Case No: 99545-1

Court of Appeal Cause No. 53558-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOUGLASS PROPERTIES II, LLC,

Appellant,

v.

CITY OF OLYMPIA,

Respondent.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF THE PETITION FOR REVIEW

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Whether a legislatively mandated permit condition is subject to the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

INTRODUCTION

Douglass Properties II, LLC's Petition for Review raises a critically important question concerning the limits that the Fifth and Fourteenth Amendments to the United States Constitution place on a local government's authority to enact laws that use the land-use permit process to exact property and/or money for public use. In *Nollan*, 483 U.S. at 837, and *Dolan*, 512 U.S. at 391, the Supreme Court of the United States held that the doctrine of unconstitutional conditions, as specially applied to land-use permitting, requires the government to show that an exaction demanding a dedication of land is necessary to mitigate impacts caused by the proposed development via a two-part "essential nexus" and "rough proportionality" test. A permit condition that does not satisfy those tests is unconstitutional and invalid. *Id*. The Court confirmed that the doctrine applies to impact fees in *Koontz*, 570 U.S. at 604–05.

Although the U.S. Supreme Court has always applied the doctrine to conditions mandated by acts of general legislation (see pages 3–6 below), Division II of the Washington State Court of Appeals ruled that, as a matter of law, the doctrine of unconstitutional conditions does not apply to any demand that originates in the legislative branch. Petition Appendix (Pet. App.) at 12. In reaching that conclusion, the court created conflicts with other Washington appellate courts[1] and deepened a split of authority among state courts, which have expressed confusion regarding the circumstances in which legislative conditions are subject to the doctrine of unconstitutional conditions. *California Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 136 S. Ct. 928, 194 L. Ed. 2d 239 (2016) (Thomas, J., concurring in denial of certiorari) (The longstanding split of authority on this question "shows no signs of abating" and should be resolved at the earliest opportunity.); Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 194 (2019) (The legislative exactions issue is "one of the most pressing questions across the entire realm of takings law."). Until the legislative exactions question is resolved, "property owners and local governments are

[1] *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 273, 255 P.3d 696 (2011) (an ordinance requiring owners to dedicate a conservation buffer must satisfy *Nollan* and *Dolan*); *Honesty in Envtl. Analysis Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 533, 979 P.2d 864 (1999) (Generally applicable critical area regulations "must comply with nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.").

left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." *California Bldg. Indus. Ass'n*, 577 U.S. at 1179. Review should be granted.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS PREMISED ON AN OBVIOUS MISTAKE

The Court of Appeals' opinion warrants review because the decision to adopt a per se rule limiting the doctrine of unconstitutional conditions to exactions imposed pursuant to an ad hoc adjudicative proceeding was premised on an obvious mistake. Pet. App. at 10–12 (wrongly concluding that the exactions at issue in *Nollan*, *Dolan*, and *Koontz* were not legislatively mandated).

In truth, *Nollan*, *Dolan*, and *Koontz* involved conditions mandated by general legislation. In *Nollan*, the California Coastal Act and California Public Residential Code imposed public-access conditions on all coastal development permits, including the beachfront easement over the Nollans' property. 483 U.S. at 828–30; *see also id.* at 859 (Brennan, J., dissenting) (The California Coastal Act of 1972 required the Commission to impose deed restrictions granting the public easements for lateral beach access "since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract."). Similarly, municipal land-use ordinances mandated

the bike path and greenway dedications that were conditions on Florence Dolan's permit to expand her plumbing supply store. *See Dolan*, 512 U.S. at 377–78; *id*. at 378 (The city code "requires that new development facilitate this plan by dedicating land for pedestrian pathways."); *id*. at 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). And Florida's Water Resources Act and Wetland Protection Act required a land dedication or in-lieu fee permit condition on Coy Koontz's development proposal, the amount of which was determined pursuant to a legislatively adopted and generally applicable mitigation ratio schedule.[2] *Koontz*, 570 U.S. at 600–01. The lower court's failure to note the legislative origins of the conditions at issue in *Nollan*, *Dolan*, and *Koontz* resulted in its adoption of a categorical rule that severely curtails the federal constitutional rights of Washington state residents.

The Court of Appeals, moreover, plainly misunderstood the doctrine of unconstitutional conditions, which has always applied to legislative demands.[3] As explained by the U.S. Supreme Court, the

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[2] *See also* Respondent's Brief in Opposition at 5 n.4, *Koontz*, 133 S. Ct. 2586 (2012) (No. 11–1447), 2012 WL 3142655, at *5 n.4 (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

[3] *See, e.g.*, *Lafayette Ins. Co v. French*, 59 U.S. 404, 407, 18 How. 404, 15 L. Ed. 451 (1855) (invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. district courts); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (invalidating provisions of the Occupational Safety and Health Act requiring

doctrine is premised on the recognition that "the sover[eign] power of a state . . . is subject to the limitations of the supreme fundamental law." *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532–33, 42 S. Ct. 188, 66 L. Ed. 352 (1922). In its most basic formulation, the doctrine states that "the power of the state"—a formulation that expressly includes legislative action—"is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights." *Frost*, 271 U.S. at 593–94.

Thus, as applied in the context of land-use permitting, the doctrine holds that "governmental authority to exact such a condition [is] circumscribed by the Fifth and Fourteenth Amendments." *Dolan*, 512 U.S. at 385; *see also Koontz*, 570 U.S. at 606 (The "government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and

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business owners to consent to warrantless searches as a condition on a business license); *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528–29, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (invalidating a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath); *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593–94, 46 S. Ct. 605, 70 L. Ed. 1101 (1926) (invalidating state law that required trucking company to dedicate personal property as a condition for permission to use highways).

rough proportionality to those impacts."). There is nothing in the High Court's formulation of the doctrine that limits its application to a single branch of the government. *See Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (emphasizing that the Takings Clause is unconcerned with which "particular state actor is" burdening property rights); *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116, 1117–18, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995) (Thomas, J., joined by O'Connor, J., dissenting to denial of certiorari) ("It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can.").

Even if a credible argument could be made for limiting the doctrine's application, there is still substantial disagreement among state and federal courts about where exactly to draw that line, warranting review by this Court. *See*, *e.g.*, *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 165, 425 P.3d 1099 (Ct. App. 2018) (noting widespread uncertainty and "the continuing need for clarification" of the law); *California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 459, 189 Cal. Rptr. 3d 475, 351 P.3d 974 (2015) ("[T]he full range of monetary land-use permit conditions to which the *Nollan/Dolan* test applies under the

Koontz decision remains at least somewhat ambiguous."). Indeed, contrary to the per se rule adopted below, the California Supreme Court recently held that, after *Koontz*, legislative fees intended to mitigate for development impacts (like the traffic impact fee at issue here) must satisfy nexus and proportionality, exempting only those conditions seeking general public benefits that are unrelated to the proposal. *California Bldg. Indus. Ass'n*, 61 Cal. 4th at 459; *Alliance for Responsible Planning v. Taylor*, No. C085712, 2021 WL 1525538, at *7–8 (Cal. Ct. App. Unpub. Apr. 19, 2021) (holding a traffic impact fee ordinance subject to *Nollan/Dolan*; distinguishing it from a generally applicable land-use restriction).

Making matters even more difficult for courts seeking to limit the doctrine's reach is the fact that it is often difficult—if not impossible—to distinguish "between actions denominated adjudicative and legislative." *Town of Flower Mound v. Stafford Estates Ltd.*, 135. S.W.3d 620, 641, 47 Tex. Sup. Ct. J. 497 (2004) (holding legislative exactions are not per se exempt from the doctrine); *see also Highlands-In-The-Woods, L.L.C. v. Polk Cty.*, 217 So. 3d 1175, 1178 n.3 (Fla. Dist. Ct. App. 2017) ("Even though the County's exactions in this case are authorized in part by a County ordinance, they are also adjudicatory in nature in that they were in response to Highlands' request for a permit and they required Highlands to

dedicate a portion of its land."); *Washington Townhomes, LLC v. Washington Cty. Water Conservancy Dist.*, 388 P.3d 753, 758 & n.3 (Utah 2016) (remanding case to determine the "difficult" question of whether an impact fee regime was "legislative" in nature, and, if so, whether and how *Nollan/Dolan* scrutiny applies); Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 266 (2000) ("[T]he discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction.").

The absence of a predictable method for distinguishing legislative and adjudicative conditions is an additional reason that courts should reject the type of categorical rule adopted below in favor of a rule applying the unconstitutional conditions doctrine on a case-by-case basis to land-use permits regardless of the source of the condition at issue. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area."). Indeed, from the property owner's perspective, whether a legislative or administrative body or official forces him to bargain away his rights in exchange for a permit

results in the exact same injury, for which the Constitution must provide a remedy. *See* Lisa Harms Hartzler, *The Stringent Takings Test for Impact Fees in Illinois: Its Origins and Implications for Home Rule Units and Legislation*, 39 N. Ill. U. L. Rev. 92, 131 (2018) ("[W]herever the power to command exactions from landowners arises—from legislation or adjudication—the U.S. Constitution provides a valuable and essential limitation on extortionate behavior."). Review should be granted.

II. SETTLING THE LEGISLATIVE EXACTIONS QUESTION ADVANCES THE PUBLIC'S INTEREST IN AFFORDABLE HOUSING

A decision by this Court recognizing that legislative exactions must comply with *Nollan*, *Dolan*, and *Koontz* is in the public's interest in affordable housing. For decades, local governments have increasingly relied on impact fees as a strategy for funding public facilities without making the public pay for them through tax increases.[4] This trend—however expedient—is contrary to the public's need for affordable housing because impact fees, like other development costs, frequently drive the final purchase price of the home "beyond the means of many . . . moderate-

[4] Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth."); *see also* Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 T.M. Cooley L. Rev. 1, 2 (2005) ("Because tax increases are so politically unpopular, many states turned to development exactions . . . for any type of development, from subdivisions to strip malls.").

income workers." *See $819 Increase in Fees Will Boost Home Cost by $1,000, Study Says*, 35 No. CD-15 HDR Current Developments 10 (2007).

The number of moderate-income people priced out of homeownership due to impact fees is staggering. A modest $1,000 fee is estimated to price more than 217,000 potential home buyers out of the housing market.[5] Yet it was estimated that, in 2019, each new single-family home built in Olympia was burdened with $14,242 in impact fees. *See* Duncan Associates, *National Impact Fees Survey: 2019*, at 3 (2019). By shielding legislative fees from heightened scrutiny, the decision below encourages the type of cost-shifting that *Nollan*, *Dolan*, and *Koontz* intended to stop. *Dolan*, 512 U.S. at 384 ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (citation omitted)).

CONCLUSION

For the foregoing reasons, *Amici* Pacific Legal Foundation and Building Industry Association of Washington request that the Court grant review of the case, reverse the Court of Appeals' opinion, and clarify that legislative exactions are subject to the doctrine of unconstitutional conditions.

[5] https://www.biaw.com/wp-content/uploads/2021/04/3.1.2021-Priced-out.pdf

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Respectfully submitted,

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