No. _____

In the

Supreme Court of the United States

ALTO ELDORADO PARTNERSHIP, RANCHO VERANO, LLC, CIMARRON VILLAGE, LLC, DENNIS R. BRANCH, and JOANN W. BRANCH,

Petitioners,

v.

THE COUNTY OF SANTA FE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A New Mexico county ordinance forces landowners who seek permits to subdivide their properties to construct and sell "affordable housing" units to County-approved buyers. Petitioners Alto Eldorado Partnership, et al., (collectively, "Alto") are property owners who brought a Fifth Amendment claim in federal district court under 42 U.S.C. § 1983, seeking to have the ordinance enjoined on the grounds that it imposes an unconstitutional permit condition in violation of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Citing *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the court held that Alto's claim was unripe and had to be litigated as a compensation claim in state court; the decision effectively denies Alto a federal forum for its Section 1983 claim, because state-court resolution of that claim will bar its litigation in federal court. The court also held that Alto has no viable unconstitutional-conditions claim under *Nollan*, on the grounds that the "affordable housing" condition (1) is a legislative (as opposed to administrative) requirement, and (2) does not take real property, but merely restricts the use of land or, alternatively, requires a monetary payment.

1. Are *Nollan* claims for prospective relief, which by definition implicate no compensation issues, outside the purview of *Williamson County*'s state-procedures rule and immediately ripe in federal court?

2. If not, should the Court overrule *Williamson County*'s state-procedures rule on the grounds that the rule effectively bars, from federal court, taking claims brought under 42 U.S.C. § 1983, in contravention of

Congress's intent in enacting § 1983 to provide federal rights claimants with access to federal court?

3. Did the Tenth Circuit err in holding, contrary to this Court's precedents and the decisions of state supreme courts, that heightened review under *Nollan* does not apply to permit conditions that result from legislative enactments and that constitute non-physical-invasions of property?

LIST OF ALL PARTIES

Petitioners: Alto Eldorado Partnership, Rancho Verano, LLC, Cimarron Village, LLC, Dennis R. Branch, and Joann W. Branch

Respondent: The County of Santa Fe

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent companies, subsidiaries, or affiliates that are publicly owned corporations, and there is no publicly held corporation that owns 10% of their stock.

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PETITION FOR WRIT OF CERTIORARI

Alto Eldorado Partnership, Rancho Verano, LLC, and Cimarron Village, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reported at 634 F.3d 1170 (10th Cir. 2011), and appears at Petitioners' Appendix (Pet. App.) at A-1. The Memorandum Opinion of the United States District Court for the District of New Mexico is reported at 644 F. Supp. 2d 1313 (D.N.M. 2009), and appears at Pet. App. C-1.

JURISDICTION

This district court had jurisdiction to review this case pursuant to 28 U.S.C. §§ 1331 and 1343. The decision of the Tenth Circuit Court of Appeals was filed on March 16, 2011. Pet. App. at A-1. That decision became final on April 11, 2011, upon entry of the Court of Appeals' denial of a petition for rehearing en banc. Pet. App. at F-1. This Court has jurisdiction under 28 U.S.C. § 1254.

LEGAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not]

be taken for public use without just compensation." U.S. Const., amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, § 1.

42 U.S.C. § 1983 provides, in pertinent part, that

> [e]very 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.

Sante Fe County Ordinance No. 2006-02 states, in relevant part: "Of the total housing provided in any Major Project, no less than thirty percent (30%) shall be Affordable Housing as defined herein. Of the total housing provided in any Minor Project, no less than sixteen percent (16%) shall be Affordable Housing as defined herein." Pet. App. at G-6. "'Major Project' means any division of property into twenty-five (25) or more parcels for purpose of sale, lease or other conveyance of one or more single-family residences." *Id.* at G-5. "'Minor Project'" means subdivision of a parcel or parcels into between five (5) and no more than twenty-four (24) parcels (inclusive of any Affordable Housing provided as a result of the

application of requirements of this Ordinance) for purpose of sale, lease or other conveyance of one or more single-family residences." *Id.*

STATEMENT OF THE CASE

Alto Eldorado Partnership and fellow Petitioners are local businesses and residents who own parcels of grazing land in rural Santa Fe County. They have master plan approval and intend to proceed with the subdivision of their properties. But they are significantly impacted by County Ordinance No. 2006-02. Pet. App. at C-3.

As a condition of obtaining a permit to subdivide land, the Ordinance requires property owners to build and sell "affordable" homes for the County's residents. No less than 30% of the total housing allowable or provided in a "Major Project," and no less than 16% of the total housing allowable or provided in a "Minor Project," must be "affordable" homes built by the permit applicant—again, even if he only wants to subdivide and sell the lots. Pet. App. at G-6. The Ordinance forces the applicant to sell these "affordable" homes at below-market, County-approved prices to buyers with incomes ranging from 0% to 120% of the Santa Fe area's median income. *Id*. at G-4-6. Moreover, when an "affordable housing" unit is sold, the difference between the resale price and the original sale price is split between the County and the qualified buyer, allowing the County to capture a portion of the loss the Ordinance imposes on the original developer. Pet. App. at G-20.

A landowner seeking a subdivision permit satisfies the condition when he files and records an

"affordable housing" agreement against his property, along with his final development plan or plat. Pet. App. at G-7-8. He can try to propose an alternative means of complying with the condition, which the County may or may not approve at its discretion. For example, he can propose building "affordable housing" units off-site, dedicating land for "affordable housing," or paying a substantial in-lieu fee[1] of equal or greater value than would have been required if the"affordable housing" units had been constructed on site. Pet. App. at G-14. Because the "affordable housing" obligation is imposed as a condition of obtaining a subdivision permit, the Ordinance does not provide for or contemplate "just compensation" to affected property owners.

Alto challenged the Ordinance in federal district court, alleging federal taking, equal protection, and due process claims, along with pendent state claims. Pet. App. at A-3. The federal taking claim at the heart of this case is that the Ordinance on its face imposes an unconstitutional condition on property owners under *Nollan*. Pet. App. at C-5. Alto alleges that, because subdivision permit applicants do not create or contribute to the lack of "affordable housing," there is no connection between the condition and the impact of the proposed property use, and the condition amounts to "an out-and-out plan of extortion." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). Alto seeks only declaratory and injunctive relief from the Ordinance; it does not seek damages. Pet. App. at C-6.

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[1] For example, for a 100-lot subdivision, the fee is $4,960,000. Pet. App. at C-5.

The County moved to dismiss Alto's suit under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Pet. App. at C-6. The district court focused exclusively on the jurisdictional question of whether Alto's claim for declaratory and injunctive relief was ripe for review in federal court, in light of *Williamson County*. Pet. App. at C-12, *et seq*.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court considered whether the plaintiff stated a ripe federal taking claim for monetary damages arising from the county's application of a land-use ordinance and regulations to its property that led to temporary denial of its development project. This Court identified two ripeness rules for such as-applied taking claims for just compensation: (1) the claimant must obtain a final decision regarding application of the offending regulations to the property, *id.* at 186, and (2) the claimant must seek and be denied just compensation for the taking through the procedures provided by the State, *id.* at 194. This Court held that the first rule precluded plaintiff's claim from being adjudicated in federal court, because plaintiff had not obtained a final decision as to how the regulations would be applied to its property. *Id.* at 199-200.

The district court dismissed Alto's claim as unripe and, along with it, the remaining federal and state claims. Pet. App. at C-74-77. In a published decision, the Tenth Circuit affirmed. Pet. App. at A-1. The court concluded that Alto's claim was unripe because, "[i]rrespective of the nature of the remedy sought," it had failed to "utilize[] the available state procedure to seek compensation for the alleged taking as required

by *Williamson County*."[2] Pet. App. at A-7. In the court's view, it made no difference that Alto sought prospective relief—as is appropriate for *Nollan* claims—and not compensation.[3] *Id.*

The court also held that Alto had no viable claim under *Nollan* for two reasons. First, the court said that only a government demand that a property owner submit to a "permanent physical invasion of private property"—like an easement—triggered *Nollan*'s heightened scrutiny. Pet. App. at A-14. In the court's view, the Ordinance did not make such a demand, but merely constituted "a restriction on how the developers may use their land should they choose to subdivide it or, in the alternative, the imposition of a fee." *Id.* Second, the fact that the "affordable housing" condition was the result of a legislative enactment (the Ordinance), as opposed to the *ad hoc* decision of an "administrative body" (like a county planning commission), shielded the condition from heightened review under *Nollan*. The court offered no analysis or authority for this point. Pet. App. at A-16.

The court denied a petition for rehearing (Pet. App. at F-1), and Alto timely filed this Petition for Writ of Certiorari.

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[2] The County concedes, and the Court of Appeals did not dispute, that the first ripeness rule does not apply to facial taking claims, like Alto's. Pet. App. at A-6.

[3] The Court further rejected Alto's argument that facial taking claims—which also do not implicate compensation issues—avoid the state-procedures rule. Pet. App. at A-7.

REASONS FOR GRANTING THE WRIT

I

THE TENTH CIRCUIT'S APPLICATION OF *WILLIAMSON COUNTY*'S STATE-PROCEDURES RULE TO ALTO'S *NOLLAN* CLAIM FOR PROSPECTIVE RELIEF CONFLICTS WITH THIS COURT'S DECISIONS

Williamson County creates special ripeness rules for one kind of taking claim: a taking claim for just compensation. *Williamson County*, 473 U.S. at 194. As this Court held in a later case, "one seeking *compensation*" must satisfy the state-procedures rule. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 312 n.6 (1987) (emphasis added). *Williamson County* has nothing to say about, and has no application to claimants like Alto who seek no compensation, but only prospective relief under *Nollan*.

Decided two years after *Williamson County*, *Nollan* applied the well-established unconstitutional-conditions doctrine in the context of land-use permits. Whereas the goal of lawsuits for just compensation is to obtain just compensation for an otherwise lawful act (*i.e.*, the taking of one's property), the goal of unconstitutional-conditions claims under *Nollan* is to prevent the government from consummating an unconstitutional act—specifically, the act of unlawfully conditioning a land-use permit. *Nollan*, 483 U.S. at 828 (claim for "invalida[tion of] the access condition" imposes on a land-use permit).

In *Nollan*, the California Coastal Commission required the Nollans, owners of beach-front property,

to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. *Id.* at 827-28. Furthering the Commission's comprehensive program to provide continuous public access, the condition specifically was justified on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission). The Nollans refused to accept the condition and brought a federal taking claim against the Commission in state court—not for damages, but for the prospective remedy of "invalidat[ion of] the access condition." *Id.* at 828. The Nollans argued that the condition was unlawful, because it bore no connection to the impact of their proposed remodel.

This Court agreed, holding that the Commission's easement condition lacked an "essential nexus" to the alleged social evil that the Nollans' project caused. *Id.* at 837. The Court could not see how the Nollans' home, which would have no impact on public-beach access, was in any way connected to the Commission's condition that they dedicate an easement over their property. *Id.* at 838-39. Without a constitutionally sufficient connection, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837 (citations omitted). On remand, the state trial court issued a writ of mandate—*i.e.*, prospective relief equivalent to a declaration or injunction—invalidating the Commission's extortionate practice. *Id.* at 841;

J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. Envtl. Aff. L. Rev. 247, 303 (2006) ("In [*Nollan*], the leading exaction takings case, the plaintiffs sought—and the Court provided—the equivalent of declaratory relief in holding that permit conditions [e]ffected a taking.").

Similarly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land use. The City of Tigard imposed conditions on Florence Dolan's permit to expand her store that required her to dedicate some of her land for flood-control and traffic improvements. *Id.* at 377. Dolan refused the conditions and sued the city in state court, alleging that they effected an unlawful taking and should be enjoined. Like *Nollan*, the case made its way up to this Court, which handed Dolan a partial victory.

The Court held that the City established a connection between both conditions and the impact of Dolan's proposed expansion under *Nollan*, but nevertheless held that the traffic-improvement condition was unconstitutional. Even when an "essential nexus" exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The Dolan Court held that

the city had not demonstrated that the traffic-improvement condition was roughly proportional to the impact of Dolan's expansion. As in *Nollan*, the proper remedy in *Dolan* was prospective relief to prevent the permit condition from being consummated.

The proper remedy was nonmonetary in both *Nollan* and *Dolan*, because they constituted a "special application of the 'doctrine of unconstitutional-conditions.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005). Under that doctrine, "the government may not require a person to give up a constitutional right . . . 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. Thus, in the unconstitutional-conditions context, the injury occurs when the government makes the unlawful attempt to bargain its way around its constitutional obligations; the remedy is to thwart that attempt—not to allow the government to accomplish its unlawful scheme, and then award damages to the scheme's victim. *See, e.g.*, *Rumsfeld v. Forum for Academic and Inst'l Rights, Inc.*, 547 U.S. 47, 52 (2006) (adjudicating merits of First Amendment claim for prospective relief based on unconstitutional-conditions doctrine); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (holding that a business owner could not be compelled to choose between a warrantless search of his business and shutting down the business, and granting declaratory and injunctive relief); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgement of freedom of the press because it forced newspaper to incur additional

costs by adding more material to an issue or to remove material it desired to permit).

The Tenth Circuit's decision ignores the nature and purpose behind the unconstitutional-conditions doctrine—and, specifically, its application in the context of land-use permits. The decision compels a *Nollan* claimant, like Alto, to abandon his claim for prospective relief in federal court and assert, in state court, a completely distinct claim for damages. The decision does not square with this Court's precedents—including *Lingle*, 544 U.S. at 547, which reaffirms *Nollan*'s viability in the federal-court context—and calls for certiorari.

II

WILLIAMSON COUNTY'S STATE-PROCEDURES RULE BARS SECTION 1983 TAKING CLAIMS FROM FEDERAL COURT, EVEN THOUGH SECTION 1983'S PURPOSE IS TO PROVIDE FEDERAL RIGHTS CLAIMANTS WITH A FEDERAL FORUM

A. This Court Has Interpreted Section 1983 As Guaranteeing a Federal Forum for Federal Rights Claimants

Section 1983 was enacted by Congress in 1871 pursuant to section 5 of the Fourteenth Amendment for the protection of certain rights "secured by the Constitution and laws" against infringement by states and local governments. 42 U.S.C. § 1983. The statute creates a cause of action for damages or prospective relief, like an injunction, against government entities and officials. *Id.* Through the years since its

enactment, this Court has consistently viewed Section 1983 as a vehicle for providing federal rights plaintiffs a federal forum for their claims.

In *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972), this Court explained that Section 1983 was the result of "the new structure of law that emerged in the post-Civil War era"—one that saw "the Federal Government as a guarantor of basic federal rights against state power." According to the Court, the purpose of Section 1983 was to "throw open the doors of the United States courts to individuals who were threatened with, or who had suffered, the deprivation of constitutional rights, . . . and to provide these individuals immediate access to the federal courts." *Patsy v. Bd. of Regents*, 457 U.S. 496, 504 (1982) (emphasis added) (internal citations and quotation marks omitted) (holding that Section 1983 plaintiffs could not be required to pursue administrative remedies prior to going to federal court); *Mitchum*, 407 U.S. at 239 (Section 1983 "opened the federal courts to private citizens."). As the Court eloquently stated in *Mitchum*, "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum*, 407 U.S. at 242; *see also* Steven Stein Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693 (1993) ("The primary purpose of § 1983 is to allow federal courts to prevent local governments from determining when and which federal laws will be enforced."); *see also Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on [Section 1983] . . . we have not required exhaustion of state *judicial or administrative* remedies . . . ." (emphasis added)); *Felder v. Casey*, 487 U.S. 131, 152 (1988) ("'Whatever springs the State

may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'").

This Court has been unequivocal in its views about Section 1983 and the underlying concerns that it believes the statute addresses. Assessing the "long and extensive" debates surrounding passage of Section 1983, this Court has concluded that "[i]t is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Indeed, as the *Monroe* Court reported, "states' rights" opponents of Section 1983 complained that it was just "a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States." *Monroe*, 365 U.S. at 179. Despite such objections, Section 1983 became law.

In accordance with the history and purpose of Section 1983, as interpreted by the courts, plaintiffs generally are entitled to litigate their federal rights claims in federal court. But in 1985, the *Williamson County* Court created one glaring and major exception: Regardless of the relief they seek, federal taking claimants asserting Fifth Amendment rights must first seek and be denied just compensation in state court—in theory, to ripen their claim for federal-court

review. However, in practice, preclusion rules bar federal taking plaintiffs from federal court once they have litigated their claims in state court—as this Court confirmed in *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323 (2005).

B. *Williamson County* Conflicts with This Court's Interpretation of Section 1983

In *San Remo*, this Court considered the plight of a federal taking plaintiff who had complied with *Williamson County*'s state-procedures rule by seeking and being denied just compensation in state court, only to find itself barred from federal court. *San Remo*, 545 U.S. at 326. Because the parties had not directly raised and briefed the issue, the merits of the judicially created state-procedures rule—the very source of the plaintiff's problem—was not before the Court for reconsideration. *Id.* at 352 (concurring op.). Instead, the Court considered the interplay between two federal statutes: Section 1983's guarantee of a federal forum to federal rights claimants and the Full Faith and Credit Act's effect of barring federal-court access to plaintiffs with state-court judgments. *Id.* at 341-45.

The San Remo Hotel was a hotelier that challenged a San Francisco ordinance requiring it to pay a $567,000 fee to convert hotel units from residential to tourist use. After the California courts rejected the San Remo Hotel's state-law taking claims, it pursued federal taking claims in federal court. The city sought dismissal based on the Full Faith and Credit Act, arguing that the state courts already had decided the very same issues raised by the San Remo Hotel's federal taking claims. The San Remo Hotel argued for an exception to the Act's preclusion rules,

largely on the grounds that Section 1983 entitled him to a federal forum after he had complied with *Williamson County*'s state-procedures rule. *Id.* at 327-331, 341-45.

This Court was presented with the question of whether to create an exception to the Full Faith and Credit Act "in order to provide a federal forum for litigants who seek to advance federal takings claims that are not ripe until the entry of a final state judgment denying just compensation." *Id.* at 337. This Court declined to do so, reasoning that, regardless of the unfairness of effectively banishing federal taking claims from federal court, it was "not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum." *Id.* at 347. The Court's holding "ensures that litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court." *Id.* at 351 (concurring op.). As a consequence, federal taking claimants have the dubious honor of being the *only* federal rights plaintiffs to be categorically barred from federal court. *See* Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J.L. & Pol'y 99, 123 (2000) ("No other federally protected rights have the *Williamson County* precondition to federal litigation. All other federally protected rights may be vindicated in federal court without first having to pass through a state court filter, if the plaintiff so chooses."); *see also* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 Conn. L. Rev. 723, 725 (2008) ("[T]he Court has not yet extended this rule [requiring state-court litigation of a federal rights claim] to cases outside the takings context. . . .").

Faced with a conflict between two federal statutes—Section 1983's federal-court guarantee and the Full Faith and Credit Act—the *San Remo* Court considered it necessary to preserve the Act's integrity. But behind the conflict was a judicially created rule that was not (and could not) be addressed by the Court—namely, *Williamson County*'s state-procedures rule. As four Justices of the *San Remo* Court lamented, the correctness of the state-procedures rule was not before the Court for reconsideration. *San Remo Hotel, LP*, 545 U.S. at 352 (concurring op.) (urging reconsideration of the state-procedures rule in the right case). With this petition, it is.

After *San Remo*, an irreconcilable tension exists between (1) a judicially created, prudential rule that extinguishes federal-court access for *Nollan* claimants like Alto (and other federal taking claimants as well), and (2) Section 1983's promise of federal-access for all federal rights claimants, as recognized by this Court through the years. The Tenth Circuit decision perpetuates the conflict, which only this Court can resolve. With no facts in dispute, and the viability of *Williamson County*'s state-procedures rule squarely at issue, Alto's case presents an opportunity for the Court to reconsider that rule in light of its impact on a distinct group of Section 1983 litigants—federal taking plaintiffs—that is just as deserving of federal-court protection as any other. After all, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *See, e.g.*, *Dolan*, 512 U.S. at 392.

III

THE TENTH CIRCUIT'S DECISION THAT *NOLLAN* APPLIES ONLY TO *AD HOC*, ADMINISTRATIVE CONDITIONS REQUIRING DEDICATION OF INTERESTS IN REAL PROPERTY CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF STATE COURTS OF LAST RESORT

A. Courts Have Held That *Nollan* Applies to Both Legislatively and Administratively Imposed Permit Conditions

Courts across the country are split over the question of whether legislatively imposed permit conditions are subject to *Nollan* review. For example, the Texas and Ohio Supreme Courts have declined to distinguish between legislatively and administratively imposed exactions, and applied *Nollan*-level scrutiny to generally applicable permit conditions. *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 643 (Tex. 2004); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000). On the other hand, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, and the Tenth Circuit in this case have chosen to limit *Nollan*—and *Dolan*—to administratively imposed conditions. *See, e.g.*, *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (*Dolan* does not apply to legislatively imposed conditions); *Mead v. City of Cotati*, 389 Fed. Appx. 637, 638-39 (9th Cir. 2010) (same). The conflict among the courts raises an important question

concerning the scope of the constitutional right to be free from uncompensated takings of private property, particularly when the cases refusing to apply *Nollan* may be in conflict with *Nollan* and *Dolan* themselves.

As this Court's decisions show, there appears to be no doctrinal justification for the "legislative v. administrative" distinction; indeed, it is often difficult to distinguish one from the other. Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487 (2006) (describing the difficulty in drawing a line between legislative and administrative decisionmaking in the land-use context). The *Nollan* Court applied heightened scrutiny to and invalidated the California Coastal Commission's easement condition, which was the result of the agency's quasi-legislative policy that already had been applied to over 40 similarly situated property owners. *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, "stringent regulation of development along the California coast has been in place at least since 1976" and, in particular, a deed restriction granting the public an easement 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, in *Dolan*, the government acted under a generally applicable and legislatively enacted ordinance designed to address transportation congestion when it conditioned a property owner's building permit on her dedication of a pedestrian/bicycle pathway. *Dolan*, 512 U.S. at 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code].").

There is no reason "beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999). But such deference is unjustified. As Justice Thomas explained in his dissent to the denial of certiorari in *Parking Association of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117-18 (1995):

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis . . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Clearly, from the property owner's perspective, whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit results in the exact same injury.

The irrelevance of the "legislative v. administrative" distinction comes as no surprise, in light of *Nollan*'s roots in the unconstitutional-conditions doctrine. *Lingle.*, 544 U.S. at 547. The doctrine "does not distinguish, in theory or in practice, between conditions imposed by different branches of government." 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). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise of government power and not the specific source of that power." *Id.* at 438.

The Tenth Circuit's opinion in this case, which holds that *Nollan* is inapplicable when a permit condition is imposed legislatively, adds confusion to federal takings law. The Court should grant certiorari to restore a proper understanding of *Nollan*.

B. Courts Have Held That *Nollan* Applies Beyond Demands for Interests in Real Property

The Tenth Circuit's decision limiting *Nollan* to physical invasions of property departs from *Nollan*, *Dolan*, and several state supreme court decisions. First, nothing in the language of *Nollan*, *Dolan*, or any other decision of this Court justifies such a limitation. Under *Nollan*, the government cannot demand that a property owner waive his right to compensation for an exaction unless the exaction bears an "essential nexus" to the impact of the permitted project. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 386. Only those infringements of property rights that are otherwise protected by the Takings Clause qualify as exactions that trigger heightened scrutiny. In *Nollan*, the exaction took the form of an interest in real property—an easement—but *Nollan* does not limit its protection of property owners to interests in land. Neither does *Dolan*.

Indeed, the Takings Clause protects a vast array of rights in property, not just interests in land. Protected property rights include: money, *Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) (plurality), *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003); air rights for high-rise buildings, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); trade secrets, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); the right of access to land, *e.g.*, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); the right to exclude from one's land, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); the right to transfer property by devise or intestacy, *Hodel v. Irving*, 481 U.S. 704 (1987); the right to make use of property, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); liens on real property, *Armstrong v. United States*, 364 U.S. 40 (1960); the right to mine coal, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); the right to sell personal property, *Andrus v. Allard*, 444 U.S. 51 (1979).

The Ordinance in this case implicates a property right protected by the Takings Clause, triggering heightened scrutiny under *Nollan*. The Ordinance's primary mandate is to require subdivision applicants to encumber their lands with agreements to build and sell units to County-approved buyers. Depending on whether a subdivision applicant wants to sell or lease his property, the condition substantially burdens or encumbers the right to alienate, use, or exclude. And even if the County allows—in its discretion—the payment of an in-lieu fee, direct transfers of money to the government are protected under the Takings Clause. *Eastern Enterprises*, 524 U.S. at 538 (plurality); *Brown v. Legal Found. of Wash.*, 538 U.S.

at 234-35 (interest on lawyers' trust accounts can, in theory, be taken); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980) (money taken in violation of the Takings Clause).

State precedents concur in the application of *Nollan* and *Dolan* to exactions other than demands for interests in real property. *See, e.g., Smith v. Town of Mendon*, 822 N.E.2d 1214, 1219 (N.Y. 2004) (explaining that it had extended the *Nollan/Dolan* standards to a fee imposed in-lieu of a physical dedication); *Town of Flower Mound*, 135 S.W.3d at 635 (explaining that "[t]he requirement that a developer improve an abutting street at its own expense is in no sense a use restriction; it is much closer to a required dedication of property—that being the money to pay for the required improvement"); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) (applying *Nollan* and *Dolan* to in-lieu fees imposed as a condition of development); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994) (holding that *Dolan* applies to a generally applicable ordinance imposing park development fees). *Contra*, *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001) (holding that *Dolan* applies only to physical exactions); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001) (same).

While *Nollan* and *Dolan* involved challenges to real-property conditions, nothing in the text or logic of those decisions precludes *Nollan*'s application to other kinds of permit conditions. Nevertheless, confusion has reigned among the courts about the scope of *Nollan*'s protections. *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008), *cert. denied*,

129 S. Ct. 2765 (2009) (declining to apply *Nollan/Dolan* to financing of utility upgrade, but observing that "[o]ther courts addressing this general issue have come to different conclusions"); *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) (declining to apply *Nollan/Dolan* to a "Tenant Relocation Assistance Ordinance" fee on landowners, while acknowledging that "[n]either *Nollan* nor *Dolan* provide[s] a court with any guidance to determine whether" they apply outside the context of physical invasions of property.) As with the "legislative v. administrative" debate, this Court should provide guidance as to whether *Nollan* provides robust protections against *all* extortionate permit conditions, or merely those that involve demands for interests in real property.

CONCLUSION

For these above-stated reasons, the Court should grant the Petition for Writ of Certiorari.

DATED: July, 2011.

Respectfully submitted,

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