No. 20-1212

In The Supreme Court of the United States

PEYMAN PAKDEL; SIGMA CHEGINI,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; SAN FRANCISCO DEPARTMENT OF PUBLIC WORKS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Peyman Pakdel and Sima Chegini ("Pakdels" or "Petitioners") purchased a tenancy-in-common interest in a single unit of property in San Francisco ("San Francisco" or "City") in 2009. At the time, they agreed with the co-owners of their building to apply to convert the units into condominiums. In 2015, pursuant to that agreement, the Pakdels and their co-owners voluntarily applied for expedited condominium approval under a program that required applicants to offer any non-owner tenants a lifetime lease in the units they occupied. The Pakdels repeatedly confirmed their intent to abide by the terms of the expedited program, acknowledged that converting their tenancy-in-common to a condominium interest would increase the value of their property, and affirmatively waived their right to challenge the lifetime lease requirement in exchange for these and other program benefits. In 2017, the Pakdels received the condominium map they had applied for—a "final approval."

At no point during the application process, including the several required public hearings, did the Pakdels notify San Francisco that they objected to or sought relief from the lifetime lease requirement; nor did they appeal any of the conditions of approval of their condominium map. Instead, only after all applicable appeal deadlines had passed, after the Pakdels had obtained all the value of this land use entitlement and were in violation of the program's requirements did they ask the City to relieve them of the central condition

of approval of their condominium map. They did not propose to waive or return the refund they had received in exchange for offering the lifetime lease, or suggest other modifications to the conditions of the map. And none of their co-applicants joined their request for relief. The City declined these untimely requests, and the Pakdels filed this lawsuit claiming that the program effected a taking of their private property.

Nothing in this Court's recent decision in *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019), turns these facts into a cognizable takings claim. Instead, as the Court of Appeals for the Ninth Circuit recognized below, *Knick* held that the first prong of the ripeness test for takings claims set forth in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the "final decision" requirement, remains good law. That prong requires property owners to plead facts establishing that they have obtained a final administrative decision based on a meaningful project application. A meaningful project application, in turn, requires the property owner to request available variances or exceptions that would avoid the alleged taking. A majority of the Ninth Circuit panel ("Panel") correctly applied this finality requirement when it held that the Pakdels could not establish a ripe takings claim where they had obtained a final decision on a *different project than the one they desired* without ever timely seeking a waiver or variance from the program's requirements.

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Here, the Pakdels voluntarily applied for condominium conversion under a program they knew required them to offer their tenant a lifetime lease, and the requirement was reflected as a condition of approval of their condominium map. But instead of seeking a waiver of the requirements of San Francisco's program during the application process, they continued to affirmatively represent that they agreed to the condition, acknowledged the financial benefits of the requested subdivision map approval, waived their right to challenge the condition and even tendered to the City a partially executed lease agreement, misleading San Francisco into believing that they intended to comply with the condition. By failing to submit a meaningful project application during the administrative process in accordance with the reasonable procedures dictated by the City's Subdivision Code—one that contained the exception or variance they desired—the Pakdels failed to ripen their takings claim.

The questions presented here are:

1. Can a takings plaintiff establish ripeness under *Williamson County's* final decision rule where the local land use authority issued its final decision on a different project, before plaintiff refused to comply with and belatedly sought relief from a condition of project approval?

2. Does the unconstitutional conditions doctrine apply to a legislative condition imposed on every

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subdivision map issued through an expedited processing program in exchange for a fee refund, expedited processing of the map, increased property value, and other tangible benefits granted to all participating property owners?

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INTRODUCTION

The Panel decision is fully consistent with this Court's precedents, and does not present issues that require resolution of splits between the circuits. The Petition should therefore be denied.

The opinion below expressly rejected the argument, repeated here by Petitioners, that requiring property owners to present local decisionmakers with a "meaningful" application for the project they want approved—including seeking available variances or waivers—imposes an improper exhaustion requirement on a takings claim. Instead, the foundation of the Panel's decision is the uncontroversial proposition that "[c]onstitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them 'ripe' for federal adjudication." Appendix A ("App. A") at App. A-11 (citing *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990)). *Knick* retains the requirement that a property owner obtain a final decision before seeking relief from an alleged taking in the federal courts. Thus, the Panel correctly observed that "*Knick* left this finality requirement untouched, so that aspect of *Williamson County* remains good law." App. A-12 (citing *Knick*, 139 S.Ct. at 2169; *see also Campbell v. United States*, 932 F.3d 1331, 1340 n. 5 (Fed. Cir. 2019) (recognizing that the finality requirement "remains good law under *Knick*"). The Dissent agreed with the majority of the Panel on this issue. App. A-26.

The Panel explained the rule as follows:

> This rule means that a plaintiff must "meaningful[ly]" request and be denied a variance from the challenged regulation before bringing a regulatory takings claim. [. . . .] Plaintiffs who "have foregone an opportunity to bring their proposal" to use their property in a manner that diverges from the regulation alleged to effect a taking "before a decision-making body with broad authority to grant different forms of relief" therefore "cannot claim to have obtained a 'final' decision."

App. A-14–A-15. These concepts are neither novel nor disputed by other circuits. In fact, Petitioners cannot cite a single court that has negatively cited the Panel's decision to date, because the Panel's holding is consistent with this Court's precedents and those of other circuits addressing the ripeness issue since *Knick*. On the contrary, the only two cases outside the Ninth Circuit to cite to the Panel's decision have done so with approval. *See Brumit v. City of Granite City, Illinois*, No. 19-CV-1090-SMY, 2021 WL 462624, at *5 (S.D. Ill. Feb. 9, 2021); *Petworth Holdings, LLC v. District of Columbia*, No. CV 18-3 (JEB), 2021 WL 1167019, at *5 (D.D.C. Mar. 26, 2021).

Here, Petitioners applied for a condominium map under an expedited program that provided numerous benefits to applicants in exchange for one thing: all non-owner tenants must be offered a lifetime lease ("Lifetime Lease Requirement"). *See generally* App. F-5; F-17–F21. The Pakdels

> agreed to offer their tenant a lifetime lease as a condition of converting and duly received final approval from the City to convert. During this process, they had several opportunities to request an exemption from the lifetime lease requirement but did not do so. Nevertheless, at the eleventh hour, they balked. Refusing to execute the lifetime lease they had offered to their tenant, Plaintiffs instead sued the City, contending under various theories that the lifetime lease requirement violates the Takings Clause of the Fifth Amendment.

App. A-5. The Pakdels signed an agreement with the City to enter into a lifetime lease with their tenant, waiving their right to object to the Lifetime Lease Requirement, and then offered their tenant an unsigned lifetime lease. App. A-9.

In 2017, they received exactly what they had applied for—a final map converting their tenancy-in-common ownership into a condominium. App. A-9. The Panel expressly found that "[u]ntil that point, Plaintiffs had given the City no indication that they objected to the Lifetime Lease Requirement." App. A-9. Instead, only after the Pakdels were in violation of the conditions of approval, after all applicable appeal periods had run and when the City could no longer deny the application or otherwise amend the conditions of approval, did the Pakdels ask the City to waive the Lifetime Lease Requirement. App. A-9.

The Panel correctly determined that this behavior did not satisfy the long-recognized requirement of a

"meaningful" application to satisfy the finality requirement. On that basis, the Panel affirmed the District Court's dismissal of the Pakdels' claim asserting that the Lifetime Lease Requirement effected an unconstitutional taking of the Pakdels' property. App. A-25.

The Complaint in this case asserts that the Lifetime Lease Requirement exacted an unconstitutional condition or exaction under the *Nollan/Dolan* rubric. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); App. G-11–G-13. But review of the Panel's holding is unwarranted for two reasons. First, the unconstitutional conditions claim fails because the Complaint does not assert a protected property interest. Second, as the Panel correctly held, the Ninth Circuit, like the growing majority of lower courts around the country, hold that the unconstitutional conditions analysis does not apply to legislatively imposed conditions like the Lifetime Lease Requirement. The Dissent did not dispute the correctness of this aspect of the Panel's decision.

STATEMENT OF THE CASE

A. Background

Petitioners Peyman Pakdel and Sima Chegini are residents of Akron, Ohio who purchased a tenancy-in-common ("TIC") interest in a six-unit apartment building in San Francisco in 2009. App. A-5. Their TIC interest gave them ownership rights to a single unit in

the building ("Unit"). App. C-2. When they purchased their Unit, the Pakdels signed a private agreement to cooperate with the owners of the other five units in the building to convert their TIC properties to condominiums. App. C-2. Shortly after their purchase, the Pakdels rented the Unit to a tenant who continues to reside there today. Petition at 28; App. A-5.

Conversion of TICs to condominiums changes the *manner* in which real property is owned and regulated. *See*, *e.g.*, Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 Colum. L. Rev. 987, 989 (1963) ("[I]n all of its forms [a condominium's] principal goal remains constant: to enable occupants of a multi-unit project to achieve more concomitants of ownership. . . ."); *San Francisco Inches Toward Deal on 'Tenants in Common' Condo Conversions*, KQED (April 17, 2013), https://www.kqed.org/news/94420/new-tic-to-condo-plan-would-impose-10-year-conversion-moratorium-in-exchange-for-lottery-bypass ("Because of the cumbersome ownership structure, TICs cost 10 to 20 percent less than a comparable condo. And unlike condos, they can be financed only with adjustable rate mortgages. Just about anyone who is part of a TIC hopes to convert the building to a condo, because conversion instantly raises the value of the property and allows the owner to refinance into a fixed-rate mortgage."). In San Francisco, when a TIC converts into condominium units, the change exempts the condominium units from the City's rent control laws, gives condominium owners greater access to financing, and immediately

increases property values of the converted units. App. A-7; App. F-4 (Ord. No. 117-13 § 1(c)(2)).

At the time the Pakdels purchased their Unit, San Francisco TIC owners who wished to convert their properties into individually-owned condominium units had to apply for conversion through a lottery system that often took a decade to complete and did not guarantee successful conversion from TIC to condominium status. App. A-5; App. F-3. In 2013, San Francisco enacted Ordinance 117-13, placing a moratorium on the existing condominium conversion program lottery and creating the Expedited Conversion Program ("ECP") in order to eliminate this backlog and facilitate the conversion of eligible TIC units to condominiums. *See generally* App. F (S.F. Subdiv. Code §§ 1396.4, 1396.5). The ECP required, as a condition of approval under the program, that applicants for conversion offer a lifetime lease to any existing non-owning tenants. App. F-17–F-21 (S.F. Subdiv. Code § 1396.4(g)). San Francisco adopted this Lifetime Lease Requirement to balance the significant financial benefits the ECP program offers to TIC owners, including an estimated 15% increase in property values for condominiums as compared to TICs, the potential of significantly higher rent for condominium units, improved access to credit and a substantially shortened application process, with the City's urgent need to avoid mass displacement of existing tenants from apartments converted into condominiums and thereby removed from rent control restrictions. App. F-4–F-5.

The Pakdels did not seek relief from the obligations of their TIC agreement with their co-owners, or negotiate the voluntary termination of the lease with their tenant through a tenant buyout. Instead, with their tenant still living in the Unit, the Pakdels and their fellow TIC owners applied to subdivide their property into six condominiums under the ECP in 2015. App. A-8.

In the course of applying for a condominium map under the ECP, the Pakdels entered into an agreement with the City committing to offer their tenant a lifetime lease, and then presented an unsigned lifetime lease for the tenant to sign; after the tenant executed the lease, however, the Pakdels refused to sign it. App. A-9. In their agreement with the City, the Pakdels expressly covenanted and agreed not to seek a waiver of the Lifetime Lease Requirement. App. A-9. In exchange for this agreement, the Pakdels received a partial refund of their ECP application fee. App. A-9; *see* App. F-21–F-22 (S.F. Subdiv. Code § 1396.4(h)). The Pakdels thus indicated in writing and by their conduct their acceptance of the terms of the ECP and the sufficiency of the corresponding benefits of condominium conversion.[1]

[1] In the exactions context, scholars have analogized permit issuance to a "trade" whereby the permit applicant agrees to comply with conditions in exchange for the permit; in this context, "[a]cceptance by the homeowner of the trade constitutes the best evidence that the compensation is adequate." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1505

Throughout the ECP process, the Pakdels repeatedly confirmed that they intended to comply with the Lifetime Lease Requirement, and never sought relief from the requirement while their application was being considered by the Planning Department, Planning Commission or the Department of Public Works. App. A-9. In short, prior to receiving their condominium map, the Pakdels never objected to granting a lifetime lease to their tenant. App. A-9; *see also* Unofficial Transcript of Oral Argument, *Pakdel v. City and County of San Francisco*, No. 17-17504, 2019 WL 5497631 (9th Cir. Sept. 13, 2019). Similarly, the Pakdels never requested other relief from the requirements of the ECP, such as the fee requirement, as permitted under Subdivision Code section 1396.4(j).

In December 2016, the Pakdels and their co-tenants received *exactly what they had applied for*: expedited approval of a final condominium map for their property. App. A-9. The Pakdels recorded the condominium deed for the Unit on March 25, 2017. App. C-3. The tenant then submitted an executed lifetime lease for the Pakdels to execute. App. C-3. At this point, for the first time, the Pakdels made their objection to the Lifetime Lease Requirement known. After the final condominium map was recorded, all available administrative avenues for relief were time-barred and the Pakdels were in violation of their obligations under the ECP, the Pakdels requested that the City either release them from the Lifetime Lease Requirement of

(1989). "Within the particular structure of the takings clause, the condition on the permit is justified." *Id.*

the ECP or compensate them for transferring a lifetime lease interest in their property. App. A-9. The other applicants to convert the six-unit property did not join this request for relief from the requirements of the ECP. The City refused, and reminded the Pakdels that their continued failure to execute the lifetime lease violated the ECP and could result in an enforcement action. App. A-9; C-3.

On June 26, 2017, the Pakdels filed this lawsuit.

By its own terms, the ECP has now expired. The last date for the Department of Public Works to accept applications and fees under the program was January 24, 2020. *See* App. F-12–F-13. The condominium conversion lottery system will recommence no sooner than January 2024. *See* App. F-25.

B. Proceedings Below

San Francisco filed its motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. On November 20, 2017, the District Court granted the City's motion, holding that the Pakdels' takings claim did not satisfy the state litigation prong of the ripeness test set forth in *Williamson County*, 473 U.S. at 172, and rejecting Plaintiffs' invitation to exercise the District Court's discretion not to impose the ripeness requirement set forth in that case. App. C-6–C-7. The District Court also rejected the remaining claims under § 1983 because the Pakdels failed to allege membership in a protected class, or violation of a fundamental right. App. C-12–C-14. In addition, the

District Court held that San Francisco's adoption of the ECP is supported by the legitimate governmental purpose of balancing the impacts of large-scale conversion of apartments into condominiums with the potential for displacement of tenants. App. C-13–C-14. This purpose passes the deferential rational basis standard of review. App. C-14. Finally, the District Court rejected the argument that the private contracts between the Pakdels and their fellow TIC owners, and the lease with the Pakdels' tenant, combined with the decision to apply for the benefits of the ECP, had resulted in a seizure of Petitioners' property. App. C-15–C-16. The Pakdels appealed.

After the parties had filed their briefs in the Ninth Circuit, but before oral argument, this Court issued its decision in *Knick*. In *Knick*, this Court reconsidered the two prongs of the *Williamson County* ripeness test: The finality requirement, holding that a takings claim challenging the application of land use regulations is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue; and the state-litigation requirement, holding that a claim is not ripe if the plaintiff did not seek compensation [for the alleged taking] through the procedures the State has provided for doing so. *See Williamson County*, 473 U.S. at 191. While it overruled the state-litigation prong of the *Williamson County*, this Court's ruling in *Knick* left intact *Williamson County's* "final decision" requirement. *Knick*, 139 S.Ct.

at 2169; *see also Sagaponack Realty, LLC v. Vill. of Sagaponack*, 778 F.App'x 63, 64 (2d Cir. 2019).

In a unanimous Memorandum Opinion, the Panel affirmed the District Court's dismissal with prejudice of the Pakdels' Fourth Amendment unreasonable seizure claim, the substantive due process and equal protection claims. App. B. A majority of the Panel also affirmed the trial court's decision dismissing the takings-related causes of action, holding that the Pakdels' takings claim "remains unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit." App. A-13. The Pakdels' request for rehearing en banc was denied on October 13, 2020. Nine judges dissented from the decision. App. E.

REASONS THIS COURT SHOULD DENY THE PETITION

I. THE PANEL'S ENFORCEMENT OF *WILLIAMSON COUNTY'S* FINALITY REQUIREMENT COMPORTS WITH *KNICK* AND ALL SISTER CIRCUITS.

Contrary to the clear holdings and reasoning of the Panel below, the Petition for Writ of Certiorari ("Petition") argues that the Panel has imposed an improper exhaustion requirement on takings plaintiffs in violation of *Williamson County* and *Knick*. The Petition mischaracterizes the holdings below and the facts in this case. Because the Panel decision comports with *Knick*,

and there is no circuit split, this Court should decline review.

A. The Panel's Decision Correctly Applies This Court's Final Decision Rule Precedents, Including Both *Knick* and *Williamson County*.

The Panel rejected the Pakdels' attempts, asserted below and reiterated here, to conflate the concepts of ripeness and exhaustion. In fact, consistent with this Court's holdings in both *Williamson County* and *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 504 (1982), the Panel firmly acknowledged that "[i]t is true that, in general, 'there is no requirement that a plaintiff exhaust administrative remedies before bringing a §1983 action.'" App. A-21 (citing *Williamson County*, 473 U.S. at 192). But while a property owner need not exhaust administrative remedies in order to ripen a takings claim, *Williamson County* nevertheless held that failure to seek a variance or its equivalent through procedures made available by the local government means that there is no "final decision" for takings purposes. 473 U.S. at 193. It is this requirement that the Panel found the Pakdels had not met. App. A-18.

In rejecting the Pakdels' false equivalency between requiring a final decision and administrative exhaustion, the Panel relied on the policy rationale for the finality requirement as articulated in *Williamson County*.

> *Williamson County* illuminates the rationale for and scope of the finality requirement. There, a county planning commission disapproved a landowner's proposed plat for developing a tract of land after determining that the plat violated various zoning regulations. 473 U.S. at 181, 105 S.Ct. 3108. Local government entities "had the power to grant certain variances" from the zoning regulations that would have resolved many of the commission's objections to the plat. *Id*. at 188, 105 S.Ct. 3108. Yet the landowner did not seek such variances. *Id*. Instead, the landowner brought suit in federal court alleging that the commission's application of the zoning regulations amounted to a taking of the property. *Id*. at 182, 105 S.Ct. 3108. The Supreme Court held that the takings claim was not ripe in part because factors central to determining whether a regulatory taking occurred—such as "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations"—"simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id*. at 191, 105 S.Ct. 3108. *Williamson County* thus made clear that the finality requirement "is compelled by the very nature of the inquiry" required in a takings case. *Id*. at 190, 105 S.Ct. 3108.

App. A-13.

The Panel also found support for its decision in other precedents of this Court, which emphasize "that the finality requirement 'responds to the high degree of discretion characteristically possessed by land-use boards' in granting variances from their general regulations with respect to individual properties." App. A-13–A-14 (citing *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997).) Specifically, the Panel relied on this Court's precedents to hold that "[i]n light of 'such flexibility or discretion,' courts cannot make 'a sound judgment about what use will be allowed' by local land-use authorities merely by asking whether a development proposal 'facially conform[s] to the terms of the general use regulations.'" App. A-14 (citing *Suitum*, 520 U.S. at 738–39; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (explaining that "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes," which requires "a final and authoritative determination" of how the regulation will be applied to the property in question)).

Petitioners acknowledge that the exhaustion requirement "generally refers to administrative and judicial procedures by which an injured party may seek *review of an adverse decision* and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." Petition at 14 (citing *Williamson County*, 473 U.S. at 193) (emphasis added). The Panel did not require plaintiffs to appeal an adverse decision on their map application in order to ripen their claim, because the Pakdels received exactly the decision they

sought—a final condominium map that conformed precisely to the map they applied for. App. A-9, Thus, there was no appeal to administratively exhaust. Rather, the Panel followed longstanding Supreme Court precedent requiring that a takings plaintiff present a "meaningful" application to the local government, including any available variances, waivers or exceptions that allow for a determination of how far the city's regulation of a particular property really goes.

> Accordingly, under *Williamson County*, "a final decision exists when (1) a decision has been made 'about how a plaintiff's own land may be used' and (2) the local land-use board has exercised its judgment regarding a particular use of a specific parcel of land, eliminating the possibility that it may 'soften[] the strictures of the general regulations [it] administer[s].'"

App. A-14 (citing *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1147 (9th Cir. 2010)) (alterations in original) (quoting *Suitum*, 520 U.S. at 738–39). "Plaintiffs who 'have foregone an opportunity to bring their proposal' to use their property in a manner that diverges from the regulation alleged to effect a taking 'before a decisionmaking body with broad authority to grant different forms of relief' [. . .] 'cannot claim to have obtained a "final" decision.'" App. A-15 (quoting *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d at 503).

The Panel noted numerous opportunities the Pakdels had, but failed to take, during the ECP

application process to notify San Francisco of their true intentions to avoid the Lifetime Lease Requirement. App. A-15–A-17. These were not obligations to exhaust administrative appeals of an adverse decision, since no adverse decision was ever rendered. Rather, these were the Pakdels' opportunities to seek a waiver or variance from the program requirements of the ECP.

The Petition concedes that a final decision has not been reached for purposes of ripeness until a municipality has reached a "conclusive determination . . . whether it would allow [the property owner] to develop the subdivision **in the manner [it] proposed**." Petition at 14 (citing *Williamson County*, 473 U.S. at 193) (emphasis added). Because the Pakdels never notified San Francisco that it objected to the Lifetime Lease Requirement until *after* they had obtained final approval of a project that conformed to the requirements of the ECP (with no waivers or exceptions), the Panel correctly applied this Court's precedents in finding Petitioners' case unripe for review. App. A-9, A-17. As the Panel explained,

> [the Pakdels] do not dispute that they gave no indication of any reservations about the Lifetime Lease Requirement despite having had these opportunities to request an exemption. To the contrary, after allowing each objection period to lapse, they forged ahead with the conversion process. . . .

App. A-17. Even the Pakdels failed to assert that their belated attempts to seek relief from the Lifetime Lease

Requirement satisfied the ripeness requirement of *Williamson County* until they filed their Supplemental Reply Brief on Appeal. App. A-17 n. 5. As a consequence, the Panel followed this Court's lead in *Williamson County*, and refused to allow the Pakdels to "make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant." App. A-18 (citing *Williamson County*, 473 U.S. at 190). Here, as in *Williamson County*, the property owners' failure to seek a variance through procedures made available by the local land use authority meant that the authority had not reached a "final decision" satisfying the ripeness test. App. A-18 (*see* 473 U.S. at 193).

The Petition fails to explain how a final decision on a project application that did not include any request for a variance or exception to the Lifetime Lease Requirement satisfies the final decision rule set forth in *Williamson County*. Nor does it cite a single case adopting its theory that a property owner can avoid the "meaningful application" requirement by allowing all applicable administrative deadlines to pass without presenting the desired project to the local government decisionmakers. Requiring a property owner to explicitly request the project it desires during the administrative process, rather than after all applicable administrative deadlines have passed, is entirely consistent with this Court's holdings in *Williamson County* and *Patsy*, and does not create an impermissible exhaustion requirement.

B. The Decision Below Does Not Implicate a Split Among the Circuits.

The Petition cites no case where a property owner obtained *approval* of their requested project, then challenged the local land use authority for failing to approve a *different* project. And no case from any jurisdiction, nor any secondary source, criticizes the decision by the Panel below. The reason for this is simple: because the Pakdels never disclosed their objection to the Lifetime Lease Requirement while the City was considering their application under the ECP, App. A-17, they never tested the boundaries of the ordinance at issue while the City could grant them the relief they now seek. *See*, *e.g.*, *Suitum v. Tahoe Reg'l Plan. Agency*, 520 U.S. 725, 737 (1997) ("[A] developer must at least 'resort to the procedure for obtaining variances . . . [and obtain] a conclusive determination by the Commission whether it would allow' the proposed development[ ] in order to ripen its takings claim."). Petitioners' analysis of cases describing circumstances where property owners had not sat on their rights, but rather could still ripen their claims by filing an available variance or its equivalent is not, therefore, instructive.

The Pakdels' refusal to present their preferred project to San Francisco before the expiration of all administrative deadlines distinguishes this case from those cited in the Petition. The fact that the plaintiffs in some of those cases could *still ripen* their takings claims does not demonstrate a split among the circuit courts, but rather underscores the uniqueness of the

facts presented here. In fact, none of the cases cited in the Petition present the final decision problem the Pakdels brought on themselves.

In *DM Arbor Ct., Ltd. v. City of Houston*, 988 F.3d 215 (5th Cir. 2021), the Fifth Circuit considered ripeness in the context of a property owner who had failed to obtain *any decision* on its permit application from the final arbiter of such permits—the Houston City Council—before filing suit. While the case was pending, however, the city council denied the permit. Thus, as the court explained, "[e]veryone agrees that the impediment that existed in the district court—the lack of a final decision from the City Council—is now absent." 988 F.3d at 220. There was no issue of the property owner failing to ask the city for the project it wanted approved. In that case, the apartment owner simply filed its lawsuit prematurely, before it had reached the end of its application process under the city's ordinary procedures. That case did not consider an applicant's failure to present the decisionmaker with a meaningful application that accurately reflected the desired project, as was the case here.

Similarly, the Petition relies on cases from the Second and Fourth Circuits that are factually distinguishable from this case. In those cases, the courts applied the final decision requirement to situations where plaintiffs had sought approval for the desired project, but filed their suits prematurely. In *Thomas v. Town of Mamakating, New York*, 792 F.App'x 24 (2d Cir. 2019), the Second Circuit applied the "meaningful application" test, holding that "[i]n practice, the final decision

requirement 'conditions federal review on a property owner submitting at least one meaningful application for a variance.' " 792 F. App'x at 27. While it is true that the property owner in that case could still ripen her claim by filing an available variance application, *id*., the court was not required to decide the issue presented in *Pakdel*. Specifically, the court was not called upon to determine whether an unripe claim could be rendered permanently unripe if the property owner had obtained a *different project approval* instead of timely seeking a variance authorizing its preferred project.

Similarly, in *Sagaponack Realty*, the Second Circuit held that the property owner's takings claim was unripe where plaintiff had filed a lawsuit with a decision pending on its subdivision application. The court found that the village was withholding a final decision on the competing applications made for use of the property pending a decision by the state courts. *Sagaponack Realty*, 778 F.App'x at 64. *See also Ballantyne Vill. Parking, LLC v. City of Charlotte*, 818 F.App'x 198, 203 (4th Cir. 2020) (due process claim "not fit for judicial decision" because administrative appeal was still pending).

These circuit court cases, and the trial court decisions standing for the same principles,[2] correctly

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[2] In *Driftless Area Land Conservancy v. Pub. Serv. Comm'n of Wisconsin*, No. 19-CV-1007-WMC, 2020 WL 6822707, at *10 (W.D. Wis. Nov. 20, 2020), the court did not resolve the issue of a final decision, instead reserving it for resolution at trial:

applied the final decision rule to hold that lawsuits filed while administrative permitting processes were incomplete are unripe for judicial review under *Williamson County*. Each of these decisions is entirely consistent with the Panel's holding that a property owner that refuses to submit a meaningful application for its preferred project before all applicable deadlines have passed fails to present a ripe takings claim for judicial review.

In fact, the Pakdels cite only one case with facts similar to those presented here. Unsurprisingly, the court in that case determined that the plaintiffs had not *and could not* present a ripe claim because they had allowed all applicable time periods to lapse before testing the bounds of the local land use laws to their property. *See Bar-Mashiah v. Inc. Vill. of Hewlett Bay Park*, 2019 WL 4247593, at *9 (E.D.N.Y. Sept. 6, 2019).

Because the Panel did not impose an exhaustion requirement, but rather properly required takings plaintiffs to ripen their claim by timely presenting a meaningful application to the local land use authority, the Pakdels offer no basis for this Court to grant further review, much less summary vacatur of the judgment below.

"[r]egardless, the court will leave any remaining factual dispute over the finality of the CPCN to summary judgment or trial."

C. This Case Is the Wrong Vehicle to Resolve Any Lingering Ambiguity Over the Finality Rule Left Open by This Court's Decision in *Knick*.

Both the Petition and the Amicus Curiae Brief of Pelican Institute For Public Policy ("Pelican Amicus Brief") invite this Court to revisit the final decision rule. Interestingly, the Pelican Institute does not argue that the Panel misapplied this Court's precedents, or that the ruling implicates a split in circuit court authority. Rather, it invites this Court to revisit its controlling precedents on the theory that *Knick* did not go far enough in overruling the ripeness tests established 37 years earlier in *Williamson County*. Pelican Amicus Brief at 2 (describing *Knick* as "only a partial victory for takings claimants seeking redress in federal courts because it did not also overturn the finality requirement"). But whether or not this Court ever goes beyond its ruling in *Knick*, this is not the case to do it. That is because, contrary to the Pelican Institute's characterization, the Pakdels' experience here was anything but "typical of takings claimants over the years." *Id*. at 2.

Far from the usual takings case filed by a disappointed permit applicant, these property owners received the exact condominium map they applied for with their fellow TIC owners. App. A-9. However, as the Panel pointedly explained, the Pakdels had actively concealed their true project goals from the local decisionmakers until six months after they received their final condominium map. App. A-9; A-17. Then, only after they had obtained all of the benefits of an

admittedly valuable land use approval, *see* App. A-7 (describing economic benefits of conversion to condominium ownership); App. A-9 (Petitioners received fee refund in exchange for Lifetime Lease agreement); App. F-4 (property value increases by approximately 15% when converted from TIC to condominium); App. F-4 (condominiums not subject to rent control limitations of TIC units), did they refuse to comply with the conditions of approval, App. A-17, citing the City's response to their violation of the conditions of approval as the basis for a takings claim. App. G-8–G-9. This is *not* a "typical" takings case. Proving this point, Petitioners and amici fail to cite even one similar case.

To the extent the Court intends to revisit the final decision requirement of *Williamson County* at some future date, this case is also a poor vehicle to do so because Petitioners argued that their belated requests for forgiveness from the Lifetime Lease Requirement satisfied the final decision requirement for the first time in their Supplemental Reply Brief on appeal. App. A-17 n. 5. Even then, the argument was only "mentioned in passing in a footnote." *Id.* Because the Panel held that the Pakdels' request for relief from the Lifetime Lease Requirement was untimely and had been expressly waived, it did not need to consider whether they had waived the right to raise the argument at all. Granting review would require this Court to consider whether Petitioners waived these arguments in the Ninth Circuit.

> [I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed

> argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.

Vargas-Colon v. Fundacion Damas, Inc., 864 F.3d 14, 24 (1st Cir. 2017); *see also State of New York v. United States Dep't of Justice*, 964 F.3d 150, 166 (2d Cir. 2020) (denying en banc rehearing) (Katzmann, J., dissenting) (criticizing the panel for "revers[ing] the district court's grant of partial summary judgment . . . based on legal arguments that Defendants either had not made, had abandoned, or had even expressly disavowed"); *Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016) (appellate courts generally do not consider arguments appellants failed to include in opening brief); *Dream Games of Arizona, Inc. v. PC Onsite*, 561 F.3d 983, 994 (9th Cir. 2009) (appellant waived argument by failing to include that argument in its opening brief).

II. THIS CASE IS A POOR VEHICLE TO REVISIT THE APPLICABILITY OF THE *NOLLAN/DOLAN* UNCONSTITUTIONAL CONDITIONS DOCTRINE TO LEGISLATIVE ENACTMENTS.

A. The Case Does Not Implicate the Unconstitutional Conditions Question.

The doctrine of unconstitutional conditions forbids the government from conditioning the receipt of a government benefit on waiver of a constitutionally

protected right. *Simmons v. United States*, 390 U.S. 377, 394 (1968); *Louisiana Pac. Corp. v. Beazer Materials & Servs., Inc*., 842 F.Supp. 1243, 1248 (E.D. Cal. 1994). The doctrine precludes attaching conditions that penalize the exercise of a right protected by the Constitution. *United States v. Pizarro*, 717 F.2d 336, 348 (7th Cir. 1983). The doctrine only applies if the government places a condition on the exercise of a constitutionally protected right. *Petrella v. Brownback*, 787 F.3d 1242, 1265 (10th Cir. 2015). Here, the Pakdels fail to state a protected property interest that San Francisco impinged in exchange for the Lifetime Lease Requirement. As a result, the Panel was correct in rejecting this claim.

Courts apply "a two-step analysis to determine whether a 'taking' has occurred: first, we determine whether the subject matter is 'property' within the meaning of the Fifth Amendment and, second, we establish whether there has been a taking of that property, for which compensation is due." *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985, 1002 (9th Cir. 2007), aff'd, 553 U.S. 591 (2008). Without a demonstrated property interest, there is no takings claim for the court to analyze, and the claim must be dismissed. If a plaintiff fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end. *Maritrans Inc. v. U.S*., 342 F.3d 1344, 1352 (Fed. Cir. 2003).

"Property interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings

that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Bowers v. Whitman*, 671 F.3d 905, 912 (9th Cir. 2012). To determine whether a property interest has vested for Takings Clause purposes, "the relevant inquiry is the certainty of one's expectation in the property interest at issue." *Engquist*, 478 F.3d at 1002. "[A] mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). "[I]f the property interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification or removal of the interest will not constitute a . . . taking." *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015) (citation omitted); *see also Miller v. Bd. of Trustees of the California State Univ.*, No. 2:20-CV-03833-SVW-SK, 2021 WL 358376, at *5 (C.D. Cal. Jan. 13, 2021). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it"; "[h]e must, instead, have a legitimate claim of entitlement to it." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (internal quotation marks omitted); *see also UMC Dev., LLC v. D.C.*, 401 F.Supp.3d 140, 152 (D.D.C. 2019).

Here, Petitioners seek to protect their purported right to occupy the Unit at any time. Petition at 28. But Petitioners voluntarily gave up possession of their

property when they leased the Unit to their tenant. App. A-7; App. B-2; App. G-2 (¶ 2). The owners of the six apartments at the property then voluntarily and jointly applied to convert their properties, including the Unit, to condominiums under the ECP. *See* Petition at 27. California law does not create a certain expectation that landlords can eject their tenants at the time of their choosing, without cause. Instead, as the Panel unanimously recognized, "Plaintiffs do not have a fundamental right under California's Ellis Act [California Government Code §7060(a)] to exclude people from their home once it has been converted into a condominium." App. B-3; *but see* Petition at 28 n. 15 (referencing, without citing, the Ellis Act).

The Ellis Act does not apply to condominiums, and does not apply when, as here, the property owner has entered an agreement with the government to offer accommodations for rent or lease in exchange for a direct financial contribution. App. B-3. "[I]f a statute creates a property right . . . , the property interest so created is defined by the statute. . . ." *In re C.R. Bard, Inc.*, MDL. No. 2187, *Pelvic Repair Sys. Prod. Liab. Litig.*, 810 F.3d 913, 932 (4th Cir. 2016). Moreover, Petitioners never exercised their rights to evict the tenant under the Ellis Act prior to applying for the ECP. App. A-9 (Pakdels offered tenant lifetime lease during ECP application process). The Complaint alleges nothing more than a legally unsupported desire to retain flexibility to evict their tenant at an unspecified future date.

Similarly, "an interest in a particular land use does not constitute a protected property interest,

unless the interest has vested in equity based on principles of detrimental reliance." *Bowers*, 671 F.3d at 916. Here, Petitioners sought to change the manner in which they held title to the property, not its residential use. And, since the City's authority to regulate or even prohibit condominium conversion is long recognized, *City of West Hollywood v. Beverly Towers, Inc.*, 52 Cal.3d 1184, 1194 (1991), the Pakdels cannot state a constitutionally protected right to convert their Unit into a condominium.

The unilateral expectations of Petitioners are not a cognizable property interest for takings purposes. Having failed to assert a constitutional right to exclude their tenant at the time of their choosing, or to convert the form of their property interest from a TIC to a condominium, the Panel correctly rejected the Pakdels' unconstitutional conditions claim. As a result, whether the condition of the Lifetime Lease Requirement was imposed via legislative or ad hoc administrative process is irrelevant, and this case does not present an opportunity to resolve any perceived split between the circuit courts.

B. Rather Than a Split Between the Circuits, the Petition Reflects Growing Consensus Since *Koontz* that the Unconstitutional Conditions Doctrine Does Not Apply to Legislatively Imposed Conditions.

While this Court has not expressly resolved the question whether the unconstitutional conditions

doctrine applies to generally applicable land use regulations, *see Better Hous. for Long Beach v. Newsom*, 452 F.Supp.3d 921, 933 (C.D. Cal. 2020) (citing *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016)) (Thomas, J., concurring in denial of cert.), the Petition and amicus briefs demonstrate that, since this Court issued its decision in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013), the lower courts are coalescing in a consensus consistent with the Panel's decision in this case. Moreover, *Dolan* itself supports this limitation. In that case, " 'the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel,' instead of imposing an 'essentially legislative determination [ ] classifying entire areas of the city.' " *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (citing *Dolan*, 512 U.S., at 385).

In support of their invitation to resolve the question, Petitioners attempt to blur the distinction between cases where land use restrictions were imposed through generally applicable legislation and those where exactions were imposed on an ad hoc basis. Petition at 30 ("*Nollan*, *Dolan* and *Koontz* all involved conditions mandated by general legislation."). But this Court has expressly differentiated between these circumstances, holding that "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005). In *Koontz*, the Court analyzed an "adjudicative, individual determination," and the majority never addressed *Nollan/Dolan's*

application to general legislation. Instead, the Court repeatedly emphasized "the special vulnerability of land use permit applicants to extortionate demands for money." *Koontz*, 570 U.S. at 619. Moreover, *Dolan's* "rough proportionality" requirement demands an "individualized determination" that the exacted public benefit "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. This requirement does not apply in the context of generally applicable regulations, which, by definition, do not involve individualized determinations. *See also Better Hous. for Long Beach*, 452 F.Supp.3d at 932–33.

In this case, the Panel cited to binding circuit authority in concluding that the unconstitutional conditions doctrine does not apply in cases where the alleged taking arises from a generally applicable legislatively imposed condition rather than an ad hoc permit condition. App. A-10 n. 4 (citing *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008)). Nothing in this Court's decision in *Koontz* undermined the decision in *McClung*. Instead, the holding in *McClung* remains good law and all but one of the cases cited in the Petition that were decided since *Koontz* have agreed that the *Nollan/Dolan* rubric is inapplicable to legislatively imposed requirements. *See* Petition at 34; Amicus Brief of Southeastern Legal Foundation et al. ("SLF Amici Brief") at 14–17 (citing only one federal case since *Koontz* that did not follow reasoning of *McClung*). The single outlier has been disagreed with and distinguished, including by courts in its own district. *Levin*

v. City and County of San Francisco, 71 F.Supp.3d 1072 (N.D. Cal. 2014), disagreed with by, *e.g.*, *Better Hous. for Long Beach*, 452 F.Supp.3d at 932; *Ballinger v. City of Oakland*, 398 F.Supp.3d 560, 571 (N.D. Cal. 2019); *Bldg. Indus. Ass'n – Bay Area v. City of Oakland*, 289 F.Supp.3d 1056, 1058 (N.D. Cal. 2018), aff'd sub nom. *Bldg. Indus. Ass'n – Bay Area v. City of Oakland*, 775 F.App'x 348 (9th Cir. 2019).

Because the lower courts examining this issue have followed this Court's lead since its decision in *Koontz* by applying the *Nollan/Dolan* analysis only to cases involving individualized, ad hoc land use regulations, there is no reason for the Court to weigh in on the issue and resolve a nonexistent split of authority.

C. Petitioners and Amici Fail to Offer a Convincing Rationale for Expanding the Unconstitutional Conditions Doctrine to Legislatively Imposed Conditions.

According to Amicus Curiae the Cato Institute ("Cato"), "[i]t makes little sense" to treat legislatively imposed conditions different from ad hoc permitting conditions, because legislators are "just as capable as administrators of imposing uncompensated conditions." Cato Brief at 3-4. SLF Amici similarly argue that the Ninth Circuit below made the "improper distinction" between conditions imposed "legislatively, rather than administratively." SLF Amici Brief at 11. Such arguments "ignore the extent to which open-ended land use regulatory processes can enable robust,

legitimate, and inclusive local politics, a context that may yield substantively better resolutions than abstract, preconstituted formulas" to "complicated and intractable local disputes." Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 669 (2004). Moreover, residents affected by legislative acts wield powerful political remedies capable of holding legislators accountable and counteracting legislative overreach. Vicki Been, *"Exit" As A Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 Colum. L. Rev. 473, 545 n. 150 (1991) ("Neighbors also have political, or voice, remedies: the public can prohibit any exactions at all, either directly through initiatives or indirectly by pressuring elected representatives to legislate such a prohibition; it can allow exactions but vote against those politicians who abuse them; and it can lobby against conditioned benefits in particular cases.").

The ECP exemplifies a legislative fix carefully formulated through a transparent and inclusive process that embraced public participation and debate. *See*, *e.g.*, *S.F. approves condo conversion deal despite objections*, S.F. Examiner, June 12, 2013, https://www.sfexaminer.com/news/s-f-approves-condo-conversion-deal-despite-objections/; *S.F. condo compromise deserves praise*, S.F. Chron., April 16, 2013, https://www.sfchronicle.com/opinion/editorials/article/S-F-condo-compromise-deserves-praise-4439893.php; Heather Knight, *Supes propose shortcut to S.F. condo conversion*, S.F. Chron., June 12, 2012, https://www.sfchronicle.com/

bayarea/article/Supes-propose-shortcut-to-S-F-condo-conversion-3626365.php. The ECP was painstakingly calibrated as a "one-time adjustment to the backlog in applications for [condominium] conversions given the specific needs of existing owners of tenancy-in-common units." App. F-3 (Ordinance No. 117-13 § 1(c)(1)). The ECP balanced the interests of TIC owners whose property values would appreciate immediately upon conversion with those of TIC tenants, who could face significant costs associated with displacement if the ECP did not include measures to protect against evictions. App. F-4–F-5.

The City's elected Board of Supervisors was uniquely situated to navigate the discordant interests and craft the ECP, a tailored solution to a distinctive and vexing public policy puzzle. *See* Fenster, at 669–70 ("When decision-making processes enable the inclusion, debate, and compromise of fundamentally opposed positions within the complicated matrix of personal, social, environmental, and fiscal issues central to local government, they play an important function in identifying and allowing contest over issues of local importance."); Sean F. Nolon, *Bargaining For Development Post-Koontz: How The Supreme Court Invaded Local Government*, 67 Fla. L. Rev. 171, 192 (2015) ("Municipalities can use a range of deliberative processes-including negotiation-to involve citizens in the legislative decision-making context while making legislative decisions, when adopting a comprehensive plan, zoning regulations, as well as during adjudicative decisions like development approvals."). The ECP

facilitated the conversion of thousands of TIC units into condominiums, supplying public goods to landlords and tenants alike, without giving rise to any lawsuits against the City apart from the subject lawsuit. *See Condominium Conversion Restrictions*, S.F. Plan., S.F.'s Community Stabilization https://projects.sfplanning.org/community-stabilization/condominium-conversion-restrictions.htm (last visited April 27, 2021); *see also Expedited Conversion Program 2019 Update*, S.F. Public Works (2019), https://sfpublicworks.org/sites/default/files/ECP_2019_Update.20190426.pdf (indicating one lawsuit challenging the ECP). Subjecting the ECP and similar legislative solutions to the unconstitutional conditions doctrine would "stifl[e] . . . innovation that can make government run more efficiently, increase public safety, enhance national security, or provide sought-after public goods" and "involve undesirable or intolerable second-guessing of electorally accountable officials." Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 Utah L. Rev. 1773, 1814 (2012).

Moreover, "exposing legislative exactions to *Nollan* and *Dolan* scrutiny could put the judiciary in the position of regularly micromanaging local governments' fiscal decisions and thereby stifle municipalities' abilities to make responsible roadway, utility, and other plans for the future." Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 198 (2019). This Court has previously cautioned against adopting a test in the takings context that would "require courts to scrutinize the efficacy of a vast array of state and

federal regulations—a task for which courts are not well suited" or "empower . . . courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Lingle*, 544 U.S. at 544. As this Court stated in *Lingle*, "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established. . . ." *Id*. at 545.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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