No. 20-1212

In The
Supreme Court of the United States

PEYMAN PAKDEL; SIMA 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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

San Francisco's decision is final—it will not change its mind. It told the Pakdels so. App. A-9 ("[T]he City refused both requests."); Brief in Opposition (BIO) at 9. Yet, the Ninth Circuit below held that the City had not reached a final decision, conflating *Williamson County*'s "final decision" ripeness requirement—a straightforward question that asks, "are there any procedures remaining *in the future* by which a property owner might convince the government to change its mind?"—with exhaustion of administrative remedies, which asks, by contrast, whether a property owner utilized such remedies *in the past*, and waived a constitutional challenge by failing to pursue administrative review. The holding conflicts with this Court's settled rule that exhaustion of administrative remedies is not a prerequisite to bringing a section 1983 claim. Ten Ninth Circuit judges recognize the majority's error. App. E-3 (nine judges dissenting from denial of rehearing en banc); App. A-26 (Bea, J., dissenting). The City ignores them.

The decision below also adds to the entrenched lower court split by categorically foreclosing any review under the unconstitutional conditions doctrine articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the condition is legislatively imposed. Both questions warrant resolution by this Court.

ARGUMENT

I. This Court Should Grant the Petition to Stop the Transformation of *Williamson County*'s Finality Requirement Into an Impermissible Exhaustion Requirement.

The City admits that its lifetime lease requirement applies to the Pakdels and that there are no available procedures to remove the requirement. BIO at 9. The City has thus reached a definitive position imposing the lifetime lease requirement on the Pakdels.

The City's brief, however, focuses primarily on the City's condominium conversion application process rather than the imposition of the lifetime lease requirement. This focus on administrative procedures over the Ordinance's effect demonstrates that the Ninth Circuit imposed an exhaustion requirement contrary to this Court's established precedents. When evaluating exhaustion, a court looks to the "administrative and judicial procedures by which an injured party may seek review of an adverse decision …." *Williamson Cty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985). When evaluating finality, however, a court determines whether the "decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury …." *Id.*

In short, while the Ninth Circuit frames its holding in terms of "ripeness" (when a takings claim is dismissed because it is *too early* and can be brought later), the court actually created an exhaustion requirement by holding that the Pakdels are *too late* and forever barred from bringing a challenge because

they did not engage in a previously available (but now defunct) administrative process seeking a waiver or compensation. App. A-18; *see also* App. E-10 (Collins, J., dissenting from denial of rehearing en banc). Whether or not the Pakdels exhausted administrative remedies has no "bear[ing] on the question whether the City had reached a final decision that required the Plaintiffs to comply with the lifetime lease requirement." App. A-27–A-28 (Bea, J., dissenting). Property owners are not required to exhaust administrative remedies before bringing a takings claim in federal court. *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019).

Attempting to divert this Court's attention, the City recharacterizes the Pakdels' post-conversion requests that the City waive the lifetime lease requirement as a new, separate "application" for development. BIO at 3, 18. The Ninth Circuit, however, never characterized the Pakdels' requests as a *new* development application, but correctly recognized them as requests relating to the original condo conversion. App. A-9. Regardless, the City has clearly stated that there is nothing the Pakdels can do now or ever to remove the lifetime lease requirement. BIO at 9. The City's decision is final.

The City disparages the Pakdels, accusing them of hiding their intentions to challenge the lifetime lease requirement. BIO at 15. This is refuted by the record. The City passed the Ordinance knowing that many people, like the Pakdels, had contractual agreements with their co-tenants-in-common to fully participate in any conversion application. App. G-6. The City put a poison pill in the Ordinance that shut down the entire program for all buildings containing

even one non-owning tenant if any one owner dared sue to remove the lifetime lease requirement. App. F-32. The City forced the Pakdels to choose between breaching their contract with their co-owners by suing and losing the right to convert, or completing the conversion and seeking compensation for the taking caused by the lifetime lease requirement.

The City also argues that the Pakdels got what they asked for. BIO at 8. But when the Pakdels asked for a condo conversion, the City imposed the lifetime lease requirement, which the Pakdels allege is unconstitutional. Just because the City "ultimately succeed[ed] in pressuring [the Pakdels] into forfeiting a constitutional right" does not mean that the couple is now precluded from vindicating their constitutional rights in court. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

Again, it does not matter what the Pakdels did or did not do before the City rendered its final decision imposing the lifetime lease requirement. After *Knick*, the only requirement to bring a takings challenge in federal court is that the government's decision is final. 139 S. Ct. at 2169. A decision is final when a court knows "how the regulations will be applied to [the landowner's] property." *Williamson Cty.*, 473 U.S. at 200. Despite knowing that the lifetime lease requirement applies to the Pakdels, the Ninth Circuit held that the City had not reached a final decision because the Pakdels did not follow certain procedures before filing their lawsuit. App. A-15–16. The Ninth Circuit's opinion thus imposes an impermissible exhaustion requirement. *See id.*

The Ninth Circuit's newly framed exhaustion requirement is an outlier among federal courts yet

now controls in nine states, including the nation's most populated.[1] Nearly every post-*Knick* case outside the Ninth Circuit recognizes the difference between finality and exhaustion. Pet. at 19–24. The City attempts to distinguish these cases, BIO at 18–21, based on factual differences that do not hinge on the legal distinction between finality and exhaustion. The Ninth Circuit's approach is fundamentally different than that of other courts, and wrong. The Ninth Circuit incorrectly determines *ripeness* by looking backward, at whether the plaintiff exhausted all available procedures before bringing a lawsuit. As other Circuit courts explain, determining ripeness requires courts to look forward, asking whether there are procedures *still available* to remove an unwanted condition. Pet. at 19–22 (citing cases). Moreover, the Ninth Circuit's approach conflicts with this Court's precedents holding that exhaustion is not a prerequisite to filing a section 1983 claim. *Knick*, 139 S. Ct. at 2167; *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 504 (1982).

Driftless Area Land Conservancy v. Public Service Comm'n of Wisconsin is a post-*Knick* case that illustrates the proper approach to determining finality. No. 19-cv-1007-wmc, 2020 WL 6822707, at *10 (W.D. Wis. Nov. 20, 2020). There, the court held that if the government's only role "going forward" is to enforce or defend the challenged decision, then the government's decision is final. *Id.* Here, the Ninth

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[1] The City cites two district courts that positively cited the decision below. BIO at 2. But those cases cite *Pakdel* merely for the proposition that *Williamson County*'s finality requirement remains in place after *Knick*. *Knick* itself says the same thing. 139 S. Ct. at 2169.

Circuit held that even though the City's only role going forward is to enforce the lifetime lease requirement, the decision is *not* final. *See* App. A-26 (Bea, J., dissenting).[2]

II. This Case Presents a Clean Vehicle to Resolve the Issue of Finality Versus Exhaustion.

Because this case was appealed from a motion to dismiss, App. C, this Court's resolution of the finality versus exhaustion issue will simply allow the Pakdels to have their day in court. This Court need not address the merits of their takings claim at this juncture. *See* App. E-9 n.1 (Collins, J., dissenting from denial of rehearing en banc). The dissents filed at both the panel and en banc stages ensure that this Court will have no shortage of perspectives to consider if it grants the petition.

Citing the Ninth Circuit opinion, the City wrongly claims that the Pakdels waived any argument that their two requests "satisfied the finality requirement." App. A-17; BIO at 23 (citing App. A-17 n.5). But the court's language merely reinforces its conflation of exhaustion and finality. App. A-17. As Judge Bea stated in his dissent, the two requests *confirm* the finality of the City's decision because the City unequivocally responded that it would never remove the lifetime lease requirement. App. A-30 (Bea, J., dissenting). The two requests were not a prerequisite to filing the lawsuit because the Pakdels did not need

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[2] Because the *Driftless* order denied a motion to dismiss, the issue of finality was preserved for trial. 2020 WL 6822707, at *10. But regardless of the procedural posture, it demonstrates the proper, forward-looking approach to finality, in contrast to the Ninth Circuit's incorrect, backward-looking approach.

to exhaust administrative remedies. If the Pakdels never made those requests, the decision would still be final.

Furthermore, the Pakdels waived no portion of their finality argument. The district court dismissed the Pakdels' takings claims solely on *Williamson County*'s state-litigation requirement. App. C-9. The Pakdels' supplemental brief thus explained that this Court overturned the state-litigation requirement in *Knick* and asked the Ninth Circuit to vacate the dismissal. Appellants' Supplemental Brief, Ninth Circuit case no. 17-17504, docket no. 38 (filed July 22, 2019). In its supplemental response brief, the City for the first time during the appeal raised the issue of finality despite the district court not basing its decision on that aspect of *Williamson County*. San Francisco's Supplemental Answering Brief, Ninth Circuit case no. 17-17504, docket no. 41 (filed July 29, 2019). The Pakdels responded to the finality argument at their first opportunity, in the supplemental reply. Appellants' Supplemental Reply Brief, Ninth Circuit case no. 17-17504, docket no. 45 (filed Aug. 6, 2019). "[A]n appellant's reply to an argument raised for the first time in the opposing appellee's brief has not been waived ...." *United States v. Jurado-Nazario*, 979 F.3d 60, 62–63 (1st Cir. 2020); *see also Matthews v. Wells Fargo Bank*, 536 F. App'x 577, 579 (6th Cir. 2013) (same). No waiver precludes this Court's consideration of the legal issues in this case.

Courts will continue to employ "finality" as a procedural roadblock to constitutional property rights claims until this Court stops it. The Ninth Circuit's ruling invites other courts to join in. *But cf. Harrison*

v. Montgomery County, Ohio, __ F.3d. __, No. 20-4051, 2021 WL 1881382, at *5 (6th Cir. May 11, 2021) (rejecting government's procedural "end run around" *Knick*). This Court need not wait for further percolation of this issue while millions of property owners in the country's most populous circuit languish in unnecessary procedural purgatory. This Court's intervention is needed to right the ship now, before further harm results.

III. This Court Should Decide Whether the Unconstitutional Conditions Doctrine Applies to Legislative Takings.

As a condition of converting their tenancy-in-common unit to a condominium, the City demanded that owners offer their existing tenants a lifetime lease. For the Pakdels, the price of converting their unit was the prospect of never living in it. App. at G-2 (complaint alleges that the ordinance "punishes those who lawfully seek to convert property into a condominium by forcing them to give their non-owning tenants lifetime leases, thereby eliminating their *fundamental right to reside in their own homes*") (emphasis added). The ability to reside in one's own residential property is an identifiable and long-accepted property right. *See* Pet. at 27 (citing cases). The right at issue is *not* the right to convert (BIO at 28); it is the right to engage in the conversion process without being forced to give up the fundamental right to live on their own residential property.

The City claims that the Pakdels voluntarily gave up that right by leasing the unit. BIO at 26–27. However, when they executed the lease, the Pakdels retained the right to evict their tenant and move in themselves. Pet. at 6 (citing Cal. Gov't Code § 7060(a));

App. G-8. As the City notes, the Pakdels lost that right *only* as a condition applied to their conversion. BIO at 27;[3] App. E-5 (Collins, J., dissenting from denial of rehearing en banc). By conditioning the conversion on the Pakdels giving up that property right, the lifetime lease requirement was an unconstitutional condition that amounted to a taking. *See Koontz*, 570 U.S. at 607 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

The court below did not dispute the fundamental nature of the right to occupy. It dismissed the Pakdels' unconstitutional conditions claim solely on the ground that the doctrine does not apply when a condition is imposed by legislation, rather than by an individualized administrative decision. App. A-10 n.4. This reflects the law of the Circuit. *Better Housing for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 933 & n.3 (C.D. Cal. 2020) (citing cases for narrow application of *Koontz* that excludes legislative actions).[4]

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[3] The City faults the Pakdels for not negotiating a buyout or evicting their tenant prior to applying for conversion. BIO at 7, 27. This is an odd position for a City that professes the desire to *increase* housing supply. Moreover, the City's position is pure speculation as well as irrelevant to the questions presented. To the extent the City wishes to pursue this argument, it may do so on remand, when both parties may present evidence about the Pakdels' attempted negotiations with their tenant.

[4] The City and the court below place great weight on *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), App. A-10 n.4, BIO at 30, which involved a takings claim against an ordinance

Because Takings Clause claims have "full-fledged constitutional status ... among the other protections in the Bill of Rights," *Knick*, 139 S. Ct. at 2170, unconstitutional conditions upon a person's exercise of property rights must receive the same judicial scrutiny as conditions upon the exercise of other constitutional rights. And for no other constitutional right does it matter whether an unconstitutional condition is imposed via adjudication or legislation.

The City argues that the court below correctly distinguished between legislatively and administratively imposed exactions because the politicized legislative process may provide some protection for property owners that is absent from administrative decision-making. BIO at 32–34. But "the Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities ...." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring in judgment). If the City were correct, similar "legislative/administrative" distinctions would exist in other areas of constitutional law. Yet they do not, and this Court frequently applies the

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requiring all developers to install certain types of storm pipes. *McClung* held that the *Penn Central* test, rather than the *Nollan/Dolan* unconstitutional conditions doctrine, controlled the challenge. This conclusion did not presume that *Nollan/Dolan* never apply to legislated exactions. It was premised on the categorization of the storm pipe requirement as an ordinary land use regulation, rather than an exaction. 548 F.3d at 1227–28. The decision explicitly declines to address whether there was a categorical bar to applying the *Nollan/Dolan* test to a legislatively imposed exaction. *Id.* at 1225 n.3.

unconstitutional conditions doctrine to invalidate legislative acts. For example, *Marshall v. Barlow's, Inc.* invalidated provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business. 436 U.S. 307, 315 (1978). In *Miami Herald Publ'g Co. v. Tornillo*, this Court struck down a state statute that unconstitutionally abridged the freedom of the press by forcing a newspaper to incur additional costs by adding more material to an issue or removing material it desired to print. 418 U.S. 241, 255 (1974). *See also Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59–60 (2006) (applying doctrine to a legislatively imposed condition without regard to its origin); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512–13 (1996) (striking down a statute conditioning the right to do business on waiver of constitutional rights); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (same); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (unemployment compensation statute held unconstitutional when it required a person to choose between "violat[ing] a cardinal principle of her religious faith" or receiving benefits); *Perry v. Sindermann*, 408 U.S. 593 (1972) (applying doctrine to administratively imposed condition without regard to its origin); *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958) (a state constitutional provision violated the unconstitutional conditions doctrine when an applicant had to choose between swearing a loyalty oath or losing a tax exemption); *Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (invalidating provisions of state law conditioning permission for a foreign company to do business in

Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts).

The legislative/adjudicative distinction has been percolating for decades, with the majority of courts now holding that property owners are foreclosed from pursuing *Nollan/Dolan* claims to legislatively imposed conditions. Further delay will only entrench these cases and degrade constitutionally protected property rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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