No. _____

In the
Supreme Court of the United States

COMMON SENSE ALLIANCE,

Petitioner,

v.

SAN JUAN COUNTY,

Respondent.

On Petition for Writ of Certiorari to the Washington State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MERIEM L. HUBBARD
ANTHONY L. FRANCOIS*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

A San Juan County, Washington, ordinance requires that every shoreline property owner applying for a development permit agree to permanently dedicate a portion of the property as a conservation area to filter pollutants from stormwater that flows from other properties and crosses the shoreline lot. This condition is based on a collection of reports that argue for a broad public need for stormwater filtration, but include no site specific analysis of the area necessary to filter water originating only on the permitted shoreline parcel.

The questions presented are:

1. Whether such a permit condition, imposed legislatively, is subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and

2. Whether a generalized scientific study, which concludes that preserving shorelines may protect the environment but makes no individualized determination, satisfies the constitutional requirement that the government demonstrate that the permitted use will impact the shoreline before exacting property in exchange for permit approvals, pursuant to the "essential nexus" and "rough proportionality" tests as set out in *Koontz*, *Dolan*, and *Nollan*.

LIST OF ALL PARTIES

Common Sense Alliance was a petitioner in the Washington state appellate and supreme court proceedings below and is the petitioner herein.

San Juan County, Washington, is the municipal respondent.

Friends of the San Juans were petitioners in a consolidated action before the administrative agency and participated as petitioners and cross-respondents in the Washington appellate and supreme court proceedings.

The Growth Management Hearings Board was named as the agency respondent, but did not participate at any phase of appeal.

The P.J. Taggares Co. participated as a petitioner in the underlying administrative action, but is not participating in this petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner is a nonprofit organization of landowners and business owners interested in local land use and environmental issues. It has no parent companies, subsidiaries, or affiliates that are publicly owned corporations.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

APPENDIX

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

State Statutes

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

PETITION FOR WRIT OF CERTIORARI

Common Sense Alliance respectfully petitions for a writ of certiorari to review the judgment of the Washington State Court of Appeals, Division I.

OPINIONS BELOW

Division I of the Washington State Court of Appeals issued its unpublished opinion at *Common Sense Alliance v. Growth Management Hearings Board*, 189 Wash. App. 1026 (2015). *See* Petitioner's Appendix (Pet. App.) at A. The opinion of the Washington State Superior Court for the County of San Juan appears at Pet. App. at B. The Washington State Supreme Court's order denying review appears at Pet. App. at C.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The enactment of a San Juan County, Washington, ordinance was challenged as violating the Fifth and Fourteenth Amendments to the United States Constitution, and the ordinance was upheld in the August 10, 2015, decision of Division I of the Washington State Court of Appeals. The decision became final on February 10, 2016, when review was denied by the Washington State Supreme Court. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL 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.

STATEMENT OF THE CASE

This petition seeks review of San Juan County's 2012 critical areas ordinance update, which conditions the issuance of new land-use permits for shoreline properties upon the owners' dedication of significant portions of their land as conservation areas. The County's decision to use the permit process as a tool to require land dedications subjects its ordinance to the nexus and proportionality tests as set out in *Nollan* and *Dolan*.

Together, the nexus and proportionality tests constitute a special application of the unconstitutional conditions doctrine. They hold that government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate impacts caused by the proposed development. *Koontz v. St. Johns River Water Mgmt. Dist.*, __ U.S. __, 133 S. Ct. 2586, 2594-95, 2599 (2013).

The County never made this necessary showing. Instead, it argues that the government does not have to show that a permit condition is calculated to mitigate only for the negative impacts caused by the proposed land use when the government has relied on a scientific report indicating that private property could benefit the public if dedicated to an environmental use. The Court of Appeals decision to uphold the critical areas ordinance without a showing of nexus and proportionality raises significant questions of constitutional law upon which the lower courts are in conflict with decisions of this Court.

A. San Juan County Adopted an Ordinance Requiring Landowners To Dedicate a Portion of Their Property To Provide Stormwater Filtration for Pollution from Other Properties

In 2006, San Juan County began the process of updating its critical areas ordinance, as periodically required by Washington's Growth Management Act (GMA), Ch. 36.70A Wash. Rev. Code. From the outset, government agencies and environmentalists lobbied for regulations that would require shoreline property owners to dedicate substantial portions of their property as conservation buffers intended to ameliorate a variety of ecological impacts caused by community-wide development and use. In order to gain an equal voice in the one-sided proceedings, a group of County home and business owners, many of whom own shoreline properties, formed the non-profit organization Common Sense Alliance (CSA) in 2009. CSA's mission is to inform the public about the proposed land use regulations, and their effects on the community, economy, and environment. CSA's role is

primarily one of education, outreach, and providing public comments on proposed land-use and environmental regulations. Through CSA, local homeowners and business owners pointed out that the actual conditions on 400 hundred miles of marine shoreline vary, both in terms of development and geological conditions, and should not be subject to the same buffer requirements.

After many years of heated public debate, in 2012, San Juan County enacted its highly controversial critical areas ordinance update. Pet. App. A at 2; Pet. App. B. In part, the updates require that all shoreline property owners dedicate on-site conservation areas—including a water quality buffer—upon the County's determination that a proposed land use will occur within 200 feet of a shoreline. San Juan County Code (SJCC) 18.35.100. The water quality buffer provisions require that every shoreline property owner dedicate a buffer of between 25 and 250 feet wide as a mandatory condition for approval of any new land-use permit. The purpose of the buffer is to ensure that 60%-70% of the pollutants that may be suspended in storm water entering and crossing over the property are filtered out before the runoff reaches the shoreline—including a significant amount of pollutants originating on upland parcels. *Id.* To meet that goal, the County developed a formula that sets the size of the buffer based on how much property would have to be set aside to achieve its pollution removal standard. *Id.*

On the surface, the formula appears "site-specific," because the buffer matrix purports to vary buffer widths based on intensity of development and geographical conditions. But the appearance of

tailoring disappears under any scrutiny. First, the ordinance does not require that the County determine the actual volume of storm water or the presence of pollutants entering a shoreline lot. *Id.* Second, the formula does not require the County to identify the source of any pollutants or runoff. *Id.* And third, the formula does not identify what part of the pollutant load is directly attributable to the landowner's proposed use of his or her property, and, as a result, the formula fails to limit the size and scope of the buffers to the actual impacts caused by the proposed development. *Id.*

B. The County's Rationale for the Water Quality Buffer

San Juan County's "best available science" record confirms that the water quality buffers are intended to force shoreline landowners to mitigate for pollution and runoff caused by neighboring properties. The compiled studies (summarized in the County's Synthesis of Best Available Science, May, 2011) comment on the potential threats posed by a wide range of contaminants that can be found in storm water runoff and the range of benefits that a fully vegetated and undeveloped shoreline buffer could provide to the marine environment. The benefits include the land's potential to filter and store pollutants in soil and root systems. Synthesis at Ch. 2, p. 40. The science, however, cautions that, due to a variety of site-specific considerations, "buffers are not always the best way to protect the water quality." *Id.* at 14.

For a water quality buffer to function as intended, the government must first determine the actual pollutant load and flow rate entering and exiting the

property. *Id.* at 14-15. Then, and only then, can the government determine whether a particular development proposal affects water quality. *Id.* The County, however, did not include any studies determining the volume of runoff entering and leaving the shoreline, nor did it include any studies identifying or measuring containment concentrations in the area:

> [P]ollutant loading and transport factors are, in some cases, left out of the procedure not only for the sake of maintaining simplicity in the regulations, but also because of the high variability of these factors within a single parcel, the need for staff with advanced geomorphic and geotechnical skills and knowledge, and the cost to analyze discharge rates, water quality, and wetland exposure to contaminants.

Synthesis at Ch. 2, pp. 14-15. Instead, the County *assumed* the presence of every possible contaminant and *assumed* an identical incoming flow rate on every shoreline property throughout the region. Then, based on those assumptions, the County developed a matrix (Table 3.6) to assure a theoretical 60%-70% filtration rate.

But, as noted in the Synthesis, setting a filtration rate without knowing the actual pollutant load and flow rate is meaningless: "A 95% pollutant removal efficiency means nothing if the incoming runoff is severely polluted, and a 10% pollutant removal efficiency can be outstanding if the incoming runoff is polluted only minimally." *Id.* at 59. Thus, by design, the County's buffers are neither intended to mitigate for an identified environmental impact, nor are they limited to only that portion of a public problem that is

caused by proposed development. Instead, the buffer matrix operates to ensure that the buffer is large enough to filter hypothetical, area-wide runoff and pollutant loads. Synthesis at Ch. 2, pp. 44-45 (The buffers are intended to mitigate for polluted runoff originating throughout the entire "contributing area.").

C. Proceedings Below

CSA raised its unconstitutional conditions claim before the San Juan County Superior Court and Division I of Washington's Court of Appeals. CSA argued that the ordinance, on its face, was invalid because it imposed an unconstitutional condition under *Nollan* and *Dolan*. The County could not satisfy its burden of demonstrating that its buffer program satisfied the nexus and rough proportionality tests, and made no attempt to do so. *Dolan*, 512 U.S. at 391 (the burden of showing that a condition satisfies nexus and proportionality is placed on the government, not the landowner).

Under the nexus test, the County was required to show that a development will create or exacerbate the identified public problem. *Nollan*, 483 U.S. at 836-37. If the County was able to establish a nexus, it must next show that its proposed solution to the identified public problem is roughly proportional to that part of the problem that is created or exacerbated by the landowner's development. *Dolan*, 512 U.S. at 391 (A condition must be "related both in nature and extent to the impact of the proposed development."). The purpose of these tests is to determine whether the government is taking advantage of the permit process to force "some people alone to bear public burdens,

which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CSA explained that, by imposing a water quality buffer on permits to develop shoreline property without first identifying the presence and source of pollutants in storm water, the ordinance improperly relieved the County of its burden of demonstrating that the proposed development was the cause of such pollution—let alone the County's burden of establishing the necessary relationship between the exaction and the actual impacts of development.

Adjudication of this claim, however, was hindered at the outset by a recent Washington appellate court decision that characterized *Nollan* and *Dolan* as establishing a due process test, subject only to minimal scrutiny. *See Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wash. App. 250, 273-74 (2011). As required by Washington law, the trial court's analysis treated the nexus and proportionality tests as due process claims. Pet. App. B at 8. Then, based on a state case disallowing facial due process claims, the court dismissed CSA's unconstitutional conditions doctrine claim as unripe. *Id*. at 9-11 (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 331 (1990) (allowing facial takings claims, but disallowing facial due process claims).

The Washington Court of Appeals rejected CSA's unconstitutional conditions claim on three alternative grounds. First, relying on the dissenting opinion in *Koontz*, the lower court concluded that a landowner may not challenge a legislative exaction under the

doctrine of unconstitutional conditions. Pet. App. A at 16-17 (citing *Koontz*, 133 S. Ct. at 2594-95).

Second, citing no authority, the lower court concluded that a government demand that a property owner dedicate a conservation buffer to a public environmental use would not qualify as a taking if imposed directly. Pet. App. A at 17-18.

And third, relying on the aforementioned *KAPO* decision, the lower court applied a rule that excludes legislatively-imposed exactions from heightened *Nollan/Dolan* scrutiny.[1] Pet. App. A at 10. Thus, the lower court concluded that a local government's reliance on a scientific opinion when developing a mandatory dedication automatically satisfies the unconstitutional conditions doctrine:

> Because the county had "considered the best available science and employed a reasoned process in adopting its shoreline critical areas ordinance" . . . permit decisions . . . based on those regulations would satisfy the nexus and rough proportionality tests.

Pet. App. A at 10 (citing *KAPO*, 160 Wash. App. 273-74).

CSA filed a motion for reconsideration, which was denied. CSA's petition for review to the Washington Supreme Court was also denied. This petition follows.

---

[1] The court ultimately reached the merits of the exactions claim because Washington state courts apply *Nollan* and *Dolan* through an impact fee statute that limits permit conditions to only those "reasonably necessary as a direct result" of the proposed development. Pet. App. A at 7-8 (citing Wash. Rev. Code § 82.02.020).

REASONS FOR GRANTING THE WRIT

This case raises an important and unresolved issue concerning the limitations that the Takings Clause of the Fifth Amendment of the U.S. Constitution place on a government's authority to use the permit process to force private property owners to dedicate private property to a public use. In the decision below, the Washington Court applied a judicially-created rule exempting the government from the nexus and proportionality analysis set out by this Court in *Koontz*, 133 S. Ct. 2586, *Dolan*, 512 U.S. 374, and *Nollan*, 483 U.S. 825, when the permit condition is required by legislation.

The lower court held that legislatively-mandated conditions are subject only to minimal, rational basis review to determine whether the condition advances a legitimate government objective. Pet. App. A at 10-11. Under that rule, permit conditions wholly unrelated to the impacts of development are deemed lawful so long as the condition was adopted pursuant to a "reasoned process." *Id.*; *KAPO*, 160 Wash. App. 273-74. That approach stands in stark conflict with this Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542-43 (2005), because it fails to address the protections guaranteed by the Fifth Amendment and the unconstitutional conditions doctrine. The doctrinal basis and requirements of the unconstitutional conditions doctrine were fully explained three years ago in *Koontz*. Not only does the Washington decision violate this Court's precedent, it deepens a long-

standing split of authority among the lower courts regarding the scrutiny applied to legislatively-mandated exactions. Both conflicts warrant certiorari.

I

THE WASHINGTON COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO LEGISLATIVELY-MANDATED EXACTIONS RAISES A QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

The Washington Court carved out a massive exception to *Nollan* and *Dolan* when it held that conditions imposed on development permits by operation of a legislative act are immune from those decisions' heightened scrutiny. Pet. App. A at 11, 16.

A. This Court Has Repeatedly Held Legislatively-Mandated Exactions Are Subject to the Unconstitutional Conditions Doctrine

There is no basis in this Court's case law to hold legislatively-mandated exactions to a different standard than any other exaction. In fact, this Court's unconstitutional conditions decisions belie any distinction whatsoever. *Nollan*, *Dolan*, and *Koontz* all involved conditions mandated by general legislation—a fact specifically noted in each of the opinions. The dedication of the Nollans' beachfront was required by a state law. *Nollan*, 483 U.S. at 828-30 (California Coastal Act and California Public Residential Code imposed public access conditions on all coastal development permits); *see also id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, 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."). Both the bike path and greenway dedications at issue in *Dolan* were mandated by city land-use planning ordinances. *See Dolan*, 512 U.S. at 377-78 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways."); *id.* at 379-80 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). And the in-lieu fee at issue in *Koontz* was required by state law. *Koontz*, 133 S. Ct. at 2592 (Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands).

Nor does the legislative/adjudicative distinction find any support in the unconstitutional conditions doctrine. This Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals since the doctrine's origin in the mid-Nineteenth Century.[2] The

---

[2] *See Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts because "[t]his consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution of laws of the United States."); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the

(continued...)

reason the doctrine applies without regard to the type of government entity making the unconstitutional demand is made clear by the doctrine's purpose. The unconstitutional conditions doctrine is intended to enforce a constitutional limit on government authority:

> [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 . . . compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).[3]

---

[2] (...continued)
business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

[3] *See also Doyle v. Continental Ins. Co.*, 94 U.S. (4 Otto) 535, 543 (continued...)

Given this body of case law, two Justices expressed marked skepticism at the very idea that the need for heightened scrutiny is obviated when a legislative body—as opposed to some other government entity—decides to exact a property interest from developers. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required the owners of parking lots to include landscaped areas equal to at least 10% of the paved area at an estimated cost of $12,500 per lot. 515 U.S. 1116, 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Despite an apparent lack of proportionality, Georgia's Supreme Court upheld the ordinance, concluding that legislatively imposed exactions are not subject to *Nollan* and *Dolan*. *Id.* at 1117. The dissenting Justices stated that there appeared to be no meaningful distinction between legislatively-imposed conditions and other exactions:

> It is not clear why the existence of a taking should turn on the type of government entity responsible for the taking. A city council can take property just as well as a planning

---

[3] (...continued)
(1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit—"it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights.").

> commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18. Both Justices argued that the question presented warrants review because it raises a substantial question of federal constitutional law. *Id.* at 1118.

Justice Thomas reaffirmed that position in his concurring opinion in support of the Court's denial of certiorari in *California Building Industry Ass'n v. City of San Jose*, __ U.S. __, slip op. at 1 (Feb. 29, 2016). There, he wrote that the "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" for at least two decades. Slip op. at 2. Once again, he expressed "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'" *Id.* (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117-18).

> Until we decide 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. These factors present compelling reasons for

> resolving this conflict at the earliest practicable opportunity.

Id.; *see also Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.").

Legal scholars also find "little doctrinal basis 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). 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, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision-making in the land-use context). The irrelevance of the "legislative v. administrative" distinction comes as no surprise, because *Nollan* and *Dolan* are rooted in the unconstitutional conditions doctrine, which "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. Indeed, from the property owner's perspective, he suffers the same injury whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit.

B. There Is a Split of Authority Among the Lower Courts About Whether the *Nollan* and *Dolan* Standards Apply to Exactions Mandated by Legislation

Courts across the country are split over the question of whether legislatively-imposed permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (recognizing a nationwide split of authority); *California Building Industry Ass'n*, slip op. at 2 (division has been deepening for over twenty years). For example, the Texas, Ohio, Maine, Illinois, and New York Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively- and administratively-imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

On the other hand, the Supreme Courts of Alabama, Alaska, Arizona, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively-imposed conditions. *See*, *e.g.*, *Alto Eldorado Partners v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 996 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997).

Meanwhile, the Ninth Circuit is internally conflicted on this question. *See Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); *Garneau v. City of Seattle*, 147 F.3d 802, 813-15, 819-20 (9th Cir. 1998) (plurality opinion, the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions); *see also Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (*Koontz* undermines the reasoning for holding legislative exactions exempt from scrutiny under *Nollan* and *Dolan*), *appeal pending*.

This Court should address the split of authority on the scope of *Nollan* and *Dolan* because this case presents the issue as a pure question of law. The deep and irreconcilable split of authority is firmly

entrenched, and it cannot be resolved without this Court's clarification.

II

THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THIS COURT BY CREATING AN EXCEPTION TO *NOLLAN* AND *DOLAN*

The decision below applied a rule that authorizes a local government to exact private property from permit applicants without limiting the size and scope of the dedication to only that which is necessary to mitigate for adverse impacts caused by the proposed development, so long as the government relied on scientific reports showing that dedications, in general, may provide benefits to the public. Pet. App. A at 9 (citing *KAPO*, 160 Wash. App. at 273-74). The decision to allow a scientific study, no matter how generalized, to dictate buffers on all new shoreline development is in direct conflict with *Nollan* and *Dolan*, which require government to demonstrate that a development condition is sufficiently related to an identified impact of new development on the public to justify the exaction.

A. The *KAPO* Rule Conflicts With *Koontz* and *Lingle*

The decision below improperly relies on the erroneous *KAPO* rule as establishing a less stringent standard of review for critical area dedications than that expressly required by *Nollan* and *Dolan*. Pet. App. A at 10. In *KAPO*, the Court of Appeals declined to apply nexus and proportionality scrutiny to a critical areas ordinance that required all shoreline property owners to dedicate a predetermined shoreline buffer as

a mandatory condition on all new permit approvals, regardless of the impacts of development. 160 Wash. App. at 272-74. To do so, the court mistakenly characterized *Nollan* and *Dolan* as establishing a "due process" doctrine, under which a regulation is subject only to rational basis scrutiny. *Id.* at 272. Then, applying rational basis scrutiny, the court concluded that *Nollan* and *Dolan* would be satisfied if the government engaged in a "reasoned process" to determine "the necessity of protecting functions and values in the critical areas" when adopting Critical Areas Ordinance (CAO) buffers. *KAPO*, 160 Wash. App. at 272-74.

Since *KAPO* was decided, however, this Court clarified that the nexus and proportionality tests constitute "'a special application' of the [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits." *Koontz*, 133 S. Ct. at 2594. Contrary to the Washington courts' due process-based analysis—which focuses on the reasonableness of the government's determination of need—the unconstitutional conditions doctrine "does not implicate normative considerations about the wisdom of government decisions," nor posit whether the exaction is "arbitrary or unfair." *Koontz*, 133 S. Ct. at 2600. Instead, the Court's task is to determine whether the exaction demanded by the County as a condition on any new use of shoreline property bears the "required degree of connection between the exactions imposed by the [county] and the projected impacts" of the property owner's proposed change in land use. *See Dolan*, 512 U.S. at 386.

Because the Washington courts have based their recent exactions decisions on the wrong constitutional provision, it is unsurprising that the rule applied below focuses on a substantively different question than that posed by *Nollan* and *Dolan*. The decision below asks only whether the government relied on a scientific document to determine "the necessity of protecting functions and values in the critical areas," *i.e.*, the alleged public need. *KAPO*, 160 Wash. App. at 272-74; Pet. App. A at 10. By contrast, the *Nollan* and *Dolan* tests ask whether the government can justify an exaction by demonstrating a sufficient relationship between the development condition and the impact caused by the proposed development. *Lingle*, 544 U.S. at 546-47.

This Court explained this important distinction in *Lingle*, when it rejected the "substantially advances a legitimate government interest" test as a takings test, because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights." 544 U.S. at 542. "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation." *Id.* at 543. Thus, in the context of the Takings Clause, a determination that a regulation serves a public need, without more, cannot justify a regulation that appropriates property for a public use. *Id.* at 542-43; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

By circumventing the *Nollan/Dolan* analysis , the Washington rule shifts the takings inquiry away from the severity of the burden imposed, and focuses instead on the manner by which it has been imposed. Under this formulation, the same burdensome exaction may be upheld if imposed legislatively, but struck down as a taking if imposed adjudicatively. This is precisely the result that *Lingle* pronounced to be incongruent with the Takings Clause. 544 U.S. at 543. *Lingle* provides that, if two landowners are identically burdened by regulatory acts, "[i]t would make little sense to say that the second owner had suffered a taking while the first had not." *Id.* *Lingle*'s pronouncement that identical regulatory burdens should be treated equally under the Takings Clause is no less true in the exactions context, and the court below improperly held otherwise.

B. Upholding Legislative Exactions Under a Mere "Reasonably Related to the Public Welfare" Test Undermines the Anti-Coercion Purpose of the Unconstitutional Conditions Doctrine

The Washington rule also threatens to undermine the anti-coercion underpinnings of the nexus and proportionality tests. *See Koontz*, 133 S. Ct. at 2594 (The doctrine of unconstitutional conditions "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."). The doctrine prevents the government from taking advantage of its permitting power to exact excessive or unrelated benefits from a landowner. *See Nollan*, 483 U.S. at 837 (The government's demand for a public easement was "an out-and-out plan of extortion" because there was not a sufficient

connection between the demand and the proposed development.).

By designating public need as the sole determinative factor when a legislative exaction is challenged, the Washington rule endorses the very type of opportunistic taking of property that this Court expressly disallowed in *Nollan* and *Dolan*. In *Dolan*, this Court explained that nexus and proportionality analysis is necessary to determine whether a development condition is " 'merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.' " *Dolan*, 512 U.S. at 390 (quoting *Simpson v. City of North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

The analysis required by *Nollan* and *Dolan* is especially important where the government seeks to exact benefits relating to popular policy goals, such as environmental protection. *See* James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."). In these circumstances, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a

majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound,* 135 S.W.3d at 641.

That is precisely the issue in this case. The County decided to address its general water quality problem by requiring individual landowners to dedicate buffers designed to filter pollutants from area runoff. It did this despite the fact that the County's scientific study concluded that a significant amount of the pollutants originate from upland properties. The County's buffer matrix does absolutely nothing to limit the buffer size to mitigate for only that portion of pollutant loading caused by a proposed use of the shoreline lot. To the contrary, the matrix ensures that any new development will set aside enough land to achieve the County's regional filtration goals. Pet. App. A at 16-17. There is no question that the County could have implemented its policy by condemning land or existing buildings for a public use. *See United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). Instead, the County made its demand in the form of a permit condition, in an effort to circumvent the just compensation requirement.

The decision below unconstitutionally focuses solely on whether the exaction advanced a public need, rather than evaluating the relationship between the exaction and the proposed development. By doing so, the Washington court removed any effective limit on the County's authority to take private property without compensation. The Washington court's decision vitiates the rules and policy this Court set out in *Nollan*, *Dolan*, and *Koontz*. This Court should not allow such a troubling decision to stand.

III

THE WASHINGTON COURT'S REFUSAL TO RECOGNIZE WELL-SETTLED PROPERTY RIGHTS CONFLICTS WITH DECISIONS OF THIS COURT

The decision below adopted a rule that excludes well-recognized property rights from the protections guaranteed by the unconstitutional conditions doctrine.

The nexus and rough proportionality tests are important safeguards of private property rights subject to land-use permitting. *Koontz*, 133 S. Ct. at 2599; *see also Nollan*, 483 U.S. at 833 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may only require a landowner to dedicate property to a public use where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving the public property that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property."). The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners "are especially vulnerable to the

type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 133 S. Ct. at 2594; *see also id.* at 2596 ("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.").

To qualify for protection under *Nollan* and *Dolan*, a landowner only needs to show that the demand, if imposed directly, would entitle the owner to just compensation. *Id.* In other words, the demand must seek an interest in private property. That requirement is satisfied here. Washington state property law expressly recognizes that a conservation buffer is a valuable interest in real property: "A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property."[4] 64.04.130 Wash. Rev. Code; *see also KAPO*, 160 Wash. App. at 273 ("Regulations adopted under the GMA that impose conditions on development applications must comply with the nexus and rough proportionality tests."); *Honesty in Envtl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App.

[4] Under both Washington state property law and federal constitutional law, a public dedication of a property interest can be achieved via notice on a binding public document, such as a site plan, which is the method employed by the County. *See*, *e.g.*, *Richardson v. Cox*, 108 Wash. App. 881, 884, 890-91 (2001); *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (dedication achieved via a deed restriction).

522, 533 (1999) ("[P]olicies and regulations adopted under GMA must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications."). Indeed, this Court has twice applied the unconstitutional conditions doctrine to conservation areas. In *Dolan*, this Court invalidated the government's demand that a landowner dedicate a stream buffer. *Dolan*, 512 U.S. at 393-94. And in *Koontz*, this Court held a fee imposed in lieu of a conservation easement was subject to the unconstitutional conditions doctrine. *Koontz*, 133 S. Ct. at 2592.

The decision below, however, adopted a rule that excludes the very type of dedication invalidated in *Dolan* and *Koontz* from the protections guaranteed by *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 17. In reaching that conclusion, the lower court failed to discuss—let alone distinguish—the large body of case law holding that conservation areas are property interests, thereby creating a conflict with decisions of this Court and raising an important question of federal takings law that warrants review.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: May, 2016.

Respectfully submitted,

MERIEM L. HUBBARD
ANTHONY L. FRANCOIS*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org

Counsel for Petitioners