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 OF *AMICI CURIAE* CALIFORNIA BUILDING INDUSTRY ASSOCIATION ("CBIA") AND NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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June 5, 2023

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The NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") and the CALIFORNIA BUILDING INDUSTRY ASSOCIATION ("CBIA"), as amici curiae, respectfully submit this Brief in support of the Petition for Writ of Certiorari filed by the Petitioner, George Sheetz, pursuant to Supreme Court Rules 33.1, 34, 37 and 37.2.[1] CBIA previously submitted an amicus brief to the California Supreme Court in support of Mr. Sheetz's petition for review filed with that Court.

On behalf of their thousands of members devoted to building and providing homes of all types across the country, the NAHB and CBIA respectfully request that this Court grant the Petition for Certiorari to review and correct the decision of the California Court of Appeal for the Third Appellate District, published at *Sheetz v. County of El Dorado*, 84 Cal. App. 5th 394 (Cal. Ct. App. 2022) ("*Sheetz*").

The appellate decision below is inconsistent with this Court's controlling authority, as well as an increasing body of case law in other jurisdictions, generally prohibiting "the government" from imposing unconstitutional conditions as the price for approvals or benefits, including development permits. The decision further confuses and exacerbates the split of authority among lower courts as to whether development fees and other exactions that are vaguely

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[1] **Rule 37.6 disclosure**: This Brief has been authored in whole by the undersigned counsel on behalf of NAHB and CBIA, and no monetary contributions were made by counsel or any party (other than amici CBIA and NAHB) to fund the preparation of the Brief.

(and misleadingly) described as "legislatively imposed" are somehow "exempt" from otherwise prevailing requirements to bear an essential nexus to and at least be roughly-proportional to development impacts in order to avoid being invalid unconstitutional conditions or uncompensated takings.

The decision also has devastating economic implications, at least in states like California that believe this Court contemplated an exemption shielding so-called legislative exactions from the otherwise universal prohibition against governmental imposition of unconstitutional conditions and exactions. The decision would approve the imposition of "the full cost" of county-wide road improvements solely on applicants for new building permits, despite its acknowledgement that the government admittedly made no effort to allocate those costs between existing needs or deficiencies and needs created by new development, or to demonstrate any proportionality to impacts caused by the applicants. The decision thereby encourages unconstrained exactions on new development, further adding to the crushing costs of housing in California and other jurisdictions that refuse to require governments to show any proportionality between the amount of fees demanded and the alleged impacts of new development.

NAHB and CBIA respectfully urge this Court to grant certiorari to provide clarity and uniformity of decision on the important constitutional issues clearly and cleanly presented in this case.

IDENTITIES AND INTERESTS OF THE *AMICI CURIAE*

1. The National Association of Homebuilders

The National Association of Home Builders (NAHB) is a Washington, D.C. based trade association whose mission is to enhance and promote housing availability and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. NAHB is a federation of more than 700 state and local associations. NAHB is comprised of approximately 140,000 members consisting of home builders, remodelers, suppliers, and other professionals supporting the home building industry. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights and economic interests of its members, and all others interested in the availability and affordability of housing nationwide.

2. The California Building Industry Association ("CBIA")

CBIA is a California-based, statewide, non-profit trade association of people and entities devoted to the planning, construction, and provision of homes for the people of California. CBIA is a judicially-recognized advocate for housing availability throughout the state, and elsewhere in the nation, "representing

homebuilders, architects, trade contractors, engineers, designers, and other building industry professionals." *Cal. Bldg. Indus. Ass'n v. Bay Area Air Quality Mgmt. Dist.*, 362 P.3d 792, 795 (Cal. 2015). CBIA includes more than 2,500 members, including a wide range of people, organizations, housing advocacy groups, and businesses dedicated to the planning and provision of much-needed housing for Californians at all levels of affordability and accessibility. Collectively, CBIA's members employ approximately 100,000 people, and are responsible for providing approximately 80 percent of all new homes built and sold annually in California.

3. ***Amici* have immediate and direct interests in supporting certiorari**

As regular and frequent applicants for development approvals, the members of NAHB and CBIA are constantly involved in the land use and development processes which in recent years now include ubiquitous demands for payment of a multitude of development fees and exactions.[2] While such fees add to the burdens of producing housing, NAHB, CBIA and their members have extensive experience in working with governments to establish reasonable and proportionate "fair share" fees to mitigate impacts of development on public facilities and infrastructure. Properly justified and proportionate fees can allow for appropriate internalization of development impacts, but without

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[2] Development fees are a form or sub-set of monetary exactions and the terms may be used interchangeably in this Brief.

stifling the feasibility of pursuing development. Many communities and jurisdictions have no problem in assuring that their fees are reasonable and proportional to impacts as required by *Nollan/Dolan*.

As accurately observed by this Court in *Cedar Point Nursery v. Hassid,* 141 S.Ct. 2063 (2021): "[B]oth the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy." (141 S.Ct. at 2079.)

The questions presented in this case are of critical real-world importance in the realms of development and housing construction, because some courts still refuse to consistently apply *Nollan/Dolan* standards to all development fees and exactions. Such unwarranted deviations from this Court's holdings dramatically impact the feasibility and viability of all kinds of development activity nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENTS

This case squarely presents an important question involving fundamental constitutional issues — whether fees and exactions imposed by "the government" as conditions of a development permit are exempt from the otherwise prevailing prohibition against governmental imposition of unconstitutional conditions simply if they may be characterized as being "legislatively-established" exactions.

This question is widely recognized as "[o]ne of the most pressing questions across the entire realm of

takings law . . . ." Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 194 (2019).

This Court has previously explained the broad applicability of the unconstitutional conditions doctrine in the context of development permitting in its holdings in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) ("*Nollan*"), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Dolan*") as follows:

> In those cases, we held that a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a "nexus" and "rough proportionality" between the government's demand and the effects of the proposed land use.

Koontz v. St. Johns River Water Mgt. Dist., 570 U.S. 595, 599 (2013) ("*Koontz*").

The Court did not limit its holdings to "non-legislative" governmental actions, nor did the Court intimate an exemption might be warranted where the government attempts to insulate its exaction from meaningful judicial review by imposing the condition by legislative act.

There is no principled basis for allowing some lower courts, such as the California state courts, to continue to exempt legislatively established fees and exactions from the application of the unconstitutional conditions doctrine in the economically-vital context of land use and building permit approvals. "To

summarize, there is no logical reason why the form of the exaction should dictate the test that determines the fairness of it." Fred P. Bosselman, "*Dolan* Works," in TAKING SIDES ON TAKINGS ISSUES PUBLIC AND PRIVATE PERSPECTIVES, 345, 350 (Thomas. E. Roberts, ed at 2002).

The prohibition against unconstitutional conditions is applied broadly against a wide range of actions by "the government" – without distinguishing between conditions imposed as a result of administrative or legislative actions. *Cedar Point Nursery, supra,* 141 S.Ct. at 2072 (2021) ["The essential question is not . . . whether the government action . . . comes garbed as regulation (or statute, or ordinance, or miscellaneous decree.").]

Indeed, the Sixth Circuit most recently published a cogent analysis of this issue, in *Knight v. Metropolitan Gov't of Nashville & Davidson County*, 67 F.4th 816, 829 (4th Cir. 2023), meticulously explaining why legislatively-enacted exactions based on a local ordinance are not exempt from the constitutional conditions requirements of *Nollan/ Dolan*:

> We now hold that *Nollan*'s unconstitutional-conditions test applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones. Nothing in the text or original understanding of the Takings Clause justifies Nashville's requested distinction. Its requested

> distinction also conflicts both with the Supreme Court's unconstitutional-conditions precedents and with its takings precedents.

Id.

This Court's jurisprudence prohibits unconstitutional conditions in general, and has not carved out an exception to that doctrine that would allow "the government" in some states to impose otherwise unconditional conditions – provided only that they do so (1) in a land use permitting context, and (2) base their exactions of rights and demands on some "legislatively-established" authorization.

Nevertheless, that is how this Court's constitutional jurisprudence continues to be misread and artificially-constrained. As asserted by the appellate court below (in error or defiance?): "Under California law, only certain development fees are subject to the heightened scrutiny of the *Nollan/Dolan* test." (84 Cal.App.5th at 406.)

Such disregard of this Court's holdings and articulation of the prohibition against governmental imposition of unconstitutional conditions in any form or by any branch of the government should no longer be indulged or tolerated.

The Court previously rejected similar attempts by government actors in state courts to carve out "exceptions" to the constitutional requirements of *Nollan* and *Dolan*. In *Koontz*, the Court rejected arguments that those requirements should not apply

to "monetary exactions," or that they did not apply in cases where the permit applicant refused to comply with the government's demands. 570 U.S. at 606–09, 613–18. The Court forthrightly reiterated the broad scope of the *Nollan/Dolan* requirements, and rejected the attempts of state courts to "effectively inter[]" the constitutional protections articulated in "those important decisions." *Id.* at 599. This case vividly illustrates the need for the Court to do so again.

The Court should grant certiorari to clarify whether or not the broadly-applicable doctrine prohibiting "the government" – generally – from demanding unconstitutional conditions contains a loophole allowing some states, like California, to exempt their "legislatively established" development fees and exactions from its otherwise sweeping prohibitions.

WHY CERTIORARI SHOULD BE GRANTED

A. THE COURT SHOULD PROVIDE CLARITY WHETHER *NOLLAN* AND *DOLAN* APPLY CONSISTENTLY TO ALL DEVELOPMENT FEES AND EXACTIONS OR WHETHER THERE IS A CONSTITUTIONAL BASIS FOR EXEMPTING "LEGISLATIVELY-ESTABLISHED" FEES FROM THOSE REQUIREMENTS.

This Court has repeatedly explained that the *Nollan/Dolan* standards are based on application of the doctrine of unconstitutional conditions in the

context of land-use permitting.[3] That doctrine generally prohibits "the Government" – whether in its legislative or adjudicatory or other embodiments – from demanding the surrender of constitutional rights as "the price" for receiving or enjoying discretionary government-issued permits or benefits. *See e.g., Dolan*, 512 U.S. at 385.

States such as California offer no constitutionally-based explanation or excuse for providing an "exception" or exemption from the doctrine based simply on how, or by whom, "the Government" acts. By contrast, this Court has consistently stated the doctrine in more absolute terms: "We have said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'" *Koontz, supra*, 570 U.S. at 604 (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, (1983)) (emphasis added); *see also*, *Perry v. Sindermann,* 408 U.S. 593, 597 (1972).

This Court has not declared any reservation, or exemption, from the prohibition against unconstitutional conditions in favor of exactions made by the legislative branch of the government, nor in favor of "generally applicable" ordinances.

An unconstitutional governmental demand or condition is invalid, regardless how or by whom the

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[3] *E.g.*, *Nollan*, 483 U.S. at 831–32; *Dolan*, 512 U.S. at 384; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Koontz*, 570 U.S. at 605; and *Cedar Point Nursery*, 141 S.Ct. at 2072.

government makes its demand. *Cedar Point Nursery*, 141 S.Ct. at 2072.

As pointed out in *Knight v Metro Gov't, supra*:

> Over some 160 years, the Court has accepted many unconstitutional-condition claims for many constitutional provisions. . . . . During that time, the Court has regularly found generally applicable legislative conditions (not just ad hoc administrative ones) unconstitutional when a legislature provided a benefit only if the recipients agreed to waive a constitutional right. See, e.g., *All. for Open Soc'y Int'l*, 570 U.S. at 208, 221 (1926). . . . Indeed, the doctrine grew out of these types of generally applicable *legislative* conditions.

Knight, 67 F.4th at 832 (emphasis added).

In the context of land use exactions and development fees, the justification most frequently offered for making such a distinction is the belief in some courts, such as California, that administrative or "quasi-adjudicatory" entities are more likely than "legislative bodies" to abuse the power to impose exactions or to extort unjustified money or property interests. *See*, *San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 104-105 (Cal. 2002). Such a basis for distinction does not speak well of either type of governmental body, and seems far from having any

evidentiary support, much less any support in logic, precedent, or the Constitution.

To the contrary, it is widely recognized that fees "are politically popular because they are charged to developers rather than current residents." *Residential Impact Fees in California, supra,* TERNER CENTER FOR HOUSING INNOVATION AT UC BERKELEY, at 21. Demanding fees from "newcomers" can enable governments, including elected legislative bodies, to shift much of the cost of such improvements away from all users of public infrastructure (e.g., the voting general public) to a narrow segment of the public – homebuilders and new homebuyers.

The *Knight* decision appropriately questioned this purported justification:

> This claim suffers from both legal and practical problems. . . . Practically, an "extortion" risk exists no matter the branch of government responsible for the condition. *Town of Flower Mound [v. Stafford Ests. Ltd. P'ship,*] 135 S.W.3d 620, 641 (Tex. 2004).

67 F.4th at 835.

This Court should explain if this "less likely to extort" justification for exempting legislatively established fees from *Nollan/Dolan* has any constitutional merit. *Amici* submit it does not.

B. THE COURT SHOULD DETERMINE IF THERE IS ANY VALID BASIS UNDER THE CONSTITUTION, OR UNDER LAND USE LAW, FOR A DISTINCTION BETWEEN DEVELOPMENT FEES IMPOSED "LEGISLATIVELY" AND THOSE IMPOSED "ADMINISTRATIVELY" FOR *NOLLAN/DOLAN* PURPOSES.

1. This Court's decisions have not distinguished "legislative" fees from fees and exactions generally.

Those lower courts that perceive and apply a purported distinction between "legislative" exactions and "quasi-adjudicatory" or "administratively-imposed" exactions often attribute that distinction to a bit of *dictum* in *Dolan*.[4] In a footnote in the majority opinion in *Dolan* — ostensibly responding to the dissent's criticism of "placing the burden on the city" to justify the challenged exaction — a "distinction" was made – but not the distinction asserted by the lower court in *Sheetz*. 512 U.S. 374, 385, n.8. The *Dolan* majority agreed, at footnote 8, that the dissent

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[4] At least since the fractured and ambivalent decision in *Ehrlich v City of Culver City*, shortly after *Dolan*, California courts have questioned the universal scope of the *Nollan/Dolan* standards: "[I]t is not at all clear that the rationale … (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment." 911 P.2d 429, 447 (Cal. 1996) (emphasis in original).

> is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e. g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, . . . (1926) Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city. See *Nollan*, 483 U.S. at 836."

Id. (emphasis added).

Thus, the "distinction" drawn in the *Dolan* footnote actually contrasted "most generally applicable zoning regulations" (as applied in *Euclid*) against the imposition of conditions (having their basis in a general plan policy) requiring the exaction of property interests as the "price" of the project-specific permit at issue in *Dolan*.

The relevant distinction made was thus between *regulation* of property use and *exaction* of property by the Government. Such a distinction between governmental action that merely regulates property and action aimed at exacting or acquiring property is consistent with this Court's recognition of "the settled difference in our jurisprudence between appropriation and regulation." *Horne v. Dep't. Of Agric.*, 376 U.S. 351, 362 (2015).

The *Dolan* footnote did not purport to contrast two types of "exactions" nor did it purport to distinguish "generally applicable exactions" from *ad hoc* or 'quasi-adjudicatory' exactions. Rather it distinguished the judicial review applicable to exactions (those imposed on Mrs. Dolan)[5] against the more deferential standard of review traditionally applicable to regulatory zoning legislation [merely regulating *the use* of property, rather than commanding the surrender of property or constitutional rights to obtain a permit]. *See Dolan*, 512 U.S. at 385; *see also*, Inna Reznik, "*The Distinction Between Legislative & Adjudicative Decisions in Dolan v. City of Tigard*," 75 N.Y.U. L. Rev. 242, 257 (2000).

Attempts to draw a purported "distinction" on this basis may rest (at least in part) on a questionable reading of the *Dolan* opinion and footnote, n.8, as pointed out in *Heritage at Pompano Housing Partners, L.P. v. City of Pompano Beach*, No. 20-61530-CIV-SMITH/VALLE, 2021 WL 8875658, at *5 (Dec. 15, 2021 S.D. Fla.) ["The footnote [in *Dolan*] addresses 'general zoning regulations,' not all generally applicable regulations."] (emphasis in original).

The Court's subsequent applications of the unconstitutional conditions doctrine have also involved conditions and demands derived from

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[5] It has been pointed out that Justice Souter, at least, characterized the subject exactions in *Dolan* as being "legislative" in character. *See,* 512 U.S. at 413–14 (J. Souter, dissenting.) As the Justice noted, the *Dolan* exactions were imposed pursuant to requirements in the city's legislatively-enacted development code, much the same as the roadway exaction imposed in *Sheetz*.

"legislative" or "generally applicable" actions. In *Koontz*, the government sought to demand exactions from the permit applicant under the authority of the state Henderson Wetlands Resource Management Act. 570 U.S. at 601. In *Cedar Point Nursery*, , the condition was based on a generally-applicable state regulation. 141 S.Ct. at 2069.

2. There is no constitutional or practical basis for attempting to distinguish between fees that are "legislatively-established" and other fees.

The *Dolan* text, purporting to distinguish between the imposition of exactions and regulatory zoning legislation, does not support the efforts of some courts to rely on it as authority to distinguish "legislative exactions" from exactions generally. In most states, including California, "zoning regulations" are distinct from the type of local "legislation" that establishes or imposes development fees or exactions.[6] In California, all zoning or rezoning is considered "legislative" in nature. *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.3d

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[6] Indeed, the California Supreme Court emphasized this difference between the imposition of exactions and the operation of ordinary "land use regulation" as the substantive basis for its decision in *Cal. Bldg. Indus. Ass'n. v. City of San Jose*, 351 P.3d 974, 991 (Cal. 2015). Part of that opinion discussed a purported "legislative/adjudicatory" distinction, but that was mere *dictum*, since the Court's decision was based on its conclusion that San Jose's particular affordable housing ordinance was not an "exaction" of any kind – neither legislative nor administrative – and thus *Nollan/Dolan* had no relevance in that decision.

565, 568 (Cal. 1980). Zoning regulates the "nature and extent of the uses of land." *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 780 (Cal. Ct. App. 1965). Once enacted, zoning ordinances apply continuously to all similarly-situated properties and owners, whether or not the property owner is seeking a governmental permit. By contrast, fees are usually imposed in response to an application for a development approval of some type, in the form of one-time charges, and are exacted only from those persons who may apply for governmental approval of development. *See generally*, CALIFORNIA LAND USE PRACTICE, Cal. Cont. Educ. of the Bar, Chapter 18, *Exactions: Dedications and Development Impact Fees* (2022).

The cases that exempt "certain fees" from *Nollan/Dolan* are not consistent as to the basis for their distinctions. The California Supreme Court initially purported to exempt "a *generally* applicable development fee or assessment." *Ehrlich*, 911 P.2d at 447. The *Sheetz* court restated the scope of the purported exemption from *Nollan/Dolan:*

> The requirements of *Nollan* and *Dolan*, however, do not extend to development fees that are generally applicable to a broad class of property owners through legislative action.

84 Cal. App. 5th at 406–07.

However, that version of the purported distinction raises another set of serious practical and legal questions:

- Aren't all development fees or exactions essentially based on some form of "legislative action?"
- Whether that "legislative action" is in the form of a local ordinance, or statute, or even in the form of a state constitution conferring "police power" authority on a city or county to impose fees — it is all "legislative action."
- In California, "development fees are an exercise of the local police power granted to cities and counties by article XI, section 7 of the California Constitution." *Cal. Bldg. Indus. Ass'n v. Governing Bd.*, 206 Cal. App. 3d 212, 234 (Cal. Ct. App. 1988).
- A "California-style" exemption for fees derived from some legislative action would thus appear to "swallow the rule" prescribed by *Nollan/Dolan* applicable to development fees.

Adding a qualifier based on the "breadth" of the class of impacted property owners does not provide any better constitutional or practical basis for attempting to make an exemption for certain fees.

- How "broad" must that class of property owners be, in order to be deemed "exempt" from *Nollan/Dolan*? How many property owners or parcels of property constitute "a broad class" for this purpose?

- How are courts, or local governments, to know where to draw the line between a "broad class" and a smaller class of property owners?

This set of questions is particularly problematic in a state like California, where all zoning action — regardless of the number or size of the parcels involved – is deemed to be "legislative" in nature. *See*, *Arnel Dev. Co.*, 620 P.3d at 566–67:

> California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts. . . . . A decision that some zoning ordinances, depending on the size and number of parcels affected and perhaps on other factors, are adjudicative acts would unsettle well established rules which govern the enactment of land use restrictions, creating confusion which would require years of litigation to resolve.

- If the basis of the distinction, as asserted in *Sheetz*, is purportedly based on a difference between fees "imposed . . . neither generally nor ministerially, but on an individual and discretionary basis" and fees imposed in some other way, how does that square with the fact that fees and exactions are typically "imposed" in the course of a project-specific permit application process – in which an administrative agency is supposed to apply

existing ordinances and fee policies "on an individualized" basis?

- If, by contrast, the local planning agency were to attempt to create *new* fee requirements on a project, on an "individual and discretionary basis" as suggested in *Sheetz*, what legal authority could support such low-level bureaucratic, un-legislated, creation of new fees and exactions?

- Would such *ad hoc* and individualized imposition of fees without legislative sanction run afoul of the 14th Amendment, Equal Protection, and Due Process guarantees?

C. EXEMPTING "LEGISLATIVE" FEES FROM *NOLLAN/DOLAN* ELIMINATES OPPORTUNITIES FOR MEANINGFUL STATE COURT JUDICIAL REVIEW OF SUCH FEES AND EXACTIONS.

Although the Ninth Circuit has recently acknowledged that the purported distinction between legislative exactions and quasi-adjudicatory exactions no longer holds water *Ballinger v. City of Oakland*, 24 F.4th 1287, 1298–99 (9th Cir. 2022), the California state courts continue to apply that distinction. As a result, at least in California, there is no effective state court review of fees if they are characterized as "legislative," as plainly shown in *Sheetz*.

At least 12% of America's population remain consigned to a state court regime that now differs

substantially from the local federal courts when seeking judicial review of development fees and exactions. California law requires that challenges to development conditions and exactions must first be brought in state court by way of writ of administrative mandate under California Code of Civil Procedure section 1094.5. *See*, *Lynch v. Cal. Coastal Com*., 396 P.3d 1085, 1089 (Cal. 2017); *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19. However, opportunities to question the fairness of fees established by "legislative" actions are limited, since Due Process requirements for notice and right to an individualized hearing are not generally applicable to such actions. And, under the "rule" applied in *Sheetz*, permit applicants in California seeking judicial review of legislative fees in mandate proceedings will therefore run up against the "rule" precluding a challenge based on *Dolan's* requirements, and be summarily dismissed. "Catch 22."

Property owners and developers will thus be left with limited options for judicial relief and effective *Nollan/Dolan* review – such as Petitioners in this case.

D. CERTIORARI SHOULD BE GRANTED TO ADDRESS SIGNIFICANT PUBLIC POLICY AND EQUITY CONCERNS.

It is widely recognized that unjustified, and disproportionate, development fees and exactions significantly impair the availability and affordability of housing. "Ensuring that impact fees do not charge more than the proportionate share is fair and

equitable and protects affordable housing developers from paying a disproportionate share." Altshuler & Gomez-Ibanez, *Regulation for Revenue: The Political Economy of Land Use Exactions*, Brookings Institute/Lincoln Institute of Land Policy (1993).[7]

Similar findings about the adverse consequences of development fees on equity, housing affordability, and other "serious drawbacks" if fees are not proportionate to impacts were made by the U.S. Department of Housing and Urban Development:

> One of the central themes in structuring and implementing impact **fees of all types** is the concept of "**proportionate share**," which has been generally accepted and dates back to at least the 1970's…. Ensuring that impact fees do not charge more than the proportionate share is fair and equitable and protects affordable housing from paying a disproportionate share.

Impact Fees and Housing Affordability – A Guidebook for Practitioners, U.S. HUD (June 2008), at ii (emphasis added).

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[7] *See also*, Vicki Been, "I*mpact Fees and Housing Affordability,*" Cityscape: A Journal of Policy Development and Research, Volume 8, Number 1, p. 148 (2005) ["Opponents of impact fees argue that apart from the direct effects impact fees may have on the price of housing, they have indirect exclusionary effects as well."].

The challenges of trying to provide housing that approaches even a modest level of affordability are widely recognized, especially in states like California. *See, e.g., "California's High Housing Costs: Causes and Consequences*," LEGISLATIVE ANALYST'S OFFICE (March 2015). Those challenges become even more severe if courts refuse to apply the *Nollan/Dolan* requirements to fees that are loosely characterized as "legislatively-established" and allow local governments to impose unjustified fees that admittedly lack even "rough proportionality" to the impacts of new development as in this case.

Development fees and exactions – such as the "traffic mitigation impact fees" in this case – are a major factor contributing to the high cost of housing. "Development fees—which cities levy to pay for services needed to build new housing or to offset the impacts of growth on the community—make up a significant portion of the cost to build new housing in California cities." "*It All Adds Up The Cost of Housing Development Fees in Seven California Cities,"* TERNER CENTER FOR HOUSING INNOVATION AT UC BERKELEY, at 3 (March 2018). A recent study sponsored by NAHB reported that 23.8% of the final cost of a new single-family home built for sale is attributable to regulations imposed by governments at all levels. (Paul Emrath, Ph.D., *Government Regulation in the Price of a New Home: 2021*, NAT'L ASS'N OF HOME BUILDERS (May 5, 2021), https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-government-regulation-in-the-price-of-a-new-home-may-2021.pdf.)

"[O]verly burdensome fee programs can limit growth by impeding or disincentivizing new residential development, facilitate exclusion, and increase housing costs across the state." *Residential Impact Fees in California*, TERNER CENTER FOR HOUSING INNOVATION AT UC BERKELEY, at 4 (August 2019). See also, *E.g.*, Cal. Gov. Code § 65589.5(a) ["The Legislature finds and declares . . . [t]he excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that . . . require that high fees and exactions be paid by producers of housing."].

California, where the state courts refuse to apply the *Nollan/Dolan* constitutional requirements to "legislatively established" development fees, stands out for extraordinarily high development fees. *See,* "*California's High Housing Costs: Causes and Consequences*," *supra*, at 13–19: "[D]evelopment fees—charges levied on builders as a condition of development—are higher in California than the rest of the country." An academic study in 2018 found at least one city charging fees of $157,000 per single-family home. "*It All Adds Up The Cost of Housing Development Fees in Seven California Cities,"* TERNER CENTER FOR HOUSING INNOVATION AT UC BERKELEY, March 2018 at 3. The same study observed that, "[o]n average, these fees continue to rise [in California], while nationally fees have decreased." *Id*.

The fee in the case below was ostensibly based on a legislatively adopted fee schedule which was not "generally applicable" in the usual sense of that phrase – rather the schedule only applies to that small

segment of the County's population who might seek building permits. As the appellate court opinion in *Sheetz* acknowledged:

> The program requires that new development pay the full cost of constructing new roads and widening existing roads without regard to the cost specifically attributable to the particular project on which the fee is imposed. In assessing the fee, the County does not make any "individualized determinations" as to the nature and extent of the traffic impacts caused by a particular project on state and local roads.

84 Cal. App. 5th at 402.

As a result of the deviant California "rule" that fees deemed to be of legislative derivation are exempt from the *Nollan/Dolan* standards, the County was excused from any obligation to demonstrate that such an amount was even "roughly proportional" to the County's costs of "mitigating" additional traffic (if any) caused by Mr. Sheetz building a modest "single-family manufactured home" on his residentially-zoned lot. Mr. Sheetz was required to pay a "traffic impact mitigation fee" of more than $23,000, and his attempt to question the fee in court was summarily dismissed without a chance to argue the merits.

This case presents the appropriate vehicle for this Court to finally settle this important issue, and NAHB and CBIA respectfully request, once again, that this

Court grant certiorari to clearly determine whether "legislatively established" fees and exactions actually do represent a legitimate "exception" to the *Nollan/Dolan* constitutional standards. *Cf.*, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (cert. denied, on procedural grounds).

E. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE *SHEETZ'S* SPLIT WITH RECENT CASES HOLDING THAT *NOLLAN/DOLAN* APPLY UNIFORMLY TO ALL DEVELOPMENT FEES AND EXACTIONS.

As pointed out, a split in authority developed after the *Dolan* decision, regarding the so-called legislative fee exemption. Scholars and commentators have bemoaned this split and the resulting confusion that ensued. *See, e.g.*, Goodin, "*Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference*" 28 HAWAII L. REV. 139 (2005); Haskins, "*Closing the Dolan Deal: Bridging the Legislative/Adjudicative Divide*" 38 URBAN LAWYER 487 (2006); Baker, "*Much ado about Nollan/Dolan: The Comparative Nature of the Legislative/Adjudicative Distinction in Exactions*" 42 URBAN LAWYER 171 (2010).

There now seems to be a progressive deepening of that split, as more recent cases have concluded that *Nollan* and *Dolan* should be applied uniformly to *all* development exactions, irrespective of the nature of

the source. This trend appears to be accelerating, particularly following this Court's decisions in *Lingle*, *Koontz*, *Cedar Point Nursery*, and *Pakdel v. City & County of San Francisco*, 141 S.Ct. 2226 (2021).

Examples of that recent trend include the brand new Sixth Circuit decision in *Knight*. 67 F.4th at 829; *see also*, the recent Ninth Circuit decision in *Ballinger*, 24 F.4th at 1299–1300: "[W]e agree with the Ballingers that "[w]hat matters for purposes of *Nollan* and *Dolan* is not who imposes an exaction, but what the exaction does," and the fact "[t]hat the payment requirement comes from a [c]ity ordinance is irrelevant." *See also, Pakdel v. City & County of San Francisco*, where the court denied the city's motion to dismiss, where the complaint adequately alleged that the lifetime lease requirement was not "roughly proportionate" to the impacts of landlord's condominium conversion. *Pakdel v. City & County of San Francisco,* No. 17-cv-03638-RS, 2022 WL 14813709, at *8 (N.D. Cal. Oct. 25, 2022).

Recent state court decisions similarly reject the idea of an "exemption" from *Nollan/Dolan*. *See, e.g.*, *Anderson Creek Partners, L.P. v. County of Harnett,* 876 S.E.2d 476, 500 (N.C. 2022) ("[A]s a constitutional matter, we believe that a decision to limit the applicability of the test set out in *Nollan* and *Dolan* to administratively determined land-use exactions would undermine the purpose and function of the "unconstitutional conditions" doctrine."); *see also*, *Fassett v. City of Brookfield* 975 N.W.2d 300, 308–09 (Wis. Ct. App. 2022) [Condition which required subdivider to dedicate a through street, was a

legislative exaction which was nevertheless subject to *Nollan/Dolan* scrutiny].

These more recent cases stand in stark contrast to a number of state and federal court decisions, like *Sheetz*, that have carved out an exemption from *Nollan/Dolan* review for legislative imposed exactions. (See, e.g., cases cited in the Petition for Review.)

The Court should grant certiorari to consider *Sheetz* in the context of these new decisions and provide clarity and unity with respect to these important issues.

CONCLUSION

The concept of "fair share" is commonly asserted in defense of development fees and exactions. Indeed, the concept of "fair share" implicitly underlies this Court's "takings" jurisprudence.

As this Court recently pointed out in *Tyler v. Hennepin County,* ___ U.S. ___, 2023 U.S. LEXIS 220, at *14 (May 25, 2023):

> The Takings Clause "was designed 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." *Armstrong*, 364 U.S., at 49. A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she

> owed. The taxpayer must render unto Caesar what is Caesar's, but no more.

Those principles would seem applicable in a situation like this case. The County may be entitled to demand that new development contribute a fair, and proportionate, share to the costs of improved roads made necessary by development, but no more.

Certiorari should be granted so that the Court may address and resolve these critical, long-simmering, issues.

Dated: June 5, 2023

Respectfully Submitted,

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