

No. 04- _____

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

SAN REMO HOTEL L.P., THOMAS FIELD,
ROBERT FIELD, AND T&R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT
OF CITY PLANNING, CITY PLANNING COMMISSION,
BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS
OF THE CITY AND COUNTY OF SAN FRANCISCO
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The City and County of San Francisco adopted an ordinance that prohibited hotels from continuing their historic, duly-licensed operation as hotels, but allowed hotel owners to avoid those restrictions by paying an exaction. Petitioners brought this action challenging the exaction based on the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983. The United States Court of Appeals for the Ninth Circuit initially refused to reach the merits of the constitutional challenge, finding that petitioners were required to ripen their claim by seeking compensation in state court under *Williamson County Planning Commission v. Hamilton Bank of Johnson City*. Once the claim was ripe, the Ninth Circuit again refused to reach the merits of the constitutional challenge, finding that the claim was barred by issue preclusion. In reaching that conclusion, the Ninth Circuit held that the California Supreme Courts' refusal to apply heightened scrutiny to legislative exactions under state law is consistent with federal Takings law. The questions presented are:

1. Is a Fifth Amendment Takings claim barred by issue preclusion based on a judgment denying compensation solely under state law, which was rendered in a state court proceeding that was required to ripen the federal Takings claim?
2. Is deferential scrutiny, akin to the rational basis test, appropriate for exactions imposed by legislation even though exactions imposed by administrative adjudications are subject to heightened scrutiny under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*?

**PARTIES TO THE PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

The parties are set forth in the caption. T&R Investment Corporation does not have a parent corporation. No publicly held company owns any interest in T&R Investment Corporation or San Remo Hotel, L.P.

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PETITION FOR WRIT OF CERTIORARI

Petitioners San Remo Hotel L.P., Thomas Field, Robert Field, and T & R Investment Corp. pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 14, 2004.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing en banc is unreported and is reproduced as Appendix (App.) A. The opinion of the Ninth Circuit is reported as *San Remo Hotel, L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), and is reproduced as Appendix B. The orders of the United States District Court for the Northern District of California are unreported and reproduced as Appendices C and D. The opinion of the California Supreme Court is reported as *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643, 41 P.3d 87, 117 Cal.Rptr.2d 269 (2002), and is reproduced as Appendix E.

JURISDICTION

The opinion of the Ninth Circuit was filed and entered on April 14, 2004. App. B. The order of the Ninth Circuit denying the petition for rehearing en banc was entered on June 9, 2004. App. A. This petition for writ of certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in pertinent part, that “private property [shall not] be taken for public use, without just compensation.”

The Residential Hotel Unit Conversion and Demolition Ordinance adopted by the City and County of San Francisco, as codified at Chapter 41 of the San Francisco Administrative Code, is reproduced as Appendix F.

STATEMENT OF THE CASE

A. Statement of Facts¹

The San Remo Hotel was built in 1906 and has been operated as a tourist hotel since the 1950s. Petitioners bought the San Remo Hotel in 1971 when it was fully-licensed as a tourist hotel. After petitioners restored the building in 1976, the City issued new permits and licenses that authorized unlimited tourist use of the hotel. Since then, the City has collected hotel taxes based on the tourist use of the hotel.

The City adopted the first version of the Residential Hotel Unit Conversion and Demolition Ordinance (HCO or Hotel Ordinance) in 1981, despite the City Attorney’s advice that it was unconstitutional. Under the Hotel Ordinance, rooms

¹ This case was decided on a motion to dismiss under Fed.R.Civ.P. 12(b)(6); therefore, all of the facts alleged in the complaint are presumed true. This statement of facts is based on the operative complaint, which appears at pages 108-136 of the Excerpts of Record, filed in the Ninth Circuit on September 5, 2003.

were designated as residential units based on their use during a particular 32-day period: from August 22 to September 23, 1979. HCO § 41.4(n) and (q), App. F-202a, 203a. Thus, a room was designated as a residential unit if it was occupied by the same person during those 32 days in 1979, even if the room had never before been rented to a residential tenant.

The consequence of being designated a residential unit was that the room could only be rented to tourists on a daily basis during the tourist season from May 1 to September 30. During the rest of the year, only weekly or monthly rentals were allowed. The Hotel Ordinance allowed hotel owners to obtain a permit to rent the residential units to tourists year-round. But, that permit would be subject to a condition requiring the payment of a replacement housing fee or the creation of new residential units at another location either by construction of new units or rehabilitation of unusable units. The replacement housing fee was set at 40% of the cost of constructing replacement housing plus the site acquisition cost.

The San Remo Hotel's 62 rooms were mistakenly designated as residential units even though there were only 10 residential tenants. Nevertheless, petitioners (like many hotel owners) were able to continue their historical use as a primarily tourist hotel. As allowed by the Hotel Ordinance, petitioners rented the rooms to tourists during the tourist season, did not rent rooms on a daily basis during the rest of the year when there was little or no tourist business, and kept about 10 residential tenants year-round.

In 1990, the City adopted a new version of the Hotel Ordinance that severely restricted petitioners' operation of the hotel. The new ordinance reduced the allowed daily rental to tourists during the tourist season from 100% to 25% of the

designated residential units; prohibited even that 25% tourist use unless the rooms were rented to residents during the rest of the year (thereby subjecting those rooms to San Francisco's rent control ordinance, which severely restricts evictions); and doubled the replacement housing fee imposed on permits to escape the Hotel Ordinance's use restrictions. HCO §§ 41.13(a)(4), 41.19(a)(3), App. F-227a, 236a-237a. The Hotel Ordinance explicitly states that the City doubled the replacement housing fee from 40% to 80% of the cost of constructing new housing because adequate public funding was no longer available. HCO § 41.3(m), App. F-198a.

Because the 1990 Hotel Ordinance eliminated petitioners' right to continue the historical use of their hotel, they immediately applied for a permit to escape the new restrictions. Three years later, the San Francisco Planning Commission granted a permit for the San Remo Hotel, but imposed an exaction as a condition: Petitioners were required to pay the City an exaction of \$567,000 under the Hotel Ordinance. Petitioners appealed that decision to the Board of Supervisors, which affirmed the Planning Commission's decision by a 6-5 vote. A dissenting Supervisor called the City's exaction "organized extortion."

B. Procedural History

In 1993, petitioners brought this federal court action to challenge the exaction imposed by the City. The district court issued a preliminary injunction, finding that the Hotel Ordinance was facially unconstitutional. Three years later, the district court granted the City's motion for summary judgment and dissolved the preliminary injunction.

Two years later, the Ninth Circuit held that petitioners' as-applied Takings claims were unripe because petitioners had not sought compensation in the state courts as required by *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) (*San Remo I*).

Two years later, the California Court of Appeal reversed the state trial court's dismissal of the state law compensation claims, finding that heightened scrutiny applies to the exaction even though it was imposed by legislation. *San Remo Hotel v. City and County of San Francisco*, 82 Cal.App.4th 1105, 100 Cal.Rptr.2d 1, 9-11 (2002).

Two years later, the California Supreme Court reversed the state appellate court and rejected petitioners' state law claims for compensation in a 4-3 decision. *San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th 643 (2002) (*San Remo II*), App. E. In particular, that court found that under the state constitution, there is no heightened scrutiny for exactions imposed by legislation. *San Remo II*, App. E-130a-144a. All seven justices agreed that the state court had not decided any federal question. *San Remo II*, App. E-107a, n.1, E-170a, E-194a.

One year later, the district court granted the City's motion to dismiss under Fed.R.Civ.P. 12(b)(6). The district court found that petitioners' federal Takings claims were barred by issue preclusion, based on the state supreme court decision, and the statute of limitations. App. C-50a-51a, C-85a, D-73a, D-90a.

Finally, eleven years after this action was filed, the Ninth Circuit affirmed the district court solely on the ground that

petitioners' claims were barred by issue preclusion, and did not reach the statute of limitations issue. *San Remo Hotel v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004) (*San Remo III*), App. B. The Ninth Circuit held that issue preclusion can bar federal Takings claims even though the state court proceedings were required to ripen those claims. App. B-12a-16a. Under the applicable state law rules of issue preclusion, petitioners' claims were barred only if the substantive federal Takings law is the same as California state compensation law. App. B-16a-17a. The Ninth Circuit held that the claims were barred by issue preclusion because federal law and state law are the same, i.e., there is no heightened scrutiny for exactions imposed by legislation. App. B-17a-21a.

REASONS THE PETITION SHOULD BE GRANTED

I. THE NINTH CIRCUIT'S DECISION SQUARELY CONFLICTS WITH THE SECOND CIRCUIT AND CREATES A TRAP THAT PRECLUDES ALL FEDERAL COURTS FROM REVIEWING THE MERITS OF FEDERAL TAKINGS CLAIMS

The practical effect of the Ninth Circuit's rule on issue preclusion, when combined with the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), is that federal Takings claims can never be considered on the merits in any federal court, including this Court. Indeed, one commentator has dubbed the Ninth Circuit's combination of ripeness and issue preclusion, "The *Williamson* Trap". Meacham, Madeline J., *The Williamson Trap*, 32 Urb. Law. 239 (2000). Moreover, this is not just a trap for the unwary, it is a "procedural snare that swallows the careful takings claimant as well as the unwary". Breemer, J. David,

Overcoming Williamson County's Troubling State Procedures Rule, 18 J. Land Use & Envtl. L. 209, 240, 242 (2003) (“following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion.”).

The Ninth Circuit squarely acknowledged that its holding “expressly conflicts” with the Second Circuit’s holding that state rules of issue preclusion cannot prevent the federal courts from reviewing the merits of federal Takings claims. *San Remo III*, App. B-15a, discussing *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 128 (2003), cert. pet.(on other issues) pending, No. 04-142. The other Circuits that have considered this issue are also split, with the Third and Tenth Circuits agreeing with the Ninth Circuit² and the Fourth, Fifth and Eleventh Circuits agreeing with the Second Circuit.³

This split in the Circuits reflects the lower courts’ struggle to deal with the consequences of the *Williamson County* ripeness doctrine. The interplay of ripeness and issue preclusion creates an irreconcilable conflict between principles of finality, which militate in favor of issue preclusion, and principles of fairness, which require the federal courts to

² *Peduto v. City of North Wildwood*, 878 F.2d 725, 729 (3d Cir. 1989); *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1323-1325 (10th Cir. 1998).

³ *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998); *Jennings v. Caddo Parish School Bd.*, 531 F.3d 1331 (5th Cir. 1976); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1305-1306 (11th Cir.1992).

review the merits of federal takings claims even if the state courts deny compensation under state law. This split, and the underlying conflict between the principles of finality and fairness, can only be resolved by this Court.

The Second Circuit explained the reasons that the constitutional mandate should prevail over the Ninth Circuit's rule:

It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim – a state court-inverse condemnation action – also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130.

As the Second Circuit emphasized:

There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.

Santini, 342 F.3d at 128, quoting *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964).

The Second Circuit refused to follow the Ninth Circuit's rule because it creates a "Catch-22 for Takings plaintiffs": under *Williamson County*, they are required to seek compensation in state court to make the federal Takings claim ripe, but once the federal Takings claim is ripe, it would be

defeated by the preclusive effect of the state court judgment. *Santini*, 342 F.3d at 127.

If not reversed by this Court, the Ninth Circuit's rule will prevent federal Takings' plaintiffs from seeking review on the merits in this Court. In this case, for example, petitioners could not have filed a petition for certiorari to review the California Supreme Court decision because that court did not decide any federal question. *San Remo II*, App. E-107a, n. 1.⁴ Indeed, the California courts could not have decided the federal Takings claims because those claims may not be brought in state court until the state compensation remedy has been denied. *Breneric Associates v. City of Del Mar*, 69 Cal.App.4th 166, 188-189, 81 Cal.Rptr.2d 324, 338-339 (1998) (*Williamson County* ripeness requirement applies in state courts); see also *Santini*, 342 F.3d at 126-127, discussing *Melillo v. City of New Haven*, 249 Conn. 138, 154, 732 A.2d 133, 143 n. 28 (1999) (Connecticut applies same rule as *Breneric*). Even this petition cannot raise the merits; instead, it can only raise the substantive federal Takings law issue because it was a necessary predicate of the Ninth Circuit's decision on the issue preclusion question.

⁴ All seven justices of the California Supreme Court expressly stated that they expected that petitioners would obtain a ruling on the merits of their federal claims in this federal court action. The majority stated that petitioners "explicitly reserved their federal causes of action" and that because petitioners relied "solely on state law, no federal question has been presented or decided in this case." *San Remo II*, App. E-107a, n. 1. Both dissents made the same point. *San Remo II*, App. E-170a (Baxter and Chin, dissenting: "Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation"); App. E-194a (Brown, dissenting: "I dissent and hope the plaintiffs find a more receptive forum in the federal courts.").

The Ninth Circuit's barrier to federal court consideration of Fifth Amendment claims is indefensible. Under the Ninth Circuit's rule, the Fifth Amendment's protection of property rights is relegated to the "status of a poor relation" of the other rights secured by the Bill of Rights. *Cf., Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

In sum, the Ninth Circuit's rule effectively precludes consideration of the merits of federal Takings claims in both state and federal court and leaves plaintiffs with nothing but state compensation claims in the state courts – and no opportunity at all for this Court to review the merits. The Ninth Circuit's rule cannot be squared with this Court's rationales in *Williamson County* and *England*; therefore, this Court should grant the petition for certiorari and adopt the Second Circuit's holding in *Santini*.

II. THERE IS A NATIONWIDE SPLIT OF AUTHORITY ON WHETHER EXACTIONS IMPOSED BY LEGISLATION ARE SUBJECT TO HEIGHTENED SCRUTINY

Although the Ninth Circuit did not reach the merits, under the applicable state law rules of issue preclusion, it was required to determine whether the substantive federal law of Takings is the same as California state law governing compensation claims. App. B-16a-17a. The Ninth Circuit concluded that the federal Takings rule is the same as the state law rule announced by the California Supreme Court: there is no heightened scrutiny for exactions imposed by legislation. *San Remo III*, App. B-17a-21a. The Ninth Circuit concluded that "rational relationship" is the correct federal test for legislative exactions (*id.*), despite this Court's rejection of that test for Takings claims challenging administrative exactions because it is too deferential. *Dolan v. City of Tigard*, 512

U.S. 374, 391 (1994).

Justices Thomas and O'Connor recognized ten years ago that the distinction between legislative and administrative exactions raises an important question and that there already was "confusion in the lower courts". *Parking Association of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (dissenting from denial of certiorari). Their dissent emphasized that:

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

Id., 515 U.S. at 1117-1118.

Now, there is even more confusion; in fact, there is a "nationwide split of authority" on the issue of whether heightened scrutiny applies to legislatively imposed exactions. E.g., Faus, Richard, *Exactions, Impact Fees, and Dedications – Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704 (2000). State courts in New York, Texas, Ohio, Illinois, Washington and federal courts in the First and Fourth Circuits have applied heightened scrutiny to exactions imposed by legislation.⁵ By

⁵ *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 107, 111, 542 N.E.2d 1059, 1065-1066, 1068 (1989); *Town of Flower Mound v. Stafford Estates Ltd.*, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 640-642 (2004); *Home Builders Ass'n v. City of Beavercreek*, 89 Ohio St.3d 121, 128, 729 N.E.2d 349, 356 (2000);

contrast, state courts in Colorado, Oregon, Arizona, North Dakota, and Georgia and a federal court in the Tenth Circuit have applied a deferential level of scrutiny akin to the rational basis test.⁶

The level of scrutiny is critical, of course, because it determines the outcome in almost every case. As Gerald Gunther observed, the rational basis test is “minimal scrutiny in theory and virtually none in fact”. Gunther, Gerald, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). Thus, in this case, the application of deferential scrutiny resulted in a finding that the San Francisco Hotel Ordinance is constitutional. Yet, when a virtually identical New York City ordinance was subjected to heightened scrutiny, it was found unconstitutional. *Seawall Associates v. City of New York*, 74

Northern Illinois Home Builders Ass’n, Inc. v. County of Du Page, 165 Ill.2d 25, 31-33, 649 N.E.2d 384, 388-389 (1995); *Trimen Development Co. v. King County*, 124 Wash.2d 261, 273-274, 877 P.2d 187, 194 (1994); *National Ass’n of Home Builders v. Chesterfield County*, 907 F.Supp. 166, 168-169 (E.D. Va. 1995), aff’d 92 F.3d 1180 (4th Cir. 1996); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 14 (1st Cir. 1995).

⁶ *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-697 (Colo. 2001); *Rogers Machinery, Inc. v. Washington County*, 181 Or.App. 369, 397-398, 45 P.3d 966, 982 (2002); *Home Builders Ass’n v. City of Scottsdale*, 187 Ariz. 479, 486, 930 P.2d 993, 1000 (1997); *Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co.*, 527 N.W.2d 884, 896 (N.D. 1995); *Parking Ass’n of Georgia v. City of Atlanta*, 264 Ga. 764, 766, 450 S.E.2d 200, 203 n. 3 (1994); *Harris v. City of Wichita*, 862 F.Supp. 287, 294 (D. Kan. 1994), aff’d, 74 F.3d 1249 (10th Cir. 1996).

N.Y.2d 92, 542 N.E.2d 1059 (1989).⁷

This case presents a clear choice between the two conflicting views that animate the split in authority. The courts that apply heightened scrutiny believe that it is required to protect against the danger of government leveraging, i.e., by imposing a permit condition that requires the payment of an exaction that is unrelated or disproportionate to the development allowed by the permit. On the other hand, the courts that apply deferential scrutiny believe that the democratic political process will protect even small groups of property owners from the danger of leveraging.

The former view was adopted by the New York Court of Appeals, which explained that heightened scrutiny is necessary to distinguish regulations involving “the adjustment of rights for the public good” from regulations forcing “‘some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole’”. *Seawall*, 74 N.Y.2d at 107, 111, 542 N.E.2d at 1065-1066, 1068, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Thus, the critical feature of the New York City ordinance that led to its invalidation was its imposition of an exaction:

[B]y equating the “cure” with dollars -- i.e., permitting “buy-out” payments of \$45,000 per [hotel]

⁷ This Court denied certiorari in *Seawall*, 493 U.S. 976, and a prior case involving the constitutionality of San Francisco’s Hotel Ordinance. *Lambert v. City and County of San Francisco*, 529 U.S. 1045, 120 S.Ct. 1549 (2000) (Justices Scalia, Kennedy, and Thomas dissenting). This is a better case than *Lambert* to resolve the issue of heightened scrutiny because the City denied the Lamberts’ permit instead of granting it with an exaction condition. *Lambert*, 120 S.Ct. at 1550.

unit . . . -- the terms of [the ordinance] itself demonstrate that the obligations placed on a few property owners are just the kind which could, and should, be borne by the taxpayers as a whole.

Seawall, 74 N.Y.2d at 112, 542 N.E.2d at 1069.⁸

By contrast, the four-justice majority of the California Supreme Court decided to apply a very deferential level of scrutiny under the state constitution because the City used generally applicable legislation to impose the exaction. *San Remo II*, App. E-140a-142a. Their primary rationale was that while the political process is not sufficient to protect the rights of a single property owner when an administrative agency imposes an exaction, it is sufficient to protect the rights of even very small groups of property owners when a legislative body imposes an exaction. *San Remo II*, App. E-141a.

The three dissenting justices disagreed, as Justice Janice

⁸ The California Supreme Court majority asserted that *Seawall* was “impliedly overruled” by *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). *San Remo II*, App. E-145a, n. 15, citing *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107, 721 N.E.2d 971, 975 (1999). That assertion is wrong. *Del Monte Dunes* holds that the rough proportionality test of *Dolan* does not apply when a permit is denied. *Del Monte Dunes*, 526 U.S. at 703. Similarly, *Bonnie* does not address the *Seawall* holding that heightened scrutiny applies to an exaction imposed by legislation; instead, it was only concerned with the appropriate level of scrutiny for a permit denial. *Bonnie*, 94 N.Y.2d at 108, 721 N.E.2d at 976. Neither *Del Monte Dunes* nor *Bonnie* affects the analysis of *Seawall* or this case because the City did not deny petitioners’ permit, the City granted the permit -- with a \$567,000 exaction.

Rogers Brown explained:

[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process – or, worse, the political powerbrokers who often control the government independently of majoritarian preferences.

San Remo II, App. E-175a-176a.

The Texas Supreme Court recently reached a similar conclusion:

[W]e think it 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 v. Stafford Estates Ltd. Partnership, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620, 641 (Tex. 2004).

Nevertheless, the Ninth Circuit concluded that the California Supreme Court’s state law ruling is consistent with federal Takings law. In short, the Ninth Circuit concluded that, under the federal Takings Clause, only a deferential level of scrutiny is applied to legislative exactions. *San Remo III*, App. B-17a-21a. The Ninth Circuit’s conclusion defies this Court’s repeated statements that the Takings test requires a higher level of scrutiny than the rational basis test under the Due Process Clause. *Nollan*, 483 U.S. at 834 n. 3 (“our

verbal formulations in the takings field have generally been quite different” from due process and equal protection); *Dolan*, 512 U.S. at 391 (Takings claims are subject to judicial review that is higher than the “minimal level of scrutiny” mandated by due process and equal protection).

As this Court recognized in *Nollan* and *Dolan*, limiting judicial review to a deferential level of scrutiny provides no protection against the dangers of governmental leveraging. Indeed, a deferential level of scrutiny enables local governments to put zoning up for sale; thus, rewarding local governments that enact severe use restrictions, but allow property owners to buy their way out of the restrictions. Indeed, under the Ninth Circuit’s deferential scrutiny, cities could prohibit all development except for one-story, single-family homes, but offer a second story permit for \$20,000, an apartment building permit for \$10,000 per unit, a commercial building permit for \$50,000 per floor, and so forth. That very result was both predicted and condemned by this Court:

One would expect that a [permit] regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes.

.

[T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State’s police power to protect the public safety . . . , adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban.

Therefore, even though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Nollan v. California Coastal Commission, 483 U.S. 825, 837 and n. 5 (1987).

This case presents an egregious illustration of the leveraging allowed by deferential scrutiny. The City based the \$567,000 exaction on the mistaken report that all of the San Remo Hotel's rooms were occupied by residential tenants during the specified 32 days in 1979. But, even if the San Remo Hotel had always been occupied by residential tenants, the City may not impose conditions based on the City's "loss" of the owner's prior use of the property:

The city may not constitutionally measure the magnitude of its loss, or of the . . . exaction, by the value of facilities it had no right to appropriate without payment.

Ehrlich v. City of Culver City, 12 Cal.4th 854, 883, 50 Cal.Rptr.2d 202, 262 (1996).

In this case, the state court distinguished *Ehrlich* because the exaction in that case was imposed by an administrative adjudication. *San Remo II*, App. E-139a-140a. But, that distinction demonstrates that applying different levels of scrutiny to administrative and legislative exactions encourages local governments to simply change the techniques and labels used to impose exactions. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n. 12 (1992) (deferential scrutiny "amounts to a test of whether the legislature has a stupid staff"); *Nollan*, 483 U.S. at 841

(compliance with the Fifth Amendment is “more than an exercise in cleverness and imagination”).

In sum, this case presents a perfect opportunity to resolve the nation-wide split of authority. The stark conflict in the outcomes of this case and *Seawall* highlights the rationales of the two possible tests as well as the outcome-determinativeness of the choice between the tests. This issue has percolated long enough in the lower courts. No further light will be shed on this issue by allowing the lower courts to continue grappling with the issue. This Court should grant the petition and resolve the nationwide split of authority.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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