No. 20-1212

IN THE

Supreme Court of the United States

PEYMAN PAKDEL, ET UX.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.,

Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the unconstitutional conditions doctrine applies to legislatively imposed land-use permit conditions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

This case concerns Cato because it affords the Court the opportunity to clarify that the "nexus" and "rough proportionality" test from *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and its progeny applies to legislatively imposed development permit conditions. If the decision below stands, states and localities will impose legislative conditions to circumvent the Takings Clause in precisely the manner this Court sought to stop in *Nollan, Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Nollan,* the Court recognized that some states were using land-use permits to avoid their obligations under the Takings Clause. It held that a state may not condition the grant of a land-use permit on the

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

landowner's giving up an interest in property unless the state provides just compensation for that property interest. The "unconstitutional conditions" doctrine stops states from accomplishing indirectly, through land-use permits, what they cannot do directly. *Dolan*, 512 U.S. at 385 ("[T]he 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."). The Court recently clarified the scope of this anti-circumvention principle when it set aside a condition requiring a landowner to pay for improvements on unrelated property in order to get a land-use permit. *See Koontz*, 570 U.S. at 607–08.

The test for determining whether a condition violates the unconstitutional conditions doctrine is straightforward. A reviewing court must first determine whether the condition itself would be a taking if imposed outside the permitting context. *Id.* at 607, 611–12. 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 599. This Court's unconstitutional-conditions jurisprudence thus stops states from circumventing the Takings Clause.

California municipalities have tried to evade the Court's preclusion of backdoor, uncompensated takings. Here, San Francisco passed an ordinance requiring all property owners seeking to convert tenancy-in-common interests into condominiums to offer lifetime leases to existing tenants as a condition for approval. S.F. Subdiv. Code § 1396(g). The court

below held that such so-called legislatively imposed conditions are exempt from the unconstitutional conditions doctrine. *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1162 n.4 (9th Cir. 2020). In the Ninth Circuit, the doctrine applies only to conditions imposed during ad hoc permitting processes. *See e.g. McClung v. City of Sumner*, 548 F.3d 1219, 1227–29 (9th Cir. 2008). Applying that distinction here, the court found that the San Francisco ordinance did not constitute an unconstitutional condition, but a standard regulation of land use, because it was not an "individualized requirement to grant property rights to the public imposed as a condition for approving a specific property development." *Pakdel*, 952 F.3d at 1162 n.4.

But there's no basis in the Court's jurisprudence—or in logic—for treating legislatively imposed conditions this way. The Court has not distinguished between legislatively imposed conditions and ad hoc permitting conditions in its unconstitutional conditions doctrine. Instead, it has declined to elevate form over substance and has found both legislative and ad hoc conditions to be unconstitutional. *See, e.g., Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (finding that a legislatively imposed condition violated the unconstitutional conditions doctrine). Moreover, "[it] is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissental). "A city council can take property just as well as a planning commission can." *Id.* at 1118. Indeed, it makes little sense to treat the two types of conditions differently.

Further, exempting legislative conditions from heightened scrutiny puts property rights at the mercy of local officials' whims. A common justification for distinguishing between legislatively mandated conditions and ad hoc permitting conditions is that ad hoc conditions are more prone to abuse. *See, e.g.*, *San Remo Hotel v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 671 (2002). This view is myopic. Legislators are just as capable as administrators of imposing uncompensated conditions and can target groups in legislation that a majority of their constituents support. And while ad hoc conditions apply only to a single landowner at a time, legislative conditions apply automatically to broad swaths of landowners. Legislative conditions thus are much more efficient in effectuating takings. To that end, many California municipalities have already used this tactic. *See* Maura Dolan, *Developers Can Be Required to Include Affordable Housing, California High Court Rules*, L.A. Times, June 15, 2015. Naturally, then, legislatively imposed conditions are more threatening to individual rights. Indeed, the proliferation of ordinances that impose market-wide caps on prices or deny homeowners the ability to live on their own property threaten property rights across California. As this trend demonstrates, the need to apply the unconstitutional conditions doctrine to legislative conditions is *more* acute than with ad hoc conditions.

Finally, as the petitioners detail, there is a split of authority on this issue. *See, e.g.*, *Parking Ass'n*, 515 U.S. at 1117 (Thomas, J., dissental). That split "shows no signs of abating," with the majority of courts incorrectly exempting legislative conditions from the unconstitutional conditions doctrine. *Cal. Bldg.*

Indus. Ass'n v. City of San Jose ("CBIA"), 136 S. Ct. 928, 928 (2016) (Thomas, J., concurral). Without guidance from this Court, the lower courts will continue trending in the wrong direction, allowing more states broadly and systematically to skirt their constitutional obligations under the Takings Clause.

ARGUMENT

I. STATES EVADE THE TAKINGS CLAUSE WHEN COURTS EXEMPT LEGISLATIVELY IMPOSED CONDITIONS FROM THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. The Decision Below Undermines *Nollan, Dolan,* and *Koontz*.

The Fifth Amendment's Takings Clause states: "nor shall private property be taken for public use, without just compensation." "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.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted).

This Court recognized in *Nollan*, *Dolan*, and *Koontz* that states circumvent their obligations to pay "just compensation" when they force landowners to turn over property in exchange for a land-use permit. In *Nollan*, the government conditioned a building permit on the landowners granting a public easement across their property to access the beach. 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. The Court thus found 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). To prevent such circumvention of the Takings Clause, the Court has applied the doctrine of "unconstitutional conditions" to states' attempts to extract property interests in this manner. *See Dolan*, 512 U.S. at 385. As a result, states cannot force a landowner to choose between a land-use permit and the right to receive just compensation for a taking.

There are important reasons why courts should not allow states to bargain with land-use permits to bypass their takings obligations. 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 far more than property it would like to take." *Koontz*, 570 U.S. at 604–05. The government can take advantage of the fact that a land-use permit may be worth more than the property interest taken to force an owner to give up that property in exchange for the permit. *Id.* "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation," so "the unconstitutional conditions doctrine prohibits them." *Id.* at 605. In short, the Court has made clear that states cannot take property without compensation through such "gimmickry." *Dolan*, 512 U.S. at 387.

To prevent that kind of extortion, the Court applies heightened scrutiny to conditions embedded in land-use permits. Under the operative test, a court

must first decide whether the condition would be a taking if the government imposed it directly on the landowner outside the permitting process. *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."); *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 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*, 570 U.S. at 605–06. By requiring a relationship between the condition and the landowners' requested permit, the Court made sure that states cannot affect takings of property wholly unrelated to the requested land-use permit.[2]

Unsurprisingly, states have tried to evade this restriction on uncompensated takings. *Koontz* involved just such an example of states' "gimmickry." There, a water management district conditioned the landowner's requested permit on payment for improvements on unrelated state-owned property. 570 U.S. at 601. The government argued that the landowner's claim failed at the first step because "the

[2] The test preserves states' ability to impose uncompensated conditions on land-use permits when those conditions mitigate any issues a requested permit may cause. For example, if a landowner's "proposed development . . . somehow encroache[s] on existing greenway space in the city," 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.

exaction at issue here was the money rather than a more tangible interest in real property." *Id.* at 612. The Court rejected that reasoning and explained 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 accomplishing an end-run around the Takings Clause's just-compensation requirement.

San Francisco's ordinance is essentially the same as prior attempts to dodge the Takings Clause—but the Ninth Circuit immunized it from constitutional scrutiny by exempting all legislatively imposed conditions from the unconstitutional conditions doctrine. *See Pakdel*, 952 F.3d at 1162 n.4. It did so because it does not view such conditions as "an individualized requirement to grant property rights to the public imposed as a condition for approving a specific property development." *Id.* Applying that distinction, the court below concluded that the ordinance is not an exaction under *Nollan* and *Dolan*.

In sum, San Francisco took advantage of the Ninth Circuit's differential treatment of legislative versus ad-hoc-permitting conditions. By imposing its condition through an ordinance, the city immunized itself from paying just compensation to landowners affected by its ordinance. Municipalities located in the Ninth Circuit can thus bypass the Takings Clause and undermine the property-rights protections that this Court's jurisprudence provides.

B. The Ninth Circuit's Distinction Between Legislatively Imposed and Ad Hoc Permitting Conditions Is Illogical, Difficult to Apply, and Inconsistent with This Court's Precedents.

The Ninth Circuit's decision to treat legislatively imposed conditions differently than ad hoc permitting conditions is an act of hollow formalism. As two justices recognized over 25 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*, 515 U.S. at 1118 (Thomas, J., joined by O'Connor, J., dissental). A citizen's property is taken whether it is done by legislative or administrative action. "A city council can take property just as well as a planning commission can." *Id.*

If allowed to stand, the Ninth Circuit's decision will lead to absurd results. Following that court's reasoning, a municipality cannot require *one builder* to give up an easement if that condition comes from the ad hoc permitting process. But the same municipality can legislate that *every builder* give up an easement. That cannot be.

There are also significant line-drawing problems between a condition that is legislatively imposed and one that is the product of ad hoc permitting. While the San Francisco ordinance is a legislative mandate, it is often the case that "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." Inna Reznik, *The Distinction*

Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 266 (2000). Accordingly, "a workable distinction can[not] always be drawn between actions denominated adjudicative and legislative." *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 641 (Tex. 2004). The absence of a bright line delineating the difference between legislative and adjudicative conditions is an additional reason that courts should apply the unconstitutional conditions doctrine to land-use permits regardless of the source of the condition at issue.

Finally, this Court has never suggested that legislative conditions are somehow exempt from the unconstitutional conditions doctrine. Understanding that the government can impose conditions in a variety of ways, the Court has correctly declined to distinguish between legislatively imposed conditions and ad hoc permitting conditions. In fact, the Court has invalidated both legislative and administrative mandates under the unconstitutional conditions doctrine. For example, in *Memorial Hosp. v. Maricopa Cty*, the Court blocked a statute that conditioned the receipt of state-sponsored healthcare on living in that state for a year. 415 U.S. at 251, 269–70; see also *Regan v. Taxation With Representation*, 461 U.S. 540, 545 (1983) (applying the unconstitutional conditions doctrine to a federal statute without regard to its legislative origin); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 59–60 (2006) (same). The Court in *Koontz* relied on these cases when it applied the unconstitutional conditions doctrine to land-use permits. *See* 570 U.S. at 604.

C. Legislatively Imposed Conditions Threaten Property Rights More Broadly Than the Ad Hoc Permitting Process.

"One of the principal purposes of the Taking Clause is 'to bar Government from forcing some people 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 legislative and ad-hoc-permitting conditions is that the latter are more likely to be abused. *See, e.g.*, *San Remo*, 27 Cal. 4th at 671 ("Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape . . . political controls."). Similarly, the Arizona Supreme Court wrote, "The risk of [extortionate] leveraging does not exist when the exaction is embodied in a generally applicable legislative decision." *Home Builders Ass'n 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).

The notion that ad hoc permitting conditions are more prone to abuse is overly simplistic; indeed, the risk of abuse may in fact be *greater* for legislatively imposed conditions. The Texas Supreme Court, for example, has recognized that government 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*,

135 S.W.3d at 641. In that regard, land-use decisions can "reflect classic majoritarian oppression." Reznik, *supra*, at 271. For example, 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 predevelopment minority is quite likely given that they are so outnumbered." *Id.*

The potential for abuse through legislatively imposed conditions is amplified by the fact that such conditions have sweeping application. The San Francisco ordinance, for example, applies on its face to every tenant-in-common complex owner in the city. Instead of a single administrative body extracting unconstitutional concessions from complex owners one by one, San Francisco accomplished that feat in one fell swoop. If the decision below stands, other municipalities—in California and other states that seek to flout this Court's guidance—will be free to impose similar exactions.

II. STATES AND CIRCUITS WILL REMAIN DEEPLY SPLIT UNTIL THIS COURT GIVES FURTHER GUIDANCE ON LEGISLATIVE CONDITIONS

Two justices recognized over 25 years ago that there is a circuit split on whether legislatively imposed conditions are subject to the unconstitutional conditions doctrine. *See Parking Ass'n*, 515 U.S. at 1117 (Thomas, J., joined by O'Connor, J., dissental). They explained that "[t]he 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." *Id.* at 1117. Since that time, the circuit "division shows no signs of abating." *CBIA*, 136 S. Ct. at 928 (Thomas, J., concurral). Moreover, until the issue is rectified, "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." *Id.*

This Court has revisited its jurisprudence in this context only once since 1995, in *Koontz*. But *Koontz* did not address the split, which has only deepened. *See* Petition at 32–33. The majority of courts have followed the wrong path, choosing to exempt legislatively imposed conditions from the unconstitutional conditions doctrine. *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); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 701 (Alaska 2003); *San Remo*, 27 Cal. 4th at 643, 670–71; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n*, 930 P.2d at 996.

Many of these courts refused to apply the doctrine to legislatively imposed conditions out of a mistaken belief that this Court has never applied the doctrine outside the ad hoc permitting process. *See e.g.*, *Town of Flower Mount*, 135 S.W.3d at 641 (explaining how the exactions in *Nollan* and *Dolan* were imposed under a legislative scheme). For example, in *Krupp*, the Colorado Supreme Court believed that *Nollan* and

Dolan arose only in the context of an ad hoc permit application. *See* 19 P.3d at 696. That court then refused to apply heightened scrutiny to a legislatively imposed condition, believing it somehow differed from the challenged actions in *Nollan* and *Dolan*. *Id.*

If this Court does not clarify that such conditions are in fact subject to the unconstitutional conditions doctrine, lower courts will continue to trend in the wrong direction.

CONCLUSION

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

Respectfully submitted,

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