No. 22-1074

In the Supreme Court of the United States

GEORGE SHEETZ,
Petitioner,
v.
COUNTY OF EL DORADO, CALIFORNIA,
Respondent.

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

Brief on the Merits for *Amici Curiae* California Building Industry Ass'n and National Ass'n of Home Builders in Support of Petitioner

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The NATIONAL ASSOCIATION OF HOME BUILDERS ("NAHB") and the CALIFORNIA BUILDING INDUSTRY ASSOCIATION ("CBIA"), respectfully submit the accompanying brief as *amici curiae* in support of the Petitioner, George Sheetz.[1]

A. National Association of Home Builders.

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 home-building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to possess safe, decent, and affordable housing. NAHB is a federation of more than 700 state and local associations, comprised of approximately 140,000 members consisting of home builders, remodelers, suppliers, and other professionals supporting the home building industry. NAHB is an active and informed advocate for home building and housing production. 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.

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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 CBIA and NAHB) to fund the preparation of the Brief.

B. The California Building Industry Association.

The California Building Industry Association ("CBIA") is a statewide, non-profit trade association of people and entities devoted to the planning, construction, and provision of homes for the people of California. It is comprised of more than 2,500 member companies, including a wide range of people, businesses, and diverse groups dedicated to the 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. CBIA is a judicially-recognized advocate for housing "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 previously submitted an *amicus* brief to the California Supreme Court in support of Mr. Sheetz's petition for review filed with that Court.

C. *Amici* have direct interests in reversal and correction of the decision below.

As regular and frequent applicants for development approvals, the members of NAHB and CBIA are routinely immersed in the land use and development processes, which now include ubiquitous demands that builders pay or provide a growing multitude of development fees and exactions. Unconstrained – and

disproportionate – fees unduly inflate the costs of housing and limit both the supply and affordability of housing. Such regulatory costs and exactions add significantly to the costs of housing production: regulatory costs (mainly consisting of fees and exactions) were recently found to comprise a staggering 40.6% of the total costs of multi-family housing development nationally in 2022.[2]

Reasonably-related and proportionate fees can allow for the appropriate internalization of development impacts without stifling the feasibility of development. NAHB and CBIA work in many communities and jurisdictions that assure that their fees are both reasonably-related and proportional to impacts, as required by *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (requiring the government to show an "essential nexus" between the alleged public impact of development and the fee or exaction), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (the government must also show that the amount or burden of the exaction or fee is at least roughly proportional to the alleged impact the exaction or fee is intended to address), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (logically holding that *Nollan* and *Dolan* apply

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[2] Paul Emrath & Caitlin Sugrue Walter, NAT'L MULTIFAMILY HOUS. COUNCIL & NAT'L ASS'N OF HOME BUILDERS, REGULATION: 40.6 PERCENT OF THE COST OF MULTIFAMILY DEVELOPMENT (2023), https://perma.cc/XJ7E-UJLD (fees and exactions found to comprise over 26% of the total cost of multifamily development).

to monetary exactions and fees, as well as exactions of possessory interests in property).[3]

As this Court recently observed in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021): "[B]oth the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy." *Amici* and their members can attest to the truth of this statement; it is not difficult to calculate and establish fees that meet those requirements – but only in those jurisdictions where the courts respect and adhere to this Court's holdings.[4]

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 the *Nollan*/*Dolan* standards to development fees and exactions, which

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[3] This Brief refers to the first two decisions, collectively, as "*Nollan*/*Dolan*."

[4] Indeed, some states have incorporated the "essential nexus" and "rough proportionality" requirements in legislation governing development fees without triggering fiscal chaos. *See e.g.*, Colo. Rev. Stat. Ann. § 29-20-203(1) (West 2023) (Colorado's Regulatory Impairment of Property Rights Act, "RIPRA," requiring an essential nexus and rough proportionality); Utah Code Ann. § 17-27a-507(1) (West 2023) (same). As observed in *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 207 (6th Cir. 2021): "In other state court cases, . . . the government generally satisfies the nexus and rough proportionality test with ease by introducing some evidence relating to the 'methodology and functioning' of its exactions."

dramatically impacts the feasibility and viability of all kinds of development activity nationwide.

SUMMARY OF ARGUMENTS

A. The decision below is legally unsound and inconsistent with this Court's controlling authority that generally prohibits "the government" from imposing unconstitutional conditions as the price of approvals or benefits, including permits to build homes. *Nollan*, 483 U.S. 825; *Dolan*, 512 U.S. 374; *Koontz*, 570 U.S. 595.

The decision wrongly rejects the applicability of those constitutional constraints to the County's project-specific imposition of the disputed mitigation fees, claiming to be "bound" by a purported "rule" prevailing in California (and in a number of other jurisdictions) that categorically precludes the application of the *Nollan*/*Dolan*/*Koontz* standards to development exactions loosely characterized as being "generally applicable" – *i.e.*, legislatively-established. *Sheetz v. Cnty. of El Dorado*, 300 Cal. Rptr. 3d 308, 321 (Cal. Ct. App. 2022). The court below defended its decision by claiming that "[u]nder California law, only certain development fees are subject to the heightened scrutiny of the *Nollan*/*Dolan* test." *Id.* at 316.

To the contrary, this Court has repeatedly held that the unconstitutional conditions doctrine applies widely, and generally prohibits a unit of government – of any type – from imposing preconditions to approval that require the applicant to surrender their constitutional rights. *See, e.g.*, *Cedar Point Nursery*, 141 S. Ct. at 2079. *Sheetz*, and other lower court decisions of its ilk, would unjustifiably punch a "loophole" in the otherwise

broad prohibition of unconstitutional conditions. Such decisions appear to be in denial of this Court's elucidation of the constitutional requirements applicable to exactions imposed as conditions to development approval generally, and the fact that this Court has not exempted any category of conditions or exactions from those requirements. Since *Nollan*/*Dolan*/*Koontz* prescribe requirements for the substantive constitutionality of exactions, it does not matter, nor should it, how the exaction is imposed or how large a group is subject to the exaction.

B. *Sheetz*, and others like it, rest on the unsound assumption that there is some constitutionally-relevant basis for distinguishing between exactions that are "administratively" imposed on a "project-specific" basis, and those described as "legislatively-established" and/or "generally applicable to a broad class of people" for purposes of judicial review. As shown below, that underlying assumption reflects misunderstandings both as to this Court's precedent and as to the realities of land use practice and the "process" by which exactions are created and imposed.

A purported "exemption" from the rule prohibiting unconstitutional conditions on that basis would swallow the rule and make hollow this Court's jurisprudence. *Sheetz* illustrates how such an illusory distinction is misused to justify applying a different – "anything goes" – standard to many or most exactions in jurisdictions like California.

As this Court has indicated, the relevant "distinction" is, rather, the distinction between non-confiscatory legislation that *regulates the use* of

property (such as traditional "Euclidean" zoning), and *exactions* (in whatever form) that require the surrender of property or constitutional rights, as to which the protections of the *Nollan*/*Dolan* standards are required.

C. There are devasting economic consequences implicated by decisions like *Sheetz*. In California and other jurisdictions that imagine the "legislative-exactions loophole" in the unconstitutional conditions prohibition, the judicial refusal to consistently enforce the principles of *Nollan*/*Dolan*/*Koontz* has allowed local and state governments to establish and impose an ever-expanding constellation of unconstrained – and often economically-prohibitive – development exactions.

The widespread use and abuse of such unconstrained fees is now widely recognized as a leading factor in the limited supply – and exorbitant cost – of housing in California and other places that have disdained the applicability of the *Nollan*/*Dolan*/*Koontz* constitutional standards.

It also allows local governments in those jurisdictions to continue to disproportionately burden new residents with misallocated costs of public facilities, and allows NIMBY[5] townships to perpetuate failed policies that stifle housing production and facilitate exclusion of certain communities from housing.

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[5] An acronym for "Not In My Backyard," NIMBY is a common land use term used to express the concept of self-interested residents who would rather development occur somewhere else – and who vote accordingly. *See, e.g.*, David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1672 n.1 (2013).

SUMMARY OF FACTS

The traffic impact mitigation fee for which Mr. Sheetz sought judicial review in this case was ostensibly based on the County's "legislatively-enacted" General Plan policy.

> The amount of the fee is generally based on the location of the project (i.e., the specific geographic zone within the County) and the type of project (e.g., single-family residential, multifamily residential, general commercial). 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.

Sheetz, 300 Cal. Rptr. 3d at 312.

Mr. Sheetz was required to pay a "traffic impact mitigation fee" of more than $23,000, under protest. *Id.* His timely attempt to question the fee in court was abruptly shut down by the trial court's summary refusal to apply the doctrine prohibiting unconstitutional conditions, based simply on its misguided belief that in California, only certain fees are subject to the *Nollan*/*Dolan* requirements.

> As relevant here, the [trial] court concluded the TIM fee was not subject to the requirements of *Nollan* and *Dolan* (and therefore did not violate the "unconstitutional conditions doctrine" as a matter of law) because it is a legislatively

> prescribed development fee that is generally applicable to a broad class of property owners.

Id. at 313.[6]

The California Court of Appeal affirmed. As a result of that adherence to the deviant California "rule" that fees deemed to be of legislative derivation are exempt from the *Nollan*/*Dolan* standards, the *Sheetz* court found the County permissibly excused itself from any obligation to demonstrate that such an amount of fees 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.

The *Sheetz* decision cited several older California cases following *Ehrlich v. City of Culver City*, 911 P.2d 429, 447 (Cal. 1996), in which California courts simply questioned whether this Court's *Dolan* decision applied where the disputed exaction "takes the form of a *generally* applicable development fee or assessment." That initial judicial ambivalence about the applicability of the *Nollan*/*Dolan* standards appears to have ossified into what the *Sheetz* court considered to be "the rule – by which we are bound – that generally applicable development fees are not subject to the *Nollan*/*Dolan* test." 300 Cal. Rptr. 3d at 321. It is respectfully submitted that such a purported categorical "rule" is

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[6] In reality, the traffic impact fee is not "generally applicable" to "the broad class" of property owners who use and benefit from the County's roads and streets, but is only applicable to that small portion of the community that may seek a permit to build something on their land.

not consistent with the Fifth or Fourteenth Amendments to the Constitution, nor consistent with the actual holdings of this Court.

ARGUMENTS

The appellate court decision in *Sheetz* – and the California Supreme Court's unexplained refusal to review it – further highlight the confusion among lower courts as to whether there is, or should be, some "exemption" from this Court's general prohibition against unconstitutional conditions if the challenged exactions, imposed as conditions of land development approvals, are characterized as legislatively imposed, or generally-applicable.

Arguments seeking to justify such an exemption were most recently – and comprehensively – rejected by the Sixth Circuit in *Knight v. Metropolitan Government of Nashville & Davidson County*, in which the Court explained in detail why a legislatively-enacted ordinance requiring the imposition of sidewalk exactions as a condition of permit approval are not exempt from the unconstitutional conditions doctrine of *Nollan*/*Dolan*, concluding 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 precedent and with its takings precedent.

67 F.4th 816, 829 (6th Cir. 2023).

If left standing, the *Sheetz* decision would improperly sanction the County's imposition of "the full cost" of new county-wide road improvements solely on applicants for new building permits, despite the appellate court's acknowledgement that the County admittedly made no effort to proportionately allocate those costs between costs of improvements made necessary by impacts of new development and costs attributable to existing deficiencies or community needs.

The unfounded refusal to apply the *Nollan*/*Dolan* constitutional requirements on the artificial basis that the exactions are deemed to be "legislatively established" thus tolerates the imposition of unconstitutional conditions that would otherwise be prohibited. Cases like *Sheetz* do not deny that unrelated and disproportionate fees and exactions are unconstitutional conditions; rather they argue that governments can get away with otherwise admittedly "extortionate" conditions if the blackmail note is written by a town council and addressed to "a group" of unspecified (and indefinable) breadth.

As a direct result, disproportionate exactions are condoned and add to the already extraordinary and crushing costs of housing in California and other jurisdictions that refuse to require governments to show any nexus and proportionality between the

amount of fees demanded and the alleged public costs of mitigating the alleged impacts of new development.

I. THE DECISION IS LEGALLY UNSOUND, IS IN CONFLICT WITH THE BROADLY-APPLICABLE DOCTRINE PROHIBITING UNCONSTITUTIONAL CONDITIONS, AND WRONGLY ASSUMES THERE IS A CONSTITUTIONALLY-RELEVANT DISTINCTION BETWEEN "GENERALLY APPLICABLE EXACTIONS" AND EXACTIONS "IMPOSED ON A PROJECT-SPECIFIC BASIS."

This Court has repeatedly explained that the *Nollan*/*Dolan*/*Koontz* standards are based on application of the doctrine of unconstitutional conditions in the context of land-use permitting. The doctrine generally prohibits the government – whether in its legislative, 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; *Cedar Point Nursery*, 141 S. Ct. at 2072 ("The essential question is not . . . whether the government action . . . comes garbed as regulation (or statute, or ordinance, or miscellaneous decree).").

A. There is no principled constitutional basis for allowing an "exemption" from the prohibition against the imposition of unconstitutional conditions for "legislatively-established" or "generally applicable" development fees and exactions.

This Court previously rejected similar attempts by government actors in various state courts to carve out "exceptions" to the broad applicability of the constitutional requirements of *Nollan* and *Dolan*. In *Koontz*, the Court colorfully explained that there was no merit to the attempts of state courts to "effectively inter[]" the constitutional protections articulated in "those important decisions." 570 U.S. at 599.

The Court rejected two previously-asserted arguments that sought to limit the scope of those "important decisions." First, it rejected the argument that they did not apply in cases where the permit applicant refused to comply with the government's demands. Next, it rejected the argument that *Nollan*/*Dolan* requirements should not apply to "monetary exactions." *Id.* at 606–09, 613–18.

This case vividly illustrates the need for the Court to again reject the efforts of some misguided lower courts to "effectively inter" or unduly limit the constitutional protections demanded by "those important decisions."

1. The prohibition of unconstitutional conditions is applied broadly to all "units of government."

This Court's jurisprudence prohibits unconstitutional conditions in general in many situations. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). "[T]he doctrine barring unconstitutional conditions is broader than the exactions context." *Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022) (citing *Koontz*, 570 U.S. at 604 (collecting cases re same)).

The Court has not carved out an exception to that doctrine that would allow the government in some states to impose otherwise unconstitutional conditions – provided only that they do so (1) in a land use permitting context, and (2) base their conditions or exactions of on some legislatively-established authorization, or make their exactions applicable to a large enough group of fee payers.

To the contrary, the Court has previously explained the broad applicability of the unconstitutional conditions doctrine in the context of development permitting in its holdings in *Nollan* and *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, 570 U.S. at 599.

The Court did not suggest that "a unit of government" might slip through a loophole in the constitutional requirements, or insulate its exactions from meaningful judicial review, by the artifice of establishing the unlawful condition by way of "legislative" action. It would indeed be strange if state and local "units of government" could evade constitutional mandates by such a simple dodge, or if taking local "quasi-legislative" action served as a self-created loophole trumping the prohibition against unconstitutional conditions.

The cases that exempt "certain fees" from *Nollan*/*Dolan* are not even consistent as to the basis for the purported exemptions. For example, a plurality of the California Supreme Court in *Ehrlich*, 911 P.2d 429, initially purported to exempt "a *generally* applicable development fee or assessment," (*id.* at 447 (plurality opinion of Arabian, J.) imposed not "individually" but "pursuant to an ordinance or rule of general applicability" (*id.* at 464 (Kennard, J., concurring in part and dissenting in part)). That same court would later claim that "[t]he '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," and restated "the distinction we drew in *Ehrlich* [and other cases] between ad hoc exactions and legislatively mandated, *formulaic* mitigation fees." *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 41 P.3d 87, 105 (Cal. 2002)

(cleaned up, emphasis added). The *Sheetz* court below stated the scope of the purported exemption yet another way: "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." 300 Cal. Rptr. 3d at 316 (emphasis added).

Is the purported "exemption" from *Nollan*/*Dolan* based on "the general applicability" of the exaction regime, or on the "breadth of the class" of impacted property owners, or on the establishment of the exaction "through legislative action" – or all of the above? The inability of lower courts to provide a consistent definition of the scope of the purported exemption demonstrates its dubious provenance.

Courts in states such as California offer no coherent constitutionally-based excuse for creating an "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,* 570 U.S. at 604 (quoting *Regan v. Taxation With Representation of Wash*., 461 U.S. 540, 545, (1983)) (emphasis added); *see also Perry*, 408 U.S. at 597.

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. *See, e.g.*, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713–14 (2010) ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor.").

2. In determining the applicability of the *Nollan*/*Dolan* requirements, there is no valid basis to distinguish between "legislatively established" exactions and exactions imposed otherwise.

"The law respects form less than substance" is a maxim of jurisprudence honored by most courts. *See, e.g.*, *Frank Lyon Co. v. United States*, 435 U.S. 561, 573 (1978): "In applying this doctrine of substance over form, the Court has looked to the objective economic realities of a transaction rather than to the particular form the parties employed."

The decision in *Sheetz*, however, wrongly inverts this principle in order to disregard the unlawful and disproportionate substance of an exaction simply because the exaction is perceived as coming in the "form" of a legislative act, or an act "generally applicable" to a broad group.

"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*, TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES, 345, 350 (Thomas E. Roberts Ed. 2002).

Members of this Court have called out the fallacy of this purported distinction for years:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).[7]

3. Unjustified and disproportionate exactions may be wrongly "extorted" by "quasi-legislative" action at least as easily as otherwise.

In the context of land use exactions and fees, the purported justification most frequently offered for imagining such a distinction is the unfounded assumption in some courts, such as in California, that

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[7] *See also Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (Thomas J., concurring in denial of certiorari) ("I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking.").

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*, 41 P.3d at 103–05. The *San Remo Hotel* court cited absolutely no evidence to support this naïve and wildly inaccurate assumption.[8] In any event, this "rationale" does not reflect high regard for the integrity of either type of governmental body.

To the contrary, it is widely recognized that fees "are politically popular because they are charged to developers rather than current residents." Hayley Raetz et al., TERNER CTR. FOR HOUS. INNOVATION, RESIDENTIAL IMPACT FEES IN CALIFORNIA: CURRENT PRACTICES AND POLICY CONSIDERATIONS 21 (2019) (hereafter, "RESIDENTIAL IMPACT FEES IN CALIFORNIA"), https://perma.cc/Y9TR-UJ73. Demanding fees from "newcomers" can thus enable governments, including elected legislative bodies, to shift much of the cost of such improvements away from current users of public infrastructure (*e.g.*, the voting general public) to a narrow segment of the public (*e.g.*, prospective new homebuyers and residents) not likely to be well-represented in the local electoral processes.

The Sixth Circuit in *Knight* appropriately questioned this purported justification: "This claim suffers from both legal and practical problems. . . .

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[8] It is the experience of the *amici* and their members, to the contrary, that many local politicians enthusiastically campaign on anti-development positions, and tout their "no growth" policies, including high fees on newcomers.

Practically, an 'extortion' risk exists no matter the branch of government responsible for the condition." 67 F.4th at 835 (citing *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004)).

More importantly, those courts categorically exempting "legislatively-derived" exactions (or "generally-applicable" exactions) from the prohibition against unconstitutional conditions offer no sound legal or constitutional basis for doing so.[9] If, as this Court has repeatedly held, the Constitution prohibits "the Government" from demanding extortionate fees or other unconstitutional conditions, what precedent, logic, or evidence might justify a loophole in that prohibition based solely on whether the extortionate fees are exacted based on "legislative authority"?

Nearly all exactions are derived from some source of "legislative" action, whether from a town council's ordinance or from a state constitution or statute. And "legislative action" can, and does frequently, result in disproportionate and extortionate exactions as much as otherwise. *See e.g.*, *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198 (6th Cir. 2021) (holding that city's legislatively-enacted tree replacement ordinance unlawfully resulted in imposition of unjustified exaction of more than $47,000 of in-lieu tree replacement fees).

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[9] As skeptically observed by the Texas Supreme Court, the *San Remo Hotel* decision "provided the only justification for the limitation – political reality." *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 640 (Tex. 2004).

Alternatively, if the "exemption" is defended by claiming the disputed exactions are "generally applicable to a broad class," that begs the question: Where does the Constitution draw such an imaginary line? How many is "a broad class"? How many more lawsuits will be litigated to seek answers to such vexing questions raised by cases like *Sheetz*?

4. Nearly all development fees and exactions are derived from some "legislative" or "quasi-legislative" authorization.

There is no basis in actual land use practice for courts to claim to espy a real or widespread distinction based on the source of the authority for an exaction, or based on the number of applicants upon whom the exaction may be imposed. "In practical terms, the distinction is simply an unworkable standard in the context of land use regulation." Matthew Baker, *Much Ado About* Nollan/Dolan*: The Comparative Nature of the Legislative-Adjudicative Distinction in Exactions*, 42 URB. LAW. 171, 179 n.64 (2010).

In fact, this is an artificial, or at least irrelevant, distinction. "Some land-use decisions fall neatly within the legislative/adjudicative categorical framework. Most do not. . . . '[I]n reality, the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction.'" *B.A.M. Dev. LLC v. Salt Lake Cnty.*, 128 P.3d 1161, 1170 (Utah 2006) (quoting Inna Reznik, Note, *The Distinction Between Legislative and*

Adjudicative Decisions in Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 266 (2000)).

"[T]he difficulty lies . . . in determining where, exactly, generally applicable, legislatively formulated fees end and adjudicatively imposed development exactions begin." *Wolf Ranch LLC v. City of Colo. Springs*.[10]

Virtually all fees and exactions are "established" by some source of legislative action authorizing the governmental unit to ultimately "impose" a fee or exaction. The legislatively-authorized fees or exactions may then be "imposed" administratively on individual projects, in a "second step," when they apply for a development permit.[11] By contrast to zoning, which applies continuously to all similarly-situated properties, whether or not the property owner is seeking a governmental permit, while fees must be authorized by some first-step legislative action, they are usually imposed only in response to a specific application for an approval, as one-time charges. *See generally* CAL. LAND USE PRACTICE § 18.1 et seq., Exactions: Dedications and Development Impact Fees (Cont. Educ. Bar 2022).

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[10] *See also* Christopher T. Goodin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference*," 28 U. HAW. L. REV. 139 (2005).

[11] *See, e.g.*, *Walker v. City of San Clemente*, 192 Cal. Rptr. 3d 635, 640–42 (Cal. Ct. App. 2015) (explaining the two-step fee establishment/imposition process under California law).

Local planning staff members do not typically have the authority to unilaterally invent or demand such exactions out of thin air. The unique in-lieu fees negotiated "behind closed doors" in the *Ehrlich* case may have been "ad hoc" and project-specific, but they were created and imposed by the City Council itself.

As described in a leading California land use treatise, the process by which development fees are actually imposed on a builder or permit applicant involves two steps:

> **Development fees are imposed in a two-step process**. First, the local agency adopts an ordinance or resolution levying fees to be imposed on future development projects. Second, the agency imposes the fees on a specific project as a condition of development approval.

LONGTIN'S CAL. LAND USE § 8.43, Procedures for Adopting Fees (2013).

The disputed fees in *Sheetz* were based on a legislatively-adopted general plan policy but were imposed on a "second-step" project-specific basis in the course of an administrative permit-issuance process. If the supposed "rule" invoked in *Sheetz* were to be sustained, then virtually all fees and exactions will be categorically exempt from the constitutional protections mandated by this Court in *Dolan*.

5. The relevant "distinction" regarding the applicability of *Nollan*'s and *Dolan*'s standards of judicial review is actually between *all* types of "*exactions*" of property or money – and traditional non-confiscatory regulations on the *use* of property.

Those lower courts that claim to perceive a purported distinction between two or more "types" of development exactions for purposes of deciding whether or not *Nollan*/*Dolan* is applicable do not identify any clear constitutional authority for such a distinction. Instead, they give only a narrow, grudging, and misleading spin on some of the statements, or *dicta*, from this Court.

Much of that misguided spin is often attributed to misreading a bit of *dictum* in *Dolan*.[12] In a footnote in the majority opinion in *Dolan* (512 U.S. at 391 n.8) – ostensibly responding to the dissent's criticism of "placing the burden on the city" to justify the challenged exaction – a "distinction" was made as to the standards applicable to two different types of governmental action affecting property. However, the distinction actually made in *Dolan* was not the same distinction asserted by the lower court in *Sheetz*.

To the contrary, the *Dolan* majority contrasted the city's exaction of property rights in that case against several cases involving challenges to traditional types

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[12] "This view treats one sentence in *Dolan* as trumping everything else in the opinion." *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 834 (6th Cir. 2023).

of regulations on the use of property: "The sort of *land use regulations* discussed in the cases just cited . . . [*i.e.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Agins v. City of Tiburon*, 447 U.S. 255 (1980)]." *Id.* at 385 (emphasis added). Similarly, the majority agreed, in footnote 8, that

> [the dissent] 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. at 391 n.8 (emphasis added).

Thus, the "distinction" drawn in *Dolan* actually contrasted the burden of proof required when challenging "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*. *See id.* at 385.

Dolan's footnote 8 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 *Dolan* contrasted the

judicial review applicable to exactions generally against the more deferential standard of review sometimes applied to traditional ("Euclidean") types of legislation regulating *the use* of property.[13]

The relevant distinction made in the *Dolan* footnote was thus between non-confiscatory *regulation* of property use and *exaction* of property by the Government. Such a distinction between governmental action that regulates property and action aimed at exacting or acquiring property is consistent with this Court's recognition of "**the settled difference in our takings jurisprudence between appropriation and regulation**." *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015) (emphasis added).

The purported constitutional "distinction" between legislative or "generally-applicable" exactions and the administrative imposition of project-specific fees is thus a false construct. Indeed, the Court's applications of *Nollan*/*Dolan* standards to exactions have actually involved exactions based upon authority enacted in some underlying "legislative" or "generally applicable" actions, but imposed in a second-step:

In *Koontz*, for example, the government sought to demand exactions from the permit applicant under the

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[13] At least one perceptive District Court has pointed out the error of reading footnote 8 in the *Dolan* opinion as contrasting two "types" of exactions. To the contrary, the Southern District of Florida pointed out that "[t]he footnote [in *Dolan*] addresses 'general *zoning* regulations,' not all generally applicable regulations." *Heritage at Pompano Hous. Partners, L.P. v. City of Pompano Beach*, 2021 WL 8875658, at *16 (S.D. Fla. Dec. 15, 2021) (cited on another point in *Knight*, 67 F.4th at 829).

authority of "generally-applicable" state legislation, the Henderson Wetlands Resource Management Act. 570 U.S. at 601.

In *Cedar Point Nursery*, 141 S. Ct. at 2069, the condition was based on a generally-applicable state regulation.

Even in *Dolan* itself, the challenged exaction was imposed on Mrs. Dolan – much as in *Sheetz* – based on the City's quasi-legislative, "generally applicable," land use policies, as pointed out by Justice Souter in his dissent.[14]

II. UNRELATED OR DISPROPORTIONATE FEES AND EXACTIONS, UNCONSTRAINED BY *NOLLAN*/*DOLAN*, HAVE DISASTROUS IMPACTS ON HOUSING AND PUBLIC POLICY.

A. Development fees, unconstrained by the constitutional requirements to be related to, and at least "roughly proportional" with, impacts of development, reduce housing supply and affordability.

NAHB estimates that almost 73% of the households in the United States cannot afford a median priced

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[14] *See* 512 U.S. at 413–14 (Souter, J., 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*.

home.[15] It is widely recognized that unjustified, and disproportionate, development fees and exactions significantly impair the availability and affordability of housing. *See, e.g.*, Cal. Gov't 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."

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.,* STATE OF CAL., LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (2015) (hereafter, "CALIFORNIA'S HIGH HOUSING COSTS"), https://perma.cc/DW74-CXZB. 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. *See, e.g.*, *Anderson Creek Partners, L.P. v. Cnty. of Harnett,* 876 S.E.2d 476, 505–06 (N.C. 2022) (acknowledging that the costs of development fees are often passed to the ultimate purchasers of new homes).

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[15] *See* Na Zhao, NAT'L ASS'N OF HOME BUILDERS, NAHB PRICED-OUT ESTIMATES FOR 2023 (2023), https://perma.cc/M36N-VZWB.

California, where the state courts have refused 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 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.").

A 2018 study sponsored by the California Department of Housing & Community Development found at least one city charging fees of $157,000 per single-family home. Sarah Mawhorter et al., TERNER CTR. FOR HOUS. INNOVATION, IT ALL ADDS UP: THE COST OF HOUSING DEVELOPMENT FEES IN SEVEN CALIFORNIA CITIES 3 (2018) (hereafter, "IT ALL ADDS UP"), https://perma.cc/R7E8-28DD.

The same study observed a perverse trend, in that, "[o]n average, **these fees continue to rise [in California], while nationally fees have decreased**." *Id.* (emphasis added). That phenomenon can be attributed in large part to the refusal of California's courts to apply the nexus and rough proportionality constraints of *Nollan*/*Dolan* to development fees, the vast majority of which are characterized as "legislatively established."

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 at 3.

A recent study sponsored by NAHB reported that, nationwide, 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, NAT'L ASS'N OF HOME BUILDERS, GOVERNMENT REGULATION IN THE PRICE OF A NEW HOME: 2021 (2021), https://perma.cc/42VY-4K9L.

More recently, a similar study found that, on average, 40.6% of the cost of developing multifamily housing is driven by regulations and exactions, with fees and exactions alone being responsible for more than 26% of those costs. Paul Emrath & Caitlin Sugrue Walter, NAT'L MULTIFAMILY HOUS. COUNCIL & NAT'L ASS'N OF HOME BUILDERS, REGULATION: 40.6 PERCENT OF THE COST OF MULTIFAMILY DEVELOPMENT (2023), https://perma.cc/XJ7E-UJLD.

B. Exempting "certain fees" from *Nollan*/*Dolan* aggravates public policy and equity concerns regarding access to housing.

Allowing development exactions to be unconstrained by any nexus or proportionality requirement not only leads to excessive housing costs, but has also been found to inhibit access to housing, especially affordable housing, and to "facilitate exclusion" of under-housed communities. "[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 at 4.

See also Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. OF POL'Y DEV. & RSCH. 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 U.S. Department of Housing and Urban Development made similar findings about the adverse consequences of development fees on equity, housing affordability, and other "serious drawbacks" if fees are not required to be proportionate to impacts:

> 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**.

U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF POL'Y DEV. & RSCH., IMPACT FEES & HOUSING AFFORDABILITY: A GUIDE FOR PRACTITIONERS ii (2008) (emphasis added), https://perma.cc/3CP7-XRRV.

III. OTHER LOWER COURTS REFUSE TO APPLY THE "EXEMPTION" FROM *NOLLAN/DOLAN* CLAIMED IN *SHEETZ*.

Following the *Dolan* decision, many lower courts reached different conclusions as to the existence of the so-called legislative fee exemption. Scholars and commentators have bemoaned this split and the resulting confusion that ensued. *See, e.g.*, Matthew Baker, *Much Ado About* Nollan/Dolan*: The Comparative Nature of the Legislative-Adjudicative Distinction in Exactions*, 42 URB. LAW. 171 (2010); Steven Haskins, *Closing the* Dolan *Deal: Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487 (2006); Christopher T. Goodin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference*," 28 U. HAW. L. REV. 139 (2005).

The *Sheetz* case reveals that many lower courts – and many municipalities and property owners – remain victims of that confusion. Recently, however, it appears that more lower court decisions have concluded – contrary to *Sheetz* – 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 *Cedar Point Nursery* and *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226 (2021).

Recent examples of that trend include:

Knight v. Metro. Gov't of Nashville & Davidson Cnty., 67 F.4th at 829; *Ballinger v. City of Oakland,* 24

F.4th at 1299–300 ("[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.'"); *Pakdel v. City & Cnty. of San Francisco*, 2022 WL 14813709, at *8 (N.D. Cal. Oct. 25, 2022) (denying the city's motion to dismiss because the complaint adequately alleged that the lifetime lease requirement was not 'roughly proportionate' to the impacts of landlord's condominium conversion); *Beck v. City of Whitefish*, 653 F. Supp. 3d 813 (D. Mont. Jan. 27, 2023) (denying city's motion for judgment on the pleadings and holding that *Dolan* applied to plaintiffs' complaint alleging that the city unconstitutionally conditioned the issuance of building permits on the payment of "excessive impact fees grossly disproportionate to the actual impact of proposed developments").

Recent state court decisions similarly reject the idea of an "exemption" from *Nollan*/*Dolan*. *See, e.g.*, *Charter Twp. of Canton v. 44650, Inc.,* 2023 WL 2938991 (Mich. Ct. App. 2023) (holding that township failed to carry its burden to prove that exactions imposed under its tree replacement ordinance met *Dolan* standard of proportionality); *Anderson Creek Partners, L.P. v. Cnty. 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."); *Fassett v. City of Brookfield*, 975 N.W.2d 300, 308–09 (Wis. Ct. App. 2022) (condition requiring subdivider to dedicate

a through street was a legislative exaction nevertheless subject to *Nollan*/*Dolan* scrutiny).

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*:

> 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." . . . 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.

598 U.S. 631, 647 (2023) (cleaned up).

Those principles apply here as well. 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 a particular development, but no more.

This case provides both the opportunity and the necessity for this Court to, at long last, make clear that there is no such "loophole" in the prohibition against governmental demands for unconstitutional conditions.

NAHB and CBIA respectfully urge this Court to set aside the flawed decision of the court below and make clear that the constitutional standards of *Nollan*, *Dolan*, and *Koontz* apply uniformly to all fees, exactions, or other governmental conditions of approval for building permits or other development approvals – with no exemption for "legislatively-established" exactions.

Respectfully submitted,

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