No. _____

In The
Supreme Court of the United States

JULIET ERICKSON and PETER LOCKYER,

Petitioners,

v.

COUNTY OF NEVADA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an exaction occur when a County, in violation of its own ordinances, refuses to issue a building permit it previously approved for a single-family residence unless the applicants consent to record an *ad hoc* deed restriction on their lot which would conserve all trees and vegetation in a specified area?

PROCEEDINGS BELOW

- *Juliet Erickson and Peter Lockyer vs. County of Nevada,* No. CU13-079389, Superior Court of the State of California, County of Nevada. Statement of Decision and Judgment entered Aug. 17, 2016.
- *Juliet Erickson and Peter Lockyer vs. County of Nevada,* No. C082927, Court of Appeal of the State of California, Third Appellate District. Judgment entered on Nov. 30, 2020, opinion modified on denial of rehearing without affecting decision, Dec. 18, 2020.
- *Juliet Erickson and Peter Lockyer vs. County of Nevada,* No. S266541, Supreme Court of California. Order denying review entered Mar. 17, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Juliet Erickson and Peter Lockyer petition for a writ of certiorari to review the judgment of the California Court of Appeal, Third Appellate District, in this case.

OPINIONS BELOW

The Third District ordered that its opinion in No. C082927 not be published and declined petitioners' request to reconsider that order. Its decision filed November 30, 2020 is reproduced at App. 4. Its December 18, 2020 order modifying that opinion and denying rehearing is reproduced at App. 1. The order of the California Supreme Court denying review in the case is reproduced at App. 109.

The Superior Court of Nevada County, California rendered a Judgment and Statement of Decision in Civil Case No. CU13-079389 on August 17, 2016, together with three Appendices. The Statement and Appendices are reproduced beginning at App. 24. The Judgment is reproduced at App. 107.

JURISDICTION

The Court of Appeals entered judgment on November 30, 2020 and modified its opinion without changing the judgment on December 18, 2020. After extending the time for its review, the Supreme Court

of California entered an order denying review on March 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution states in relevant part:

> " . . . nor shall private property be taken for public use, without just compensation."

INTRODUCTION AND STATEMENT OF THE CASE

In a trio of cases, this Court has defined the Fifth-Amendment concept of an "exaction." In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the Court held that when a government approves a development permit on condition that the landowner grant the public an easement over the applicant's property, there has to be a "nexus" that relates the nature of the easement to the development for which approval is sought, in order to keep the exaction from constituting an unconstitutional taking of property. In *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the Court added the requirement that an exaction will be deemed unconstitutional unless there is a "rough proportionality" between the property interest the government

demands and the social cost of applicant's proposal. Finally, in *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013), the Court held that the required nexus and proportionality must hold even where a government denies a land-use permit unless the applicant agrees to pay a sum of money for public improvements (as opposed to deeding any interest in property).

In the present case, the government approved the requested permit to build a one-story, single-family residence and two-story garage, but imposed a "management plan" on a portion of the applicants' parcel that required them to maintain trees and vegetation growing there for as long as their home and garage remained standing. No tree or vegetation could be cut or removed in the area without the approval of the County and of an outside professional, and any tree or vegetation accidentally destroyed had to be replaced by its same kind, again under the supervision of an outside professional.

This case thus differs from *Nollan, Dolan* and *Koontz* in that it involved only a ministerial building permit, and not a discretionary land-use permit (the applicants' lot was zoned for a single-family residence). The court below, however, held that because the County required that the applicants record a deed restriction on their own property, there was no "conveyance" of their property at issue, and so the requirement did not amount to an exaction as this Court has defined the term in those three cases.

As such, the case presents an issue of pure law, that is ripe for summary grant of review, vacation and remand for further proceedings in conformity with this Court's exaction doctrine. An issue this straightforward, and unencumbered with ancillary questions, is unlikely to present itself again to this Court, if only because there are few petitioners like the Lockyers who can take on the ten-year litigation burden required to fight for a simple and unfettered building permit.

A. Permit Proceedings with the County

Petitioners Juliet Erickson and Peter Lockyer (together, the "Lockyers") are a married couple. In 2009, they bought a 10-acre parcel in a subdivision overlooking the community of Lake Wildwood in unincorporated Nevada County, California, known as "Wildwood Heights." This subdivision had originally been approved by the Nevada County Board of Supervisors in 1978. The lot bought by the Lockyers, Lot #2, was—like all of the lots in the Wildwood Heights subdivision—zoned "R-3" by the County, meaning it was pre-approved for a single-family dwelling, which could be built upon the issuance of a ministerial building permit. In March 2011, the Lockyers applied for a building permit for a 1,688-square-foot house on the lot, with a detached garage and small office above.

Upon receipt of the Lockyers' building permit application, County planners determined, for the first time, that the ridge behind which the Lockyers' home would be built was "visually important," and that the

project would require a management plan to protect the ridgeline's trees in front of the building site. The County soon granted the Lockyers' building permit, but imposed a condition on the permit which required the Lockyers to dedicate (via a recorded deed restriction) the portion of their parcel fronting on the ridge to the permanent maintenance of its natural trees and vegetation. The restriction, covering approximately 10% of their parcel, forbade all cutting, thinning or other disturbance of trees or brush in the dedicated area, as well as required the replacement, at their expense, of any tree or vegetation that died, burned down, or was otherwise lost—all under the supervision of a County-approved forester or other professional. As subsequently modified, the restrictions would last for as long as the buildings remained.

The Lockyers' appeal of these restrictions to the Nevada County Board of Supervisors was unsuccessful. They brought suit for an unlawful taking and (as California law requires) for a writ of mandate in the local superior court. (App. 34.)

B. Trial Court Proceedings

Eventually, after proceedings lasting four years, including a remand to the Board of Supervisors to revise the permit conditions (which they did not

meaningfully do), the trial court granted its writ of mandate requiring their elimination.[1] (App. 69-70.)

In further, bifurcated proceedings on their Fifth Amendment takings claim, the trial court found that the County's restrictive permit conditions were contrary to the County's own ordinance applicable to "visually important" ridgelines, and were also an improper attempt to impose an involuntary conservation easement in exchange for a permit, in violation of Section 815.3(b) of the California Civil Code.[2] It concluded, under the strict scrutiny required by *Nollan* and *Dolan*, that the conditions were a form of exaction as found in those cases. (App. 59-60.)

Despite these findings, the trial court also held that the Lockyers had established no right to damages or compensation. Rather, the trial court found that the five years that it took the Lockyers to successfully remove the illegal permit conditions were not a "compensable taking," but were the consequence of "normal delay in development" (*citing Landgate v. California*

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[1] The Lockyers did not challenge Condition #1 of the management plan, which limited the height of their planned home to that designed by their architect so as not to be visible from below the ridge. They challenged only the restrictions regarding trees and vegetation in Conditions #2 and #3, which the trial court eventually ordered removed from the permit as constituting an illegal exaction.

[2] That subsection provides in relevant part:

> No local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter.

Coastal Commission, 17 Cal.4th 1006, 1030 (1998)). (App. 61.) The Lockyers then appealed on the applicability of *Landgate* to exactions under this Court's Fifth Amendment jurisprudence. The County, however, took no cross-appeal from the judgment.

C. Decision Which Petitioners Seek to Have Reviewed

In the Lockyers' appeal to the Third District Court of Appeal, they noted that (unlike *Landgate*) there had been no unreasonable delay in the permit, which the building department had approved in July 2011, approximately four months after they had submitted their application. The County had simply refused to issue the permit until the Lockyers agreed to all three of its management plan conditions. Accordingly, the sole question that the Lockyers asked the appellate court to resolve was whether *Landgate* applied to bar compensation for the damages resulting from the attempted imposition of an illegal permit condition in violation of their Fifth Amendment rights. (App. 5, 8.)

Despite the lack of any cross-appeal by the County challenging the trial court's findings and conclusions, the Third District Court of Appeal, in an unpublished decision, ignored the question presented and instead reversed the trial court's factual finding that the County's conditions amounted to an exaction that was "erroneous, arbitrary, and unjustified" under *Nollan* and *Dolan*. (App. 58.)

In so concluding, the Court of Appeal relied heavily on the California Supreme Court's decision in *California Building Industry Assn. v. City of San Jose*, 61 Cal.4th 435, 351 P.3d 974, 189 Cal.Rptr.3d 475 (2015) (*California Building*). In that case, the Court held: "It is the governmental requirement that the property owner *convey* some identifiable property interest that constitutes a so-called 'exaction' under the takings clause and that brings the unconstitutional conditions doctrine into play." (*Id.* at 460; emphasis added.) Citing that holding, but ignoring the fact that the County in this case *had* required the Lockyers to convey a property interest in the form of a deed restriction, the Court of Appeal affirmed the conclusion reached by the trial court that the Lockyers were not entitled to recover any damages or compensation.

REASONS FOR GRANTING THE PETITION

The decision below (a) claims to follow this Court's exactions jurisprudence while excepting from its scope the particular conditions imposed on the Lockyers, and (b) minimizes its divergence from settled law by ordering that it not be published. Without comment, the California Supreme Court declined review. The Lockyers are left with no recourse but to apply to this Court. While mindful that the Court's main purpose is not to correct erroneous decisions below, petitioners submit that this case is ripe for disposition by summary treatment that would require the courts below to carry out their responsibilities and respect this Court's

jurisprudence in the frequently litigated area of land-use takings. (Rule 10(c), S. Ct. Rules.)

Denial of review would, after ten years, amount to an inadequate remedy for landowners faced with unlawful permit conditions: the courts may strike those conditions, but in doing so leave governments free to try their chances anew against other, less resistant applicants.

That was, of course, the California Supreme Court's exact holding over 40 years ago in *Agins v. City of Tiburon*, 24 Cal.3d 266, 272-275 (1979), a holding that this Court expressly rejected in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310-311 (1987)—and impliedly rejected again in *Koontz* (*supra*).

A. The Court Below Nodded at *Koontz* While Following *Agins*

The substantive part of the court's opinion starts by noting, correctly, that this Court has created a "special" category of takings claims for "land-use exactions." (App. 14, *quoting Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, at 538, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).) The opinion then goes on to state: "A land use exaction occurs when the government demands property from a land use permit applicant in exchange for permit approval."[3]

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[3] *Ibid.* As a purely academic matter, it should be noted that this statement is not entirely accurate. Not all permit conditions

This simple premise, applied to the Lockyers' situation, should have led to the conclusion that the County's conditions *were* exactions, as found by the trial court, and as held by this Court. Perplexingly, however, the appellate court reached the opposite conclusion, via this reasoning:

> Unlike most takings claims, exaction claims are not necessarily premised on the taking of any property. As the Supreme Court explained in *Koontz*, the principles undergirding the court's exaction cases do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so.

(App. 15; internal citations and quotations omitted.)

The opinion then relies heavily on the following passage from *Koontz* to support its conclusion that the conditions imposed by the County on the Lockyers' building permit were not exactions:

> 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.
>
> . . . .

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that demand property are "exactions," only those that violate the nexus and rough proportionality tests established in *Nollan* and *Dolan*.

> That is not to say, however, that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.

(570 U.S. at 608-609 (emphasis in original); *see also* App. 15-16.)

From the outset, this passage from *Koontz* is of dubious applicability to the instant case, because the Lockyers' permit was *not* denied (probably for the reason it was a ministerial permit and the County knew it had no basis to do so—*see* Section B, *infra*, at 14); rather, it was granted but with conditions requiring the subsequent conveyance of a real property interest (App. 107-108). The County's imposition of those conditions, in light of this Court's Fifth Amendment jurisprudence, amounted to an unconstitutional exaction under *Nollan* and *Dolan*.

The County, therefore, having found the building permit in order, had no further ground upon which to refuse its issuance. Its insistence upon what was in

effect a conservation easement—one designed *ad hoc* for the Lockyers' property, and not applicable to that of any other—denied them the ability to put a home on their lot until they agreed to the County's unconstitutional conditions. Had the County wished to condemn a portion of the Lockyers' property for conservation purposes, it would have had to compensate them for the value so taken. Requiring them to enact their own "conservation easement" by signing a deed restriction does not alter the fundamental analysis. The County was still exacting from them that which it would otherwise have had to pay for under the Fifth Amendment. (*See, e.g.*, *Koontz*, *supra*, 570 U.S. 595, at 604-05, *see also Cedar Point Nursery v. Hassid*, 594 U.S. ___, No. 20-107 (2021), slip op. at 12-13: ". . . property rights 'cannot be so easily manipulated'", *quoting Horne v. Dept. of Agriculture*, 576 U.S. 350, at 365 [2015].)

The appellate court adopted the County's defense of its actions by relying heavily, but mistakenly, on the California Supreme Court's opinion in *California Building* to reach its conclusion. That case held, after reviewing *Nollan, Dolan*, and *Koontz*, that nothing in those three cases suggested that:

> . . . the unconstitutional conditions doctrine . . . would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval.
>
> . . .

> It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called 'exaction' under the takings clause and that brings the unconstitutional conditions doctrine into play.

(*Id.* at 460.)

Whether that is a correct reading, or not, of this Court's exactions jurisprudence could be debated, but as just noted, the County's purported distinction of *this* case based on its asserted lack of any conveyance "of some identifiable property interest" seems to have misled the appellate court. The County's conditions unquestionably required the Lockyers to convey away all rights in a significant portion of their property, and to devote that portion to preserving indefinitely its existing environment at their expense. That is the analytical result, whether reached by means of a conservation easement or a deed restriction. (*Cf. Cedar Point, supra*, slip op. at 9-10, 12-14.)

By making decisive the distinction it read into *California Building*, the California Court of Appeal actually denied the applicability of this Court's exactions doctrine while paying it lip service. The question is not even a close one, and its attempt to make an end run around *Cedar Point*, *Koontz* and their predecessors should receive a summary rejection. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 166, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996); 28 U.S.C. § 2106.

B. Nexus or Proportionality Does Not Apply to Ministerial Permits

As noted above, *Nollan, Dolan* and *Koontz* were all cases involving discretionary development permits. The doctrines of nexus and rough proportionality are meant to strike a balance between the landowners' goals and the government's discretion in mitigating their impacts:

> Our 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 [*quoting Dolan*, 512 U.S. at 391]. Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

Koontz, *supra*, 570 U.S. 595, 606, 133 S.Ct. 2586, 186 L.Ed.2d 697.

In the case of a standard residential building permit, however, there is little to no discretion on the part of the permitting authority. If a review of the plans shows that they meet the applicable code, and that setback, height and similar requirements are all observed, the authority issues the permit upon payment of the calculated fees, and that is it.

As the trial court held, the County in this case had no discretion to find that the house was planned to be built upon a "visually important ridgeline." The ordinance that authorized such a finding specified that it applied to discretionary development permits, and specifically *not* to building permits. (*See* App. 56-61. The County should have taken up the question back when it approved the map for Wildwood Heights subdivision in 1978.)

Nor did it have any discretion to impose any kind of conservation easement as a condition to issuing the permit, given the State law prohibiting it from doing so (Cal. Civil Code, § 815.3(b)—*see* p. 6 *supra*, text at n. 2).

Lacking any authority to condition the building permit upon any extraneous requirement, therefore, the County had no means of demonstrating any reasonable nexus or proportionality between the purpose of the ministerial permit and the *ad hoc* management plan it sought to impose on the Lockyers. It could not demonstrate compliance with *Nollan, Dolan*, or *Koontz* even if it conceded their applicability to this case.

Given its exoneration by the Court of Appeal, the County's attempt to exact an improper conservation easement from the Lockyers furnishes an additional ground to grant review in this case. For otherwise, the use of "deed restrictions" (*i.e.*, negative or conservation easements) to get around *Nollan* and *Dolan* will proliferate, in the absence of any definitive ruling by this Court on this issue. Most permit applicants will not

have the resources to challenge such improper conditions to a ministerial act in lengthy, costly court proceedings. There will in any event be no disincentive to their imposition, since the worst the government can have happen to it is that its restrictions will be stricken.

In the present instance, the County approved the Lockyers' building permit *ten years ago*, in July 2011. They have not been able to proceed with construction—first, because the trial court proceedings stretched out until 2016; next, the Court of Appeal did not hear their case for four years, and then because it refused to grant them any relief for the ten-year delay. Without any recompense for the interim taking that has made their 2011 building plans obsolete, they will have to begin all over.[4]

This case presents a vivid illustration of the lengths to which governments will go to extort improper concessions from landowners, and of the California courts' tendency over the years to enable such conduct with little downside for the authorities if they are challenged. For these reasons, this Court should send a strong signal that governmental overreaching

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[4] Once the Lockyers established an improper exaction under this Court's Fifth Amendment cases, the resulting injury to their property interests becomes compensable under California inverse condemnation law (Cal. Const., Art. I, Sec. 19; Cal. Code of Civ. Proc., Sec. 1036). The Court of Appeal attempted to skirt this remedy *sub rosa* by redefining the concept of "exaction" in a manner it declined to publish for other courts to see.

in land-use regulation is not to be tolerated, or swept under the rug.

CONCLUSION

Petitioners emphasize that the lower court's refusal to publish its two opinions in this case should not be used to justify further denial of meaningful review. Without such review, neither counties nor courts in California have any incentive to alter their course of conduct as they pursued it below. While property owners might, here or there, win a battle or two, on the whole their resources do not generally extend to contesting a taking based on an abuse of the requirements imposed on a building permit.

The case presents a pure question of law as to whether the condition calling for the Lockyers to record a quasi-permanent deed restriction on their property amounted to an exaction under *Nollan, Dolan* and *Koontz*. The petition should be granted, the decision below vacated, and the case remanded to the Court of

Appeal for further proceedings consistent with this Court's jurisprudence in exaction cases.

Respectfully submitted,

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