No. 15-330

IN THE

Supreme Court of the United States

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,
Petitioner,

v.

CITY OF SAN JOSE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF SAN JOSE, SAN JOSE CITY COUNCIL, AND MAYOR OF SAN JOSE

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PARTIES TO THE PROCEEDINGS

Respondents agree with petitioner's statement regarding the parties (Pet. ii) except that (1) the San Jose City Council and the Mayor of San Jose are also respondents because each was named in the complaint as a defendant along with the City of San Jose, and each continued to appear throughout the litigation below, *see, e.g.*, Pet. App. B-1; and (2) the Public Interest Law Project and Law Foundation of Silicon Valley are counsel for intervenors rather than intervenors.

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STATEMENT

A. San Jose's Inclusionary-Housing Ordinance

1. History and purpose

a. For over three decades, "a severe shortage of affordable housing" has plagued California, "especially for persons and families of low and moderate income." Cal. Gov. Code §65913(a); *see also* Pet. App. A-2. Because this shortage "threatens the economic, environmental, and social quality of life in California," Cal. Gov. Code §65589.5(a)(1), the state has declared adequate affordable housing to be "a priority of the highest order" and a matter "of vital statewide importance," *id.* §65580(a).

To address its protracted housing shortage, California requires municipalities to provide for the existing and projected housing needs of "all economic segments of the community." Cal. Gov. Code §65583(c); *see also id.* §65300; Pet. App. A-8. In particular, 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." Cal. Gov. Code §65583(c)(2).

b. Like the state around it, respondent City of San Jose suffers from a "severe shortage of adequate, affordable housing for extremely low, very low, lower, and moderate income households." San Jose Mun. Code (hereafter S.J.M.C.) §5.08.010(A); *see also* Pet. App. A-12; AA2530, AA2607.[1] Seeking to reduce or eliminate this shortage—and to meet its obligations under California law—the city in late 2007 began considering a citywide "inclusionary housing" ordinance. AA922.

Such ordinances have been adopted by "more than 170 California cities and counties," Pet. App. A-10; *accord* AA1571, as well as hundreds of municipalities in other states, Innovative Housing Institute, *Inclusionary Housing Survey: Measures of Effectiveness* (2010). Although their terms vary, inclusionary-housing programs generally "require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low- and moderate-income residents." Pet. App. A-2.

Assisted by an outside consultant, the San Jose City Council (also a respondent) spent about six months studying inclusionary-housing programs, including

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[1] "AA" refers to the appellants' appendix filed in the California Court of Appeal.

their potential benefits and costs, as well as the feasibility of one in San Jose. AA922, AA1570-1870. The council then spent another six months holding dozens of meetings—with businesses, homebuilders and labor associations, affordable-housing advocates, community organizations, and the general public—both to educate residents and other interested parties about inclusionary housing, and to solicit feedback on a possible inclusionary-housing ordinance in San Jose. AA922-923, AA883-884. After this period of study and comment, the council released a draft ordinance and held nine public meetings to discuss it. AA923.

c. In 2010, after more than two years of development, the City Council enacted Ordinance No. 28689, the inclusionary-housing program challenged in this case. Pet. App. A-3; *see also* S.J.M.C. ch. 5.08 (ordinance as codified).[2] As elaborated below, the ordinance's principal feature is a requirement that developers of large residential real-estate projects sell at least 15 percent of their units at prices affordable to lower- and moderate-income households. S.J.M.C. §5.08.400(A)(1).[3]

The ordinance's declared purpose is "to enhance the public welfare by establishing policies which require the development of housing affordable to households of very low, lower, and moderate incomes." S.J.M.C. §5.08.020. And the City Council found in enacting the ordinance that it would "substantially ad-

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[2] The full ordinance is available at https://www.municode.com/library/ca/san_jose/codes/code_of_ordinances?nodeId=TIT5HO_CH5.08INHO. Excerpts are reproduced in pages D-1 to D-24 of the petition appendix.

[3] The ordinance also addresses inclusionary housing in rental developments, but those provisions are not at issue here. Pet. App. A-17 n.6 (citing S.J.M.C. §5.08.400(A)(2)).

vance the city's legitimate interest in providing additional housing affordable to all income levels and dispersed throughout the city." *Id.* §5.08.010(E). The council further found that "[r]equiring builders of new market rate housing to provide some housing affordable to very low, lower, and moderate income households is … reasonably related to the impacts of their projects," in two ways. *Id.* §5.08.010(F). First, "[n]ew market-rate housing uses available land and drives up the price of remaining land," thereby "reduc[ing] the … land … available for the construction of affordable housing." *Id.* §5.08.010(F)(1). Second, "[n]ew residents of market-rate housing place demands on services provided by both public and private sectors, creating a demand for new employees"—some of whom "earn incomes only adequate to pay for affordable housing." *Id.* §5.08.010(F)(2).

2. Operative terms

San Jose's inclusionary-housing ordinance requires developers of large residential projects to support the creation of affordable housing in conjunction with their development. It does this primarily via a requirement that, as a condition of obtaining a building permit for any residential development project comprising "twenty … or more new, additional, or modified dwelling units," S.J.M.C. §5.08.250, the owner and developer of the relevant property agree to make 15 percent of the for-sale units in the development "inclusionary units," *id.* §§5.08.125, 5.08.195, 5.08.400(A)(1); 5.08.610; *see also* Pet. App. A-3 to A-4. Inclusionary units must "be made available for purchase at an affordable housing cost to … households earning no more than one hundred ten percent (110%) of the area median income." S.J.M.C. §5.08.400(A)(1); *see also* Pet. App. A-16.

Under the ordinance, inclusionary units are typically required to have "a comparable square footage and the same bedroom count … as the market rate units," as well as "the same amenities." S.J.M.C. §5.08.470(D) & (F). Moreover, the "quality of exterior design and overall quality of construction of the inclusionary units shall be consistent with the exterior design of all market rate units in the residential development." *Id.* §§5.08.470(B). However, inclusionary units "may have different interior finishes and features than [such] market rate units …, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality." *Id.* §§5.08.470(C).

Inclusionary units must generally "remain affordable to the targeted income group" for 45 years. S.J.M.C. §5.08.600(B). And "to ensure that the number of affordable housing units … is not lost upon resale," Pet. App. A-19, the ordinance requires that certain covenants, resale restrictions, or other documents be "recorded against the residential development, all inclusionary units, and any site subject to" the ordinance. S.J.M.C. §5.08.600(A); *see* Pet. App. A-48 (discussing this provision). Also required to be recorded are "documents permitting the city to capture at resale"—that is, upon sale by a subsequent owner, not the developer—"the difference between the market rate value of the inclusionary unit and the affordable housing cost, plus a share of appreciation realized from an unrestricted sale in such amounts as deemed necessary … to replace the inclusionary unit." S.J.M.C. §5.08.600(A). Any such "shared appreciation payments … shall be deposited into … the City of San José affordable housing fee fund," *id.* §5.08.700(A), which is "used exclusively to provide housing to lower and moderate income households," Pet. App. A-47.

The ordinance provides seven ways to comply other than the 15-percent on-site inclusionary-unit requirement. *See* S.J.M.C. §5.08.500(B). These include providing inclusionary units at another site, *id.* §5.08.510(A); paying an in-lieu fee to the city, *id.* §5.08.520(A); and "propos[ing]" to the city manager "any combination" of the other options that "provide[s] substantially the same or greater level of affordability" and a specified number of units, *id.* §5.08.570; *see also id.* §5.08.610(F). The ordinance offers various economic incentives, however, to encourage developers to select the 15-percent on-site option. *See* Pet. App. A-18 to A-19. Among these incentives are a reduction in "minimum setback requirements," a reduction in the maximum number of parking spaces required, and the ability to build "inclusionary units … that are of a different unit type than the market rate units within the residential development." S.J.M.C. §5.08.450.

Finally, the ordinance provides that its "requirements … may be waived, adjusted, or reduced if the [permit] applicant shows … that there is no reasonable relationship between the impact of a proposed residential development and the [ordinance's] requirements," or shows that "applying the [ordinance's] requirements … would take property in violation of the United States or California Constitution[]." S.J.M.C. §5.08.720(A). To obtain a waiver, the developer must submit a request to the City and adduce "substantial evidence to support the claim." *Id.* §5.08.720(B)-(D).

B. Proceedings Below

1. California Superior Court

Petitioner filed this action in California state court two months after the ordinance was enacted, and be-

fore it took effect. *See* AA1-15 (complaint); S.J.M.C. §5.08.300 (describing when the ordinance would take effect). Petitioner sought a declaration that the ordinance was facially invalid and an injunction prohibiting its enforcement. AA2, AA10, AA15. Shortly after the complaint was filed, "[s]ix nonprofit affordable housing organizations and a low-income resident of San Jose [were permitted] to intervene in support of the challenged ordinance." Pet. App. A-22.

In its complaint, petitioner alleged that the ordinance imposed "exactions and conditions" that violated "controlling state and federal constitutional standards," AA10, but it did not "explicitly spell out the specific nature of its constitutional claim," Pet. App. A-4. As the case proceeded, however, petitioner made clear—contrary to what it asserts now—that it was not relying on the standards this Court promulgated in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). For example, petitioner's counsel told the trial court: "We agree that the [*Nollan*/*Dolan*] heightened scrutiny standard does not apply." Tr. 8.[4] Similarly, petitioner's closing trial brief stated emphatically that "[a]s previously explained, plaintiff does *not* contend that the enactment of the Ordinance is subject to 'heightened scrutiny' (as used in *Nollan*/*Dolan*[])." AA3138.

Petitioner instead argued in the state courts that the ordinance flunked the test employed by the California Supreme Court in *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 41 P.3d 87 (Cal. 2002)—a case that expressly declined to apply "*Nollan*/*Dolan* scrutiny," *id.* at 105; *see also id.* at 103-104 ("The Court of Ap-

[4] "Tr." refers to the reporter's transcript on appeal for the trial-court proceedings held July 11, July 13, and November 17, 2011.

peal held that [the challenged] fees … were subject to *Nollan*/*Dolan*[] review …. [T]he City argues for … more deferential constitutional scrutiny …. We agree with the City."); Pet. App. A-74 (Werdegar, J., concurring) ("[I]n *San Remo Hotel* we … first determined [that the] fees were not subject to the heightened … scrutiny established … in *Nollan* … and *Dolan*"). Rather, *San Remo* held that the proper standard on the facts of that case was whether a "legislatively imposed development mitigation fee[]" bore "a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." 41 P.3d at 105. Petitioner argued here that the San Jose ordinance lacked such a reasonable relationship, i.e., that it failed *San Remo* scrutiny. In its post-trial brief, for example, petitioner stated that "[t]he invalidity of the Ordinance is the result of the City's failure to comply with the legal requirements under the California Constitution for a demonstration of 'reasonable relationships' … —as most recently expounded … in the closely analogous case[] of *San Remo*." AA3138; *see also* Pet. App. C-7 (trial court observing that "[i]n support of [its] contention, Plaintiff places reliance upon San Remo").[5]

The trial court accepted petitioner's argument, holding the ordinance invalid under "controlling state law," i.e., *San Remo*. Pet. App. C-10; *see also supra* n.5

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[5] As this Court has noted, *San Remo* was decided solely under state law because "'Plaintiffs sought no relief … for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action.'" *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 332 n.9 (2005) (quoting *San Remo*, 41 P.3d at 91 n.1) . The California Supreme Court nonetheless looked in *San Remo* to this Court's cases, after noting that it (the state high court) had previously "construed the [state and federal takings] clauses congruently." 41 P.3d at 100-101.

(explaining that *San Remo* was a state-law decision). In the trial court's view, the ordinance imposed "mandatory exactions of homes," apparently because the ordinance might require a developer to "sell a home at a level which may be potentially below its costs in building that home." Pet. App. C-9. The court thus held (though without addressing the City Council's findings, *see supra* p.4) that "in the generality or great majority of cases," the ordinance's conditions lacked a "reasonable relationship" to the impacts of the new residential developments, and therefore was facially unconstitutional. Pet. App. C-9; *see also id.* at C-7 (discussing the "reasonable relationship" standard).[6]

2. California Court of Appeal

The Court of Appeal reversed. It first rejected petitioner's contention that San Jose's ordinance requires developers to "dedicate or convey property (new homes) for public purposes," concluding that the ordinance "does not prescribe a dedication." Pet. App. B-12.[7]

Turning to the applicable standard, the court noted that petitioner (as in the trial court) "maintain[ed] that *San Remo* prescribes the required analysis." Pet. App. B-13; *accord* Pet'r Cal. C.A. Br. 33 ("The trial court

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[6] Petitioner contends here (Pet. 7) that the trial court "appl[ied] the *Nollan* and *Dolan* tests." In the state courts, however, petitioner insisted that "the trial court applied *San Remo*." Pet'r Cal. S. Ct. Br. 14; *accord* Cal. C.A. Oral Arg. Tr. 23 (petitioner's counsel stating: "The trial court applied the directions … handed out … in *San Remo*[.]"). The Court of Appeal agreed with that view. *See* Pet. App. B-8 n.5

[7] Petitioner asserts (Pet. 7) that the trial court "found" that the ordinance did require such a conveyance or dedication. The court made no such "finding."

properly held that the standards confirmed in *San Remo* … governed its review of this IHO [inclusionary-housing ordinance]."). The appellate court rejected that argument. It held that "the Ordinance should be reviewed as an exercise of the City's police power," Pet. App. B-20, because *San Remo* was limited to "development *mitigation fee[s]*"—that is, fees "specifically designed to *mitigate*" an adverse effect, *id.* at B-13.

The Court of Appeal remanded the case for the trial court to review petitioner's challenge in the first instance under the standard the appellate court had adopted. Pet. App. B-20, B-23.[8]

3. California Supreme Court

a. The state supreme court granted petitioner's petition for review and unanimously affirmed.

In the supreme court, petitioner—consistent with its litigation in the lower state courts—presented a single question for review, regarding the applicability of the *San Remo* standard:

> Must inclusionary housing ordinances which exact property interests or in-lieu development fees as a condition of development permit approval be reasonably related to the deleterious

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[8] Continuing its efforts to suggest (wrongly) that it argued for *Nollan*/*Dolan* scrutiny in the state courts, petitioner asserts (Pet. 8) that the Court of Appeal "declin[ed] to address *Nollan* and *Dolan* under the belief that those cases were limited to dedications of real property." In fact, the court simply recognized that petitioner had not sought relief under *Nollan*/*Dolan*—instead espousing the *San Remo* standard. *See* Pet. App. B-19 to B-20 n.8 ("Aside from an oblique suggestion that *Nollan* and *Dolan* are applicable by citing *Lingle* [v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)], CBIA does not attempt to reintroduce heightened scrutiny as a standard for measuring the City's regulation.").

> impact of the development on which they are imposed, as set forth in *San Remo* …?

Pet'r Cal. S. Ct. Br. 1 (citation omitted). Hence, while petitioner "clarified that its challenge rests on 'the unconstitutional conditions doctrine as applied to development exactions,'" Pet App. A-4 to A-5, it continued to maintain that *San Remo*—not *Nollan* and *Dolan*—governed here. For example, petitioner told the state high court that "*San Remo Hotel*, not *Nollan/Dolan*, appl[ies] to legislative affordable housing exactions such as the Ordinance." Pet'r Cal. S. Ct. Reply Br. 10; *accord* Pet'r Cal. S. Ct. Answer to Amicus Brs. 10 ("As an exaction, the Ordinance must meet the standard in *San Remo*[.]"); Cal. S. Ct. Oral Arg. Recording 9:17:23-36 a.m. (petitioner's counsel stating: "*San Remo* …, your Honor, we, we argue is the standard by which the validity of this exaction should be determined, and that simply says that it has to be reasonably related to some negative impact of the project"). Petitioner also conceded that it was not asking the court to revisit the question it now presents to this Court—a question *San Remo* had already decided, *see* 41 P.3d at 105—namely "whether *Nollan* and *Dolan* apply to legislative exactions." Pet'r Cal. S. Ct. Reply Br. 29.[9]

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[9] Petitioner attempts to elide its prior focus on state law and *San Remo*—and its concomitant disavowal of *Nollan/Dolan*—by asserting (Pet. 8) that "[t]he California Supreme Court granted review to address CBIA's claim that, as a matter of federal constitutional law, the Ordinance is subject to the unconstitutional conditions doctrine under the Takings Clause of the Fifth and Fourteenth Amendments." The state high court's opinion refutes that assertion, stating that petitioner "sought review … maintaining that the appellate court's decision directly conflicts with … [the reading of *San Remo* adopted in *Building Industry Ass'n of Central California* v.] *City of Patterson*, 171 Cal.App.4th 886 [(5th Dist. 2009)], and that … *Patterson* was correctly decided …. We

Faced with petitioner's clear presentation of its position, the California Supreme Court first analyzed, in Part IV of its opinion, whether the ordinance facially imposes unconstitutional conditions. *See* Pet. App. A-26 to A-49. Reviewing this Court's relevant decisions as well as California case law, the court recognized that "there can be no valid unconstitutional-conditions takings claim without a government exaction of property." *Id.* at A-29. That alone, the court held, disposed of petitioner's unconstitutional-conditions challenge, because 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." *Id.* at A-35 to A-36. More specifically, the court explained that "like many other land use regulations," the principal requirement at issue here—that a developer sell 15 percent of its on-site units at an affordable-housing price—"simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale." *Id.* at A-36. While the court recognized that price controls are "unquestionably subject to constitutional limits," such as "if they are found to be confiscatory," petitioner "d[id] not claim that the requirements imposed by the ordinance will have a confiscatory effect." *Id.* at A-41, A-42.

"[N]otwithstanding [its] rejection of CBIA's unconstitutional conditions claim," Pet. App. A-49, the state high court separately rejected, in Part V of its opinion, petitioner's contention that *San Remo* required the ordinance to have "a reasonable relationship to the dele-

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granted review to determine the soundness of the Court of Appeal's ruling in this case." Pet. App. A-6 (citation omitted).

terious public impacts attributable to the developments," *id.* at A-51. Instead, the court held, because the ordinance's purpose "goes beyond mitigating the impacts attributable to the proposed developments," the ordinance had to "be reasonably related to the broad general welfare purposes for which [it] was enacted." *Id.* at A-57, A-59.[10]

b. Justices Werdegar and Chin each filed a separate opinion. Justice Werdegar, "concur[ring] fully in the majority opinion," Pet. App. A-73, wrote to explain her view that "*San Remo Hotel*'s reasonable relationship test is best understood," in light of this Court's intervening decision in *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), "to state a due process standard, not a takings one," Pet. App. A-78. (The majority here declined to "explore" whether *San Remo*'s framework was based on "due process or takings principles." *Id.* at A-56 n.18.) Justice Chin likewise "agree[d] with the majority that the ordinance is a valid land use regulation." *Id.* at A-81. He wrote separately to explain his reason: The ordinance does not cause "an exaction of property for takings purposes" because it "leaves room for the developer to build the affordable units more cheaply than the other units. Accordingly, it is not clear …, and certainly not on a facial challenge, that the developer could not turn a profit even on the affordable units." *Id.* at A-80 to A-81.

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[10] Consistent with respondents' (and intervenors') argument that the ordinance was valid even if *San Remo* applied, *see* Resp. Cal. S. Ct. Br. 38; Intervenors' Cal. S. Ct. Br. 53-56, the court also recognized—citing the City Council's findings—that "new market rate housing exacerbates the city's affordable housing problem," Pet. App. A-57 n.19.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE TO ADDRESS WHETHER *NOLLAN* AND *DOLAN* APPLY TO LEGISLATIVELY IMPOSED EXACTIONS

Petitioner attempts to seize the Court's attention by asserting at the outset (Pet. i) that this case "raises an issue on which the state courts of last resort and federal circuit[s] … are split," namely whether *Nollan* and *Dolan* apply to "permit condition[s] imposed legislatively" rather than via ad hoc administrative proceedings. Even if the Court deemed that issue worthy of review, this would be a poor vehicle to take up the issue, for two reasons. *First*, there is a question about whether the petition, which was filed 91 days after the decision below issued, was jurisdictionally out of time. *Second*, petitioner did not raise the legislative/administrative issue in the state courts, and those courts (unsurprisingly) made no holding regarding it. Instead, the state high court, as explained, rejected petitioner's claim on the ground that the requisite exaction is absent here—a holding that is itself another vehicle problem, in that it would prevent any ruling this Court might make on the legislative/administrative issue from having any effect in this case.

A. The Timing Of The Petition Raises A Question About This Court's Jurisdiction

Congress has directed that any petition for a writ of certiorari in a civil case "shall be [filed] within ninety days after the entry of [the] judgment" sought to be reviewed. 28 U.S.C. §2101(c). "This 90-day limit," the Court has stressed, "is mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). Here, the petition was filed on September 14, 2015—91 days after the California Supreme Court issued its decision. *See*

http://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-330.htm; Pet. App. 1a. The petition thus appears to be jurisdictionally untimely.[11]

The 90th day after the decision below issued, however, was a Sunday, and in *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949), this Court held—based on "considerations of liberality and leniency"—that an exception to the 90-day requirement should be judicially engrafted onto §2101(c) for cases in which the statutory period ends on a Sunday or holiday, *id.* at 41. If *Lamb* (which this Court has cited only once, on a different point) remains good law, then the petition is timely. But *Lamb* is in substantial tension with this Court's more recent decisions making clear that courts simply have "no authority to extend [statutory deadlines] except as Congress permits." *Jenkins*, 495 U.S. at 45. (The lone exception to the 90-day deadline in §2101(c) is for cases in which a Justice, "for good cause shown," extends that deadline for up to 60 days; no extension was granted here.) *Lamb* is likewise in tension with this Court's more recent decisions recognizing that "policy" concerns, *Lamb*, 337 U.S. at 40, cannot trump clear statutory text. *See, e.g.*, *Cent. Bank, N.A.* v. *First Interstate Bank, N.A.*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and

[11] By rule, California Supreme Court decisions do not become final until 30 days after filing. *See* Cal. R. Ct. 8.532(b). But this 30-day "waiting period" (during which rehearing may be sought) does not affect "the time within which [this Court's] jurisdiction to review may be invoked." *Mkt. St. Ry. Co.* v. *R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Hence, "[w]hen the case is decided, the time to seek … review begins to run" (unless rehearing is actually sought, which did not occur here). *Id.* at 552. The statutory 90-day clock in this case therefore started on June 15, when the California Supreme Court's decision issued.

structure of the Act[.]"); *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) ("Given the clear meaning of 'prevailing party' in the fee-shifting statutes, we need not determine which way the[] various policy arguments cut.").[12]

Lamb is further undercut by the contrast between §2101(c) and the very next subsection, which states that "[t]he time" to petition to "review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." 28 U.S.C. §2101(d). Consequently, the "rule-based time limit" for petitions challenging state-court judgments in criminal cases "may be waived because [t]he procedural rules adopted by the Court … are not jurisdictional and can be relaxed by the Court." *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007) (alteration in original) (quotation marks omitted). By contrast, §2101(c) does not authorize the Court to prescribe rules extending the 90-day deadline in civil cases. Congress's authorization of rules-based extensions for certain petitions is additional evidence that such extensions are not authorized for other petitions. *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).[13]

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[12] Like *Lamb*, this Court's Rule 30.1 provides that deadlines falling on a day the Court is closed are automatically extended to the next day the Court is open. But that rule cannot be applied to a jurisdictional statutory deadline like the one here, because it is "axiomatic that [court-prescribed procedural rules] do not create or withdraw federal jurisdiction." *Hibbs* v. *Winn*, 542 U.S. 88, 98 (2004) (alteration in original) (quotation marks omitted). "The statute," that is, "takes priority over the procedural rules adopted by the Court." *Id.* (quotation marks omitted); *accord Jenkins*, 495 U.S. at 45, *quoted supra* p.15.

[13] *Lamb* flipped the *Russello* principle on its head, holding that because the Federal Rules of Civil Procedure contain (with Congress's blessing) an express provision extending deadlines that

This Court could reach petitioner's question presented only if it first concluded that, notwithstanding the foregoing, stare decisis or other considerations warranted reaffirmation of *Lamb*. If it were to conclude instead that *Lamb* should be overruled in light of the plain statutory text and more recent case law, then it would have to "dismiss the petition" for lack of jurisdiction. *Jenkins*, 495 U.S. at 45. (Any plea for an equitable exception to the statutory deadline would be unavailing because "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214; *see also Stone* v. *INS*, 514 U.S. 386, 405 (1995).) Particularly given the other vehicle problems discussed below and the fact that there is no need to address the question presented in this particular case—a pre-enforcement facial challenge—the Court, if it wishes to decide that question, should await a case in which it might not be prevented from doing so by a jurisdictional defect.[14]

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fall on a Sunday or holiday, the same provision should be judicially read into a statute in which Congress did not put it. *See* 337 U.S. at 40-41. That approach does not respect Congress's presumed deliberate disparate treatment. *Cf. also* 2 U.S.C. §394(a) (expressly extending deadlines ending on a weekend or holiday).

[14] A second jurisdictional issue is that the California Supreme Court's decision is not a final judgment, as is normally required to confer jurisdiction under 28 U.S.C. §1257(a). *E.g.*, *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). The judgment is not final because the state high court affirmed the intermediate appellate court's decision to remand the case to the trial court to evaluate petitioner's claim under the approved standard. Pet. App. A-24, A-73. There are, however, "at least four categories of … cases in which th[is] Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U. S. C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). This case appears to fall within

B. The Question Presented Was Neither Pressed Nor Passed Upon Below

Petitioner urges this Court to address whether conditions like those imposed by San Jose's ordinance are immune to *Nollan/Dolan* scrutiny when they originate in legislation rather than ad hoc administrative action. That issue, however, was neither "pressed or passed upon below," and thus this Court should decline to take it up in the first instance. *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

1. The California Supreme Court's unconstitutional-conditions holding rested on the absence of any exaction

The California Supreme Court's opinion makes clear that the court did not reject petitioner's unconstitutional-conditions claim on the ground that the challenged conditions were mandated by legislation. Rather, the court held that the ordinance's primary condition would not (certainly on its face) constitute a taking if ordered directly—which under this Court's precedent is a prerequisite for *Nollan/Dolan* scrutiny, *see Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013) ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim

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the first such category: "cases in which … the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The case appears to fit into that category because petitioner has stipulated that if certiorari is denied, "a judgment of dismissal of this action with prejudice shall be entered" against it. Cal. Super. Ct. Stip. 2 (Dec. 2, 2015). Although the San Jose respondents therefore believe that the final-judgment rule is not a jurisdictional bar here, they note the issue to assist the Court in evaluating its own jurisdiction.

to do what it attempted to pressure that person into doing."), *quoted in* Pet. App. A-34 to A-35.

The state high court could hardly have been clearer that this principle, not the legislative/administrative issue petitioner now raises, was the basis for its decision. The court stated, for example, that "the San Jose inclusionary housing ordinance 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 … outside of the permit process." Pet. App. A-35 to A-36. In particular, the court explained, the ordinance's primary permit condition (that developers make at least 15 percent of on-site for-sale units available at an affordable housing cost) "does not require the developer to dedicate any portion of its property to the public or to pay any money to the public." *Id.* at A-36. Rather, the condition "simply places a restriction on the way the developer may use its property." *Id.* (citing *Yee* v. *Escondido*, 503 U.S. 519, 532 (1992)). "[S]uch a requirement," the court held, "does not constitute an exaction for purposes of the *Nollan*/*Dolan* line of decisions and does not trigger application of the unconstitutional conditions doctrine." *Id.*[15]

Other portions of the opinion below likewise make clear that the basis for the court's decision was the absence of any exaction rather than the legislative origin of the challenged permit conditions. For instance, in

[15] The state court correctly noted that because at least one option the ordinance offers does not violate the unconstitutional-conditions doctrine, it is immaterial whether any (or even all) of the others do. *See Koontz*, 131 S. Ct. at 2598, *cited in* Pet. App. A-48 to A-49.

the paragraph that summarized the analysis to follow, the court stated that "the conditions that the San Jose ordinance imposes upon future developments do not impose 'exactions' upon the developer's property so as to bring into play the unconstitutional conditions doctrine." Pet. App. A-6. As with the passage discussed above, nothing in this paragraph even hints that the court regarded the legislative origin of the permit conditions as relevant, let alone dispositive. Similarly, in later describing Part IV of its opinion, which disposed of petitioner's unconstitutional-conditions challenge, the court stated only that that part addressed "whether the conditions imposed by the San Jose ordinance constitute 'exactions' … and thus trigger the applicability of the unconstitutional conditions doctrine." *Id.* at A-25; *see also id.* at A-48. Again, the court did not mention the legislative/administrative issue that petitioner now attempts to use as bait for this Court's review of the decision below.

The California Supreme Court's failure to hold anything regarding that issue (though as discussed below the court did mention it in footnoted dicta) is unsurprising. As explained in the Statement, petitioner contended at every step of the state-court litigation that the governing standard here was the one adopted in *San Remo*, a case that, again, expressly rejected application of *Nollan*/*Dolan*. Indeed, petitioner explicitly disclaimed any request for *Nollan*/*Dolan* scrutiny, and conceded that it was not contending that *San Remo*'s rejection of *Nollan*/*Dolan* scrutiny for legislatively imposed conditions should be overruled. *See supra* p.11. Given that, and given the state high court's no-exaction holding, the court had no occasion to consider the issue petitioner now raises. Petitioner should not be permitted to raise that issue for the first time here. *See, e.g.*,

OBB Personenverkehr AG v. *Sachs*, 2015 WL 7722430, *7 (U.S. Dec. 1, 2015) ("Absent unusual circumstances … we will not entertain arguments not made below."). That is especially true in light of the fact that, as noted, the no-exaction holding means any ruling this Court might make on the legislative/administrative issue would not affect the judgment below.[16]

2. Petitioner's contrary arguments rest on a mischaracterization of the decision below

Petitioner acknowledges the holding actually underlying the California Supreme Court's decision, i.e., that the 15-percent inclusionary-unit requirement "did not constitute an 'exaction.'" Pet. 9. Petitioner insists, however, that that holding was only one of "two reasons" the court gave for rejecting petitioner's unconstitutional-conditions challenge. *Id.* The other was supposedly that "*Nollan* and *Dolan* only apply to conditions imposed as part of an ad hoc administrative proceeding—not conditions required by legislation." *Id.* That claim badly mischaracterizes the court's opinion.

[16] To be clear, the argument here is not that the Court lacks jurisdiction over petitioner's legislative/administrative challenge. As a jurisdictional matter, "[o]nce a federal claim is properly presented, a party can make any argument in support …; parties are not limited to the precise arguments they made below." *Yee*, 503 U.S. at 534. But as a prudential matter, this Court has repeatedly "decline[d]" to "allow a petitioner to assert new substantive arguments attacking … the judgment when those arguments were not pressed … or at least passed upon" below. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). Applying that rule here is particularly warranted given that one rationale for it is "due regard for the appropriate relationship of this Court to state courts." *Illinois* v. *Gates*, 462 U.S. 213, 221 (1983); *accord Williams*, 504 U.S. at 44 n.5.

a. Part IV of the California Supreme Court's opinion, which as noted addressed petitioner's unconstitutional-conditions challenge, referred to the legislative/administrative issue only once, as part of a lengthy (600-word) footnote that discussed in dicta two unresolved issues the state court perceived in this Court's unconstitutional-conditions precedent. *See* Pet. App. A-33 to A-34 n.11. One of those two, the court stated, was "whether the *Nollan*/*Dolan* test is applicable to legislatively prescribed monetary permit conditions." *Id.* The court then ended the footnote by observing that it had already weighed in on that issue, holding in *San Remo* that "legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test." *Id.*

It is this footnoted dicta that petitioner cites in asserting that "the California Supreme Court *held* that *Nollan* and *Dolan* only apply to conditions imposed as part of an ad hoc administrative proceeding—not conditions required by legislation." Pet. 9 (emphasis added). That is demonstrably wrong. Again, the footnote merely stated that this Court had not resolved the legislative/administrative question, and that *San Remo* had weighed in on it. The state court did not reaffirm *San Remo*'s holding on the issue; it did not say, for example, that it was rejecting petitioner's request to revisit that holding (undoubtedly because petitioner, as explained, denied making any such request). Petitioner's attempt to spin footnoted dicta into a holding is wholly unavailing.

That conclusion is confirmed by the sentences in the text of the opinion that immediately follow the footnote. In those sentences, the California Supreme Court said: "Nonetheless"—that is, irrespective of the legislative/administrative question and the other unre-

solved question discussed in the footnote—"*Koontz* … explicitly acknowledges that '[a] predicate for any unconstitutional conditions claim is that …' the condition is one that would have constituted a taking of property without just compensation if it were imposed by the government on a property owner outside of the permit process." Pet. App. A-33 to A-35 (alteration in original) (quoting *Koontz*, 133 S. Ct. at 2598). In other words, the court concluded that it did not need to reach the legislative/administrative issue because petitioner's challenge failed at the threshold given the lack of any exaction. And again, it was the court's no-exaction holding that provided the basis for the decision below.[17]

b. Petitioner's assertion (Pet. 9) that the California Supreme Court "held" that legislatively imposed conditions are exempt from *Nollan*/*Dolan* scrutiny also relies on Part V of the court's opinion. *See* Pet. 10-11 (interspersing citations to Part V with citations to footnote 11, which appears in Part IV). Nothing in Part V, however, helps petitioner manufacture a legitimate basis for certiorari.

Although Part IV of the California Supreme Court's opinion disposed of petitioner's unconstitutional-conditions argument, *see* Pet. App. A-49, the court, in

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[17] As noted, petitioner acknowledges (Pet. 9) that the California court held "that the affordable housing condition did not constitute an 'exaction.'" Yet it contradicts itself just two sentences later in stating (*id.*) that the state court concluded that whether the ordinance's "condition was an exaction remained an 'ambiguity' in federal unconstitutional conditions law, which the court would not … resolve because the case could be decided on different grounds." In reality, that is not one of the two issues the court described as ambiguities. *See* Pet. App. A-33 to A-34. And as explained, the court squarely "resolve[d]" that question (Pet. 9), holding that the ordinance's principal condition was not an exaction.

order to clarify its own precedent, *see id.*, went on in Part V to answer a narrow question: whether a single sentence in *San Remo* compelled the conclusion that, for the San Jose ordinance to be valid, the conditions imposed thereunder needed to have a reasonable relationship to the impact of the development to which the conditions attached, rather than just a reasonable relationship to some legitimate public purpose. *See* Pet. App. A-54 ("CBIA contends that the … sentence just quoted [from *San Remo*] … mean[s] that the conditions imposed by the San Jose ordinance … would be valid only if those requirements 'bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.'" (quoting *San Remo*, 41 P.3d at 105); *see also id.* at A-25 (describing Part V as addressing only that issue). After reviewing the surrounding portions of the *San Remo* opinion in detail and closely parsing the relevant paragraph, the court rejected petitioner's argument, concluding that "the paragraph is explicitly addressed and applies only to 'development *mitigation* fees'…—and does not purport to apply to price controls or other land use restrictions." *Id.* at A-55 (quoting *San Remo*, 41 P.3d at 105). The court therefore held, after also discussing other precedent of its own and of the California Court of Appeal, that the *San Remo* standard did not apply here. *E.g.*, *id.* at A-63.

As the foregoing discussion indicates, nowhere in Part V did the California Supreme Court hold anything regarding the question petitioner presents here, i.e., whether legislatively imposed conditions are immune to *Nollan*/*Dolan* scrutiny. As in footnote 11, the court in Part V *noted San Remo*'s holding on this point. *See* Pet. App. A-52. But it did not reaffirm or otherwise engage with that holding—again, undoubtedly because

petitioner never asked the court to do so. Indeed, it would have been passing strange for the court, faced with petitioner's argument that *San Remo* controlled here, to say that it was overruling a separate portion of *San Remo* that petitioner never challenged.[18]

* * *

From cradle to grave, petitioner litigated this case in the state courts on the theory that the *San Remo* standard applied here and that the ordinance failed under that standard. It affirmatively chose not to urge *Nollan*/*Dolan* scrutiny, let alone challenge *San Remo*'s holding that such scrutiny does not apply to legislative enactments. Having thus deprived the state courts of the opportunity to address those issues—and this Court of the benefit of those courts' analysis of them—petitioner should not be heard to make the arguments for the first time here. *See supra* n.17. Certiorari would therefore be unwarranted even if there were not a question about the Court's jurisdiction.

II. THE DECISION BELOW IS CORRECT

Petitioner contends (Pet. 12, 15-16) that the California Supreme Court "refus[ed] to recognize well-settled property rights," specifically, property owners' rights to "their investment in their property ... [and] to

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[18] Largely ignoring the foregoing points, petitioner attacks at length (Pet. 22-26) the substance of the court's holding in Part V. But again, this case would be an exceedingly poor vehicle to address that alternative holding—which is separate from the legislative/administrative issue, and which petitioner does not assert implicates any circuit conflict—because it was independent of the court's no-exaction holding in Part IV. As explained in the text below, that no-exaction holding was correct. Even a reversal of the Part V holding, then, would not alter the California Supreme Court's judgment.

sell their property to whom they choose, at a price they choose." That is meritless; the court's factbound conclusion that petitioner's unconstitutional-conditions challenge fails because there is no predicate exaction here—a holding that petitioner does not say implicates any circuit conflict—flows directly from this Court's precedent.

A. *Nollan/Dolan* Scrutiny Does Not Apply Here Because The 15-Percent Inclusionary-Unit Requirement Would Not Constitute A Facial Taking If Ordered Directly

As discussed, the California Supreme Court correctly held that under this Court's cases, a "predicate for any unconstitutional conditions claim is that …' the condition is one that would have constituted a taking of property without just compensation if it were imposed by the government on a property owner outside of the permit process." Pet. App. A-34 to A-35 (quoting *Koontz*, 133 S. Ct. at 2598). The state court likewise looked to this Court's precedent in ruling that "so long as a permitting authority offers a property owner at least one alternative … condition that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition." *Id.* at A-48 to A-49 (citing *Koontz*, 133 S. Ct. at 2598). These rulings are unassailable; in fact, petitioner acknowledges that "[t]o qualify for protection under *Nollan* and *Dolan*, a landowner … needs to show that the demand, if imposed directly, would entitle the owner to just compensation." Pet. 14.

The state supreme court also correctly applied the foregoing principles here. The court rejected petitioner's facial takings challenge on the ground that at least one condition in the ordinance—the 15 percent on-site

inclusionary-unit requirement—"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." Pet. App. A-35 to A-36. That ruling is wholly consistent with this Court's case law.[19]

1. As this Court explained in *Lingle*, "[t]he paradigmatic taking … is a direct government appropriation or physical invasion of private property." 544 U.S. at 537. Petitioner appears to argue that the 15-percent inclusionary-unit requirement *would* constitute such an appropriation if ordered directly. That is not correct. The 15-percent requirement does not involve the government physically entering a developer's property, or otherwise obtaining possession of or title to any property. It is thus categorically different from the cases that petitioner cites (Pet. 14-16). For example, under the program at issue in *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419 (2015), "[a]ctual raisins [we]re transferred from the growers to the Government," *id.* at 2428; *see also id.* at 2429. Similarly, *Koontz* involved a condition "directing the owner of a particular piece of property to make a monetary payment" for the government's benefit—in effect, a government "demand for money." 133 S. Ct. at 2599; *see also Brown* v. *Legal Found.*, 538 U.S. 216, 224-225, 235 (2003) (assuming but not deciding that a per se taking occurred where the

[19] Petitioner asserts (Pet. 9) that in finding no exaction, the California Supreme Court "rel[ied] on state case law … and the dissenting opinion in *Koontz*." That is not true. In the two key paragraphs, the court cited only majority opinions of this Court—including *Koontz*. *See* Pet. App. A-33 to A-36 (citing the *Koontz* majority opinion three times, *Lingle* twice, *Yee*, and *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999)).

government required that interest earned on an IOLTA account be paid directly to a government-created entity). The 15-percent inclusionary-unit requirement is not remotely like any of these—and petitioner cites no case in which a regulation like that requirement was held to constitute a compensable taking, much less a case so holding in a facial challenge.

2. The inclusionary-unit requirement is instead an archetypal land-use regulation. *See, e.g.*, *Horne*, 135 S. Ct. at 2427 ("Our cases have stressed the 'longstanding distinction' between government acquisitions of property and regulations."). Such regulations, *Lingle* reaffirmed, "generally will be deemed *per se* takings" only if they either "require[] an owner to suffer a permanent physical invasion of her property," 544 U.S. at 538 (citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), or "completely deprive an owner of '*all* economically beneficial use' of her property," *id.* (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). Petitioner has never argued that either category applies here—and for good reason. The first category is inapplicable because buyers of developers' inclusionary units are "invited by [the developers], not forced upon them by the government." *Yee*, 503 U.S. at 528; *see also id.* at 527 ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."). And the second category is inapplicable because even with the 15-percent inclusionary-unit requirement, developers can sell the overwhelming majority of their units at market rates (and even the remainder will not necessarily be sold at a loss). Developers are thus assuredly left with economically beneficial use of their property.

The fact that the inclusionary-unit requirement could (once actually applied, that is) interfere with protected property interests, diminish property values, or even result in a wealth transfer does not make it a *per se* taking. As the court below recognized, "[m]ost land use regulations or restrictions reduce the value of property; in this regard the affordable housing requirement … is no different from limitations on density, unit size, number of bedrooms, required set-backs, or building heights." Pet. App. A-45. Yet there is no serious argument that most such regulations constitute *per se* takings. To the contrary, this Court has said that it "must remain cognizant that government regulation—by definition—involves the adjustment of rights for the public good, and that Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lingle*, 544 U.S. at 538 (citations and quotation marks omitted). Thus, the Court has repeatedly rejected the notion that a regulation effects a *per se* taking merely by virtue of reducing value or transferring wealth, even though the regulation "may have the same economic impact" on the property owner as a government appropriation of the property. *Horne*, 135 S. Ct. at 2428; *see also Yee*, 503 U.S. at 529-531; *Koontz*, 133 S. Ct. at 2601. The government may even "prohibit the sale of [property] without effecting a per se taking." *Horne*, 135 S. Ct. at 2428; *see also id.* at 2429 (discussing *Andrus* v. *Allard*, 444 U.S. 51 (1979), where "the Court found no taking …, even though the owners' artifacts could not be sold at all").

3. Because the 15-percent inclusionary-unit requirement does not effect a *per se* taking—most obviously not on its face—petitioner could succeed here only by satisfying the multi-factor taking standard of

Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538-539. Below, however, petitioner "disclaimed any reliance on … *Penn Central*." Pet. App. A-43; *see* Pet'r Cal. S. Ct. Reply Br. 3. Even in this Court, petitioner does not so much as cite *Penn Central*, thereby confirming the waiver.

Petitioner's disclaimer is understandable, as there is no plausible argument that the 15-percent inclusionary-unit requirement—whatever its possible impact in practice—effects a *facial* taking under *Penn Central*. That is because the standard involves "an 'ad hoc' factual inquiry, … considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Horne*, 135 S. Ct. at 2427. In light of the test's fact-sensitive nature, this Court has "found it particularly important in takings cases to adhere to [its] admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Pennell* v. *City of San Jose*, 485 U.S. 1, 10 (1988) (quotation marks omitted). *Penn Central* itself made the same point, stating that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" 438 U.S. at 124 (alteration in original).

Even were it theoretically possible for a court to conclude under *Penn Central* "that no set of circumstances exists under which [the law] would be valid, or that the statute lacks any plainly legitimate sweep," *United States* v. *Stevens*, 559 U.S. 460, 472 (2010) (citations and quotation marks omitted), petitioner "has not and cannot show that the ordinance will have such an

effect," Pet. App. A-44. Putting aside that by its terms the ordinance cannot be enforced in a way that effects a taking, *see supra* p.6, the ordinance will not "necessarily reduce a developer's revenue or profit from what the developer could earn by selling all of the units at market rate," Pet. App. A-44. For example, "the ordinance leaves room for the developer to build the affordable units more cheaply than the other units." *Id.* at A-81 (Chin, J., concurring). Moreover, developers who select the 15-percent on-site requirement are entitled to various economic incentives, further reducing the condition's economic impact. *See id.* at A-44 (maj. op.); *supra* p.6. "[T]hese rights … undoubtedly mitigate whatever financial burdens the law has imposed on [developers] and, for that reason, are to be taken into account in considering the impact of regulation." *Penn Central*, 438 U.S. at 137. But again, they cannot be "taken into account" until the ordinance is actually applied.

* * *

Petitioner addresses virtually none of the foregoing. Most fundamentally, it never explains how under this Court's precedent the 15-percent requirement would constitute a taking if ordered directly, given that it involves no physical invasion or mandatory transfer of money or other property to the government, nor deprives developers of all economically beneficial use of their property. Petitioner instead wrongly suggests that any infringement on one's ability to sell property at full market price constitutes a compensable taking, and levels sweeping but (as shown) baseless charges that the California Supreme Court failed to recognize important property rights. None of that undermines the state supreme court's straightforward application of this Court's case law, or otherwise provides a basis for review.

B. Petitioner's Facial Challenge Would Fail Under *Nollan/Dolan* Even Were There A Predicate Exaction

When they apply, *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. Even if the predicate exaction were present here (and if *Nollan/Dolan* scrutiny had been urged below), the ordinance—certainly as a facial matter—would satisfy these requirements.

As the California Supreme Court explained, "the ordinance identifies two distinct adverse impacts that the new market rate residential developments have upon the city's existing affordable housing problem": reducing the supply, and thus increasing the price, of land "available for affordable housing," and creating "demand for new employees to service the needs of the new residents"—employees who often earn low wages and thus would be forced to either incur burdensome commutes or spend more on housing than they can afford. Pet. App. A-57 n.19; *see also id.* at A-14 to A-16. The 15-percent inclusionary-unit requirement therefore directly addresses the effects of large residential development in a city already suffering a "severe shortage of adequate, affordable housing for extremely low, very low, lower, and moderate income households." S.J.M.C. §5.08.010(A); *see* Pet. App. A-16 ("[T]he ordinance is intended to alleviate the impacts that would result from the use of available residential land solely for the benefit of households that are able to afford market rate housing and to mitigate the service burden imposed by households in new market rate residential developments by making additional affordable housing available for service employees."). These legislative findings

sufficiently articulate the ordinance's nexus and proportionality to survive facial review. *See* Pet. App. A-14 to A-15. Indeed, petitioner does not even venture a contrary argument here—nor, again, cites even one case sustaining a facial takings challenge. That failure is telling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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