No. 16-1137

IN THE
Supreme Court of the United States

616 CROFT AVE., LLC, AND
JONATHAN & SHELAH LEHRER-GRAIWER,
Petitioners,

v.

CITY OF WEST HOLLYWOOD,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF IN OPPOSITION

MICHAEL JENKINS
CHRISTI HOGIN
GREGG W. KETTLES
JENKINS & HOGIN, LLP
1230 Rosecrans Ave., Suite 110
Manhattan Beach, CA 90266
(310) 643-8448
gkettles@localgovlaw.com

JEFFREY A. LAMKEN
Counsel of Record
EMILY K. DAMRAU
Admitted Only in Illinois
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Petitioners purport to seek review of the following question: Whether a legislatively mandated permit condition is subject to the unconstitutional conditions doctrine set out in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

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BRIEF IN OPPOSITION

INTRODUCTION

The petition seeks review of a single question: whether a "legislatively mandated permit condition" is subject to the unconstitutional conditions analysis set out in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Pet. i. The decision below, however, does not even purport to resolve that question. The judgment rests on a different ground. Despite the petition's protestations, Pet. 9, 11-12, 18, the intermediate state appellate court did not reject petitioners' position because the conditions were "legislatively" imposed. It rejected petitioners' argu-

ment because the challenged condition was "not an 'exaction.'" Pet. App. A8. The "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* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013). Petitioners lost below because they failed to establish that predicate—not because the challenged condition was legislatively mandated.

This Court does not grant review on questions that cannot alter the judgment below. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987); *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"); *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). That forecloses review here. Regardless of how one might resolve the question on which petitioners seek review, the judgment below would still stand. Moreover, as explained below, it is far from clear that the judgment below rests on an issue of federal law at all. The only discussion of *Nollan/Dolan* in the decision below appears in the court's analysis of a *California statute* and how that *state statute* allocates the burden of proof for purposes of *state law*. For those reasons, and because myriad other procedural issues preclude or render this case unsuitable for further review, the petition should be denied.

STATEMENT

This case arises from petitioners' development of an 11-unit condominium project in the City of West Hollywood, California. Petitioner 616 Croft Ave., LLC (owned by co-petitioners Shelah and Jonathan Lehrer-Graiwer) obtained the development permits for the project in ac-

cordance with local zoning laws. Years after agreeing to pay certain development fees, petitioners brought this challenge to avoid paying them. The California Superior Court denied petitioners' action for a writ of mandate. The California Court of Appeal affirmed. And the California Supreme Court denied review.

I. THE INCLUSIONARY ZONING REQUIREMENTS OF WEST HOLLYWOOD'S MUNICIPAL CODE

The State of California has long suffered from "a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income * * * can afford." Cal. Health & Safety Code § 50003(a). To address that shortage, the State has mandated that California cities and counties take specific steps to promote the creation of affordable housing. Cal. Gov't Code § 65583(c)(1)-(c)(2). Each municipality must adopt a program to "[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households." *Ibid.*

To "meet its regional fair share requirements * * * of housing affordable to low and moderate income persons," the City of West Hollywood has imposed development requirements in its zoning laws. West Hollywood Mun. Code ("WHMC") § 19.22.010; Pet. App. E-1. Of relevance here, West Hollywood's Municipal Code requires housing projects that exceed a certain size to have "inclusionary units" designed for lower-income households. WHMC § 19.22.030. For projects of 11 to 20 units (like petitioners'), 20 percent of the new units created must be inclusionary units. *Ibid.*[1] The owner of the project must also

[1] A similar ordinance was adopted in the City of San Jose. See San Jose Mun. Code § 5.08.400(A)(1). Upholding the ordinance, the California Supreme Court held it is "an example of a municipality's permissible regulation of the use of land under its broad police power."

grant the City, or City-designated agency, a right of first refusal that allows it to purchase any inclusionary units not sold to eligible purchasers. WHMC § 19.22.090. Under state law, the City must provide any developer who builds affordable units a variety of benefits, such as "density bonuses" (*i.e.*, the right to build additional units beyond the number otherwise allowed), to compensate for the lower profit attainable from affordable units. See Cal. Gov't Code § 65915; WHMC § 19.22.050.

Developers often can "opt out" of providing inclusionary units, and all related requirements, by choosing to pay an "in-lieu fee" instead. WHMC § 19.22.040; Pet. App. E-3.[2] The in-lieu fee is intended to provide funds sufficient to facilitate the development of replacement affordable units. WHMC § 19.22.040(D); Pet. App. E-3. In particular, the fees are calculated based on the number and size of affordable units that would have been provided on-site if the developer had opted to provide them; the fee is supposed to be sufficient to fund the development of an equivalent number of units at another location. WHMC §19.22.040(D); Pet. App. E-3.[3]

California Bldg. Indus. Ass'n v. *City of San Jose*, 61 Cal. 4th 435, 457 (2015), cert. denied, 136 S. Ct. 928 (2016).

[2] When petitioners' project was proposed, the West Hollywood Municipal Code allowed projects with 20 or fewer units the option to pay the in-lieu fee instead of providing affordable units on-site. Petitioners' 11-unit project qualified. See WHMC § 19.22.040(A) (codified 2001); Ord. 05-719 § 6 (2005) (developers with "twenty or fewer units may choose to pay a fee"). The City's Municipal Code was later amended to restrict the in-lieu fee option to projects of 10 units or fewer. WHMC § 19.22.040(A) (2007).

[3] The fee is calculated in compliance with a fee schedule established by the City Council. WHMC § 19.22.040(B); Pet. App. E-3. The schedule sets a dollars-per-square-foot figure, which is multiplied by

Consistent with that, in-lieu fees are placed into the City's "Affordable Housing Trust Fund," which must be used for costs associated with providing "units affordable to low- and moderate-income households." WHMC § 19.22.040(E). The City's zoning laws, and its inclusionary housing provisions in particular, are thus designed to ensure that new residential housing development is balanced, providing residential housing for all classes of City residents—not to offset the putative impacts of any individual project.

II. PROCEEDINGS IN THIS CASE

A. Petitioners' Proposed Housing Project

In 2004, petitioners applied for approval of a project that would involve the demolition of two existing single-family homes on two adjacent lots. In their place, petitioners proposed constructing an 11-unit condominium complex. AR 469.[4] There is no dispute that the project is subject to the inclusionary-housing requirements under the City's Code. WHMC § 19.22.020(A).

Rather than provide affordable housing units, petitioners opted to pay the in-lieu fee. AR 31, 152. The City approved petitioners' application in 2005, conditioned on (among other things) petitioners' payment of the in-lieu fee in accordance with the City Council fee schedule in effect when petitioners' building permit was issued. AR 474. Petitioners agreed to those conditions, signing an "Acceptance Affidavit." AR 515.

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a project's total square footage to yield the total in-lieu fee. See WHMC § 19.22.040.

[4] Citations to the Administrative Record are denoted "AR." The Administrative Record was admitted into evidence in the trial court and lodged with the California Court of Appeal.

The approval specified that, unless significant construction had commenced, it would automatically expire in two years. AR 473, 490. Petitioners did not begin construction before the anticipated expiration date. Petitioners instead repeatedly requested, and were granted, extensions. AR 555, 559, 561, 609, 661-663, 666, 681. Following those requests, petitioners again executed at least one additional acceptance affidavit, reaffirming (among other things) their agreement to pay any in-lieu fees, as calculated under the fee schedule in effect at the time they obtained their building permit. AR 660-663.

Petitioners did not apply for building permits until 2011. AR 681, 683-685. Consistent with the parties' agreement, the City provided petitioners with the fee schedule in effect when their permit applications were filed. AR 683-685. The schedule showed that the in-lieu housing schedule (by then $24.68 per square foot) had nearly doubled since 2005. AR 474, 685. Under that schedule, petitioners' 21,896 square-foot project would require payment of an in-lieu fee of $540,393.28. AR 685. In December 2011, petitioners paid that fee, and other fees, labeling those payments as "under protest" pursuant to California's Mitigation Fee Act. AR 687-690.

Petitioners objected that the fee collection was premature. AR 689-694. Petitioners also argued that the "City has failed to provide any evidence demonstrating that our * * * development, or new residential development in general, in any way caused or increased any additional public need to provide additional 'inclusionary zoning' housing for other residents of the City." AR 690.

B. Proceedings in California Superior Court

Petitioners filed an action in California Superior Court, eventually seeking a writ of administrative man-

date pursuant to California Civil Procedure Code § 1094.5. CA JA 1-19, 52-53.[5]

1. The Complaint alleged that the inclusionary zoning provisions of the City's Municipal Code, including the requirement that a developer provide affordable units or pay an in-lieu fee, is "facially invalid" under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). CA JA 10 (Complaint); *id.* at 42 (Amended Complaint). In addition, petitioners raised an "as-applied" claim. The City, they alleged, failed to demonstrate a "reasonable relationship" between the City's requirements and increased needs for affordable housing caused by new development generally "or [by] Plaintiffs' project in particular." CA JA 10; *id.* at 43 (Amended Complaint). Petitioners asserted other state-law grievances. See, *e.g.*, CA JA 14, 47 (violation of Cal. Gov't Code § 66007 through untimely fee demand); *id.* at 15, 49 (refund of fees collected by the City).

The case was stayed while the City held an administrative hearing. AR 823-850. Following the hearing, the City upheld most of the challenged fees, including the affordable housing in-lieu fee. AR 856, 858-863, 876.

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[5] A writ of administrative mandate is used to obtain review of administrative action, not unlike an Administrative Procedure Act suit under federal law, 5 U.S.C. § 702. See *Selby Realty Co.* v. *City of San Buenaventura*, 10 Cal. 3d 110, 123 (1973); *Ocean Park Assocs.* v. *Santa Monica Rent Control Bd.*, 8 Cal. Rptr. 3d 421, 430 (Ct. App. 2004). Petitioners' initial Complaint included multiple additional causes of action, CA JA 1-19, and the action for a writ of administrative mandate was added later, *id.* at 30-61. Petitioners, however, abandoned all of their other causes of action in favor of the action for a writ of administrative mandate. *Id.* at 429-431.

2. On review in Superior Court, petitioners relied heavily on California's Mitigation Fee Act, Cal. Gov't Code § 66001(3)-(4), which requires a "reasonable relationship" between a fee's use and the type of project for which the fee is imposed. CA JA 104. Petitioners argued the City had failed to meet that requirement. *Id.* at 106-107. In so arguing, petitioners urged that the federal *Nollan/Dolan* standards informed the meaning of the California Mitigation Fee Act. *Id.* at 268-269 (stating the "constitutional standards" of *Nollan* and *Dolan* "are impliedly incorporated into California's Mitigation Fee Act"). Petitioners further asserted that "*all* fees, regardless of how they may be imposed, must meet the *Nollan/Dolan* tests." *Id.* at 270. Petitioners also pressed arguments predicated on other California statutes and West Hollywood's Municipal Code. *Id.* at 109, 279-280.

The Superior Court denied the petition. The court first rejected petitioners' facial challenge on two, independent grounds. First, the court held that petitioners had not carried their burden of showing the provisions are invalid on their face. Pet. App. C9. "[T]heir briefing barely addresses the facial validity of the Ordinance, and even then only makes conclusory statements that are unsupported by an application of the law to the facts of this case." *Ibid.* Second, the court held the facial challenge was untimely, having been filed more than 90 days from the City's enactment of the challenged provisions. *Id.* at C10 (citing Cal. Gov't Code § 65009(c)(1)(B)).

The Superior Court then turned to petitioners' "as-applied" challenge. The court rejected petitioners' argument that the City needed to find an "essential nexus" and "rough proportionality" between the amount of the affordable housing in-lieu fees and the impact of the petitioners' particular development. Pet. App. C11. Relying

on *San Remo Hotel L.P.* v. *City and County of San Francisco*, 27 Cal. 4th 643 (2002), the trial court held the scrutiny described in *Nollan/Dolan* does not apply to the City's affordable housing fees because the City did not make any individualized determinations. Pet. App. C13-C14. *Nollan/Dollan* scrutiny, the court stated, is appropriate where the local government imposes "discretionary" conditions on land-use permits because that discretion might be "abuse[d] * * * to exact money or property without justification." *Id.* at C14.

The court observed that, after the conclusion of briefing, the California Supreme Court had decided *California Building Industry Ass'n* v. *City of San Jose*, 61 Cal. 4th 435 (2015), cert. denied, 136 S. Ct. 928 (2016). See Pet. App. C11 n.3. Under *San Jose*, the court stated, providing property owners the *alternative* of paying an in-lieu fee, instead of satisfying a zoning requirement, can amount to an unconstitutional condition only if the zoning requirement would be a taking absent the in-lieu fee option. Where the government offers alternatives to complying with "a condition that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition." *Ibid.* Because *San Jose* post-dated briefing, however, the Superior Court declined to "address it other than to note that it would not affect its decision to deny [the] writ of mandate." *Ibid.*

3. The court held that the City's inclusionary zoning requirements still must meet the "reasonable relationship" requirement of California law. Under state law, development fees must "'bear a *reasonable relationship*, in both intended use and amount, to the deleterious public impact of the development.'" Pet. App. C15 (quoting *San Remo Hotel L.P.*, 27 Cal. 4th at 671). The court resolved

that issue in the City's favor. Discussing both the use and the amount of the in-lieu fee at length, the Superior Court held that the reasonable relationship test was amply satisfied. *Id.* at C16-C21.

C. The Decision of the California Court of Appeal

Petitioners appealed, and the California Court of Appeal affirmed. Pet. App. A1-A18.

1. Before the Court of Appeal, petitioners began by faulting the Superior Court for supposedly "mischaracterizing" their argument: As a matter of law, they insisted, their "challenge to [the City] Council's refusal to grant relief from application of its fees to this project necessarily involve[d] a challenge to the *validity* (not necessarily the 'constitutionality') of the 'affordable housing in-lieu fees' as unjustified development *exactions*." Pet. CA Br. 48. The Superior Court, petitioners urged, "missed this point and erroneously characterized this aspect of Petitioners' challenge to the affordable housing fee as seeking 'a determination of facial *unconstitutionality*' and as a '*taking*'—challenges *not* raised by Petitioners." *Id.* at 49; see also *id.* at 50 ("It was not necessary, contrary to the trial court's apparent assumption, for Petitioners to show that the fee requirement was 'unconstitutional' * * *.").

Having clarified that invalidation of "the affordable housing fee * * * as a *taking*" was a "challenge[ ] *not* raised," petitioners clarified the argument they were making: "[I]n the absence of substantial evidence demonstrating the 'reasonable relationship' required by the City's own Municipal Code," they urged, the City's inclusionary housing requirement "is just as 'invalid' as if it had been adopted in the absence of a quorum required by the Municipal Code." Pet. CA Br. 51 (citation omitted). Petitioners then pressed a series of state-law arguments.

Among other things, they argued that the trial court had erroneously shifted the burden of proof to petitioners, *id.* at 54; that "park" fees were excessive, *id.* at 55; and that the City could not demand payment of in-lieu fees before project completion, *id.* at 56-57.

2. The intermediate state appellate court rejected petitioners' facial challenge as time-barred. "Even if" petitioners were raising only a validity challenge and "not a constitutional challenge," the court ruled, "re-characterizing the argument would not save the claim from procedural failure because [the] challenge" would still be "untimely." Pet. App. A6-A7. Under California Government Code § 65009(c)(1)(B)-(C), the applicable statute of limitations for challenges to legislative decisions is 90 days. *Id.* at A7. Here, petitioners filed their suit challenging the City's enactment of the inclusionary housing requirements, and the attendant fee schedule, more than 90 days after their enactment. *Ibid.*

3. The court then rejected petitioners' claim that the City bore the burden of proving its fees were reasonable. Pet. App. A7-A15. Under the headings "Croft's as-applied challenge improperly places the burden on the City * * *," and "Croft bears the burden, not the City," *id.* at A7, the court engaged in an extensive analysis of petitioners' and the City's relative burdens under state law.

The court rejected petitioners' argument that California's Mitigation Fee Act, Cal. Gov't Code § 66000, *et seq.*, requires the City to prove reasonableness. Pet. App. A8-A11. The Mitigation Fee Act, the court stated, applies only where (1) there is "a monetary exaction," *and* (2) that exaction is imposed to "defray[] all or a portion of the cost of public facilities related to the development project." *Id.* at A8. Invoking the California Supreme

Court's decision in *San Jose*, 61 Cal. 4th at 461, the Court of Appeal held the "exaction" requirement was not met. The City's requirement that new developments include affordable housing, the court held, is "not an exaction." Pet. App. A8. Instead, like the similar requirements challenged in *San Jose*, the "restriction 'is an example of a municipality's permissible regulation of the use of land under its broad police power.'" *Ibid.* (quoting *San Jose*, 61 Cal. 4th at 457).

The court noted that petitioners were challenging an in-lieu fee rather than the inclusion of affordable housing units in their development. Pet. App. A8-A9. But the court held that the same reasoning applies: If the set-aside requirement in *San Jose* is not an exaction, then neither is the in-lieu fee, which is an alternative to the on-site affordable housing requirement. *Id.* at A9.

The court further held that the Mitigation Fee Act's second precondition—that the challenged fee have the "purpose" of defraying certain costs—likewise was not met. The City's inclusionary housing requirement and alternate in-lieu fee, the court held, were not designed to "defray" costs specific to petitioners' development, but rather "to combat the overall lack of affordable housing." Pet. App. A9. The court observed that such land-use regulation—designed to "enhance the public welfare" by "govern[ing] a property owner's future use of his or her property"—generally does not violate the Takings Clause "so long as [that] land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property." *Ibid.* That, the court added, seems "especially" appropriate when the regulation, like the one here, "broadly applies nondiscretionary fees to a class of owners because the risk of the govern-

ment extorting benefits as conditions for issuing permits to individuals is unrealized." *Id.* at A9-A10.

The court also rejected petitioners' argument that, even "if the in-lieu fee is not an exaction," the City's right of first refusal (to purchase affordable housing units not purchased by low-income persons) is an exaction. Pet. App. A10. Petitioners, the court held, did not set units aside and could not attack that provision in an as-applied challenge. *Ibid.* And any facial challenge to that provision would be time-barred. *Ibid.* In any event, the court concluded, "the Mitigation Fee Act does not apply to the in-lieu fee." *Id.* at A10-A11.

The Court of Appeal then rejected petitioners' other grounds for shifting the burden of proving "reasonableness" to the City. Pet. App. A11-A13. The "cited California Constitution articles," the court concluded, "do not place the burden on the City to demonstrate individual reasonableness." *Id.* at A11. Nor did the City take "that responsibility upon itself in its municipal code." *Id.* at A12.

4. Finally, the court turned to whether the fees charged were "reasonable" in relation to the goal of ensuring affordable housing. Pet. App. A13-A16. The court rejected petitioners' argument that the City was required to prove, "dollar for dollar," that "the fee it charged [petitioners] was proportional to the negative impact [petitioners'] development had on the demand for affordable housing." *Id.* at A13. Petitioners misunderstood the purpose of West Hollywood's inclusionary housing requirement. The requirement did not seek to impose a fee that, in every application, precisely corresponds to the impact of each development. Rather, it was designed to ensure balanced development that includes affordable housing. As a result, the question is whether

"the fee schedule itself is reasonably related to the overall availability of affordable housing in West Hollywood." *Id.* at A14.

Here, petitioners did not "challenge the City's method in creating the fee schedule." Pet. App. A14. Moreover, any such challenge would be barred by the statute of limitations. *Id.* at A14-A15. The court observed that petitioners could have brought an as-applied challenge disputing the City's mathematical calculation of the individual fee imposed on them, but petitioners made no such claim. *Id.* at A14 n.6. In the final pages of its opinion, the court rejected petitioners' remaining state-law challenges as well. *Id.* at A15-A17.

D. The California Supreme Court Denies Review

The California Supreme Court denied review. Pet. App. B1.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to decide whether this Court's decisions in *Nollan* and *Dolan*—and the unconstitutional conditions tests they set forth—apply to "legislatively mandated permit condition[s]." Pet. i. There "is no basis in the unconstitutional conditions doctrine," they assert, "for drawing any distinction between legislative and adjudicative exactions." *Id.* at 20.

The judgment below, however, does not turn on the resolution of that question. Nor does the decision of the intermediate state appellate court below purport to resolve it. The judgment below rests on an entirely different ground. Consequently, even a ruling in petitioners' favor on the question presented would not alter the judgment. This Court does not grant review to answer hypothetical issues that cannot affect the case before it. See *Int'l Longshoremen's Ass'n, AFL-CIO* v. *Davis*, 476

U.S. 380, 387 (1986). The judgment below, moreover, does not even appear to rest on an issue of federal law at all. Instead it addresses the burden of proof under a *state* statute for purposes of *state* law. And myriad other barriers to review—including multiple waivers and a statute-of-limitations issue—render this case a singularly problematic if not impossible vehicle for review.

I. THIS CASE DOES NOT PRESENT WHETHER *NOLLAN* AND *DOLAN* APPLY TO LEGISLATIVELY MANDATED EXACTIONS

A. The Judgment Below Rests on Different Grounds

This Court does not grant review to decide questions that cannot alter the judgment below: Such decisions would be advisory in nature and thus beyond the Court's authority. *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945). That rule forecloses review here: The decision below does not resolve, and does not turn on resolution of, the question the petition purports to present. "This Court 'reviews judgments, not statements in opinions.'" *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)).

Petitioners repeatedly characterize the California Court of Appeal as having adopted "a per se rule that excludes all legislatively mandated exactions" from the unconstitutional conditions tests articulated in *Nollan* and *Dolan*. Pet. 20; *id.* at 17-18 (asserting "that under the California rule, * * * all legislative exactions are categorically exempt from heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*").[6] Petitioners, however, offer not a

[6] See Pet. 11 (urging that the court "adopted a rule of federal law that allows the government to circumvent the nexus and proportion-

single quotation from the decision below to support their repeated assertions—and with reason: The decision rests on entirely different grounds. And those grounds appear to be purely state-law rulings on purely state-law questions.

1. Petitioners' position is impossible to reconcile with the Court of Appeal's reasoning—and virtually everything it said. The only discussion of *Nollan* and *Dolan* in the decision below appears under the heading "Croft's as-applied challenge improperly places the burden on the City * * *," and the subheading "Croft bears the burden, not the City." Pet. App. A7. As the court explained, petitioners had "argue[d] the City bears the burden to prove its fees were reasonable" under various provisions of California law, including California's Mitigation Fee Act. *Id.* at A8. The court rejected those arguments: It held that the Mitigation Fee Act does not apply, and it rejected petitioners' argument that *Nollan* and *Dolan* required a contrary result. *Id.* at A8-A9. It then addressed other bases for shifting the burden of proof, including the provisions of the West Hollywood Municipal Code and the California Constitution, and held they did not shift the burden either. *Id.* at A11-A13.

The Court of Appeal did *not* hold, however, that *Nollan* and *Dolan* are inapplicable whenever a legislative condition is at issue. Rather, the court held that the Mitigation Fee Act applies (and shifts the burden to the City) only when each of two statutory preconditions are met: (1) "a *monetary exaction* * * * is charged by a local agen-

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ality analysis set out by this Court" in *Koontz*, *Dolan*, and *Nollan* "whenever the permit condition is required by an act of generally applicable legislation"); *id.* at 12 (claiming the "court refused to examine the permit condition to determine if" it required "dedication of a property interest" because of a supposed "per se" rule).

cy," and (2) the exaction is imposed "*for the purpose of defraying* all or a portion of *the cost of public facilities* related to the development project." Pet. App. A8 (emphasis added). The court then held that neither condition was met.

The first condition was not met, the court held, because there "was not an 'exaction'" of any sort. Pet. App. A8. In so holding, the Court of Appeal relied on *California Building Industry Ass'n* v. *City of San Jose*, 61 Cal. 4th 435 (2015), cert. denied, 136 S. Ct. 928 (2016). In *San Jose*, the California Supreme Court addressed another inclusionary housing ordinance that, like West Hollywood's, required developers to include affordable units in certain developments. 61 Cal. 4th at 461. The challenged ordinance, the California Supreme Court held, "does not violate the unconstitutional conditions doctrine because there is no exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." *Ibid.* The unconstitutional-conditions doctrine, the California Supreme Court stated, does not apply where the government simply restricts the use of property in a way that is not otherwise unconstitutional, "without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." *Id.* at 460; see *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

Invoking *San Jose*, the Court of Appeal held that West Hollywood's similar inclusionary development requirement is not an "exaction." Pet. App. A8. Instead, the court ruled, such a land-use restriction "'is an example of a municipality's permissible regulation of the use of land

under its broad police power.'" *Ibid.* (quoting *San Jose*, 61 Cal. 4th at 457). Land-use restrictions of that sort, the court further explained, generally amount to takings—and thus operate as "exactions"—only if they effect "a physical taking or deprive a property owner of all viable economic use of the property." *Id.* at A9. That, the court held, was not the case here. *Ibid.*

The court rejected petitioners' reliance on *Nollan* and *Dolan* as showing that the Mitigation Fee Act's "exaction" requirement was met. Pet. App. A9. The court agreed that, in this case, petitioners "challenge[d] paying an in-lieu fee rather than actually setting aside a number of units," *id.* at A8, but concluded that the result should still be the same. If the required inclusion of affordable units does not amount to an unconstitutional taking, the court explained, "the validity of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend" on "*Nollan* or *Dolan* either." *Id.* at A9. Finally, the court concluded that the Mitigation Fee Act's second requirement—that the exaction be "for the purpose of defraying all or a portion of the cost of public facilities related to the development project"—likewise was not met. *Id.* at A8.

As the foregoing makes clear, the Court of Appeal did not hold that *Nollan* and *Dolan* are categorically inapplicable to "legislative" (as opposed to "ad hoc") conditions. It held, in language the petition does not address, that such analysis is unnecessary here because there was no "exaction." Pet. App. A8.

2. Far from disputing the propriety of the court's actual holding, petitioners endorse it. This Court has observed that the "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*, 133 S. Ct. at 2598. Citing *Koontz*, petitioners agree that courts evaluating in-lieu fees "must look at the *underlying* condition to determine whether it implicates the doctrine of unconstitutional conditions." Pet. 20 (emphasis added). "Thus, as a predicate," the "court must *first* determine whether * * * the alternative demands (in this case, the dedication of low-income units and a right of first refusal) would violate the Constitution." *Ibid.* (emphasis added). Only if the answer to that question is "yes" does a court evaluate the in-lieu fee under the unconstitutional-conditions doctrine. *Ibid.*

Here, the Court of Appeal rejected petitioners' argument at that first, "predicate" step: It concluded that there was "not an 'exaction,'" because requiring developers to include affordable units in their projects does not amount to an unconstitutional taking; it is instead a legitimate land-use restriction. Pet. App. A8. Where imposing such a requirement does not violate the Constitution, affording petitioners the alternative of paying an in-lieu fee does not either. *Id.* at A9-A10.[7] That is true even apart from the fact the Court of Appeal was addressing the scope of California's Mitigation Fee Act,

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[7] The court also rejected petitioners' argument that, even "if the in-lieu fee is not an exaction," the City's right of first refusal to purchase any affordable housing units not purchased by low-income persons is "an exaction." Pet. App. A10. The court held that petitioners did not set aside units and thus could not attack that provision in an as-applied challenge. *Ibid.* Any facial challenge to that provision, the court further observed, was time-barred. *Ibid.* Finally, the court ruled that "the Mitigation Fee Act does not apply to the in-lieu fee" regardless: West Hollywood's inclusionary housing requirement does not have the specified purpose. Pet. App. A9; see pp. 12-13, *supra*. Petitioners do not challenge those determinations, which concern only state procedural questions.

rather than performing an unconstitutional conditions analysis. See pp. 22-24, *infra*.

The Court of Appeal thus did not "adopt[] a per se rule that excludes all legislatively mandated exactions from inquiry," Pet. 20, or "refuse[]" to examine the underlying permit condition to determine its legality based on such a rule, *id.* at 12, 17-18. The Court of Appeal did what petitioners concede to be proper: It asked whether the underlying requirement of West Hollywood's Municipal Code—the inclusion of affordable housing as part of the development—was itself an "exaction" or "taking" the government could not impose directly. Petitioners lost on *that* issue, not based on a per se rule exempting legislative conditions. They failed to show "that the government could not have constitutionally ordered" them to include affordable units. *Koontz*, 133 S. Ct. at 2595; see Pet. 20 (conceding they had to make a "predicate" showing that requiring "dedication of low-income units * * * would violate the Constitution"). And nowhere do petitioners seek further review of that highly fact-dependent ruling, much less explain how this case adequately presents it. See pp. 30-31, *infra*.

3. Petitioners' contention that the Court of Appeal adopted a per se rule, eliminating unconstitutional conditions analysis for all legislatively imposed conditions, thus defies virtually everything that court actually said. It is inconsistent with the Court of Appeal's detailed analysis of whether the affordable housing requirement amounts to an "exaction." Pet. App. A8-A9. That analysis would have been unnecessary if legislative conditions were per se exempt. Petitioners' contention is inconsistent with the Court of Appeal's description of the sorts of land-use restrictions that will, and will not, amount to a "taking." *Id.* at A9 (citing *San Jose*, 61 Cal. 4th at 444).

That too would have been surplusage if legislative conditions were categorically exempt. So would have been the Court of Appeal's discussion of whether the right of first refusal amounts to an exaction. *Id.* at A10.[8]

Petitioners' position also defies the Court of Appeal's heavy reliance on *San Jose*, which it cites at least 10 times. In that case, the California Supreme Court held the ordinance at issue did "not violate the unconstitutional conditions doctrine *because there is no exaction*"—not because there is an across-the-board exemption for legislative conditions. 61 Cal. 4th at 461 (emphasis added); see also *California Bldg. Indus. Ass'n* v. *City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring) ("Nor did the California Supreme Court's decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action."). The Court of Appeal simply reached the same result here.

Despite their repeated insistence that the Court of Appeal invoked a per se rule about legislative conditions, petitioners identify no point where the court supposedly held that legislative conditions, as opposed to ad hoc conditions, are categorically exempt from *Nollan*'s and *Dolan*'s requirements. That speaks volumes about their position.[9]

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[8] Thus, contrary to petitioners' assertion (Pet. 16-18), the Court of Appeal did address its claim that the right of first refusal effected an exaction. It simply found the argument procedurally foreclosed and insufficient to trigger the Mitigation Fee Act anyway. See p. 19 n.7, *supra*; pp. 24 n.11, 31-32, *infra*.

[9] The only language in the Court of Appeal's opinion that even touches on that distinction shows that the decision does *not* rest on it. After ruling that the housing provision "here was not an 'exaction' "—and that there was no other basis for applying the Mitigation Fee Act, Pet. App. A8-A9—the Court of Appeal noted that land-use

B. The Judgment Below Does Not Even Implicate an Issue of Federal Law

For related reasons, the Court of Appeal's judgment does not even appear to implicate a federal question of any sort. The sole portion of the Court of Appeal's decision that even mentions *Nollan* and *Dolan* does not purport to address any question of federal law. Instead, it addresses whether California's Mitigation Fee Act shifts the burden of proof of reasonableness to the City. That is an issue of state law.

As an initial matter, that entire discussion appears under the bold-typeface heading "**Croft's as-applied challenge improperly places the burden on the City * * * ***" and—more important—the subheading "**Croft bears the burden, not the City**." See *616 Croft Ave., LLC* v. *City of W. Hollywood*, 3 Cal. App. 5th 621, 207 Cal. Rptr. 3d 729 (Ct. App. 2016), review denied (Dec. 21, 2016), avail.

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restrictions are ordinarily not takings if they do "not constitute a physical taking or deprive a property owner of all viable economic use of the property," *id.* at A9. The Court of Appeal *then* added: "This is *especially* true when the regulation, like the one here, broadly applies nondiscretionary fees to a class of owners because the risk of government extorting benefits * * * is unrealized." *Id.* at A9-10 (emphasis added). Even petitioners recognize that this lone sentence, quoted nowhere in their brief, does not amount to a holding that *Nollan* and *Dolan* apply only to ad hoc conditions. By its terms, the sentence addresses the sorts of direct land-use regulations that will amount to takings, not the unconstitutional-conditions doctrine. As this Court has recognized, where restrictions broadly distribute burdens across society or a large class of people, they are less likely to trigger takings concerns. See *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980), abrogated on other grounds by *Lingle* v. *Chevron USA Inc.*, 544 U.S. 528 (2005). Moreover, the phrase "especially true" makes it clear that the basis of the Court of Appeal's decision lies earlier—in its holding that there was "not an exaction" in the first instance.

at: www.courts.ca.gov/opinions/archive/B266660.PDF.[10] That signals no federal issue. And what follows is an extensive analysis of petitioners' and the City's relative burdens under the Mitigation Fee Act and other provisions of California law.

The first sentence following the subheading explains the argument being addressed: Petitioners "argue[ ] the City bears the burden to prove its fees were reasonable *under the Mitigation Fee Act*." Pet. App. A8 (emphasis added). The court then examines whether two conditions for application of the California Mitigation Fee Act are met—(1) whether there was an "exaction" and (2) whether the assessment was charged "'for the purpose of defraying all or a portion of the cost of public facilities related to the development project.'" *Ibid.* (quoting Cal. Gov't Code § 66000(b)). The Court of Appeal determined neither state condition had been met. See pp. 11-13, *supra*.

Petitioners do not ask this Court to review the conclusion that those two state statutory requirements were not met. Nor could it. Whether the Mitigation Fee Act applies is not a question of federal law this Court will review. See *Dickerson* v. *United States*, 530 U.S. 428, 438 (2000); *Mu'Min* v. *Virginia*, 500 U.S. 415, 422 (1991). It is fundamentally a question of state law not subject to federal review.[11] So, too, is the remainder of the court's

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[10] Petitioners appear to have inadvertently removed the formatting on the headings in their appendix.

[11] Petitioners may assert that there are federal issues intertwined with the Court of Appeal's ruling (Pet. App. A8) that there was "not an 'exaction'" within the meaning of the Mitigation Fee Act. But further review would still be impossible. First, the petition does not seek review of whether there was an exaction. Pet. i. Second, resolving the exaction issue could not alter the outcome of this case.

opinion, which addresses petitioners' argument that various other state-law provisions shift the burden of proof to the City. Pet. App. A13-A17 (holding neither the California Constitution nor West Hollywood's Municipal Code shifts the burden to the City).

C. The Question Presented Was Not Properly Preserved Below

It is not surprising that the Court of Appeal did not reach any reviewable federal questions. It is far from clear that petitioners even pressed a *Nollan/Dolan* claim (or any other federal question) in the Court of Appeal below. The issue is thus forfeited. And the record is singularly unsuitable for review in any event.

1. In their briefing on appeal, petitioners did not merely fail to produce any sustained discussion of a putative federal constitutional challenge to West Hollywood's inclusionary housing requirement. They appear to have expressly disclaimed that argument. Their opening brief on appeal characterized their challenge to

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There was another requirement that also had to be satisfied before the Mitigation Fee Act would apply: The exaction's "purpose" had to be "to defray the cost of increased demand on public services resulting from [petitioners'] specific development project." Pet. App. A9; pp. 11-13, *supra*. The Court of Appeal concluded that the Act's second requirement was not met either. Pet. App. A9 (holding that the purpose was "not to defray the cost of increased demand on public services" but to "combat the overall lack of affordable housing" and to "enhance the public welfare by promoting the use of available land * * * available to low- and moderate-income households"). Consequently, the Court of Appeal's conclusion that the State's Mitigation Fee Act is inapplicable, and does not shift the burden of proof here, would stand regardless of how the "exaction" question is resolved.

the in-lieu fee as "a challenge to the *validity* (not necessarily the 'constitutionality')" of West Hollywood's inclusionary housing requirement. Pet. CA Br. 48. Accusing the Superior Court of having "missed the point," they urged that it had "erroneously characterized" their suit "as seeking 'a determination of facial unconstitutionality' *and as a taking*—challenges *not* raised by Petitioners." *Id.* at 49 (some emphasis added).

Having clarified that invalidation of the City's "affordable housing fee * * * as a *taking*" was a "challenge[ ] *not* raised," Pet. CA Br. 49, petitioners explained that their challenge rested on California's reasonable relationship requirement—not the "essential nexus" and "rough proportionality" requirements under *Nollan/Dolan*: "[I]n the absence of substantial evidence demonstrating the 'reasonable relationship' *required by the City's own Municipal Code*," they argued, the City's fee "is just as 'invalid' as if it had been adopted in the absence of a quorum required by the Municipal Code." *Id.* at 50-51 (citation omitted and emphasis added). Petitioners' disavowal of a federal constitutional challenge should preclude review of such a challenge here. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

2. The petition, moreover, does not appear to specify where petitioners raised the federal issue "in the appellate court[ ]" or the "method or manner of raising [it]." Sup. Ct. R. 14.1(g)(i). Although the briefing below is not entirely pellucid, petitioners appear to have taken issue with the application of the in-lieu fee in light of the requirements of California law—particularly California's Mitigation Fee Act. California law requires there be a "reasonable relationship" between the fee's use and the type of project on which the fee is imposed. Cal. Gov't Code § 66001(3)-(4). Petitioners argued that the fee was

"invalid" because it did not meet the Mitigation Fee Act's requirement that it be "reasonably related" to the development and the fee's purpose. Pet. CA Br. 50.

Indeed, petitioners mentioned *Nollan/Dolan* in the argument section of their brief only in a single paragraph. Pet. CA Br. 52. But that paragraph appears to use those cases solely to support petitioners' interpretation of the state-law "reasonable relationship" test and the burden thereunder—not as an independent constitutional challenge. *Ibid.* That, too, forecloses review, *Williams*, 504 U.S. at 41, and does so jurisdictionally where, as here, the petition seeks review of a state-court judgment, *Webb* v. *Webb*, 451 U.S. 493, 495 (1981). This Court will not grant review unless it is "reasonably certain" that "the record clearly shows that the federal issue has been properly raised below." *Id.* at 499. There can be no claim that certainty and clarity are present here.

3. For similar reasons, this case is an inappropriate vehicle for review. Because petitioners focused on state-law issues below, the arguments petitioners now make are neither developed in the lower court briefing nor addressed in the Court of Appeal's decision. *Webb*, 451 U.S. at 500. It would be "unseemly" for them to be addressed in the very first instance here. *Ibid.* And the parties have not been given "the opportunity to develop the record necessary" for proper adjudication. *Ibid.*

D. The Petition Improperly Seeks To Circumvent a State-Law Time Bar on Their Facial Challenges

Petitioners do not dispute their facial challenge was untimely. They expressly disclaim any facial challenge here, stating that the "petition concerns the as-applied challenge." Pet. 10 n.13. But petitioners never distinguish their as-applied challenge from the concededly un-

timely facial challenge they abandon. That is because the two are indistinguishable. Recognizing as much, the intermediate state appellate court declined to allow petitioners to circumvent state limitations periods by relabeling their facial challenge as an as-applied challenge.

Petitioners' facial claim was concededly barred as a matter of state procedural law. Pet. App. A7. Because petitioners had failed to challenge either West Hollywood's inclusionary housing requirements or its fee schedule for in-lieu fees "within 90 days after the legislative body's decision," Cal. Gov't Code § 65009(c)(1)(E), petitioners' challenge to the provisions was untimely. Pet. App. A7. Petitioners were left with only an as-applied challenge to West Hollywood's Municipal Code.

But petitioners' as-applied challenge, properly understood, turned out to be the same as their facial challenge. Petitioners asserted that the City had to show that the *individual fee* charged to them was reasonable in relation to the adverse impacts of *their individual* development. Pet. App. A13. The court rejected that as "mischaracteriz[ing] the nature of the reasonableness inquiry." *Ibid.* The correct test, the court explained, was whether the overall fee schedule was "reasonably related to the *overall availability* of affordable housing in West Hollywood." *Id.* at A14 (emphasis added). Any such challenge to the overall reasonableness of the fee schedule, however, was a *facial* challenge and thus time-barred. *Id.* at A14-A15.

Petitioners *could* have brought an as-applied challenge to the City's "actual mathematical calculation of its individual fee" by arguing (for example) that the City "exaggerated the number of square feet or made a multiplication error." Pet. App. A14 n.6. Or they could have made other arguments that did not challenge the fee

schedule en grosse. But petitioners "ma[d]e no such arguments here." *Ibid.* Rather, the only arguments petitioners made were indistinguishable from facial challenges—arguments they now expressly disclaim and which are time-barred in any event.

E. Petitioners Repeatedly Waived Any Challenge by Agreeing To Pay the Fee

Petitioners did not merely waive their time-barred facial challenge. Pet. 10 n.13. They have waived *any* challenge to the in-lieu fee by repeatedly agreeing to pay it. When petitioners first sought a permit for their development project, they signed an "Acceptance Affidavit," AR 515, in which they agreed to pay the in-lieu fee. Petitioners again signed an "Acceptance Affidavit" when one of their many extension requests was granted. AR 660.

"Waiver is an intentional relinquishment of a known right." *Gould* v. *Corinthian Colls., Inc.*, 192 Cal. App. 4th 1176, 1179 (Ct. App. 2011). By signing the "Acceptance Affidavits," petitioners expressly agreed to pay the fees outlined above. Petitioners thereby waived their right to later object to them. See *County of Imperial* v. *McDougal*, 19 Cal. 3d 505 (1977) (finding waiver where landowner failed to object).[12]

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In light of the foregoing, this case presents no viable question for further review. While petitioners invoke the

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[12] Petitioners cannot avoid waiver by asserting that the fees ultimately imposed were increased during the six years the City waited for petitioners to move forward with the project. The appendix to petitioners' Acceptance Affidavit plainly states that the applicant shall pay the in-lieu fee "according to the fee schedule established by the City Council." AR 522. Petitioners therefore agreed to any increased fee schedule.

separate opinions of members of this Court in connection with other certiorari petitions, Pet. 23-24, those underscore precisely why review cannot be granted here. For example, in *San Jose*, 136 S. Ct. at 929, Justice Thomas (concurring in the denial of certiorari) emphasized that the case was an inappropriate vehicle for review because the decision below did not "rest on the distinction (if any) between takings effectuated through administrative versus legislative action." *Ibid.* Likewise here, the decision below does not rest on that distinction. Indeed, it does not rest on any question of federal law—and other bars to review abound.

The other case petitioners cite, *Parking Association of Georgia, Inc.* v. *City of Atlanta*, 515 U.S. 1116 (1995), again makes clear that review is inappropriate here. In that case, two Justices dissented from the denial of certiorari. But the state supreme court below had explicitly ruled that the ordinance at issue passed "constitutional muster under *federal* taking analysis" and relied on the city's "*legislative determination*" to distinguish the case from *Dolan*. *Parking Ass'n of Ga., Inc.* v. *City of Atlanta*, 264 Ga. 764, 766 n.3 (1994) (emphasis added). Not so here. The decision below rests on other—and purely state-law—grounds. To the extent the question petitioners purport to present is important and recurring, this Court will have ample opportunity to address it in a case that actually presents it for review.

II. THE DECISION BELOW IS CORRECT

Petitioners do not take issue with any of the reasoning of the state court on the issues of state law—including the meaning of the Mitigation Fee Act—the Court of Appeal actually addressed. But even if the court's reasoning were evaluated under this Court's "unconstitutional conditions" precedents, it would still be correct

under *Nollan*, *Dolan*, and *Koontz*. And the in-lieu fee amply meets any "essential nexus" and "rough proportionality" requirement.

A. The Court of Appeal Correctly Analyzed Petitioners' Claim Under the California Mitigation Fee Act

Petitioners describe the Court of Appeal as having held that, "under the California rule, it is unnecessary for a court to consider whether the government's underlying demand seeks the dedication of a property interest because all legislative exactions are categorically exempt from * * * *Nollan*, *Dolan*, and *Koontz*." Pet. 17-18. As explained above, the Court of Appeal held no such thing: Instead, it addressed petitioners' arguments under California's Mitigation Fee Act and concluded that neither of the two conditions for the Act's application were met. There was no "exaction," it held, and the provision did not have the required "purpose" of defraying the impact the development project would have on City facilities. Pet. App. A8-A10; pp. 11-13, 18, *supra*.

Even apart from the fact that the state intermediate court was applying a state statute, its decision would be correct as a matter of federal law. As explained above, this Court has made clear that "[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* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013). Petitioners thus concede that, as a "predicate" to a *Nollan/Dolan* claim, they "first" must show "the alternative demands (in this case, the dedication of low-income units and a right of first refusal) would violate the Constitution." Pet. 20. Petitioners offer no sustained argument the

predicate was met here. They do not argue that the requirement of 20 percent inclusionary housing represents a physical occupation that might be a per se taking; they do not claim the requirement denies them all economically viable use of their property; and they do not claim it could amount to a taking under the flexible balancing test of *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). They thus do not even mention the economic benefits that, under state law, the City must provide to offset the effects of the inclusionary housing provisions. See p. 4, *supra*. The sort of record needed for an as-applied takings analysis is simply absent here. And petitioners do not raise the issue in the question presented.

Petitioners focus attention on the City's right of first refusal for any inclusionary units that are not purchased by eligible residents. Pet. 16-18. But the Court of Appeal held that any challenge to that provision was barred under state law. Petitioners could not bring an "as-applied" challenge because they did not provide inclusionary units (much less end up with unpurchased units subject to any right of refusal). They could bring a facial challenge—but any "facial challenge is time barred." Pet. App. A6; pp. 26-27, *supra*. Petitioners, moreover, make no effort to show that the right of first refusal results in an uncompensated taking. That would be hard: The City would have to pay them for any units that were acquired—the same amount that would be paid by private parties under the unchallenged inclusionary housing requirement. That payment forecloses the possibility of a taking "without just compensation." And petitioners do not include that issue in the question presented either.

B. Petitioners' Challenge Would Fail Under *Nollan*/*Dolan*

When applicable, *Nollan* and *Dolan* require "a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 133 S. Ct. at 2595. Petitioners' argument under *Nollan*/*Dolan* misconstrues the purpose of West Hollywood's inclusionary housing requirement and the in-lieu fee alternative. Petitioners proceed on the premise that West Hollywood's requirements are designed to mitigate the *impact* of petitioners' development on housing supply or the need for City services. That is incorrect.

As the California Court of Appeal explained, the inclusionary zoning requirement is not designed to offset the social costs of a particular development. It is designed to regulate land use so that development as a whole proceeds in a balanced fashion that satisfies the need for affordable as well as other types of housing. Pet. App. A5-A6. The City has a clear and unquestioned interest in such regulation of land use in the public interest.

Petitioners opted not to provide inclusionary housing in their development. The in-lieu fee directly addresses the effects of their decision not to provide otherwise required inclusionary housing in a City and State suffering a "serious shortage of decent, safe, and sanitary housing" for low-income individuals. Cal. Health & Safety Code § 50003(a). The in-lieu fee thus directly addresses the "social cost" of petitioners' choice not to comply with a zoning rule designed to ensure balanced development that will meet the needs of all City residents.

The in-lieu fee, moreover, is proportional to the impact. It is based on the cost of developing the affordable units forgone by petitioners. The amount of the fee is es-

tablished by resolution of the City Council and revised periodically based on studies showing the costs of providing replacement affordable units within the City. WHMC §§ 19.22.010, 19.22.040; Pet. App. E-1, E-3. Petitioners have made no challenge to the City's method of developing the fee. Pet. App. A7. And any such challenge would be untimely in any event. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MICHAEL JENKINS
CHRISTI HOGIN
GREGG W. KETTLES
JENKINS & HOGIN, LLP
1230 Rosecrans Ave., Suite 110
Manhattan Beach, CA 90266
(310) 643-8448
gkettles@localgovlaw.com

JEFFREY A. LAMKEN
Counsel of Record
EMILY K. DAMRAU
Admitted Only in Illinois
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for Respondent
City of West Hollywood

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