No. 18-1538

IN THE

Supreme Court of the United States

DARTMOND CHERK AND THE CHERK FAMILY TRUST,
Petitioners,

v.

MARIN COUNTY, CALIFORNIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners purport to seek review of the following questions:

1. Whether permit conditions are exempt from review under the unconstitutional-conditions doctrine when their intended purpose is not to mitigate adverse impacts of a proposed development but to provide unrelated public benefits?

2. Whether the unconstitutional-conditions doctrine applies to such permit conditions when imposed legislatively, as the high courts of Texas, Ohio, Maine, Illinois, New York and Washington and the First Circuit Court of Appeals hold; or whether that scrutiny is limited to administratively imposed conditions, as the high courts of Alabama, Alaska, Arizona, California, Colorado, and Maryland and the Tenth Circuit Court of Appeals hold?

RELATED PROCEEDINGS

The directly related proceedings, within the meaning of Rule 14.1(b)(iii), are:

- Superior Court of California, County of Marin: *Dartmond Cherk, and the Cherk Family Trust v. County of Marin*, No. 1602934 (Dec. 6, 2017) (decision below);

- California Court of Appeal, First Appellate District: *Dartmond Cherk et al. v. County of Marin*, No. A153579 (Dec. 14, 2018) (decision below); and

- Supreme Court of California: *Dartmond Cherk et al. v. County of Marin*, No. S253558 (Mar. 13, 2019) (denying review).

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JURISDICTION

The judgment of the California Court of Appeal was entered on December 14, 2018. The California Supreme Court denied review on March 13, 2019. Pet. App. C1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. The State of California has "a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income, including the elderly and handicapped, can afford." Cal. Health & Safety Code § 50003(a). California's housing crisis has only grown "more severe" since the California legislature made that finding four decades ago, and it "ha[s] reached what might be described as epic proportions in many of the state's localities." *Cal. Bldg. Indus. Ass'n v. City of San Jose* (*CBIA*), 61 Cal. 4th 435, 441 (2015), *cert. denied*, 136 S. Ct. 928 (2016) (No. 15-330). Housing in California "has become the most expensive in the nation," "hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, [and] worsening poverty and homelessness." Cal. Gov't Code § 65589.5(a)(1)-(2).

To address this crisis, California requires local jurisdictions to "[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households." *Id.* § 65583(c)(2). To that end, Marin County adopted an ordinance that "requires new developments to contribute to the County's affordable housing stock through the provision of housing units, land dedication, and/or fees." Marin Cty. Code (MCC) § 22.22.010.

The County's affordable housing ordinance provides that at least 20 percent of new units or lots within a subdivision must be developed as affordable housing. *Id.* § 22.22.090(A). "Affordable housing" is a price control; it means offering the unit for sale or rent at a price that is affordable to households below a certain income level and taking specified steps to ensure the property remains in compliance with that price restriction. *See id.* §§ 22.22.080, 22.22.120.

Where calculating 20 percent of the new units or lots in a subdivision results in a decimal fraction between 0.50 and 1, the fraction is rounded up to 1—i.e., one whole unit or lot must be developed as affordable housing. *Id.* § 22.22.090(A). In contrast, if 20 percent of the new units or lots created results in a decimal fraction less than or equal to 0.50, the applicant has a choice: It can develop one unit or lot as affordable housing, or, alternatively, "the project applicant shall pay an in-lieu fee proportional to the decimal fraction." *Id.*; *see also* Pet. App. A20-23. The amount of the full in-lieu fee (i.e., the fee before it is prorated by the decimal fraction) is periodically "established by the County" and based on the current market value of an

affordable housing unit. *Id.* § 22.22.090(B); *see* Pet. App. B11-12. The County is required to use any fees collected under this provision to "develop[] and preserv[e] affordable housing for income qualifying households." MCC § 22.22.080(G).

So, for instance, if a development proposes 4 new residential units, 20 percent of the 4 units results in a decimal fraction of 0.80. Because 0.80 is greater than 0.50, the 0.80 fraction is rounded up to 1, and the developer is required to dedicate one unit to affordable housing. If, on the other hand, a development creates 2 units (as is the case here), 20 percent of the 2 units results in a decimal fraction of 0.40. Because 0.40 is less than 0.50, the developer has the option of paying 0.40 of the current established in-lieu fee rather than committing to price one unit affordably.[1]

2. Petitioners applied to the Marin County Community Development Agency (Planning Division) to divide a parcel of land into two single-family residential lots. Pet. App. A2-3. Their plan was to retain one and sell the other. Pet. App. B10.

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[1] The ordinance provides other non-fee alternatives, including developing a different property *offsite* as affordable housing, and dedicating land to the County to develop as affordable housing. MCC § 22.22.060(A). Because this case centers on the on-site affordable housing option as an alternative to the in-lieu fee, and because the entire ordinance is constitutional so long as one available option does not effect a taking, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 611 (2013), *see infra* at 19-20, we limit our discussion to the on-site affordable housing alternative.

Because Petitioners proposed to create two lots, applying § 22.22.090(A)'s formula yielded a decimal fraction of 0.40. So the Planning Division offered Petitioners a choice: They could round up to 1 and conform one of the lots to the affordable housing requirement or pay 0.40 of the current in-lieu fee. Pet. App. A5, 22. The Planning Division at one point set that sum at over $90,000 (based on the then-current in-lieu fee) but later exercised its discretion to reduce it to $39,960 (by using the in-lieu fee that had been in place when Petitioners' application was deemed complete).[2] Pet. App. A5, B12; *see* MCC § 22.22.060 (authorizing planning officials to "grant a waiver" of ordinance requirements). The Planning Division also allowed Petitioners to pay in installments over time. Pet. App. A6.

Petitioners chose to pay the fee "under protest," and their permit application was approved. Pet. App. A6. Seven months later, however, Petitioners demanded a refund, which the County declined to issue. Pet. App. A6, B13. Petitioners were entitled to pursue an administrative appeal, *see* Cal. Gov't Code § 66452.5; MCC § 22.40.020, but they elected not to.

3. Petitioners instead filed a petition for writ of administrative mandate and for declaratory relief in the Marin County Superior Court. They raised two

[2] The full in-lieu fee—i.e., the market value of an affordable housing unit—was $99,900 at the time Petitioners' application was deemed complete, and 0.40 of that amount is $39,960. Pet. App. B12.

claims relevant to this petition—one under state law, and one under federal law.

Petitioners first claimed that the in-lieu fee violated California's Mitigation Fee Act (the Act), Cal. Gov't Code § 66001. That statute governs development "fee[s]," meaning "a monetary exaction … charged … for the purpose of defraying all or a portion of the cost of public facilities related to the development project." *Id.* §§ 66000(b), 66001(a). It provides that a development fee must bear a "reasonable relationship" to that mitigating purpose. *Id.* § 66001(b). Petitioners claimed that their payment qualified as a "fee" under the Act and was invalid because their project had no adverse public impact. Pet. App. B20; Ct. App. J.A. 10-11, 48-49.

Second, Petitioners claimed that their "only option" was to pay the fee and that conditioning permit approval on their paying a large fee constituted an unconstitutional condition under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz*, 570 U.S. at 611. *See* Ct. App. J.A. 8, 11-12 (Petitioners' petition for peremptory writ of mandate and complaint for declaratory relief). Petitioners did not argue that the first option the County offered them—selling or renting the second lot as affordable housing—was itself unconstitutional. Instead, they conceded such a requirement was constitutional, but they argued that only the in-lieu fee option was open to them. *See* Ct. App. J.A. 65, 75 (Petitioners' brief, describing alternative means of satisfying the permit conditions as "unobjectionable").

4. The trial court denied the petition for writ of mandate. Pet. App. B1-37.

The court addressed the state and federal claims separately, rejecting each. As to the state claim (Pet. App. B16-32), the court held that the County's fee was not a "fee" within the meaning of the Mitigation Fee Act because it was not "intended to defray the public burden directly caused by Petitioners' project." Pet. App. B8; *see* Pet. App. B26, B28. The County therefore did not need to show that the fee would offset the development's impact.

Turning to the federal claim, the trial court held that the fee was not an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*. Pet. App. B32-36. The court relied on the California Supreme Court's decision in *CBIA*, which held that an ordinance similar to Marin's "does not violate the unconstitutional conditions doctrine" because paying an in-lieu fee is just one option open to permit applicants, who can choose a different option that does not involve giving up any constitutional rights, and thus "there is no exaction." Pet. App. B35 (quoting 61 Cal. 4th at 461). The court concluded that the same option was available to Petitioners here. *Id.*

5. The California Court of Appeal, First Appellate District, affirmed in an unpublished, nonprecedential opinion. Pet. App. A1-25.

a. As in the trial court, Petitioners argued that the in-lieu fee separately violated California's Mitigation Fee Act and the Fifth Amendment. Petrs.' Ct. App. Opening Br. 9-10. As to Petitioners' state-law claim,

the appellate court held that the fee was not subject to the Act because "it serves broader purposes than simply mitigating the impact of [Petitioners'] subdivision." Pet. App. A2. Only a fee "imposed for the purpose of defraying" a development's costs falls within the Act's definition and requires the government to show that the fee mitigates the development's impact. Pet. App. A17 (internal quotation marks omitted) (quoting Cal. Gov't Code § 66000(b)).

b. The Court of Appeal then relied on a different rationale to reject Petitioners' federal challenge to the in-lieu fee. Its reasoning had three steps. First, it began with this Court's precedent establishing that "the unconstitutional conditions doctrine is not implicated where the permitting authority offers the applicant at least one constitutionally permissible alternative to paying the in-lieu fee." Pet. App. A19 (citing *Koontz*, 570 U.S. at 611 (holding that a demand for money can be an unconstitutional condition on a permit, but that "so long as a permitting authority offers the landowner at least one alternative [to the fee condition] that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition")).

Second, the court rejected Petitioners' contention that their only option was to pay the fee. Petitioners had argued that, because the Marin ordinance says that "the applicant 'shall' pay an in-lieu fee where the inclusionary housing calculation results in a decimal fraction less than or equal to 0.50," they had no other option. Pet. App. A20 (quoting MCC § 22.22.090(A)). But the court interpreted the ordinance to allow applicants to choose to satisfy the permit conditions by

either paying the fee *or* complying with the on-site affordable housing requirement. Pet. App. A21-22. The court also rejected Petitioners' argument that, on the facts of this case, Marin County had given them no choice but to pay the fee. Pet. App. A22 ("[W]e find no support in the record that the County made such a demand or interpreted its ordinance in a way that gave [Petitioners] no choice but to pay the fee.").

Third, the court concluded that the on-site affordable housing alternative was not itself a taking because it merely "restricts the use of property by limiting the price for which developers may offer some of its units for sale." Pet. App. A20 (citing *CBIA*, 61 Cal. 4th at 455-57). That price restriction is "a permissible regulation of the use of land under a county's general police power" and, therefore, not a per se taking subject to analysis under *Nollan* and *Dolan*. *Id.* Because this non-taking option was available as an alternative to paying the in-lieu fee, the fee was not an unconstitutional "condition" under *Koontz*.

c. The court then offered an alternative reason to reject Petitioners' federal claim: "Additionally, 'legislatively prescribed monetary fees'—as distinguished from ad hoc monetary demands by an administrative agency—'that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test.'" Pet. App. A23 (quoting *CBIA*, 61 Cal. 4th at 459 n.11).

d. Finally, the court dismissed Petitioners' argument that the ordinance effects an unconstitutional regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), concluding the argument was both meritless and "doubly

waived" because Petitioners did not raise it in the trial court or their opening brief. Pet. App. A24.

6. The California Supreme Court denied Petitioners' petition for review. Pet. App. C1.

REASONS FOR DENYING CERTIORARI

Petitioners principally contend that this case presents the question whether permit conditions whose "intended purpose" is not to mitigate the impact of a proposed development are exempt from heightened scrutiny under this Court's unconstitutional-conditions cases. Pet. i, 9, 16, 18-20. That question is not actually presented in this case, however, because the intermediate state appellate court did not decide Petitioners' federal claim (as opposed to their state-law claim) by reference to the County ordinance's purpose. The court instead held that, because Petitioners had the option of satisfying the ordinance in a way that involved no per se taking, they were not being forced to choose between paying the in-lieu fee and giving up their constitutional rights. To the extent Petitioners also mean to challenge that holding, notwithstanding the phrasing of their question presented, Petitioners waived their challenge by expressly conceding in the state courts that their alternative to paying the fee—the affordable housing price cap—is a permissible land-use regulation. And Petitioners "doubly waived" the only relevant line of attack on such a regulation, a *Penn Central* challenge. Pet. App. A24. In any event, the Court of Appeal's principal holding is correct and does not conflict with any decision of this Court or any

court of appeals or state high court, nor do Petitioners allege any such conflict.

Petitioners further contend that this Court should resolve a conflict over whether heightened scrutiny under *Nollan* and *Dolan* applies to permitting conditions imposed by generally applicable legislative enactments in addition to ad hoc administrative decisions. Pet. i, 9, 21-30. This Court has recently denied several petitions raising that question. *See, e.g.*, *Dabbs v. Anne Arundel Cty.*, 139 S. Ct. 230 (2018) (No. 18-54); *616 Croft Ave., LLC v. City of W. Hollywood*, 138 S. Ct. 377 (2017) (No. 16-1137); *Common Sense All. v. San Juan Cty.*, 137 S. Ct. 58 (2016) (No. 15-1366); *CBIA*, 136 S. Ct. 928 (No. 15-330). The same result is warranted here. This is a particularly unsuitable vehicle for addressing that question because the state appellate court addressed it only as an alternative holding, and so resolving it would not alter the judgment below. In any event, the court's alternative holding was correct and follows directly from a distinction this Court drew in *Dolan*.

I. The First Question Presented Does Not Warrant Review.

A. There is no split on the first question presented.

Petitioners assert that the Court of Appeal rejected their unconstitutional-conditions claim because the County's purpose in applying the ordinance to them was not to offset the impact of their proposed development. *E.g.*, Pet. 4, 9, 16, 18-19. That was not the basis of the decision below, *see infra* § I.B, but

even if it were, review would be unwarranted because Petitioners allege no division of authority on this point. They allege a split only as to the second question presented. Pet. 4. Neither Petitioners nor their amici have identified *any* court that looks to a regulation's purpose in deciding whether *Nollan* and *Dolan* apply.[3]

Nor have Petitioners or their amici identified any division of authority with respect to the actual basis of the decision below—that the County's in-lieu fee is not an unconstitutional condition because Petitioners could have instead elected to obtain a permit by complying with a use restriction (a price cap) that would not itself effect a per se taking. Pet. App. A2; *see supra* at 7-8. Rather, courts broadly agree that affordable housing requirements, like Marin's affordable on-site housing alternative, constitute lawful use restrictions, not per se takings. *See, e.g.*, *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011), *cert. denied*, 565 U.S. 880 (2011) (No. 11-50); *2910 Ga. Ave. LLC*, 234 F. Supp. 3d at 304-05; *Home Builders Ass'n of Greater Chi.*, 213 F. Supp. 3d at 1025, 1028.

The absence of any division in the lower courts is reason enough to deny review of the first question presented. *Compare Koontz*, 570 U.S. at 604 (certiorari

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[3] That includes the two federal district court decisions Petitioners cite. Pet. 18-19. Those courts upheld affordable housing programs because, as here, there was no underlying taking and therefore no exaction. *See 2910 Ga. Ave. LLC v. D.C.*, 234 F. Supp. 3d 281, 305-06 (D.D.C. 2017); *Home Builders Ass'n of Greater Chi. v. City of Chi.*, 213 F. Supp. 3d 1019, 1025, 1028 (N.D. Ill. 2016).

granted "on a question of federal constitutional law on which the lower courts are divided").

B. The first question is not actually presented here.

1. Review is also unwarranted because Petitioners' first question is not actually presented here.

Petitioners contend that this case involves the question "[w]hether permit conditions are exempt from review under the unconstitutional-conditions doctrine when their intended purpose is not to mitigate adverse impacts of a proposed development but to provide unrelated public benefits." Pet. i; *see* Pet. 4, 9. But the Court of Appeal did not resolve Petitioners' *federal* claim by looking to the fee's "purpose"; only the court's state-law holding, under California's Mitigation Fee Act, involved any analysis of purpose. Petitioners have confused the two distinct holdings.

As to the federal claim, the court held that "the fee is not subject to the unconstitutional conditions doctrine because there were alternative means of complying with the inclusionary housing ordinance that did not violate *Nollan* / *Dolan*." Pet. App. A23-24; *see* Pet. App. A2 (similar). The court reasoned that at least one alternative under the County ordinance—complying with a price ceiling on one of the two subdivisions—does not itself effect a per se taking because it merely "restricts the use of property by limiting the price for which developers may offer some … units for sale." Pet. App. A19-20; *see* Pet. App. A23-24. And, as Petitioners acknowledge, "so long as a permitting authority offers the landowner at least

one alternative [to paying a fee] that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." Pet. App. A13 (quoting *Koontz*, 570 U.S. at 611). None of this analysis turned on any examination of the "intended purpose" of the ordinance. Pet. i.

Petitioners' state-law claim, by contrast, hinged on the County's purpose. Petitioners alleged that the in-lieu fee was subject to, and unable to satisfy, the requirements of California's Mitigation Fee Act. The court disagreed, holding that "[t]he fee falls outside the scope of the [Mitigation Fee] Act's scrutiny of certain 'exactions' because it serves broader purposes than simply mitigating the impact of the Cherks' subdivision." Pet. App. A2; *see* Pet. App. A17-18; *supra* at 6-7.

It is *that* state-law reasoning Petitioners mistakenly reference when describing the Court of Appeal's federal-law holding. They assert, for example, that the court held that "land-use permit conditions are not subject to the unconstitutional-conditions doctrine where they impose burdens intended to provide broad public benefits rather than to mitigate adverse impacts of a proposed change in land use." Pet. 9. But the page of the decision Petitioners cite, Pet. App. A18, gives that as the reason why "the in-lieu fee was not a development fee or exaction subject to the [Mitigation Fee] Act's reasonable relation standard." Similarly, at Pet. 6-7, they describe the trial court's federal holding as turning on what the fee is "intended" to do, but they cite the trial court's state-law holding at Pet. App. B8 and B24-25.

Petitioners' other citations are instances in which the decisions below quoted this passage from the California Supreme Court's decision in *CBIA*: "San Jose's inclusionary housing ordinance is intended to advance purposes beyond mitigating the impacts or effects that are attributable to a particular development or project and instead 'to produce a widespread public benefit' that inures generally to the municipality as a whole." *E.g.*, Pet. App. A16 (quoting 61 Cal. 4th at 474 (citation omitted)). Here again, Petitioners confuse a state-law standard with the federal standard. When *CBIA* discussed purpose in this passage, it had already held that the federal unconstitutional-conditions doctrine did not apply because there was no underlying exaction. 61 Cal. 4th at 468-69. This passage appears in a separate subsequent section that distinguishes an earlier California Supreme Court case, *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002), on *state* constitutional and statutory grounds. *See CBIA*, 61 Cal. 4th at 469-77. None of that discussion bears on the *federal* question addressed in the decision below; the Court of Appeal did not announce any purpose-based holding with respect to the federal unconstitutional-conditions doctrine.[4]

c. Accordingly, Petitioners' first question presented is not actually presented here. This Court

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[4] Even if the Court of Appeal had gone beyond *CBIA* here, it would have no consequence beyond this case because its opinion is nonprecedential. *See* Cal. R. Ct. 8.1115(a) (unpublished decisions of the California Court of Appeal "must not be cited or relied on by a court or a party in any other action," subject to narrow exceptions that do not apply here); Pet. App. A1.

"ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam). And because the court's *federal* holding rests on a different ground, review of Petitioners' "purpose" question would not affect the judgment below. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986) (this Court will not "review federal issues that can have no effect on the state court's judgment"); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ as improvidently granted where resolving the question presented would not "make any difference even to these litigants").

2. To the extent Petitioners' short discussion of the actual basis of the Court of Appeal's federal holding (Pet. 13-16) suggests they also mean to challenge it, this Court should not entertain the challenge.

a. "The framing of the question presented has significant consequences" because "'[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.'" *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (alteration in original) (quoting S. Ct. R. 14.1(a)). Petitioners did not include in their questions presented whether the price-cap alternative option is itself a per se taking subject to review under *Nollan* and *Dolan*. They chose instead to present a question that has nothing to do with the decision below and misstates the actual basis of the court's judgment. No "exceptional" circumstances warrant departing from the Court's ordinary practice of ignoring "questions outside those presented in the petition." *Id.* On the contrary, for the reasons noted

immediately below, Petitioners' waivers render this case a poor vehicle for resolving the splitless question whether the alternative condition in the County's ordinance constitutes a per se taking.

b. With respect to the actual basis of the decision below, Petitioners now contend that the on-site affordable housing alternative is itself a per se taking and therefore cannot save the in-lieu fee from being viewed as an impermissible "condition" under *Koontz*. Pet. 13-16. Petitioners criticize the intermediate appellate court for having "glossed" over this question and answering it "without analysis." Pet. 13. But the reason the court did not dwell on this issue is that Petitioners never raised it in the trial court or the Court of Appeal. They should not be heard on it now. *See Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017) ("[I]t is not the Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." (citation omitted)).

Petitioners never argued—not even in the alternative—that a requirement to offer a unit for sale at affordable prices (the ordinance's primary option) effects a per se taking. *See* Ct. App. J.A. 79 (Reply to Motion for Judgment, stating they were only "contesting the application of one of element of the County's ordinance"—the fee). On the contrary, they *conceded* that the affordable housing program in *CBIA* included "at least one permissible option" that "functioned as a regulation of the use of their land": providing "on-site affordable housing units." Petrs.' Ct. App. Opening Br. 21, 23; *see* Ct. App. J.A. 75 (trial court briefing) (similar). The alternative that *CBIA* upheld—and that rendered the ordinance there "unobjectionable,"

as Petitioners said below—is the same as the alternative here: offering a portion of the development for sale at affordable prices. Petrs.' Ct. App. Opening Br. 23; *see CBIA*, 61 Cal. 4th at 461.

Petitioners' concession was express and deliberate. In an effort to distinguish *CBIA*, Petitioners chose *not* to challenge the validity of the alternatives under the County ordinance. Instead, they argued that, "[u]nlike San Jose's ordinance," which they acknowledged "provided at least one permissible option," "Marin County's law—as applied to the Cherks—offers no alternatives" to paying an in-lieu fee. Ct. App. J.A. 76-77 (trial court briefing); *see also* Petrs.' Ct. App. Opening Br. 9, 21-23, 27-28 ("[T]he Cherks had no such choice…."). It is only now that the state court has flatly rejected Petitioners' interpretation of the ordinance, and concluded that an alternative *was* open to them under County law, *see* Pet. App. A20-23, that Petitioners have pivoted to arguing that the affordable housing option is a taking after all. *See* Pet. 7-8, 13-16. The argument is waived.

"Prudence … dictates awaiting a case in which the issue was fully litigated below, so that [this Court] will have the benefit of developed arguments on both sides and lower court opinions squarely addressing the question." *Yee*, 503 U.S. at 538. Indeed, this Court likely lacks jurisdiction to entertain Petitioners' challenge to the constitutionality of the alternative condition. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

Webb v. Webb, 451 U.S. 493, 496-97 (1981); *see* 28 U.S.C. § 1257(a) (granting this Court jurisdiction over state-court judgments where a federal issue was "specially set up or claimed" below). That is why this Court's Rules require petitions for certiorari directed to state courts to specifically cite where and how specific federal questions were preserved—a requirement the petition does not (and could not) satisfy. S. Ct. R. 14.1(g)(i).[5]

c. Finally, Petitioners "doubly waived" a regulatory-takings claim under *Penn Central*, 438 U.S. 104, by failing to raise it in the trial court and raising it only belatedly in the intermediate appellate court. Pet. App. A24. That waiver has distorted the way Petitioners present the issues to the Court in this case: They now seek to repackage their waived regulatory-takings challenge into a novel theory of "non-possessory" per se takings. Pet. 14-15; *see infra* at 21-22.

Penn Central's regulatory takings framework offers the most fitting mode of analysis for Petitioners' challenge to the ordinance's price-cap alternative. *See Yee*, 503 U.S. at 529 (explaining that rent-control regulations "are analyzed by engaging in the 'essentially ad hoc, factual inquiries' necessary to determine whether a regulatory taking has occurred"). If this Court wishes to address the constitutionality of inclusionary zoning regulations, it would be better to do so

[5] Petitioners did challenge the validity of the alternative in their petition for review to the California Supreme Court, Petrs.' Cal. S. Ct. Pet. 5, but that court denied review, and the "judgment" as to which they seek a writ of certiorari is the California Court of Appeal's. 28 U.S.C. § 1257(a); *see* Pet. 1.

in a case in which all doctrinal options are on the table and actually aired—including *Penn Central*—to avoid an artificially constrained consideration of the issues. *See, e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 334 (2002) (determining that "the circumstances in this case are best analyzed within the *Penn Central* framework" but concluding that "[r]ecovery under a *Penn Central* analysis is also foreclosed … because petitioners expressly disavowed that theory").

Petitioners' failure to timely raise their *Penn Central* claim means that the Court could comprehensively consider the constitutionality of the County's ordinance only by undertaking *Penn Central*'s highly factbound inquiry in the first instance, on an undeveloped record. But this is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and that is not a "sensible exercise of this Court's discretion," *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990).

C. The decision below is correct.

The Court of Appeal correctly held that *Nollan*/*Dolan* scrutiny does not apply to the County's in-lieu fee because Petitioners could have chosen to obtain a permit by complying with a condition that would not itself constitute a per se taking if imposed directly.

1. Petitioners acknowledge that the Court of Appeal applied "the uncontroversial proposition" that "'so long as a permitting authority offers the landowner at least one alternative […] that would satisfy

Nollan and *Dolan*, the landowner has not been subjected to an unconstitutional condition.'" Pet. 7-8 (quoting Pet. App. A13, in turn quoting *Koontz*, 570 U.S. at 611); *see* Pet. App. A22-23. The proposition is uncontroversial because a "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz*, 570 U.S. at 612. If the government could directly impose a requirement—because it is not a taking—and that requirement is an option open to the permit applicant, then the government is not pressuring the applicant to give up her constitutional rights in order to receive a government benefit when it makes an alternative fee option available.

2. The state appellate court correctly applied that principle to the County ordinance. Under the ordinance, Petitioners could have split the lots and sold the half they wished to sell without paying the in-lieu fee, so long as they instead complied with the affordable housing option. This Court's precedents confirm that that option, like a standard rent-control ordinance, is not a per se taking.

First, an on-site affordable housing requirement does not "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (alteration in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

Second, the affordable housing option is not a "direct government appropriation or physical invasion of

private property." *Id*. at 537. No "[a]ctual" property is "transferred from [owners] to the Government," and no "[t]itle" is passed. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015) (cited at Pet. 15 n.2). Nor does the government "require[] the landowner[s] to submit to the physical occupation of [their] land," *Yee*, 503 U.S. at 527 (emphasis omitted), for instance by granting "easement[s] allowing public access" to their property, as in *Nollan* and *Dolan*. *Lingle*, 544 U.S. at 546 (describing *Nollan* and *Dolan*); *compare Koontz*, 570 U.S. at 617 (alternative to fee was "deeding to the public a conservation easement on a larger parcel of undeveloped land," which *was* a per se taking). Rather, the affordable housing option merely regulates the terms according to which Petitioners can use a portion of their property. *See Dolan*, 512 U.S. at 385 (distinguishing between "a requirement that [the landowner] deed portions of the property to the city" and "simply a limitation on … use"). It does that by limiting the price Petitioners can charge and ensuring that price cap stays in place. This Court has repeatedly recognized that use restrictions—and particularly price controls tied to specific units of property—are constitutional. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987); *Yee*, 503 U.S. at 524, 532. Petitioners do not challenge these precedents here.

3. Petitioners instead point to several "non-possessory property interests" that the County's price restriction allegedly exacts. Pet. 14-15. But Petitioners' premise is wrong as a matter of County law. The provisions of the ordinance that they say "exact[]" various "property interests" do not require Petitioners to

convey any property interest to the County. Pet. 14-15. Rather, they are rules designed to ensure that the units are made available for affordable housing and remain affordable in the future by, for example, *authorizing* the County to buy the unit when it is up for resale or if Petitioners violate the income restrictions, without *requiring* Petitioners to sell it to the County. MCC § 22.22.120(B)(5). Other requirements operate on the reseller, not Petitioners (the developer). *E.g.*, *id.* § 22.22.120(B)(1) ("Limitation on Resale Price").

Petitioners' conclusion is also wrong. Even if the ordinance "exacted" any interests from *them*, "nonpossessory governmental activity" without a "physical occupation" is "analyzed under the multifactor inquiry" of *Penn Central*—the argument Petitioners doubly waived here—but it is not a per se taking. *Loretto*, 458 U.S. at 440. That is why the government can even go so far as to "prohibit the sale of [property] without effecting a per se taking." *Horne*, 135 S. Ct. at 2428. Petitioners' expansive theory of per se takings is incompatible with "the 'longstanding distinction' between government acquisitions of property and regulations"—a distinction this Court has recently and repeatedly "stressed." *Id.* at 2427.

II. The Second Question Presented Does Not Warrant Review.

A. The judgment below does not depend on any distinction between legislatively and administratively imposed fees.

1. Petitioners' second question presented does not warrant review because it addresses only an

alternative holding below. As noted above, at 7-8, the intermediate appellate court principally concluded that *Nollan* and *Dolan* did not apply because Petitioners had at least one non-taking option for satisfying the permit conditions. The court then noted a brief, "[a]dditional[]" reason for declining to apply *Nollan* and *Dolan*: The in-lieu fee here "is a legislatively mandated fee that applies to a broad class of permit applicants," so, unlike fees imposed on an "individual and discretionary basis," it does not raise the same risk that local governments will single out landowners for extortionate exactions. Pet. App. A23 (citing *CBIA*, 61 Cal. 4th at 459 n.11, *San Remo*, 27 Cal. 4th at 663-71, and *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996)).

As Petitioners acknowledge, this was an "alternative basis" for the judgment. Pet. 26. The judgment below thus did not "rest on the distinction (if any) between takings effectuated through administrative versus legislative action." *CBIA*, 136 S. Ct. at 929 (Thomas, J., concurring in the denial of certiorari). Because this Court "reviews judgments, not statements in opinions" from state courts, and review of this question would not alter the judgment below, this is not a proper vehicle to consider the second question presented. *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)); *see Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

The only way this Court could properly reach the second question presented would be if it granted review of the court's primary holding as well—despite the absence of a split, the waiver of Petitioners'

arguments, and Petitioners' failure to include it among the questions presented—and then reversed that primary holding in the face of this Court's precedents supporting it. If this Court determines that the second question presented is worthy of review, it should await a case that squarely raises it and in which resolution of the issue would directly affect the judgment.

2. This case is also a poor vehicle for considering the second question presented because the permit application here involved an unusual process that, in parts, more resembled an ad hoc fee assessment than a legislatively mandated one.

Indeed, Petitioners argued below that the in-lieu fee *was* an "*ad hoc*" (i.e., administrative) imposition because the County had discretion to waive or adjust the fee. Petrs' Ct. App. Br. 33; *see also* Ct. App. J.A. 78-79 (Petitioners' trial court brief, arguing that the Marin County Code gives officials "discretion … to impose fees on an *ad hoc* basis" and "officials here did exercise their discretion to reduce the fee charged to the Cherks"). The County agreed in its briefing below that it *had* exercised its discretion—at Petitioners' request, and to Petitioners' significant benefit—to impose the fee in effect when Petitioners' application was deemed complete, rather than the higher fee applicable when Petitioners' tentative subdivision map was approved. Resp. Ct. App. Br. 34-35.

That dynamic is not found in run-of-the-mill cases in which general impact or service fees are imposed area-wide by generally applicable legislation. *See, e.g.*, *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 811-

13 (Md. Ct. App. 2018). If the Court wishes to address the second question presented, it should do so in a case that cleanly presents the issue. But this is not a representative case involving the usual scenarios that have prompted reviewing courts to decline to apply *Nollan* and *Dolan* scrutiny to legislative permit conditions.

B. The split of authority is overstated, and this Court has recently denied review of the question.

1. As Members of this Court have previously noted, some lower courts have declined to apply *Nollan* and *Dolan* scrutiny to conditions imposed by general legislative enactments. *See Koontz*, 570 U.S. at 628 (Kagan, J., dissenting); *CBIA*, 136 S. Ct. at 928 (Thomas, J., concurring in the denial of certiorari); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting from the denial of certiorari).

But whatever uncertainty may exist among lower courts on this question, the division is stale, and this Court has often and recently denied review of this question. *See supra* at 10; *see also Alto Eldorado P'ship v. Santa Fe Cty.*, 565 U.S. 880 (2011) (No. 11-50); *Mead v. City of Cotati*, 563 U.S. 1007 (2011) (No. 10-828); *Action Apartment Ass'n v. City of Santa Monica*, 556 U.S. 1237 (2009) (No. 08-1139); *Drebick v. City of Olympia*, 549 U.S. 988 (2006) (No. 06-223); *Rogers Mach. Co. v. Wash. Cty.*, 538 U.S. 906 (2003) (No. 02-750); *Agencia La Esperanza Corp. v. Orange Cty. Bd. of Supervisors*, 538 U.S. 916 (2003) (No. 02-

638). This case offers no reason to take up the question now.

2. In any event, Petitioners vastly overstate the extent to which courts are divided on this question.

Several of the cases Petitioners cite as implicating that alleged conflict resolved exclusively state-law disputes. In *City of Portsmouth v. Schlesinger*, 57 F.3d 12 (1st Cir. 1995), the First Circuit evaluated a state-law statutory challenge to the legality of an individualized impact fee and ultimately certified the dispositive state-law question to the New Hampshire Supreme Court; the case did not "present any legal challenge to the concept of conditional use zoning on either constitutional or statutory grounds," *id.* at 16. *See also N. Ill. Home Builders Ass'n v. Cty. of Du Page*, 649 N.E.2d 384, 389-91 (Ill. 1995) (striking down transportation impact fee statute under the state-law takings framework, a standard the *Dolan* Court concluded was more "exacting" than the federal test, 512 U.S. at 389-90); *Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 192-93 (Wash. 1994) (upholding individualized permit condition against state-law statutory challenge).

Other cases Petitioners cite raised *some* federal takings issue but still did not address the particular legislative/administrative question presented in the petition. Instead:

- In *CBIA*, 61 Cal. 4th at 469, the California Supreme Court concluded that the unconstitutional-conditions doctrine did not

apply because the underlying condition was not a taking. *See supra* at 14.

- *Alto Eldorado Partnership*, 634 F.3d at 1174, 1178-79, concluded that *Nollan* and *Dolan* do not apply because the challenged condition did not constitute a taking.

- *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003), affirmed a legislative condition on the ground that the developer's predecessor had already accepted the condition before the developer purchased the property and the developer had not demonstrated that the predecessor could have raised a *Nollan*/*Dolan* claim.

- And in *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998), the court held that *Nollan* and *Dolan* did not apply because the claim raised a facial, not as-applied, challenge and because the plaintiffs offered no evidence to suggest that the permit condition constituted an exaction, while the concurrence concluded that the takings clause did not apply to monetary exactions at all, *id.* at 817 (Williams, J., concurring).

Still other cases merely applied *Nollan* and *Dolan* to permit conditions but did not turn on whether the condition was imposed under a general enactment or an ad hoc adjudicative determination, or whether *Nollan*/*Dolan* scrutiny is warranted for legislatively imposed conditions. *See, e.g.*, *Home Builders Ass'n of*

Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355 (Ohio 2000) (concluding that development fees are subject to a version of the *Nollan*/*Dolan* test); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Me. 1998) (legislative nature of challenged dedication requirement just one factor in *Nollan*/*Dolan* analysis); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479 (N.Y. 1994) (finding no basis in *Nollan* to apply different takings tests for physical and regulatory exactions); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (pre-*Dolan* case holding that *Nollan* did not heighten the level of scrutiny applicable to permit conditions).

And in others, any distinction drawn between legislative and administrative conditions was not dispositive because—as in this case—the court relied on alternative, independent bases for declining to apply *Nollan* and *Dolan*. *See, e.g.*, *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So.3d 992, 1008 (Ala. 2010) (holding that *Nollan* and *Dolan* did not apply to permit conditions that did not require "the dedication of property to public use"); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 689 n.1 (Colo. 2001) (concluding, before *Koontz*, that *Nollan* and *Dolan* apply only where the government demands real property, rather than a development fee, as a condition of development); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997) (determining that the plaintiff had not raised the *Nollan*/*Dolan* issue before the trial court).

Finally, in *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 641 (Tex. 2004), the Texas Supreme Court held that *Nollan* and *Dolan* applied to

an exaction that was imposed only after the town "t[ook] into account individual circumstances" of the permit applicant, but declined to "decide here in the abstract whether the *Dolan* standard should apply to all 'legislative' exactions."

So, of those cases that remotely touch on this question, most either did not draw the clear-cut distinction between legislative and administrative conditions Petitioners would suggest or did not rest solely on the fact that a challenged condition arose from generally applicable legislation.

3. Petitioners' insistence that any purported split is "deepening" is also incorrect. Nearly all of the cases Petitioners cite are more than a decade old. Only two were decided in the six years since *Koontz* clarified that *Nollan* and *Dolan* apply to monetary fees at all, and they simply reaffirmed or noted precedent from the state high court from a prior decade. *See Dabbs*, 182 A.3d at 812-13 (reaffirming 1994 decision declining to apply *Nollan* and *Dolan*); *CBIA*, 61 Cal. 4th at 459 n.11 (noting 1996 *Ehrlich* decision).

C. Distinguishing between general legislative enactments and ad hoc administrative determinations follows from this Court's decisions in *Nollan*, *Dolan*, and *Koontz*.

Finally, the distinction some lower courts have drawn between legislatively and administratively imposed conditions is correct and flows directly from this Court's precedents.

This Court has described "the central concern of *Nollan* and *Dolan*" as "the risk that the government may use its substantial power *and discretion* in land-use permitting" to pursue "[e]xtortionate demands for property" in the face of such vulnerability. *Koontz*, 570 U.S. at 604-05, 607, 614 (emphasis added); *see also Dolan*, 512 U.S. at 387 (noting the risk that an agency will "simply try[] to obtain an easement through gimmickry," thereby "convert[ing] a valid regulation of land use into an out-and-out plan of extortion" (internal quotation marks omitted)). Permitting conditions and fees imposed by generally applicable legislation do not run the same risk of undue coercion through unconstitutional exactions; by their nature, such enactments are not subject to agency discretion and instead apply across the board to all similarly situated landowners. That widespread effect leaves little room for extortionate behavior because political accountability serves as a potent check. Heightened constitutional review is unnecessary.

Indeed, *Dolan* suggested that its heightened scrutiny ought to apply only to situations in which a government "made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," but not to "essentially legislative determinations classifying entire areas of the city." 512 U.S. at 385. When imposing the former category of condition, this Court explained, the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. But for "most generally applicable zoning regulations, the burden properly rests

on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391 n.8.

So it is no coincidence that *Nollan*, *Dolan*, and *Koontz* all arose from ad hoc administrative or adjudicative determinations imposed on individual landowners seeking development permits, not from the rote application of general legislative requirements. *See Koontz*, 570 U.S. at 601-02 (recounting the elaborate administrative process); *Dolan*, 512 U.S. at 380-82, 385 (similar); *Nollan*, 483 U.S. at 828-29 (similar); *see also Lingle*, 544 U.S. at 546 ("Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions…."). The California courts and others have therefore been correct to limit heightened scrutiny to the adjudicative context rather than usurp the political process's governance of generally applicable laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 16, 2019