No. 18-54

In The
Supreme Court of the United States

WILLIAM A. DABBS, JR.,
Petitioner,

v.

ANNE ARUNDEL COUNTY, MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether legislatively proscribed monetary exactions on land use development are subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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INTRODUCTION

Respondent Anne Arundel County does not contest any of the substantial reasons why this Court should resolve the question whether legislatively mandated exactions are subject to the nexus and proportionality tests set out by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Indeed, the County ultimately agrees that a categorical rule exempting legislative actions from constitutional scrutiny would likely conflict with *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013). Opposition Brief (Opp.) at 22. The Maryland Court of Appeals adopted such a rule when it concluded that "[i]mpact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny." Pet. App. A at 29.

The County, however, opts to not address this ruling. Instead, it fabricates a straw man argument by claiming (without citation) that the court of appeals "ruled that the County's impact fees constitute taxes." Opp. at 17. Based on that misrepresentation, the County argues that the Maryland court simply followed settled law by holding a "tax" exempt from the nexus and proportionality tests. Opp. at 11-24. Not true. For the reasons discussed below, the County never asked the state courts to rule that its fee was actually a tax. Accordingly, each state court ruled only that legislatively mandated "impact fees" are exempt from the nexus and proportionality requirements. Pet. App. A at 29; Pet. App. B at 25; Pet. App. C at 31.

The County's jurisdictional arguments are equally unavailing. This Court unquestionably has jurisdiction over the federal constitutional question

decided by the Maryland Court of Appeals. 28 U.S.C. § 1257(a). Moreover, the court of appeals determined that Dr. Dabbs paid the impact fees and has standing to sue. Pet. App. A at 2, 7 n.9. The County's arguments regarding the adequacy of Dr. Dabbs' initial pleadings are irrelevant (and incorrect).

Finally, the County's criticism of the merits of Dr. Dabbs' unconstitutional conditions case is misleading. The Maryland state courts decided the legislative exactions issue as a pure question of law. Pet. App. A at 29; Pet. App. B at 25, n.7; Pet. App. C at 14, 31. The County's factual arguments are not relevant to this Court's determination of the question presented.

Certiorari is warranted and should be granted.

ARGUMENT

I

THIS COURT HAS JURISDICTION

Where a state court of last resort rules on a question of federal constitutional law, any inquiry into how or when the question was raised in the state courts is irrelevant to this Court's exercise of jurisdiction. *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182 (1945); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."). In its opinion below, the Maryland Court of Appeals extensively analyzed and ruled on a question of federal constitutional law (Pet. App. A at 17-29), concluding that "[i]mpact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny." Pet. App. A at 29. This Court unquestionably has

jurisdiction under 28 U.S.C. § 1257(a).[1] *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (jurisdiction exists where the record establishes that the federal constitutional issues were "squarely considered and resolved in state court").

There is no risk that this Court's exercise of its jurisdiction would be "advisory" where a state court decides a question of federal law. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The possibility that a Maryland court might, after reversal and remand, reach the same result but on the merits of the proper federal constitutional test does not render this Court's review advisory. *See*, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992) (explicitly contemplated that the government could still "win its case" under the correct takings test).

This Court would be acting well within the jurisdiction conferred by 28 U.S.C. § 1257(a) to grant the petition in this case.

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[1] The County's assertion that Dr. Dabbs did not raise a *Nollan* and *Dolan* claim in his state court pleadings is baseless. Opp. at 7-8, 25. The state courts considered this federal constitutional claim as part of his declaratory judgment cause of action, which alleged a violation of his property rights. Pet. App. A at 15; Pet. App. B at 20-25; Pet. App. C at 4, 31; *see also Keeler v. Mayor & City Council of Cumberland*, 940 F. Supp. 879, 887 (D. Md. 1996) (A complaint alleging violations of Articles 19 and 24 was sufficient to state a claim for a violation of federal property rights doctrines.).

II

DR. DABBS HAS STANDING TO CHALLENGE THE IMPACT FEES

The court of appeals determined that all of the *Dabbs* plaintiffs had paid the impact fees and had standing to sue. Pet. App. A at 2, 7 n.9; *see also* Pet. App. C at 2 (noting that the complaint alleged that the plaintiffs had "paid [all] fees [and] were current owners of property affected by the collection of the development fees"). That conclusion is consistent with case law recognizing that a homeowner will have standing to challenge the constitutionality of an impact fee where the fee is incorporated into the price of the house. *See Herron v. Mayor & City Council, Annapolis Maryland*, 198 F. App'x 301, 303 (4th Cir. 2006). The County's passing reference to a case concerning statutory standing to asserting a third-party tax appeal is irrelevant. Opp. at 3 n.2. Dr. Dabbs properly alleged that the impact fees violated his constitutional rights under Maryland's declaratory judgment statute, which authorizes injured persons to assert such claims in the state courts. *See Howard v. Montgomery Mut. Ins. Co.*, 805 A.2d 1167, 1171 (Md. Ct. App. 2002). The County's claim that Dr. Dabbs lacks standing is baseless. Opp. at 3, 6-8, 25.

III

THE COUNTY'S TAX CLAIM IS A STRAW MAN ARGUMENT AND IS UNSUPPORTED BY THE RECORD OR LAW

The bulk of the County's opposition hinges on the false claim that the court of appeals "ruled that the County's impact fees constitute taxes." Opp. at 17. Based on that representation, the County argues that

the state court merely followed settled law when it held "taxes" exempt from heightened scrutiny under *Nollan* and *Dolan*. Opp. at 15 (citing *Koontz*, 570 U.S. at 615). This is a straw man argument.

The County provides no citation indicating where the court of appeals concluded that the impact fee constituted a tax—despite asserting this "fact" 15 times. Opp. at 4, 10-11, 17, 20-21, 24. That is because the court did not enter such a conclusion.

The decision below is unequivocal. It holds, without qualification, that "[i]mpact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny." Pet. App. A at 29. The County does not acknowledge or address this conclusion in its opposition brief. On this basis alone, this Court should reject the tax argument as nonresponsive.

Furthermore, this Court should deem the tax argument waived because the County deliberately chose not to assert it below. *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 399 (1997) (The Court will typically not consider claims that were not raised to the trial court.). Indeed, had the County argued that the fee constituted a tax in the state courts, it would have effectively conceded that its actions were unlawful. *See Koontz*, 570 U.S. at 617. Maryland's constitution requires that any local tax or fee be specifically authorized by the State's General Assembly. Md. Const. art. XI-E, § 5. Here, the County enacted its Impact Fee Ordinance under a state law that authorized local governments to impose development impact fees to offset the cost of development impacts on certain public facilities. Opp. at 1. The County did not enact the impact fee

ordinance under any state laws authorizing excise or property taxes. *See* Opp. at 2-3 (citing *E. Diversified Properties, Inc. v. Montgomery Cty.*, 570 A.2d 850, 854-55 (Md. 1990) (invalidating "development impact tax" where the county enacted the tax without specific legislative authority)). And the County has cited no authority for a development tax in the course of this litigation. *Cf. Waters Landing Ltd. P'ship v. Montgomery Cty.*, 650 A.2d 712, 717 (Md. 1994) (upholding development tax as an excise tax enacted under express statutory authority). It is improper to raise this substantive (and likely determinative) question for the first time in an opposition brief.

The County's insistence that its impact fee constitutes a tax is also inconsistent with its defense of the ordinance throughout this litigation. In its briefing below, the County argued that the fee was a regulatory measure that applied only to persons whose use of real property causes an impact to certain public facilities.[2] The County insisted that the ordinance exacted fees in an amount (it believed to be) proportionate to those impacts.[3] The County further argued that the ordinance limits its use of the exacted fees to only those public facilities impacted by new development.[4] And the County conceded that it could not use any of the fees for general projects.[5] Thus, the

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[2] Corrected Brief of Appellee, at 4 (July 11, 2016) (citing AACC §§ 17-11-203, 206); *see also* AACC § 17-11-202(2) (The purpose of the County's fee is to pay for impacts that are "reasonably attributable" to development.).

[3] *Id.* (citing AACC § 17-11-201(2)).

[4] *Id.* (citing AACC § 17-11-209(a))

[5] *Id.*; *see also* AACC § 17-11-208 (The County must "ensure that all fees . . . are designated for improvements reasonably

County argued that its impact fees satisfied the nexus and proportionality requirements (of course, this argument was based on the County's erroneous claim that proportionality can be measured by aggregate rather than individual impacts).[6] This argument belies the County's claim that its impact fee is "indistinguishable" from the tax at issue in *E. Diversified*, 570 A.2d at 854-55 (holding that an exaction will constitute a fee where it is intended to mitigate for the impacts of the development).

Finally, the ordinance, by its plain language, operates upon a specified interest in real property. *Koontz*, 570 U.S. at 617. The ordinance directs permitting officials to determine the proposal's development category, then imposes a predetermined impact fee based on the presumed impacts caused by that type of development. AACC § 17-11-204. Even though the impact fee is mandatory, the determination of development categories frequently calls upon permit officials to exercise their discretion. *See Am. Furniture Warehouse Co. v. Town of Gilbert*, __ P.3d __, 2018 WL 3359070, at *7 (Ariz. Ct. App. 2018). The ordinance requires the owner to pay all fees as a condition on the issuance of a building permit. AACC § 17-11-206(a) ("A permit or zoning certificate of use may not be issued until any applicable development impact fee has been paid."). And, even after issuance, the fee remains inextricably linked to the specific permitted development proposal. AACC § 17-11-206(d) ("If a building permit expires and construction under the permit has not commenced,

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attributable to new development and are expended to reasonably benefit the new development.").

[6] *Id.* at 33.

the feepayer is entitled to a refund of any development impact fee paid as a condition of the permit's issuance[.]").

For these reasons, the state courts correctly analyzed the County's impact fee as a regulatory fee.

IV

THE LEGISLATIVE EXACTIONS QUESTION IS PRESENTED AS A PURE QUESTION OF LAW

The Maryland courts determined the legislative exactions issue as a question of law. *See* Pet. App. B at 25 n.7 ("Because the [*Nollan/Dolan*] test does not apply to the impact fees in this case, we need not address the merits of whether the County complied with the test's requirements."); Pet. App. C at 14 (The lawfulness of the impact fee is a "question of law.").

The County's attempt to insert issues of fact into this legal question is misleading. In its statement of facts, the County recounts the trial court's criticism of evidence offered in support Dr. Dabbs' statutory refund claim out of context to make it appear that the trial court had ruled on the merits of the unconstitutional conditions claim.[7] *See* Opp. at 8-9

[7] The County, moreover, fails to acknowledge that the refund claim asked only whether the County had expended the fees in in a manner that reasonably benefitted the district in which the property is located. Pet. App. C at 7-9. The unconstitutional conditions doctrine asks the qualitatively different question of whether the amount of the fee was proportional to the impacts that a development had on public facilities. *Koontz*, 570 U.S. at 604-05. The County makes no effort to show that evidence supporting the refund claim is in any way relevant to the constitutional question.

(citing Pet. App. C at 12-13). It did not. *See* Pet. App. C at 14, 31; Pet App. B at 25 n.7.

In truth, the only criticism that the trial court aimed at the unconstitutional conditions claim was that Dr. Dabbs had not "articulate[d] the analytical basis for [his] argument." Pet. App. C at 31. But that is of no significance where the court of appeals found the basis for his argument sufficiently clear: "[to satisfy *Nollan* and *Dolan*], the County must demonstrate that its expenditure of impact fees was attributable reasonably to new development[.]" Pet. App. A at 16-17; *see also Dolan*, 512 U.S. at 386 (Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development.").

The question presented by the petition does not involve any relevantly disputed facts.

V

THE COUNTY FAILS TO REFUTE THE SUBSTANTIAL REASONS FOR RESOLVING THE LEGISLATIVE EXACTIONS QUESTION

The County does not dispute that the legislative exactions question raises an important question of federal constitutional law. In fact, the County ultimately agrees that a categorical rule exempting legislative exactions from constitutional scrutiny would likely conflict with *Koontz* and other cases interpreting the Fifth Amendment. Opp. at 22. The County, nonetheless, insists that this is not the right case in which to resolve that question because (according to the County) the court of appeals "*never* mentioned the legislative adjudicative distinction" in its decision. Opp. at 12. Not so. The court identified

the question presented as asking whether *Nollan* and *Dolan* are applicable to impact fees "that are imposed legislatively and set on a general basis across a jurisdiction or district." Pet. App. A at 17. And to answer this question, the court examined the differences between adjudicative conditions and legislatively mandated conditions (*id.* at 22-24) and considered a nationwide split of authority (*id.* at 26-27 nn.20, 21) before ruling that, as a matter of law: "Impact fees imposed by legislation applicable on an area-wide basis are not subject to *Nollan* and *Dolan* scrutiny." *Id.* at 29. Clearly the Maryland court ruled on the legislative exactions question. The County provides no meaningful reason why review should not be granted.

All of the County's diversionary arguments aside, this Court should not lose focus on the fundamental conflict at issue in this case. In *Nollan* and *Dolan*, this Court applied the well-recognized rule that "government may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property." *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 837, 841. This Court has consistently applied this rule to invalidate excessive or extortionate permit conditions, without regard to the specific branch of government from which the demand originates. Indeed, this Court has twice applied this rule to conditions mandated by generally applicable legislation. *See Koontz*, 570 U.S. at 600; *Dolan*, 512 U.S. at 377-80. The Maryland court's decision, however, threatens this essential protection by adopting a categorical rule that exempts legislative

demands from constitutional scrutiny. Pet. App. A at 29. If allowed to stand, Maryland's per se rule would encourage the very type of unrelated and disproportionate demands that *Nollan* and *Dolan* intended to curtail.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: August, 2018.

Respectfully submitted,

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