NO. 24-_____

In the Supreme Court of the United States

VILLAGE COMMUNITIES, LLC, ET AL.,

Petitioners,

v.

COUNTY OF SAN DIEGO, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent County of San Diego, *et al.* (County), a California land use agency, denied the land use permits for Village Communities *et al.* (Village) to develop a much-needed residential and mixed-use community in North San Diego County, California. The County denied the Project solely because Village "failed" to satisfy the County's condition requiring Village to pay money to acquire offsite easements from 100 percent of the 50 property owners along a public road near Village's property site in spite of the fact that the County made no individualized determination that the monetary exaction, a sum of approximately $2.5 million, bore an "essential nexus" and "rough proportionality" to the purported impacts associated with Village's project as required by *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The questions presented are:

1. Whether the Ninth Circuit's holding that a land use permit applicant/landowner must show the government's permit condition would coerce the applicant to give up <u>*both*</u> its own property <u>*and*</u> money to establish a Fifth Amendment takings claim under the unconstitutional conditions doctrine, conflicts with this Court's decision in *Koontz v. St. Johns River Management District*, 570 U.S. 595 (2013)?

2. Whether the Ninth Circuit's decision is contrary to *Koontz*, which imposes on the land use permit applicant/landowner only the burden to show that the government imposed an unconstitutional condition that required the applicant to give up property/money for which the Fifth Amendment would otherwise require just compensation under *Koontz*, *Dolan*, and *Nollan*?

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

Collectively, these Petitioners are referred to as "Village" in this brief:

- Village Communities, LLC
- Shirey Falls, LP
- Alligator Pears, LP
- Gopher Canyon, LP
- Ritson Road, LP
- Lilac Creek Estates, LP
- Sunflower Farms Investors, LP

Respondent and Defendant-Appellee below

Collectively, these Respondents are referred to as "County" in this brief:

- County of San Diego
- Board of Supervisors of the County of San Diego

CORPORATE DISCLOSURE STATEMENT

Petitioners are limited liability companies and limited partnerships with no stock. No public entity owns 10% or more of the membership units of any petitioner or parent company.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

No. 23-55679

Village Communities, LLC v. County of San Diego,

Memorandum Opinion: August 28, 2024

Rehearing Denied: October 2, 2024

U.S. District Court, S.D. California

No. 20-cv-01896

Village Communities, LLC v. County of San Diego

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PETITION FOR WRIT OF CERTIORARI

Village respectfully requests that this Court issue a writ of certiorari to review the Memorandum of the United States Court of Appeals for the Ninth Circuit (also referred to as the "Panel's decision").

Though not published, the Panel's decision is reported on Westlaw, citable for its persuasive or precedential value or for any reason under FRAP Rule 32.1, and in conflict with this Court's precedent and one published federal district court decision on issues of nationwide importance arising under the Fifth Amendment's Takings Clause and the unconstitutional conditions doctrine.[1]

The questions presented are significant constitutional issues, and the legal effect of the Panel's decision is far-reaching and touches land-use permitting and the constitutional validity of "monetary exaction" conditions throughout the United States.

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[1] As of 2004, Memorandum dispositions were used in upwards of three-fourths of all cases in the U.S. courts of appeals. See Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, SO. CAL. INTERDISCIPLINARY L. J., Vol. 14:67 (2004), at 69, 71-75. In the past 10 years, their use has likely increased. See also *County of Los Angeles v. Kling*, 474 U.S. 936, 938, and n. 1 (1985), Justice Stevens, dissenting; and William M. Richman, William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 274-275-277, 293-294 (1996) ("formal publication [is] now the exception rather than the rule," "decisional shortcuts have had the practical effect of transforming the courts of appeals into certiorari courts," with the "right to appeal . . . is now only nominal" and with "deplorable effects").

OPINIONS BELOW

The Order denying Plaintiffs-Appellants' request for publication. The Order is reproduced in PA B at App.11a.

The Mandate issued by the United States Court of Appeals for the Ninth Circuit in *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 23-55679 on October 10, 2024. The Mandate is reproduced in PA C at App.12a.

The Order denying Village's petition for panel rehearing and rehearing en banc by the United States Court of Appeals for the Ninth Circuit in *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 23-55679, filed on October 2, 2024. The Order is reproduced in PA L at App.104a-105a.

The Memorandum of the United States Court of Appeals for the Ninth Circuit, filed on August 28, 2024, and reported in *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 23-55679, 2024 WL 3963841 (9th Cir. Aug. 28, 2024), from the Appeal of the May 22, 2023 Judgment of the U.S. District Court for the Southern District of California. The Memorandum is not published but is reproduced in PA A at App.1a-10a.[2]

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[2] Though the Ninth Circuit panel designated its Memorandum as "Not for Publication," Rule 32.1(a) of the Federal Rules of Appellate Procedure (FRAP) provides that a "court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as . . . 'not for publication' . . . and (ii) issued on or after January 1, 2007." *Id.* The Committee Notes to FRAP 32.1,

The Order: (1) Denying Motion for New Trial, to Alter or Amend Judgment, and Relief from Judgment; and (2) Denying Motion for Leave to Amend/Correct the Final Pretrial Conference Order of the U.S. District Court for the Southern District of California in *Village Communities, LLC, et al. v. County of San Diego, et al.*, entered on July 14, 2023. This Order is reproduced in PA D at App.13a-28a.

The Final Pre-Trial Conference Order entered on February 2, 2023, in *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 3:20-CV-1896-AJB-DEB. Excerpts from this Order are reproduced in PA E at App.29a-37a.

The Judgment in a Civil Case entered on May 22, 2023, in *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 20-CV-1896-AJB-DEB. This Judgment is reproduced in PA F at App.38a-39a.

The Order Granting Summary Judgment *sua sponte* of the U.S. District Court for the Southern District of California reported at *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 20-CV-01896-AJB-DEB, 2023 WL 3485261 (S.D. Cal. May

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paragraph 4, adds that Rule 32.1(a) "is intended to replace these inconsistent standards with one uniform rule[,]" and under Rule 32.1(a), "a court of appeals may not prohibit . . . citing an unpublished opinion . . . for its persuasive value or for any other reason." *Id*. As a result, the Memorandum is citable for its persuasive and precedential value, even though not published. *See* FRAP Rule 32.1(a) and Comm. Note – 2016, ¶ 4. Village requested publication of the Memorandum, but the Ninth Circuit denied the request. *See* PA B at App.11a. This denial does not diminish the legal effect of the Memorandum's persuasive or precedential value going forward under FRAP 32.1(a).

15, 2023). This Order is reproduced in PA G at App.40a-46a.

The Order of the U.S. District Court for the Southern District of California entered on April 18, 2023, in *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 20-CV-1896-AJB-DEB. This Order is reproduced in PA H at App.47a-49a.

The Order on Defendants' Motion for Reconsideration of the U.S. District Court for the Southern District of California reported at *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 20-CV-01896-AJB-DEB, 2023 WL 157787 (S.D. Cal. January 13, 2023). This Order is reproduced in PA I at App.50a-65a. In that Order, the district court denied the County's motion to reconsider denial of the County's motion for summary judgment on Petitioner's taking claims.

The Order: (1) Denying Plaintiffs' Motion for Partial Summary Judgment; and (2) Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment of the U.S. District Court for the Southern District of California reported at *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 20-CV-01896-AJB-DEB, 2022 WL 2392458 (S.D. Cal. July 1, 2022). This Order is reproduced in PA J at App.66a-90a.

The Order Granting-in-Part Defendants' Motion to Dismiss of the U.S. District Court for the Southern District of California reported at *Village Communities, LLC, et al. v. County of San Diego, et al.*, No. 3:20-CV-01896-BEN-DEB, 2021 WL 369543 (S.D. Cal. Feb. 3, 2021). This Order is reproduced in PA K at App.91a-103a.

STATEMENT OF JURISDICTION

Village's timely-filed petition for panel rehearing and rehearing en banc was denied by the Ninth Circuit on October 2, 2024 (PA L at App.104a-105a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, RESOLUTIONS, AND REGULATIONS

A. Fifth Amendment Takings Clause.

The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S.528, 536 (2005) (citing *B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897), provides:

> "[N]or shall private property be taken for public use, without just compensation."

U.S. Const. amend. V.

B. Fourteenth Amendment Due Process Clause.

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.

C. 42 U.S.C. § 1983.

42 U.S.C. § 1983 provides in relevant part:

> "Every 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, ..."

Id.

Section 1983 prohibits any State, or any of its subdivisions, from depriving a plaintiff of the "rights, privileges or immunities secured by the Constitution," and to prevail on a Section 1983 claim, a plaintiff must show that "(1) acts by the defendants (2) under color of state law (3) depriv[ed] [it] of federal rights, privileges or immunities [secured by the Constitution and laws of the U.S.] [and] (4) caused [it] damage." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n,* 42 F.3d 1278, 1284 (9th Cir. 1994)).

D. County Board of Supervisors' Resolution No. 20-078.

County Board of Supervisors' Resolution No. 20-078 ("A Resolution of the San Diego County Board of Supervisors Denying General Plan Amendment(GPA) PDS2012-3800-12-001, Zoning Reclassification PDS-2012-3600-12-003 (REZ), Specific Plan PDS2012-3810-12-001 (SP), Master Tentative Map PDS2012-3100-5571 (TM), Implementing Tentative Map PDS2012-3100-5572 (TM), Major Use Permit PDS2012-3300-

12-005 (MUP), and Site Plan PDS2012-3500-12-018 (STP)"). Board Resolution No. 20-078 is reproduced in PA N at App.121a-128a.

Resolution No. 20-078 states repeatedly that:

> "[T]he offsite easements have not been obtained by the Applicant [Village Communities]"

as the basis for the Board of Supervisors' denial of the Lilac Hills Ranch Project. PA N at App.121a-128a; *see also* PA J at App.66a-90a*, Village Communities, et al. v. County of San Diego, et al.*, 2022 WL 2392458 at *5 (S.D. Cal. July 1, 2022).

E. County of San Diego Consolidated Fire Code.

Section 4907.2.1 of the County of San Diego 2020 Consolidated Fire Code states:

> "The FAHJ [Fire Authority Having Jurisdiction] *may require* a property owner to modify *combustible vegetation* in the area within 20 feet from each side of the driveway or a public or private road adjacent to the property to establish a *fuel modification zone*. The FAHJ has the right to enter private property to insure the fuel modification zone requirements are met."

PA M at App.120a (emphasis added.)

Section 4907.2.1, which is reproduced in PA M at App.106a-120a, is an enabling regulation ("may require"), and it authorizes the County's fire authority to require "a property owner to modify combustible vegetation in the area within 20 feet from each side of . . . a public or private road adjacent to the property to establish a fuel modification zone." PA M at App.120a.

The Consolidated Fire Code § 96.1.4902 defines "combustible vegetation" to mean:

> "[M]aterial that in its natural state will readily ignite, burn and transmit fire from native or landscape plants to any structure or other vegetation."

PA M at App.116a.

"Fuel modification zone" is defined in Consolidated Fire Code § 96.1.202 to mean:

> "[S]trip of land where combustible vegetation has been thinned or modified or both and partially or totally replaced with approved fire-resistant and/or irrigated plants to provide an acceptable level of risk from vegetation fires."

PA M at App.114a.

Consolidated Fire Code section 96.1.004(b) states that with exception of Section 96.1.004(a), all other portions of the County Fire Code, including Section 4907.2.1, "shall be enforced" by the fire warden "in all unincorporated areas of the County" outside a fire protection district, or by the district fire chief for areas within a fire protection district. *Id.* at § 96.1.004(b) (PA M at App.109a). Thus, it is *mandatory* for the fire warden or district fire chief to enforce Section 4907.1 where site conditions warrant it.[3]

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[3] To illustrate, a fire inspector enters a crowded theater to do a fire inspection and notes a chain with a lock on a marked Exit door. The Fire Code does not allow marked Exits in occupied buildings to be blocked or locked in this manner. Therefore, it is not optional for the inspector to "let it go" due to costs or any other consideration. As a matter of public safety, the fire inspector must enforce the Fire Code. Failure to do so is not only a breach of public trust, but also negligent.

F. County-Required "Deed of Easement."

The "Deed of Easement" is reproduced in PA O at App.129a-133a. The County required the easement to be used to obtain all the roadside fuel modification easements from the 50 property owners along a segment of West Lilac Road. Among other things, the Deed of Easement contemplated that the Project applicant [Grantee] pay for such easements. The easement states, in part:

> NOW, THEREFORE, Grantor, for and in consideration of the sum of _____ and other valuable consideration *paid by Grantee*, does hereby give, grant, and convey unto Grantee the perpetual rights and easements as more fully described below.
>
> 1. **Grant of Easement.** Grantee shall have a permanent a nonexclusive easement (hereinafter, "Easement") over the portion of Grantor's Property consisting of an area that is located within twenty (20) feet of the W. Lilac Rd., . . . (hereinafter, "Easement Area"). *Grantee shall have* the right of access, ingress, and egress over, upon, through, and under the Easement Area, and *the right to convey said easement, or any portion of said easement, including to public entities*. . . .
>
> 2. **Purpose of Easement.** The *purpose* of this Easement is *for Grantee to maintain the Easement Area free of combustible vegetation* and structures and/or otherwise *in compliance with the County of San Diego Consolidated Fire Code and State Fire Code*, as amended from time to time (collectively hereinafter, "Fire Code"). *Nothing stated*

herein shall be interpreted as precluding Grantor from carrying out such maintenance.

3. **Scope of Easement.** Grantor shall retain fee simple ownership of the Easement Area; provided, however, no use may be made of the Easement Area that interferes with Grantee's full, reasonable use of the Easement and rights described herein. *Further, this Easement entitles, but does not obligate, Grantee and/or its duly authorized successors, assigns, agents, and or contractors to modify and/or clear combustible vegetation in the Easement Area to the standards of the Fire Code and to enter upon the Easement Area at any and all times for said purposes. The grant of this Easement is not intended to supersede or replace the Fire Code, or relieve Grantor(s) of their obligations thereunder, and Grantee does not hereby assume any duty or responsibility assigned by the Fire Code to the Grantor(s) or any other person.*

4. **No Obligation to Maintain:** This Easement does *not impose on Grantee any obligation to maintain the Easement Area, or otherwise clear the area or perform any other affirmative act of maintenance.*

PA O at App.130a-131a (emphasis added).

G. Other Essential Materials for Understanding Petition.

Excerpts from the County's August 7, 2015, Planning Commission Hearing Report are reproduced in PA P at App.134a-154a. The County's January 8, 2020 letter demanding the easements is reproduced in PA Q at App.155a-159a; and the January 29, 2020,

email exchange between Village and County staff clarifying the easement requirement is reproduced in PA R at App.160a-164a.

Excerpts from senior County staff's deposition transcript (Mark Slovick) is reproduced in PA S at App.165a-174a, along with excerpts from the June 2020, County Planning Commission public hearing transcript at PA T at App.175a-200a. Limited excerpts from Village's opening and reply briefs on appeal are reproduced in PA U at App.201a-212a and V at App.213a-228a, respectively, illustrating the undisputed evidence that the County's easement condition was a demand for money under *Koontz*. *See also* PA X at App.238a-243a, PA Y at App.244a-246a, and PA Z at App.247a-249a. Lastly, limited excerpts from the County's former planning director's sworn deposition testimony is reproduced in PA W at App.229a-237a to drive home the point that the easement condition was indeed the County's attempted confiscation of property interests (easements) by requiring Village to pay for the easements, without just compensation, as the price for possible permit approvals.

INTRODUCTION

The Panel's decision conflicts with this Court's precedent in *Koontz* and *Sheetz*, engrafts non-existent requirements onto the Fifth Amendment's Takings Clause and the unconstitutional conditions doctrine, and strips Village of its right to a jury trial after it withstood a motion to dismiss, a summary judgment motion, a reconsideration motion, and completed the

pretrial order process just weeks before the start of a jury trial after five years of litigation. Village's takings claim arises in an area of exceptional importance (land use permitting), where this Court has already recognized that a monetary exaction linked to land use permitting of the kind presented in this case "frustrate[s] the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 570 U.S. at 605.

Per the Panel's decision, for the unconstitutional conditions doctrine to apply, the condition must "coerce" the land-use permit applicant "into 'voluntarily *giving up* property for which the Fifth Amendment would otherwise require just compensation.'" *See* PA A at App.8a, citing *Koontz*, 570 U.S. at 605 (original emphasis). The Panel concluded that "[n]one of Village's *own land* was at risk of being taken" and even assuming that the County's easement condition was "coercive," it "was, at most, 'coercing' Village into *acquiring* additional property interests in the form of easements," which "could not have been an unconstitutional exaction under *Koontz*. PA A at App.8a-9a (original emphasis).

The Panel's decision conflicts with *Koontz* and *Sheetz*. The Panel engrafts a new requirement onto both the Fifth Amendment's Taking Clause and the unconstitutional conditions doctrine – that Village must show it was coerced into giving up *both* its own property *and* money. *See* PA A at App.8a. Said differently, per the Ninth Circuit, it is not enough for the landowner/project applicant to show a demand for money for a purported public benefit in exchange for land-use permits under *Koontz*. Instead, the

landowner/applicant must show it was forced to give up its own property *and* money. *Id.*

Additionally, the Panel's decision imposed a "burden" on the permit applicant to show the government imposed an unconstitutional condition that required the applicant to actually give up property/money. Neither the Takings Clause, the unconstitutional conditions doctrine, nor this Court's precedent imposes any such burden.

Village stands in the shoes of thousands of Americans across the country who, annually, must seek land use permits from the government to develop their property, but routinely encounter demands that they dedicate land *or* pay money to the government for a perceived public purpose as a condition for the land use permits, and in the process, must forego their constitutional right to just compensation required by the Fifth Amendment's Takings Clause under the unconstitutional conditions doctrine.

Village respectfully requests that the Court grant this petition and eliminate the conflict with this Court's precedent.

STATEMENT OF THE CASE

A. After Years of Processing, the County Denies Land Use Permits Based Solely on Village's Failure to Purchase and Secure Costly Off-Site Easements as the Ultimate "Price" for Possible Permit Approval.

Village owned 608 acres of land in North San Diego County, California, located just east of Interstate 15 and south of West Lilac Road (Property). PA J at App.67a; *see also* PA E at App.31a-32a. After receiving County authorization to proceed in 2010, Village's predecessor submitted a land use permit application to the County proposing a 1,746-home planned community, including a fully staffed fire station. *Id.*; *see also* PA I at App.50a-65a and PA F at App.32a-33a. With the onsite fire station, the Property would have been served by a total of three fire stations. PA P at App.134a-154a (including Fig. 21).

The permit planning and processing spanned an approximate 10-year period. PA F at App.32a.

From 2012 through 2018, the project underwent exhaustive public and environmental review. PA E at App.33a-35a. In June 2017, Village acquired the Property and resumed processing of a revised project. PA E at App.35a; PA I at App.51a. In June 2018, the County Planning Commission voted to advance the project to the Board of Supervisors, with no mention of easements. PA E at App.31a, and App.35a.

In early January 2020, for the first time, the County demanded that Village acquire easements

from private property owners along West Lilac Road, a public road, as a condition to development of the Property. PA Q at App.155a-159a. Thereafter on January 29, 2020, County staff confirmed that easements "shall be provided and instituted" along a designated segment of West Lilac Road "for both sides of the road and be inclusive of ALL PROPERTIES regardless of current vegetation that may be present" and because the easements had not been secured, nor likely to be secured, "the County will not be recommending approval of the project" permits.[4] PA R at App.160a-164a.

From January through April 2020, the County was advised that easements were unnecessary and duplicative because the County Consolidated Fire Code already mandates that property owners establish roadside fuel modification zones adjacent to their property if needed, and authorizes the County's fire authority to enter the property to ensure that the fuel modification requirements are met. *See* Section III E., above, and PA M at App.120a. By requiring Village to purchase and secure easements from private landowners, the County also abrogated its regulatory authority under the Fire Code to establish and enforce roadside fuel modification zones in the County where needed. *Id.*; *see also* PA U at App.201a-212a and PA V at App.213a-228a.

Further, the easement condition shifted private property owner responsibility for roadside fuel modification zones on their property (per Section 4907.1)

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[4] The County provided about 20 days for Village to purchase and secure the 50 offsite easements and then informed Village it would not recommend permit approval because the easements had not been secured. PA R at App.160a-164a.

to a third-party permit applicant, who has no authority to compel the grant of the easements, and who must compensate these owners for the easements, if obtained. *Id.* Easements—interests in real property—are not granted for free.

Additionally, the condition was impossible, or nearly impossible, to satisfy. Senior County staff conceded there were project opponents who resided along West Lilac Road, making it "extremely difficult" to obtain 100% of the required easements. PA S at App.165a-168a.

On June 12, 2020, at the Planning Commission hearing, Commissioners expressed disbelief at the easement condition, calling it "an overreach," "a back breaker," "a hill too steep to climb," "a terrible precedent" because it gave a "veto" over the project to any West Lilac Road property owner, "preposterous," "beyond unprecedented," and finding that the "developer's going to simply be extorted." PA T at App.183a, App.197a, App.180a and App.188a. The Commission also made clear that "no other. . . project that . . . [has] required . . . easements." PA T at App.194a. The Commission recommended that the Board approve the project, *without* the need for easements. *Id*. at App.199a-200a.

On June 24, 2020, at the County Board's hearing on staff's recommendation to deny Village's permits, the Board adopted Resolution No. 20-078 denying the permits. *See* Section III, D., above. The Board's decision to deny Village's permits was based *solely* on the fact that Village, as Project applicant, did not obtain the required offsite easements. *See* PA E at App.36a; PA I at App.52a-53a; PA J at App.78a ("Resolution No. 20-078 . . . specifically outlines Plaintiffs'

failure to obtain offsite easements as the basis for the Board's denial of the Project").

B. Village Is Forced to Bring Suit for Inverse Condemnation Arising Under 28 U.S.C. § 1983 and *Nollan*, *Dolan*, and *Koontz*, Which Suit Withstands the County's Motion to Dismiss, Motion for Summary Judgment, and Motion for Reconsideration.

After denial of the project, Village filed this action. The district court denied the County's motion to dismiss Village's claims under 42 U.S.C. § 1983, holding that Village plausibly stated claims for violations of their rights under the Fifth Amendment's Takings Clause through inverse condemnation based on the unconstitutional conditions doctrine. PA K at App.91a-103a. Therefore, Village *withstood* the County's motion to dismiss its takings claims. *Id*.

In July 2022, Village *withstood* the County's summary judgment motion as to its takings claims when the district court denied the parties' cross-motions. PA J at App.66a-90a.

In January 2023, the district court denied the County's motion for reconsideration of the district court's summary judgment order. PA I at App.50a-65a. As a result, Village also *withstood* the County's motion.

C. The District Court Does an About-Face, Granting Summary Judgment *Sua Sponte* on Grounds Rejected by the Ninth Circuit.

On April 18, 2023, on the eve of trial, after the final pre-trial conference order was issued (PA E at App.29a-37a), the district court vacated the trial date (set to begin on May 2, 2023) and ordered Village to

file a supplemental brief explaining what evidence of a taking exists in the case under *Koontz*. PA H at App.47a-49a.

On May 15, 2023, the district court granted summary judgment *sua sponte* in the County's favor. PA G at App.40a-46a. The district court rejected Village's claim that the County's easement condition was an extortionate demand for money, burdening Village's Fifth Amendment rights and resulting in a "cognizable injury" under *Koontz*, 570 U.S. at 607, 619. The district court barred this claim *solely* because Village's supplemental brief and declarations were supposedly "*silent* as to what evidence exists of an 'extortionate demand for money' . . . ." PA G at App.45a. The district court added that Village did "not show they were required to pay money in exchange for the easements" and *sua sponte* granted summary judgment. *Id*.

On May 22, 2023, the district court entered judgment in the County's favor. PA F at App.38a-39a. On July 24, 2023, the district court denied Village's motion for new trial, to alter or amend the judgment, and for relief from judgment, and motion for leave to amend the pre-trial conference order. PA D at App.13a-28a. Village timely appealed. *See* PA A at App.1a-2a.

D. The Ninth Circuit "Disagrees" with District Court But Nevertheless Affirms on Other Grounds Not Raised Below.

In August 2024, the Ninth Circuit issued its Memorandum, 2024 WL 3963841 (9th Cir. Aug. 28, 2024). PA A at App.1a-10a. In it, by disagreeing with the district court, the Ninth Circuit implicitly acknowledges that Village's evidence was *more than*

sufficient to preclude summary judgment for the County. PA A at App.6a. Nevertheless, the Ninth Circuit affirmed the summary judgment ruling "on alternative grounds" not raised below. *Id.*

As shown on appeal, Village's overwhelming evidence demonstrates that the County denied the permits solely because Village refused to accede to the County's easement condition to purchase the 50 easements, at a substantial cost, or face project denial. *See* PA U at App.201a-212a and PA V at App.213a-228a. The Ninth Circuit does not quarrel with this largely undisputed evidence. *See* PA A at App.6a.

But instead of reversing, the Ninth Circuit misconstrues *Koontz*, stating that, for the unconstitutional conditions doctrine to apply, the condition must "coerce" the permit applicant "into 'voluntarily *giving up* property for which the Fifth Amendment would otherwise require just compensation.'" *See* PA A at App.8a, citing *Koontz*, 570 U.S. at 605 (original emphasis). The Ninth Circuit concludes that "[n]one of Village's *own land* was at risk of being taken" and even assuming that the County's easement condition was "coercive," it "was, at most, 'coercing' Village into *acquiring* additional property interests in the form of easements." PA A at App.8a-9a (original emphasis). It further states that Village "provides no authority that requiring that a landowner *acquire* property as a condition of permit approval constitutes the type of unconstitutional taking it claims occurred here." PA A at App.8a-9a (original emphasis). As shown below, however, *Koontz* does not require the applicant to have given up its *own land*. *See Koontz*, 570 U.S. at 602.

And importantly, the so-called missing "authority" is *Koontz* itself, which held there can be a taking where a governmental agency refused to issue a land use permit, unless a project applicant agreed to pay for off-site wetlands work on land he did not own. *Koontz*, 570 U.S. at 601-602. *Koontz* thereby limits the government's ability to use land-use permitting as leverage to coerce project applicants and landowners to pay money and perform various services without the government making evidentiary showings of the "essential nexus" and "rough proportionality."

Additionally, the unconstitutional conditions doctrine recognizes that extortionate demands for property or money in the land use permitting context "run afoul of the Takings Clause . . . because they *impermissibly burden* the right not to have property taken without just compensation." *Koontz*, 570 U.S. at 607. Where the land use permit is denied and the condition is never imposed, "nothing has been taken," but the unconstitutional conditions doctrine still recognizes that that this government action nonetheless "*burdens*" a constitutional right, which is a "constitutionally cognizable injury," and the question becomes the remedy—a question left open in *Koontz*. *See Koontz,* 570 U.S. at 607-609, original emphasis.

In sum, in conflict with *Koontz,* the Panel engrafts a *new* requirement onto both the Fifth Amendment's Takings Clause and the unconstitutional conditions doctrine, the burden to show applicants were coerced into giving up *both* their own property and money. PA A at App.8a. If left in place, the Panel's decision can and will be cited for the proposition that a condition/demand for money in exchange for development permits is not sufficient under *Koontz*. Instead, per

the Ninth Circuit, there can be no taking unless permit applicants prove they are forced to give up property *and* money for ultimate permit approval. PA A at App.8a.

But these propositions conflict with *Koontz* and *Sheetz,* which acknowledge that a government's demand for property or the payment of money from permit applicants/landowners seeking permits must satisfy the requirements of *Nollan* and *Dolan*, "even when the government *denies* the permit and even when its demand is for money." *Koontz*, 570 U.S. at 619 (emphasis added). Additionally, it is of no moment "whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right. The unconstitutional conditions doctrine *forbids burdening* the Constitution's Takings Clause by coercively withholding benefits from those who exercise them." *Id*. at 606.

Here, the Ninth Circuit, like the Florida Supreme Court in *Koontz,* "was puzzled over how the government's demand for property can violate the Takings Clause even though 'no property of any kind was ever taken.'" *Koontz*, 570 U.S. at 607. But this Court already answered this inquiry:

> "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" and as in "other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, *the impermissible*

> *denial of a governmental benefit is the constitutionally cognizable injury*."

Id. (emphasis added).

E. The Ninth Circuit Denies Rehearing and Publication Requests.

On September 9, 2024, Village timely filed its petition for panel rehearing and rehearing en banc, which was denied on October 2, 2024. PA L at App.104a-105a.

On October 24, 2024, Village filed its request to the Ninth Circuit to publish its Memorandum, which was denied. PA B at App.11a.

Village has timely filed this petition, and respectfully requests that this Court issue a writ of certiorari and provide much-needed direction on important constitutional law questions decided below that involve the Fifth Amendment's Takings Clause and the unconstitutional conditions doctrine. Property rights protected by the Fifth Amendment's Takings Clause are "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment," and "should not be relegated to the status of a poor relation" by the Ninth Circuit, nor any other court. *Dolan*, 512 U.S. at 392.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Refusal to Apply *Koontz* Scrutiny to an Unconstitutional Monetary Condition/Exaction Case That Resulted in Land-Use Permit Denials Raises an Important Question of Constitutional Law That This Court Should Settle.

The Ninth Circuit engrafts a new requirement onto a Section 1983 takings claim under *Koontz*. Under the Panel's decision, an unconstitutional condition, rejected by the permit applicant/landowner resulting in permit denial, is now immune from the *Koontz* heightened scrutiny. If the Panel's decision stands, it will strip Village of important protections provided by *Koontz* and *Sheetz*, and threatens to rob thousands of permit applicants/landowners throughout the country of those very same protections.

Specifically, the Panel's decision itself concedes the easement condition "coerc[ed] Village Communities into *acquiring* additional property interests in the form of easements," but then concludes that Village "provide[d] no authority that requiring that a landowner *acquire* property as a condition of permit approval constitutes the type of unconstitutional *taking* it claims occurred here." *See* PA A at App.8a-9a (original emphasis). The so-called missing "authority" is *Koontz*.

II. This Case Is Indistinguishable from *Koontz*; But the Ninth Circuit Refused to Apply This Court's Precedent.

The Panel's decision states that *Koontz* is "distinguishable" from this case, and does so by misreading it. The Panel describes the unconstitutional condition in *Koontz* as follows:

> "In *Koontz*, a landowner who sought permits from his water district to develop 3.7 acres of his 14.9-acre tract of land could not receive a permit unless: (1) he reduced the size of his development to one acre and deeded the remaining 13.9 acres to the water district, or (2) deeded 11 acres to the water district *and* hired contractors to improve about fifty acres of district-owned land," citing *Koontz*, 570 U.S. at 601-602.

See PA A at App.8a (original emphasis).

The misread is that *Koontz* does not involve a condition that demanded the applicant's land *and* money. Instead, in *Koontz*, the landowner applied to his water district for permits to develop his property; and to mitigate environmental effects, *he offered* to not develop the balance of his property (11 acres) by deeding to the district a conservation easement over that remaining acreage. *Koontz*, 570 U.S. at 601. The district considered the "11-acre conservation easement to be inadequate," and it informed the landowner that it would approve the permits (and construction) only if Mr. Koontz agreed to one of two concessions. *Id.* The first concession not at issue (reduce the size of the development to just one acre and provide a

conservation easement over the remaining 13.9 acres). *Id*.

The second concession is where the Ninth Circuit's wheels fly off. Contrary to the Panel's characterization, the district's *second* concession was *not* to deed applicant's property *and* hire and pay contractors. *See* PA A at App.8a. The landowner had already committed to develop as he proposed (3.7 acres), and he had already offered the easement over the balance of his land (about 11 acres). *Koontz*, 570 U.S. at 602. With his commitments in place, the district was still not satisfied and demanded that if the owner wanted his permits, he would have to agree "to hire contractors to make improvements to District-owned land several miles away." *Id*. at 602. The monetary extortion/coercion was the demand for the applicant to "*fund* offsite mitigation work." *Id*. at 602, 605 (emphasis added). This Court held that "'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id.* at 612.

Similarly, the easement condition was a demand for money for easements and fuel clearing improvements on offsite property. Like *Koontz*, this case "implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its power in land-use planning to pursue government ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Koontz*, 570 U.S. at 614.

Accordingly, this Court in *Koontz* held:

> "We *hold* that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan even when* the government *denies* the permit *and even when its demand is for money*."

Id. at 619 (emphasis added).

In short, *Koontz* centered on a monetary condition *to pay* to improve 50 acres of *off-site* land. *Koontz* did *not* involve a condition for the permit applicant to <u>both</u> deed property <u>and</u> purchase 50 off-site easements as the price for possible permit approvals. PA A at App.8a.

Here, Village was coerced into paying substantial money to acquire 50 easements as the ultimate, and heavy, price for possible permit approval. If the Panel's decision is allowed to stand, it will invalidate the Takings Clause's guarantee that government is barred "from forcing some people 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).

III. The Ninth Circuit Ignores *Koontz* as Controlling Authority.

The Ninth Circuit states that Village provides "no authority that requiring that a landowner *acquire* property as a condition of permit approval constitutes the type of unconstitutional taking it claims occurred here." PA A at App.8a-9a. *Koontz* is the authority.

In *Koontz*, the government required Mr. Koontz to spend money to improve off-site district-owned land for a perceived public benefit (wetlands enhance-

ment). 570 U.S. at 601-602. Mr. Koontz refused, and his permit was denied because of his refusal.

Similarly, the County required Village to spend money to improve off-site third-party property for a perceived public benefit (vegetation clearing). Village refused to accede to the condition, which was impossible to implement in any event, and its permits were denied because of such refusal.

In both cases, the landowners were conditioned to pay money to improve off-site property for a perceived public benefit without any essential nexus or rough proportionality. The result in both cases is also the *same* — extortionate demands in the land-use permitting context violated the Takings Clause "not because they take property, but because they impermissibly burden the right not to have property taken without just compensation" and as "in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the case of coercive pressure, the impermissible denial of a public benefit is a conditionally cognizable injury." 570 U.S. at 607.

Koontz and this case are *indistinguishable*.

Nonetheless, the Ninth Circuit *might* be saying this case is distinguishable from *Koontz* because Mr. Koontz deeded land *and* was conditioned to also pay money to improve offsite land, however, in this case, Village was *only* impermissibly conditioned to pay money to acquire the offsite roadside easements and improve that roadside land by vegetation clearing. If that is what the Ninth Circuit meant, then it badly misunderstands the land-use permitting process. Here, Village, like Mr. Koontz, already agreed to deed large

portions of its land for open space. PA E at App.32a. Like Mr. Koontz, Village "agreed" to that dedication of *its own land*, and now, on top of that, the County, like the water district, was still not satisfied, and impermissibly demanded the easements and vegetation clearing improvements—making this case *indistinguishable* from *Koontz*.[5]

IV. The Ninth Circuit Overlooks the Applicability of This Court's Decision in *Sheetz* (2024)—A Case Confirming That an Unconstitutional Monetary Condition/Exaction Need Only Involve the Government's Attempted Relinquishment of Property or Money, and Not Property and Money.

The Panel's decision makes no mention of *Sheetz*, applicable higher court precedent involving a permit applicant/landowner conditioned to pay a traffic fee for a building permit. *Sheetz*, 601 U.S. at 270. The owner argued the fee constituted an exaction of money under *Koontz*, but the lower courts held the doctrine only applied to conditions imposed on an individual and discretionary administrative basis and not through legislative action. *Id*. at 272-273.

This Court disagreed, finding that the unconstitutional conditions doctrine applies to a fee condition for a land use permit in both legislative and administrative land use permit settings. *Id*. at 274-276. *Sheetz*

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[5] If the Panel did not take the time to understand the land-use process, this case should *also* be granted review because the decision so far departed from acceptable judicial proceedings, as to call for this Court's exercise of its supervisory powers. Supreme Court Rule 10(c); s*ee also County of Los Angeles, v. Kling*, 474 U.S. 936, 938 (1985).

held that the unconstitutional conditions test applies "regardless of whether the condition requires the landowner to relinquish property *or* require payment of a 'monetary exaction' instead of relinquishing property," citing *Koontz*. *Id*. at 276 (emphasis added). *Sheetz* confirmed that the condition must represent a relinquishment of property *or* money, and *not* a relinquishment of property *and* money, and drove home this point by illustration:

> "Imagine that a local planning commission denies the owner of a vacant lot a building permit unless she allows the commission to host its annual holiday party in her backyard . . . . The landowner is "likely to accede to the government's demand, no matter how unreasonable," . . . *Koontz*, 570 U.S. at 605. *So too if the commission gives the landowner the option of bankrolling the party at a local pub instead of hosting it on her land*. See *id*., at 612-613 . . . . Because such conditions lack a sufficient connection to a legitimate land-use interest, they amount to 'an out-and-out plan of extortion,'" citing *Nollan*, 483 U.S. at 837.

601 U.S. at 275 (emphasis added; parallel cites omitted).

This "abuse" within land-use permitting is addressed in *Nollan*, *Dolan*, and *Koontz* by requiring the permit condition to have both an "essential nexus" to the government's land-use interests, and "rough proportionality" to the development's impacts based on the government's "individualized determination." *See Sheetz*, 601 U.S. at 275-276; *Nollan*, 483 U.S. at 837; and *Dolan*, 512 U.S. at 391. Village's case

was headed to a jury trial to resolve the nexus and proportionality issues, but the jury trial was stripped from Village by the erroneous summary judgment ruling, which the Panel's decision *disagreed* with in light of the evidence presented by Village.

V. The Panel's Decision Conflicts with *Nollan*, *Dolan*, *Koontz*, and a Southern District of Florida Decision – *Megladon*.

The Panel's conclusion that this "case is distinguishable" from *Nollan*, *Dolan*, and *Koontz* because "[n]one of Village Communities' own land was at risk of being taken[,]" conflicts with this Court's precedent and *Megladon, Inc. v. Village of Pinecrest*, 661 F.Supp.3d. 1214 (S.D. Fla. 2023). PA A at App.8a.

First, neither *Nollan* nor *Dolan* places a burden on Village to show the County's easement condition resulted in Village actually "*giving up*" its labor and money to purchase and secure the easements. Relatedly, neither *Nollan* nor *Dolan* supports the notion that the unconstitutional conditions doctrine require the permit applicant to *give up its own land.* The question in *Nollan* and *Dolan* was whether the government could lawfully demand property as a condition of development; it was not whether the government was successful or that the actual taking of property occurred. *Nollan*, 483 U.S. at 827-828; *Dolan*, 512 U.S. at 377.

In both cases, the constitutional violation occurred at the moment an unlawful demand was made. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 389-390; *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1412,m 1421-1422 (1989) (The unconstitutional conditions doctrine arises "when the

government offers a benefit on the condition that the recipient perform or forgo an activity that a preferred constitutional right normally protects from government interference."). The doctrine does *not* require the "recipient" to actually perform an activity, forego an activity, or actually *give up* his own property or money. The demand itself is sufficient.

Similarly, *Koontz*' constitutional claim did not hinge on whether Mr. Koontz *actually gave up* his money to improve the district-owned offsite land, nor on whether the district *actually acquired* the labor or money to improve the district-owned land, but on whether the district's demands interfered with Mr. Koontz' right to make productive use of his property for its intended development purposes.

Under *Koontz*, Village need only to establish that the County imposed the condition to purchase the 50 offsite easements. 570 U.S. at 602, 607, 619. *Koontz* does not require an evidentiary showing that West Lilac Road neighbors asked for payment in exchange for easements or that Village actually paid for any of the easements. *Id*. *Koontz* does not require that easement interests be "transferred" to Village or the County. *Id*.; *see also* PA J at App.79a. And it does not matter that not a single easement was obtained. *Id*. This Court held:

> "*In so holding, we have recognized that regardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right*, the unconstitutional conditions *doctrine forbids burdening* the Constitution's enumerated rights *by coercively withholding benefits from those who exercise them*."

570 U.S. at 606 (emphasis added).

There is also an existing split between the Panel's decision and the recent, published 2023 Southern District of Florida decision—*Megladon*. Importantly, the Southern District of Florida rightly held that a plaintiff need only to allege the imposition of the unconstitutional condition, and not that the condition be actually implemented, or that the agency *succeeded* in forcing the landowner to *give up* its property or money. Like the County here, the defendant agency in *Megladon* argued that plaintiff's unconstitutional conditions claim should be dismissed because the agency had "not exacted anything from the Plaintiff." 661 F.Supp.3d at 1239. *Megladon* correctly held this argument "misstates the relevant test." *Id*. "The whole point of the unconstitutional-conditions doctrine is that it 'forbids burdening the Constitution's enumerated rights . . . *regardless* of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right[,]'" citing *Koontz*, 570 U.S. at 606. *Id*. Relying on *Koontz*, the *Megladon* court held:

> "The doctrine, in other words, specifically applies in situations like ours—where *nothing* has been taken. See ibid. ('The principles that undergird our decisions in Nollan . . . and Dolan . . . do not change depending on whether the government approves a permit on the condition that the applicant turn over property [or money] or denies a permit because the applicant refuses to do so.')."

661 F.Supp.3d at 1239-1240 (original emphasis).

Here, both courts, at the urging of the County, insisted that the evidence must show not only imposition of the unconstitutional condition, *but also* that the County or the West Lilac Road neighbors demanded Village *give up* its money to purchase and *actually acquire* the easements. *E.g.*, PA J at App.80a-81a; and PA N at App.121a-128a. As in *Megladon*, this misstates the legal test, which was misconstrued by both courts here.

Village has shown the County imposed the easement condition requiring Village to purchase and secure the easements. When Village refused, and in any event, could not satisfy County staff due to the impossibility of acquiring all 50 offsite easements, staff refused to process the project and recommended denial, and the Board denied the project for one reason, namely, Village had "failed" to satisfy the County's condition. PA N at App.121a-128a. At that point, the unconstitutional condition was imposed and the project denied because of it. Village has satisfied the required burden under *Koontz*.

VI. The Panel's Decision Is Not "Saved" by *Ballinger*, an Inapplicable Ninth Circuit Opinion.

The Panel's decision relies on a Ninth Circuit opinion involving plaintiffs' challenge to a relocation fee under a local ordinance as "an unconstitutional physical taking of their money for a private purpose and without just compensation." *Id.* at *4, citing *Ballinger v. City of Oakland*, 24 F.4th 1287, 1291 (9th Cir. 2022). *Ballinger* was a *physical takings* case, and not, as here, a land use permit unconstitutional conditions case that conflicts with *Nollan*, *Dolan*, *Koontz*, and *Sheetz*. *Ballinger* was also dis-

missed on a Rule 12(b)(6) motion to dismiss, and not on an evidentiary summary judgment record.

This case is based on *Koontz* and the unconstitutional conditions doctrine. In *Ballinger*, the Ninth Circuit rightly concluded the relocation fee was not an unconstitutional taking under *Koontz*. The relocation fee "was a mere obligation to pay in relation to the use of one's property." 24 F.4th at 1297. In contrast, *Ballinger* stated that in *Koontz*, "the government demanded and specifically identified that it wanted Koontz' payment of money in exchange for granting a benefit to either Koontz's parcel of land or another identified parcel of land." *Id*.; *see also Koontz*, 570 U.S. at 601-602, 612-613. This case also does not entail a "use fee," or anything close to it.

Similarly, the easement condition was a demand for money to acquire the easements and clear vegetation in exchange for granting a benefit to Village. *Koontz*, 570 U.S. at 604-606, 612-614, 619; and *Dolan*, 512 U.S. at 391-392 (exactions where government makes "some sort of individualized determination that the required . . . condition is related both in nature and extent to the impact of the proposed development"). The County insisted that Village purchase the easements "prior to Board consideration" of the development project "to avoid putting the County 'at risk' of having to condemn private property easements because Village Communities 'had not done so.'" *See* PA W at App.234a-236a. This alone illustrates that the easement condition was imposed on Village to avoid having the County condemn the easements if the condition was imposed post-project approval and not implemented because some private property owner

would have refused to provide the easements in return for money.

The County's demand for Village to pay a pot of its own money to secure the easements is a monetary exaction subject to the alleged Takings Clause claim arising under Section 1983. That the County did not succeed in pressuring Village into forfeiting its Fifth Amendment right is of no moment. *See Koontz*. 570 U.S. at 606.

VII. The Panel's Decision "Disagree[s]" with the District Court's Summary Judgment Ruling Because the Evidence and Associated Inferences Overwhelmingly Preclude the Ruling, and the Panel Had No Alternative Ground to Justify Affirming the Grant of Summary Judgment.

As shown above, the Panel's decision had no alternative ground to affirm the district court's grant of summary judgment, leaving its own "disagree[ment]" with the lower court's grant of summary judgment. PA A at App.8a. The *lone* legal issue that stripped Village of its right to a jury trial on a constitutional issue of substantial national importance was the district court's erroneous ruling that Village "fail[ed] to provide evidence that Defendants [County] . . . ever demanded that [Village Communities] pay money for the easements." *See* PA G at App.45a. The district court went further, stating, Village's briefing is "*silent* as to what evidence exists of an 'extortionate demand for money'" and that Village "failed to show that any demand was actually made." *Id*. (emphasis added). As shown, the Panel's decision itself "disagree[s] with the district court[.]" PA A at App.8a .

In other words, the Panel's decision concurred with Village that on *de novo* review, there was more than sufficient evidence and supporting inferences to justify reversal, which the Ninth Circuit side-stepped. The result was to foreclose Village's right to a jury trial by misconstruing this Court's precedent.

The Panel's decision *also* frustrated the importance of developing the Taking Clause law, where the Panel itself declared that this case would "answer the question left open in *Koontz* —'whether *federal law* authorizes plaintiffs to recover damages for unconstitutional conditions claims predicated on the Takings Clause," citing *Koontz*. *See* PA A at App.6a, fn.6 (original emphasis). The Panel's decision points out that this "question has not yet been answered in our circuit nor in any other circuit." *Id*. If this petition is granted, and this case is remanded for trial, this will be the case to *also* resolve this important federal question, and hence it represents another reason to grant this writ.

If this writ petition is granted, the undisputed evidence will show that Village's evidence, plus reasonable inferences, viewed in the light most favorable to Village, was more than enough for a jury to conclude that 50 offsite landowners, some of whom oppose the project, would not willingly give up property interests (easements) that encumber title to their property without payment, let alone provide 100 percent of the easements "for free."

Exhibit "A" to the district court's erroneous ruling (with which the Ninth Circuit disagreed) is the deposition testimony of the County's former Planning Director Mark Wardlaw. PA W at App.229a-237a. The Wardlaw testimony proves the County's intent

was for Village to "purchase and secure" the required easements. PA W at App.230a. Mr. Wardlaw later testified the applicant would "have to purchase" the easements ("yes with a caveat"), and the so-called caveat emphasized the "purchase" could have been an "option," a "purchase," and that "they had to secure the easement[s]." Pet App. W at App.231a.

Additionally, Mr. Wardlaw admitted the County's condition was a demand for money because the County would have to pay for them if it had to condemn them. He repeatedly emphasized the easements needed to be acquired *pre-Board consideration* to avoid putting the Board "at risk" of having to "condemn" the easements as a *post*-project condition of approval under the California Subdivision Map Act, Gov. Code § 66462.5, if Village were not successful in purchasing and securing the easements. PA W at App.234a.

Ken Keagy, MAI, estimated the costs of acquiring the easements (a low of $2.5 million) (PA X at App.241a), and the County's Fire Chief Nissen testified in corroboration that "some people would want money," that the "*sky's the limit*" on the sum of money they would demand, and that 50 property owners could extract as much as $50,000 each or $2.5 million or "higher." PA Y at App.244a-246a.

Sarah Aghassi, the Deputy Chief Administrative Officer, testified without objection that the easements "would have to be purchased." PA Z at App.247a-250a.

Commissioner Michael Edwards commented at a hearing the "developer's going to simply be extorted . . . [y]ou want an easement from me? It's going to cost you $50,000." PA T at App.194a. Mr. Edwards'

comments are reminiscent of the concern in *Koontz*, that it makes no difference that no property was actually taken. 570 U.S. at 606-607.

CONCLUSION

For the above reasons, this petition should be granted.

Respectfully submitted,

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