No. _____

In The

Supreme Court of the United States

DOUGLASS PROPERTIES II, LLC,

Petitioner,

v.

CITY OF OLYMPIA,

Respondent.

On Petition For Writ Of Certiorari To The Washington Court Of Appeals, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 619, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013), this Court clarified that the requirements of the *Nollan/Dolan*[1] doctrine apply to a government agency's demand for property from a land-use permit applicant "even when the government denies the permit and even when its demand is for money." This Court recognized that demands for money create the same 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." 570 U.S. at 614. The dissent in *Koontz* criticized the majority, *inter alia*, for failing to clarify whether a distinction between "adjudicative" and "legislative" impact fees still exists. 570 U.S. at 628 (Kagen, J., dissenting).

The question presented in this case is:

Whether, after *Koontz*, the *Nollan/Dolan* doctrine applies generally to impact fees, i.e., whether after *Koontz* there is any distinction between "adjudicative" and "legislative" fees when a government agency demands money or property as a condition of issuing a

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[1] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

QUESTION PRESENTED—Continued

land use permit and the fee is not a uniform permitting fee but is based on the specific nature and impacts of the project.

A potentially *narrower* question presented in this case is:

Whether development impact fee statutes such as Washington's (RCW 82.02.050 *et seq*.), which afford substantial discretion to local officials to determine the amount of the impact fee required for a particular permit, are subject to *Nollan/Dolan* scrutiny under *Koontz*.

PARTIES TO THE PROCEEDING

Petitioner is Lanzce Douglass Properties II, LLC. The respondent is the City of Olympia, a Washington municipal corporation.

RULE 29.4(c) STATEMENT

Petitioner states that 28 U.S.C. § 2403 may apply, and this pleading shall be served on the Attorney General of the State of Washington.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent companies, subsidiaries, or affiliates that are publicly owned corporations, and there is no publicly held corporation that owns 10% of its stock.

RELATED CASES

Douglass Properties II, LLC v. City of Olympia, No. 18-2-04520-34, Thurston County Superior Court. Judgment entered May 17, 2019.

Douglass Properties II, LLC v. City of Olympia, No. 535558-1-I, Washington Court of Appeals, Division Two. Judgment entered Feb. 2, 2021.

Douglass Properties II, LLC v. City of Olympia, No. 99545-1, Washington Supreme Court. Judgment entered June 30, 2021.

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PETITION FOR WRIT OF CERTIORARI

Douglass Properties II, LLC (hereafter "Douglass") respectfully requests that this Court issue a writ of certiorari to review the judgment of the Washington Supreme Court.

OPINIONS BELOW

The *Order* of the Washington Supreme Court denying review is reproduced at Appendix 1-2. The *Published Opinion* of the Washington Court of Appeals is reported at *Douglass Properties II, LLC v. City of Olympia*, 16 Wn. App. 2d 158, 479 P.3d 1200 (2021) and is reproduced at Appendix 3-25. The *Decision* of the King County Superior Court is reproduced at Appendix 26-28. The *Decision* of the Olympia Hearing Examiner is reproduced at Appendix 29-62.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioner Douglass Properties II, LLC filed a lawsuit challenging the City of Olympia's collection of mandatory development impact fees as violating the unconstitutional conditions doctrine predicated on the Fifth and Fourteenth Amendments to the United States Constitution. The Washington Court of Appeals denied the federal claim, and the Washington Supreme

Court denied review on June 30, 2021. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This case is an excellent vehicle for the Court to clarify the application of *Nollan/Dolan/Koontz* to development impact fees commonly demanded by government agencies across the nation as a condition for issuance of a land use permit. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and later in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), this Court held that when a government agency demands property as condition of a land use permit, the government's demand must have an essential nexus and rough proportionality to the impacts of the proposed development.

In *Koontz*, this Court clarified that the requirements of the *Nollan/Dolan* doctrine apply to a government agency's demand for property from a land-use permit applicant "even when the government denies the permit and even when its demand is for money." This Court recognized that demands for money create the same 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." 570 U.S. at 614.

The dissent in *Koontz* criticized the majority, *inter alia*, for failing to clarify whether a distinction between "adjudicative" and "legislative" impact fees still exists. 570 U.S. at 628 (Kagen, J., dissenting). The dissent also suggested that there was no evidence of governments declining to apply heightened scrutiny to impact fees or extorting permit applicants. *Id*. at 629. Nonetheless, the dissent specifically cited Washington's impact fee statute as an example of the types of land-use impact fees that would be subject to *Nollan/Dolan* under *Koontz*. *Id*. at 626 (citing *City of Olympia v. Drebick*, 156 Wn.2d 289, 305, 26 P.3d 802 (2006)).

In this case the City of Olympia demanded a traffic impact fee of $167,580 as a condition for the issuance of a building permit for a consumer mini-storage warehouse based in part on traffic impact data for commercial warehouses. That figure was at least three-and-a-half times the undisputed actual traffic impact of petitioner's project. Petitioner Douglass proved

that a proportionate impact fee was no more than $48,179.93, and that the City's figure ($167,580) was based on erroneous assumptions, an inappropriate use category, and a lack of data about the impacts of mini-storage warehouses when the City's impact fee schedule was adopted. The City offered no contrary evidence, but relied on its previously adopted traffic impact fee schedule for commercial warehouses as the basis for the impact fee without presenting any evidence that the impacts were even roughly comparable. Based on the erroneous conclusion that *Nollan/Dolan* was inapplicable even after *Koontz*, the Hearing Examiner refused to make findings of fact as to the actual proportional impacts of the Douglass project and upheld the City's impact fee demand under the "clearly erroneous" standard.

The Washington Court of Appeals affirmed the Hearing Examiner. Ignoring both the uncontroverted evidence that the fee was not proportionate to the actual impacts and the substantial discretion granted by the impact fee statutes to local officials to determine the actual amount of a particular impact fee, the Court of Appeals held that *Koontz* was inapplicable to "legislatively prescribed" development fees:

> Although *Koontz* expanded the scope of takings that require *Nollan/Dolan* scrutiny to include "monetary exactions," it did not expand that scope to include legislatively prescribed development fees like those at issue here.

Appendix at 18-19. The court's characterization of the City's impact fees as "legislatively prescribed" was

directly contrary to *Koontz*, which held that *Nollan/Dolan* must apply wherever the government has substantial power and discretion in land use approvals. 570 U.S. at 614.

This Court should grant certiorari in this case to clarify the application of *Nollan/Dolan/Koontz* to all development impact fee statutes, whether "legislatively" prescribed or not, that impose fees that are not simply uniform permitting fees but instead are based on the impacts of the project, such as the nature, size, and/or volume of traffic generated by the project. There is no reason why such fees should be immune from compliance with the *Nollan/Dolan* nexus and proportionality requirements.

Alternatively, this Court should grant certiorari in this case to clarify the application of *Nollan/Dolan/Koontz* to impact fee statutes that give local governments substantial discretion to determine the amount of impact fees required for a particular permit. This Court should confirm that, even where generally applicable impact fee schedules are legislatively adopted, where local government has discretion to determine the amount of impact fees required for a particular project, the impact fees must satisfy *Nollan/Dolan*.

STATEMENT OF THE CASE

A. Legal Background—Washington State's Impact Fee Statute

Prior to 1990 amendments to RCW 82.02.020 *et seq.*, local governments in Washington had no authority under state law to impose impact fees as a condition of approval for a land use permit or approval. *See Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 753 n.9, 49 P.3d 867 (2002); Laws of 1990, 1st Ex. Sess. Ch. 17, § 42. The 1990 Growth Management Act (GMA) amended Chap. 82.02 RCW to allow counties and cities to impose traffic impact fees under certain conditions. RCW 82.02.020. Specifically, traffic impact fees:

> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; . . . .

RCW 82.02.050(4).

Although Washington's impact fee statutes require local agencies to adopt impact fee schedules, RCW 82.02.060(1), the statutes also give local officials considerable discretion to determine the actual amount of impact fees required for a particular permit:

- RCW 82.02.070(5) requires local governments to provide an appeal for impact fees at which "the impact fee may be modified upon a determination that it is proper to do so based on principles of fairness."

- RCW 82.02.060(5) and (6) require local governments to allow consideration of unusual circumstances as well as studies and data provided by the developer in determining the amount of fees.

In 2006, the question of whether the nexus and proportionality requirements in RCW 82.02.050(4) were also constitutionally-required by the *Nollan/Dolan* doctrine was debated by the Washington Supreme Court in *City of Olympia v. Drebick*, 156 Wn.2d 289. The majority of that court noted that (in 2006) this Court had not yet extended the *Nollan/Dolan* doctrine to impact fees:

> [N]either the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances.

156 Wn.2d at 302.

But in 2013, this Court clarified that even monetary exactions required for a land use permit are subject to *Nollan/Dolan*, and therefore must be roughly proportionate to the impact of a proposed development:

> We hold that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the

> permit and even when its demand is for money.

Koontz, 570 U.S. at 619.

The dissent in *Koontz* confirmed that *Nollan/Dolan* now applies to all sorts of land-use permit exactions and permit conditions:

> By applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes—the majority extends the Takings Clause, with its notoriously "difficult" and "perplexing" standards, into the very heart of local land-use regulation and service delivery.

570 U.S. at 626 (Kagen, J., dissenting). The *Koontz* dissent specifically cited **Washington's** impact fee statutes as an example of state impact fees that "now must meet *Nollan* and *Dolan's* nexus and proportionality tests." *Id.* at 626-27 (citing *Drebick*, 156 Wn.2d at 305).

B. Factual and Procedural Background

In 2016, Douglass applied for building permits to construct a mini-storage warehouse in Olympia, Washington. Appendix at 4. The City imposed a traffic impact fee of $167,000 based in part on a previously adopted impact fee schedule for commercial warehouses. *Id*. Douglass appealed to the City's Hearing Examiner, arguing that the fee was excessive and not roughly proportionate to the impact of the Douglass project. Appendix at 53-55.

At the hearing, Douglass proved that a proportionate impact fee for its mini-storage warehouse was no more than $48,179.93, and that the City's figure ($167,580) was based on erroneous assumptions, an inappropriate use category, and a lack of data about the impacts of mini-storage warehouses when the City's impact fee schedule was adopted. Appendix at 41-50. The City offered no evidence to the contrary. Instead, the City's expert merely testified about how the impact fee schedules were adopted. Appendix at 6-7, 42, 44-46, 47-49.

Douglass argued that the City's impact fees were subject to *Nollan/Dolan* under *Koontz*, *supra*. But the Hearing Examiner ignored *Koontz*, erroneously concluding that the Hearing Examiner was required to follow the Washington Supreme Court's 2006 decision in *Olympia v. Drebick*, *supra*, whether or not that decision was still valid after *Koontz*. Appendix at 58.

Based on its erroneous conclusion that *Nollan/Dolan* did not apply, the City's Hearing Examiner failed to make the findings of fact on whether the impact fee for the Douglass project was in fact proportionate under *Nollan/Dolan*. Instead, the Hearing Examiner ignored undisputed evidence and upheld the City's reliance on its existing impact fee schedule for a different use under the clearly erroneous standard. Appendix at 60.

For example, Douglass' expert explained that the City's trip length adjustment variable, which assumed an average trip length to a mini-storage warehouse

would be 5.1 miles, had no basis in reality. Appendix at 48. That distance was larger than the entire City of Olympia, and there were several other mini-storage warehouses within 5 miles. *Id*. Douglass' expert also explained that the City's impact fee schedules were based on traffic data for ordinary commercial warehouses, which have much longer average trip lengths than mini-storage facilities. Appendix 48-49. In response, the City's expert merely opined that it was "appropriate" to rely on data for ordinary warehouses in the absence of data on mini-storage warehouses. *Id.* at 49. Based on this evidence the Hearing Examiner stated:

> d. Trip Adjustment Variable. Douglass's most compelling argument is with respect to the trip adjustment variable of 1.7, resulting in an average trip to mini warehouses of 5.1 miles. Douglass's arguments have an intuitive quality, especially with additional anecdotal evidence as to the current location of competing facilities and the likely travel patterns of self storage customers. But the City's decision to rely on the best available data is not clearly erroneous, especially when no data has been gathered specifically for mini warehouse facilities.

Appendix at 54.

The Hearing Examiner similarly rejected Douglass' other challenges to the impact fee calculations based on the Hearing Examiner's erroneous conclusion that the City was not required by *Nollan/Dolan* to establish

that the impact fee was actually proportionate to the impact of the Douglass project. Appendix at 58. Without making any findings of fact on whether the impact fee was actually proportionate, the Hearing Examiner upheld the City's impact fee demand based on the conclusion that the City's impact fee schedules, and the City's decision to adhere to those schedules, was not "clearly erroneous." Appendix at 60.

The Thurston County Superior Court affirmed. Appendix at 27. Douglass appealed to the Washington Court of Appeals.

The Court of Appeals upheld the Hearing Examiner's decision. Appendix at 4. Ignoring both the uncontroverted evidence that the fee was not proportionate to the actual impacts and the substantial discretion afforded to the City under RCW 82.02.060(5), (6) and RCW 82.02.070(5), the court held that that the City's impact fees are "legislatively prescribed development fees" that are not subject to *Nollan/Dolan* scrutiny under *Koontz*, *supra*. Appendix at 9.

Douglass also argued that the City had the burden to prove the proportionality of the impact fee. But the Court rejected these arguments, again based on its erroneous interpretation of *Koontz*:

> Because the *Nollan/Dolan* test does not apply to legislatively prescribed impact fees, and because this is a LUPA appeal where the City's ordinance was explicit in giving the challenger the burden of proof, we agree with the City.

Appendix at 20. The court agreed with the City that Douglass had the burden to prove that the City's imposition of the impact fees was "clearly erroneous." Appendix at 22.[2]

Douglass filed a petition for review in the Washington Supreme Court, which denied review on June 30, 2021. Appendix at 2. Douglass seeks review in this Court.

REASONS FOR GRANTING THE WRIT

A. Certiorari should be granted to clarify that *Nollan/Dolan/Koontz* applies to all development impact fees.

This case presents an opportunity to clarify the application of *Koontz* to a more common type of land use regulation: ***impact fees***. The facts of *Koontz* were both complex and unusual, involving demands for both easements and offsite mitigation, which demands were

[2] The Washington appellate courts could have ruled ***in favor of Douglass*** on state law grounds. The Court of Appeals noted that appellate courts should avoid constitutional issues where cases can be decided upon state law grounds. Appendix at 11. But the court did not do so, and relied on its erroneous interpretation of *Koontz* to reject all of Douglass' arguments. Appendix at 1, 9, 15, 20, 24. The Court ignored, *sub silentio*, the City's erroneous assertion that the impact fee was merely a tax for purposes of *Koontz*. If the court had accepted the argument that impact fees under RCW 82.02.050 *et seq*. were merely taxes it would not have been necessary for the court to address *Koontz* at all, much less hold that the impact fees were "legislative" as opposed to adjudicative fees.

ultimately rejected by the applicant. The majority and dissent in *Koontz* were far apart as to whether the majority's application of *Nollan/Dolan* would significantly change land use law. 570 U.S. at 618, 626 (Kagen, J., dissenting). The majority noted that:

> Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it. Yet the "significant practical harm" the dissent predicts has not come to pass. (Citations omitted).

570 U.S. at 618. But this Court has not yet applied *Nollan/Dolan* to the most ubiquitous of monetary exactions, development impact fees,[3] and the decision of

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[3] As of 2019, thirty-nine states authorized development impact fees. According to a 2019 National Impact Fee Survey conducted by a nationally recognized consulting firm that specializes in planning services for cities, counties, regions, and states throughout the country, thirty-four states had impact fees of various types. http://www.impactfees.com/publications%20pdf/2019 survey.pdf. This survey did not include five more states that authorize or allow impact fees. Indiana authorizes them under Ind. Code Ann. § 36-7-4-1311 (West). Maine authorizes impact fees under Me. Rev. Stat. tit. 30-A, § 4354. New Jersey authorizes impact fees under N.J. Stat. Ann. § 40:55D-42 (West). Rhode Island authorizes impact fees under Rhode Island's Development Impact Fee Act (RIDIFA), G.L. 1956 chapter 22.4 of title 45. In addition, Alabama allows local impact fees under more general enabling statutes for municipalities. *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1004-05 & 1008 (Ala. 2010) (discussing authority for imposing fees and holding *Nollan/Dolan* inapplicable to impact fees).

the Washington Court of Appeals in this case shows that there is still significant disagreement about the scope of *Nollan/Dolan* after *Koontz*. This case allows the Court to apply *Nollan/Dolan* to the much more typical situation of monetary exactions involving impact fees, and thereby clarify that such exactions must comply with the constitutional requirements of nexus and proportionality.

Clarification of the scope of *Koontz* is needed. The *Koontz* dissent specifically predicted that Washington's impact fee statutes would be governed by *Nollan/Dolan* after *Koontz*. 570 U.S. at 626-27. But the Court of Appeals reached the opposite result by characterizing the impact fees as "legislatively prescribed development fees." Appendix at 9. The approach adopted by the Washington court would make the most common form of monetary exactions immune from scrutiny simply by having them "legislatively" adopted by local governments. There is no constitutionally-based rationale for affording such fees immunity from scrutiny. As this case demonstrates, such fees contain implicit and explicit assumptions that go to the heart of nexus and proportionality. There is no principled reason for allowing the most widespread method of imposing monetary exactions on permitting to evade compliance with most basic of constitutional requirements.

This case also avoids many of the issues raised by the *Koontz* dissent, allowing the Court to focus on the central issue of applying *Nollan/Dolan* to ordinary development impact fees. Specifically, this case avoids the issue of whether the impact fees are taxes under state

law. The *Koontz* majority stated that "teasing out the difference between taxes and takings is more difficult in theory than in practice." 570 U.S. at 616. In this case both the hearing examiner and the Court of Appeals rejected, *sub silentio*, the City's argument that impact fees under Chap. 82.02 RCW were taxes under state law.

In addition to disagreeing with the majority's application of *Nollan/Dolan*, the dissent had two other objections to the *Koontz* majority opinion that are not relevant to this case:

- First, the *Koontz* dissent disputed whether the District had made an unequivocal demand (for money or property) to the permit applicant such that *Nollan/Dolan* could apply. 570 U.S. at 631-34 (Kagen, J., dissenting). In this case the City clearly demanded a specific amount of money as a condition of issuance of a particular permit. Appendix at 3.
- Second, the *Koontz* dissent questioned what remedy, if any, could be provided where no property had actually been taken (because the District's demand was refused). 570 U.S. at 634-35. (Kagen, J., dissenting). In this case Douglass paid the City $167,800 under protest, and, at a minimum, Douglass is entitled to refund of much of that money. Appendix at 5.

Avoiding these secondary issues will allow the Court, including the *Koontz* dissenters, to focus on the central issue of applying *Nollan/Dolan* to impact fees.

The *Koontz* dissent questioned whether there remains a viable distinction between "adjudicative" decisions to impose particular permit conditions and "legislative" determinations that apply more broadly. 570 U.S. at 628. In this case the Court of Appeals concluded that *Koontz* "did not expand that scope to include legislatively prescribed development fees like those at issue here." Appendix at 19.

The Court should grant review to clarify, in response to the *Koontz* dissent and the Washington court's narrow interpretation of *Koontz*, that there is no distinction between "legislatively prescribed" fees and adjudicative or discretionary fees for purposes of *Nollan/Dolan*. This case demonstrates how agencies can use "legislatively prescribed" fees to evade *Nollan/Dolan* scrutiny and extort excessive impact fees from permit applicants.

On each of the "legislatively prescribed" impact fee variables challenged by Douglass, the City made assumptions that resulted in larger impact fees, and refused to consider any evidence that its assumptions were wrong:

- Despite the fact that a newer version of the ITE Transportation Manual had lowered the trip generation rate for mini warehouses from 0.26 trips per 1000 square feet to only 0.17 per 1000 square feet, a reduction of more than a third, the City insisted on using the inflated figure from the older ITE manual because it resulted in a larger impact fee. Appendix at 45.

- The City assumed, based on a lack of available data, that 100% of vehicle trips to a mini storage warehouse would be new vehicle trips that would otherwise not have occurred. In other words, the City assumed that mini storage customers (i) never choose a mini-storage warehouse that is on the customer's usual travel route for other errands, work or school, and (ii) never combine their trip to the mini-storage warehouse with any other vehicle trip. Those assumptions, which are contrary to both common sense and the actual data that was provided by Douglass, resulted in the largest possible impact fee, so the City had no incentive to question its obviously erroneous assumption built into its schedule. Appendix at 47.

- The City assumed, again based on a lack of available data, that the average length of a vehicle trip to a mini-storage warehouse was the same as the average vehicle trip to a commercial warehouse, resulting in an absurd average trip length of 5.1 miles. Douglass' expert explained that there was no basis for this assumption, and even the hearing examiner agreed. But the City insisted on using the trip length multiplier for commercial warehouses because that assumption resulted in a much larger impact fee. Appendix at 49.

On each variable the City made unwarranted assumptions that resulted in the largest possible impact fee. These facts also demonstrate why the typical impact fee is nothing like a uniform fee or uniform processing

fee. The assumptions and formulas "legislatively prescribed" in the typical impact fee ordinance contain a number of elements that, as demonstrated in this case, can be manipulated to maximize the fee without regard to its proportionality or nexus.

Simply labeling impact fees as "legislatively prescribed" ignores the reality of how those codes are written and how they are applied. There is no principled reason why such "legislatively prescribed" fees should be allowed to evade the nexus and proportionality requirements of *Nollan/Dolan/Koontz*. This case highlights the reasons why this issue should be addressed. By characterizing the City's assumptions as "legislatively prescribed," the Court of Appeals allowed the City to charge Douglass an impact fee that was at least three times larger than the actual traffic impact of his project. By not clarifying that the nexus and proportionality requirements of *Nollan/Dolan/Koontz*, apply to impact fees that are not uniform processing fees, there is nothing to stop municipalities from incorporating assumptions or criteria about traffic (or other) impacts for certain land uses or industries to simply maximize revenue without satisfying the nexus and proportionality tests, so long as the municipality enshrines those assumptions in its local code "legislatively."

There is no practical reason for allowing "legislatively prescribed" fees to evade *Nollan/Dolan* scrutiny. State impact fee schemes, like Washington's, already provide for a hearing to determine the actual fee for a particular project. *See* RCW 82.02.070(5); Arizona

Revised Statutes, 9-500.12. By applying *Nollan/Dolan* to all impact fees, the subject matter of such hearings would merely shift from the irrelevant question of how the local government enacted the fee system or default schedules to the relevant inquiry of whether the demanded impact fee has sufficient nexus and is roughly proportionate to the impact of the project.

B. Alternatively, certiorari should be granted to confirm that *Koontz* applies to all development impact fees where the agency has discretion to determine the amount of the fees.

The Court of Appeals in this case cited three post-*Koontz* cases to support its conclusion that, even after *Koontz*, the *Nollan/Dolan* doctrine does not apply to impact fees under Chap. 82.02 RCW. Appendix at 18. But all of those cases involved legislatively-determined fees that gave local officials no discretion to determine the amount of the fee. *See Dabbs v. Anne Arundel County*, 182 A.3d 798, 811 (Md. 2018) (legislative fee left no discretion in the imposition or calculation of the fee); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1105 (Ariz. 2018) (traffic signal fee was legislative act); *Better Housing for Long Beach v. Newsom*, 452 F. Supp. 3d 921 (C.D. Cal. 2020) (rental assistance ordinance requiring payment of one month's rent was legislative fee). None of those cases involved fees for which the government agency had discretion to

determine the amount of fees required for a particular permit.[4]

In this case the Court of Appeals simply ignored the discretion afforded to local agencies by Chap. 82.02 RCW. The statute requires that local impact fee ordinances

> (5) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;
>
> (6) Shall include a provision for calculating the amount of the fee to be imposed on a particular development that permits consideration of studies and data submitted by the developer to adjust the amount of the fee;

RCW 82.02.060. The statute also requires local governments to provide a hearing process in which impact fees may be modified "based on principles of fairness." RCW 82.02.070(5).[5] These statutes give local agencies

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[4] Although *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099 (Ariz. 2018) held that the traffic signal fee was a legislative act not subject to *Nollan/Dolan*, the court also held that, because the agency exercised discretion in determining which land use category applied to the particular project, the applicant was entitled to a hearing under state law. 425 P.3d at 1107.

[5] The Court of Appeals cited RCW 82.02.060(6) and RCW 82.02.070(5) in its preliminary discussion of state law. Appendix at 14. The court failed to cite RCW 82.02.060(5) which gave the City additional discretion to determine the amount of the fee. *Id*.

in Washington exactly the sort of discretion that should trigger *Nollan/Dolan* scrutiny under *Koontz*, even if this Court does not apply *Nollan/Dolan* to all impact fees:

> 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. (Emphasis added).

570 U.S. at 614.

In this case the City had the discretion to impose a smaller impact fee based on the obvious errors in the City's fee determination that Douglass established. For example, under RCW 82.02.060(5) the City had the discretion to simply acknowledge that the City's absurd assumption of a 5.1 mile average trip length to a mini-storage warehouse—a radius larger than the entire City of Olympia and which included numerous competing storage facilities—was obviously excessive. The City also could have simply conceded the point at the hearing, acknowledging that "principles of fairness" required the City to demand a smaller impact fee. But the City refused to do so. Rather than respond

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But the court simply ignored the discretion created by these statutes in order to conclude that the impact fee was "legislatively prescribed." Appendix at 19.

to Douglass' showing that the City's assumptions for mini-storage warehouses were erroneous, the City defended its preexisting impact fee assumptions under the "clearly erroneous" standard in order to take more money from Douglass.

Douglass was thus subjected to exactly the sort of extortionate demands from local officials that the *Nollan/Dolan* doctrine is intended to prevent. As the *Koontz* majority stated:

> So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

570 U.S. at 605. Douglass had no choice but to pay the City's extortionate demand for $167,580 in order to obtain the permit required for his project.

The Court of Appeals mischaracterized the City's impact fees as "legislatively prescribed" fees "outside the scope of *Koontz*" by simply ignoring the discretion afforded to local officials to determine the amount of the fee required for a particular permit. Appendix at 20. Assuming, *arguendo*, that a distinction between "legislatively prescribed" fees and adjudicative or discretionary fees remains viable after *Koontz*, this Court should grant review to clarify that where the local

government has discretion to determine the impact fee for a particular permit such fees are subject to *Nollan/Dolan*. It is essential to clarify this issue to ensure that those statutory schemes do not evade the *Nollan/Dolan/Koontz* requirements.

The Court should grant review to clarify (1) that the *Nollan/Dolan/Koontz* doctrine does not recognize any distinction between "adjudicative" and "legislative" fees, and applies to legislatively adopted development impact fees when those fees are based on the characteristics of the project and are not uniform processing fees, and/or (2) that the *Nollan/Dolan/Koontz* doctrine applies to impact fee statutes that give local governments substantial discretion to determine the amount of impact fees required for a particular permit. Either way, the Court should grant review to clarify that *Nollan/Dolan* applies to the impact fees at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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