No. 21-218

In The
Supreme Court of the United States

JOHN PIETSCH, et al.,

Petitioners,

v.

WARD COUNTY, et al.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioners' argument that the violation of the "unconstitutional conditions doctrine" creates a stand-alone cause of action in the context of land-use exactions under *Nollan v. California Coastal Commission*, 483 U.S. 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) merits consideration by this Court, in light of Petitioners' failure to plead a stand-alone unconstitutional conditions claim or advance such argument in the lower courts.

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INTRODUCTION

The Petitioners challenged a Ward County, North Dakota Zoning Ordinance under the Due Process Clause of the United States Constitution. The Zoning Ordinance required landowners seeking to outlot real property along public roads to dedicate right-of-way. No Takings claim was alleged by the Petitioners, who specifically disavowed that they were asserting any claim under the Takings Clause. The Petitioners advocated to the United States District Court for the Western District of North Dakota that the Zoning Ordinance deprived the Petitioners of their due process rights. The Petitioners asserted both substantive and procedural due process claims to the District Court but abandoned their substantive due process claims on Appeal to the United States Court of Appeals for the Eighth Circuit. The decision of the District Court and the unanimous decision of the Eighth Circuit held that the Petitioners' attempt to apply the Supreme Court's analysis in *Nollan* and *Dolan* to their procedural due process claim was an impermissible attempt to recast a Takings claim. The Eighth Circuit affirmed the decision of the District Court holding that the Petitioners were afforded notice and a meaningful hearing and, as such, their procedural due process rights were not violated.

Now, in their Petition, the Petitioners have abandoned their previous challenges to the constitutionality of the Ward County Zoning Ordinance under the Due Process Clause and have instead advocated, for the first time, that this Court should grant their Petition for a Writ of Certiorari and offer an advisory

opinion as to whether a stand-alone unconstitutional conditions claim can exist exclusive of the Takings Clause in the context of land-use exactions. Because the Petitioners never pleaded a stand-alone unconstitutional conditions claim, this case is a poor vehicle to consider the Petitioners' premise that such a claim can exist wholly independent of the Takings Clause.

This Court's decisions in *Nollan*, *Dolan*, and *Koontz* "involve a special application" of the doctrine of unconstitutional conditions that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013), *citing* (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Dolan*, 512 U.S., at 385, 114 S.Ct. 2309). The Petitioners elected not to plead a Takings claim. The Petitioners solely pleaded a claim under the Due Process Clause. Both the District Court and the Eighth Circuit properly rejected the Petitioners' attempt to apply the *Nollan-Dolan* analysis to procedural due process. There is no confusion among the Courts as to the correct legal theory that applies to a land-use exaction challenged under *Nollan* and *Dolan*. *Nollan* and *Dolan* both interpreted the Takings Clause. *Id*. Moreover, because the Petitioners neither pleaded a Takings claim nor an unconstitutional conditions claim, none of the Courts below were afforded an opportunity to consider the Petitioners' Questions Presented in their Petition for a Writ of Certiorari. As such, no record was developed in the lower courts and

the issues identified in the Petitioners' Questions Presented are not properly before this Court. This Court should deny the Petition.

STATEMENT OF THE CASE

I. Procedural History

Petitioners John Pietsch; Arlan Irwin, as trustee for the Albert and Grace Irwin Trust; Ward County Farm Bureau, a North Dakota non-profit corporation; and, Ward County Farmers Union, a North Dakota non-profit corporation ("Petitioners") brought a one-count Complaint against the Respondents Ward County, a political subdivision of the State of North Dakota; and the Board of County Commissioners for Ward County, North Dakota ("Respondents") under 42 U.S.C. § 1983 challenging the constitutionality of the Ward County Zoning Ordinance Chapter 3, Article 24, Section 4(A)(12) (the "Zoning Ordinance") alleging a violation of the Petitioners' substantive and procedural due process rights. App. 60-70.

The United States District Court for the Western District of North Dakota ("District Court") dismissed the Petitioners' one-count Complaint with prejudice as the Petitioners improperly applied *Nollan*, *Dolan*, and *Koontz* Takings analysis to their procedural due process challenge to the Zoning Ordinance, which was "truly a square peg in a round hole." App. 9. The District Court also dismissed the Petitioners' substantive due process challenge as the government action was

not "truly irrational." App. 50-57. The District Court held that "if the [Petitioners] believe the dedication ordinance is invalid because it bucks the Fifth Amendment Takings standards handed down in *Nollan* and *Dolan*, then they should have pursued a Fifth Amendment Takings challenge based on *Nollan* and *Dolan*." App. 49.

The Petitioners abandoned their substantive due process claims on appeal to the United States Court of Appeals for the Eighth Circuit and presented no argument on substantive due process. App. 3. The only argument presented to the Eighth Circuit involved procedural due process. The Eighth Circuit held:

> [Petitioners] claim the County's dedication rules could result in an exaction, which would require consideration of nexus and proportionality. But this conflates Takings and due process law. "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. *Koontz* authorizes a Takings claim, not a due process claim: "*Nollan* and *Dolan* 'involve a special application' of [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id*. at 604. [Petitioners] thus have a remedy for unconstitutional

> exactions under the Takings Clause. See *id*. at 605; *Pietsch*, 446 F. Supp. 3d at 520, 522, 538 (discussing alternative remedies). They cannot claim a redundant remedy under the Due Process Clause. *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 855 (9th Cir. 2007) ("[T]he Fifth Amendment would preclude a due process challenge only if the alleged conduct is actually covered by the Takings Clause.").

The Eighth Circuit affirmed the District Court's decision dismissing the Petitioners' procedural due process claim citing to this Court's opinion in *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) and its opinion in *Anderson v. Douglas Cty.*, 4 F.3d 574, 578 (8th Cir. 1993), "[i]n the zoning context, assuming a landowner has a protectible property interest, procedural due process is afforded when the landowner has notice of the proposed government action and an opportunity to be heard."

II. Background

The Petition incorrectly states that the District Court and the Eighth Circuit "held that the case at bar had to be pled as a 'Takings case.'" Petition 4. This is an imprecise representation of what occurred in the lower courts. The lower courts held that, because the Petitioners did not plead a Takings case, the *Nollan-Dolan* analysis was not applicable to their procedural due process claim. The lower courts did not restrict the legal theories that the Petitioners asserted in their

Complaint. Rather, the Petitioners elected to proceed in both lower courts with a one-count Complaint that challenged the constitutionality of the Ward County Zoning Ordinance under procedural due process. The Petitioners were not prevented from pleading a Takings claim or a stand-alone unconstitutional conditions claim, but the Petitioners chose not to assert claims under those legal theories in their Complaint and Amended Complaint. Doc. ID#1 (February 5, 2018) and Doc. ID#30 (April 2, 2019).

REASONS THIS COURT SHOULD DENY THE PETITION

I. This case is a poor vehicle to consider whether a claim under the doctrine of unconstitutional conditions is a stand-alone cause of action because petitioners did not plead an unconstitutional conditions claim.

This Petition for a Writ of Certiorari does not come to this Court after the District Court's dismissal of a Complaint alleging a stand-alone cause of action for unconstitutional conditions. This Petition does not come to this Court after the Eighth Circuit affirmed the District Court's dismissal of a Complaint alleging a stand-alone cause of action for unconstitutional conditions. This Petition comes to this Court after the Eighth Circuit affirmed the District Court's Dismissal

of the Petitioners' one-count procedural[1] due process Complaint in which the Petitioners argued to both lower courts that *Nollan* and *Dolan* set the applicable standard for procedural due process cases in the zoning context.

Neither the District Court nor the Eighth Circuit were afforded any opportunity to consider whether an independent cause of action under the "unconstitutional conditions" doctrine could have been pleaded by the Petitioners in their original Complaint. The record is clear that the Petitioners did not bring an unconstitutional conditions claim in their Complaint but instead pleaded a one-count Complaint as a violation of due process. The Petitioners cite to the Eighth Circuit's Opinion wherein the Court states "[Petitioners'] due process and unconstitutional conditions claims" as a potential recognition by the Eighth Circuit that the Petitioners were asserting due process claims and unconstitutional conditions claims. App. 4. However, the Petitioners' extraction of the phrase "unconstitutional conditions" from the entire sentence of the Opinion removes the context in which the Eighth Circuit was addressing the doctrine of unconstitutional conditions when read in the entirety of the Opinion. Specifically, the complete sentence is as follows: "[Petitioners'] due process and unconstitutional conditions claims are an impermissible attempt to recast a Takings claim." In the preceding sentence of the Opinion, the Eighth Circuit was citing to *Lingle v.*

[1] The Petitioners did not raise substantive due process at the Eighth Circuit.

Chevron U.S.A., Inc., 544 U.S. 528, 540, 546-48 (2005) which held that the due process inquiry has "no proper place" in Takings doctrine, while distinguishing *Nollan* and *Dolan* as a special application of the unconstitutional conditions doctrine for Takings. *Id.* In other words, the unconstitutional conditions doctrine as discussed in *Nollan* and *Dolan* applied to Takings cases and not due process cases. The Eighth Circuit was not opining that the Petitioners had asserted an unconstitutional conditions claim as is seemingly alluded to by the Petitioners. In fact, the phrase "unconstitutional conditions" does not even appear in the Petitioners' Complaint or Amended Complaint. The clear language of the Petitioners' Complaint and Amended Complaint identifies due process as Petitioners' sole cause of action.

The Petitioners explicitly did not plead any Takings claim. App. 3-4, 8, 45. The District Court found as follows:

> [T]his is not a Takings case. Instead, the [Petitioners] have chosen to wield two alternative legal theories—substantive and procedural due process—to vindicate their claims. In a single-count amended complaint invoking 42 U.S.C. § 1983, the [Petitioners] lodge both facial and as-applied constitutional challenges against the dedication ordinance. App. 8.

In [*Petitioners'*] *Response in Opposition to Defendants' Motion for Summary Judgment*, the Petitioners stated as follows:

> The [Petitioners] have alleged that the Dedication Ordinance violates procedural and substantive due process, but the [Respondents] have erroneously equated the [Petitioners'] claims with a claim under the Takings Clause. This misstep by the [Respondents] resulted in their reliance on inapposite legal standards. Arguments made by the [Respondents] solely applicable to the Takings Clause, denial of just compensation, and the availability of inverse condemnation have no relevance or bearing on the claims of the [Petitioners] within their Complaint.
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> Doc. ID#51 at p. 3 (June 5, 2019).

In the Petitioners' own words as cited in the preceding, the Petitioners' Amended Complaint explicitly asserted procedural and substantive due process claims and not a Takings claim. *Id*. The Petitioners did not identify any stand-alone unconstitutional conditions claim. Rather than plead a Takings claim or an unconstitutional conditions claim, the Petitioners elected to proceed under due process and advocated to both the District Court and the Eighth Circuit that the Zoning Ordinance violated the Petitioners' substantive due process rights on their face and as-applied.

The District Court dismissed the Petitioners' as-applied substantive due process challenges to the Zoning Ordinance, reasoning that "[f]rom start to finish, the County Commission's decisionmaking related exclusively to the merits of Pietsch and Irwin's plat applications." App. 53. This was not truly

irrational government action, which was the appropriate legal analysis in respect to an as-applied substantive due process challenge to a zoning ordinance. *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102 (8th Cir. 1992). The District Court also dismissed the Petitioners' facial substantive due process challenge as the Zoning Ordinance was not arbitrary and capricious but was rationally related to a legitimate government purpose in all its applications, which was the appropriate legal analysis in respect to a facial substantive due process challenge to a zoning ordinance. The District Court further found that "the ordinance is conceivably designed to provide for public roads," which was even acknowledged by the Petitioners to be a legitimate government interest. App. 55. The Petitioners abandoned their substantive due process arguments and did not present them in their Appeal to the Eighth Circuit.

Rather than plead a Takings claim or unconstitutional conditions claim, the Petitioners elected to proceed under procedural due process and advocated to both the District Court and the Eighth Circuit that the appropriate analysis to be applied to the Petitioners' facial and as-applied procedural due process challenges to the Zoning Ordinance was the "individualized determination" that there is both an "essential nexus" and "rough proportionality" as outlined in *Nollan* and *Dolan*. The District Court and the Eighth Circuit both rejected the Petitioners' attempt to substitute the *Nollan-Dolan* analysis for the notice and hearing analysis that applies to procedural due process. Both the District Court and the Eighth

Circuit held that the legal analysis applicable to a procedural due process claim was not the "essential nexus" and "rough proportionality" analysis from *Nollan* and *Dolan*. Both lower courts held, "[i]n the zoning context, assuming a landowner has a protectible property interest, procedural due process is afforded when the landowner has notice of the proposed government action and an opportunity to be heard." *Anderson v. Douglas Cty.*, 4 F.3d 574, 578 (8th Cir. 1993). "The fundamental requirement of due process is the opportunity to be 'heard at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *citing* (*Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). *See Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914)).

The District Court and the Eighth Circuit both analyzed the facts in this matter and the law on the one-count due process Complaint that was actually pleaded by the Petitioners. The Petitioners established no record in this matter that informed that the Petitioners were pursuing an unconstitutional conditions claim before the District Court. The only mention of a separate claim appears in the Petitioners' briefing on appeal to the Eighth Circuit, wherein the Petitioners argue, in the alternative, that the Ordinance is an unconstitutional condition which violates the Due Process Clause of the Fourteenth Amendment or the Takings Clause. However, there was no mention by the Petitioners at either the Eighth Circuit or the District Court that the Petitioners were asserting a

stand-alone claim under the doctrine of unconstitutional conditions wholly separate from the Takings and Due Process Clause. Respondents took issue with the Petitioners' attempt to raise for the first time on appeal at the Eighth Circuit an argument that the Dedication Ordinance violates the doctrine of unconstitutional conditions under the Takings Clause, as the argument was entirely inconsistent with the Petitioners' Amended Complaint and arguments before the District Court. The unasserted unconstitutional conditions claim under the Takings Clause was not properly before the Eighth Circuit[2] because the Petitioners did not assert a claim under the Takings Clause in their Amended Complaint.

The Petitioners have attempted to again recast their claims before this Court but rather than cast their claims under Due Process Theory, as alleged in the Petitioners' Complaint and Amended Complaint to the District Court, the Petitioners attempt to recast their claims under the doctrine of "unconstitutional conditions." Despite not having asserted a stand-alone "unconstitutional conditions" claim in their Amended Complaint, the Petitioners attempt to seek an advisory opinion from this Court as to whether an unconstitutional conditions claim could theoretically have

[2] This Court generally "will not consider an argument raised for the first time on appeal. *Bannister v. Barr*, 960 F.3d 492, 494 (8th Cir. 2020) *See*, e.g., *Winthrop Res. Corp. v. Eaton Hydraulics, Inc.*, 361 F.3d 465, 469 (8th Cir. 2004) ("[W]e review de novo only the evidence and arguments that were before the district court when it made its determination in the orders challenged on appeal.").

been pleaded as a stand-alone claim to the District Court. This Court has repeatedly held that a fundamental principle of the American appellate court system is that appellate courts do not decide issues that were not raised in the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 37 (2012), *citing Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) ("Mindful that we are a court of review, not of first view").

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.
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> *Sims v. Apfel*, 530 U.S. 103, 109 (2000), *citing Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

The Petitioners are without question attempting to present a question to this Court which was never considered by the lower courts, specifically whether or not an unconstitutional conditions action may be pleaded as a stand-alone claim exclusive of the Takings Clause.

While the Petitioners quoted a sentence in *Dolan's* discussion of the doctrine of unconstitutional conditions in their briefing to the Eighth Circuit, there was nothing in the Petitioners' Complaint or Amended Complaint to indicate that the Petitioners were pursuing a stand-alone cause of action under the doctrine of unconstitutional conditions. Neither the District Court nor the Eighth Circuit opined in any way on the question of whether or not an unconstitutional conditions claim could proceed independently outside of a claim under the Takings Clause. At this stage, this question is merely academic, is in no way grounded in the record, and would in no way affect the judgment entered in this matter by the District Court, who decided this case based on the claim that was actually asserted by the Petitioners. Accordingly, this Court should deny the Petition for Writ of Certiorari as the Petitioners never pleaded a stand-alone claim under the doctrine of unconstitutional conditions.

II. There is no dispute between the courts as to what legal theory *Nollan* and *Dolan* apply.

The Petitioners allege that there is a dispute between the "courts" and legal scholars as to the correct legal theory to be applied to land use exactions under *Nollan* and *Dolan*. There is no such dispute, as is clearly demonstrated by even the cases cited by the Petitioners, which involved the Takings Clause in applying the doctrine of unconstitutional conditions in the *Nollan* and *Dolan* land-use context. The

Petitioners do not cite to any decisions that support their position that there is any confusion as to the appropriate theory under which to assert a *Nollan-Dolan* challenge to a land-use exaction. The Petitioners cite the following cases: *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal.App.4th 456 (2008); *Iowa Assur. Corp. v. City of Indianola, Iowa*, 650 F.3d 1094 (8th Cir. 2011); *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 22, 424 P.3d 95 (Utah 2017); and *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1142 (9th Cir. 2014), *rev'd sub nom. Horne v. Department of Agric.*, 576 U.S. 350 (2015).

Action Apartment Ass'n v. City of Santa Monica, 166 Cal.App.4th 456 (2008) is distinguishable from the instant case in that the Action Apartment Ass'n asserted a *Nollan* and *Dolan* claim under the Takings Clause. The Petitioners did not assert a *Nollan* and *Dolan* claim under the Takings Clause. Furthermore, *Action Apartment Ass'n*, which was decided after *Lingle* but before *Koontz*, recognizes that *Nollan* and *Dolan* involved "a special application of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." [Internal citations omitted]. *Action Apartment Ass'n* does not support any confusion between the courts as to the fact that *Nollan*

and *Dolan* claims involving land-use exactions be asserted under the Takings Clause.[3]

Iowa Assur. Corp. v. City of Indianola, Iowa, 650 F.3d 1094, 1099 (8th Cir. 2011) is also distinguishable from the instant case because *Iowa Assur. Corp.* alleged claims under the Takings Clause. The Petitioners did not allege claims under the Takings Clause in the instant case. *Iowa Assur Corp*. also did not involve a land-use exaction but rather involved an ordinance that placed a requirement "that figure eight cars, among other race cars, [] be enclosed by a fence in all outdoor areas where two or more vehicles are present." *Id*. at 1096. *Iowa Assur Corp*. was decided as a regulatory Takings case under *Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), and not as a *Nollan* and *Dolan* case. "*Nollan* only applies to 'land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit,' or presumably obtaining other governmental benefits or licenses." *Iowa Assur Corp.*, 650 F.3d at 1099.

Alto Eldorado P'ship v. County of Santa Fe, 634 F.3d 1170, 1179 (10th Cir. 2011) is distinguishable from the instant case because *Alto Eldorado P'ship* brought a lawsuit challenging an ordinance as unconstitutional

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[3] *Action Apartment Ass'n* alleged claims under both the Takings and Due Process Clauses of the Federal and State Constitutions.

under the Takings Clause.[4] The Petitioners in the instant matter did not assert a claim under the Takings Clause. *Alto Eldorado P'ship* was dismissed on ripeness grounds under *Williamson County Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 43 U.S. 172 (1985).[5] *Alto Eldorado P'ship* clearly applies the *Nollan-Dolan* analysis under the Takings Clause. *Id*. at 1178. Accordingly, *Alto Eldorado P'ship* does not support the Petitioners' suggestion that there is any confusion among the courts as to the appropriate theory a land-use exaction should be challenged. Furthermore, the distinct issues in *Alto Eldorado P'ship*, which did not involve dedications of land, were never fully addressed by the Tenth Circuit as the Court affirmed the District Court's dismissal finding that the Takings claims were not ripe.

The Petitioners acknowledge that *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal.App.4th 456 (2008); *Iowa Assur. Corp. v. City of Indianola, Iowa*, 650 F.3d 1094 (8th Cir. 2011); and *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) identify Takings law as the proper legal theory

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[4] Alto Eldorado P'ship alleged claims under the Takings Clause, Equal Protection, and Due Process clauses of the Federal and State Constitutions.

[5] *Alto Eldorado P'ship v. County of Santa Fe*, 634 F.3d 1170 (10th Cir. 2011) was decided in 2011 before this Court decided *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 595 (2013), *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162 (2019) and *Pakdel v. City & Cty. of San Francisco, California*, 141 S.Ct. 2226, 2228 (2021). *Alto Eldorado P'ship* would likely be decided differently today in considering the subsequent decisions of this Court.

to plead a *Nollan* and *Dolan* claim. (Petition at pp.16-17). The Petitioners further acknowledge that *Nollan*, *Dolan*, and *Koontz* were all Takings cases. (Petition p.18 n. 5).

The Petitioners next cite to two cases, which they suggest support the position that the appropriate legal theory to challenge land-use exactions under *Nollan* and *Dolan* is the doctrine of unconstitutional conditions, *Alpine Homes, Inc. v. City of W. Jordan*, 2017 UT 45, ¶ 3, 424 P.3d 95 and *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1142 (9th Cir. 2014). As is discussed in the preceding section of this Brief, the Petitioners never pleaded a stand-alone unconstitutional conditions claim and, for that reason, the question of whether a *Nollan-Dolan* claim can be asserted as a stand-alone unconstitutional conditions claim is not properly before this Court. Furthermore, the *Alpine Homes, Inc*. and *Horne* cases cited by the Petitioners do not support the notion that a stand-alone unconstitutional conditions claim can be asserted exclusive of Takings theory in a *Nollan-Dolan* land-use exaction case.

Alpine Homes, Inc. v. City of W. Jordan, 2017 UT 45, ¶ 3, 424 P.3d 95 involved the manner in which a city spends impact fees. Impact fees "include fees associated with the increased need for park services, roads, police protection, water services, storm water infrastructure, and sewer services." *Id*. at ¶ 6. The Plaintiff Developer Alpine Homes, Inc. challenged the manner in which the City of W. Jordan spent impact fees. Alpine Homes, Inc. did not challenge the

constitutionality of the initial demand for impact fees "at the time the demands were made because the fee lacked either an essential nexus or rough proportionality to the anticipated social costs of the proposed development." *Id*. at ¶ 26. The Developer Alpine Homes, Inc. argued "that the manner in which the city later spent the impact fees ran afoul of *Koontz* and the *Nollan-Dolan* analysis." *Id*. The Utah Supreme Court held that the Developer Alpine Homes, Inc.'s *Nollan* and *Dolan* challenge did not apply to the manner in which the impact fees were spent, rather *Nollan* and *Dolan* dealt with the initial demand for property or, under *Koontz*, the initial demand for a fee or monetary exaction in lieu of the dedication. *Id*. at ¶¶ 27-29.

The Utah Supreme Court further recognized in *Alpine Homes, Inc.* that the *Nollan-Dolan* line of cases and their progeny evaluate the constitutionality of conditioning the grant of a land-use permit upon a landowner's uncompensated transfer of private property to the government. *Id*. "The manner in which a city spends impact fees does not affect the constitutionality of the initial demand for fees, which is the focus of the *Koontz* monetary exactions analysis." *Id*. at ¶ 29. The Utah Supreme Court, consequently, dismissed the Takings claims because *Nollan* and *Dolan* did not apply to the manner in which the impact fees were spent by the City. *Nollan* and *Dolan* applied to the initial demand for fees. The Utah Supreme Court did not opine that an unconstitutional conditions claim exists exclusive of the Takings Clause; the Utah Supreme Court held that the doctrine of unconstitutional

conditions vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving up their rights. *Id*. at ¶ 22. The Utah Supreme Court then cited to *Koontz*:

> 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. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Id*. at ¶ 22, *citing Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013).

The Opinion of the Utah Supreme Court in *Alpine Homes, Inc.* was addressing the manner in which a City spent impact fees. This was not a land-use exaction case. The Utah Supreme Court cited verbatim to *Koontz* and held that *Nollan* and *Dolan* applied the doctrine of unconstitutional conditions in respect to the Takings Clause. Alpine Homes, Inc. asserted a *Nollan* and *Dolan* claim under the Takings Clause. Again, the Petitioners in the instant case did not plead a stand-alone unconstitutional conditions claim or a *Nollan* and *Dolan* claim under the Takings Clause.

The Petitioners next cite to the case of *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014), *rev'd sub nom*. *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015)

as further support for their assertion that there is a split between the Courts as to what legal theory to apply in the context of land use exaction cases. Again, *Horne*, 750 F.3d 1128 (9th Cir. 2014) and *Horne*, 576 U.S. 350 (2015) are wholly distinguishable from the instant case. The Hornes asserted a Takings claim alleging that the Government's requirement to set aside reserve raisins under its raisin marketing order affected an uncompensated taking of their personal property, specifically the reserved raisins. The Petitioners in the instant case did not assert a Takings claim, so neither the Ninth Circuit's analysis nor this Court's analysis of the Hornes' claims under the Takings Clause bear upon this matter as the District Court and the Eighth Circuit only considered issues encompassed within the one-count due process claim actually pleaded by the Petitioners.

The Petitioners incorrectly rely on the Ninth Circuit's language from *Horne*, 750 F.3d 1128, 1138 (9th Cir. 2014) for the proposition that an unconstitutional conditions claim can exist exclusive of the Takings Clause, as follows:

> If the Secretary works a constitutional taking by accepting (through the RAC) reserved raisins, then, under the unconstitutional conditions doctrine, the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of reserved raisins does not violate the Constitution, neither does the imposition of the penalty.

Rather, the preceding language supports the well-identified special application of the unconstitutional conditions doctrine to the Takings Clause in the context of land use exactions or, in the Ninth Circuit's opinion in *Horne*, by analogy to the personal property exaction of the reserved raisins. This is further apparent in the Ninth Circuit's Opinion as follows:

> Thus, the distillate of the *Nollan-Dolan* rule appears to be this: If the government seeks to obtain, through the issuance of a conditional land use permit, a property interest the outright seizure of which would constitute a taking, the government's imposition of the condition *also* constitutes a taking unless it: (1) bears a sufficient nexus with and (2) is roughly proportional to the specific interest the government seeks to protect through the permitting process.
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> *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1142 (9th Cir. 2014), *rev'd sub nom. Horne v. Department of Agric.*, 576 U.S. 350 (2015)

Nothing in *Horne*, 750 F.3d 1128, 1138 (9th Cir. 2014) distinguishes the *Nollan-Dolan* analysis, or as the *Nollan-Dolan* analysis was applied to a monetary exaction in *Koontz*, as a separate stand-alone claim exclusive of the Takings Clause. In fact, both the Ninth Circuit and this Court's opinions in *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014), *rev'd sub nom. Horne v. Dep't of Agric.*, 576 U.S. 350 (2015), relied entirely on the Takings line of cases. Finally, even assuming *arguendo* that the Petitioners' suggestion

that a stand-alone unconstitutional conditions claim is alluded to by the Ninth Circuit's opinion in *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014), a stand-alone unconstitutional conditions claim is not a question that was considered by the District Court or the Eighth Circuit, as the Petitioners did not plead unconstitutional conditions as a stand-alone cause of action.

This Court unambiguously held *Nollan* and *Dolan* "involve a special application" of the doctrine of unconstitutional conditions that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013), *citing* (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Dolan*, 512 U.S., at 385, 114 S.Ct. 2309). The Petitioners' new argument that suggests that a stand-alone cause of action could exist under the doctrine of unconstitutional conditions is not even an argument in support of the claims that the Petitioners sought in the lower courts. The Petitioners have abandoned their procedural and substantive due process claims in their Petition to this Court in pursuit of an advisory opinion on an unasserted stand-alone unconstitutional conditions claim. No record has been established in this case in respect to a stand-alone unconstitutional conditions cause of action.

CONCLUSION

The Eighth Circuit did not consider the unasserted unconstitutional conditions claim that the Petitioners have, for the first time, raised in their Petition to this Court. The Eighth Circuit properly applied this Court's precedent in respect to procedural due process, which was the sole issue before it. The unasserted stand-alone unconstitutional conditions cause of action hypothecated by the Petitioners is not properly before this Court because the Petitioners did not raise it in the lower Courts. The Petitioners have failed to cite this Court to any confusion as to the correct legal theory to apply the *Nollan-Dolan* analysis. For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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