

**In The
Supreme Court of the United States**

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JOHN PIETSCH; ARLAN IRWIN, AS TRUSTEE
FOR THE ALBERT AND GRACE IRWIN TRUST;
WARD COUNTY FARM BUREAU,
A NORTH DAKOTA NON-PROFIT CORPORATION;
WARD COUNTY FARMERS UNION,
A NORTH DAKOTA NON-PROFIT CORPORATION,

Petitioners,

v.

WARD COUNTY, A POLITICAL SUBDIVISION
OF THE STATE OF NORTH DAKOTA;
THE BOARD OF COUNTY COMMISSIONERS
FOR WARD COUNTY, NORTH DAKOTA,

Respondents.

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

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REPLY BRIEF

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QUESTIONS PRESENTED

1. Does the violation of the “unconstitutional conditions doctrine” under *Nollan v. California Coastal Commission*, 483 U.S. 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), create a stand-alone cause of action?
2. If the violation of the “unconstitutional conditions doctrine” for an extortionate exaction prior to a Fifth Amendment takings is a stand-alone cause of action, what is the appropriate remedy?

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INTRODUCTION

The Petitioners have argued from the very beginning that *Ward County Zoning Ordinance*, ch. 3, art. 24 § 4(A)(12) (herein referred to as the Zoning Ordinance) created an unconstitutional condition. As can be shown from each of the Petitioners' pleadings and briefs, Petitioners have given Ward County, the Federal District Court for the District of North Dakota, and the Eighth Circuit Court of Appeals fair notice of what their claims were and the grounds upon which those claims rested.



ARGUMENT

I. An unconstitutional conditions claim was adequately pled to give Ward County fair notice of the claim.

While a stand-alone cause of action for unconstitutional conditions was not specifically pled in either Complaint, the Petitioners alleged sufficient facts and legal arguments in their complaint to constitute sufficient notice that the Petitioners were bringing an unconstitutional conditions claim. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) [Internal citations omitted] ("Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'").

Petitioners gave Ward County fair notice of their unconstitutional conditions claim on several occasions in both the Complaint and the Amended Complaint. Paragraph 101 of both complaints specifically quotes the unconstitutional conditions doctrine referred to in *Dolan*. Comp. ¶ 101 and Am. Comp. ¶ 101. By quoting the legal standard for the unconstitutional conditions doctrine in the complaints, the Petitioners gave fair notice to Ward County that they would be presenting a claim of unconstitutional conditions.

Similarly, the Petitioners alleged facts connected to an unconstitutional conditions claim. Paragraph 113 of both complaints alleged that the Zoning Ordinance is “an improper use of Ward County’s police powers to compel the [Petitioners] into surrendering rights guaranteed by the Takings Clause and as such does not rationally relate to a legitimate government purpose.” Comp. ¶ 113 and Am. Comp. ¶ 113. Paragraph 114 of both complaints alleged that the Zoning Ordinance “is an improper use of [Ward County’s] police powers to avoid eminent domain.” Comp. ¶ 114 and Am. Comp. ¶ 114. Paragraph 117 alleged that “as a direct and proximate result of [Ward County’s] actions, [Petitioners] were forced to follow an unconstitutional process. . . .” Comp. ¶ 117 and Am. Comp. ¶ 117. Paragraph 120 alleged that “[b]ut for [Ward County’s] actions [Petitioners] would not have exaction imposed requiring the dedication of private property or development hindered by Ward County’s refusal to approve plats without the exactions.” Comp. ¶ 120 and Am. Comp. ¶ 120. All of these alleged facts combined together clearly

indicated that Petitioners were claiming that Ward County's actions were creating unconstitutional conditions in which the Petitioners were being forced to forsake a constitutional right in order to receive a discretionary benefit. *See Dolan*, 512 U.S. at 381.

Since the requirements of notice pleading are not rigid and only require "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. Reciting the legal doctrine of unconstitutional conditions found in *Dolan* and alleging facts supporting a claim under the unconstitutional conditions doctrine was more than adequate notice to Ward County that an unconstitutional conditions claim was being pled.

II. The doctrine of unconstitutional conditions was adequately briefed at all levels.

In addition to being adequately pled so as to provide fair notice to Ward County that there was a claim of unconstitutional conditions, the Parties consistently briefed the matter at each court level. These briefs culminated in the Eighth Circuit acknowledging that the Petitioners made an unconstitutional conditions claim. App. 4. In turn, due to the culmination of briefs to this point, as well as the Eighth Circuit's acknowledgment of the Petitioners' claim of unconstitutional conditions, it is clear that this is not a newly raised issue brought before this Court.

The Petitioners mentioned unconstitutional conditions numerous times in their trial memorandum in support for their motion for summary judgment. For example, pages 19 and 20 of their memorandum explicitly quoted the standards of the unconstitutional conditions doctrine and made the case as to why the Zoning Ordinance created an unconstitutional condition. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment p. 19-20. Petitioners brought up the doctrine again on pages 34 and 35 of their memorandum, concluding that "The granting of such relief would allow [Petitioners] to re-apply for outlots without being subjected to an unconstitutional process as well as an unconstitutional condition." *Id.* at p. 34-35.

The Petitioners also repeatedly mentioned unconstitutional conditions in their response in opposition to Ward County's motion for summary judgment. On pages 16 and 17 of the response the Petitioners claimed that their outlot applications were denied only because they refused to give up their rights under the Fifth and Fourteenth Amendments which prohibit the taking of property without due process and just compensation. Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment p. 16. The Petitioners then subsequently discussed the legal doctrine of unconstitutional conditions in the context of *Nollan* and *Dolan* and concluded that Ward County's actions created an unconstitutional condition for the Petitioners. *Id.* at 16-17. On page 30 of the response, the Petitioners directly briefed on the remedy issue for an unconstitutional condition presented before this

Court stating, “The *Koontz* Court did not offer any suggestions as to what remedies or causes of actions could be brought to vindicate the rights of a plaintiff who had a permit denied because of an unconstitutional condition, thus a §1983 claim predicated on either procedural or substantive due process, two distinct causes of action, is the logical avenue for relief.” *Id.* at 30.

The Petitioners’ unconstitutional conditions claim was also thoroughly briefed before the Eighth Circuit Court of Appeals. Section VI of the Petitioners’ opening brief before the Eighth Circuit explicitly argued that the Zoning Ordinance, on its face and as applied, violated the doctrine of unconstitutional conditions. Appellants’ Opening Brief p. 63-67. Additionally, the fifth question presented to the court in the Petitioners’ opening brief was “Whether [the Zoning Ordinance], on its face and as applied to [the Petitioners] violates the doctrine of unconstitutional conditions.” *Id.* at 4. Petitioners again discussed the doctrine of unconstitutional conditions and argued that the Zoning Ordinance violated the doctrine. Appellants’ Reply Brief p. 24-27.

Respondents acknowledged that the Petitioners brought the argument that the Zoning Ordinance violated the doctrine of unconstitutional conditions before the Eighth Circuit and argued that the claim was waived because it was not in the Petitioners’ complaint or raised in the lower court. Appellees’ Brief p. 21. Ward County then additionally briefed the doctrine of unconstitutional conditions in their brief claiming that they did not violate the doctrine. *Id.* at 33-36.

Ultimately, due in part because the claim of unconstitutional conditions was clearly and consistently briefed at all levels, the Eighth Circuit Court of Appeals did not adopt Ward County's argument that the Petitioners' claim of unconstitutional conditions was waived. In fact, the Eighth Circuit explicitly acknowledged that the Petitioners made a claim of unconstitutional conditions. *See* App. 4 (stating that "Plaintiffs' due process and *unconstitutional conditions claims* are an impermissible attempt to recast a Takings claim.").

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CONCLUSION

The complaint provided fair notice to Ward County that the Petitioners were claiming that the Zoning Ordinance created an unconstitutional condition. The issue has also been thoroughly briefed at each level leading up to the Petitioners' request before this Court. For the foregoing reasons and those presented in the Petition for Writ of Certiorari, the Court should grant the petition.

Respectfully submitted,

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