

No. 20-1212

---

---

In The  
**Supreme Court of the United States**

---

---

PEYMAN PAKDEL; SIMA GHEGINI,

*Petitioners,*

v.

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

*Respondents.*

---

---

**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

---

---

**BRIEF OF AMICI CURIAE  
SOUTHEASTERN LEGAL FOUNDATION,  
NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS SMALL BUSINESS LEGAL CENTER,  
AND TEXAS PUBLIC POLICY FOUNDATION  
IN SUPPORT OF PETITIONERS**

---

---

KAREN HARNED  
ROB SMITH  
NFIB SMALL BUSINESS  
LEGAL CENTER  
555 12th St., N.W.  
Ste. 1001  
Washington, D.C. 20004  
(202) 314-2061  
karen.harned@nfib.org

ROBERT HENNEKE  
TEXAS PUBLIC POLICY FOUNDATION  
901 Congress Ave.  
Austin, TX 78701  
(512) 472-2700  
rhenneke@texaspolicy.com

KIMBERLY S. HERMANN  
*Counsel of Record*  
CELIA HOWARD O'LEARY  
SOUTHEASTERN LEGAL  
FOUNDATION  
560 W. Crossville Rd.  
Ste. 104  
Roswell, GA 30075  
(770) 977-2131  
khermann@  
southeasternlegal.org  
*Counsel for Amici Curiae*

## 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.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	6
I. Allowing a government to evade the Constitution simply by imposing an unconstitutional condition through legislation rather than through an ad hoc administrative process conflicts with this Court's precedent .....	7
II. Only this Court can provide the clarity needed to protect the constitutional right to just compensation and to resolve the deep split of authority over the standard for reviewing legislatively-imposed exactions .....	11
CONCLUSION.....	19

## TABLE OF AUTHORITIES

	Page
CASES	
<i>44 Liquormart Inc. v. Rhode Island</i> , 517 U.S. 484 (1996).....	11
<i>Alto Eldorado P’ship v. Cty. of Santa Fe</i> , 634 F.3d 1170 (10th Cir. 2011).....	14
<i>Arcadia Dev. Corp. v. City of Bloomington</i> , 552 N.W.2d 281 (Minn. Ct. App. 1996) .....	15
<i>Cal. Bldg. Indus. Ass’n v. City of San Jose</i> , 136 S. Ct. 928 (2016).....	5, 14, 18
<i>City of Portsmouth v. Schlesinger</i> , 57 F.3d 12 (1st Cir. 1995) .....	16
<i>Commercial Builders of N. Cal. v. City of Sacra- mento</i> , 941 F.2d 872 (9th Cir. 1991).....	16
<i>Common Sense All. v. Growth Mgmt. Hearings Bd.</i> , 2015 Wash. App. LEXIS 1908 (Aug. 10, 2015) .....	16
<i>Curtis v. Town of S. Thomaston</i> , 708 A.2d 657 (Me. 1998).....	17
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994).....	<i>passim</i>
<i>Frost &amp; Frost Trucking Co. R.R. Comm’n</i> , 271 U.S. 583 (1926) .....	8, 11
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1930) .....	4, 5
<i>Harris v. City of Wichita</i> , 862 F. Supp. 287 (D. Kan. 1994) .....	12, 13
<i>Home Builders Ass’n of Cent. Ariz. v. Scottsdale</i> , 930 P.2d 993 (Ariz. 1997) .....	15

## TABLE OF AUTHORITIES—Continued

	Page
<i>Home Builders Ass’n of Dayton and Miami Valley v. City of Beavercreek</i> , 729 N.E.2d 349 (Ohio 2000).....	16, 17
<i>Koontz v. St. Johns River Water Mgmt. Dist.</i> , 570 U.S. 595 (2013) .....	<i>passim</i>
<i>Krupp v. Breckenridge Sanitation Dist.</i> , 19 P.3d 687 (Colo. 2001).....	15
<i>Levin v. City and Cty. of San Francisco</i> , 71 F. Supp. 3d 1072 (N.D. Cal. 2014).....	17
<i>Lingle v. Chevron U.S.A., Inc.</i> , 544 U.S. 528 (2005).....	7, 9
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982) .....	7
<i>Manocherian v. Lenox Hill Hosp.</i> , 643 N.E.2d 479 (N.Y. 1994) .....	12
<i>Mead v. City of Cotati</i> , 389 Fed. App’x 637 (9th Cir. 2010) .....	14, 16
<i>N. Ill. Home Builders Ass’n, Inc. v. Cty. of Du Page</i> , 649 N.E.2d 384 (Ill. 1995).....	17
<i>Nat’l Ass’n of Home Builders v. Chesterfield Cty.</i> , 907 F. Supp. 166 (E.D. Va. 1995).....	17
<i>Nollan v. Cal. Coastal Comm’n</i> , 483 U.S. 825 (1987).....	<i>passim</i>
<i>Parking Ass’n of Ga. v. City of Atlanta</i> , 515 U.S. 1116 (1995).....	6, 12
<i>Parking Ass’n of Ga. v. City of Atlanta</i> , 450 S.E.2d 200 (Ga. 1994).....	12, 13

## TABLE OF AUTHORITIES—Continued

	Page
<i>Penn Cent. Transp. v. New York City</i> , 438 U.S. 104 (1978) .....	14
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972) .....	6
<i>Regan v. Taxation with Representation of Wash.</i> , 461 U.S. 540 (1983) .....	6
<i>Rumsfeld v. Forum for Acad. &amp; Inst. Rights, Inc.</i> , 547 U.S. 47 (2006) .....	6
<i>San Mateo Cty. Coastal Landowners' Ass'n v.</i> <i>Cty. of San Mateo</i> , 38 Cal. App. 4th 523 (1995).....	14
<i>San Remo Hotel L.P. v. City and Cty. of San</i> <i>Francisco</i> , 41 P.3d 87 (Cal. 2002).....	15
<i>Spinell Homes, Inc. v. Mun. of Anchorage</i> , 78 P.3d 692 (Alaska 2003).....	15
<i>Stop the Beach Renourishment v. Florida Dep't</i> <i>of Envtl. Prot.</i> , 560 U.S. 702 (2012).....	10
<i>St. Clair Cty. Home Builders Ass'n v. City of Pell</i> <i>City</i> , 61 So. 3d 992 (Ala. 2010).....	15
<i>Town of Flower Mound v. Stafford Estates Ltd.</i> <i>P'ship</i> , 135 S.W.3d 620 (Tex. 2004) .....	17
<i>Trimen Dev. Co. v. King Cty.</i> , 877 P.2d 187 (Wash. 1994) .....	12
<i>United States v. Am. Library Ass'n, Inc.</i> , 539 U.S. 194 (2003).....	11
 CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. V .....	3, 7

## TABLE OF AUTHORITIES—Continued

	Page
RULES	
Sup. Ct. R. 37.2(a) .....	1
Sup. Ct. R. 37.6 .....	1
OTHER AUTHORITIES	
Luke A. Wake & Jarod M. Bona, <i>Legislative Ex- actions After Koontz v. St. Johns River Man- agement</i> , 27 <i>Geo. Int'l Env'tl. L. Rev.</i> 539 (2015).....	9
Richard A. Epstein, <i>Bargaining with the State</i> 5 (1993).....	8, 9

**INTEREST OF AMICI CURIAE<sup>1</sup>**

Southeastern Legal Foundation (SLF) is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion. For 45 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional governmental takings. SLF drafts legislative models, educates the public on key policy issues, and litigates often before this Court.

National Federation of Independent Business Small Business Legal Center (NFIB) is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate, and grow their businesses. To protect its members' interests, NFIB frequently files amicus curiae briefs in cases that threaten to harm small businesses. Specifically, Amicus NFIB files this brief because the small business community is concerned about eminent domain abuse. Too often, local officials ignore this Court's precedent regarding the unconstitutional conditions doctrine, particularly when it comes to small businesses. Local governments often subject small businesses to more zoning, permitting, and licensing requirements than the average

---

<sup>1</sup> Rule 37 statement: The parties were notified that Amici intended to file this brief more than 10 days before its filing and consented to its filing. *See* Sup. Ct. R. 37.2(a). No party's counsel authored any of this brief; Amici alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.



person. Without uniform enforcement of the doctrine, small business owners are left to the whims of local officials on the vitality of their constitutional rights.

The Texas Public Policy Foundation (“TPPF”) is a 501(c)(3) nonprofit, nonpartisan research institute. The Foundation’s mission is to promote and defend liberty, personal responsibility, and free enterprise by educating policymakers and shaping the public policy debate with sound research and outreach. Through its Center for the American Future, TPPF seeks to uphold the rights and limitations on governmental power guaranteed through the United States Constitution.

Amici’s direct interest here stems from their profound commitment to protecting America’s legal heritage, including private property rights. Unconstitutional conditions that lack a nexus and rough proportionality are unconstitutional, regardless of whether the government imposed the condition through legislation or through an ad hoc administrative process. This case is another example of lower courts misapplying the unconstitutional conditions doctrine and serves to further deepen the divide among the lower courts. Unless and until this Court resolves the split and provides much needed clarity, local governments will be able to continue evading constitutional review.



## SUMMARY OF ARGUMENT

A government may not require a person to give up a constitutional right as a condition to receiving a discretionary government benefit. The “unconstitutional conditions doctrine” protects private property owners from being forced to surrender their Fifth Amendment right to just compensation to obtain a building permit, a variance, or other government benefit related to their property. Under the tests set forth by this Court in *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a “government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013).

This Court has consistently applied the unconstitutional conditions doctrine to conditions imposed both legislatively and administratively. In fact, as Petitioners explain, the conditions found unconstitutional in *Nollan*, *Dolan*, and *Koontz* all followed from legislation rather than ad hoc administrative decisions. Pet. at 30; *see also Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 377-78; *Koontz*, 570 U.S. at 599-603. And this Court struck down each of those conditions as unconstitutional in violation of the Fifth Amendment. *Nollan*, 483 U.S. at 841-42; *Dolan*, 512 U.S. at 396; *Koontz*, 570 U.S. at 619.

Ignoring the facts of those precedent-setting cases, a growing number of lower courts refuse to apply the heightened scrutiny mandated by *Nollan* and *Dolan* to legislatively-imposed conditions, recognizing exaction claims only when the government imposes the condition in an ad hoc administrative setting. The Ninth Circuit here is no exception—refusing to even consider the Pakdels’ unconstitutional conditions claim solely because the condition was imposed through legislation, and thus depriving them of even an opportunity to assert their constitutional right.

The danger of treating challenges to legislatively- and administratively-imposed exactions as two distinct actions warranting separate forms of judicial review cannot be overstated. It would be irrational to hold that a condition that is unconstitutional when applied by a zoning board becomes wholly acceptable and unreviewable if adopted by a city council. To hold otherwise incentivizes governments to coerce the surrender of property exclusively through legislative means, because such measures would be functionally immune from judicial review under the Takings Clause. This Court itself has warned against this danger, finding: “When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such isolation is not carried over when state power is used as an instrument for circumventing a federally protected right.” *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1930). This Court and the entire judicial branch acts as a check on state and local governments to prevent them “from exploiting a power

acknowledged to be absolute in an isolated context to justify the imposition of an ‘unconstitutional condition.’” *Id.*

As a result, this Court has never distinguished between unconstitutional conditions imposed by legislative bodies and unconstitutional conditions imposed by administrative bodies. Ignoring this Court’s precedent-setting cases, a growing number of lower courts refuse to apply the heightened scrutiny mandated by *Nollan* and *Dolan* to legislatively-imposed conditions, recognizing exaction claims only when the government imposes the condition in an ad hoc administrative setting. This not only defies the unconstitutional conditions doctrine and *Nollan*, *Dolan*, and *Koontz*, but it also results in a deep and now established split among state and federal courts. This deepening split of authority allows the government to evade proper constitutional review, casts a cloud on governmental actions, and even worse, leads to the unconstitutional taking of property without just compensation.

*Amici* write separately because the division among the lower courts “shows no signs of abating.” *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari). Only this Court can resolve the split and provide the resolution needed to protect and preserve those property rights guaranteed by the Fifth Amendment. And until it does, private property owners and courts are left struggling to determine the level of scrutiny applicable to legislatively-imposed conditions, and

state and local governments are handed a roadmap to evade the Constitution.

---

◆

## ARGUMENT

Although the “distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference,” *Parking Ass’n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., joined by O’Connor, J., dissenting from denial of certiorari), many lower courts dispense with *Nollan* and *Dolan* scrutiny simply because the government imposed the unconstitutional condition by a legislative act rather than through a discretionary administrative process. This rejection of *Nollan* and *Dolan*’s heightened scrutiny creates several conflicts<sup>2</sup> that warrant this Court’s attention. The first and most obvious is the direct conflict with this Court’s precedent set forth in *Nollan* and

---

<sup>2</sup> This Court has consistently applied the unconstitutional conditions doctrine to both legislatively- and administratively-imposed conditions without regard to the condition’s origin. *See, e.g., Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (applying doctrine to a legislatively-imposed condition without regard to its origin); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (same); *Perry v. Sindermann*, 408 U.S. 593 (1972) (applying doctrine to administratively-imposed condition without regard to its origin). As Petitioners explain, lower courts’ refusal to apply heightened scrutiny to legislatively-imposed conditions conflicts with this Court’s precedent as it relates to the unconstitutional conditions doctrine generally, and lacks support for distinguishing between legislative and adjudicative acts. Pet. at 16.

*Dolan*, and recently reaffirmed in *Koontz*: cases which all involved conditions imposed through a legislative act. And the second is the growing conflict among the lower courts, both state and federal.

**I. Allowing a government to evade the Constitution simply by imposing an unconstitutional condition through legislation rather than through an ad hoc administrative process conflicts with this Court's precedent.**

The Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. U.S. Const. amend. V. There are three primary taking doctrines: physical takings, regulatory takings, and takings based on the unconstitutional conditions doctrine. Thus, a taking occurs when the government (1) directly appropriates or physically invades private property (a physical taking), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 (1982); (2) enacts or applies a regulation “so onerous that its effect is tantamount to a direct appropriation or ouster” (a regulatory taking), *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536-37 (2005); or (3) places conditions on a property owner’s right to use or build on her property that lack any reasonable relationship to the development (an unconstitutional condition, or an exaction), *Koontz*, 570 U.S. at 599; *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

In its most basic formulation, the unconstitutional conditions doctrine provides that a government may not require a person to give up a constitutional right in exchange for a discretionary government benefit. In the seminal unconstitutional conditions case, the Court held that a government may not do indirectly what it could not accomplish directly:

[T]he power of the state [ . . . ] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in 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 & Frost Trucking Co. R.R. Comm'n*, 271 U.S. 583, 594 (1926) (striking down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public highways). The “doctrine holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of that person’s constitutional rights.” Richard A. Epstein, *Bargaining with the State* 5 (1993). And courts have invoked the unconstitutional conditions doctrine in many cases when the government sought to trade a discretionary benefit for a person’s right to free speech, right to freedom of religion, right to equal protection,

and right to due process of law. *Id.* at 9-10 (discussing and citing unconstitutional condition doctrine cases).

Through *Nollan*, *Dolan*, and *Koontz*, this Court made clear that the unconstitutional conditions doctrine also applies to protect property rights against coerced waivers. *Lingle*, 544 U.S. at 547 (explaining, in a unanimous opinion, that the tests set forth in *Nollan* and *Dolan* constitute a “special application” of the unconstitutional conditions doctrine). Under the *Nollan* and *Dolan* tests, a government cannot condition the grant or denial of a land-use permit on the relinquishment of another right unless it can show that there is both a “nexus” and “rough proportionality” between its demand and the effects of the proposed land use. *Koontz*, 570 U.S. at 599.

“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.” *Id.* at 607. As this Court explained, the unconstitutional conditions doctrine recognizes a constitutional injury where a government forces a property owner to choose “between (a) foregoing development opportunities, while preserving Fifth Amendment rights and (b) sacrificing those rights in order to obtain authorization to carry out development.” Luke A. Wake & Jarod M. Bona, *Legislative Exactions After Koontz v. St. Johns River Management*, 27 *Geo. Int’l Env’tl. L. Rev.* 539, 569 (2015). A finding that such a condition is unconstitutional is the equivalent of finding that such a demand



“amount[s] to a *per se* taking[.]” *Koontz*, 570 U.S. at 615 (citing *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831).

Here, as in *Nollan*, *Dolan*, and *Koontz*, the “condition” imposed by the government comes in the form of a required dedication of private property for a public use. And, as in *Nollan*, *Dolan*, and *Koontz*, the government imposed its “condition” in accordance with a legislative enactment. *See Nollan*, 483 U.S. at 828-30 (*state law* requiring dedication of beachfront property for a public access point as a condition to obtain a development permit); *Dolan*, 512 U.S. at 377-78 (*city land-use planning ordinance* requiring dedication of property for a bike path and greenway as a condition to obtain a permit); *Koontz*, 570 U.S. at 599-603 (*state law* requiring an in-lieu fee as a condition to obtain a development permit for land designated as wetlands).

A property owner’s constitutional right should not hinge on whether the government violates that right through a legislative act versus an administrative one. *See Stop the Beach Renourishment v. Florida Dep’t of Envtl. Prot.*, 560 U.S. 702 (2012) (emphasizing that the Takings Clause is unconcerned with which “particular state actor is” burdening property rights).<sup>3</sup> To be sure, the Court has always applied the unconstitutional

---

<sup>3</sup> The Takings Clause applies equally to all coordinate branches of state government under the Fourteenth Amendment. For that reason, it cannot be that the Takings Clause imposes a different standard of review for actions violating property rights when carried out by a legislative body where that same action would constitute a taking where carried out by an administrative agency.

conditions doctrine just the same when reviewing conditions imposed by statute. *See, e.g., 44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (striking down a statute conditioning the right to do business on waiver of constitutional rights); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003) (conditioning receipt of government funds on waiver of rights). Indeed, in the seminal unconstitutional conditions case, this Court struck down a California statute that unconstitutionally conditioned the right of commercial carriers to operate on public highways. *See Frost & Frost Trucking Co.*, 271 U.S. at 594.

That said, the lower court here refused to apply *Nollan* and *Dolan* scrutiny simply because the City imposed the condition legislatively, rather than administratively. The Ninth Circuit is not the first to make this improper distinction and to ignore this Court's unconstitutional conditions doctrine jurisprudence. Instead, this is one more decision contributing to an ever-deepening split of authority on this issue.

**II. Only this Court can provide the clarity needed to protect the constitutional right to just compensation and to resolve the deep split of authority over the standard for reviewing legislatively-imposed exactions.**

In 1995, just one year after this Court's opinion in *Dolan*, in a dissent from a denial of certiorari, Justice Thomas acknowledged that the lower courts were

already “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.” *Parking Ass’n of Ga.*, 515 U.S. at 1117. Just a few months after *Dolan*, at least four lower courts disagreed about its application, with two applying the nexus and rough proportionality test to legislative takings and two refusing to do so. Compare *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994) (denying motion for reconsideration) (declining to apply *Dolan* because case involved legislative regulatory taking rather than an adjudicative one), and *Parking Ass’n of Ga. v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994) (same), with *Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994) (applying *Dolan* even though challenged ordinance was a legislative enactment), and *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994).

In *Trimen Development*, a developer challenged a local ordinance requiring developers to dedicate land for open space or pay a fee in lieu of the dedication as a condition to obtaining subdivision plat approval. 877 P.2d at 188. Less than one month after *Dolan*, the Supreme Court of Washington applied this Court’s rule to the ordinance and found a rough proportionality between the dedication or in-lieu fee and the impact of the proposed development. *Id.* at 194.

One month later in *Manocherian*, the Court of Appeals of New York reviewed a property owner’s challenge of a city ordinance that required property owners to offer renewal leases to not-for-profit hospitals. 643

N.E.2d at 479-80. In doing so, the court applied *Nollan* and *Dolan*, explaining that through them, this Court “establish[ed] a constitutional minimum floor of protection which [it] lacks authority to diminish under the Supremacy Clause.” *Id.* at 482. It continued, noting there is no evidence “for concluding that the Supreme Court decided to apply different takings tests” and that this Court’s takings jurisprudence “suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases.” *Id.* at 483.

Despite the “uniform, clear and reasonably definitive standard,” a few months later, the District Court of Kansas declined to apply *Dolan* because the condition at issue was imposed legislatively rather than applied on an ad hoc administrative basis. *Harris*, 862 F. Supp. at 294. Soon after, the Supreme Court of Georgia followed suit and refused to apply the nexus and rough proportionality tests to a group’s challenge of a city ordinance requiring owners of surface parking lots to dedicate portions of their property to create barrier curbs and landscaping areas. *Parking Ass’n of Ga.*, 450 S.E.2d at 201-02. The court rejected the plaintiff’s reliance on *Dolan*, opting instead to apply a test of its own creation, the significant detriment test. *Id.* at 203 n.3. Yet Justice Sears, joined by Chief Justice Hunt and Justice Carley, wrote a strong dissent contending that the court erred in failing to follow this Court’s takings jurisprudence under *Nollan* and *Dolan*. *Id.* at 203-04 (Sears, J., dissenting).

This almost immediate split of authority following *Dolan* provided state and local governments with a

roadmap to evade constitutional scrutiny—impose land-use conditions through legislative enactments rather than through administrative procedures and avoid meaningful constitutional review. When property owners challenged legislatively-imposed exactions, governmental defendants could, from the beginning, persuade the court to side with the District Court of Kansas and the Supreme Court of Georgia and apply a lower level of scrutiny.

Over the last two decades, the split has deepened and local and state governments continue to evade the Constitution. For example, the lower courts have found the following conditions valid, under the Ninth Circuit’s approach:<sup>4</sup>

- Ordinances requiring dedication of affordable housing units. *See Cal. Bldg. Indus. Ass’n v. City of San Jose*, 61 Cal. 4th 435, 459 n.11 (2015); *Alto Eldorado P’ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *Mead v. City of Cotati*, 389 Fed. App’x 637, 639 (9th Cir. 2010);
- A county ordinance imposing an agricultural and open space easement on subdivision applicants. *See San Mateo Cty. Coastal Landowners’ Ass’n v. Cty. of San Mateo*, 38 Cal. App. 4th 523, 546-49 (1995);

---

<sup>4</sup> When *Nollan*, *Dolan*, and *Kootnz* are held inapplicable, courts typically apply the much more deferential balancing test set forth in *Penn Cent. Transp. v. New York City*, 438 U.S. 104 (1978).

- An ordinance imposing landscaping and street maintenance requirements as a condition to obtain a permit or certificate of occupancy. *Spinell Homes, Inc. v. Mun. of Anchorage*, 78 P.3d 692, 702 (Alaska 2003);
- A city ordinance conditioning permit approvals on requirements to pay impact fees. *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010);
- An ordinance requiring developers to pay a sanitation permit fee as a condition for development approval. *See Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-96 (Colo. 2001);
- A city ordinance imposing a water resources development fee on all new realty developments. *See Home Builders Ass'n of Cent. Ariz. v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997);
- A city ordinance requiring mobile home park owners who close their parks to pay displaced tenants. *See Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996);
- A city ordinance imposing a fee on hotel owners as a condition for a permit to reconfigure business to no longer provide rooms to long-term renters. *See San Remo Hotel L.P. v. City and Cty. of San Francisco*, 41 P.3d 87, 105 (Cal. 2002); and

- An ordinance requiring property owners to dedicate much of their property as a conservation area as a condition for a permit. *Common Sense All. v. Growth Mgmt. Hearings Bd.*, 2015 Wash. App. LEXIS 1908, \*17-19 (Aug. 10, 2015).

Had those conditions been administratively-imposed, those courts would have applied *Nollan* and *Dolan* scrutiny and many of those conditions would have, perhaps, been invalidated.

The severity of the split of authority is readily apparent when one compares these cases and conditions with those that follow. Despite the similarities between the laws listed above, the courts evaluating the following legislatively-imposed conditions all applied *Nollan* and *Dolan* scrutiny:

- A city ordinance requiring dedication of affordable housing units. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991);<sup>5</sup>
- Ordinances conditioning permit approvals on requirements to pay impact fees. See *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Home Builders*

---

<sup>5</sup> This Court will notice that the Ninth Circuit itself appears to be split when it comes to legislatively- and administratively-imposed conditions. In *Commercial Builders*, the Ninth Circuit applied only *Nollan* to the affordable housing ordinance at issue because it decided the case several years before *Dolan*. But as the present case and *Mead*, 389 Fed. App'x at 639 show, the Ninth Circuit has not applied *Nollan* and *Dolan* scrutiny to any legislatively-imposed conditions in recent years.

*Ass'n of Dayton and Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000);

- A town ordinance imposing road improvement requirements as a condition to obtain a development permit. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004);
- A town ordinance imposing an easement for fire prevention purposes as a condition for subdivision approval. *See Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998);
- State statutes and local ordinances imposing transportation impact fees on new developments. *See N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995);
- A city ordinance requiring property owners to pay a lump sum to displaced tenants as a condition for withdrawing rent-controlled property from the rental market. *Levin v. City and Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1089 (N.D. Cal. 2014); and
- An ordinance requiring a cash proffer in exchange for a favorable action on rezoning applications. *Nat'l Ass'n of Home Builders v. Chesterfield Cty.*, 907 F. Supp. 166, 168-69 (E.D. Va. 1995).



Not only has the split deepened, but as Justice Thomas noted in his concurring opinion in support of the Court’s denial of certiorari, the “division shows no signs of abating.” *Cal. Bldg. Indus. Ass’n*, 136 S. Ct. at 928. For over two decades, “lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively-imposed condition rather than an administrative one.” *Id.* And, while this Court has recognized that there is no “precise mathematical calculation,” *Dolan*, 512 U.S. at 395, for determining when an adjustment of rights has reached the point when “fairness and justice,” *id.* at 384, requires compensation, until this Court “decide[s] this issue, 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.” *Cal. Bldg. Indus. Ass’n*, 136 S. Ct. at 929. As Justice Kagan explained in *Koontz*, the split of authority “casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.” *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting).



**CONCLUSION**

For all of these reasons, and those stated by the Petitioners in the Petition for a Writ of Certiorari, *Amici* request that this Court grant the writ of certiorari.

KAREN HARNED  
ROB SMITH  
NFIB SMALL BUSINESS  
LEGAL CENTER  
555 12th St., N.W.  
Ste. 1001  
Washington, D.C. 20004  
(202) 314-2061  
karen.harned@nfib.org

ROBERT HENNEKE  
TEXAS PUBLIC POLICY FOUNDATION  
901 Congress Ave.  
Austin, TX 78701  
(512) 472-2700  
rhenneke@texaspolicy.com

April 1, 2021

Respectfully submitted,

KIMBERLY S. HERMANN  
*Counsel of Record*  
CELIA HOWARD O'LEARY  
SOUTHEASTERN LEGAL  
FOUNDATION  
560 W. Crossville Rd.  
Ste. 104  
Roswell, GA 30075  
(770) 977-2131  
khermann@  
southeasternlegal.org  
*Counsel for Amici Curiae*