IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

No. A153579

DARTMOND CHERK AND
THE CHERK FAMILY TRUST,

Plaintiffs and Appellants,

v.

COUNTY OF MARIN,

Defendant and Respondent,

On Appeal from the Superior Court of Marin County
(Case No. CIV 1602934, Honorable Roy O. Chernus, Judge)

APPELLANTS' OPENING BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A153579 Division: One

Case Name: *Cherk, et al. v. County of Marin*

Please check the applicable box:

☑ There are no Interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	

Please attach additional sheets with Entity or Person information, if necessary.

/s/ Lawrence G. Salzman Date: May 1, 2018.
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS 2
TABLE OF CONTENTS 3
TABLE OF AUTHORITIES 5
INTRODUCTION AND SUMMARY OF ARGUMENT 8
FACTUAL AND PROCEDURAL BACKGROUND 10
STATEMENT OF APPEALABILITY 14
STANDARD OF REVIEW 14
ARGUMENT 15
I
THE COUNTY FAILED TO PROCEED ACCORDING TO LAW BECAUSE, AS APPLIED, ITS "AFFORDABLE HOUSING FEE" VIOLATES THE MITIGATION FEE ACT 15
A. The Mitigation Fee Act Requires the County to Show a "Reasonable Relationship" Between the Exaction and an Adverse Public Impact of the Proposed Development 16
B. The County Did Not and Cannot Show a "Reasonable Relationship" Between the Fee and Any Adverse Public Impact Caused by the Cherks' Lot Split 19
C. The Trial Court Erred in Applying Precedent from Recent "Inclusionary Housing" Cases 20
II
THE COUNTY FAILED TO PROCEED ACCORDING TO LAW BECAUSE ITS AFFORDABLE HOUSING FEE IS A MONETARY EXACTION THAT FAILS SCRUTINY UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE 26
A. The County Cannot Demonstrate a Nexus Between the Exaction and Any Adverse Public Impacts Caused by the Cherks' Lot Split 29
B. The County Cannot Show a "Rough Proportionality" Between the Amount of the Exaction and Any Adverse Public Impact Caused by the Cherks' Lot Split 31

C. The Distinction Between Legislative and Adjudicative Exactions Finds No Support in U.S. Supreme Court Precedent, History, or Scholarship of the Unconstitutional Conditions Doctrine 33

CONCLUSION 38

CERTIFICATE OF COMPLIANCE 39

DECLARATION OF SERVICE 40

TABLE OF AUTHORITIES

Cases

616 Croft Ave, LLC v. City of West Hollywood,
3 Cal. App. 5th 621 (2016) 21, 24-25

Armstrong v. United States, 364 U.S. 40 (1960).....32

California Building Industry Ass'n v. City of San Jose,
61 Cal. 4th 435 (2015) 14, 21-24, 27

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).....26

City of San Marcos v. Loma San Marcos, LLC,
234 Cal. App. 4th 1045 (2015) 17

Dolan v. City of Tigard, 512 U.S. 374 (1994).....passim

Doyle v. Continental Ins. Co., 94 U.S. 535 (1876) 36

Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996) 10, 17-18, 20

Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583 (1926).....36

Gilbert v. City of Sunnyvale, 130 Cal. 4th 1264 (2005).....15

Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore,
185 Cal. App. 4th 554 (2010) 16-17

Jefferson Street Ventures LLC v. City of Indio,
236 Cal. App. 4th 1175 (2015) 20

Koontz v. St. Johns Water Mgmt. Dist., 570 U.S. 595 (2013).....passim

Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).....35

Lechuza Village West v. Cal. Coastal Comm'n,
60 Cal. App. 4th 218 (1997) 16

Levin v. City & Cnty. of San Francisco,
71 F. Supp. 3d 1072 (N.D. Cal. 2014).....30

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).....35

McAllister v. Cal. Coastal Comm'n, 169 Cal. App. 4th 912 (2009).....14

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).....35

Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) .....passim

Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n,
163 Cal. App. 4th 215 (2008) 15

Prof'l Eng'rs in Cal. Gov't v. Kempton, 40 Cal. 4th 1016 (2007).....14-15

San Remo Hotel L.P. v. City & Cnty. of San Francisco,
27 Cal. 4th 643 (2002) 29, 31

Speiser v. Randall, 357 U.S. 513 (1958) 35

Sterling Park L.P. v. City of Palo Alto,
57 Cal. 4th 1193 (2013) 17-18, 20, 28

Walker v. City of San Clemente, 239 Cal. App. 4th 1350 (2015) 16

Yamaha Corp. of America v. State Bd. of Equalization,
73 Cal. App. 4th 338 (1999) 15

State Statutes

Code of Civ. Proc. § 1094.5(b) 14

Code of Civ. Proc. § 904.1(a)(1) 14

Gov't Code § 66000, *et seq.* 16

Gov't Code § 66000(b) 17

Gov't Code § 66001 10

Gov't Code § 66001(b) 16-17

Gov't Code § 66020 10

Gov't Code § 66020(e) 18

Gov't Code § 66021 16

Federal Constitution

U.S. Const. amend. V 26

State Constitution

Cal. Const. art. I, § 19 26

Miscellaneous

Burling, James S. & Owen, Graham, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*,
28 Stan. Envtl. L.J. 397 (2009) 37

Callies, David L., *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*,
28 Stetson L. Rev. 523 (1999) 36-37

Epstein, Richard A., *Bargaining with the State* (1993) 36

Glaeser, Edward L., Gyourko, Joseph, & Saks, Raven, *Why Is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 J.L. & Econ. 331 (2005) 9

Haskins, Steven A., *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487 (2006) 37

Ikeda, Sanford & Washington, Emily, *How Land-Use Regulation Undermines Affordable Housing*, Mercatus Research (Mercatus Ctr. at George Mason Univ., Arlington, VA), Nov. 2015 9

Means, Tom & Stringham, Edward P., *Unintended or Intended Consequences? The Effect of Below-Market Housing Mandates on Housing Markets in California*, 30 J. Pub. Fin. & Pub. Choice (2012) 9

Taylor, Mac, *California's High Housing Costs: Causes and Consequences*, Legislative Analyst's Office (2015), http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf 8

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is the story of an elderly couple of modest means—Dartmond and Esther Cherk—and their halting journey to divide a single, vacant, 2.79-acre residential parcel of land in Marin County into two developable lots on behalf of their family[1]. What transpired was a years-long process to gain permission with an unexpected final twist: the approval was conditioned on a monetary exaction in the amount of $39,960, styled as an "affordable housing" fee. This lawsuit is an as-applied challenge to the validity of that fee.

It is well known that California suffers from a chronic housing shortage due in large measure to local governments' refusal to permit enough homes to be built to meet a rising population.[2] The resulting scarcity causes escalating prices and is widely supported by a familiar chorus of "not in my backyard" by existing residents who seemingly wish new development to occur anywhere but where they live. Many local governments, including Marin County beginning in 2003, have attempted to address the housing affordability problem by instituting various types of "inclusionary housing" ordinances. These ordinances require developers, as a condition for obtaining

[1] Petitioner-Appellants Dartmond Cherk and the Cherk Family Trust are hereinafter referred to as "the Cherks."

[2] Mac Taylor, *California's High Housing Costs: Causes and Consequences*, Legislative Analyst's Office 10-12 (2015), http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf.

a building permit, to set aside a certain percentage of proposed housing to be sold as "affordable." Some programs allow developers to pay a fee into a government fund, in lieu of the housing set aside as an alternative.

"Inclusionary housing" programs have been widely studied and widely criticized as a violating constitutional property rights, as ineffective,[3] and as tending to result in higher prices and fewer net homes.[4] As discussed below, some programs have been the subject of legal challenges, and courts, including the California Supreme Court, have sustained them. A stupid or counterproductive policy is not always unlawful. The Marin County program differs, however, from other "inclusionary housing" programs that have been reviewed by other courts. It extends to even the smallest projects, such as the Cherks' division of one lot into two, and for those projects it imposes a bare demand for money—a monetary exaction—as a condition of a permit.

The monetary exaction that was imposed on the Cherks is unlawful for two reasons. First, the County demanded the fee without determining that it was reasonably related to any adverse public impact caused by the Cherks'

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[3] Sanford Ikeda & Emily Washington, *How Land-Use Regulation Undermines Affordable Housing*, Mercatus Research (Mercatus Ctr. at George Mason Univ., Arlington, VA), Nov. 2015; Tom Means & Edward P. Stringham, *Unintended or Intended Consequences? The Effect of Below-Market Housing Mandates on Housing Markets in California*, 30 J. Pub. Fin. & Pub. Choice 39 (2012).

[4] Edward L. Glaeser, Joseph Gyourko, & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 J.L. & Econ. 331 (2005).

project, as required by the Mitigation Fee Act. *See* Gov't Code §§ 66001; 66020. Second, the fee is an unconstitutional condition on the Cherks' permit because there is neither a logical connection nor a rough proportionality between the exaction and any adverse public impact caused by the division of their lot, as required by both the California and U.S. Constitutions. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns Water Mgmt. Dist.*, 570 U.S. 595 (2013). The County failed to meet its statutory and constitutional burdens when it imposed its fee, which must now be refunded.

FACTUAL AND PROCEDURAL BACKGROUND

Beginning in 2000, the Cherk family applied to the County's Planning Division to divide their 2.79-acre, vacant, residentially-zoned parcel of land into two developable lots. AR 3-6. The Cherks simply wanted to sell one lot to supplement their modest retirement income, while keeping the remaining lot in their family, which has owned the property for approximately 70 years. JA 7; AR 1.[5] When they began the process, the County had no ordinance

[5] Citations to the Joint Appendix filed in this Court are cited as "JA XX." Citations to the Administrative Record, which was lodged in the trial court by the County and transmitted to this Court by the trial court, are cited as "AR XX." *See* JA 158 (trial court notice of transmittal of administrative record).

requiring "affordable housing fees" to be paid as a condition of a residential lot split. AR 20-22.

As often happens in land use matters, the project was delayed. Some delay was due to the county Planning Division's encouragement that the Cherks wait to finalize their application until a revised County Code was implemented, AR 102; some due to the customary bureaucracy that has grown up around local land use decisions in California and in the County; and yet additional time due to the Cherks' deliberation about whether the new code would allow their land to be split profitably into three rather than two lots. *See* AR 134-37, 162-64. Ultimately, in December 2007, the County approved the division of their parcel into two lots. AR 274-85. As a condition of this approval, however, the County imposed a monetary exaction in the amount of $39,960, pursuant to a 2003 revision of the County code[6] mandating affordable housing fees for lot splits. *Id.* Under the County's ordinance, 20 percent of dwelling units or lots must be dedicated to affordable housing; however, for small projects such as the Cherks' *the only option* is to pay a fee. The Cherks' fee was calculated as 40% of the estimated market value of an affordable housing unit on the date of the lot split approval. AR 164.

[6] Marin County Ordinance No. 3393 (AR 116-119); Marin County Code, Ch. 22.22.

The Cherks were surprised by the fee and did not immediately complete the process by remitting payment and filing a required parcel map. AR 289-90. While the process was still pending, in 2008, the County informed them that the prevailing market value of affordable housing had increased, raising the fee due to $92,808. AR 289-90. County officials later exercised their discretion under the ordinance to reduce the fee back to $39,960. AR 294, 311. By this time, the Cherks were concerned that the value of their land was impaired by a nationwide recession and so they sought, and the County granted, extensions of time (until December 13, 2015) to complete their land division. AR 286-301; 305.

The Cherks moved ahead in October 2014, submitting a proposed final Parcel Map to the County. AR 329-331. The Planning Division accepted the map and reaffirmed the approval of the lot split the next month, subject to payment of the $39,960 fee. AR 332. The Cherks paid the fee under protest on July 29, 2015. AR 338-39.

The Cherks subsequently retained an attorney who requested a refund of the fee on the grounds that it was an unlawful monetary exaction. AR 340-43. The request also asked whether an administrative appeal was available. The County never responded to those requests. JA 87. The instant case followed on August 15, 2016, when the Cherks filed a petition for traditional and administrative mandate and a complaint for declaratory relief in the Marin County Superior Court. The petition challenged the imposition of the

fee as an abuse of the County's discretion for failing to act in accordance with law when it imposed the fee in violation of the unconstitutional conditions doctrine and the Mitigation Fee Act. The complaint also asserted an equal protection violation. *See* JA 5-24.

The Cherks moved for judgment solely on their petition for writ of administrative mandate. JA 37-56. The trial court issued a tentative decision denying the writ petition on December 6, 2017, which became final on December 21. The Cherks voluntarily dismissed their remaining claims, and the trial court issued a final judgment on January 5, 2018, denying the petition for writ of administrative mandate and disposing of all claims between the parties. *See* JA 110-11.

This is an appeal from the judgment against the petition for writ of administrative mandate. The trial court ruling contains two principal holdings. First, the court held that the fee imposed on the Cherks was "not a development impact fee intended to defray the public burden directly caused by" their project and, therefore, "is not subject to the heightened 'reasonable relationship' test under the Mitigation Fee Act." JA 85. Second, the trial court held that the "fee imposed as a condition for approval of Petitioners' project does not impose a 'monetary exaction' subject to" the unconstitutional conditions test established by the U.S. Supreme Court in *Nollan*, 483 U.S. 825, *Dolan*, 512 U.S. 374, and *Koontz*, 570 U.S. 595. JA 98. In the course of its analysis, the trial court also stated that under California law,

"'legislatively proscribed monetary fees that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test.'" JA 97 (quoting *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 460 n.11 (2015) (*CBIA*)).

STATEMENT OF APPEALABILITY

This is an appeal from a final judgment (*see* JA 106-07) resolving all issues between the parties, pursuant to Code of Civil Procedure section 904.1(a)(1).

STANDARD OF REVIEW

When considering a petition for writ of administrative mandate a court determines whether the challenged agency "has proceeded without, or in excess of jurisdiction . . . or whether there was any prejudicial abuse of discretion." Code of Civ. Proc. § 1094.5(b). An agency's action must be set aside as an abuse of discretion if the agency did not "proceed in a manner required by law," its action is not supported by its findings, or the findings are not supported by the evidence. *Id*.; *McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 920 (2009). The Cherks argued in the trial court that the County failed to proceed in a manner required by law because it imposed a fee that did not conform to the requirements of the Mitigation Fee Act and violated the unconstitutional conditions doctrine.

This Court reviews a trial court's denial of a petition for writ of mandate *de novo*. *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016,

1032 (2007). The role of the Court of Appeals in such a case has been described as "identical to that of the trial court." *See Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215, 227 (2008). This appeal raises only issues of law, with no disputed material facts. Therefore, this Court exercises its independent judgment without deference to the trial court or municipal agency's views or decision. *See Gilbert v. City of Sunnyvale*, 130 Cal. 4th 1264, 1275 (2005) ("In resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment."); *see also Yamaha Corp. of America v. State Bd. of Equalization*, 73 Cal. App. 4th 338, 349 (1999) (agency's interpretation of statutes and regulations subject to independent review).

ARGUMENT

I

THE COUNTY FAILED TO PROCEED ACCORDING TO LAW BECAUSE, AS APPLIED, ITS "AFFORDABLE HOUSING FEE" VIOLATES THE MITIGATION FEE ACT

Under California's Mitigation Fee Act, before imposing a fee as a condition for approving a property-development application, a government agency must first determine that the fee is reasonably related to a deleterious public impact caused by the proposed development. As shown below, the County did not—and cannot—do that in this case. The trial court abused its discretion by failing to proceed in the manner required by law when it concluded that the County's fee did not violate the Mitigation Fee Act. *See*

Lechuza Village West v. Cal. Coastal Comm'n, 60 Cal. App. 4th 218, 233-34 (1997). Accordingly, reversal is warranted.

A. The Mitigation Fee Act Requires the County to Show a "Reasonable Relationship" Between the Exaction and an Adverse Public Impact of the Proposed Development

The Mitigation Fee Act, Gov't Code § 66000, *et seq.*, establishes "uniform procedures for local agencies to follow in establishing, imposing, collecting, accounting for, and using development fees." *Walker v. City of San Clemente*, 239 Cal. App. 4th 1350, 1357 (2015). For purpose of the Act, the concept of "development fees" is broad and inclusive. It provides a cause of action to challenge "the imposition of *any fees*, dedications, reservations, or *other exactions* imposed on a development project." (Emphasis added.) The related Gov't Code § 66021 states that any "party on whom a *fee*, tax, assessment, dedication, reservation, or *other exaction* has been imposed, the payment . . . of which is required to obtain government approval of a development . . . may protest." (Emphasis added.)

The County's "affordable housing fee" is plainly a development fee or "other exaction," requiring compliance with the Act. *See* Gov't Code § 66001(b); *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 560 (2010).

The Act requires government to "show that a valid method was used for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the

development." *Homebuilders Ass'n of Tulare/Kings Counties, Inc.*, 185 Cal. App. 4th at 561; *City of San Marcos v. Loma San Marcos, LLC*, 234 Cal. App. 4th 1045, 1058 (2015); Govt. Code § 66001(b). The Act "thus codifies, as the statutory standard applicable by definition to nonpossessory monetary exactions, the 'reasonable relationship' standard employed in California and elsewhere to measure the validity of required dedications of land (or fees in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments." *Ehrlich*, 12 Cal. 4th at 855.

The undisputed fact in this case is that the County established no public burden created by the Cherks' proposed lot split related to affordable housing. That finding should be dispositive of the case under the analysis required by the Mitigation Fee Act. The trial court determined, however, that the Act didn't apply, on the ground that the County's fee was not intended as a monetary exaction imposed for the purpose of defraying adverse public impacts attributable to the project. Therefore, the court held that the in-lieu fee imposed here fell outside the scope of the Act. JA 89 (citing Gov't Code § 66000(b)). That holding is contrary to the purpose of the Act and leads to an absurd result in practice.

"As its legislative history evinces, the [Act] was passed by the Legislature in response to concerns among developers that local agencies were imposing development fees *for purposes unrelated to development projects*." *Sterling Park L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1205

(2013) (citing *Ehrlich*, 12 Cal. 4th at 864 (emphasis added)). Therefore, it makes no sense to exempt from the Act exactions "not intended to defray the public burden directly caused by" a property owner's project. JA 85. The trial court's ruling, if upheld, would upend the Act's fundamental purpose.

Indeed, the trial court's interpretation implies that a permit fee or other exaction designed to mitigate the adverse impacts of development is subject to heightened scrutiny, but a fee imposed for purposes entirely unrelated to a project's impact evades meaningful scrutiny. That cannot be the law, as the California Supreme Court has itself observed, because:

> [u]nder that interpretation, if a fee or exaction is not merely excessive but truly arbitrary, the developer would have to pay it with no recourse. . . . In other words, the more unreasonable the fee or exaction, the less recourse the developer would have. This perverse interpretation is not only contrary to the legislative intent, it is contrary to the broad language—"any fees, dedications, reservations, or other exactions"—the legislature used in defining [the Act's] reach.

Sterling Park, 57 Cal. 4th at 1205.

The broad language describing the scope of the Mitigation Fee Act makes it applicable to all development fees and "other exactions," including the fee imposed on the Cherks. To justify that exaction, the County was required to demonstrate a reasonable relationship between the fee and public costs related to the Cherks' lot split. As shown below, it cannot make that showing. The remedy for an unlawfully imposed monetary exaction is a refund, to which the Cherks are entitled. *See* Gov't Code § 66020(e).

B. The County Did Not and Cannot Show a "Reasonable Relationship" Between the Fee and Any Adverse Public Impact Caused by the Cherks' Lot Split

To the extent that the County engaged in any method or made any findings at all concerning the relationship between the Cherks' lot split and housing, it is this:

> The project is consistent with the goals and policies of the Countywide Plan because it would create two residential parcels . . . without disrupting existing public services for water supply, fire protection, waste disposal, schools, traffic, circulation, and other services or adversely impacting natural resources. . . . The project would result in a future increase in the availability of housing opportunities in an existing residential community.

AR 278 (Staff Report recommending approval of lot split with conditions); *see also* AR 190 (initial study stating that "[t]he project would result in future development of two single-family residences on a vacant property, and therefore, would not result in the displacement of existing housing stock"). Therefore, contrary to any adverse impact on housing affordability, the Cherks' project would increase the availability and affordability of housing in the community.

Without any adverse impacts or public costs related to affordable housing—indeed, given the positive effects on the availability of future housing—the County cannot impose any fee on a simple lot split, much less can it show that the fee it did impose is reasonably related to increased public burdens *caused by* the Cherks' proposed division. When a proposed

development does not increase any public burdens, there is nothing to mitigate, and no development fee can lawfully be imposed. *See Jefferson Street Ventures LLC v. City of Indio*, 236 Cal. App. 4th 1175, 1198 (2015) ("There was nothing in the record suggesting [the] project caused or contributed to the need for the Interchange Project.") (holding that the trial court had erred by denying a developer's petition for writ of mandate, challenging the conditions of approval that required the developer to set aside acreage for a freeway interchange).

The County's fee in this case is an example of what the California Supreme Court derisively calls "regulatory leveraging"—imposing an "*unrelated* exaction[] as a condition for . . . permit approval[.]" *Ehrlich*, 12 Cal. 4th at 867-68 (emphasis in the original). It is, rather, an exaction that "is not merely excessive but truly arbitrary," *Sterling Park*, 57 Cal. 4th at 1205, and "thus entirely illegal." *Id*. at 1209. The fee imposed on the Cherks is therefore an "unrelated exaction" that violates the Mitigation Fee Act and should be refunded.

C. The Trial Court Erred in Applying Precedent from Recent "Inclusionary Housing" Cases

The crux of the trial court's holding concerning the applicability of the Mitigation Fee Act comes down to this:

> Recent decisions in *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435 (2015) (*CBIA*), and *616 Croft Ave, LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016), have reviewed similar affordable housing ordinances and have

> held that the validity of the "inclusionary" affordable housing conditions like the ones present in the Marin County Code, are not "exactions" intended to mitigate or offset the impact on public facilities caused by the development, but are instead permissible land use regulations enacted under the local government's broad police powers in order to promote the public welfare. [citations omitted]. These cases held that the validity of these inclusionary conditions are not reviewed under the "reasonable relationship" test [imposed by the Mitigation Fee Act].

JA 91 (trial court ruling). However, Marin County's ordinance is materially different than the "inclusionary housing" ordinances involved in those cases. The trial court erred in applying those precedents to the County's application of its ordinance to the Cherks.

The most salient difference between those two cases and the one at hand is that the holdings in both *CBIA* and *Croft* hinged on the fact that the petitioners in those cases were provided various alternative means of satisfying the demands of the respective affordable housing programs. At least one alternative available to the petitioners in those other cases functioned as a regulation of the use of their land, rather than as a monetary exaction. The outcome of both of those cases expressly depended on the fact that such alternatives were available. However, Marin County's program, as applied, offered no such alternative to the Cherks. Neither *CBIA* nor *Croft* ruled on, or even considered, the question of whether a demand for a lump sum of money in the guise of an affordable housing program—absent any

alternative means of satisfying the program's objectives—violates the Mitigation Fee Act.

CBIA stands for the proposition that an inclusionary housing ordinance that requires a developer to set aside a percentage of proposed housing units for sale as affordable housing is akin to traditional land use regulation, and not an exaction. The Court noted that the San Jose ordinance "provides residential developers with a menu of options" to promote affordable housing. *CBIA*, 61 Cal. 4th at 449. Thus, while a basic feature of San Jose's law requires 15 percent of homes built in a residential development to be constructed on-site as "affordable" units, a developer may in the alternative elect to pay a fee to the city in lieu of that set aside; dedicate land in equal value to the in-lieu fee; or acquire and rehabilitate units off-site to serve as affordable housing. *Id*. at 451-52.

The *CBIA* petitioner mounted a facial challenge to the ordinance on the ground that it imposed an unconstitutional condition on development permits. The Court held that a requirement to set aside 15 percent of the on-site for-sale units as affordable housing was "an example of a municipality's permissible regulation of the use of land under its broad police power" rather than an exaction. *Id*. at 492-93. The Court explained that "so long as a permitting authority offers a property owner at least one *alternative means of satisfying a condition* that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition." *Id*. at 469-

70 (emphasis added). "The validity of the in lieu fee . . . logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's housing affordability need" because it is "an alternative to the [unobjectionable] on-site affordable housing requirement." *CBIA*, 61 Cal. 4th at 477. That conclusion is not surprising since the U.S. Supreme Court has itself held that "so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." *Koontz*, 570 U.S. at 611.

CBIA's holding does not extend to the instant case for at least two reasons. First, under the ordinance at issue there, "[n]o developer is required to pay the in lieu fee and may always opt to satisfy the ordinance by providing on-site affordable housing units." *CBIA*, 61 Cal. 4th at 476. Because the ordinance provided at least one permissible option, the alternative of paying a fee becomes unobjectionable. Unlike the ordinance in *CBIA*, however, Marin County's law—as applied to the Cherks—offers no alternatives: a small lot split such as theirs is conditioned solely on the demand for a lump sum of money to satisfy the County's affordable housing mandate. *CBIA* did not rule on the question presented by this case: whether the County's demand for money, as the exclusive means of satisfying its affordable housing mandate, is an unlawful exaction under the Mitigation Fee Act and the unconstitutional conditions doctrine.

Second, *CBIA* is inapplicable because the petitioner in *CBIA* did not raise, and the Court did not consider, any Mitigation Fee Act claim at all.

Croft did consider a Mitigation Fee Act claim, but its holding depended on the same key fact as *CBIA*. The West Hollywood ordinance at issue in *Croft* required developers to "sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an in-lieu fee designed to fund construction of" affordable units. *616 Croft*, 3 Cal. App. at 625. The petitioner in that case paid an in-lieu fee under protest and challenged it as a violation of the Mitigation Fee Act and the unconstitutional conditions doctrine.

The court of appeal rejected that challenge because, following *CBIA*'s rule concerning the availability of alternatives, "a set-aside requirement is not governed by *Nollan* or *Dolan*," and the in-lieu fee was paid by the petitioner "voluntarily as an *alternative*" to the set aside. *Id*. at 628 (emphasis in original). Again, since the developer had the option of complying with the ordinance by selling or renting affordable units—which *CBIA* deems to be a land use restriction and not an exaction—the petitioner could not be heard to protest that its choice to pay the in-lieu fee instead of complying with the land use restriction was an unlawful exaction.

As applied to the Cherks, however, Marin County's ordinance imposes a monetary exaction and with no offer of permissible alternatives. The Cherks were forced to either abandon their plans for a lot split or make

a payment of $39,960 to satisfy the ordinance. The Cherks' case does not involve a question of whether a *set-aside*, or a fee paid *as an alternative* to a set-aside, violates the Act. The Cherks' case raises the different question of whether a development fee or "other exaction," as a flat demand for money as a permit condition, must comply with the "reasonable relationship" test established by the Act.

Further, the trial court here erroneously stated that "[t]he *Croft* court . . . held that the inclusionary housing conditions, specifically the in-lieu fee imposed on the developer, was not an 'exaction' under the Mitigation Fee Act." JA 94. But, in fact, the *Croft* court merely "[a]ssume[d]" without deciding that West Hollywood's "fee [wa]s not for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of available land for" affordable housing. *Id.* at 629. This dicta is superfluous to *Croft*'s actual holding that the fee did not violate the Act in light of available alternatives. The *Croft* court did not consider whether a bare demand for money, alone and apart from other means of satisfying an affordable housing program, constitutes a monetary exaction subject to the Act. Finally, even if the *Croft* court had held as the court below believed, the holding of a sister court of appeal is not binding on this Court. For the reasons discussed above, the dicta of the Third District should not be adopted as this Court's holding because it would effectively immunize municipal violations of property rights from meaningful scrutiny.

II

THE COUNTY FAILED TO PROCEED ACCORDING TO LAW BECAUSE ITS AFFORDABLE HOUSING FEE IS A MONETARY EXACTION THAT FAILS SCRUTINY UNDER THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Both the United States and California Constitutions protect property owners from takings without just compensation. U.S. Const. amend. V;[7] Cal. Const. art. I, § 19. The U.S. Supreme Court has expressed repeated concern that "land-use permit applicants are especially vulnerable" to government pressure "to giv[e] up property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605. "So long as the building permit is more valuable" than the demand, "the owner is likely to accede to the government's demand, no matter how unreasonable." *Id.* Over several decades the Supreme Court has developed and applied the unconstitutional conditions doctrine to prevent government agencies from abusing the permitting power to circumvent the Takings Clause.

The *Nollan*, *Dolan*, and *Koontz* cases establish "a special application" of the unconstitutional conditions doctrine aimed at prohibiting "[e]xtortionate demands of this sort [that] frustrate the . . . right to just compensation." *Id.* Under that doctrine, government may constitutionally exact money from property owners as a condition of changing the use of their

[7] The Fifth Amendment's Takings Clause applies to local governments through the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

property only if (1) the exaction has an "essential nexus" (*i.e.*, a logical connection) to the public impact of the proposed new use, *Nollan*, 483 U.S. at 837, and (2) the exaction is roughly proportionate in both nature and extent to negative public impacts caused by the new use, *Dolan*, 512 U.S. at 391. The doctrine prohibits "monetary exactions" which fail that test, like the one imposed on the Cherks in this case. *Koontz*, 570 U.S. at 612-14.

In the proceedings below, however, the trial court—based on its interpretation of the *CBIA* case—held that the "in-lieu fee imposed as a condition for approval of Petitioners' project" is not the kind of "'monetary exaction' subject to the *Nollan*/*Dolan*/*Koontz* test." JA 98. This is untenable. As discussed above, infra Section I.C., the trial court's discussion of *CBIA* does not account for the key fact of its holding: the property owners in that case were not *required* to pay any fee; they had the *alternative* of satisfying the County's land use restriction by dedicating a certain portion of their development to lower cost housing. The *CBIA* court ruled that the latter was not a taking and, "so long as a permitting authority offers a property owner at least one alternative means of satisfying a condition that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition" if the property owner chooses instead to pay the fee. *Id*. at 469-70. But the Cherks had no such choice in this case—they were faced with an exclusive demand for money as a condition of changing the

use of their property. There is no way to describe that demand as anything other than a "monetary exaction."

The County's imposition of the "affordable housing" fee on the Cherks' project is a government "action[] that divest[s] the developer of money or a possessory interest in property." *Sterling Park*, 57 Cal. 4th at 1204-06. *Koontz* noted that similar "so-called 'in-lieu of' fees are functionally equivalent to other types of land use exactions." 570 U.S. at 612. In describing the hallmarks of a monetary exaction, the Supreme Court observed that:

> the monetary obligation burdened petitioner's ownership of *a specific parcel of land* . . . . Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. at 613-14.

It is incontrovertible in this case that the fee charged to the Cherks was tied to their permit application to change the use of their specific parcel of land. Accordingly, the "affordable housing" fee they paid is a monetary exaction subject to the same constitutional standards, and limitations, as are other forms of exaction and dedication requirements.

Therefore, the unconstitutional conditions doctrine applies, and the County may condition the approval of development permits on a fee, *only if*

it can demonstrate an "essential nexus" and "rough proportionality" between the fee and an adverse impact of the development. *Koontz*, 570 U.S. at 605-06 (citing *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391). As shown below, the fee imposed on the Cherks fails on both counts. *See San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 666 (2002) ("*Nollan* and *Dolan* require a *factually* sustainable proportionality between the effects of a proposed land use and a given exaction.") (internal quotation marks and citation omitted) (emphasis in the original). Accordingly, the County failed to proceed in a manner required by law when it imposed the fee as a condition of the Cherks' lot split.

A. The County Cannot Demonstrate a Nexus Between the Exaction and Any Adverse Public Impacts Caused by the Cherks' Lot Split

The County cannot show an "essential nexus" between the "affordable-housing" fee and the public impact of the Cherks' lot division. A demand for money, in exchange for a permit to change the use of property that does not mitigate and is not proportionate to public impacts caused by the change, violates the unconstitutional conditions doctrine set out in *Nollan*, 483 U.S. at 836-37, *Dolan*, 512 U.S. at 388-92, and *Koontz*, 570 U.S. at 604-06.

Here, the County forced the Cherks to pay $39,960 as a condition of receiving permission to change the use of their property, purportedly to ameliorate the County's lack of affordable housing. Had the County

commanded a payment of that sum from the Cherks outside the permitting process, it surely would constitute a taking of their money. Yet, nothing in the record provides any logical connection between the County's lack of affordable housing and the Cherks' lot split, which could justify a fee. The County's fee-imposition, therefore, is not a valid land use regulation, but an "out-and-out plan of extortion." *Nollan*, 483 U.S. at 837.

As discussed above, the Cherks' proposed property division will result in *no* deleterious impacts arising from the division of the Cherks' land into two residential lots. The Cherks' proposal will not result in a decrease in housing—affordable or otherwise. To the contrary, by dividing their residential parcel into two lots, the Cherks will *increase* the available land that can be developed for housing. The severe lack of affordable housing in Marin County is not caused or made worse by the Cherks' project, but result from market forces and the County and other regional governments' long-term land use policies. *See Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1084 (N.D. Cal. 2014) (holding that there is no nexus between a monetary exaction conditioning the withdrawal of rental property from the city's rental market and a lack of affordable housing that was "caused by entrenched market forces and structural decisions made by [the municipality] long ago in the management of its housing stock").

Because the division of the Cherks' lot does not create or contribute to the County's housing affordability problem, the County cannot impose

any fee for affordable housing, let alone the substantial fee imposed here. *San Remo Hotel*, 27 Cal. 4th at 671 (2005). Indeed, the only findings in the record related at all to the public impact on housing of the Cherks' lot split establish that it will increase housing opportunities and reduce the housing supply problem that the County purportedly seeks to address. AR 278.

B. The County Cannot Show a "Rough Proportionality" Between the Amount of the Exaction and Any Adverse Public Impact Caused by the Cherks' Lot Split

Nor does the County's fee meet the "rough proportionality" test, which requires the County to show that "the degree of the exaction[]" bears a "rough proportionality" to the projected negative impact of the Cherks' proposed property division. *Dolan*, 512 U.S. at 388, 391. The County was required to "make some sort of individualized determination that the required [condition]" is "related both in nature and extent to the impact of the proposed development." *Id.* at 391. In other words, the burden was on the County to demonstrate that Cherks' project gave rise to the need for additional "affordable housing" and that the fee imposed was roughly proportionate that need. The only showing made here by the County is its *ipse dixit* that a fee is required.

In *Dolan*, the U.S. Supreme Court held that the city of Tigard, Oregon failed to carry its burden of showing a "rough proportionality" when the city offered a generalized finding that its demand for a public dedication of the permit-applicant's land "could offset some of the traffic demand and lessen

the increase in traffic congestion" and mitigate potential flooding due to proposed paving of the land's surface. *Id*. at 389 (quoting the city's findings). There was no credible finding, however, that the property owner's proposed project would cause an increase in traffic congestion or that the amount of land demanded by the City was roughly proportionate to any of the alleged public impacts of the project. That is similar to the instant case.

Here, there is no finding that an adverse public impact on affordable housing will result from the Cherks' proposal to divide their parcel. The only noted impact will be the additional availability of land for housing development. Therefore, because the lot split produces no negative impact on affordable housing warranting mitigation, no fee for that purpose could satisfy the requirement that such a fee be related "in nature" or roughly proportionate. *Id*. at 388, 391.

The monetary exaction in this case cannot withstand scrutiny under *Nollan* and *Dolan* because, at bottom, there is nothing to mitigate. Rather, the County has singled out individual property owners who have the misfortunate of needing a land use permit to contribute to a fund that subsidizes or otherwise makes housing more "affordable" for others. The lack of affordable housing is a general social problem, however, that "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The City might lawfully tax its whole population for that purpose, but it cannot solve the high cost of housing by

exacting funds from individual property owners whose projects bear no logical connection and which are unrelated in either nature or extent to that problem.

C. The Distinction Between Legislative and Adjudicative Exactions Finds No Support in U.S. Supreme Court Precedent, History, or Scholarship of the Unconstitutional Conditions Doctrine

In its determination that the unconstitutional conditions doctrine did not apply to the monetary exaction at issue here, the trial court stated that the California Supreme Court "has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test." JA 97 (emphasis in original).

First, it is an error to conclude that the government's action here was "legislatively prescribed" since Marin's ordinances gives discretion to Planning Division officers to "grant a waiver" of the fee if they determine that it is warranted in the service of the County's affordable housing goals. *See* Marin County Code § 22.22.060 ("The review authority may grant a waiver to the requirements of this Chapter if an alternative affordable housing proposal demonstrates a better means of serving the County in achieving its affordable housing goals than the requirements."). This discretion allows Marin County officials to impose fees on an *ad hoc* basis. Nonetheless, to the extent that this Court holds that conclusion to be a true

statement of the law, the Cherks object and preserve the matter for consideration in any further appeal.

There is, in fact, no basis in the U.S. Supreme Court's case law to provide lesser scrutiny to legislatively mandated in-lieu fees than to those imposed *ad hoc* by an administrative agency. The U.S. Supreme Court's exactions decisions belie any distinction between legislative or adjudicative exactions. The *Nollan*, *Dolan*, and *Koontz* cases all involved conditions mandated by general legislation—a fact noted in each of their opinions. The dedication of an easement over the Nollans' beachfront, for example, was a general requirement imposed by state law. *Nollan*, 483 U.S. at 828-30 (California Coastal Act and California Public Residential Code imposed public access conditions on all coastal development permits); *see also id.* at 858 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract.").

Similarly, both the bike path and greenway land dedications at issue in *Dolan* were mandated by municipal land use ordinances. *See Dolan*, 512 U.S. at 377-78 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways"); *id.* at 379-80 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community

Development Code].”). And the in-lieu fee at issue in *Koontz* was required by state law. *Koontz*, 570 U.S. at 600-01 (Florida’s Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands).

In short, all exactions tied to the grant of a land use permit to develop a specific parcel of property, whether adjudicatively or legislatively imposed, warrant heightened review because all such exactions pose a risk that government is leveraging its permitting power to force an applicant to abandon constitutional rights as the price of the permit.

The legislative/adjudicative distinction finds no support in the history of the unconstitutional conditions doctrine even beyond the land use context. Since the 19th century, the U.S. Supreme Court has relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions.[8] The

[8] *See, e.g.*, *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855) (invalidating state law conditioning permission for a foreign company to do business in Ohio upon waiver of the right to litigate disputes in U.S. Federal District Courts because the condition was “repugnant to the constitution of laws of the United States.”); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business or closing the business); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (invalidating statute on First Amendment grounds because it forced a newspaper to incur additional costs by adding more material to an issue or removing material as a condition of publication); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (state constitutional provision requiring a loyalty oath as a condition of receiving a tax exemption held to violate unconstitutional conditions doctrine).

reason the doctrine applies without regard to the form of the demand or type of government entity imposing the demand is made clear by the doctrine's purpose—it is intended to enforce constitutional limits on government action:

> [T]he power of the state [. . .] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in a like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition of permission to use highways).[9]

Legal scholars also find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State*

[9] *See also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even when the government has absolute discretion to grant or deny any individual a permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights.").

and Federal Courts Are Doing About It, 28 Stetson L. Rev. 523, 567-68 (1999). Indeed, it is often difficult to distinguish one from the other. *See* Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/ Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision-making in the land use context).

The irrelevance of the legislative/administrative distinction comes as no surprise, as *Nollan* and *Dolan* are rooted in the broader history of the unconstitutional conditions doctrine, which "does not distinguish, in theory or in practice, between conditions imposed by different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power." *Id.* at 438. Indeed, from the property owner's perspective, he suffers the same injury whether the body forcing him to bargain away his rights in exchange for a land use permit is legislative or administrative.

In sum, holding that legislatively prescribed demands for money imposed as a condition of development are not subject to the *Nollan*/*Dolan*

test departs from the Supreme Court's precedent, and would effectively insulate such demands from meaningful constitutional review.

CONCLUSION

For the reasons discussed above, this Court should reverse the trial court's denial of the Cherks' petition for writ of mandate and order a refund of the $39,960 fees unlawfully collected by the County, with interest.

DATED: May 1, 2018.

Respectfully submitted,

LAWRENCE G. SALZMAN
OLIVER J. DUNFORD
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By /s/ Lawrence G. Salzman

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Dartmond Cherk and
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 7,662 words.

DATED: May 1, 2018.

/s/ Lawrence G. Salzman
LAWRENCE G. SALZMAN

DECLARATION OF SERVICE

I, Lawrence G. Salzman, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On May 1, 2018, a true copy of APPELLANTS' OPENING BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 1st day of May, 2018, at Sacramento, California.

/s/ Lawrence G. Salzman
LAWRENCE G. SALZMAN