No. 25-1187

In the Supreme Court of the United States

THE COALITION FOR FAIRNESS IN SOHO AND NOHO, INC.; KAY POWELL; AMIT SOLOMON; IAN KERNER; LISA RUBISCH; SARA BERSHTEL; JENNIFER PETTIT; LYNN SCHNITZER; ARTHUR SCHNITZER; CATERINA ROIATTI; ROBERT TRABOSCIA,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The New York Court of Appeals

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Constitution limits the government's ability to leverage its power over discretionary permits to force property owners to give up property the government would otherwise not be able to get without paying for it. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), require the government to show "a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-06 (2013). *Koontz* clarified that these protections apply "even when the government denies the permit and even when its demand is for money." *Id.* at 619. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 279 (2024), ensures *Nollan* and *Dolan* apply equally to legislative and administrative exactions.

This case presents a clear split between two state high courts regarding the extent of these protections. Under the rule adopted below, permit applicants lack protection against extortionate monetary demands unless demanded "in lieu of" a demand for real property. App. 19a-25a. The North Carolina Supreme Court disagrees. *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 496 (N.C. 2022). Were this case in North Carolina, Petitioners would already have prevailed. App. 56a-57a (New York intermediate court held the Arts Fund fee does not satisfy *Nollan* and *Dolan*). Land-use permitting across the country depends on the answer to this question.

Respondents try to confuse the issue. But they fail to understand that the central purpose of the unconstitutional conditions doctrine is to protect those who seek a government benefit from being forced to waive their constitutional rights in exchange for that benefit. They also argue over facts that have no bearing on the only question Petitioners have raised—whether the Arts Fund fee is subject to scrutiny under *Nollan* and *Dolan* even though it is not imposed in lieu of a real property dedication. The Court should ignore Respondents' misdirection and grant certiorari to resolve the conflict on this narrow, but important question.

I. Respondents' "Independently Dispositive Holding" Is a Red Herring

Respondents argue that the "primary ground" for the Court of Appeals' holding was that "petitioners never possessed a property interest in unrestricted residential use that the challenged law could burden." Resp. at 12. They say that conclusion was independently dispositive and unworthy of this Court's review. This argument rests on a false distinction, betraying Respondents' misunderstanding of the unconstitutional conditions doctrine. What Respondents call the lack of a property interest is a central fact of all unconstitutional conditions cases: that the applicant lacks an independent entitlement to the benefit he seeks. It is that lack of entitlement that allows the government to use the permit grant as leverage to impose conditions. Because lack of entitlement precedes any unconstitutional conditions claim, it cannot be an independent basis to reject Petitioners' claim.

Respondents acknowledge, as they must, that "*Nollan* and *Dolan* are about policing how the government wields its discretion in granting land-use permits to which the owner has no legal entitlement." Resp. at 15. They then struggle to distinguish this case, which is about a discretionary land-use permit. In the four exactions cases, Respondents say, "each petitioner already owned property rights to use the land in the way they wished, but the government's permit conditions hampered the exercise of that preexisting right." Resp. at 14-15. But that isn't true. The landowners in the exactions cases did *not* have an unrestricted right to develop as they wished, as the government could have denied their permits outright. *See, e.g.*, *Nollan*, 483 U.S. at 835-36 (noting the Commission's power "to deny the Nollans their permit outright if their new house . . . would substantially impede [the Commission's stated purposes], unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking"); *Koontz*, 570 U.S. at 600-01 (Florida law made it illegal to develop on wetlands like Koontz's absent a permit, which required the landowner to "offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere"). The heart of those cases (and this one) is that each landowner's property is "subject to a preexisting prohibition on the use they now desire." Resp. at 15 (emphasis deleted); *Koontz*, 570 U.S. at 605 (the unconstitutional conditions doctrine protects land-use permit applicants from the government using as leverage its "broad discretion to deny a permit that is worth far more than property it would like to take"). Respondents could have kept that prohibition in place (unless it independently violated other law), but since they now offer a "discretionary avenue for relief," Resp. at 15, they are in the same place as the permitting authorities in the four exactions cases.

The only question is whether *Nollan* and *Dolan* apply to a purely monetary demand.

The unconstitutional conditions doctrine limits the government's ability to force people seeking a benefit to waive constitutional rights to receive the benefit. Outside of the land-use context, it also protects those who absolutely have no entitlement to—or property interest in—the benefit they seek. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214, 222 (2013) (government funding for nonprofit organizations); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (public employment); *Graham v. Richardson*, 403 U.S. 365 (1971) (public assistance benefits); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (same). The exactions cases are simply a "special application" of that rule that protects permit applicants because they "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." *Koontz*, 570 U.S. at 604-05.

Respondents' appeal to "background principles" of property law suffers the same flaw. Resp. at 15-16. It assumes that Petitioners must have a preexisting entitlement to prevail. Yet even if background principles were relevant in this context, a novel restriction implemented in 1971 in no way reflects a traditional background principle of New York law equivalent to longstanding historical restrictions on nuisance. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 144, 162 (2021) (despite a 1975 California regulation, "no traditional background principle of property law requires the growers to admit union organizers onto their premises"); *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 637-38 (2023) (rejecting the argument that a 1935 statute extinguished property rights). Nor can it matter that Petitioners bought with knowledge of the JLWQA restriction, as "[a] law does not become a background principle for subsequent owners by enactment itself." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). Were it otherwise, every California landowner who purchased property after the enactment of the Coastal Act would be out of luck, as they were on notice that the government could deny their permit application. *See ibid.* (noting that the background principles discussion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992), did not overrule *Nollan*). There is no "expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627.

In the end, Respondents cannot effectively distinguish this Court's exactions cases. Like the permitting authorities in those cases, Respondents demand property from Petitioners in exchange for permission to change the use of their real property. That is why the dispositive question in this case has nothing to do with Petitioners' entitlement to a conversion. Instead, the case turns on whether a purely monetary demand qualifies as a "predicate taking" sufficient to trigger scrutiny under *Nollan* and *Dolan*.[1] The majority below held it does not, App. 19a-25a, while the dissent argued that *Koontz* recognized the doctrine applies to all monetary exactions, App.

[1] To be sure, the "predicate taking" analysis includes whether the condition (here, the Arts Fund fee) would be a taking outside of the permitting process. *Koontz*, 570 U.S. at 612. This isn't about entitlement to the change in land use, but rather whether the thing demanded in exchange for the land-use change could otherwise be taken without compensation. That is the very issue in this case—whether the protection of the unconstitutional conditions doctrine extends to monetary demands not made in lieu of a dedication of real property.

34a-47a. *See also* App. 33a ("At this step, the majority's analysis ends, declining to consider the Arts Fund fee under the *Nollan/Dolan* test by concluding that there is no such predicate taking, despite the Arts Fund fee being a condition imposed on a property owner's right to obtain a desired land-use permit."). This is the question Petitioners ask the Court to decide. Respondents' claimed "independently dispositive holding" merely distracts from the important, outcome-determinative question this case presents.[2]

II. Respondents' Asserted Factual Disputes Are Irrelevant to the Question Presented

Only a few undisputed facts are relevant to the question whether *Nollan* and *Dolan* apply to the Arts Fund fee. There is no question that JLWQA owners need a permit to convert their homes to general residential use. Nor is there any dispute that Respondents require the owners to pay a six-figure fee into a broadly defined Arts Fund to apply for a conversion permit. These are the only relevant facts at this stage. While some other facts might be relevant to a court determining whether the Arts Fund fee survives scrutiny under *Nollan* and *Dolan*,

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[2] Even if Part IV.A of the majority below could be read as an independently dispositive holding, it presents no obstacle to review. For the reasons stated in this section, the view that the unconstitutional conditions doctrine does not apply where a permit applicant is not otherwise entitled to the benefit he seeks "rests on a serious misapprehension of federal constitutional law" that the Court may correct because it is "essential to the correct disposition of the other issues in the case." *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). That holding would be "fairly comprised" within the question presented. *See id.*; *see also* Sup. Ct. R. 14.

they present no obstacle to review of the question presented.

Respondents primarily dispute the JLWQA owners' assertion that conversions are effectively mandatory because someone will have to pay the fee upon transfer. Resp. at 18-21. While common sense suggests the JLWQA owners are right about this,[3] *see* Am. Br. of Ronnie Wolf & 43 Other SoHo/NoHo Artists (Artists Brief) at 16-20, it is legally irrelevant. Respondents admit that none of the landowners in previous exactions cases were required to seek a development permit. Resp. at 14 (noting that those landowners could have "avoided" the "burden" on their rights "by forgoing the desired development of the land"). The same is true in other unconstitutional conditions contexts. *See, e.g.*, *Agency for Int'l Dev.*, 570 U.S. at 214 (nonprofits can refuse to accept government funds if they dislike the conditions on funding). Unconstitutional conditions protections don't exist because applying for a permit is mandatory, but rather to prevent government from using the applicant's desire for a permit as leverage to force extraction of property that the government is not entitled to take absent just compensation. *See Koontz*, 570 U.S. at 604-05.

Respondents also try to undermine Petitioners' point that the City's lack of artist certification in recent years has resulted in a compressed market for JLWQA homes. Resp. at 21. Market conditions are certainly one reason that JLWQA owners might want to convert to general residential use even if conversion

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[3] *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506 (1996) (employing "common sense" understanding of how a market functions).

were truly voluntary.[4] But even assuming Respondents were correct about this, JLWQA owners still must pay the six-figure Arts Fund fee to apply for conversion. The extent to which the JLWQA residents might benefit from a conversion is irrelevant. *See Koontz*, 570 U.S. at 605 (emphasizing that a permit is often worth far more to a landowner than the exaction the government seeks). The Court need not consider the effect the JLWQA restriction has on the market for restricted lofts to answer the question whether the Arts Fund fee must satisfy *Nollan* and *Dolan*.

In the end, Respondents belittle JLWQA residents as wealthy, non-diverse people who just want to increase the value of their already expensive homes. Resp. at 11, 20. The SoHo and NoHo artists themselves tell a much different story in their *amicus* brief—describing the risks residents took to restore derelict buildings and create thriving neighborhoods. *See* Artists Brief at 9-15. New York City Councilmember Christopher Marte, who represents the neighborhoods, similarly refutes Respondents'

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[4] *See* Am. Br. of Councilman Christopher Marte (Marte Brief) at 3 ("Although the 2021 Rezoning appears, on its face, to present homeowners with a choice to avoid these costs by selling, transferring, or bequeathing their homes to a certified artist, City policy has rendered the artist certification process largely defunct, leaving homeowners with no practical choice but to pay the Arts Fund Fee and pay for conversion."). *See also id.* at 13-14 ("When current homeowners sell, transfer, or bequeath their home, the 2021 rezoning ostensibly provides a choice between either converting the JLWQA and paying the Arts Fund Fee (a six-figure conveyance tax), or transferring the JLWQA to a certified artist. This choice is an illusion because . . . the City's own policies have rendered the artist certification process obsolete, resulting in next to no artist certifications in recent years.").

characterization. Marte Brief at 9 ("The current JLWQA resident population is diverse and includes many of the artists who were certified in the initial wave of certification applications, now in their 70s and 80s and living on fixed, lower incomes."), 10 ("JLWQA residents also include working families, retirees, remaining kin of deceased certified artists, and individuals who inherited or purchased JLWQA units but were not able to obtain certification."). While this is legally irrelevant, as the Constitution protects all permit applicants regardless of race or class, the Court should reject Respondents' false description of the JLWQA residents.

III. The Court of Appeals' Decision Squarely Conflicts with the North Carolina Supreme Court

Respondents seek to diminish the clear conflict between the decisions of the Court of Appeals below and the North Carolina Supreme Court's decision in *Anderson Creek*. Resp. at 22-23. They again rely on the false distinction between permit applicants seeking a development permit and who would obtain an "entirely new right." *Id.* at 23; *see supra* Part I. Like in each of this Court's exactions cases, the developer in *Anderson Creek* could not have developed its land without obtaining a permit and thus dedicating the demanded property. *Anderson Creek*, 876 S.E.2d at 479 (the challenged ordinance "requires residential property developers to pay one-time water and sewer 'capacity use' fees associated with each lot that they wish to develop as a precondition for obtaining the County's concurrence in the developer's application for the issuance of required water and sewer permits . . ."). The same is true of conversion in this case. Again, Respondents' distinction is illusory.

The conflict between these two high court decisions is clear. *Anderson Creek* squarely rejected Respondents' argument that *Koontz* is limited to fees demanded in lieu of a dedication of real property. *Id.* at 496 ("[T]he 'monetary exactions' with which *Koontz* was concerned were not limited to 'in lieu of' fees and instead, encompassed a broader range of governmental demands for the payment of money as a precondition for the approval of a land-use permit."); *see also* App. 46a (Garcia, J., dissenting).

In light of this clear conflict, Respondents suggest that *Anderson Creek* on its own is not enough, while also criticizing Petitioners for relying on lower court cases coming to the same conclusion (and for not citing a conflict with a federal Court of Appeals, *but see* Sup. Ct. R. 10(b)). Resp. at 22-24. Respondents chastise Petitioners for relying on pre-*Koontz* cases, suggesting that the question presented should percolate further in the lower courts. But the existence of pre- and post-*Koontz* cases likely means that while this Court might have thought it resolved the matter in *Koontz*, subsequent confusion emerged. It would not be the first time this Court had to intervene in such a situation. *See, e.g.*, *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474, 478-81 (2021) (per curiam) (granting certiorari and summarily rejecting the Ninth Circuit's incorrect approach to settled law on finality and administrative exhaustion for takings claims).

State high courts have confronted this question for decades. They disagreed before, and this Court granted certiorari in *Koontz*. A square conflict has again emerged over the contours of *Koontz*. The conflict is outcome determinative in a broad swath of exactions cases. No further percolation is necessary for the Court to resolve this question.

IV. Respondents' Arguments on the Merits Only Highlight the Need for Review

Finally, Respondents defend the Court of Appeals' decision on the merits. The existence of such stark disagreement on this point of law, not only between Petitioners and Respondents but between the majority and dissenting opinions both below and in *Anderson Creek*, only heightens the need for this Court's review. The conflicting rules adopted in various courts alter the course of dealing between property owners and local governments nationwide. This Court should grant certiorari to provide uniformity and certainty to the millions of Americans who rely on the law in this area.

Respondents cannot minimize the nature of the rule the Court of Appeals adopted. Even as they try to cast the decision below as a product of the idiosyncratic JLWQA program, Respondents defend the lower court's rule exempting almost all monetary demands from scrutiny under *Nollan* and *Dolan*. Resp. at 25-29. Respondents say such a broad exemption is consistent with *Koontz*. *But see Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 36-37 (2012) (warning against creating "blanket exemptions from the Fifth Amendment's instruction"). The Court should take this case to decide whether it is.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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