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

OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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California Government Code § 66001 (Deerings 2023).

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

(d)
(1) For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make all of the following findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted:
(A) Identify the purpose to which the fee is to be put.
(B) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.
(C) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a).
(D) Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.
(2) When findings are required by this subdivision, they shall be made in connection with the public information required by subdivision (b) of Section 66006. The findings required by this subdivision need only be made for moneys in possession of the local agency, and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date. If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).
(e) Except as provided in subdivision (f), when sufficient funds have been collected, as determined pursuant to subparagraph (F) of paragraph (1) of subdivision (b) of Section 66006, to complete financing on incomplete public improvements identified in paragraph (2) of subdivision (a), and the public improvements remain incomplete, the local

agency shall identify, within 180 days of the determination that sufficient funds have been collected, an approximate date by which the construction of the public improvement will be commenced, or shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis, the unexpended portion of the fee, and any interest accrued thereon. By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

(g) A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or

(2) achieve an adopted level of service that is consistent with the general plan.

INTRODUCTION

Respondent County of El Dorado, California, respectfully requests that this Court deny Petitioner George Sheetz's Petition For Writ Of Certiorari ("Petition") which seeks review of the judgment of the California Court of Appeal, Third Appellate District.

The question presented in the Petition is "whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan* [*v. California Coastal Commission* (1987) 483 U.S. 825] and *Dolan* [*v. City of Tigard* (1994) 512 U.S. 374] simply because it is authorized by legislation." But that is not what this case is about. The Court of Appeal did not decline to apply the *Nollan/Dolan* test "simply because it is authorized by legislation." While that may be true of some of the case law and commentary cited in the Petition, it is not true here. Mr. Sheetz' simplistic distinction between "legislative" and "administrative" exactions, as well as his discussion of the purported "legislative/ administrative loophole," does not encompass the totality of what the California Court of Appeal concluded in the Decision below.

The question presented in the Petition ignores the fact that the legislatively mandated, formulaic, nondiscretionary and broadly-applied fees under the County's Traffic Impact Mitigation ("TIM") Fee Program that Mr. Sheetz challenges here were found by the trial court and the Court of Appeal to fully

satisfy the "reasonable relationship" test for legislative exactions under California's Mitigation Fee Act, Govt. Code 66000 *et seq.* ("MFA"). App. A-6 – A-7, A-23 – A-27. No case cited in the Petition or in any of the *amici curiae* briefs, or found by Respondent, has ever held that impact fees that meet the reasonable relationship test for legislative exactions in the MFA must also satisfy the *Nollan/Dolan* test. Thus, there is no split of authority for this Court to resolve in this case. The Petition should therefore be denied. *See e.g., R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 227 (1944) ["There appearing to be no conflict of decision between circuits, we on November 9, 1942 denied certiorari"]; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-179 (1938) ["Nor would the writ be granted to review the questions of anticipation and invention that petitioner argues, for as to them there is no conflict between decisions of circuit courts of appeals."]

Furthermore, the Petition essentially challenges the constitutionality of the distinction between legislative exactions and adjudicatory exactions in the MFA. But that issue was never raised or decided below. For that additional reason, the Petition should be denied.

STATEMENT OF THE CASE

Respondent hereby incorporates by reference the "Factual And Procedural Background" in the Court of Appeal's Decision, below. App. A-2 to A-7.

The Superior Court denied Mr. Sheetz' petition for writ of mandamus. App. B-1. Mr. Sheetz timely

appealed. App. A-7. The Court of Appeal denied that appeal, finding (1) that the *Nollan/Dolan* test did not apply to the challenged TIM fees, and (2) that the TIM fees complied with the MFA. App. A-7 to A-20, A-23 to A-27. Mr. Sheetz timely petitioned the California Supreme Court for review of the Court of Appeal's decision, and the California Supreme Court denied that petition. C-1.

REASONS FOR DENYING THE PETITION

I. The Petition Seeks An Advisory Opinion Divorced From The Facts In This Case

The question presented in the Petition avoids the actual facts in this case, and therefore seeks an advisory opinion from this Court. Because this is an "as applied" challenge to the TIM fees, App. A-5 – A-6, Mr. Sheetz framed the question to the California Supreme Court as whether a legislative exaction "like the one imposed by the County" is subject to heightened scrutiny under the unconstitutional conditions doctrine set forth in *Nollan, Dolan* and *Koontz v. St. Johns River Water* Management *District* (2013) 570 U.S. 595. But now in this Court, Mr. Sheetz strips out from the question presented any reference to the facts regarding the actual exaction imposed by the County on his building project in this case. Instead, Mr. Sheetz asks this Court to determine the constitutionality of generic legislatively imposed impact fees under *Nollan/Dolan*, and not the actual

fees at issue here.[1] Petitioner essentially invites this Court to issue an advisory opinion, which this Court is not permitted to render. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). *See Camreta v. Greene*, 563 U.S. 692, 717 (KENNEDY, J. dissenting) ["The ' "judicial Power" is one to render dispositive judgments,' not advisory opinions."] This Court should therefore deny the Petition. *See e.g., Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) [where Court would "in effect be rendering an advisory opinion" if it passed upon the "purely artificial and hypothetical issue tendered by the petition for certiorari," the Court dismissed the writ of certiorari as improvidently granted.]

II. The Petition Fails To Present Any Split Of Authority On The Dispositive Issue In This Case

Mr. Sheetz asserts that "governments have turned to cloaking their exactions in legislation – knowing that, in doing so, their exactions can escape *Nollan/Dolan* scrutiny. That's precisely what happened to Mr. Sheetz in this case." (Petition, 6.) But that is *not* what happened here. The development impact fee imposed on Mr. Sheetz was legislatively adopted by the County pursuant to the procedures and processes set forth in California's legislatively enacted MFA. The Petition (1) omits any discussion about the

[1] The facial challenge that is now presented to this Court, if it was separated from the "as-applied" challenge, would be barred by the applicable statute of limitations. App. B-7 to B-16.

"reasonable relationship" test in the MFA, which test applies to all legislatively imposed development impact fees in California; (2) omits any discussion about how the courts below found that the TIM fees at issue here satisfy that reasonable relationship test; (3) omits any discussion that the TIM fees were applied to Mr. Sheetz' building project without any administrative discretion; and (4) omits the fact that no court has ever held that legislatively mandated, formulaic, nondiscretionary and broadly applied impact fees that satisfy that reasonable relationship test under the MFA must also satisfy the *Nollan/Dolan* standard. As a result of such omissions, the Petition fails to present any split of authority on the dispositive issue in this case. Certiorari should therefore be denied here.

A. The "Reasonable Relationship" Test In California's Mitigation Fee Act Satisfies The Constitutional Purposes Of *Nollan/Dolan* For Legislative Exactions.

The public policy considerations and constitutional concerns of developers and property owners raised in the Petition and in the several amicus briefs were specifically addressed by the California Legislature when it enacted the MFA. The California Supreme Court explained that the MFA "was passed by the [California] Legislature 'in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects.'" *Ehrlich v. City of Culver City*, 911 P.2d 429, 436, 12 Cal.4th 854 (Cal. 1996) ("*Ehrlich*") (citation omitted). To that end, the MFA "establishes a variety of requirements to ensure

local agencies timely use these fees to pay for public facilities that serve those very developments rather than divert the fees for general revenue purposes." *Walker v. City of San Clemente*, 239 Cal.App.4th 1350, 1356 (Cal. Ct. App. 2015). The MFA creates "uniform procedures for local agencies to follow in establishing, imposing, collecting, accounting for, and using development fees." *Centex Real Estate Corp. v. City of Vallejo*,19 Cal.App.4th 1358, 1361–1362 (Cal. Ct. App. 1993).

When a local agency legislatively establishes a development fee, the MFA requires in subdivision (a), of section 66001 of the California Government Code, that "the local agency to identify the purpose of the fee and the use to which the fee will be put. The local agency must also determine that both 'the fee's use' and 'the need for the public facility' are reasonably related to the type of development project on which the fee is imposed." *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal.App.4th 554, 561-565 (Cal. Ct. App. 2010) ("*City of Lemoore*"). Specifically, section 66001(a) of the MFA requires that, for legislatively imposed fees, the legislative body must find that "there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." App. A-13. A local agency must engage "in a reasoned analysis designed to establish the requisite connection between the amount of the fee imposed and the burden created." (*Cresta Bella, LP v. Poway Unified School Dist.*, 218 Cal.App.4th 438, 447 (Cal. Ct. App. 2013).) As the Court of Appeal explained in the Decision below:

> "[T]he local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development." "However, the figures upon which the public agency relies will necessarily involve predictions regarding population trends and future building costs, and they need not be exact. 'As a practical matter it will not always be possible to fashion a precise accounting allocating the costs, and consequent benefits, of particular building projects to particular portions of the population. All that is required of the [agency] is that it demonstrate that development contributes to the need for the facilities, and that its choices as to what will adequately accommodate the [new population] are reasonably based.' " App. A-24 (citations omitted).

Justice Mosk of the California Supreme Court described the constraints that the "reasonable relationship" test imposes on legislatively imposed impact fees as follows:

> Government Code section 66000 *et seq*. extensively regulates the imposition of development fees, including requirements that the purpose of the

> fee must be identified with specificity, and that a "reasonable relationship" must exist between the fee's use and the type of development project on which the fee is imposed. The statutory scheme also mandates a public hearing process for the adoption of a fee, and a procedure for the refund of unused portions of the fee. Moreover, a development fee which exceeds the burdens and benefits of development will be found to be a special tax that requires two-thirds voter approval under article XIII A, section 4 of the California Constitution. [¶] Even under more deferential review, a court's inquiry into the validity of the reasonable relationship between a development fee and a development impact will not be a "rubber stamp." [*Ehrlich, supra,* 911 P.2d at 458-459 (MOSK, J. concur).]

Thus, the MFA proves the truth of Justice Kagan's point in *Koontz* that courts can use "state law to protect against monetary demands." *Koontz*, supra, 570 U.S. at p. 629 (KAGAN, J. dissenting). This Court's majority agreed: "[T]he dissent is correct that state law normally provides an independent check on excessive land use permitting fees." *Koontz, supra,* 570 U.S. at p. 629. As the Court of Appeal explained in the Decision below, "legislatively imposed development impact fees that are not subject to the *Nollan/Dolan* test remain subject to the means-end

judicial review under the Mitigation Fee Act." App. A-15. Accordingly, the Petition and the amicus briefs are surprisingly silent regarding the present application of the reasonable relationship test in the MFA, which governs every legislatively imposed exaction in California.

The reasonable relationship test in section 66001(a) of the MFA was designed by the California Legislature to not only protect the interest of developers, as discussed above, but also to satisfy the constitutional purposes underlying the "rough proportionality" test in *Dolan*. This Court concluded in *Dolan* that the "reasonable relationship" test used by the states, such as the MFA, was the closest to the federal constitutional norm. *Dolan, supra*, 512 U.S. at 391. This Court adopted the term "rough proportionality" to describe that norm, explaining that such a formulation entails "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Ibid.* (fn. omitted.) Although no "precise mathematical calculation is required," a local agency must nevertheless "make some effort to quantify its findings in support of the dedication" beyond mere conclusory statements that it will mitigate or offset some anticipated burden created by the project. *Id.* at 395-396. That is also what the MFA's "reasonable relationship" test was designed to do in regard to legislative exactions. *See City of San Diego v. Board of Trustees of California State University*, 352 P.3d 883, 893-894 (Cal. 2015) ["mitigation fees imposed on a project must be reasonably related and roughly proportional to that project's impacts" (citing Gov.

Code, § 66001, subds. (a)(3)–(4), (b) & (g); *Ehrlich, supra,* 911 P.2d at 437-438; and *Dolan, supra,* 512 U.S. at 391].

The MFA requirements therefore prevent legislative exactions in California from being arbitrary, oppressive, and unjust, which *amicus curiae* admits is "the sort of review provided by *Nollan* and *Dolan*." Brief of The Cato Institute As *Amicus Curiae* etc. ("CATO Brief"), 10. The MFA requirements for legislative exactions follows the constitutional requirements in *Nollan*/*Dolan*. The California Supreme Court explained:

> [T]he Legislature incorporated into Government Code section 66001, subdivision (a)(3) of the Act a standard that generally corresponds to the one reflected in the high court's takings jurisprudence (*see Dolan, supra*, 512 U.S. at [391] ["We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm . . . . [W]e do not adopt it as such, partly because the term . . . seems confusingly similar to the term 'rational basis' . . ."]), it is appropriate for this court to interpret the statutory standard in a manner consistent with the high court's decisions in *Nollan* and *Dolan* so that a development fee imposed pursuant to the act, and that satisfies its requirements, will not be subject to challenge on constitutional

> grounds. By interpreting the "reasonable relationship" standard adopted by Government Code section 66001 as imposing a requirement consistent with the *Nollan/Dolan* standard, we serve the legislative purpose of protecting developers from disproportionate and excessive fees, and carry out the legislative intent of imposing a statutory relationship between monetary exaction and development project that accurately reflects the prevailing takings clause standard.
>
> We must, in other words, recognize that in the wake of *Dolan* the term "reasonable relationship" [in the MFA] embraces both constitutional and statutory meanings which, for all practical purposes, have merged to the extent that the *Dolan* decision applies to development fees--an issue we address below. Thus, developers who wish to challenge a development fee on either statutory or constitutional grounds must do so via the statutory framework provided by the [Mitigation Fee] Act. [*Ehrlich, supra,* 911 P.2d at 437-438 (ARABIAN, J. plur. opn.]

In his concurrence in *Ehrlich*, Justice Mosk similarly added: "*Nollan* and *Dolan* in most cases impose no additional constitutional burden on the government to

justify development fees beyond the burden it already bears under the state constitution and statute." *Ehrlich, supra,* 911 P.2d at 459 (MOSK, J. concur). In short, the reasonable relationship test in the MFA that applies to legislative exactions satisfies the same constitutional concerns articulated in *Nollan*/*Dolan.*

The only difference in the *Nollan*/*Dolan* test and the MFA's reasonable relationship standard for legislative exactions is that, whereas *Dolan* prescribes "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development," 512 U.S. at 391, the "required nexis" for legislative exactions under the MFA "is established based on the justifiable imposition of fees on a *class of development* rather than particular projects." App. A-21 (emphasis added). However, the constitutional purposes underlying the individualized determination element in *Dolan* are nevertheless satisfied by the reasonable relationship test for legislative exactions under the MFA. Whereas *Dolan* seeks to ensure that the development fee is related "both in nature and extent to the impact of the proposed development" *Dolan*, 512 U.S. at 391, the trial court in this case, reviewing the County's compliance with the MFA, found that the administrative record established that "the fee bore a reasonable relationship, in both intended use and amount, to the deleterious public impact of the project." App. A-6. The Court of Appeal affirmed and similarly concluded that "Sheetz has failed to show that the record before the County clearly did not support the County's determinations regarding the reasonableness of the relationship between the fee and his development project." App. A-27.

Furthermore, the considerations in *Dolan* that governments cannot circumvent constitutional requirements with mere "conclusory statement[s]" about the public interest, *Dolan*, 512 U.S. at 395, and that the government must "make some effort to quantify its findings," *id.*, were satisfied by the County's compliance with the MFA's reasonable relationship test, as discussed below.

B. The TIM Fees Here Satisfy The "Reasonable Relationship" Test For Legislative Exactions Under California Law.

In response to Mr. Sheetz' arguments on the merits, the trial court held, and the Court of Appeal affirmed, that the County's TIM Fee Program satisfied the reasonable relationship test for legislative exactions required in section 66001(a) of the MFA. Petition, 10-11 (citing App. A-16). When the County adopted new TIM fee rates in February 2012, the County's Board of Supervisors explained that, "starting in 1984 and continuing until the present time, the Board has adopted and updated various fee resolutions to ensure that new development on the western slope pay to fund its fair share of the costs of improving the county and state roadways necessary to serve that new development …." App. D-1 (emphasis added); *see also* App. A-3; Petition, 8. The trial court concluded the County met its burden of producing evidence that it used a valid method for imposing the TIM fee in 2012, one that established a reasonable relationship between the fee charged and the burden posed by Sheetz's development project. App. A-6. The Court of Appeal affirmed. App. A-27. Thus, *amici*

curiae's assertion that, under *Nollan/Dolan*, "[t]he 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," Brief of *Amici Curiae* California Building Industry Association, etc. ("CBIA Brief"), 29, is exactly what happened here because of the County's compliance with the MFA when it adopted the TIM fees.

Like the Petition, all of the *amici curiae* briefs in support of the Petition ignore the County's compliance with the reasonable relationship test in the MFA. Rather, such briefs are filled with misleading and out of context statements about legislatively adopted fees in general without reference to the TIM fees that are actually at issue here. Such misleading statements, unsupported by any citation to the record here, include the following: "The exaction for road funding is unrelated to Mr. Sheetz's activity and far out of proportion to any costs that the County of El Dorado might incur as a result of it," Brief of *Amicus Curiae* The Buckeye Institute, etc. ("Buckeye Brief"), 2; the County "extract[s] payments from individual property owners for conduct disconnected from those roads," Buckeye Brief, 6; local government may impose "unjustified fees that admittedly lack even 'rough proportionality' to the impacts of new development as in this case," CBIA Brief, 23; the TIM fees here are "arbitrary property confiscations in the land-use permit process," Brief of Amicus Curiae Pacific Legal Foundation ("PLF Brief"), 28; "there is no limit to the amount of money or property that the government can demand as a permit condition," PLF Brief, 4; "there is no end to the types of social burdens

the government can place on an individual permit-seeker," PLF Brief, 4; and "a least in California, there is no effective state court review of fees if they are characterized as 'legislative,' as plainly shown in *Sheetz*." Brief of Amici Curiae California Building Industry Association, etc. ("CBIA Brief"), 20. Because there is no supporting evidence whatsoever in the record in this case for these conclusory and misleading statements, their inclusion in the amicus briefs further demonstrate that Mr. Sheetz and *amici curiae* are seeking a conclusory opinion from this Court.

Mr. Sheetz and *amici curiae*'s avoidance of the County's compliance with the MFA's reasonable relationship test also makes inapposite the public policy arguments raised in the amicus briefs regarding the "politics of takings" and "majoritarian processes," CATO Brief, 15-22, "majoritarian oppression," PLF 16-17, and the "adverse consequences of development fees on equity, housing affordability, and other "serious drawbacks" if fees are not proportionate to impacts." CBIA Brief, 22. In short, the complete lack of any consideration of the MFA's requirements make the arguments of Mr. Sheetz and the *amici curiae* merely hypothetical and advisory in the case at bar, thereby precluding this Court's review.

C. The TIM Fees In This Case Were Applied Without Discretion.

The *Nollan/Dolan* test does not apply here because the formulaic TIM fees are applied without any discretion on the part of the County's administrative officials. The California Supreme Court recognized that adjudicative discretion is the key to determining when *Nollan/Dolan* applies. *See Ehrlich, supra,* 911 P.2d at 444 (ARABIAN, J. plur. opn.) [heightened scrutiny of the *Nollan/Dolan* test is appropriate "[w]hen such exactions are imposed . . . neither generally nor ministerially, but on an individual and *discretionary* basis" (emphasis added)]; *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (Cal.2002) ["The 'sine qua non' for application of *Nollan/Dolan* scrutiny is thus the '*discretionary* deployment of the police power' in 'the imposition of land-use conditions in individual cases'" (quoting *Ehrlich, supra,* 911 P.2d at 439 (ARABIAN, J plur. opn..) (emphasis added)); *Landgate, Inc. v. California Coastal Com.*, 953 P.2d 1188, 1198 (Cal. 1998) [*Nollan/Dolan* applies to "development fees imposed on a property owner on an individual and *discretionary* basis." (emphasis added)]; In the Decision below, the Court of Appeal recognized that there was no discretion in the application of the TIM Fees: "We conclude the trial court properly determined that the TIM fee is not subject to the heightened scrutiny of the *Nollan/Dolan* test. The fee is not an "ad hoc exaction" imposed on a property owner on an individual and discretionary basis." App. A-16.

D. None Of The Case Law Cited By Mr. Sheetz Address The Application Of The *Nollan/Dolan* Test To A Legislatively Mandated, Non-Discretionary, Broadly-Applied Impact Fee That Satisfies The MFA's "Reasonable Relationship" Test.

The Petition simplistically presents the question here as whether there is "a constitutional difference between legislative and administrative exactions for purposes of *Nollan/Dolan* review" Petition, 2. But the Decision below is not simply about "whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one." *California Bldg. Indus. Ass'n v. City of San Jose, Calif.*, 577 U.S. 1179 (2016) (THOMAS, J. concurring in denial of certiorari). Merely framing the issue as a generic 'legislative' exaction versus a generic 'administrative' exaction does not accurately describe the dispositive issue in this case. The simplistic distinction that permeates the entire Petition fails to account for (1) the formulaic and generally applied legislative exactions at issue in this case; (2) the reasonable relationship" requirements that are satisfied by the TIM fees here; (3) the state courts' ruling that the TIM fees complied with the requirements of the MFA; and (4) the lack of any discretion in the County's application of the TIM Fees. Because none of the case law cited in the Petition (or the amicus briefs) ever applied the *Nollan/Dolan* test to legislative exactions that meet such criteria, there is no split of authority for this Court to resolve and therefore certiorari should be denied.

Several cases relied on by Mr. Sheetz did not involve formulaic and generally applied legislative exactions. *See Highlands-In-The-Woods, L.L.C. v. Polk Cnty.*, 217 So.3d 1175, 1178 (Fla. Dist. Ct. App. 2017) ["We are not convinced that the County's decision regarding Highlands was only legislative in nature and not adjudicative," and the County ordinance requiring the connection to a reuse system "*may* also apply to other subdivisions in the county" (emphasis added)]; *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. Dist. Ct. App. 1995) ["the so-called 'ordinance' at issue here did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character."]

Several of the cases relied on by Mr. Sheetz address legislatively adopted exactions, but there is no discussion in those cases as to whether the exactions were required to satisfy a "reasonable relationship" test such as that which is mandated by the MFA in California. For example, there is no indication in *Anderson Creek Partners, L.P. v. Cnty. Of Harnett*, 876 S.E.2d 476, 480-481, 497, 500, 503 n. 17 (N.C. 2022) that the sewer hook-up fee mandated by local ordinance in that case was ever subjected to a "reasonable relationship" test when it was enacted. The same is true of the governmental requirements at issue in *Heritage at Pompano Hous. Partners, L.P. v. City of Pompano Beach*, 2021 U.S. Dist. LEXIS 239647, 2021 WL 8875658 (S.D.Fla.. Dec. 15, 2021); *Highlands-In-The-Woods, L.L.C. v. Polk Cnty.*, *supra*; and *Amoco Oil Co. v. Village of Schaumburg*, *supra*. Because the TIM Fees in the case at bar were governed by (and satisfied) the "reasonable

relationship" test in the MFA, but the legislative exactions in the case law cited by Mr. Sheetz did not, the Petition does not present a split of authority for this Court to resolve.

Even though there is no administrative discretion in the application of the TIM fees here, Mr. Sheetz relies on case law where there was substantial discretion in the application of legislatively mandated exactions. Petition, 14-15. For example, in *Tower of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W.3d 620, 641-643 (Tex. 2004), the Texas Supreme Court applied *Nollan/Dolan* to a local ordinance that required all developers to construct concrete streets. However, the ordinance contained an exception to that requirement if the Town's Council found and determined "that such standards work a hardship" due to the "costs" and "other related factors" resulting from the imposition of that requirement in individual cases. *Id.* at 624. In the *Stafford Estates* case, the Town denied the request by the plaintiff developer for an exception to that requirement, even though the Town "had exercised its discretion to grant exceptions to other developers on a project-by-project basis." *Id.* Thus, the *Stafford Estates* case addressed a discretionary application of a legislatively adopted exaction, similar to that in *Dolan*. However, because there is no discretion in the application of the TIM Fees by the County in the case at bar, *Stafford Estates* is materially different case, and Mr. Sheetz therefore fails to establish the existence of any split of authority between the Texas case and the Decision below.

Mr. Sheetz even relies upon case law that actually supports California's position. Mr. Sheetz

points out that in *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 350-356 (Ohio 2000), the Ohio Supreme Court applied a "dual rational nexus test" purportedly under *Nollan/Dolan* to a legislative exaction. Petition, 12-13. However, that "dual rational nexus test" did not actually follow Nollan/Dolan because it omitted the "individualized determination" component of *Nollan/Dolan*. As the Oregon Court of Appeals accurately explained, the *Dayton* decision "made no individualized assessment of proportionality at all but instead reviewed the legislation from a facial perspective as it applied to developers generally." *Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 978 n.13 (Or. Ct. App. 2002). Thus, *Dayton* is actually contrary to Mr. Sheetz' position and essentially supports the position taken by the California courts.

Therefore, none of the authorities cited by Mr. Sheetz are similar to the case at bar, where the legislatively imposed, formulaic and nondiscretionary impact fees were found to comply with the "reasonable relationship" requirement in the MFA. None of the cases cited in the Petition hold that legislative exactions that comply with the "reasonable relationship" standard in the MFA (or a similar standard) must also satisfy the "individualized determination" component of the *Nollan/Dolan* test. None of the case law cited in the Petition disagrees with, or even discusses, whether the MFA's "justifiable imposition of fees on a class of development rather than particular projects," App. A-21, is consistent with *Nollan/Dolan*. This is not the proper case for this Court to explore such issues. "The more important an issue is, the more the Court would

benefit by allowing the issue to percolate so it can avail itself of the wisdom of other courts before settling a momentous matter. This argument is especially appropriate if the issue is inadequately explored in the opinions below." Shapiro, *et al.*, *Supreme Court Practice* (11th Ed. 2019), Ch. 6.37(i)(1), p. 6-148.

In short, no split of authority exists on the key dispositive issues here. This Court should deny certiorari in this case.

III. This Court Should Deny The Petition Because Mr. Sheetz Essentially Challenges The Constitutionality Of The MFA, Which Was Never Raised Or Decided Below

Mr. Sheetz argues that the "individualized determination" in the *Nollan/Dolan* standard must apply to the legislatively imposed TIM fees. Petition, 8. Because the MFA distinguishes between legislative fees in subdivision (a) of Government Code section 66001, and adjudicatory fees in subdivision (b) of section 66001, Mr. Sheetz' Petition essentially asks this Court to decide whether that distinction in the MFA is constitutional under *Nollan/Dolan*. As the Court of Appeal explained,

> Section 66001, subdivision (a) applies to quasi-legislative decisions to impose development impact fees on a class of development projects, whereas section 66001, subdivision (b) applies to

> adjudicatory, case-by-case decisions to impose a development impact fee on a particular development project. The difference between these subdivisions is that only subdivision (b) of section 66001 requires an individualized more specific determination of reasonableness for each particular project. [App. A-20 - A-21.]

Citing numerous California cases, the Court of Appeal concluded that subdivision (a) applies to the TIM fees here, and not subdivision (b), because "California law does not require an individualized or site-specific determination of reasonableness for each particular project subject to the [TIM] fee." App. A-21, A-23. The Petition essentially asks this Court to determine whether that distinction in the MFA between subdivisions (a) and (b), of Government Code section 66001, is constitutional under *Nollan/Dolan*. The arguments of *amicus curiae* further demonstrate that the Petition is, in fact, a challenge to the constitutionality of "California law," i.e., the MFA. CBIA Brief, 8.

However, that constitutional issue was never raised or considered below, and "[it is not this Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 420 (2016). "Mindful that this is a court of final review and not first view," *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 399 (1996) (GINSBURG, J. concurring in part and dissenting in part), this Court ordinarily "do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, 151 L. Ed. 2d 489, 122 S. Ct. 511

(2001) (per curiam) (internal quotation marks omitted). Accordingly, this Court should deny certiorari here. *See e.g., Webster v. Cooper*, 558 U.S. 1039, 1041 (2009) (SCALIA, J. dissenting) ["Since he did not argue that ground to the Court of Appeals, and since that court did not address it, we would almost certainly deny certiorari"]; *EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986) [where petitioner failed to raised issues in the Court of Appeals, "[u]nder these circumstances, several central issues on which resolution of the question presented may well turn cannot be reached or resolved. Accordingly, we dismiss the writ of certiorari as improvidently granted."]

IV. The Court Of Appeal's Decision Below Is Not In Tension With Koontz Or This Court's Recent Takings Precedents

A. The Decision Below Is Not In Tension With *Koontz*.

Contrary to Mr. Sheetz's argument, the Decision below is not in tension with *Koontz* because *Koontz* simply did not address the issue raised in his Petition. Mr. Sheetz argues that *Koontz* concluded "that the *Nollan/Dolan standard* applies to all permit exactions, including legislative ones," and affirmed that "all exactions in the land-use permitting context, whether or not garbed in legislation, are subject to scrutiny under the unconstitutional-conditions doctrine." Petition, 19, 20, 24. That is incorrect. As Justice Kagan correctly observed, the majority

opinion in *Koontz* did not address that issue. *Koontz, supra,* 570 U.S. at 628 (KAGAN, J. dissenting). The Court of Appeal made a similar observation:

> We have carefully reviewed *Koontz* and agree with our Supreme Court [of California] that [*Koontz*] "does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments." *Koontz* involved an adjudicative, individual and discretionary land-use determination, and the majority opinion does not address whether the *Nollan/Dolan* test applies to legislatively mandated, generally applicable formulaic development fees. [App. A-17 (citing *California Building Industry Assn. v. City of San Jose*, 351 P.3d 974, 990 fn. 11 (Cal. 2015).]

See also Better Housing for Long Beach v. Newsom, 452 F.Supp.3d 921, 932 (C.D.Ca. 2020) ["*Koontz* itself involved an adjudicative, individual determination, and the majority never addressed *Nollan/Dolan*'s application to general legislation."] Therefore, the Court of Appeal was correct in concluding that, "because the monetary exaction in *Koontz* was not a generally applicable development impact fee, the decision, in our view, cannot be read as compelling the application of the *Nollan/Dolan* test to the fee at issue here." App. A-18.

The Decision below is also not in tension with *Koontz* because the Decision conforms to the constitutional considerations discussed by this Court in *Koontz*. This Court explained in *Koontz* that government can impose two different kinds of financial burdens on property owners. One kind "'operate[s] upon or alter[s] an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Koontz, supra*, 570 U.S. at 613 (quoting *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 540 (1998) (KENNEDY, J. opinion)). This kind of financial demand "burdens petitioner's ownership of a specific parcel of land." *Id.* A "*per se* takings" approach under *Nollan/Dolan* is proper for this kind of financial burden because "the government commands the relinquishment of funds linked to a specific, identifiable property interest." *Id.* at 613-614. Thus, the "fulcrum" of the Court's decision to apply *Nollan/Dolan* in *Koontz* was "the direct link between the government's demand and a specific parcel of real property." *Id.* at 614. Here, no such direct link applies. The TIM fees are broadly applied based on geographic areas and the type of construction involved, which is akin to the "legislative classifying areas of a jurisdiction" that Mr. Sheetz admits does not fall within *Dolan*. Petition, 23.

The second kind of financial burden imposed on property owners by government involves "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Koontz, supra*, 570 U.S. at 615-616. Such financial burdens are not governed by *Nollan/Dolan*. *Id.* Because generally applied and non-discretionary legislative exactions do not target an "identified,"

"particular," or "specific parcel of real property," but instead apply generally to parcels of land, they are similar to "property taxes, user fees, and similar laws and regulations" for which *Nollan/Dolan* does not apply. As Justice Mosk opined in *Ehrlich*: "[I]f a municipality can constitutionally impose a development tax as long as it is rationally based, why is a higher level of constitutional scrutiny required when, as in the case of generally applicable development fees, the 'tax' is earmarked for use in alleviating specific development impacts rather than for the general fund?" *Ehrlich, supra*, 12 Cal.4th at 894 (MOSK, J. concurring.)

Additionally, the dual objectives of "landowners internaliz[ing] the negative externalities of their conduct" and preventing the government from "engaging in out-and-out extortion," *Koontz, supra,* 570 U.S. at 605-06, are satisfied in this case because, as the Court of Appeal properly concluded, "the County met its initial burden to demonstrate that it used a valid method for imposing the TIM fee, one that established a reasonable relationship between the fee charged and the burden posed by Sheetz's development of a single-family residence in geographic Zone 6." App. A-27

Thus, the constitutional considerations expressed in *Koontz* are satisfied by broadly applied, nondiscretionary legislative exactions that meet the "reasonable relationship" standard in the MFA, such as the TIM fees here, even where *Nollan/Dolan* is not applied. Surprisingly, none of that is discussed in the Petition. And that is not raised or discussed in any of the case law cited in the Petition.

B. The Discretion Applied In *Nollan* And *Dolan* Does Not Exist Here.

The Decision below is also not in tension with *Koontz* because *Nollan* and *Dolan* involved discretionary, adjudicatory application of governmental exactions. Mr. Sheetz's argument that *Nollan* and *Dolan* "did not involve administrative or ad hoc decision-making" Petition, 21, is contradicted not only by this Court's statement in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005), that "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to *adjudicative* land-use exactions," but also by the facts in the *Nollan* and *Dolan* cases.

In his discussion of *Nollan*, Mr. Sheetz highlights the role of the legislative enactment of California Public Resources Code section 30212, which statute requires the property owners in that case to obtain a coastal development permit from the California Coastal Commission. Petition, 21. However, Mr. Sheetz ignores the fact that there was significant adjudicative discretion on the part of the Commission in the application of that statute. Such discretion not only is inherent in the language of section 30212, *see Grupe v. California Coastal Com.*, 166 Cal.App.3d 148 (Cal. Ct.App. 1985) [quoting section 30212], but is also shown in this Court's discussion in *Nollan* about the individual permit that was sought in that case:

> [T]he Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase

> blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." [Citation.] The new house would also increase private use of the shorefront. [Citation.] These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." [Citation.] Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. [*Nollan, supra,* 483 U.S. at 828-829.]

This Court also pointed out,

> [t]he Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but

> presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach. [*Id*. at 838.]

Thus, the Commission's findings in *Nollan* involved significant adjudicative discretion on the part of the Commission in determining how to apply the public access requirement in section 30212. *See e.g., La Costa Beach Homeowners' Assn. v. California Coastal Com.*, 101 Cal.App.4th 804, 817 (Cal. Ct. App. 2002) [discusses "Commission's exercise of discretion in this case" regarding how public beach access is to be provided under section 30212.] Such administrative discretion in the application of the exaction warrants *Nollan/Dolan* review. But no such discretion exists in the application of the TIM fees here. That fact is nowhere mentioned in the Petition.

The exaction imposed on the property owner in *Dolan* was similarly applied through the local agency's discretion. Mr. Sheetz discusses the role of the City of Tigard (Oregon) Community Planning Commission in granting the petitioner's permit application in the *Dolan* case subject to conditions imposed by the Community Development Code ("CDC"). Petition, 22-23. However, Mr. Sheetz fails to discuss the adjudicatory and discretionary application of the CDC by the Commission. This Court explained:

> Petitioner requested *variances* from the CDC standards. Variances are granted only where it can be shown that, owing to *special circumstances related to a specific piece of the land,* the literal interpretation of the applicable zoning provisions would cause "an undue or unnecessary hardship" unless the variance is granted. CDC § 18.134.010, App. to Brief for Respondent B-47. Rather than posing alternative mitigating measures to offset the expected impacts of her proposed development, as allowed under the CDC, petitioner simply argued that her proposed development would not conflict with the policies of the comprehensive plan. *Id.*, at E-4. The Commission denied the request. [*Dolan, supra,* 512 U.S. at 380-381 (emphasis added).]

Thus, *Dolan* involved wide adjudicative discretion given to the administrative staff and City officials in deciding whether to exempt the property owner from the legislatively adopted standards of the CDC through the variance process.

The recent decision by the Sixth Circuit Court of Appeals in *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816 (6th Cir. 2023), relied upon by Mr. Sheetz and amicus curiae, applied the *Nollan/Dolan* standard to an ordinance that imposed as conditions for building permits the obligations to either build a sidewalk or pay an in-lieu fee, and to

dedicate a right-of-way and/or public pedestrian easement across the property. However, unlike property owners in El Dorado County under the TIM fees here, a landowner could be exempted from the right-of-way and/or easement in *Knight* either through a "waiver" by a zoning administrator or through a "variance" granted by the Board of Zoning Appeals. *Id*. at 820-821. Indeed, the plaintiff in that case sought such a waiver and variance, which were denied. *Id*. Thus, the exaction in *Knight* was ultimately applied to the landowner because of the discretionary decisions of local zoning officials. That discretionary application of the exaction in *Knight* is akin to the adjudicative and ad-hoc exaction in *Dolan*, and unlike the non-discretionary application of the TIM fees to Mr. Sheetz' project. As discussed above, that distinction is fundamental to the application of *Nollan/Dolan* in *Koontz*. But the *amicus* briefs omit any discussion of that key distinction. *See e.g.*, Buckeye Brief, 10-15.

Because the discretionary and adjudicatory application of the exactions by administrative officials that was present in *Koontz*, *Nollan* and *Dolan* did not exist in the County's application of the TIM fees to Mr. Sheetz' building project, the Decision below is not in tension with those precedents of this Court. Again, that key fact is simply avoided in the Petition and in the amicus briefs in support of the Petition.

C. The Decision Below Is Not In Tension With *Cedar Point* And *Pakdel*.

Mr. Sheetz's reliance on *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), is misplaced. Petition, 24-25. In *Cedar Point*, a California regulation allowed representatives of a labor organization to enter an agricultural employer's property to solicit support for unionization for up to three hours per day, 120 days per year. *Id*. at 2069. This Court held that the regulation violated the takings clause because it "appropriate[d] a right to invade the growers' property and therefore constitute[d] a *per se* physical taking." *Id*. at 2072. This Court reasoned that the regulation violated the right to exclude, which is " 'one of the most treasured' rights or property ownership." *Id*. In concluding that the regulation constituted a physical taking as opposed to a regulatory taking, the court explained that the "essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id*. But *Cedar Point* is distinguishable from the Decision below. *Cedar Point* involved a state regulation that only applied to property owned by agricultural employers. *Cedar Point* does not purport to address whether the heightened scrutiny of the *Nollan/Dolan* test applies to the circumstances presented here – a legislatively mandated, formulaic and non-discretionary development impact fee that applies to a broad class of proposed developments, and that meets the "reasonable relationship" test of the MFA

(or a similar requirement). Therefore, the general observation by this Court in *Cedar Point* that Mr. Sheetz and amicus curiae rely upon – "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)" – Petition, 25; PLF Brief, 9 – is not the dispositive issue in this case. The Decision below is not in tension with *Cedar Point*.

Mr. Sheetz's argument that the Decision below is "in tension" with *Pakdel v. City & County of San Francisco*, 141 S.Ct. 2226 (2021), is similarly incorrect. In his description of the City of San Francisco's lifetime lease requirement in that case, Mr. Sheetz admits that petitioners in that case asked the city "to either *excuse* them from executing the lifetime lease or compensate them for the lease." Petition, 26 (quoting *Pakdel, supra,* 141 S.Ct. at 2228 (emphasis added). In fact, the city "twice denied their requests for the *exemption*." *Pakdel, supra,* 141 S.Ct. at p. 2229 (emphasis added). The Ninth Circuit in *Pakdel* held that the City's decision was not truly "final" for purposes of a federal takings action "because petitioners had made a belated request for an *exemption* at the end of the administrative process instead of timely seeking one 'through the prescribed procedures.' " *Id*. (citation omitted) (emphasis added). In other words, the Ninth Circuit held that "a conclusive decision is not really 'final' if the plaintiff did not give the agency the 'opportunity to exercise its "*flexibility or discretion*" ' in reaching the decision." *Id*. (citation omitted) (emphasis added). This Court reversed and remanded the case because "the Ninth Circuit's view of finality is incorrect." *Id.* at pp. 2230-2231. There is no discussion in *Pakdel* regarding

whether the heightened scrutiny of the *Nollan/Dolan* test applies to the circumstances presented here - a legislatively mandated, formulaic and non-discretionary development impact fee that applies to a broad class of proposed developments, and meets the "reasonable relationship" test in the MFA. While *Pakdel* involved an adjudicative determination of an "excuse" or "exemption" to the lifetime lease requirement, the case at bar does not involve such an adjudicative decision by a local agency regarding an *ad hoc* determination of an excuse or exemption to a generally applied legislative requirement. Thus, the Decision below is not in tension with *Pakdel*.

CONCLUSION

For the reasons stated above, Respondent requests that this Court deny Mr. Sheetz's Petition For Writ Of Certiorari in its entirety.

Respectfully submitted,

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