 496). While exhaustion is not required, this Court stated that a regulatory takings claim is generally premature until the government reaches a "final decision" applying its regulations to a landowner. *Id.* at 186–94. After all, if the government's decision is not final, it might still allow the requested use. The finality requirement assures that a land use decision-maker has "arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 193. Once the injurious

decision is final, and a court knows "how the regulations will be applied to [a landowner's] property," the takings claim is ripe because the court can assess the regulation's effects. *Id.* at 200.[11]

In *Williamson County*, this Court elaborated on how the finality requirement differs from a rule requiring exhaustion of administrative remedies. 473 U.S. at 193. A municipality has made a final decision when it has reached a "conclusive determination ... whether it would allow [the property owner] to develop the subdivision in the manner [it] proposed." *Id.* By contrast, "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* In short, finality does not depend on whether landowners participated in all available administrative procedures. *Id.* at 192–93. Instead, finality rests on whether a government entity has conclusively applied the relevant regulation to the plaintiff's property. *Id.*

The finality requirement of *Williamson County* is forward-looking, while exhaustion is backward-looking. In determining that the property owner's claim was not ripe, this Court explained that procedures remained available to the plaintiff in the future that might change how the zoning regulations

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[11] This Court also stated that a "if a State provides an adequate procedure for seeking just compensation," a property owner must use that procedure—and be denied just compensation—before bringing a takings claim in federal court. *Knick* overturned this state-litigation requirement, while the finality requirement remains in place. 139 S. Ct. at 2169.

apply to the property. *Williamson County*, 473 U.S. at 190, 193–94. But, consistent with *Patsy*, *Williamson County* held that "[e]xhaustion of review procedures is not required" to satisfy the finality requirement. 473 U.S. at 192, 194 n.13. Here, the Pakdels twice requested an exemption from the lifetime lease requirement and the City twice summarily rejected the requests. App. G-8–G-9. Neither the City, nor the Ninth Circuit in its opinion, identified any future procedures that could remove the lifetime lease requirement. App. E-10 (Collins, J. dissenting from denial of rehearing en banc).

In short, "the settled rule is that exhaustion of state remedies is *not* a prerequisite to an action under [42 U.S.C.] § 1983." *Knick*, 139 S. Ct. at 2167 (quotations omitted). *Knick* instructs courts to treat all section 1983 claims the same, regardless of the constitutional right at issue, and permit takings claims to move forward without exhaustion. *Id.* at 2173.

The Ninth Circuit, however, ignored these principles and reimposed an exhaustion requirement on property owners raising takings claims in federal court. App. A-6. Ripeness looks forward, asking whether a takings claim has been filed too early. *See* App. E-14 (Collins, J., dissenting from denial of rehearing en banc). But the Ninth Circuit looked backward at what the Pakdels might have done before filing suit. App. A-16. The court concluded that the Pakdels failed to "ripen" their claims because they did not exhaust all administrative appeals related to the conversion conditions prior to filing suit. App. A-6. The court's approach improperly equates ripeness with exhaustion. Although every case is ripe where a

plaintiff exhausts administrative remedies, the inverse is not true. The failure to exhaust does *not* mean that a case cannot be ripe. *See Patsy*, 457 U.S. at 504; *Williamson County*, 473 U.S. at 193.

What the Pakdels did (or did not do) in the past says nothing about whether the City has reached a final decision or whether the Pakdels' claims are ripe. The Ninth Circuit suggested that the Pakdels could have objected at a public hearing or appealed the Department of Public Works' decision. App. A-16. But that is irrelevant. If the Pakdels' claims are not ripe, then some process must remain available to ripen their claims. *See* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4436 (2000). Dismissal of an unripe claim does not forever bar litigation of that claim because an unripe claim may be pursued *later*, if and when it becomes ripe. *Id.* (ripeness is a "curable defect").

Neither the Ninth Circuit, nor the City, has identified *anything* that the Pakdels can do going forward to ripen their claims. App. E-10 (Collins, J., dissenting from denial of rehearing en banc). Nonetheless, the court held that the City's imposition of the requirement was not "final." App. A-13. Under the Ninth Circuit's new rule, the Pakdels are forever barred from having their claims heard in court, even though "there are no longer any administrative procedures available to Plaintiffs to forestall the challenged action of the City." App. E-10 (Collins, J., dissenting from denial of rehearing en banc) (citing

App. A-21).[12] Instead of asking whether the Pakdels filed too early, as the ripeness doctrine requires, the Ninth Circuit in effect dismissed the case because the Pakdels filed too late.

As Judge Collins opined on behalf of the nine dissenters to the denial of rehearing en banc, the Ninth Circuit's opinion is "not the finality requirement described in *Williamson County* and it bears no relation to any conventional notion of 'ripeness' doctrine." App. E-10. There is "no question here about how the 'regulations at issue [apply] to the particular land in question.'" *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *Williamson County*, 473 U.S. at 191). Instead, the Ninth Circuit's interpretation of the finality requirement "is an exhaustion requirement pure and

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[12] In contrast, in *Williamson County*, there were administrative procedures still available to the property owner. 473 U.S. at 193–94. The Ninth Circuit conflated this Court's explanation of the property owner's intentions in *Williamson County* with the merits of the decision. App. A-18. The property owners, in a letter to the county, "took the position that it would not request variances from the Commission until *after* the Commission approved the proposed plat …." *Williamson County*, 473 U.S. at 190. The county's procedures, however, required landowners to request variances before approval, so the county disapproved the plat. *Id.* But by disapproving the plat, Williamson County made no decision about how the owners could use their land going forward. Indeed, the county's disapproval allowed the property owners to reapply following the proper procedures after the case was dismissed. *Id.* at 193–94. Importantly, this Court noted that "[t]he Commission's refusal to approve the preliminary plat does not determine that issue … but *leaves open the possibility* that respondent may develop the subdivision according to its plat after obtaining the variances." *Id.* (emphasis added). Only after the property owners reapplied would the county make a final decision about whether a variance would be granted.

simple" that contradicts the language and purpose of section 1983. App. E-10 (Collins, J., dissenting from denial of rehearing en banc). "The panel majority's decision thus saddles Plaintiffs with a plainly final decision that will nonetheless be *deemed* (forever) to be 'non-final' …." *Id.*

The Ninth Circuit's disregard of *Knick* is further demonstrated by its reliance on pre-*Knick* cases that applied the state-litigation requirement. *See* App. A-19 (listing cases); *see also* App. E-12 (Collins, J., dissenting from denial of rehearing en banc) (reliance on such cases demonstrates that the Ninth Circuit's opinion is "clearly wrong"); App. A-28–A-29 n.3 (Bea, J., dissenting) (same). But it was precisely because cases like these imposed an exhaustion requirement that this Court abrogated the state-litigation requirement. *Knick*, 139 S. Ct. at 2169–70.

This Court's longstanding precedents recognize that section 1983 "guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials and the settled rule is that exhaustion of state remedies is *not* a prerequisite to an action under" that statute. *Knick*, 139 S. Ct. at 2167 (quotations omitted). The Ninth Circuit "defied Supreme Court authority by converting *Williamson County*'s finality requirement into precisely the sort of exhaustion requirement disavowed in that case and explicitly rejected as a 'clear' error in *Knick*." App. E-10 (Collins, J., dissenting from denial of rehearing en banc). San Francisco has unequivocally concluded that, under its ordinance, the lifetime lease requirement applies to the Pakdels' property. App. A-21; App. E-10 (Collins, J., dissenting from denial of rehearing en banc). There are no future

administrative procedures that will free the Pakdels from the requirement. The City's decision is as "final" as final can be. This Court should grant the petition to ensure that property owners are not subject to exhaustion requirements that prevent them from asserting their constitutional rights in federal court.

B. Granting certiorari will resolve an emerging lower court split about how to apply *Williamson County*'s finality requirement after *Knick*.

Granting the petition will also quell an emerging lower court split about how to apply *Williamson County*'s finality requirement post-*Knick*. Relatively few courts have yet applied the finality requirement since *Knick*, but those cases that address the issue show an emerging conflict with the Ninth Circuit's decision below. Most courts recognize that finality and exhaustion are separate concepts, and that a property owner does not need to exhaust all available administrative remedies before filing a takings claim in federal court. Some courts, however, are following the path of the Ninth Circuit and reimposing an exhaustion requirement post-*Knick*.

The Fifth Circuit recently applied *Williamson County*'s finality requirement by determining whether the plaintiff could take any further action to ripen its takings claims. *DM Arbor Court, Ltd. v. City of Houston*, __ F.3d __, No. 20-20194, 2021 WL 523030, at *4 (5th Cir. Feb. 12, 2021). The court determined that the plaintiff's claims had ripened while the appeal was pending and vacated the district court's dismissal. *Id.* In reaching its decision, the court recognized that "[a]s is proper when a dispute is not ripe, the district court dismissed the case without

prejudice" and a "without-prejudice dismissal allows the filing of a new lawsuit *once the case ripens*." *Id.* (emphasis added). Unlike the Ninth Circuit, the Fifth Circuit correctly recognized that ripeness concerns whether a suit is filed too early, and an unripe suit is not forever barred.[13]

The Second and Fourth Circuits have also interpreted the finality requirement by looking forward. In *Thomas v. Town of Mamakating*, 792 F. App'x 24, 27 (2d Cir. 2019), the Second Circuit held that a property owner's claim was not final, and therefore not ripe, because the landowner "can still seek a use variance from the zoning board and has not done so" and, as result, the court could not "evaluate how the Town's zoning rules will ultimately be applied to Thomas's property." *Id. See also Sagaponack Realty, LLC v. Vill. of Sagaponack*, 778 F. App'x 63, 64 (2d Cir. 2019) (decision not final where the defendant Village would reach a final land-use decision in the future but was presently "withholding a final decision on the competing applications made for use of the property pending a decision by the state courts as to which party has the authority to proceed"). Similarly, in *Ballantyne Vill. Parking, LLC v. City of Charlotte*, 818 F. App'x 198, 203 (4th Cir. 2020), the Fourth Circuit held that the case was

[13] In an earlier case, the Fifth Circuit held that a plaintiff's takings claims were ripe because the plaintiff "fully pursued the administrative remedies available to him before filing this action." *Stratta v. Roe*, 961 F.3d 340, 356 (5th Cir. 2020). This statement merely recognizes that exhaustion of administrative remedies is sufficient to ripen a claim. But it does not indicate whether the court believes, like the Ninth Circuit, that exhaustion is necessary to ripen a claim.

premature because "the status of the injury-causing permit is still debated."

In these cases, the Second and Fourth Circuits specified the *future event* that would constitute a final decision by the government. Here, in contrast, the Ninth Circuit acknowledged that *no future event* could serve as a "final decision" that would "ripen" the Pakdels' claims. App. E-10 (Collins, J., dissenting from denial of rehearing en banc).[14]

Additionally, several district courts have interpreted the finality requirement since *Knick*, and many of those cases are now on appeal. These cases show the emerging conflict between the Ninth Circuit's exhaustion approach to finality and the forward-looking approach applied by other courts and the dissenting judges in the Ninth Circuit.

Like the Second, Fourth, and Fifth Circuits, many district courts apply the finality requirement by asking whether a landowner retains options to remove the unwanted restrictions. *See, e.g.*, *Driftless Area Land Conservancy v. Public Service Comm'n of Wisconsin*, No. 19-cv-1007-wmc, 2020 WL 6822707, at *10 (W.D. Wis. Nov. 20, 2020); *Pietsch v. Ward County*, 446 F. Supp. 3d 513, 532 (D.N.D. 2020) (applying finality requirement to a substantive due process claim). This approach correctly reflects the purpose of

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[14] While *Knick* was pending in this Court, the Seventh Circuit applied the finality requirement to a claim brought under the Religious Land Use and Institutionalized Persons Act. In determining that the City's zoning classification was a final decision, the court noted that "there is no ambiguity about the city's interpretation on the permitted versus conditional use question." *Church of Our Lord & Savior Jesus Christ v. City of Markham*, 913 F.3d 670, 678 (7th Cir. 2019).

the finality requirement, *see Williamson County*, 473 U.S. at 199-200, and to regulatory takings generally. Before a court can determine if a regulation goes "too far," *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), it must first know "how the regulations will be applied to [the landowner's] property." *Williamson County*, 473 U.S. at 200; *see also Singer v. City of New York*, 417 F. Supp. 3d 297 (S.D.N.Y. 2019) (administrative record contained all information required for judicial adjudication).

For instance, in *Driftless Area Land Conservancy*, the Western District of Wisconsin held that the plaintiffs' challenge to the state's approval of a new transmission line was ripe because the agency no longer had "discretion over future land use decisions" and its only role "going forward" was to enforce or defend its decision. 2020 WL 6822707, at *10. In *Pietsch*, the District of North Dakota applied the finality requirement to a substantive due process claim, and clearly distinguished finality and exhaustion. 446 F. Supp. 3d at 532. The court held that when the county denied the landowners' plat applications, the decision was final because "the available appeal process allowed solely for review of the County Commission's decision—an unneeded avenue of potential relief to satisfy finality." *Id.* In *Singer*, the Southern District of New York held that the plaintiffs' claims were ripe, despite the Board of Standards and Appeals (BSA) not issuing a decision, because "there is little a final BSA decision could add to the record that would assist the Court in ruling on Plaintiffs' claims." 417 F. Supp. 3d at 316. In all these cases, the courts looked *forward* to determine whether any further administrative process would change the plaintiffs' situation.

Even when district courts have held that a case was not ripe under *Williamson County*'s finality prong, many still apply a forward looking standard. *See, e.g.*, *Sanimax USA, LLC v. City of S. St. Paul*, __ F. Supp. 3d __, No. 20-cv-01210 (SRN/ECW), 2020 WL 6275972, at *8–9 (D. Minn. Oct. 26, 2020) (holding that plaintiff's takings claims are "not yet ripe" because it "has not attempted to test the bounds of the City's new zoning restrictions"). Ordinarily, if the plaintiffs must take some action, courts state what the plaintiffs have not *yet* done, but can *still do*, to ripen their claims. *See, e.g.*, *Wheelahan v. City of New Orleans*, No. 19-11720, 2020 WL 1503560, at *8 (E.D. La. Mar. 30, 2020) (when the city actually enforces the challenged regulation, the takings claim will be ripe); *Willan v. County of Dane*, No. 19-cv-345-wmc, 2020 WL 2747740, at *3 (W.D. Wis. May 27, 2020) (plaintiffs' claim will ripen after they seek "a formal variance"). Unlike the Ninth Circuit, most courts do not forever bar plaintiffs from seeking relief when they determine a claim is not ripe. *See, e.g.*, *Delta Business Center, LLC v. City of Taylor*, No. 19-CV-13618, 2020 WL 4284054, at *3 (E.D. Mich. July 27, 2020) ("[P]laintiff's takings claim is not ripe for review and will be stayed until the Taylor ZBA has an opportunity to review the matter and issue a final decision.").

Since *Knick*, just one court outside the Ninth Circuit has agreed that finality requires exhaustion. *See Bar-Mashiah v. Incorporated Vill. of Hewlett Bay Park*, No. CV 18-4633 (AKT), 2019 WL 4247593 (E.D.N.Y. Sept. 6, 2019). In *Bar-Mashiah*, the court held that because the landowners did not timely appeal a decision to the Zoning Board of Appeals, they were forever barred from raising their takings claim

in federal court. *Id.* at *9. Like the Ninth Circuit, however, the court in *Bar-Mashiah* improperly relied on pre-*Knick* cases interpreting the state-litigation requirement to reach its decision. *Id.* (citing *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002)). As a result, the court reimposed an exhaustion requirement for takings claims in conflict with *Knick*.

Although most courts post-*Knick* correctly recognize the distinction between finality and exhaustion, some outliers—including the Ninth Circuit below—have disregarded this Court's precedents and transformed *Williamson County*'s finality requirement into an exhaustion requirement. But while the Ninth Circuit may be an outlier, the consequences of its decision are large. The sheer geographic breadth of the Ninth Circuit means that property owners in roughly a quarter of the country, including the nation's most populous state of California, already find their rights effectively truncated. In order to resolve this emerging conflict and eliminate any confusion about what is a "final decision," this Court should grant the petition.

C. Summary vacatur is appropriate to ensure that the no exhaustion requirement prevents property owners from filing federal takings claims in federal court.

In light of the Ninth Circuit's plain failure to follow this Court's decisions in *Knick* and *Patsy*, the Court may wish to consider summary vacatur of the judgment and remand for consideration on the merits. Although summary disposition is a rare remedy, it is warranted in this case. The decision below involves a clear error of great magnitude and practical

importance to property owners who live within the Ninth Circuit.

The Ninth Circuit's imposition of an exhaustion requirement is "not just wrong," the court below "also committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018). As demonstrated above, this Court has repeatedly and definitively held that plaintiffs need not exhaust administrative remedies before seeking relief under section 1983. In *Williamson County*, this Court stated that the finality requirement is not an exhaustion requirement. And in *Knick*, this Court stated that it is "clear" error to establish "an exhaustion requirement for § 1983 takings claims …." 139 S. Ct. at 2173. The Ninth Circuit ignored these longstanding consistent precedents and created an exhaustion requirement for takings claims. *See Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (ordering vacatur and remand where lower court "was both incorrect and inconsistent with clear instruction in the precedents of this Court").

In re-imposing an exhaustion requirement on the Pakdels and their taking claims, the Ninth Circuit "egregiously misapplied settled law," *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016), and disregarded controlling decisions of this Court. App. E-12 (Collins, J., dissenting from denial of rehearing en banc) (the majority creates an exhaustion requirement "where none should exist," and "that the majority's holding relies on the now-overruled state-litigation cases confirms that it is *clearly wrong*") (emphasis added). *See Thompson v. Hebdon*, 140 S. Ct. 348, 350 (2019) (per curiam) (granting vacatur and remanding where

"the Ninth Circuit declined to apply [this Court's] precedent" in controlling case). Therefore, summary disposition of this case is warranted to correct the Ninth Circuit's misapplication of *Williamson County*'s finality requirement. *See CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763 (2018) (per curiam) (granting vacatur and remanding because the Sixth Circuit's decision "cannot be squared" with controlling Supreme Court precedent and, in fact, sought to revive a case decided prior to that controlling precedent, "re-born, re-built, and re-purposed for new adventures" (citation omitted)).

The consequences of the Ninth Circuit's error extend beyond the Pakdels' case. The decision "relegates the Takings Clause to the status of a poor relation among the provisions of the Bill of Rights." *Knick*, 139 S. Ct. at 2169 (quotation omitted). Summary vacatur is appropriate to correct this clear misapprehension of the finality requirement.

II. Certiorari Should Be Granted to Resolve a Longstanding Circuit Split About Whether the *Nollan/Dolan* Unconstitutional Conditions Tests Apply to Legislatively-Imposed Conditions.

Additionally, this case presents a question of exceptional importance regarding the application of the unconstitutional conditions doctrine articulated in *Nollan*, *Dolan*, and *Koontz*. The Ninth Circuit dismissed the Pakdels' unconstitutional conditions claim on the ground that the doctrine does not apply when a condition is imposed by legislation, rather than by an individualized administrative decision. App. A-10 n.4. Whether the unconstitutional conditions doctrine is limited to administrative

decisions is "an important and unsettled issue under the Takings Clause." *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari). There is longstanding disagreement among lower courts on this question, and this Court should grant the petition to resolve this conflict.

People who own residential property have the right to live there. *Lone Wolf v. Hitchcock*, 19 App. D.C. 315, 319 (1902) ("The right of occupancy of lands is a property right, a right which is as sacred as the fee itself, as all authorities conclusively establish."). Indeed, it is a "point ... so obvious" that the property right to exclude all others from use of one's own property also includes the right of the owner to her own use, *see Nollan*, 483 U.S. at 831, that this is one of the "most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan*, 512 U.S. at 384. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982) (the right to exclude is "one of the most treasured strands in an owner's bundle of property rights," and "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property"). Ownership can take many forms, however, and in San Francisco, small buildings frequently were owned by tenants-in-common with agreements assigning exclusive use of each apartment to particular owners. *See* App. A-6. This means that the apartments are not saleable or financeable without consent of all owners. Like many homeowners in San Francisco, the six Green Street tenants-in-common found that ownership structure to be unsatisfactory and sought to convert their apartments to condominiums, under which all owners would have

their own deed and better control over the future of their property.

For the Green Street owners in residence, this could be accomplished with relatively normal bureaucratic paperwork. But for the Pakdels, the situation was far different because they previously leased their unit, a situation they intended to be temporary until they moved to San Francisco and took possession themselves.[15] To convert their property interest into a condominium, they were required to offer their tenant a lifetime lease. As a result, despite owning a home in San Francisco, it is possible—perhaps even probable given their tenant's relative youth—the Pakdels might never have the opportunity to live on their property, in effect pressing their home into public service as a permanent contribution of rental housing stock.

The city's requirement of a lifetime lease as a condition to condominium conversion approval presents an unconstitutional condition. *See Koontz*, 570 U.S. at 612 ("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."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421–22 (1989) ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred

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[15] As noted above, *supra* at 6, there was no lifetime lease requirement when the Pakdels purchased their interest in the property and state law ensured the owners of rental property retained the right to exit the rental business and take personal possession of the residence.

constitutional right normally protects from government interference."). In the land use context,

> 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 a 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, 512 U.S. at 385 (property owner forced to choose between a building permit and the Fifth Amendment right to just compensation for a public easement). Living in a home that one owns is precisely such an activity that could not be prohibited directly by the government and, therefore, cannot be prohibited as a condition to an otherwise routine permit request. *See Koontz*, 570 U.S. at 607 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

In short, this is a quintessential case of a government asserting regulatory leverage over a vulnerable property owner: the Pakdels need permission to convert their property interest and the City jumped on the opportunity to take an essential property right from them as the price of that permission, even though the Pakdels' proposed conversion imposes no costs on the public whatsoever.

None of these principles hinge on the source of government demand. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (emphasizing that the Takings Clause is unconcerned with which "particular state *actor* is" burdening property rights). *Nollan*, *Dolan*, and *Koontz* all involved conditions mandated by general legislation. In *Nollan*, the California Coastal Act and California Public Residential Code imposed public-access conditions on all coastal development permits, including the beachfront easement over the Nollans' property. *Nollan*, 483 U.S. at 828–30; *see also id.* at 859 (Brennan, J., dissenting) (Under the California Coastal Act of 1972, deed restrictions granting the public easements for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract."). Similarly, municipal land use ordinances mandated the bike-path and greenway dedications that were conditions on Florence Dolan's permit to expand her plumbing supply store. *See Dolan*, 512 U.S. at 377–78; *id.* at 378 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways."); *id.* at 379 ("The City Planning Commission ... granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). And Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 required the land dedication or in-lieu fee permit condition on Coy Koontz's development proposal. *Koontz*, 570 U.S. at 600–01.

The unconstitutional conditions doctrine enforces constitutional limits on all government authority, not only when it acts in an "administrative" capacity:

> [T]he power of the state ... is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in a like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. Railroad Comm'n of State of California, 271 U.S. 583, 593–94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways). This purpose is furthered regardless of which government entity makes the unconstitutional demand. *See* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009) (The unconstitutional-conditions doctrine "does not distinguish, in theory or in practice, between conditions imposed by different branches of government."). Indeed, where a single government body writes the law, issues permits, and sits in review of its own decision—as San Francisco does here—it is difficult to distinguish one branch of the government from the other. *See* Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision-making in the land-use context).

Nonetheless, the Ninth Circuit below joined those courts that draw a bright line that conditions are *never* subject to the unconstitutional conditions doctrine when they are imposed *legislatively* and not ad hoc by administrative agencies. App. A-10 n.4 (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1227–29 (9th Cir. 2008)). The court's ruling conflicts with the decisions of other courts and leaves property owners vulnerable to the type of government coercion and uncompensated takings of legally cognizable property interests that the unconstitutional-conditions doctrine is intended to prevent.

The longstanding split among state and lower federal courts as to whether constitutional tests designed to identify regulatory takings apply to exactions imposed by legislation versus those imposed ad hoc by administrative agencies might have been resolved by the *Koontz* decision in 2013. Alas, it did not, *see Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) ("Maybe today's majority accepts [the legislative versus adjudicative] distinction; or then again, maybe not."), and the nationwide split of authority that Justice Thomas recognized a quarter century ago, *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting from denial of certiorari), has grown deeper and more entrenched. *See California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., concurring in denial of certiorari) (division has been deepening for over twenty years and "shows no signs of abating").

As forecast, the disarray continues. *See* Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 194 (2019) (describing the legislative/adjudicative issue as "one of the most pressing questions across the entire realm of takings law"). In addition to the pre-*Koontz* split of authority,[16] recent decisions limiting the regulatory takings tests to adjudicative actions include *Douglass Properties II, LLC v. City of Olympia*, No. 53558-1-II, __ P.3d __, 2021 WL 345458, at *3 (Wash. Ct. App.

[16] The courts of last resort of Texas, Ohio, Maine, Illinois, New York, and Washington and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions and apply the nexus and proportionality tests to generally applicable permit conditions. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355–56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Development Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994). Meanwhile, the courts of last resort of Alabama, Alaska, Arizona, and Colorado, and the Tenth Circuit Court of Appeals limit *Nollan* and *Dolan* to administratively imposed conditions. *See 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); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 996 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997).

Feb. 2, 2021);[17] *Anderson Creek Partners, L.P. v. County of Harnett*, Nos. COA19-533, COA19-534, __ S.E.2d __, 2020 7895213, at *12 (N.C. Ct. App. Dec. 31, 2020); *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 813 (Md.), *cert. denied*, 139 S. Ct. 230 (2018) (refusing to apply *Nollan* and *Dolan* tests to legislatively imposed permit conditions); *Golf Course Assoc, LLC v. New Castle Cty.*, 152 A.3d 581 (Del. 2016), *affirming* No. 15A–02–007 JAP, 2016 WL 1425367, at *18 (Del. Super. Ct. Mar. 28, 2016) (same); *Cal. Building Indus. Ass'n v. City of San Jose*, 351 P.3d 974, 990 n.11 (Cal. 2015) (citation omitted) (same); *American Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1106 (Ariz. Ct. App. 2018) (same). The prevailing trend is *against* property rights.

Only Judge Breyer of the Northern District of California has ruled to the contrary since *Koontz*. *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (*Koontz* undermines the reasoning for holding legislative exactions exempt from scrutiny under *Nollan* and *Dolan*). Other courts simply give up trying to parse the distinction. *See Highlands-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1178 n.3 (Fla. Dist. Ct. App. 2017) ("[I]t is unclear whether the *Nollan* and *Dolan* standard applies to generally applicable legislative determinations that affect property rights.... Even

[17] This very recent decision conflicts with another Washington state case, *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 255 P.3d 696, 708 (Wash. Ct. App. 2011) ("Regulations adopted under the GMA that impose conditions on development applications must comply with the nexus and rough proportionality tests."), leaving the state of the law in Washington frankly confused.

though the County's exactions in this case are authorized in part by a County ordinance, they are also adjudicatory in nature in that they were in response to Highlands' request for a permit and they required Highlands to dedicate a portion of its land."); *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753, 758 & n.3 (Utah 2016) (noting confusion generated by *Koontz* and remanding case to lower courts to determine the "difficult" question of whether an impact fee regime was "legislative" in nature, and, if so, whether and how *Nollan/Dolan* scrutiny applies).

From the property owner's perspective, whether a legislative or administrative body or official forces him to bargain away his rights in exchange for a permit results in the exact same injury, for which the Constitution must provide a remedy. *See* Lisa Harms Hartzler, *The Stringent Takings Test for Impact Fees in Illinois: Its Origins and Implications for Home Rule Units and Legislation*, 39 N. Ill. U. L. Rev. 92, 131 (2018) ("[W]herever the power to command exactions from landowners arises—from legislation or adjudication—the U.S. Constitution provides a valuable and essential limitation on extortionate behavior."). Yet lower courts are coalescing around a position that regulatory takings tests apply only to exactions that can be clearly identified as adjudicative in nature. This once again moves property owners to the back of the line in their attempts to vindicate violations of their constitutional rights. This Court should grant the petition and resolve this recurring issue of national importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: February 2021.

Respectfully submitted,

PAUL F. UTRECHT
Utrecht & Lenvin, LLP
109 Stevenson St., 5th Floor
San Francisco, CA 94105
Telephone: (415) 357-0600
putrecht@ullawfirm.com

Thomas W. Connors
Black McCuskey Souers
& Arbaugh, LPA
220 Market Ave. S., Suite 1000
Canton, OH 44702
Telephone: (330) 456-8341
tconnors@bmsa.com

JEFFREY W. MCCOY*
**Counsel of Record*
DEBORAH J. LA FETRA
ROBERT H. THOMAS
ERIN W. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
jmccoy@pacificlegal.org
dlafetra@pacificlegal.org
rthomas@pacificlegal.org
ewilcox@pacificlegal.org

Counsel for Petitioners