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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The County has failed to overcome the reality of a persisting conflict among state and federal courts concerning whether legislative exactions are subject to *Nollan v. Cal. Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Indeed, just days after the petition was filed, that conflict deepened when the Sixth Circuit Court of Appeals decided *Knight v. Metro. Gov't of Nashville & Davidson County*, 67 F.4th 816 (6th Cir. 2023).

Facing the same question the petition presents, the court in *Knight* acknowledged it was "wad[ing] into a broad judicial debate." *Id.* at 829. Either the court could join the "many" courts that "have refused to apply *Nollan* to legislatively compelled permit conditions." *Id.* Or, the court could side with the "many" other courts that "have rejected this distinction and applied *Nollan* to all permit conditions." *Id.* Ultimately, the court held that the *Nollan/Dolan* standard "applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones." *Id.*

Thus, in the last ninth months alone, the Sixth Circuit has declared that legislative exactions are subject to *Nollan* and *Dolan*, while a California court has declared that *Nollan* and *Dolan* "do not extend to" exactions like Mr. Sheetz's "that are generally applicable to a broad class of property owners through legislative action." App. A-11. The conflict is practically self-evident, and a cleaner vehicle for resolving that conflict is unlikely to come before the Court.

How could the County oppose review under such clear-cut circumstances? Remarkably, it has—though not without grossly mischaracterizing the petition and twisting the law.

To start, the County rewrites the petition to argue that Mr. Sheetz seeks an advisory opinion on issues not litigated and decided below. First, it claims the petition seeks a ruling that all legislative exactions are facially unconstitutional, then it claims that the petition actually seeks a ruling that California's Mitigation Fee Act ("MFA" or "Act") is unconstitutional. Grasping at straws, the County also claims that the MFA has even displaced the *Nollan/Dolan* standard, rendering it irrelevant in California.

None of the arguments the County throws at the wall sticks. The petition unambiguously seeks review only of *Nollan/Dolan*'s applicability to legislative exactions—nothing more and nothing less. That question was fully litigated and decided below. Further, the MFA, which mandates only deferential review of legislative exactions, does not (and cannot) displace *Nollan/Dolan*'s more exacting standard. Finally, contrary to the County's arguments, the conflict described in the petition is real—and, as evidenced by *Knight*, deepening.

The Court should grant the petition.

ARGUMENT

I. The Petition Seeks Review of a Question That Was Fully Litigated and Decided Below

A. The County Misconstrues the Question Presented

The County argues that the Question Presented "avoids the actual facts in this case," and "asks this Court to determine the constitutionality of generic legislatively imposed impact fees under *Nollan/Dolan*, and not the actual fees at issue here." Opp. at 6. On that premise, the County concludes that Mr. Sheetz seeks an "advisory opinion." *Id.* at 7. The County is as confused as it is wrong.

First, the Question Presented details the legislative nature of the exaction at issue, why the County imposed it, and how the lower courts ruled as to *Nollan/Dolan*'s applicability. Pet. at (i). Far from "avoid[ing] the actual facts in this case," the Question Presented amply describes the relevant facts giving rise to the *Nollan/Dolan* issue.

Second, the County mischaracterizes the Question Presented as a "facial" challenge to all legislative exactions. Opp. at 6, 7 n.1. By its plain terms, the Question Presented doesn't ask whether all legislative exactions violate *Nollan/Dolan*. Rather, it asks the antecedent question whether such exactions are subject to *Nollan/Dolan* review in the first place. Simply put, the Question Presented neither says nor implies anything about a facial challenge to legislative exactions *writ large*. Opp. at 6, 7 n.1.

The petition presents a genuine case or controversy concerning a federal question that was fully litigated and decided below. The County doesn't deny that Mr. Sheetz litigated a *Nollan/Dolan* claim against a legislative exaction in the courts below. It doesn't deny that the lower courts held that Mr. Sheetz had no cognizable claim, because (in the courts' view) legislative exactions are exempt from *Nollan/Dolan* review. And the County effectively concedes that the Question Presented to this Court is the same as the one presented to the California Supreme Court. Opp. at 6. Thus, this case is the ideal vehicle for resolving the "legislative exactions" debate that continues to divide state and federal courts.

B. The Petition Does Not Challenge or Otherwise Implicate California's Mitigation Fee Act

Later in its brief, the County mischaracterizes the petition as seeking review of the Mitigation Fee Act's constitutionality. Opp. at 24-25. Specifically, the County says the petition challenges the constitutionality of the MFA's different standards for reviewing exactions. *Id.* (discussing Cal. Gov Code § 66001(a)-(b)). Whereas the MFA requires legislative exactions to bear a "reasonable relationship" to the public impacts only of the *general class of development* to which a particular project belongs, the MFA requires *ad hoc* exactions to bear a "reasonable relationship" to the project's actual impacts. App. A-20 to A-21. The County thinks the petition constitutionally challenges this dual standard for reviewing exactions—a challenge that Mr. Sheetz did

not prosecute below and therefore has waived. Opp. at 24.

It is true Mr. Sheetz didn't bring such a challenge in the lower courts. And he doesn't bring it here, either. In claiming otherwise, the County appears to conflate two independent claims that he *did* litigate below—only one of which the petition presses.

The opinion below separately describes those two claims—the first being the federal *Nollan/Dolan* claim, and the other being the state MFA claim. App. A-2, A-4 to A-5. The federal claim is that Mr. Sheetz's permit exaction "effects an unlawful taking of property in violation of the special application of the 'unconstitutional conditions doctrine' established in *Nollan* and *Dolan*." App. A-16. Those precedents require an individualized determination that an exaction bears an "essential nexus" and "rough proportionality" to the impacts of the proposed project. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391.

By contrast, Mr. Sheetz's state claim was that the exaction failed the MFA's "reasonable relationship" test. App. A-4, A-20. As the opinion below reflects, Mr. Sheetz brought his MFA claim in the alternative to his primary *Nollan/Dolan* claim. App. A-16. If *Nollan/Dolan*'s heightened scrutiny applied and was violated, Mr. Sheetz would prevail, and the exaction would be struck down; the MFA claim wouldn't come into play. If the *Nollan/Dolan* claim failed—because either *Nollan/Dolan* scrutiny didn't apply or the exaction survived scrutiny—then the County *still* would need to satisfy the MFA's less stringent "reasonable relationship" test. Either way,

disposition of the MFA claim would be insufficient to fully resolve Mr. Sheetz's challenge.

Like the trial court before it, the Court of Appeal disposed of each claim, in turn. App. A-5 to A-6 (describing trial court's separate disposition of each of the claims). As to the federal claim, the Court of Appeal held that, because Mr. Sheetz's exaction was imposed "pursuant to a legislatively authorized fee program that generally applies to all new development projects," it was "not subject to the ***heightened scrutiny*** of *Nollan/Dolan* test" (App. A-16 (emphasis added))—including the mandate that the County "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." App. A-10 (quoting *Dolan*, 512 U.S. at 391).

Turning to the MFA claim, the Court of Appeal emphasized that the statute triggers far less scrutiny than *Nollan* and *Dolan*:

> "[T]he validity of the fee . . . is only subject to the ***deferential*** 'reasonable relationship' test embodied in the Mitigation Fee Act. . . . California law does not require an individualized or site-specific determination of reasonableness for each particular project subject to the fee . . . . In general, the imposition of various monetary exactions [established by legislation] is accorded ***substantial judicial deference***. . . ."

App. A-16, A-23, A-25 (emphasis added). The court held that Mr. Sheetz's exaction satisfied the "reasonable relationship" test. App. A-27.

As the County acknowledges, Mr. Sheetz petitioned the California Supreme Court to review *Nollan/Dolan*'s applicability to legislative exactions. Opp. at 6. That's precisely the question before this Court. Pet. at (i). At no point has Mr. Sheetz ever challenged the MFA's constitutionality, including by way of this petition. That is evident from the petition itself and the opinions below. App. A-1, *et seq.*; App B-1, *et seq*.

II. The Mitigation Fee Act Doesn't Displace *Nollan/Dolan* Review

Continuing its fixation on the Act, the County raises another MFA-related argument against review. For the County, the statute's "reasonable relationship" test for legislative exactions ***displaces*** *Nollan/Dolan*'s federal constitutional standard. Opp. at 7-8. Under its newly minted theory[1]—to which no court, including the court below, ever has subscribed—the Act purportedly "satisfies the constitutional purposes of *Nollan/Dolan* for legislative exactions," thereby making *Nollan/Dolan* nugatory in California. Opp. at 8 (emphasis added). On that theory, the County urges the Court to just look the other way and deny Mr. Sheetz's petition—

[1] This is the first time the County has argued that the MFA displaces *Nollan/Dolan*. Until now, the County has defended against Mr. Sheetz's *Nollan/Dolan* claim exclusively on the basis that those precedents apply only to administrative or *ad hoc* exactions. App. A-7 to A-15; App. B-6.

even as California courts (including the court below) repeatedly acknowledge *Nollan/Dolan*'s stricter standard while refusing to apply it to legislative exactions. Not because the MFA does the work that *Nollan/Dolan* performs, but because—according to those courts—"the ordinary restraints of the democratic political process" sufficiently protect owners against extortionate legislative exactions. *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (Cal. 2002).

The County is wrong. The court below discussed the stark differences between the MFA's "reasonable relationship" test and *Nollan/Dolan*'s "essential nexus" and "rough proportionality" standard. The court characterized the *Nollan/Dolan* test as requiring "heightened scrutiny." App. A-9 to A-10 (citing *Beach & Bluff Conservancy v. City of Solana Beach*, 28 Cal. App. 5th 244, 266 (2018)). By contrast, the court characterized the MFA's "reasonable relationship" test for legislative exactions as "deferential." App. A-16. Indeed, the court observed that such exactions are accorded "substantial judicial deference." App. A-25 (citing *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoor*e, 185 Cal. App. 4th 554, 562 (2010)). As one state supreme court aptly observed about California's "reasonable relationship" test:

> "This reasonable relationship test allows local governments to act with almost unfettered discretion. While impact fees are a common means of financing public construction projects associated with new development, local governments

> should be subject to a higher degree of scrutiny than that afforded by the reasonable relationship test.

Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355 (Ohio 2000).

The tests differ dramatically in other ways, too. The MFA requires nothing like *Dolan*'s "rough proportionality." Cal. Gov. Code §§ 66001(a)-(b). Nor does the MFA require *Nollan/Dolan*'s "individualized determination"—i.e., project-specific proof that an exaction bears an adequate connection to the impacts of the particular project at issue. *Id.*; App. A-23. The agency only has to show a "reasonable relationship" between the legislative exaction and the general "type of development project" at issue. Cal. Gov. Code § 66001(a)(3)-(4).

The differences between the state and federal standards explain why the court below first disposed of Mr. Sheetz's *Nollan/Dolan* claim, then—after holding *Nollan/Dolan* didn't apply to legislative exactions—adjudicated his MFA claim. If, as the County now argues, the MFA's "reasonable relationship" test for legislative exactions displaced *Nollan/Dolan*, then the Court of Appeal would have said so and adjudicated *only* Mr. Sheetz's MFA claim. And the County would have made that argument in the proceedings below, which it did not. *See,* n. 1, *supra*.

Indeed, throughout this litigation until now, the County has defended against Mr. Sheetz's *Nollan/Dolan* claim, not on the ground that the Act

effectively replaced *Nollan/Dolan*, but on the ground that those precedents don't extend to legislative exactions. App. A-7 to A-15 (discussing MFA and *Nollan/Dolan* standard, with no mention of County's new "displacement" theory); App. B-6 (describing County's defense, with no mention of "displacement" theory); *see also San Remo Hotel*, 41 P.3d 87 at 105 (exempting legislative exactions from *Nollan/Dolan*'s "heightened takings scrutiny," but holding that they would still be subject to "means-ends" review under the MFA); *see also* App. A-11 (citing *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (1996) (plur. opn. of Arabian, J.) for the proposition that heightened scrutiny under the *Nollan/Dolan* test is appropriate to apply to administrative/*ad hoc* exactions given the greater risk of government abuse).

The County's other MFA-related arguments fall with its "displacement" theory. The County trumpets the holding below that Mr. Sheetz's exaction satisfied the MFA's "reasonable relationship" test. App. A-2. But that is irrelevant. That the exaction may have satisfied a comparatively lax and deferential standard does not answer whether it satisfies *Nollan/Dolan*'s stricter "heightened scrutiny." App. A-9 to A-10.

The County also dismisses the concerns of Mr. Sheetz and *amici* if legislative exactions remain free of *Nollan/Dolan* scrutiny in California and other jurisdictions. Among those concerns are the "politics of takings" and "majoritarian oppression." Opp. at 18. But how else to describe the fates of landowners when legislation requires them to relinquish their property in exchange for a permit—and that legislation is

afforded "substantial judicial deference"? App. A-25. Even the California courts acknowledge that exempting legislative exactions from *Nollan/Dolan* review leaves owners to the whims of the "democratic political process." *San Remo*, 41 P.3d at 105; *see also Town of Flower Mound v. Stafford Estates Ltd. P'ship,*, 135 S.W.3d 620, 641 (Tex. 2004) ("[W]e think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.").

Next, the County argues that, because its exaction is legislative, the court below correctly exempted it from *Nollan/Dolan* scrutiny. Opp. at 19. But that only begs the question. The question at this stage is not whether the court below was correct, but whether a nationwide conflict on this important federal question exists and therefore merits review.

Next, the County disclaims any conflict on the basis that no court has ever applied *Nollan/Dolan* review to a legislative exaction that satisfied a laxer standard, such as the MFA's "reasonable relationship" test. Opp. at 20-24. But that misunderstands *why* the court below refused to subject legislative exactions to *Nollan/Dolan* review. It had nothing to do with the availability of other laxer standards; it had everything to do with the view that this Court formulated the *Nollan/Dolan* standard to target only administrative or *ad hoc* exactions. App. A-18; Pet. at 11-12, 17 (citing cases rejecting *Nollan/Dolan* on that basis). If the County's argument were sound, then (1) it would have pressed it below, and (2) the lower courts would have

decided the MFA claim without reaching the *Nollan/Dolan* claim. The courts understood that *Nollan/Dolan* creates a floor of protection against exactions—and that, even if other, laxer standards apply, *Nollan/Dolan*'s heightened scrutiny remains relevant.

Finally, the County tries unsuccessfully to downplay some of the decisions establishing a conflict on the *Nollan/Dolan* question. Opp. at 21-22.

In *Highlands-In-The-Woods, L.L.C. v. Polk Cnty.*, 217 So. 3d 1175, 1178 n.3 (Fla. Dist. Ct. App. 2017), the court applied *Nollan/Dolan* to an exaction even though it was "authorized in part by a County ordinance" and after acknowledging "it is unclear whether the *Nollan* and *Dolan* standard applies to generally applicable legislative determinations." In *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 389-99 (Ill. Dist. Ct. App. 1995), the court applied *Nollan/Dolan* to an exaction after rejecting "the distinction between legislative and adjudicative actions"; while later "not[ing]" that the ordinance at issue didn't "reflect a uniformly applied legislative policy," that observation was dictum. *Id.* at 390. In *Town of Flower Mound*, 135 S.W.3d at 622, the court applied *Nollan/Dolan* to a legislative exaction. The County notes that Flower Mound had discretion to exempt owners who could establish a hardship. Opp. at 22. But the town's discretion didn't turn the exaction into an *ad hoc* condition lacking legislative authority; it remained a generally applicable, legislatively mandated condition. Finally, the County denies that the Ohio Supreme Court applied *Nollan/Dolan* to legislative exactions in *Home*

Builders, 729 N.E.2d at 356. But the decision speaks for itself: "[W]e adopt . . . the dual rational nexus test, . . . based on the *Nollan* and *Dolan* cases," which "places the burden on the city" to establish the constitutionality of legislative exactions. *Id.*

III. The Decision Below Is in Tension with This Court's Recent Takings Cases

The County denies the tension between the opinion below and this Court's recent takings precedents. Opp. at 26-37. The petition addresses the County's misguided arguments. Pet. at 19-28. Suffice to say that the County's interpretation stands against the reasoned analysis of courts inspired by this Court's more recent takings decisions to apply *Nollan/Dolan* to legislative exactions. *See, e.g.*, *Knight*, 67 F.4th at 833; *Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022).

CONCLUSION

There is no better time, and no better case, for resolving the question presented here. The Court should grant the petition.

DATED: July 2023 Respectfully submitted,

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