No. 18-1538

In the
Supreme Court of the United States

DARTMOND CHERK, ET AL.,
*Petitioners*,

v.

COUNTY OF MARIN, CALIFORNIA,

*Respondent.*

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

# BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND IN SUPPORT OF PETITIONERS DARTMOND CHERK, ET AL.

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## QUESTIONS PRESENTED

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?

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## IDENTITIES AND INTERESTS OF AMICI CURIAE

This amicus brief is submitted by National Association of Home Builders ("NAHB"), California Building Industry Association ("CBIA"), and Citizens' Alliance for Property Rights Legal Fund ("CAPR Legal Fund"), whose members are regularly subjected to burdensome land-use permit exactions.[1]

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of its approximately 140,000 members are home builders or remodelers, and its builder members construct about 80 percent of all new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services. NAHB frequently participates as a party litigant and amicus curiae to safeguard the

[1] Counsel for the parties received notice of amici's intention to file this brief at least 10 days prior to the brief's due date. Petitioners filed a blank consent, on file with the Court, to the filing of *amicus curiae* briefs. Respondent has consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici made a monetary contribution to its preparation or submission.

constitutional and statutory rights, and economic interests, of its members and those similarly situated.

CBIA is a statewide, non-profit trade association representing approximately 3,000 businesses involved in all aspects of residential development. Collectively, its members are responsible for producing approximately 80% of all new homes being built annually in California. CBIA regularly participates in litigation challenging laws, regulations, and other government actions that adversely affect the efforts of California's builders to supply plentiful and affordable housing to the State's nearly-40 million residents.

CAPR Legal Fund is a 501(c)(3) nonprofit organization, which litigates on behalf of landowners in defense of their property rights. The Legal Fund is affiliated with the umbrella organization, Citizens' Alliance for Property Rights, a nonprofit, membership organization founded in 2003. It was established to advocate for and support equitable and scientifically sound land-use regulations that do not force private landowners to pay disproportionately for public benefits enjoyed by all. CAPR membership is open to anyone with an interest in advancing the cause of property rights, and counts among its ranks a wide array of individuals—from renters, to small residential homeowners, to large ranchers. Representing 435 dues-paying members, the organization has chapters in the States of Washington and California. Given its history and experience with property rights, CAPR Legal Fund believes it can offer a unique and important perspective on the issues that the pending petition raises.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT FOR GRANTING THE PETITION

The petition presents a federal constitutional question of enormous consequence to landowners and developers across the country, and about which courts have been divided for years: Can the government shield an otherwise unconstitutional permit exaction simply because the exaction is enshrined in legislation, such as a statute or ordinance? On the premise that state and local legislators are more protective of property rights than planning or building officials who impose permit exactions on an *ad hoc* basis, a number of jurisdictions, including California, have answered the question in the affirmative. That view stands against both the doctrinal roots of the federal unconstitutional conditions doctrine, this Court's precedents in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and a number of jurisdictions that sensibly reject the distinction between legislative and *ad hoc* exactions.

More fundamentally, the premise on which the "legislative versus *ad hoc*" distinction is based is woefully naïve. Legislators are just as capable of imposing unlawful exactions as administrative officials are. And they are just as eager to do so. For example, legislatively authorizing the taking of land or money from a political minority within a jurisdiction (i.e., permit applicants) in order to enrich the general public—and thereby gain constituents' favor—is far more preferable to taxing those same constituents for the same benefits. It is vital for the Court to dispel, once and for all, the "legislative versus

*ad hoc*" myth that is entrenched in California and other jurisdictions, and clarify that the Federal Constitution requires *all* exactions—legislative or otherwise—to be subjected to the same heightened review under *Nollan* and *Dolan*.

The petition also presents another federal constitutional question of more recent vintage, but similarly consequential: Do *Nollan* and *Dolan* exempt from scrutiny the most arbitrary kind of permit exaction—namely, an exaction that bears *no relationship whatsoever* to a project's public impacts? The answer must be "no," because the whole point of *Nollan* and *Dolan* is that *only* exactions that are closely connected and proportional to, and therefore serve as actual mitigation for, a project's public impacts are constitutionally permitted. But California courts have reached the opposite conclusion. As a result, public agencies in the most populous State in the Nation can more freely take land or money from permit applicants as the condition of project approval, as long as the property serves some purpose other than as mitigation for the project's impacts—i.e., as long as the taking is totally unrelated to the project or its impacts. The Court should consider whether the California rule can be reconciled with *Nollan* and its progeny.

These two federal constitutional questions are especially relevant to homebuilders, whose projects are routinely subjected to some of the most substantial and arbitrary permit exactions imposed by permit agencies. As explained below, local agencies' near-freewheeling power to impose burdensome exactions on residential projects have

exacerbated the housing crisis afflicting communities around the country—especially in jurisdictions like California, where courts have all but banished *Nollan* and *Dolan* from their judicial arsenal. Unfortunately, skyrocketing housing costs directly attributable to the "exactions" frenzy and other arbitrary land-use regulations disproportionately have hit the most vulnerable individuals seeking a place to live.

For these reasons, and the reasons stated in the petition, amici urge the Court to grant the petition and resolve the important questions presented.

## ARGUMENT

### I.

### COURTS HAVE LONG BEEN SPLIT ON THE QUESTION OF WHETHER LEGISLATIVELY IMPOSED EXACTIONS ARE SUBJECT TO HEIGHTENED CONSTITUTIONAL SCRUTINY

Courts across the country are split over the question whether legislatively imposed permit conditions are subject to *Nollan/Dolan* review. The Texas and Ohio Supreme Courts have declined to distinguish between legislative and *ad hoc* exactions, and have applied *Nollan*/*Dolan* scrutiny to generally applicable permit conditions. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 643 (Tex. 2004); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000). On the other hand, the Arizona Supreme Court, the Ninth Circuit Court of Appeals, and the Tenth Circuit have chosen to limit *Nollan* and *Dolan* to administratively imposed or *ad hoc* exactions. *See, e.g.*,

*Alto Eldorado Partnership v. County of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011), *cert. denied*, 565 U.S. 880 (2011); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997) (*Dolan* does not apply to legislatively imposed conditions); *Mead v. City of Cotati*, 389 Fed. App'x 637, 638-39 (9th Cir. 2010), *cert. denied*, 563 U.S. 1007 (2011) (same). The conflict among the courts raises an important question concerning the scope of the right to be free from uncompensated takings of property, particularly when the cases refusing to apply *Nollan* and *Dolan* may be in conflict with the decisions themselves.

As this Court's decisions show, there is no doctrinal justification for the "legislative versus *ad hoc* exaction" distinction; indeed, it is often difficult to distinguish one from the other. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487 (2006) (describing the difficulty in drawing a line between legislative and administrative decisionmaking in the land-use context). The *Nollan* Court applied heightened scrutiny to and invalidated the California Coastal Commission's easement condition, which was the result of the agency's ***quasi-legislative policy*** that already had been applied to over 40 similarly situated property owners. *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, "stringent regulation of development along the California coast has been in place at least since 1976" and, in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects

in the Faria Family Beach Tract."). Similarly, in *Dolan*, the government acted under ***a generally applicable and legislatively enacted ordinance*** designed to address transportation congestion when it conditioned a property owner's building permit on her dedication of a pedestrian/bicycle pathway. *Dolan*, 512 U.S. at 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code].").

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

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis . . . . The distinction between sweeping legislative takings and particularized administrative takings

> appears to be a distinction without a constitutional difference.

Twenty-one years later, the same concerns plagued Justice Thomas when, for procedural reasons, he concurred in the denial of a petition asking the Court to address the "legislative v. *ad hoc*" distinction:

> I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking. 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.

*Calif. Building Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928-29 (2016) (internal citation and quotation marks omitted).

Clearly, from the permit applicant's perspective, whether a legislative or administrative body or official forces him to bargain away his rights in exchange for a permit results in the exact same injury. The irrelevance of the "legislative versus *ad hoc*" distinction comes as no surprise, in light of *Nollan*'s roots in the unconstitutional conditions doctrine. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005). The doctrine "does not distinguish, in theory or in practice, between conditions imposed by

different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise of government power and not the specific source of that power." *Id.* at 438. That is why, outside the land-use permit context, one will find no court decision that applies different levels of scrutiny to conditions burdening constitutional rights; all such conditions are subject to the same scrutiny regardless of the government body or official imposing them.

Further, allowing a purely "formalistic exception" to the unconstitutional conditions doctrine for *legislative* exactions to persist simply "would allow permitting authorities to evade heightened scrutiny when the constitutional injury would be the same with or without the exception." Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Management District, 27 Geo. Envtl. L. Rev. 539, 569 (2015). Indeed, this Court's decision in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), suggests that "courts should reject any rule that would allow government to immunize itself from the strictures of the nexus and rough proportionality tests." Wake & Bona, *supra*, at 569; *see also Koontz*, 570 U.S. at 606 ("A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.")).

Finally, the rationale advanced to justify an exemption for legislative exactions does not stand up to close examination. In *San Remo Hotel v. City & County of San Francisco*, 27 Cal.4th 643 (2002), the California Supreme Court articulated that rationale, in the context of monetary exactions:

> While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

*Id.* at 671.

Despite the *San Remo* court's speculation, there is no evidence that the "democratic political process" actually serves as a check against unlawful, legislatively imposed exactions, especially at the local level where most exactions are imposed. Scholars have found that "smaller, local governments are inherently incapable of true representative democracy," and "thus minorities are not protected from majoritarian oppression." Marc J. Herman, *The Continuing*

*Struggle Against Government Extortion, and Why the Time Is Now Right to Employ Heightened Scrutiny to All Exactions*, 46 Urb. Law. 655 (2014). Indeed, "legislative land use decisions at the local level may reflect classic majoritarian oppression," and "developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored." Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U.L. Rev. 242, 271 (2000). Developers who live—and vote—*outside* the permitting jurisdiction enjoy even less political clout. *Id.* (observing that "municipalities do not take outsiders' views into account since, by their nature, outsiders do not have the opportunity to vote"). By contrast, an *ad hoc* exaction is the product of an administrative process that at least affords the permit applicant certain due process rights, such as notice, an individualized opportunity to be heard, and administrative appeal rights. *Id.* at 273. Yet somehow the legislative process of imposing exactions is more responsive to and protective of permit applicants than the administrative process. Clearly, that is not the case.

In sum, the California Court of Appeal's opinion in this case, which holds that *Nollan* and *Dolan* are inapplicable to legislative exactions, adds confusion to takings jurisprudence and exposes owners and project applicants, big and small, to the very threat that those important decisions sought to address. As one commentator has put it, "maintain[ing] the distinction between administrative and legislative actions subverts the spirit of the unconstitutional conditions doctrine, which [this Court] fashioned to protect

private property in the 'special context' of land use regulations in Fifth Amendment jurisprudence." Kristoffer James S. Jacob, Comment, California Building Industry Association v. City of San Jose: *The Constitutional Price for Affordable Housing*, 7 Calif. L. Rev. Circuit 101 (2016). The Court should grant the petition in this case to resolve the longstanding conflict among the courts and restore the full purpose and promise of *Nollan*, *Dolan*, and *Koontz* as bulwarks against uncompensated takings in the land-use permit context.

## II.

## CALIFORNIA HAS GUTTED THE FEDERAL UNCONSTITUTIONAL CONDITIONS DOCTRINE—AN IMPORTANT CHECK ON EXTORTIONATE LAND-USE PERMIT EXACTIONS

For over three decades, the federal unconstitutional conditions doctrine has stood as a vital bulwark against state and local government attempts to leverage the land-use permit process to exact land and money from project applicants. The doctrine is reflected in three "exactions" decisions of this Court: *Nollan* (1987), *Dolan* (1994), and *Koontz* (2013). In *Nollan*, the Court held that an exaction lacking an "essential nexus" to the alleged public impacts of a proposed project is an unconstitutional attempt to take private property without compensation, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. *Nollan*, 483 U.S. at 837. In *Dolan*, the Court further held that an exaction must bear a

"rough proportionality" to a project's alleged public impacts to avoid a Takings Clause violation. *Dolan*, 512 U.S. at 391. Finally, in *Koontz*, the Court clarified that *Nollan* and *Dolan* apply, not only to exactions of real-property interests, but to monetary exactions as well. *Koontz*, 570 U.S. at 612.

At its core, *Nollan*/*Dolan* scrutiny examines the relationship (if any) between an exaction and a project's impacts. Scrutiny is applied to ensure that, when an agency demands an applicant's property as part of the permit process, the taken property serves to actually ***mitigate*** public impacts caused by the project. As *Nollan* and its progeny make clear, the unconstitutional conditions doctrine prohibits an agency from exacting property that either fails to serve as mitigation, or is disproportionate to the project's public impacts. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. *Nollan/Dolan* scrutiny applies to *any* exaction that would constitute a taking outside the permit process, whether or not the agency characterizes it as "mitigation." As this Court explained in *Koontz*:

> Our precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still prohibiting the government from engaging in "out-and-out . . . extortion" that would thwart the Fifth Amendment right to just compensation. Under *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not

> leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.

*Koontz*, 570 U.S. at 606. The dissenting Justices in *Koontz* also acknowledged that all permit exactions—whatever their alleged purpose—must be subjected to *Nollan/Dolan* scrutiny:

> Cities and towns across the Nation impose many kinds of permitting fees every day. Some enable a government to mitigate a new development's impact on the community . . . . Others cover the direct costs of providing services like sewage or water to the development. Still others are meant to limit the number of landowners who engage in a certain activity . . . . ***All now must meet*** **Nollan** ***and*** **Dolan*****'s nexus and proportionality tests***.

*Id.* at 626-27 (Kagan, J., dissenting) (emphasis added). Far from exempting an exaction from *Nollan/Dolan* review, an agency's assertion that the exaction is for something *other* than mitigation—i.e., a naked taking of private property without compensation—calls out for *Nollan/Dolan* scrutiny.

In California, the unconstitutional conditions doctrine as applied in *Nollan* and its progeny is, for all intents and purposes, a dead letter. Turning the doctrine on its head, the California Supreme Court held in *California Building Industry Association v. City of San Jose* ("*CBIA*") that an exaction whose

stated purpose is simply to advance some public goal, with no connection at all to a project's impacts, is exempt from *Nollan/Dolan* review. *California Building Industry Assn. v. City of San Jose*, 61 Cal. 4th 435, 472, 474 (2015). Rather, the doctrine applies only to an exaction that an agency (naively) states ***is*** for mitigation, with the only inquiry being whether the exaction is proportionate to the project's impacts. The upshot of the *CBIA* decision is that the very worst kind of exaction—one that bears no relationship whatsoever to a project's impacts—is effectively given a constitutional pass, while an exaction imposed as mitigation is subjected to heightened scrutiny. That flies in the face of this Court's repeated admonition that only an exaction that truly mitigates for a project's public impacts will save it from being deemed an unconstitutional taking of property. *Koontz*, 570 U.S. at 606.

The response of California's public agencies has been predictable: argue that a challenged exaction has *nothing* to do with a project or its impacts, and thereby escape heightened scrutiny under *Nollan* and *Dolan*. That is the argument the County made, and the lower courts accepted, in this case. Pet. App. at 16. California courts in other cases have followed *CBIA*'s lead, as have courts outside of California. *See, e.g.*, *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) (holding that the unconstitutional conditions doctrine does not apply where "the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from [the applicant's] specific development project, but rather to combat the overall

lack of affordable housing"); *Home Builders Ass'n of Greater Chicago v. City of Chicago*, 213 F. Supp. 3d 1019, 1024 (N.D. Ill. 2016) (same).

The California rule threatens to unleash a pernicious strategy by permit agencies to engage in unchecked takings of land and money that admittedly bear no connection to a project or its public impacts. What agencies most assuredly could not do outside the permit process—i.e., unilaterally take private property without just compensation—they may now be able to accomplish *in* the permit process simply by characterizing the taken property as something other than "mitigation." Such unbridled power is at odds with permit applicants' constitutional rights, and betrays the Takings Clause's promise to bar government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960).

## III.

## AN UNBRIDLED "EXACTIONS" POWER WILL CONTINUE TO WREAK HAVOC ON EFFORTS TO SUPPLY AFFORDABLE HOUSING, AFFECTING THE MOST VULNERABLE IN SOCIETY

Over the years, studies have confirmed that the laundry list of monetary and other property-related exactions imposed on residential projects has only exacerbated the housing crisis that many jurisdictions, including California communities,

confront.[2] Cal. Gov. Code § 65589.5(a)(2)(A) ("California has a housing supply and affordability crisis of historic proportions."); *id.* § 65589.5(a)(1)(B)("The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that . . . require that high fees and exactions be paid by producers of housing."). For example, a report from the California Legislative Analyst's Office ("LAO")[3] found a strong link between land-use exactions and housing unaffordability. *See, e.g.*, Mac Taylor, *California's High Housing Costs: Causes and Consequences* at 13-14 (Cal. Leg. Analyst's Office 2015);[4] *see also* Sarah Mawhorter, et al., *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities* at 4 (Terner Center for Housing Innovation, U.C. Berkeley 2018) (finding that exactions comprise a significant part of the cost of housing in California and that "the unpredictability of [development] fees may also delay

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[2] In California, the governor recently declared: "Housing is our great challenge." *See* https://calchamberalert.com/2019/05/31/housing-crisis-challenge-gets-attention-at-breakfast/ (last visited on July 11, 2019). In the first half of 2019 alone, the California Legislature introduced around 200 bills attempting to address the State's housing crisis. *See* https://sf.curbed.com/2019/6/25/18677757/housing-crisis-california-bills-legislatation-may-massacre-wiener (last visited on July 11, 2019).

[3] The ALO is the California Legislature's Nonpartisan Fiscal and Policy Advisor. *See* https://lao.ca.gov/ (last visited on July 12, 2019).

[4] The LAO's report is available at: https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf (last visited on July 12, 2019).

or derail projects altogether," undermining the supply of affordable housing).[5] The LAO report in particular cites a "2012 national survey [that] found that the average development fee levied by California local governments (excluding water-related fees) was just over $22,000 per single-family home compared with about $6,000 per single-family home in the rest of the country." Taylor, *supra*, at 14. "Altogether, the cost of building a typical single-family home in California's metros likely is between $50,000 and $75,000 higher than in the rest of the country." *Id.* Simply put, "development fees add to the cost of construction, reducing housing affordability and hindering housing development." Mawhorter, *supra*, at 4.

The significant costs that permit exactions add to the development of residential housing ultimately are passed on to homebuyers and renters. *See*, *e.g.*, Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. Land Use & Envtl. L. 87 (2017). As Professor Steven Eagle explains, "[u]nless [an exaction] closely offset[s] negative externalities that in fact are generated by the project"—a question that only *Nollan*/*Dolan* review can answer—"in a residential context it operates as a tax on homebuilders, the incidence of which largely is passed on to homebuyers, thus ironically making housing less affordable." *Id.* at 112-13. "[S]imilar to any tax or other costs imposed on businesses, the ultimate burden of payment will, to varying degrees, be passed to new home buyers in the form of higher house prices

[5] The study is available at: http://ternercenter.berkeley.edu/uploads/Development_Fees_Report_Final_2.pdf (last visited on July 12, 2019).

(or, equivalently, smaller houses with fewer amenities)."[6] Development Planning & Financing Group, Inc., *Impact Fee Handbook* at 25 (2nd ed. 2016). In some case, more exactions mean fewer homes built. San Francisco Planning Dept., *2018 San Francisco Housing Inventory* (2019) at 24 (Table 13), 35 (showing a nearly 50% drop in total production of housing from 2016 to 2018, after the city doubled the "inclusionary housing" exaction on homebuilders).[7]

Unfortunately, those hardest hit are homebuyers and renters in the lower to middle classes who can least afford decent housing, including young individuals and families who are just starting out. A recent report from the California Department of Housing and Community Development paints a bleak picture: "Lack of supply and rising costs are compounding growing inequality and limiting advancement opportunities for younger Californians. Without intervention, much of the housing growth is expected to overlap significantly with disadvantaged communities and areas with less job availability." Cal. Dept. of Housing & Community Develop. ("CDHCD"), *California's Housing Future: Challenges and Opportunities: Final Statewide Housing Assessment*

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[6] The study, prepared for and published by National Association of Home Builders, is available at the following address: https://www.nahb.org/advocate/-/media/8B12E2AABAE549F49CDC751B378C737A.ashx (last visited on July 11, 2019).

[7] This study is available at: http://commissions.sfplanning.org/cpcpackets/1996.0013CWP_2018.pdf (last visited on July 12, 2019).

*2025* at 1 (Feb. 2018)[8]; *see also* Sanford Ikeda & Emily Washington, *How Land-Use Regulation Undermines Affordable Housing* at 25 (2015) (finding that land-use exactions and other regulations "cause regressive effects by making all housing more expensive," but "the effect is greater for smaller houses, making housing even less accessible to those on lower incomes").[9]

Further, by drowning new housing projects in monetary and other property-related exactions, permit agencies have facilitated an artificial transfer of wealth from *new* homeowners and renters to *existing* ones. Ikeda & Washington, *supra*, at 25 (concluding that "land-use regulations"—including exactions—"likely reflect the will of a municipality's homeowners, who rationally seek to protect or inflate the value of their largest asset" (i.e., their home)). Thus, the "permit exactions" epidemic not only contributes to higher housing costs overall; it does so in a way that exacerbates existing wealth inequalities.[10] *See* CDHCD, *supra*, at 3 (concluding

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[8] This study is available at: http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_MainDoc_2_15_Final.pdf (last visited on July 12, 2019).

[9] This study is available at: https://www.mercatus.org/system/files/Ikeda-Land-Use-Regulation.pdf (last visited on July 11, 2019).

[10] The unchecked power to impose costly exactions on housing projects also has deleterious environmental effects. Research shows that local land-use policies that make it harder and more expensive to build housing in one area (like California's coastal region) only pushes residential development to other areas whose less favorable climate is associated with greater carbon emissions. This phenomenon is known as carbon "leakage." As one scholar explained: "When environmental rules prevent

that the problem of housing unaffordability, exacerbated by exactions and other land-use burdens, results in development patterns that "reinforc[e] income inequality and patterns of segregation"). Again, the hardest hit tend to be the most economically disadvantaged, including people of color. *Id.* at 28 ("Housing cost burden is experienced disproportionately by people of color."); *see also* Cal. Gov. Code § 65589.5(a)(2)(F) ("Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.").

Given the nationwide, public-policy implications of the issues presented in this case, those issues are primed for the Court's review.

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building in highly productive, highly restricted coastal California, homes get built elsewhere, like Las Vegas and Houston. Carbon emissions per household are lower in coastal California than elsewhere in the country, primarily because of a benign Mediterranean climate. California's land use restrictions don't eliminate new construction, they merely move it elsewhere, so it isn't enough to have a purely local perspective. In California's case, preventing local construction for environmental reasons only ends up increasing carbon emissions by pushing building to less salubrious climes." Edward Glaeser, *Reforming Land Use Regulations* (Brookings Institute 2017), available at: https://www.brookings.edu/research/reforming-land-use-regulations/ (last visited on July 11, 2019); *see also* Edward L. Glaeser & Matthew E. Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development* (National Bureau of Economic Research Working Paper No. 14238, 2008), available at: http://www.nber.org/papers/w14238 ("By restricting new development, the cleanest areas of the country would seem to be pushing new development towards places with higher emissions.").

## CONCLUSION

For the reasons stated above, and those stated in the petition, the Court should grant the petition.

DATED: July 2019

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