No. _____

In the
Supreme Court of the United States

DARTMOND CHERK AND
THE CHERK FAMILY TRUST,

Petitioners,

v.

COUNTY OF MARIN,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Marin County imposed a $39,960 "affordable housing" fee as a condition of approving a permit to divide a residential lot, absent any finding that the fee was needed to mitigate adverse impacts of the proposed development. Alternatively, the property owner might have dedicated various non-possessory interests in the property, other land, or low-cost housing units off-site to satisfy the condition. The court below held that neither the fee nor its alternatives were subject to the unconstitutional-conditions doctrine, which requires land-use permit conditions to bear an "essential nexus" and "rough proportionality" to adverse public impacts of the proposed development. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

The questions presented are:

1. Whether permit conditions are exempt from review under the unconstitutional-conditions doctrine when their intended purpose is not to mitigate adverse impacts of a proposed development but to provide unrelated public benefits?

2. Whether the unconstitutional-conditions doctrine applies to such permit conditions when imposed legislatively, as the high courts of Texas, Ohio, Maine, Illinois, New York and Washington and the First Circuit Court of Appeals hold; or whether that scrutiny is limited to administratively imposed conditions, as the high courts of Alabama, Alaska, Arizona, California, Colorado, and Maryland and the Tenth Circuit Court of Appeals hold?

LIST OF ALL PARTIES

Dartmond Cherk and the Cherk Family Trust are the petitioners herein and were the petitioner-plaintiffs in the California state trial, appellate, and Supreme Court proceedings below.

The County of Marin, California, is the respondent herein and was the respondent in the courts below.

CORPORATE DISCLOSURE STATEMENT

Petitioners are an individual and a family trust that have no parent companies, subsidiaries, or affiliates that are publicly owned corporations. No publicly held corporation has any ownership interest in the subject property or trust.

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PETITION FOR WRIT OF CERTIORARI

Dartmond Cherk and the Cherk Family Trust (the Cherks) respectfully request that this Court issue a writ of certiorari to review the judgment of the California Court of Appeal, First Appellate District, Division One.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal is available at *Cherk v. Cty. of Marin*, No. A153579, 2018 WL 6583442 (Cal. Ct. App. Dec. 14, 2018), *review denied* Mar. 13, 2019, and is reproduced in Petitioner's Appendix (Pet. App.) A. The unreported opinion of the Superior Court of Marin County, Case No. CIV1602934 (*filed* Dec. 6, 2017) is reproduced in Pet. App. B. The California Supreme Court order denying review appears in Pet. App. C.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Cherks brought suit on the basis of the Fifth and Fourteenth Amendments to the United States Constitution, alleging that Marin County violated the unconstitutional-conditions doctrine by requiring a $39,960 "affordable housing" fee as a condition of receiving a permit to change the use of their land. The California Court of Appeal ruled against the Cherks on December 14, 2018. The matter became final on March 13, 2019, when the California

Supreme Court denied review of the decision. This petition is timely pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which 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. The "affordable housing" ordinance at the center of the case is Marin County Code (MCC) § 22.22.090.

STATEMENT OF THE CASE

For decades California has suffered from a chronic housing shortage, due in large measure to the refusal of local governments to permit enough housing construction to meet a rising population.[1] The result is a severe lack of affordable homes for people of low and moderate income, a problem which the state has recognized as a serious detriment to the social and economic well-being of its citizens. *See California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435,

[1] *See* Mac Taylor, *California's High Housing Costs: Causes and Consequences*, Legislative Analyst's Office 10–12 (2015), http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf.

441 (2015) (*CBIA*). A growing number of cities and counties have enacted "inclusionary housing" ordinances aimed at increasing the amount of housing available to low-income residents. Typical ordinances require developers to dedicate the subject property to "affordable housing," exacting various non-possessory property interests for public use, or to pay money or transfer other land or housing units to the government as a condition of government approval of a land-use permit.

Marin County applied its inclusionary housing ordinance here, requiring the Cherks to pay a $39,960 "affordable housing" fee as a condition of receiving a permit to split their undeveloped residential lot in two. It was undisputed that the Cherks' lot-split neither caused nor had an adverse impact on the region's affordable housing problem; the County in fact acknowledged that the lot-split would increase the amount of land available for housing in the area. Pet. App. B at 20.

This Court's precedent holds that land-use permit conditions "burden[ing] [the] ownership of a specific parcel of land," such as the one at issue here, are subject to a "special application" of the unconstitutional-conditions doctrine. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013). Under this doctrine, conditions imposing monetary exactions or dedications of property must bear an "essential nexus" and "rough proportionality" to adverse public impacts of the proposed development. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994); *Koontz*, 570 U.S. at 604.

The County's permit condition "implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue," *Koontz*, 570 U.S. at 613, thereby taking an otherwise protected property interest without compensation.

The court below determined, however, that the tests set out in *Nollan*, *Dolan*, and *Koontz* do not apply: First, because the County's demands were not *intended* by the County to mitigate any adverse public impacts of the Cherks' lot-split, but rather "'to advance purposes *beyond mitigating the impacts* . . . attributable to [their] particular development.'" Pet. App. A at 16 (quoting *CBIA*, 61 Cal. 4th at 474) (emphasis added); second, following a long line of California cases, because "legislatively prescribed monetary fees—as distinguished from *ad hoc* monetary demands by an administrative agency"—are not subject to the unconstitutional-conditions tests. *Id*. at 23 (quotation marks and citation omitted). These conclusions are in apparent conflict with the decisions of this Court on an important and unresolved question with respect to the first matter and deepen a long-standing, nationwide split among lower courts with respect to the second.

A. The County Applied Its Development Code to Impose a $39,960 "Affordable Housing" Fee as a Condition of Approval of the Cherks' Lot-Split

In the year 2000, the Cherks applied to the County to divide a vacant 2.79-acre parcel of land that had been in their family for several generations into two, single-family residential lots. Pet. App. A at 2–3. In 2003, while the permitting process was ongoing, the County amended its "affordable housing regulations," contained in Title 22 (Development Code) of the Marin County Code. *Id.* at 3. For small lot-split projects like the Cherks', the amended Development Code states that "the project applicant shall pay an in-lieu fee" to the County for the purpose of affordable housing. *Id.* at 3–4.

The permitting process stalled but resumed in fits and starts for various reasons over the course of several years, until the County granted approval of the subdivision in December 2007. Pet. App. A at 5. The approval was conditioned on the Cherks' payment of the $39,960 fee, pursuant to the formula described by the Development Code. *Id.* The County made no findings that the Cherks' project caused or exacerbated the region's affordable housing problem. To the extent it made any relevant findings, it determined that "[t]he project would result in a future *increase in the availability of housing* opportunities in an existing residential area." Pet. App. B at 20 (emphasis added).

The Cherks obtained several extensions of time to pay the fee and record a required parcel map that would complete the process, and, in July 2015, they paid the fee under protest and recorded the parcel

map. In February 2016, an attorney for the Cherks wrote the County asking for a refund of the fee, on the ground that it was an unlawful monetary exaction. The County did not respond. Pet. App. A at 6.

B. The Trial Court Holds That the Fee Is Not Subject to Scrutiny Under *Nollan*/*Dolan*

In August 2016, the Cherks filed an action in the Marin County Superior Court for a refund of the fee, alleging it to be an unconstitutional condition under the doctrine set out in *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 6–7. They moved for judgment on the questions whether the County's monetary exaction violated either the state's Mitigation Fee Act or the federal unconstitutional-conditions doctrine. *Id*.

With respect to the unconstitutional-conditions claim, the trial court's ruling contained two holdings. First, the court held that the "fee imposed as a condition for approval of Petitioners' project does not impose a 'monetary exaction' subject to" the unconstitutional-conditions-test. Pet. App. B at 36. The court found that the fee was "not a development impact fee intended to defray the public burden directly caused by" the lot-split and therefore not an exaction within the meaning of *Nollan* and *Dolan*. *Id*. at 8. It was, rather, a mere "land use restriction[]" subject to rational basis review. *Id*. at 34. The court relied heavily on the California Supreme Court's analysis of the affordable-housing program at issue in *CBIA*, which similarly exempted the City of San Jose's permit conditions from review under *Nollan* because they were purportedly "intended to advance purposes beyond mitigating adverse public impacts or effects that [we]re attributable to a particular development and instead to produce a widespread public benefit."

Id. at 24–25 (internal quotation marks and citations omitted). Second, the trial court ruled that "legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test." *Id*. at 35 (quoting *CBIA*, 61 Cal. 4th at 4[59] n.11).

C. The California Court of Appeal Affirms, Holding that Neither the Fee nor Alternative Conditions Are Subject to *Nollan*/*Dolan* Because they Are Not Intended to Mitigate the Public Impact of the Project and Are Legislatively Imposed

The California Court of Appeal affirmed the trial court; also following *CBIA*, it concluded that fees and other inclusionary housing permit conditions intended to "produce a widespread public benefit" are not exactions at all and are therefore beyond the ambit of *Nollan*, *Dolan*, and *Koontz*'s holdings. Pet. App. A at 16 (quotation and citation omitted). The Court of Appeal also concurred with the trial court that "'legislatively prescribed monetary fees'—as distinguished from ad hoc monetary demands by an administrative agency—'that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test.'" *Id*. at 23 (quoting *CBIA*, 61 Cal. 4th at 459 n.11).

The appellate court went further, however, hinging its ruling on its interpretation of the County's Development Code and concluding that the fee paid by the Cherks "is not subject to the unconstitutional conditions doctrine because there were alternative means of complying with the inclusionary housing ordinance that did not violate *Nollan*/*Dolan*." Pet. App. A at 23–24. Here, the court referred to the

uncontroversial proposition in *Koontz* that "so long as a permitting authority offers the landowner at least one alternative [to the money condition] that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." *Id.* at 13 (quoting *Koontz*, 570 U.S. at 611).

According to the Court of Appeal, the Cherks might have satisfied the County's affordable housing condition by satisfying one of several alternatives to paying a fee. First, it said, the Cherks could have ignored the written demand for the in-lieu fee contained in the County's final permit approval and instead chosen to "round up" the calculation under Section 22.22.090(A) of the Development code. By doing so, they might have avoided paying the fee by dedicating one full lot in perpetuity to affordable housing and submitting to an exaction of various non-possessory property interests in the subject property. Pet. App. A at 20. The court assumed without substantial analysis that these conditions would not violate *Nollan*/*Dolan*. It also reviewed "other sections of the Development Code" to suggest "alternatives to the requirement of dedicating onsite units for affordable housing purposes" that the Cherks might have pursued. Those options included dedicating and "construct[ing] [] affordable housing units offsite" or "dedicati[ng] [] other lots of suitable real property to the County." *Id.* at 21 (citing Marin County Code § 22.22.060). Because the court believed none of these conditions burdening the Cherks' ownership of their specific parcel constituted exactions within the meaning of *Nollan* and *Dolan*, it held that the fee paid by the Cherks was "not subject to the unconstitutional conditions doctrine." *Id.* at 23.

The Cherks filed a petition for review in the California Supreme Court, which was denied. Pet. App. C. They respectfully ask this Court to issue a writ of certiorari to clarify the important questions of federal law at issue.

REASONS FOR GRANTING THE WRIT

I.
CALIFORNIA COURTS REFUSE TO RECOGNIZE WELL-SETTLED PROPERTY RIGHTS, IN CONFLICT WITH DECISIONS OF THIS COURT

The California Court of Appeal's decision adopted two rules that categorically exclude discrete and well-recognized property interests from the protections of the Fifth Amendment and the doctrine of unconstitutional conditions. First, it said that land-use permit conditions are not subject to the unconstitutional-conditions doctrine where they impose burdens intended to provide broad public benefits rather than to mitigate adverse impacts of a proposed change in land use. Pet. App. A at 18. Second, it said that such conditions are never subject to the doctrine when they are imposed legislatively and not *ad hoc* by administrative agencies. *Id.* at 23. In doing so, the court's ruling directly conflicts with the precedent of this Court and leaves property owners vulnerable to the type of government coercion and uncompensated takings of legally cognizable property interests that the unconstitutional-conditions doctrine is intended to prevent.

The nexus and rough proportionality tests are important safeguards of private property rights in the context of land-use permitting. *Koontz,* 570 U.S. at 612; *see also Nollan,* 483 U.S. at 833 n.2 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may require a landowner to dedicate property to a public use *only* where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz,* 570 U.S. at 604–06; *see also Dolan,* 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use [] in exchange for a discretionary benefit [that] has little or no relationship to the property."). *Nollan* and *Dolan* require this heightened scrutiny since landowners "are especially vulnerable to the type of coercion that the unconstitutional-conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz,* 570 U.S. at 605; *see also id.* at 607 ("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.").

In *Nollan,* the California Coastal Commission, acting pursuant to mandates of state legislation, required the Nollan family to dedicate an easement over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home. 483 U.S. at 827–28. The Commission justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828–29 (quoting state agency staff report). The Nollans refused to accept the condition and brought a federal takings claim against the Commission in state court, arguing that the condition constituted a taking because it bore no logical connection to the impact of their proposed development.

This Court agreed, holding that because the easement condition lacked an "essential nexus" to the alleged public impacts that would result from the Nollans' project, it was an unconstitutional taking. *Id.* at 837. Because the Nollans' home would have no impact on public-beach access, the Commission could not justify a permit condition requiring them to dedicate an uncompensated easement over their property. *Id.* at 838–39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was

"not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted).

In *Dolan,* this Court clarified how close a "fit" is required between a permit condition and the alleged public impact of a proposed land use. There, the city imposed conditions on Florence Dolan's permit to expand her plumbing and electrical supply store, requiring her to dedicate some of her land for flood-control improvements and a bicycle path. 512 U.S. at 377. Dolan refused to comply with the conditions and sued the city in state court. This Court held that although the city established a nexus between both conditions and Dolan's proposed expansion, the conditions were nevertheless unconstitutional. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391 (footnote omitted). The *Dolan* Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's land-use change and invalidated the permit conditions. *Id.*

In *Koontz,* this Court held that fees imposed "in lieu" of the dedication of property must also comply with the nexus and proportionality requirements. In that case, a government permitting agency conditioned the approval of Coy Koontz's application to develop a portion of his commercially-zoned property. 570 U.S. at 601–04. The agency demanded that Koontz either dedicate 13.9 acres of his land or pay a fee in lieu of the additional demanded property.

Id. at 601–02. Koontz objected to the condition and the agency denied his application. *Id*. at 602–03. On review, this Court confirmed that an in-lieu fee is often the "functional[] equivalent" of a property exaction. *Id*. at 612. Thus, courts considering a monetary-exactions claim must first analyze the entire demand imposed by the government to determine whether "it would transfer an interest in property from the landowner to the government." *Id*. at 615. If so, then the in-lieu fee constitutes an exaction subject to the nexus and proportionality tests.

In the case at hand, Marin County conditioned the Cherks' land-use permit on payment of an in-lieu fee. The court below exempted that fee from scrutiny under the nexus and proportionality tests by finding that the Cherks could have avoided the fee by submitting to alternative demands. Pet. App. A at 20–23. The court, however, glossed over the important step of considering whether those alternative demands themselves violated the nexus and proportionality tests. It merely assumed that they were, without analysis, by likening them to the conditions considered in *CBIA*, with the conclusory statement that the alternatives were mere "regulation[s] of the use of land." *Id*. at 20.

In conflict with decisions of this Court, the court below failed to acknowledge that each of the purported alternatives required the Cherks to transfer well-recognized property interests to the County without compensation. The County forced the Cherks to either pay a fee that violated the standards of *Koontz*, or submit to an exaction of property interests that violated the standards of *Nollan* and *Dolan*. In

constitutional terms, that is no choice at all—and certainly not a set of alternatives that insulates the County's demand from the unconstitutional-conditions tests.

Specifically, the County's inclusionary housing ordinance requires landowners to choose between (1) the dedication of 20 percent of the total number of lots to affordable housing (MCC § 22.22.090(A)), which, as discussed below, exacts several discrete, non-possessory property interests; and (2) paying a fee in-lieu of the above dedication (MCC § 22.22.090(B)), which is used by the County to further its affordable-housing program (*See* MCC § 22.22.080(G)). *See* Pet. App. E at 1–2 (MCC § 22.22.090).

The court below suggested two further alternatives that might have been available to the Cherks: (3) "the construction of affordable units offsite [MCC § 22.22.060(A)(1)]," which would result in the same exactions of non-possessory interests as the lot-dedication noted above in the first option; and (4) "the dedication of other lots of suitable real property to the County or its designee to develop the required inclusionary units [MCC § 22.22.060(A)(2)]." Pet. App. A at 21–22. *See also* Pet. App. D at 1–2 (MCC § 22.22.060). While the Court of Appeal did not engage in any substantive analysis of these conditions, each and every one of them independently exacts legally cognizable property interests and fails the unconstitutional-conditions tests set out by *Nollan*, *Dolan*, and *Koontz*.

As to the first option, and as referenced in the County's ordinances, dedicating a lot to affordable

housing exacts several discrete, non-possessory property interests cognizable under precedents of this Court and California property law: (a) the grant of a perpetual purchase option to the County (MCC § 22.22.120(B)(5)); (b) the abridgement of the right to freely alienate property and set its price (MCC § 22.22.120(B)(1)-(2)); and (c) the creation of a beneficial interest in the dedicated lots (or housing units developed on those lots) in favor of the County, which is valued at the difference between the market value and the County-designated "affordable" price of the property, and which is secured by a recorded agreement akin to a covenant or negative servitude (*see* MCC § 22.22.080(A)-(C) & MCC § 22.22.120(B)) (controlling the eligible purchasers, renters, resales, and price in perpetuity).[2]

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[2] California property law recognizes and protects each of these interests. First, under California law, owners have a right to sell their property to whomever they choose, at a price they choose—which places value on the purchase option or right of first refusal imposed by the County's ordinance. *See Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207 (2013) (a purchase option is a protected property right); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (1983) (a right of first refusal is a property right); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015) (finding a taking even where the government shares the sale proceeds of seized raisins because "the growers lose any right to control their disposition"); *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 191–92 (1936) ("[T]he right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments."); *Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136, 144 (1981) (recognizing an owner's right to use and dispose of property as he chooses); *Ex parte Quarg*, 149 Cal. 79, 80 (1906) (An owner of property has a "clear right to dispose of it, to sell it to whom he pleases and at such

Because the first option—the dedication of a lot to affordable housing—constitutes an exaction of protected property interests subject to the *Nollan* and *Dolan* tests, the second option of an "in-lieu" fee is similarly subject to review. *See Koontz*, 570 U.S. at 612 (monetary exactions are subject to *Nollan* and *Dolan* tests). Moreover, option three—the dedication of housing units—exacts the same protected non-possessory property interests as option one except that it imposes those burdens offsite rather than on the subject property. This difference "does not obviate the need to determine whether the demand for offsite mitigation satisfied *Nollan* and *Dolan*." *Id.* at 611. And option four is a simple demand for land (unrelated to the Cherks' proposed project) in exchange for a permit, which triggers the application of *Nollan* and *Dolan*.

The state court's holding thus failed to protect well-recognized property rights from being indirectly taken without compensation. Now, in California, land-use permit conditions are not subject to heightened scrutiny when they impose burdens intended to provide broad public benefits unrelated to the proposed change in land use. Pet. App. A at 16. Further, these conditions, when they are imposed by legislative mandate, are never subject to the

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price as he can obtain."); Cal. Civ. Code § 711 (a property owner has the right to freely alienate property, and to be free from unreasonable restraints on alienation of property).

The right to enforce a covenant is also a protected property right. *See, e.g.*, *Wooster v. Dep't of Fish & Game*, 211 Cal. App. 4th 1020, 1026 (2012) (holding that conservation easements imposing covenants on the terms of use of property are protected property interests for takings purposes).

unconstitutional-conditions doctrine. Pet. App. A at 23. These rulings warrant review because they are in violation of the Fifth Amendment, the unconstitutional-conditions doctrine, and this Court's precedent.

II.
THE CALIFORNIA COURTS' END-RUN AROUND *NOLLAN*, *DOLAN*, AND *KOONTZ* RAISES IMPORTANT QUESTIONS OF FEDERAL LAW THAT ONLY THIS COURT CAN SETTLE

An exaction of money or property conditioning the use of a specific parcel of land "implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue," *Koontz*, 570 U.S. at 614, thereby taking an otherwise protected property interest without compensation.

In this case, the County's demand for a fee was triggered by the Cherks' application to change the use of their land. The court below, following a line of California "affordable housing" cases, sidestepped *Nollan* and *Dolan* by focusing on the reason *why* the County demanded a property interest (to provide broad public benefits) and on *how* it was demanded (by legislative mandate vs. *ad hoc* administrative demand) rather than the circumstances that triggered the Cherks' obligation to pay. The court's holdings allow local governments to leverage the land-use permitting process to force individual property owners to bear the cost of an affordable-housing program that

would otherwise (and should) be borne by the public as a whole. The Takings Clause is aimed at curtailing just that kind of government action. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The California courts have created exceptions to *Nollan*, *Dolan*, and *Koontz* that undermine the Takings Clause, exceptions that only this Court can resolve.

A. The California Courts' "Intended Purpose" Exception to the *Nollan*, *Dolan*, and *Koontz* Tests Fails to Secure Property Owners' Fifth Amendment Rights Against Uncompensated Takings

The prevailing rule in California is that *Nollan* and *Dolan*'s heightened scrutiny applies only "to fees whose purpose is to mitigate the effects or impacts of the development on which the fee is imposed," and not to permit conditions "intended to advance purposes beyond mitigating the impacts or effects that are attributable to a particular development." *CBIA,* 61 Cal. 4th at 472, 474; *see also 616 Croft Ave., LLC v. City of W. Hollywood*, 3 Cal. App. 5th 621, 629 (Cal. Ct. App. 2016), *cert. denied*, 138 S. Ct. 377 (2017) (*Nollan* and *Dolan* do not apply because "the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing.").

Other courts have followed California's lead in creating this exception to *Nollan* and *Dolan*. *See, e.g., Home Builders Ass'n of Greater Chicago v. City of Chicago*, 213 F. Supp. 3d 1019, 1024 (N.D. Ill. 2016) (*Nollan*/*Dolan* do not apply to a demand that a

developer pay a fee or set aside housing units for low-income tenants as a condition of permit); *2910 Georgia Ave. LLC v. D.C.*, 234 F. Supp. 3d 281, 305 (D.D.C. 2017) (*citing CBIA* as persuasive against a claim that an inclusionary-housing program in D.C. constitutes an unlawful exaction). This "intended purpose" exception to the unconstitutional-conditions doctrine fails to secure property owners' Fifth Amendment rights against uncompensated takings.

When the government requires a property owner to give up money or other property interest as a condition of a land-use permit, it bears the hallmarks of an exaction. *Koontz*, 570 U.S. at 613. Yet, when a permit condition purports to advance broad public purposes totally unrelated to the proposed land-use change, California will not treat the condition as an exaction. This leads to absurd results. A municipality's demand will be subject to heightened scrutiny (only) when the government admits that its condition is aimed at mitigating an adverse public impact of a proposed project; yet it enjoys mere rational basis review when it purports to use the permit process for a worse, arbitrary purpose—*i.e.*, to take property for a purpose totally unrelated to any public impact attributable to the project.

A determination that a permit condition serves a broad public need, however, cannot justify an appropriation of private property for public use without compensation, absent any showing that it mitigates the adverse public impact of the project. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of

paying for the change."). By designating a broad public need for "affordable housing" as the determinative factor on which to decide whether an exaction has occurred, the California rule places property owners in just the vulnerable position that the unconstitutional-conditions doctrine aims to prevent. The nexus and proportionality analysis is necessary to determine whether a development condition is "merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit." *Dolan*, 512 U.S. at 390 (quotation and citation omitted).

This case presents that risk starkly. Simply put, the Cherks wanted to change the use of their property. That change caused no adverse impact warranting mitigation; yet the County leveraged its permitting power to take a large cash payment from them as a condition of allowing the change in use. Had the County made this demand outside the permitting process, it would have been a *per se* taking of the Cherks' property. *Koontz*, 570 U.S. at 612. The County is able to accomplish its objective without compensation here only because the denial of the Cherks' right to the ordinary and productive use of their property would have caused even greater financial pain. *Id*. at 605. The California courts have endorsed this end-run around the Takings Clause by refusing to apply *Nollan* and *Dolan* to so-called "affordable housing" permit conditions.

B. California's Legislative Exactions Exception Conflicts with Unconstitutional-Conditions Decisions of this Court

In a recent denial from certiorari on the question whether legislatively-mandated exactions are exempt from scrutiny under *Nollan*, *Dolan*, and *Koontz*, Justice Thomas "doubt[ed] that 'the existence of a taking should turn on the type of government entity responsible for the taking.'" *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., *concurring in denial of certiorari*) (citation omitted). This doubt is well-founded because this Court has not generally drawn any distinction between legislative and adjudicative exactions.

The *Nollan*, *Dolan*, and *Koontz* cases all involved conditions mandated by general legislation—a fact noted in each opinion. The dedication of an easement over the Nollans' beachfront, for example, was a general requirement imposed by state law. *Nollan*, 483 U.S. at 828–30 (California Coastal Act and California Public Residential Code imposed public-access conditions on all coastal development permits); *see also id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract.").

Similarly, both the bike-path and greenway dedications at issue in *Dolan* were mandated by municipal land-use ordinances. *See Dolan*, 512 U.S. at 377–78; *id.* at 378 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways"); *id.* at 379

("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). And the in-lieu fee at issue in *Koontz* was required by state law. *Koontz*, 570 U.S. at 600–01 (Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands).

Koontz, which like this case involved a fee imposed in lieu of a dedication of private property to the public, is directly on point. *Id.* at 600–02. The permitting authority in that case determined the amount of the fee pursuant to a generally applicable regulation setting the minimum mitigation ratio.[3] *Id.* Florida's Department of Environmental Protection adopted the regulation nearly a decade before Koontz submitted his permit application. *Id.* That the fee was legislatively required did not deter this Court from concluding that it was subject to the nexus and proportionality tests (*id.* at 613–17)—a fact that compelled Justice Kagan, writing in dissent, to question whether the majority had rejected the legislative-versus-adjudicative distinction. *Id.* at 628–29 (Kagan, J., dissenting).

Koontz holds that when the government imposes an in-lieu fee on a permit approval, the reviewing court must look at the underlying condition to determine whether it implicates the doctrine of unconstitutional conditions. *See Koontz,* 570 U.S.

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[3] *See* Respondent's Brief in Opposition, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2012 WL 3142655, at *5 n.4 (U.S. Aug. 1, 2012) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

at 612 (An in-lieu fee is the "functional[] equivalent" of the demand for a dedication of property.). Thus, as a predicate to an as-applied challenge, a court must first determine whether any of the alternative demands would violate the Constitution. *Id*. at 611.

Here, by adopting a categorical rule that excludes all legislatively mandated exactions from inquiry, the court below eliminated this necessary determination, leaving constitutionally guaranteed rights without meaningful protection.

The legislative/adjudicative distinction also finds no support in the history of the unconstitutional conditions doctrine even beyond the land-use context. Since the 19th century, this Court has relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions.[4] The purpose of the

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[4] *See Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts because "[t]his consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States"); *see also Marshall v. Barlow's Inc.,* 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo,* 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner,* 374 U.S. 398, 406 (1963) (holding provisions of unemployment compensation statute unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive

doctrine—to enforce a constitutional limit on government authority—explains why it applies without regard to the type of government entity making the unconstitutional demand:

> [T]he power of the state . . . is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in a like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. Railroad Comm'n of State of California, 271 U.S. 583, 593–94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).

Legal scholars also find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of *[Nollan* or *Dolan]* only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings & the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About*

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benefits); *Speiser v. Randall,* 357 U.S. 513, 528–29 (1958) (ruling that a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional-conditions doctrine).

It, 28 Stetson L. Rev. 523, 567–68 (1999). Indeed, where a single government body writes the law, issues permits, and sits in review of its decision—as the County does here—it is often difficult to distinguish one branch of the government from the other. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide,* 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision-making in the land-use context). The irrelevance of the "legislative vs. administrative" distinction comes as no surprise, because *Nollan* and *Dolan* are rooted in the unconstitutional-conditions doctrine, which "does not distinguish, in theory or in practice, between conditions imposed by different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions,* 28 Stan. Envtl. L.J. 397, 400 (2009).

California's adoption of a categorical rule exempting all legislatively mandated exactions from the heightened scrutiny required by *Nollan/Dolan/Koontz* warrants review because it conflicts with decisions of this Court and their rationale.

III.
STATE AND LOWER FEDERAL COURTS ARE DIVIDED ON THE QUESTION WHETHER THE *NOLLAN* AND *DOLAN* TESTS APPLY TO EXACTIONS MANDATED BY LEGISLATION

The Court of Appeal decision below adds to a long-standing and deepening nationwide split among state and lower federal courts on the question whether legislatively-imposed permit conditions are subject to review under the *Nollan* and *Dolan* tests. This case

presents that question in a particularly straightforward way and is an ideal vehicle for resolving the controversy.

As the alternative basis for its decision exempting the County's permit condition from scrutiny under *Nollan* and *Dolan*, the court below noted that "the in-lieu fee is a legislatively mandated fee that applies to a broad class of permit applicants." Pet. App. A at 23. Under California law, the court explained, "'legislatively prescribed monetary fees'—as distinguished from *ad hoc* monetary demands by an administrative agency—'that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test.'" *Id.* (quoting *CBIA*, 61 Cal. 4th at 459 n.11 (*citing San Remo Hotel L.P. v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 663–71 (2002)); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996)).

A split of authority has been growing now for nearly 25 years on the question whether there is a legally relevant difference between exactions imposed by legislation versus those imposed *ad hoc* by administrative agencies. *See Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116, 1117 (1995) (Thomas, J., *dissenting from denial of certioriari*) (recognizing a nationwide split of authority); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (Thomas, J., *concurring in denial of certiorari*) (division has been deepening for over twenty years). The courts of last resort of Texas, Ohio, Maine, Illinois, New York, and Washington and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions and apply the nexus and proportionality tests to

generally applicable permit conditions. *See Town of Flower Mound, Tex. v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355–56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998); *City of Portsmouth, N.H. v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Development Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994).

On the other hand, the courts of last resort of Alabama, Alaska, Arizona, California, and Colorado, Maryland, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions. *See Dabbs v. Anne Arundel Cty.*, 458 Md. 331, 356, *cert. denied*, 139 S. Ct. 230 (2018); *CBIA*, 61 Cal. 4th at 459 n.11 (citing *San Remo Hotel*, 27 Cal. 4th at 666–69); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

Meanwhile, the Ninth Circuit is internally conflicted on this question. *See Mead v. City of Cotati*, 389 F. App'x 637, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); *Commercial Builders of N. Cal. v. City of Sacramento*,

941 F.2d 872, 874–76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); *Garneau v. City of Seattle*, 147 F.3d 802, 813–15, 819–20 (9th Cir. 1998) (plurality opinion, the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions); *see also Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (*Koontz* undermines the reasoning for holding legislative exactions exempt from scrutiny under *Nollan* and *Dolan*).

Two Justices of this Court have expressed skepticism at the purported difference between legislatively and administratively imposed exactions. In *Parking Ass'n of Georgia*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required owners of parking lots to include landscaped areas equal to at least 10 percent of the paved area. 515 U.S. at 1116 (Thomas, J., joined by O'Connor, J., *dissenting from denial of certiorari*). The dissenting Justices criticized the notion that there is a meaningful distinction between legislatively imposed conditions and other exactions:

> It is not clear why the existence of a taking should turn on the type of government entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The

> distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117–18.

Justice Thomas again expressed doubt in his dissent from denial of certiorari in *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (questioning whether "the existence of a taking should turn on the type of governmental entity responsible for the taking.") (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117–18). There, he wrote that the "lower courts have divided over whether the *Nollan*/*Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one*,"* noting:

> Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Id. at 928–29; *see also Koontz*, 570 U.S. at 628 (Kagan, J., *dissenting*) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.").

This deep split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification. This case presents the matter as a pure issue of law for consideration.

CONCLUSION

For the reasons above, Petitioners respectfully request that this Court grant the petition for writ of certiorari, and reverse the decision of the California Court of Appeal.

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Respectfully submitted,

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