No. 22-1074

In the Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Third Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan v. Cal. Coastal Comm'n,* 483 U.S. 825, 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), simply because it is authorized by legislation.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. PLF attorneys have participated as lead counsel in several cases before the U.S. Supreme Court in defense of the right of individuals to make reasonable use of their property, and the right to obtain just compensation when that right is infringed. *See, e.g.*, *Wilkins v. United States*, 143 S.Ct. 870 (2023); *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). As part of this mission PLF attorneys were lead counsel in the unconstitutional-conditions cases *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and submitted *amicus* briefs in support of the petitioner in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). PLF attorneys were also lead counsel in the California Supreme Court case, *California Building Industry Ass'n v. City of San Jose*, 61 Cal.4th 435, 189 Cal.Rptr.3d 475, 351 P.3d 974 (2015)—a decision extensively relied upon by

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[1] Pursuant to Rule 37.2, PLF provided timely notice to all parties. Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to find the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

the California Court of Appeal in the opinion below. PLF's arguments based on this experience will assist the Court in understanding and deciding the important issues presented by the petition in this case.

INTRODUCTION AND SUMMARY

A demand that a property owner surrender his or her constitutional rights to obtain a development permit is not exempt from this Court's nexus and proportionality requirements simply because the legislature—rather than some other branch of government—imposes the condition on everyone. *Dolan*, 512 U.S. at 385 ("[G]overnmental authority to exact such a condition [is] circumscribed by the Fifth and Fourteenth Amendments."). And yet some courts, including the California court below, remain firmly entrenched on a rule that categorically exempts legislative demands from the nexus and proportionality tests. Mr. Sheetz's petition presents the Court with an excellent opportunity to finally resolve this long-festering and unsettled question concerning the limits that the Fifth and Fourteenth Amendments to the U.S. Constitution place on the government's power to adopt blanket, legislatively mandated conditions that leverage the land-use permitting process to exact private property for a public use without compensation. Timothy M. Mulvaney, *The State of Exactions*, 61 Wm. & Mary L. Rev. 169, 194 (2019) (this unsettled issue raises "one of the most pressing questions across the entire realm of takings law").

In *Nollan* and *Dolan*, this Court held that the doctrine of unconstitutional conditions, as specially applied to enforce the Fifth and Fourteenth Amendments in the context of land-use permitting, prevents the government from using that process to get for free what the Constitution requires the public pay for. To enforce those rights, *Nollan* and *Dolan* require the government to show that the condition is designed to mitigate impacts caused by the proposed development via a two-part "essential nexus" and "rough proportionality" test. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. A permit condition that does not satisfy either prong of this test is unconstitutional and invalid. *Koontz*, 570 U.S. at 604–05. In *Koontz*, this Court confirmed that the doctrine applies to impact fees (often called "in-lieu fees" or "monetary exactions") imposed as a condition of permit approval. *Id*. The rationale underlying this Court's exaction decisions applies with equal force whether the condition is imposed as part of an *ad hoc* decision-making process or via legislative command. *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117−18 (1995) ("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.") (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

The nexus and proportionality rules, however, are not equally enforced throughout the nation. Over the years, state and lower federal courts have sharply divided on the foundational question of whether the doctrine applies equally to all branches of government, or if it applies only to the executive branch. *See*, *e.g.*, *California Bldg. Indus. Ass'n v. City*

of San Jose, 136 S.Ct. 928, 929, 194 L. Ed. 2d (2016) (Thomas, J., concurring in denial of certiorari) (recognizing the need to resolve the split of authority on this important question of constitutional law). Resolution of this longstanding split of authority is necessary to ensure that the doctrine of unconstitutional conditions is applied in a consistent and predictable manner that is faithful to the text of the Takings Clause, which places no significance on which branch of government is acting when private property is taken without compensation. *Cedar Point*, 141 S.Ct. at 2072.

Settling this constitutional conflict is, moreover, a matter of utmost importance to the public's interest in ensuring the production of affordable housing. When the government is not required to demonstrate a connection between an exaction and project impacts, there is no limit to the amount of money or property that the government can demand as a permit condition, and there is no end to the types of social burdens the government can place on an individual permit-seeker. This practice by local government is contrary to the core purpose of the Fifth Amendment. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("[P]ublic burdens … should be borne by the public as a whole" and cannot be shifted onto individual property owners.). The practice also negatively impacts housing production and the ultimate purchase price of new homes. *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 506–06 (N.C. 2022) (noting that impact fees are often passed along to the purchaser). Only a faithful application of the unconstitutional-conditions doctrine ensures that government may continue to collect fees necessary to offset the impacts that a new

home might have on the public, while striking impact fees and other permit conditions that bear no demonstrable relationship to the proposed development. *See* James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause … protects against this majoritarian tyranny … by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I.

RESOLVING THE PERSISTENT SPLIT OF AUTHORITY IS NECESSARY AND WARRANTED IN THIS CASE

The question whether legislatively mandated exactions are subject to *Nollan* and *Dolan* is the topic of a persistent nationwide split of authority that has festered for decades and "shows no signs of abating" without this Court's intervention. *Cal. Bldg. Indus. Ass'n*, 136 S.Ct. at 928–29 (Thomas, J., concurring in denial of certiorari).

If anything, this divide has worsened in the seven years since Justice Thomas last acknowledged the importance of resolving it at the earliest opportunity. *Id.* at 929. Indeed, although a handful of courts have recently concluded that legislative exactions must be held subject to *Nollan* and *Dolan*,[2] at least twice as

[2] *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, __ F.4th __, No. 21-6179, 2023 WL 3335869, at *9–*15 (6th Cir. May 10,

many—including the court below—remain firmly entrenched on a categorical rule exempting legislative exactions from *Nollan* and *Dolan*. *See* App. A-11; *see also Douglass Props. II, LLC v. City of Olympia*, 479 P.3d 1200, 1207 (Wash. Ct. App. 2021) ("We hold that the *Nollan/Dolan* test does not apply to … legislatively prescribed generally applicable fees …."); *Erickson v. Cnty. of Nevada*, No. C082927, 2020 WL 7021300, at *5 (Cal. Ct. App. 2020) (following California's legislative exactions rule); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1102–03 (Ariz. Ct. App. 2018) (conditions imposed by generally applicable legislation are not subject to *Nollan* and *Dolan*); *Dabbs v. Anne Arundel Cnty.*, 182 A.3d 798, 813 (Md. 2018) ("Impact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny."); *Cherk v. Cnty. of Marin*, No. A153579, 2018 WL 6583442, at *6 (Cal. Ct. App. Dec. 14, 2018) (following California's legislative exactions rule); *Golf Course Assoc., LLC v. New Castle Cnty.*, No. 15A–02–007 JAP, 2016 WL 1425367, at *18 (Del. Super. Ct. 2016) ("general statutory restrictions, evenly applied, do not constitute an unconstitutional exaction"). Meanwhile, one state court has declined to rule on the issue altogether, citing widespread confusion and the lack of clear guidance from this Court. *Washington Townhomes, LLC v. Washington Cnty. Water Conservancy Dist.*, 388 P.3d 753, 758, n.3 (Utah 2016).

2023); *Ballinger v. City of Oakland*, 24 F.4th 1287, 1296 (9th Cir. 2022); *Anderson Creek Partners*, 876 S.E.2d at 500 (N.C. 2022).

The disarray caused by this split of authority is most apparent among the states that fall within the Ninth Circuit. As noted in the Petition, the Ninth Circuit recently revisited this issue and, after evaluating the text of the Fifth Amendment and this Court's decisions, concluded that legislatively imposed conditions on development trigger the very same concerns about governmental overreach as do exactions that officials demand via the administrative permitting process. On that basis, the Ninth Circuit held that legislative exactions are not exempt from the nexus and proportionality test. *See Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022) ("What matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does.").

In the decision below, however, the California Court of Appeal—considering the same authorities—rejected the Ninth Circuit's reasoning and reaffirmed a state-court rule that categorically exempts legislative exactions from the *Nollan*/*Dolan* test. App. A-11. The courts of Washington, Arizona, and Oregon have also adopted *per se* rules that exempt legislative exactions from scrutiny under *Nollan* and *Dolan*. *See*, *e.g.*, *Douglass Props.*, 479 P.3d at 1207; *Am. Furniture Warehouse*, 425 P.3d at 1102–03; *W. Linn Corp. Park, L.L.C. v. City of W. Linn*, 240 P.3d 29, 45 (Or. 2010) ("In the absence of a Supreme Court ruling to the contrary, we conclude that a [legislative exaction] that is not roughly proportional to the impacts of its development does not constitute an unconstitutional condition under *Nollan*/*Dolan*.").

The consequences for owners in jurisdictions that exempt legislative exactions from the doctrine of unconstitutional conditions are severe because state

laws often require that they litigate all issues arising from a land-use permit decision exclusively through state courts. *See*, *e.g.*, *Quade v. Ariz. Bd. of Regents*, 700 Fed. App'x 623, 625 (9th Cir. 2017) (a federal constitutional challenge to an agency action must be brought in the state court with statutory authority to hear an administrative appeal). Thus, in most circumstances, property owners will have no access to the federal courts to enforce their federal constitutional rights, as allowed by recent decisions like *Ballinger* and *Knight*.

This deeply entrenched divide on a basic question of constitutional law—one that arises frequently in state and federal courts—cannot be allowed to continue. *See Koontz*, 570 U.S. at 604–06 (the doctrine defines the circumstances under which government may lawfully exact property or fees from a land-use permit applicant). Until this Court resolves this question, "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." *Cal. Bldg. Indus. Ass'n*, 136 S.Ct. at 929 (Thomas, J., concurring in denial of certiorari).

This petition provides the Court with an excellent opportunity to resolve the decades-long split of authority by confirming that legislative exactions are subject to *Nollan*/*Dolan* because it presents the issue as a pure question of law. App. A-11. If *Nollan* and *Dolan* apply to the County's traffic impact mitigation fee, there is no question, then, that a violation of the unconstitutional-conditions doctrine occurred because the County made no determination whether Mr.

Sheetz's home would have any impact on state or local roads and, furthermore, made no individualized determination about the relationship between the project's alleged impacts and the $23,420 exaction. App. A-3 to A-5. The petition, therefore, squarely asks whether *Nollan* and *Dolan* apply to development conditions mandated by acts of generally applicable legislation. This Court should take the opportunity to finally settle this highly consequential and long-simmering split of authority.

II.

CALIFORNIA'S "LEGISLATIVE EXACTIONS" RULE IS IN TENSION WITH THE TEXT OF THE U.S. CONSTITUTION AND DECISIONS OF THIS COURT

Review by this Court is necessary to ensure that the unconstitutional-conditions doctrine is applied in a consistent manner that is faithful to the text of the Fifth and Fourteenth Amendments. *Dolan*, 512 U.S. at 385 ("[G]overnmental authority to exact such a condition [is] circumscribed by the Fifth and Fourteenth Amendments."). As this Court has noted on several occasions, there is nothing in the language of the Taking Clause that excludes the legislative branch (or any other branch) from its command "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In the context of a physical takings claim, then, the determination of whether a taking has occurred does not depend on "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," only that the property is taken by the government without compensation. *Cedar Point*, 141 S.Ct. at 2072; *see also*

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 713–15 (2010) (emphasizing that the Takings Clause is unconcerned with which "particular state actor is" burdening property rights) (plurality opinion); *Parking Ass'n of Ga.*, 515 U.S. at 1117–18 ("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.") (Thomas, J., joined by O'Connor, J., dissenting to denial of certiorari).

Neither is there any basis in the Fourteenth Amendment for California's "legislative exactions" rule. U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law."); *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (the Fourteenth Amendment incorporated the protections secured by the Fifth Amendment against the states). According to its plain text, the Fourteenth Amendment applies broadly to each "State"—a formulation that covers all branches of government without distinguishing among them. *See Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930). Thus, on their face, the constitutional provisions enforced by *Nollan*/*Dolan*'s application of the unconstitutional-conditions doctrine reject any rule that categorically exempts the legislature from the limitations imposed on government by the Takings Clause.

If anything, history shows that the Framers intended the Takings Clause to protect precisely against legislative acts that authorize the uncompensated taking of private property. *See Stop*

the Beach Renourishment, 560 U.S. at 739 (Kennedy, J., concurring in the judgment) (emphasizing that during the Framers' time, "it appears these physical appropriations were traditionally made by legislatures"). Indeed, in England, long before the Fifth Amendment's enactment, only Parliament could authorize appropriations of private property. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1756 (2013); Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1263 (2002). As Blackstone noted in his celebrated treatise on English law, the taking of property was viewed as too "dangerous" a power to be left to just "any public tribunal," and so "nothing but the legislature [could] perform" this activity. 1 William Blackstone, *Commentaries on the Laws of England* 135 (1765). The practice of placing this authority in the legislative branch continued in the colonies, where colonial legislatures were typically responsible for passing provisions authorizing the taking of property to be used for public projects. *See* James W. Ely, Jr., *"That Due Satisfaction May Be Made": the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 5–11 (1992) (listing examples).

Given this historical practice, it is unsurprising that legal scholarship from the period between enactment of the Fifth and Fourteenth Amendments identified the Takings Clause as primarily placing a limit on *legislative* authority. As James Kent observed, the Takings Clause "imposed a great and valuable check upon the exercise of legislative power[.]" 2 James Kent, *Commentaries on American Law* 276 (1827). Joseph Story similarly noted "how

vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1784, at 661 (1833). And Judge Thomas Cooley offered that "[t]he right to appropriate private property to public uses lies dormant in the State, until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriation." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 527–28 (1868). Many other legal scholars from before the modern era expressed similar views. *See, e.g.*, Henry E. Mills & Augustus L. Abbott, *Mills on the Law of Eminent Domain* §§ 30–36a, at 119–28 (2d ed. 1888); E. Fitch Smith, *Commentaries on Statute and Constitutional Law and Statutory and Constitutional Construction* §§ 311–13, at 466–67 (1848); William Rawle, *A View of the Constitution of the United States of America* 133 (1829); *VanHorne's Lessee v. Dorrance*, 2 U.S. (F. Cas.) 2 Dall. 304, 310–16 (C.C.D. Pa. 1795).

By adopting a rule that categorically exempts legislative acts from the doctrine of unconstitutional conditions, the California courts (and numerous other courts) have aggrandized the authority of a single branch of government far beyond the bounds established by the U.S. Constitution. Review by this Court is necessary to ensure that the guarantees of the Fifth and Fourteenth Amendments are enforced in a uniform and predictable manner across the nation and between the state and federal courts. Review is warranted and should be granted.

III.

CALIFORNIA'S "LEGISLATIVE EXACTIONS RULE" IS IN TENSION WITH THIS COURT'S UNCONSTITUTIONAL-CONDITIONS CASELAW

Review is additionally warranted because the Court of Appeal's "legislative exactions rule" is in tension with this Court's body of unconstitutional-conditions caselaw, both in its general application and as applied in *Nollan* and *Dolan*.

This Court's caselaw confirms that the unconstitutional-conditions doctrine has always applied to acts of generally applicable legislation. The doctrine finds its roots in a series of mid-nineteenth century decisions of this Court. These decisions were made in response to a wave of protectionist state laws that imposed unconstitutional conditions on foreign companies seeking to do business in those states—*e.g.*, a waiver of the right to remove lawsuits to federal court. *See*, *e.g.*, *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (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. Federal District Courts). In this way, the doctrine was specifically and originally designed to enforce the primacy of the U.S. Constitution against state legislatures. *Id.*

Thus, in its most basic formulation, the doctrine established that "the power of the state"—a formulation that expressly includes legislative authority—"is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights."

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 for permission to access highways). Put another way, the doctrine holds that state and local governments lack the power to enact laws that condition the provision of a benefit or approval upon an individual's surrender of a constitutionally protected right. *Terral v. Burke Const. Co.*, 257 U.S. 529, 532–33 (1922) ("[T]he sovereign power of a state … is subject to the limitations of the supreme fundamental law."); *see also Frost*, 271 U.S. at 594 ("It is inconceivable that guaranties [sic] embedded in the Constitution of the United States may thus be manipulated out of existence."); *Lafayette*, 59 U.S. at 407 ("This consent [to do business as a foreign corporation] may be accompanied by such condition [a state] may think fit to impose; ... provided they are not repugnant to the constitution or laws of the United States.").

Consistent with that understanding, this Court has continued to apply the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals well into the modern era. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (invalidating provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that compelled certain speech as a condition of receiving funds); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (invalidating a county ordinance that conditioned the amounts of fees to be placed on a permit to hold a rally upon the content of the intended message); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (invalidating section 399 of the

Public Broadcasting Act because it imposed the condition to refrain from "editorializing" on noncommercial educational broadcasters in exchange for public grants); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, and holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of press because it forced a newspaper to incur additional costs by adding more material to an issue or removing material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 406 (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 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional-conditions doctrine). This conflict alone warrants review. But there is more.

This Court's land-use exactions caselaw applied the nexus and proportionality tests to conditions that had been mandated by acts of generally applicable legislation. In *Nollan*, the California Coastal Commission, acting pursuant to state law, required the Nollans dedicate an easement allowing the public to cross over a strip of their private beachfront property as a condition for obtaining a permit to rebuild their home. 483 U.S. at 827–30 (beach easement required per California Coastal Act and California Public Residential Code). In *Dolan*, the

City of Tigard's development code directed permit officials to exact bike path and greenway dedications as a mandatory condition on new development. *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 [C]ity's [Community Development Code].").

Koontz, too, involved a legislatively mandated exaction. Acting pursuant to the mandates of state law, the permitting agency demanded that Koontz either dedicate 13.9 acres of his land, or otherwise pay a fee in lieu, in order to develop a small portion of his land. *Id.* at 600 (citing Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 requiring permitting agencies to impose conditions on any development proposal within designated wetlands). The legislative origin of those exactions did not deter this Court from holding each demand subject to *Nollan*/*Dolan*'s special application of the doctrine of unconstitutional conditions.

The California court's exclusive focus on the branch of government in which the exaction originates is contrary to this Court's caselaw and undermines the purpose and function of the unconstitutional-conditions doctrine. James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 438 (2009) ("Giving 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."); David L. Callies, *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, 567–68 (1999) (There is "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."). As this Court has repeatedly explained, the application of the doctrine turns on whether the condition "would transfer an interest in property from the landowner to the government," *Koontz*, 570 U.S. at 615, not on the specific branch making the demand. If any governmental entity demands an interest in property as a condition of permit approval, that constitutes an exaction and is subject to heightened scrutiny under the nexus and proportionality test. *Id*. This Court should correct the Court of Appeal's deeply consequential misunderstanding of the doctrine and hold that legislative exactions are subject to the unconstitutional-conditions doctrine.

IV.

THIS COURT'S RESOLUTION OF THE LEGISLATIVE EXACTIONS QUESTION WILL HAVE A PROFOUND IMPACT ON AFFORDABLE HOUSING

A decision by this Court recognizing that legislative exactions must comply with *Nollan* and *Dolan* is in the public's interest because it will facilitate greater production of affordable housing. For decades, state and local governments have increasingly relied on impact fees as a strategy for

funding public programs and facilities, without making the public pay for them through tax increases. 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* Arthur C. Nelson et al., *A Guide to Impact Fees and Housing Affordability* 19 (2008) (finding that the role of impact fees began as a limited, supplemental funding mechanism, but is now a primary strategy for raising funds); Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005) ("Over the past three decades, increasing numbers of local governments … have turned to new methods of financing public works projects, especially land use exactions and impact fees.").

There are two principal reasons why municipalities rely on exactions as a method for financing public projects. First, general taxes—historically, the primary source for public financing—have fallen out of favor with the voting public. As one commentator has put it,

> Because tax increases are so politically unpopular, many states turned to development exactions. For example, to deal with the cost of growth created by new development, about half of the states enacted an impact-fee statute, a type of development exaction, to give local governments authority to exact fees from developers for any type of development, from subdivisions to strip malls.

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).

Second, municipalities have used exactions to finance public projects simply because they can do so with little to no resistance. Perhaps unsurprisingly, the use of exactions against individual property owners is a very popular means of financing public projects. Who wouldn't want *others* to pay for a communal benefit? Rosenberg, *supra*, at 262 ("Residents now urge their elected officials to adopt impact fees when the locality has not yet done so."). "Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find impact fees an irresistible policy option." *Id*. Moreover, exactions are often imposed on developers, who accept them without a fight because they can easily pass on the costs to individual purchasers. *Id*. at 204 n.93.

That last point is crucial. The growing trend among municipalities to use permit conditions as a "hidden tax" to fund public programs and facilities is contrary to the public's need for affordable housing. This is because impact fees, like other development costs, are typically added to the final purchase price of the home. *See* "$819 Increase in Fees Will Boost Home Cost by $1,000, Study Says," 35 No. CD-15 HDR Current Devs. 10 (2007). Even a modest impact fee can have a dramatic effect on affordability. Indeed, a study published by the National Association of Home Builders found that an increase of just $1,000 would,

on average, price more than 217,000 potential home buyers out of the housing market. *Id*.

Most communities—particularly those in California—demand significantly more impact fees on residential development, increasing the cost of housing far "beyond the means of many teachers, firefighters, police officers, and other moderate-income workers." *Id*. Indeed, the most recent national survey of impact fees found that, on average, each new single-family home built in California will be burdened with an astronomical $37,471 in impact fees. *See* Duncan Assocs., *National Impact Fees Survey: 2019*, at 4 (2019).

Meanwhile, other states that have adopted a "legislative exactions" rule have similarly high impact fees, with Oregon demanding an average of $21,911 per house; Washington, $16,079; and Arizona, $10,068. *Id*. Without any constitutional limit on how much money a legislative body can demand of property owners (in certain states), it is very likely, as happened below, that communities in those states will continue increasing the types and amount of impact fees placed on residential development. Clancy Mullen, Duncan Assocs., *National Impact Fees Survey: 2010*, at 6 (2010) (noting that between 2004 and 2008, the amount of money charged as impact fees grew by an average of 76 percent, with some jurisdictions increasing fees up to 225 percent in that four-year period). Indeed, the $23,420 road improvement fee imposed on Mr. Sheetz's permit is nearly double the amount typically demanded of single-family home proponents in the County. Duncan Assocs. at 1 (reporting that El Dorado County's traffic

infrastructure fee averaged $12,641 per single family home).

The categorical rule adopted by the California court below encourages the very type of government abuse of the permitting process that this Court intended to stop in *Nollan*, *Dolan*, and *Koontz*. *See Nollan*, 483 U.S. at 836 n.4 (one of the principal reasons for the nexus and proportionality tests 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.") (quoting *Armstrong*, 364 U.S. at 49). Indeed, without any requirement that the government prove a sufficient connection between a legislative exaction and a project's impact on its surroundings, then there is no limit to the amount of money or property the government can demand as a permit condition. And there is no end to the types of social costs that government force individual permit-seekers to eat. In very real terms, the rule categorically exempting legislative exactions from *Nollan*/*Dolan* all but guarantees that America's chronic affordable-housing crisis will worsen as more and more public costs are shifted onto the purchase price of homes.

CONCLUSION

The Court should grant the petition.

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Respectfully submitted,

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