No. 18-1538

In the
Supreme Court of the United State

DARTMOND CHERK AND
THE CHERK FAMILY TRUST,
Petitioners,

v.

COUNTY OF MARIN,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District

REPLY BRIEF

BRIAN T. HODGES
Pacific Legal Foundation
255 S. King Street, Ste. 800
Seattle, WA 98104
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: BTH@pacificlegal.org

OLIVER J. DUNFORD
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Spring Gardens, FL 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: ODunford@pacificlegal.org

LAWRENCE G. SALZMAN*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: LSalzman@pacificlegal.org

Counsel for Petitioners
Dartmond Cherk and the Cherk Family Trust

QUESTIONS PRESENTED

Marin County imposed a $39,960 "affordable housing" fee as a condition of approving a permit to divide a residential lot, absent any finding that the fee was needed to mitigate adverse impacts of the proposed development. Alternatively, the property owner might have dedicated various non-possessory interests in the property, other land, or low-cost housing units off-site to satisfy the condition. The court below held that neither the fee nor its alternatives were subject to the unconstitutional-conditions doctrine, which requires land-use permit conditions to bear an "essential nexus" and "rough proportionality" to adverse public impacts of the proposed development. *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

The questions presented are:

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?

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INTRODUCTION AND SUMMARY OF ARGUMENT

Marin County does not dispute that when the Cherks applied for a permit to change the use of their land, the County conditioned approval on a demand for money or property to advance its affordable housing program. The demand bore no nexus or proportionality to any adverse impact of the Cherks' project, and the Cherks argued that it would constitute a *per se* taking if made outside the permitting process. But the court below ruled that the County's condition was exempt from scrutiny under the unconstitutional-conditions doctrine. As a result, the Cherks' money was taken, and the County furthered its affordable housing objectives through means forbidden by the core principle of the Takings Clause: forcing individual property owners to bear public burdens which, in all justice and fairness, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The County escaped liability because California courts have manufactured an end-run around this Court's unconstitutional-conditions tests. When government declares that fees and other exactions are not intended to mitigate adverse impacts of a land use applicant's project, but to provide wholly unrelated public benefits, California courts respond with a categorical rule exempting those conditions as beyond the scope of this Court's *Nollan*, *Dolan*, and *Koontz* tests. *See California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 472, 474 (2015) (*CBIA*). Here, the Court of Appeal followed that rule and applied *ipse dixit* from the California Supreme Court to conclude that the taking of discrete, well-recognized

non-possessory interests in property (*e.g.*, recorded, perpetual purchase options and restrictive covenants) does not constitute an exaction. Pet. App. A-20. It then buttressed the ruling by affirming the California rule that *Nollan*, *Dolan*, and *Koontz* do not apply to legislatively imposed exactions. Pet. App. A-19–A-24.

The County does not refute that California courts have created categorical exemptions to the *Nollan*/*Dolan* tests. Instead, it suggests that the "intended purpose" rule described by the Petition's first question resolved only the Cherks' state-law claim but not the federal claim. BIO 12. According to the County, the Cherks should have presented a different question, such as whether a permit condition requiring the dedication of discrete and well-recognized non-possessory interests in the subject property is an exaction subject to *Nollan* and *Dolan*. This Court could rephrase the matter that way, *see Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), but the County's objection misses the mark. The state-law and federal questions are intertwined, if not one in the same. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 867 (1996). ("[I]t is appropriate for this court to interpret the statutory standard in a manner consistent with the high court's decisions in *Nollan* and *Dolan*.") And, regardless, the County's proposed alternative question is subsidiary to and fairly included within the Cherks' first question. *See* Sup. Ct. Rule 14.1(a).

The County's conditional demand was triggered by the Cherks' application to change the use of their land, a demand that burdened their ownership of that specific parcel. This type of burden is the hallmark of an exaction as explained by this Court's precedents.

See Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 613 (2013). The Court of Appeal simply declared the County's alternative mandates to be "permissible regulation of the use of land," Pet. App. A-20, based on the California Supreme Court's endorsement of other affordable housing regulations that serve broad welfare purposes beyond mitigation. Pet. App. A-18 (citing *CBIA*, 61 Cal. 4th at 462, 474). The Court of Appeal's cramped analysis thus begged the question whether the County's demand constituted an exaction under this Court's unconstitutional-conditions jurisprudence.

Finally, the County argues that the split of authority relating to the second question—whether legislatively imposed exactions are subject to the unconstitutional-conditions test—does not warrant review. BIO 22-31. But it does not deny the existence of the split, or that members of this Court have recently noted the conflict and underscored the vital need to address it. Unless this Court settles the question, California courts will continue to ignore the unconstitutional-conditions doctrine whenever faced with challenges to legislatively imposed exactions, threatening to relegate property rights to "the status of a poor relation" among the Bill of Rights' protections. *See Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2169 (2019) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

Certiorari on both questions is warranted and should be granted.

CORRECTION TO MISTATEMENT OF THE FACTS

The County's opposition contains a critical misstatement of fact. The County claims the Cherks "conceded" in the courts below that the County's alternative non-fee mandates were constitutional. BIO 5 (citing Ct. App. JA 65, 75). Not so. In support of the misstatement, the County cites argument from *its own brief* (JA 65), and then to the Cherks' reply brief (JA 75), in which they in fact *contested* the County's claim that its ordinance is indistinguishable from one deemed constitutional by the California Supreme Court in *CBIA*. In the course of argument, the Cherks noted the California Supreme Court's holding that one of the options available to the *CBIA* plaintiffs was unobjectionable. *Id*. This was the view of the California court, *not the Cherks*. Regardless, the brief continues, "the details matter: Marin County's ordinance, as applied to the Cherks, is materially different than the inclusionary housing ordinances involved in" *CBIA*. Later, the County cites to pages 21 and 23 of the Cherks' opening brief in the Court of Appeal to make the same claim. BIO 16. Once again, the County confuses the Cherks' discussion of the *CBIA* case with the Cherks' own position. The Cherks there only explained why *CBIA's* holding did not apply to the instant case.[1]

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[1] The County (and the court below) also claim that Petitioners "waived" a *Penn Central* regulatory taking claim, but Petitioners never pled one. BIO 18. The Cherks discussed *Penn Central* in a short passage of their reply brief addressing a hypothetical application of the County's ordinance. The Court of Appeal seized on it as a new "claim," which the Cherks never truly pressed, and rejected it. Pet. App. A-24.

ARGUMENT

I.
PETITIONER'S FEDERAL QUESTION WAS INTERTWINED AND RESOLVED WITH THE STATE-LAW CLAIM

The County argues that the first question presented—whether permit conditions are exempt from review under the unconstitutional-conditions doctrine when their intended purpose is not to mitigate the adverse impact of proposed development but to provide unrelated public benefits—"is not actually presented" because, in its view, "the intermediate state appellate court did not decide Petitioner's federal claim (as opposed to their state-law claim [under the Mitigation Fee Act]) by reference to the County ordinance's purpose." BIO 9. This objection misapprehends the relationship between federal law and California's Mitigation Fee Act and is therefore without merit.

In California, "[d]evelopers who wish to challenge a development fee on either statutory or constitutional grounds must do so via the statutory framework provided by the [Mitigation Fee] Act." *Ehrlich*, 12 Cal. 4th at 867. The California Supreme Court has declared that the Act "embod[ies] the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions—proof by the local permitting authority of both an 'essential nexus' . . . and of a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development." *Id*. at 860. Therefore, when a California state court adjudicates the applicability of the Mitigation Fee Act to a land-use permit condition,

it necessarily renders judgment on the applicability of the federal constitutional test.

Accordingly, the Cherks argued in both the state trial and appellate courts that the County's demand was a *per se* taking of their money giving rise to an exaction in violation of the Mitigation Fee Act and the unconstitutional conditions doctrine.[2] The Court of Appeal rejected that claim, holding that the fee was "not a development fee or exaction subject to the Act." Pet. App. A-18. That decision turned on the court's finding that the purpose of the County's affordable housing mandates is not to mitigate the adverse public impacts of any proposed development project, but to provide the unrelated public benefit of "increasing the amount of affordable housing in Marin County." *Id.*

As *Ehrlich* explained, this holding necessarily includes the determination that the County's affordable housing fee is not subject to *Nollan* and *Dolan*'s nexus and proportionality tests. And, therefore, as this Court has recognized, federal questions are presented in the context of state statutes that codify the *Nollan* and *Dolan* tests. *E.g.*, *Koontz*, 570 U.S. at 602 (granting review of state court decision that reached a *Nollan/Dolan* question "under Fla. Stat. § 373.617(2), which allows owners to recover monetary damages if a state agency's action is an unreasonable exercise of the state's police power

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[2] JA 53 (Trial Court) ("Had the County commanded a payment of that sum from the Cherks outside the permitting process, it surely would constitute a taking of their money. Yet, the County cannot show that there is any logical connection that might make its demand permissible."); Petrs.' Ct. App. Opening Br. 30-31 (same).

constituting a taking without just compensation") (quotations omitted). The Cherks' first question presented properly raises a federal issue for this Court's review.

The Court of Appeal's finding—that purported alternatives to the affordable housing fee (dedications of discrete property interests recognized under state law, including purchase option, restrictive covenant, and a beneficial interest) were not "exactions" but "permissible regulation of the use of land," Pet. App. A-20—demonstrates the need for this Court's review. The lower court's conclusory determination simply begged the threshold question under the unconstitutional-conditions analysis. The question is not whether the demands were "exactions" (of course they were, as demands for money or property conditioning a land use permit and burdening the specific subject property), but whether those exactions would effect a taking if compelled directly, outside the permitting process. *Dolan*, 483 U.S. at 831; *Koontz*, 570 U.S. at 613. The Cherks contend they are, Pet. 13-17, and the government, "by *ipse dixit,* may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980).

The Petition asks this Court to clarify whether the scope of the unconstitutional-conditions test includes exactions whose intended purpose is not to mitigate adverse impacts of a proposed development but to provide unrelated public benefits. If the unconstitutional-conditions doctrine does include these exactions (which it does), then the question, whether the alternatives available to a property owner also constitute exactions, is a subsidiary

question fairly contained within the question presented.

It also does not matter that this threshold inquiry involves questions of state law. Every case involving property rights secured by the Takings Clause will include a threshold determination whether government action impacts a property interest, which is a question of state property law. *Koontz*, 570 U.S. at 615. But that this question involves a matter of state law, alone, does not strip this Court of jurisdiction over federal constitutional claims. *Cf. Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000) (The Takings Clause would "afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights."); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Environmental Protection*, 560 U.S. 702, 726-27 (2010) ("[F]ederal courts must often decide what state property rights exist in nontakings contexts.") (citation omitted); *see also Board of Regents of States Colleges v. Roth*, 408 U.S. 564, 577-78 (1972). As the Petition demonstrates, each of the property rights taken by the County's affordable housing mandates is recognized and protected by California state law.[3] Pet. 15 n.2. This

[3] The County suggests that no taking can occur if the property interest is non-possessory or not "conveyed" to the government. BIO 21-22. Not so. The condition in *Nollan* required no conveyance to the state; it required only that the owners acknowledge that the public had a right to pass across a portion of the property. 483 U.S. at 858 (Brennan, J., dissenting). The interest taken there was an easement, a classic "non-possessory" property interest. Likewise, the Takings Clause violation in *Lucas* was non-possessory (the impact on property due to a

Court need not settle that matter, however; it can choose to leave that "to be dealt with on remand" once clarifying the appropriate constitutional test. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1031 (1992).

Nowhere does the County refute what is undeniable: the decision below allows the government to leverage its permitting power to press private property into public service as affordable housing without compensation and without limit against unconstitutional conditions. The rule adopted by California courts abandons "the central concern of *Nollan* and *Dolan*: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue." *Koontz*, 570 U.S. at 597. On this basis alone, review is warranted.

II.
MEMBERS OF THIS COURT AND LOWER COURTS RECOGNIZE THE LEGISLATIVE/ADJUDICATIVE EXACTIONS CONFLICT

The County cannot seriously dispute that the Cherks' legislative exactions question raises an important federal question. Instead, it argues that the split is overstated. BIO 25-29. However, several members of this Court have recognized that state and lower federal courts have divided on the question whether a permit condition mandated by an act of

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modified setback line). *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1038 (1992) (Blackmun, J., dissenting).

generally applicable legislation is subject to the unconstitutional-condition doctrine's nexus and rough proportionality requirements and the need to address it.[4] *See, e.g., California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari); *Parking Ass'n of Georgia, Inc. v. Atlanta,* 515 U.S. 1116, 1117 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari); *see also Koontz*, 570 U.S. at 628 (2013) (J. Kagan, dissenting) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money."). As Justice Thomas has noted, the split has persisted for at least two decades and "[t]hat division shows no signs of abating." *California Bldg. Indus. Ass'n*, 136 S. Ct. 928 (J. Thomas, concurring in denial).

The decision below unmistakably held that the County's affordable housing fee was not an exaction—based on a long line of state case-law deeming legislatively mandated permit conditions categorically exempt from review under *Nollan* and *Dolan*. Pet. App. A-23; *see also CBIA*, 61 Cal. 4th at 459 n.11 ("Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test."); *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 668-70

[4] The County contends that this case is unworthy of review because this Court has denied petitions raising the same question in recent years. BIO 25. But the denial of certiorari carries no implications for the Court's view of the merits of a case. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of certiorari).

(2002) ("[L]egislatively prescribed monetary fees imposed as a condition of development are not subject to the *Nollan/Dolan* test.")); *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 621, 628 (2016). Petitioners admit that this holding was not the sole, but an alternative, holding of the court below. Pet. 26. But the holdings are closely related; the distinction between legislative and adjudicative exactions is a species of the "intended purpose" issue raised by the Cherks' first question.

The rule exempting legislatively mandated exactions from scrutiny under *Nollan* and *Dolan* is triggered when the legislature expresses a purpose beyond mitigation, invoking "municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." *CBIA*, 61 Cal. 4th at 461. But allowing the government to circumvent the unconstitutional-conditions inquiry by cloaking exactions as mere regulations would grant government the power to define property out of existence. "Simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights." *Dolan*, 512 U.S. at 392.

Unless addressed by this Court, this categorical rule will continue to prohibit state and lower courts from engaging in the essential first step of the *Nollan*/*Dolan* test—determining whether a permit condition takes a compensable interest in the subject property—as a matter of law. Such a rule again returns the Takings Clause "to the status of a poor relation" among the Bill of Rights. *Dolan*, 512 U.S.

at 392; *Knick*, 139 S. Ct. at 2170 (purporting to "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights."). The Opposition offers no good reason why a grant of certiorari in this case should not include the question of whether legislatively mandated exactions are subject to the *Nollan*, *Dolan*, and *Koontz* tests.[5]

[5] The County argues that this is a poor vehicle because the Cherks contested the legislative character of the mandates in the lower courts. BIO 24. But this ignores that the County argued that the affordable housing conditions were legislatively mandated and that both the trial court and Court of Appeal agreed. Pet. App. A-23.

CONCLUSION

The Cherks respectfully ask the Court to grant the Petition for Writ of Certiorari.

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Respectfully submitted,

BRIAN T. HODGES
Pacific Legal Foundation
255 S. King Street, Ste. 800
Seattle, WA 98104
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: BTH@pacificlegal.org

OLIVER J. DUNFORD
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Spring Gardens, FL 33410
Telephone: (561) 691-5000
Facsimile: (561) 691-5006
E-mail: ODunford@pacificlegal.org

LAWRENCE G. SALZMAN*
**Counsel of Record*
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 429-7747
E-mail: LSalzman@pacificlegal.org

Counsel for Petitioners
Dartmond Cherk and the Cherk Family Trust