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 REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A City of West Hollywood ordinance requires that builders of a proposed 11-unit condominium pay a $540,393.28 "affordable housing fee" to subsidize the construction of low-cost housing elsewhere in the City. The ordinance imposes the fee automatically as a condition on the approval of a building permit, without any requirement that the City show that the project creates a need for low-cost housing.

The question presented is:

Whether a legislatively mandated permit condition is subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (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 AND SUMMARY OF ARGUMENT

The City of West Hollywood does not dispute the importance of the question whether a legislatively mandated permit condition is subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Rather, in opposition to the petition, the City claims that the California courts never addressed the legislative exactions issue. That argument, however, is unsupported by the record below.

Contrary to the City's claims, the Lehrer-Graiwers raised—and the California Court of Appeal adjudicated—the question whether legislatively imposed permit conditions must satisfy the "essential nexus" and "rough proportionality" tests established by *Nollan* and *Dolan*. Indeed, the decision below dismissed the Lehrer-Graiwers' unconstitutional conditions claim under a judicially-created California rule holding that, as a matter of law, "a generally applicable development fee or assessment" is not subject to the doctrine of unconstitutional conditions. Pet. App. A at 9-10. The City's attempt to recharacterize the lower court's decision as deciding only non-constitutional questions is undone by prior pleadings in which the City argued that the court of appeal "found it would be inappropriate to apply the

unconstitutional conditions doctrine where, as here, the fee is . . . legislatively imposed[.]"[1]

This Court unquestionably has jurisdiction to review the lower court's conclusion that legislative exactions are not subject to *Nollan/Dolan/Koontz*. 28 U.S.C. § 1257(a); *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (jurisdiction exists where the record establishes that the federal constitutional issues were "either squarely considered or resolved in state court"). Moreover, contrary to the City's claims, the record demonstrates that the Lehrer-Graiwers timely filed and fully litigated their as-applied unconstitutional conditions claim after following the well-settled procedure for accepting a permit while challenging the imposition of an unconstitutional exaction.

The lower courts determined all of the facts necessary to address the question presented as a pure question of law. The City demanded the Lehrer-Graiwers to pay a $540,393.28 fee in lieu of a legislative requirement that they give the City (or a City-designated third party) an option to purchase two newly built condominium units at below-market prices. That fee did not "defray the cost of increased demand on public services resulting from [the Lehrer-Graiwers'] specific development project." Pet. App. A at 9. Indeed, when reviewing the development proposal, the City found that the Lehrer-Graiwer project "would help the City achieve its share of the

[1] Pet. Supp. App. G at 3 (City of West Hollywood, Answer to Petition for Review, at 15, Cal. Sup. Ct. No. S238136 (Nov. 21, 2016))

regional housing need" by providing "11 families with a high quality living environment."[2] Instead, the City exacted the affordable housing fee to "enhance the public welfare" by addressing the general lack of affordable housing in West Hollywood—a problem that predated the project proposal. Pet. App. A at 9; Pet. App. C at 17-18. These facts, which conclusively show the lack of nexus and proportionality, cannot be contested.

Certiorari is warranted and should be granted.

THE CITY IS ESTOPPED FROM ADOPTING A MATERIALLY DIFFERENT POSITION ON THE FACTS AND LAW

The City's statement of the case is materially different from what it argued below. Specifically, the Opposition states that, on appeal, the Lehrer-Graiwers raised only as-applied arguments pertaining to California's Mitigation Fee Act, and that the court of appeal's decision likewise only addressed that statute. Opp. at 10-13 (citing Pet. App. A at 8-11). That assertion directly contradicts the position of the City during the state court proceedings, including statements made to the California Supreme Court. There, the City acknowledged the Lehrer-Graiwers' as-applied challenge and repeatedly argued that California had adopted a per se rule exempting legislatively mandated exactions from the scrutiny required by *Nollan/Dolan/Koontz*. For example:

[2] Pet. App. D (City of West Hollywood Res. No. 05-3268, §§ 4(4), 8(c)).

> The [Court of Appeal's] Opinion turns back Petitioners' as-applied challenge, following the California Supreme Court's recent decision in *California Building Industry Assn. v. City of San Jose*, (2015) 61 Cal.4th 435 (*San Jose*), [in which the court] strongly set straight the law of unconstitutional conditions as applied to inclusionary zoning[.][3]
>
> [The Court of Appeal's] Opinion merely follows *San Jose*, which recently resolved the [legislative exactions] questions . . . .[4]
>
> The court addressed Petitioners' arguments based on the unconstitutional conditions/exactions doctrine.[5]
>
> The court also found that it would be inappropriate to apply the unconstitutional conditions doctrine where, as here, the in-lieu fee is non-discretionary, and legislatively imposed on a class of owners.[6]
>
> Having determined the *Nollan/Dolan* test for unconstitutional conditions did not apply, the court of appeal reviewed the City's application of the Ordinance under a

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[3] Pet. Supp. App. G at 2.

[4] *Id.* at 2.

[5] *Id.* at 2.

[6] *Id.* at 3.

> deferential [rational basis] standard or review.[7]
>
> Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test. . . . It was appropriate for the court of appeal to follow *San Jose* and hold that the inclusionary zoning ordinance of the City of West Hollywood . . . was not subject to the unconstitutional conditions doctrine.[8]

The reason why the City materially changed its position is obvious: the only serious argument it can muster now in opposition to certiorari is a newly minted claim that the California courts never addressed the federal constitutional question presented by the petition, or alternatively, that the Lehrer-Graiwers did not adequately raise or preserve the issue. *See* Opp. at 1-2, 10-13, 14-26. The doctrine of judicial estoppel, however, "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). This Court should therefore disregard the City's newly adopted litigation position. Moreover, as shown below, that position is in error.

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[7] *Id.* at 3.

[8] *Id.* at 3-4.

ARGUMENT

I

THE DECISION OF THE CALIFORNIA COURT OF APPEAL HINGED ON ITS DETERMINATION THAT LEGISLATIVELY MANDATED PERMIT CONDITIONS ARE NOT SUBJECT TO *NOLLAN/DOLAN/KOONTZ*

The California Court of Appeal explicitly stated that it had ruled on a facial and an as-applied challenge alleging violations of the doctrine of unconstitutional conditions predicated on the Fifth Amendment to the U.S. Constitution. Pet. App. A at 1-2, 8. The court dismissed the facial claim as time-barred, and dismissed the as-applied claim under a judicially created California rule holding that "a generally applicable development fee or assessment" is not an exaction subject to heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 9-10; *see also* JA 333 ("*Nollan/Dolan* scrutiny does not apply to generally applicable development fees."). The lower court supported its decision to dismiss the as-applied challenge by citing a line of California Supreme Court cases interpreting federal constitutional law to categorically exempt legislatively imposed monetary permit conditions from analysis under *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 10 (citing *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 459 n.11 (2015) (*CBIA*) ("Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test."); *San Remo Hotel v. City and*

County of San Francisco, 27 Cal. 4th 643, 668-70 (2002) ("[L]egislatively prescribed monetary fees imposed as a condition of development are not subject to the *Nollan/Dolan* test.").

The City's opposition fails to acknowledge that the lower court's conclusion that the in-lieu fee did not constitute an exaction was, in fact, an application of California's legislative exactions rule. Pet. App. A at 8-9 (citing *CBIA*, 61 Cal. 4th at 443-44, 457, 461, 477). Indeed, because of the categorical nature of the California rule, the lower court concluded that the in-lieu was not an exaction without first determining whether the fee was imposed in lieu of a dedication of property, as is required by *Koontz*, 133 S. Ct. at 2598-99. The court of appeal accordingly concluded that the affordable housing fee was exempt from the doctrine of unconstitutional conditions, despite acknowledging that the West Hollywood ordinance demanded that developers give the City a well-recognized property interest or pay an in-lieu fee (*see* section III below). Pet. App. A at 8-9; Pet. App. C at 16. Instead, relying on *CBIA*, the lower court held that the in-lieu fee was not subject to *Nollan* and *Dolan*, as a matter of law, because (1) it was generally applicable and (2) the purpose of the demand was "not to defray the cost of increased demand on public services resulting from [the Lehrer-Graiwers'] specific development project, but rather to combat the overall lack of affordable housing." Pet. App. A at 9.

Thus, contrary to the City's claim, the lower court's determination that the in-lieu fee did not constitute an exaction is not an alternative basis to uphold the decision.

The City's refusal to discuss California's legislative exactions rule in its opposition brief also defeats its attempt to conflate the Lehrer-Graiwers' unconstitutional condition claim with a separate claim brought under the state's Mitigation Fee Act. Opp. at 10-13, 22-24. Although the decision below discussed both claims in the same section of the opinion, it expressly dismissed the Lehrer-Graiwers' "'exactions' [claim] which invoked the United States Constitution's Fifth Amendment" as barred under the California rule. Pet. App. A at 8. The City admitted so much in its brief to the California Supreme Court, arguing that the court of appeal "found it would be inappropriate to apply the unconstitutional conditions doctrine where, as here, the fee is . . . legislatively imposed" based on *CBIA*, which had "strongly set straight the law of unconstitutional conditions[.]"[9]

The court of appeal indisputably ruled on the question of federal constitutional law presented by the petition and that ruling was essential to the judgment. Thus, there is no risk that an opinion from this Court would be "advisory." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (a decision is not advisory where the lower decision was controlled by federal law); *see also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

[9] Pet. Supp. App. G at 2, 3.

II

THERE ARE NO PROCEDURAL OR POSTURE DEFECTS IN THE CASE PRESENTED

A. The Lehrer-Graiwers' As-Applied Challenge is Timely and Properly Filed

The City does not contest that the Lehrer-Graiwers timely filed their as-applied unconstitutional conditions claim. Indeed, it cannot. The Lehrer-Graiwers followed the well-established process for challenging an excessive exaction while moving forward with the underlying development project. After the City approved the project with conditions, they signed the required acceptance form then paid the in-lieu fee under protest. *See Sterling Park L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1200 (2013) (A permit applicant may preserve an exactions claim by paying a fee under protest.). After that, the Lehrer-Graiwers requested an administrative hearing, then filed an as-applied unconstitutional conditions challenge well within the statute of limitations. JA 1-20.

The City, nonetheless, argues that the as-applied challenge should be construed as alleging a facial claim (and be therefore time barred) because the Lehrer-Graiwers "never distinguished their as-applied challenge from the . . . facial challenge." Opp. at 26-27. This argument should be rejected for three reasons. First, the City did not raise this defense below. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1009 (2017) (This Court will generally not entertain arguments that were not raised below.). Second, the complaint challenged the "particular

application" of the City's affordable housing ordinance to demand payment of a $540,393.28 in-lieu fee as a mandatory condition of permit approval (JA 42-43), which is a textbook as-applied claim. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) ("A facial challenge is an attack on a statute itself as opposed to a particular application."). And third, the decision below explicitly acknowledged that the Lehrer-Graiwers alleged a distinct as-applied claim, and addressed that claim separately. Pet App. A at 1-2, 8-10.

The City's argument that the Lehrer-Graiwers waived their right to bring an as-applied challenge is similarly flawed.[10] After approving a permit application, the City requires that the landowner execute an "acceptance affidavit" before it will issue any permits. AR 516. The stated purpose of the acceptance form is to record the conditions as deed restrictions on the property before work commences on the project. *Id*. Nothing in the City's form states that, by signing, the Lehrer-Graiwers will waive their constitutional claims. *See Gould v. Corinthian Colls., Inc.*, 192 Cal. App. 4th 1176, 1179 (2011) (a waiver must be intentional). Indeed, waiver was impossible because, at the times the City required the Lehrer-Graiwers to sign the form in 2005 and again in 2008, the resolutions approving the condominium complex had left the dollar amount for the affordable housing fee blank. AR 522-23, 662. Moreover, under California law, the City cannot require that permit applicants waive their right to challenge an excessive exaction

[10] The lower court declined to rule on the City's waiver argument as unnecessary after it ruled on the merits of the Lehrer-Graiwers' unconstitutional conditions claims. Pet. App. A at 17.

before it will issue the approved permit. *Sterling Park*, 57 Cal. 4th at 1200 (A permit applicant may preserve an exactions claim by paying a fee under protest.).

B. The Lehrer-Graiwers Preserved Their As-Applied Unconstitutional Conditions Claim

The City's contention that the Lehrer-Graiwers failed to adequately argue the as-applied claim in its state court pleadings is baseless. Opp. at 24-26. All three of the Lehrer-Graiwers' appellate briefs contain substantial argument on the doctrine of unconstitutional conditions (including discussion of state cases interpreting *Nollan*, *Dolan*, and *Koontz*).[11] [12] That briefing was more than sufficient to put the lower courts on notice of the constitutional claim and to warrant extensive briefing from the City arguing that, under California's judicially created rule, *Nollan* and *Dolan* do not apply to legislatively mandated exactions.[13]

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[11] *See* Appellants' Opening Brief at 21-23, 45-46, 49, 52, 55; Appellants' Reply Brief at 12-14, 19, 21, 23-26, 41, 47-48, 51; Appellants' Supplemental Brief at 1-3.

[12] Rather than addressing the substance of the parties' appellate arguments, the City criticizes the precision of language in the Lehrer-Graiwers' appellate brief. Opp. at 25 (complaining, for example, that the Lehrer-Graiwers used the term "validity" instead of "constitutionality" when referring to the doctrine of unconstitutional conditions). Such criticism warrants no response where the lower court expressly ruled on the as-applied unconstitutional conditions claim.

[13] *See* City of West Hollywood Response Brief at 13, 17, 28, 32, 45-58; City of West Hollywood Supplemental Brief at 1-3.

The City's claim that the Lehrer-Graiwers "disavowed" their unconstitutional conditions challenge is also false. Opp. at 26. The section of the Lehrer-Graiwers' appellate brief cited by the City's opposition was, in fact, an argument that the trial court had erred by mischaracterizing their unconstitutional conditions claim as a facial regulatory takings claim subject to *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 318 (2002). *See* Appellants' Br. at 49-51 (citing JA 331). The brief made perfectly clear that the claim challenged the validity of the in-lieu fees "as unjustified development exactions," not a regulatory taking. *Id.* at 48.

III

THE EXACTION IMPOSED BY THE CITY FAILS REVIEW UNDER A PROPER APPLICATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The City argues that, even if this Court were to overturn California's legislative exactions rule, the $540,393.28 in-lieu affordable housing fee would likely satisfy the nexus and proportionality tests. Opp. at 32-33. Not so. The nexus and proportionality tests hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate adverse public impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95, 2599.

The affordable housing fee constituted an exaction because it was imposed in lieu of a demand that the Lehrer-Graiwers give the City (or a designated third party) a right of first refusal to purchase two new condominium units at below-market prices. In *Gregory v. City of San Juan Capistrano*, the California Court of Appeal held that an ordinance appropriating a right of first refusal effected a taking. *Gregory v. City of San Juan Capistrano*, 142 Cal. App. 3d 72, 89-91 (1983); *see also Sterling Park*, 57 Cal. 4th at 1207-08 ("Compelling the developer to give the City a purchase option is an exaction[.]").

The affordable housing fee cannot satisfy the nexus and proportionality requirements because "the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from [the Lehrer-Graiwers'] specific development project, but rather to combat the overall lack of affordable housing." Pet. App. A at 9. And the lack of housing is a problem that "predates the project." Pet. App. C at 17-18. Thus, as the court of appeal explained, the City's affordable housing exaction is not intended to mitigate any adverse impacts of new development—instead the City leveraged its permitting power to single out an individual property owner dedicate land or pay fees designed to "enhance the public welfare." Pet. App. A at 9.

The City's decision to place the burden of paying for a preexisting public problem on the Lehrer-Graiwers—even though they had not contributed to it—implicates one of the principal reasons why this Court established the nexus and proportionality tests, which is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *Nollan*, 483 U.S. at 836 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: July, 2017.

Respectfully submitted,

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Appendix G–1

Supreme Court Case No. S238136

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

616 CROFT AVE., LLC, et al.

Petitioners,

v.

CITY OF WEST HOLLYWOOD,

Respondent.

After an Opinion by the Court of Appeal,
Second Appellate District, Division One
Case No. B266660

On Appeal from the Superior Court of Los Angeles
County (Case No. BC498004, Honorable Luis A.
Lavin, Judge)

ANSWER TO PETITION FOR REVIEW

[Counsel block omitted]

I. Introduction

* * * * *

. . . . The Opinion turns back Petitioners' as-applied challenge, following the California Supreme Court's recent decision in *California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th 435 ("San Jose"). In upholding *San Jose*'s nearly identical inclusionary zoning ordinance against a facial challenge based on the unconstitutional conditions/exactions doctrine, *San Jose* emphatically rejected the theories on which this Petition is based. Having recently and strongly set straight the law of unconstitutional conditions as applied to inclusionary zoning, there is no reason now for this Court to revisit the issue. [Answer, p. 5]

* * * * *

Petitioners later brought a petition for writ of mandate, challenging the Ordinance and the in lieu fee, claiming, among other things, that they violated the Fifth Amendment's unconstitutional conditions doctrine. The trial court denied the petition and the court of appeal affirmed. [Answer, p. 6]

* * * * *

The court of appeal affirmed. The court addressed Petitioners' arguments based on the unconstitutional conditions/exactions doctrine. [Answer, p. 14]

* * * * *

The court also turned back Petitioner' as applied challenge, applying the principles in this court's decision in *San Jose.* [Answer, p. 14]

* * * * *

The court also found that it would be inappropriate to apply the unconstitutional conditions doctrine where, as here, the in lieu fee is non-discretionary, and legislatively imposed on a class of owners.

The court of appeal acknowledged that the City's ordinance required a developer who chose to build the required affordable units to give the city a right of first refusal. But it did not follow that Petitioners were subject to an exaction. Petitioners did not build any affordable units; rather, Petitioners chose to pay the in lieu fee. Any challenge to the Ordinance's right of first refusal would be a facial challenge, which was time barred.

The court of appeal rejected Petitioners' argument, repeated in their petition for review, that the City's own ordinances require the City to demonstrate a reasonable relationship between the amount of the in-lieu fee and the affordable housing demand caused by the project. The court held that the cited provisions did not clearly show the City took on that burden, and the court would not shift the burden to the City without evidence that the City intended to do that.

Having determined the *Nollan/Dolan* test for unconstitutional conditions did not apply, the court of appeal reviewed the City's application of the Ordinance under a deferential standard of review. [Answer p. 15]

* * * * *

As observed by *San Jose*: "The *Koontz* decision does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments. Our court has held that legislatively prescribed monetary fees that are imposed as a

condition of development are not subject to the *Nollan / Dolan* test." *San Jose*'s holding is not seriously called into question by Petitioners' remaining citations, which consist of cases that do not involve either the takings clause or land use regulation, and law review articles.

It was appropriate for the court of appeal to follow San Jose and hold that the inclusionary zoning ordinance of the City of West Hollywood, like that of the City of San Jose, was not subject to the unconstitutional conditions doctrine. The in lieu fee paid by Petitioners was calculated by a legislatively adopted fee schedule that applies equally to all property owners. [Answer pp. 19-20] [citations omitted]

* * * * *

IV. Conclusion

For the foregoing reasons, the City respectfully requests that the Petition be denied.

Dated: November 21, 2016

Respectfully submitted,

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City of West Hollywood