No. 15-1366

In the

# Supreme Court of the United States

COMMON SENSE ALLIANCE,

*Petitioner,*

v.

SAN JUAN COUNTY,

*Respondent.*

**On Petition for Writ of Certiorari to the Washington State Court of Appeals**

## BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A San Juan County, Washington, ordinance requires that every shoreline property owner applying for a development permit agree to permanently dedicate a portion of the property as a conservation area to filter pollutants from stormwater that flows from other properties and crosses the shoreline lot. This condition is based on a collection of reports that argue for a broad public need for stormwater filtration, but include no site specific analysis of the area necessary to filter water originating only on the permitted shoreline parcel.

The questions presented are:

1. Whether such a permit condition, imposed legislatively, is subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); and

2. Whether a generalized scientific study, which concludes that preserving shorelines may protect the environment but makes no individualized determination, satisfies the constitutional requirement that the government demonstrate that the permitted use will impact the shoreline before exacting property in exchange for permit approvals, pursuant to the "essential nexus" and "rough proportionality" tests as set out in *Koontz*, *Dolan*, and *Nollan*.

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## INTRODUCTION

San Juan County does not dispute the importance of the questions presented by the Petition. Nor does the County contest the fact that there is a nationwide split of authority on the question whether legislatively-imposed exactions are subject to the nexus and proportionality tests set out by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Instead, the Opposition brief argues that, for a variety of reasons, the lower courts should have never addressed Common Sense Alliance's (CSA) unconstitutional conditions claim in the first place. None of the County's arguments have merit, nor do they contest the advisability of certiorari.

The County primarily argues that its buffer condition does not effect a dedication of private property and therefore the demand does not need to satisfy nexus and proportionality. Opp. at 8-11, 15-20. The County is mistaken. The Ordinance, by its plain terms, requires that permit applicants dedicate the buffer by designating it and recording it on a site plan or plat. SJCC 18.35.100(E); SJCC 18.35.130(D). Moreover, the County fails to acknowledge that Washington case law holds that a permit condition imposing a critical area buffer constitutes an exaction and must therefore comply with *Nollan* and *Dolan*. *See Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd. (KAPO)*, 160 Wash. App. 250, 273 (2011); *Honesty in Envtl. Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App. 522, 533 (1999). The County's repeated claim that this case does not involve a dedication lacks merit.

The County's alternative argument—that property owners should be barred from raising facial unconstitutional conditions claims—simply begs the question whether legislatively-imposed exactions are subject to scrutiny under *Nollan/Dolan*. And that question remains the subject of a well-recognized, nationwide split of authority. *See Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594-95, 2608 (2013) (Kagan, J., dissenting). The County's insistence that the lower court correctly held that property owners must go through the permitting process before challenging a legislatively-imposed exaction merely takes a side on the split of authority, confirming that both government and property owners need this Court to finally resolve the longstanding split of authority.

Review is additionally warranted because Washington courts adopted a rule that circumvents the nexus and proportionality requirements. Under this rule, an exaction will be deemed to satisfy nexus and proportionality if the government can show that it engaged in a reasoned process when determining that a dedication will advance a public purpose. Pet. App. A–10-11. The court below used the Washington rule to uphold the challenged buffer condition upon the government's showing that the "county's 'best available science' document . . . demonstrates that buffers are reasonably necessary to protect critical fish and wildlife habitat." Pet. App. A–13. The Washington rule turns the *Nollan/Dolan* test on its head by asking whether the government showed a sufficient connection between the buffer and the public's interest in the environment, rather than showing the connection between development impacts and the buffer's size/scope.

The County's justiciability arguments lack merit as well. CSA's unconstitutional conditions claim is unquestionably ripe for judicial review. CSA timely brought its challenge under a statute that authorizes facial constitutional challenges to critical areas ordinances. Wash. Rev. Code § 34.05.570(3)(a); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (A facial constitutional claim ripens upon passage of the challenged law.). The procedure CSA followed to mount a facial challenge is well-recognized by Washington courts. *See*, *e.g.*, *KAPO*, 160 Wash. App. at 272-74; *Honesty in Envtl. Analysis and Legislation*, 96 Wash. App. at 533.

The County's mootness argument is similarly without merit. Opp. at 4, 12, 26. The 2014 ordinance did not "repeal and replace" the challenged buffer provisions. By its own terms, the 2014 ordinance only "amended" select portions of the 2012 ordinance. The 2014 amendment did not substantively change the challenged buffer provisions. Moreover, the lower courts considered the effect of the 2014 amendments when ruling on CSA's constitutional challenge. *See* Pet. App. B–15-16, 45, 50, 52. CSA's challenge raises a live issue and seeks very real relief: reversal of the court of appeals' decision upholding the County's mandatory buffer exaction with no showing of nexus or proportionality.

Finally, the County's argument that the lower court correctly resolved all of the important conflicts and questions of federal constitutional law simply presumes to predict the outcome of the merits argument. Opp. at 26-28. That argument does not contest the conflicts set out in the Petition, and does

not comment on the advisability of this Court granting certiorari.

Certiorari is warranted and should be granted.

## CORRECTIONS TO THE COUNTY'S MISSTATEMENT OF FACTS

The County's statement of facts is replete with argument, generalizations, and conclusory statements, and is largely unsupported by citation to the record. Such a "statement of fact" cannot rebut the plain language of the challenged Ordinance or the Washington court's opinion.

For example, the County states that its Ordinance does not require landowners to record the buffer on a site plan (which will effect a dedication pursuant to Washington property law). Opp. at 8 n.1. The County's assertion is untrue. Two separate provisions of the Ordinance require that permit applicants designate the buffer on a plat or site plan. SJCC 18.35.100(E); SJCC 18.35.130(D).

The County then provides an extremely generalized summary of what it would like the buffer provisions to accomplish, without citing any specific code provisions. Opp. at 9-11. Notably, the County does not discuss how its buffer requirement works—let alone its stated goal of using buffers on shoreline properties to filter out 60%-70% of the pollutants that may be suspended in stormwater entering and crossing over the property before the runoff reaches the shoreline. *See Friends of the San Juans v. San Juan County*, No. 13-2-0012c, 2013 WL 5212385, at *28-30 (Wash. State Growth Mgmt. Hearings. Bd., Final Decision and Order, Sept. 6, 2013) (discussing the purpose and application of the ordinance). Thus, the

County apparently concedes there is no mechanism for determining the actual volume of stormwater or the presence of pollutants entering a shoreline lot before a buffer condition is imposed. Indeed, the administrative court below upheld the County's buffers against CSA's challenge, despite "the lack of information regarding an appropriate percentage for pollutant removal" in the county's scientific record" and a "lack of local studies of the County's wetlands and water quality functions." *Id.* at *34-35 (citing a state regulation authorizing "precautionary" buffers "where there is an absence of valid scientific information or incomplete scientific information"). Thus, the County cannot dispute that its buffer provisions provide no mechanism for identifying what part of the pollutant load is directly attributable to the landowner's proposed use of his or her property. *Id.* at *36 (noting that the County's formula for determining buffer widths "do[es] not take into account the intensity of impacts from adjacent land uses").

There are no factual disputes in this case. The questions presented are pure questions of law.

## ARGUMENT

### I

### THE DECISION OF THE WASHINGTON COURT OF APPEALS RAISES IMPORTANT QUESTIONS OF FEDERAL TAKINGS LAW

The Washington court of appeals adopted two rules of federal constitutional law that significantly limit the protections guaranteed by *Nollan* and *Dolan*. First, the court concluded that conditions imposed on development permits by operation of a legislative act

are immune from scrutiny under the *Nollan/Dolan* tests. Pet. App. A–9, 14. And second, the court held that the nexus and proportionality tests are satisfied where the government engaged in a "reasoned process" to determine "the necessity of protecting functions and values in the critical areas" when adopting CAO buffers. Pet. App. A–10-11 (relying on *KAPO*, 160 Wash. App. at 272-74). Each of these rulings raises "an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c); Pet. at 10-22. In addition, the Washington court's resolution of these questions conflicts with decisions of this Court, and conflicts with decisions from other state courts of last resort and federal courts of appeals. Rule 10(b), (c).

### A. Washington Property Law Holds That a Permit Condition Requiring a Critical Area Buffer Is an Exaction Subject to *Nollan/Dolan*

The County's primary argument in opposition to certiorari is that the lower courts should not have addressed *Nollan* and *Dolan* because the buffer condition does not constitute an exaction. Opp. at 15-20. The County's argument, however, relies on a misstatement of fact: the Opposition incorrectly states that the Ordinance does not require applicants to record the buffer on a binding document. Opp. at 8 n.1. That requirement is plainly stated in two separate sections of the Ordinance. *See* SJCC 18.35.100(E); SJCC 18.35.130(D). And according to Washington property law, such a requirement will effect a public dedication. *See Richardson v. Cox*, 108 Wash. App. 881, 884, 890-91 (2001). Moreover, Washington courts have repeatedly held that "[r]egulations adopted under

the GMA that impose conditions on development applications must comply with the nexus and rough proportionality tests." *KAPO*, 160 Wash. App. at 273; *see also Honesty in Envtl. Analysis and Legislation*, 96 Wash. App. at 533 (same). The County fails to acknowledge the language of its Ordinance and fails to address on-point case law discussed in the Petition.

The doctrine of unconstitutional conditions clearly applies here. Washington law recognizes buffers as a valuable, freely-alienable property interest. Wash. Rev. Code § 64.04.130; *see also Klickitat County v. Wash. State Dep't of Revenue*, No. 01-070, 2002 WL 1929480, at *5-6 (Bd. Tax App., June 12, 2002) (Buffer area constitutes property; the holder of the conservation interest must pay property taxes). Therefore, a demand that an owner provide a buffer as a mandatory condition of permit approval appropriates a valuable property interest. *See Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1018-19 (1992) (conservation buffers deprive the landowner of a distinct property interest and may result in a taking). The buffer condition plainly puts that property interest to a public use. *See*, *e.g.*, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("[T]here is little doubt that the preservation of the habitat of an endangered species is for government and third party use—the public—which serves a public purpose."). Thus, this case presents the precise type of condition that *Nollan/Dolan* demands be subjected to heightened scrutiny. *Koontz*, 133 S. Ct. at 2594-95.

### B. There Is a Well-Recognized, Nationwide Split of Authority Among the Lower Courts About Whether *Nollan* and *Dolan* Apply to Exactions Mandated by Legislation

The County does not contest that the lower court ruled on a federal constitutional issue that is the subject of a deep, nationwide split of authority among the lower courts.[1] *See* Pet. App. A–9, 14; Opp. at 22. Nor does it contest the importance of this unresolved question. Instead, the County repeats its mistaken claim that the lower courts should not have addressed the issue because the Ordinance does not require a dedication. As shown above, the County is wrong. This Petition provides the Court with a good opportunity to address the split of authority because it presents the issue as a pure question of law.

### C. Washington Courts Hold That *Nollan/Dolan* Created a Due Process Test, and Hold Exactions Subject Only to Rational Basis Scrutiny

In recent years, Washington courts have mischaracterized *Nollan* and *Dolan* as establishing a "due process" doctrine, under which an exaction is subject only to rational basis scrutiny. *KAPO*, 160 Wash. App. at 272. According to the Washington rule, *Nollan* and *Dolan* are satisfied if the government engaged in a "reasoned process" to determine "the

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[1] *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting); *California Building Industry Ass'n v. City of San Jose*, __ U.S. __, 136 S. Ct. 928-29 (2016) (Thomas, J., concurring in denial of certiorari); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

necessity of protecting functions and values in the critical areas" when adopting critical area buffers. *See* Pet. App. A–10-11, 13; *KAPO*, 160 Wash. App. at 272-74. In the three cases that have applied the "due process" standard (including this case), Washington courts upheld exactions based only on a determination that the government developed a scientific record showing that imposition of a conservation buffer will protect the environment.

> The county's "best available science" document . . . demonstrates that buffers are reasonably necessary to protect critical fish and wildlife habitat. We reject . . . the argument that a comprehensive study cannot support the imposition of development regulations unless it looks at a specific development proposal.

Pet. App. A–13; *see also KAPO*, 160 Wash. App. at 273-74; *Olympic Stewardship Foundation v. Western Wash. Growth Mgmt. Hearings. Bd.*, 166 Wash. App. 172, 199 (2012).

Under the Washington rule, the lower court never addressed the key facts underlying CSA's challenge: that the buffers are designed to filter a theoretical stormwater flow without any requirement that the County identify the source, pollutant load, and other site-specific information, which are all necessary to determine the portion of the stormwater problem attributable to the burdened property owner. As a result, there is absolutely no way for the County to ensure that its buffers are limited in size and scope to mitigate only for the impacts caused by a proposed development. Such a rule clearly conflicts with this Court's case law. *See Lingle v. Chevron USA, Inc.*, 544

U.S. 528, 542 (2005) (The substantially advances test "reveal[es] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights."); *see also Dolan*, 512 U.S. at 389, 391 (requiring an individualized determination).

## II

## THE CLAIMS RAISED IN THE PETITION ARE JUSTICIABLE

### A. CSA's Facial Unconstitutional Conditions Challenge Is Appropriate for Review

Contrary to the County's claim (Opp. at 22), no jurisprudential rule precludes an individual from bringing a facial claim under the doctrine of unconstitutional conditions. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) (courts regularly permit facial challenges to proceed under a diverse array of constitutional provisions). Indeed, facial claims are often the appropriate method for deciding such a challenge. *See Rust v. Sullivan*, 500 U.S. 173, 183 (1991) ("Petitioners are challenging the facial validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by [law] and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights."); *see also Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1141-44 (9th Cir. 2014) (facially applying *Nollan* and *Dolan* to the terms of a Marketing Order); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a facial *Nollan*-based claim against an ordinance requiring developers to provide affordable

housing); *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1079, 1089 (N.D. Cal. 2014) (concluding in a facial *Nollan/Dolan* challenge that a lack of affordable housing is a preexisting public problem that is not attributable to individual uses of property).

Here, CSA's challenge was properly and timely filed under Washington's Administrative Procedures Act (WAPA), which expressly authorizes facial constitutional challenges to critical areas ordinances. Wash. Rev. Code § 34.05.570(3)(a); *see also KAPO*, 160 Wash. App. at 272-74 (deciding facial *Nollan/Dolan* claim brought under WAPA). The claim, which seeks invalidation of an Ordinance exacting a buffer dedication as a mandatory condition for approval of any new shoreline development, is unquestionably ripe. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 345-46 (2005) (facial takings claims were instantly ripe because they "requested relief distinct from the provision of 'just compensation' "). There is no risk that this Court's exercise of its jurisdiction be considered "advisory" where the lower court ruled on questions of federal constitutional law. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (a decision is not advisory where the lower decision was controlled by federal law); *see also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights."). This Court would be acting well within the jurisdiction conferred by 28 U.S.C. § 1257(a) to grant the Petition in this case.

### B. CSA's Challenge Is Not Moot

The County's claim that the challenged buffer provisions were "repealed and replaced" by a 2014

ordinance is untrue. Opp. at 4, 12, 26. By its own terms, the 2014 ordinance only "amended" select portions of the 2012 ordinances, such as a provision excepting public utilities from critical areas regulations.[2] The ordinance did not amend the challenged buffer provisions, which remain in effect and are properly before this Court.[3] *See* Ord. 2-2014 at 40, 60; Table 3.6 (challenged portions of the water quality buffers unaffected by amendment, provisions and tables renumbered); *see also id.* at 52, 65 (public dedication requirement not amended). In any event, the County adopted the 2014 amendments as part of the administrative proceedings below and the trial court expressly considered the amendments when ruling on CSA's constitutional challenge to the mandatory buffers. Pet. App. B–15-16, 45, 50, 52. At no point during any of the state court or administrative proceedings did the County claim that its 2014 amendments rendered CSA's challenge moot. To the contrary, the County invited each court to reach the merits. The County's mootness argument must be rejected.

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[2] A full copy of the 2014 amendments is available at http://www.sanjuanco.com/DocumentCenter/View/1969.

[3] The current County Code is published at http://www.codepublishing.com/WA/SanJuanCounty/.

## CONCLUSION

The petition for writ of certiorari should be granted.

DATED: August, 2016.

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