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 California Court of Appeal, Third Appellate District

BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF REALTORS®, AMERICAN PROPERTY OWNERS ALLIANCE, REALTORS® LAND INSTITUTE, CALIFORNIA ASSOCIATION OF REALTORS®, AND CALIFORNIANS FOR HOMEOWNERSHIP IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AUTHORITIES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae the National Association of REALTORS® is a national trade association, representing 1.53 million members, including its institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS®, and support private property rights, including the right to own, use, and transfer real property. REALTORS® adhere to a strict Code of Ethics, setting them apart from other real estate professionals for their commitment to ethical real estate business practices.

Amicus curiae the American Property Owners Alliance is a nonprofit advocacy organization dedicated to representing the rights and interests of property owners throughout the country.

Amicus curiae REALTORS® Land Institute is a nonprofit advocacy organization focused on developing and advocating on behalf of a network of professionals who broker, lease, develop, and manage all types of land, including farms, ranches, recreational, timberland, vineyards, orchards, undeveloped tracts of land, transitional and development land, subdivision and lot wholesaling,

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

site selection and assemblage of land parcels, appraisals and land valuation, and auctions.

Amicus curiae the California Association of REALTORS® (C.A.R.) is a voluntary trade association whose membership consists of approximately 206,000 persons licensed by the State of California as real estate brokers and salespersons, and the local associations of REALTORS® to which those members belong. Members of C.A.R. assist the public in buying, selling, leasing, financing, and managing residential and commercial real estate. C.A.R.'s Operating Values include the belief that "the freedom to buy, sell, maintain and improve real property is a fundamental right." C.A.R. regularly evaluates legislation and regulations related to property rights, land use, zoning, environmental, and development issues, and often participates as *amicus curiae* in relevant court cases. In supporting the preservation of landowners' constitutional rights, C.A.R. has participated in several land use and takings cases, including as *amicus curiae* in the seminal case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Amicus curiae Californians for Homeownership is a nonprofit organization that seeks to address California's housing supply and affordability crisis through impact litigation in favor of housing development and in opposition to unlawful constraints on new housing, including excessive development fees.

Amici are interested in this case because their members and their members' clients are all too often harmed by government restrictions of their property rights. State and local governments often impose

costly and burdensome requirements that property owners obtain land-use permits as a condition of using or developing their property. These monetary costs require would-be developers to pay extortionate fees untethered to the externalities of the development. Such coercive tactics artificially increase the cost of real estate, pricing many buyers out of the market. They also inject significant uncertainty and confusion for would-be buyers of properties who can never be certain what exactions the government will demand for the right to build or improve their properties.

This case offers a chance to curb the government's ability to extort property for permits by subjecting *all* exactions—both legislative and executive—to constitutional scrutiny. Under the Court's precedent, a condition on granting a land-use permit must maintain a nexus to the property and be roughly proportional in nature and extent to the impact of the proposed development. While this workable standard allows the government to regulate land use and obligate developers to pay for all externalities associated with their improvements, it also protects property owners from unconstitutional conditions. *Amici* thus have an interest in seeing that property owners enjoy the protection provided by the Constitution regardless of which branch is doing the taking.

SUMMARY OF ARGUMENT

The Court has always checked the government's power to impose abusive conditions restricting constitutional rights. Although the government may regulate private property, it may not condition permitting approvals on demands that property

owners comply with exactions or pay fees that are untethered to the actual costs imposed by a particular development. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605–06 (2013). Such abuses of the government's coercive power over private property run afoul of the unconstitutional conditions doctrine. To comply with the Constitution, an exaction must maintain an essential nexus and rough proportionality to a development's externalities. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

State and local governments nevertheless are continually searching for creative maneuvers to circumvent these requirements. And courts are too often giving them a free pass. In many jurisdictions, courts allow the government to impose conditions that fail these requirements on the premise that constitutional limits on exactions apply only to those imposed by executive officials on an individualized basis. In these jurisdictions, so-called "legislative exactions" are exempt from the Takings Clause.

This wholesale evasion of *Nollan* and *Dolan* makes no constitutional sense. Under the lower court's approach, all generally applicable exactions imposed through legislation are immune from constitutional scrutiny, while those imposed by executive officials on an individualized basis are subject to the *Nollan/Dolan* test. But there is no constitutional principle that allows the government to take through legislation that which it could not seize through executive action. Nor does the distinction between executive and legislative exactions hold up under scrutiny. Like any other branch of government, legislatures can violate the Constitution—and this

Court has not hesitated to say so in the case of unconstitutional conditions imposed by legislatures. The Court should vacate the judgment below and remand because "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when" the exaction is imposed by a legislature. *Koontz*, 570 U.S. at 619.

ARGUMENT

I. PROPERTY OWNERS NEED PROTECTION AGAINST COERCIVE LEGISLATIVE EXACTIONS.

The government maintains a monopoly on the provision of many critical services, including permits to use or develop land. Citizens cannot turn elsewhere to obtain the same benefit. The absence of competition creates an environment in which property owners may be coerced to surrender their constitutional rights in exchange for government benefits. Conditioning benefits on the waiver of constitutional rights creates a risk that the government will abuse its power by attaching coercive strings to government benefits. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492 (1989).

Those risks are especially acute in the land-use context, because the "government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Koontz*, 570 U.S. at 605. So long as the value of the proposed development exceeds the cost of the exaction, the property owner has an economic incentive to waive his constitutional rights to obtain the permit. *Id.* To protect constitutional

rights from the government's coercive power, property owners need constitutional protection when confronted with legislative exactions that impose extortionate demands to obtain necessary permits.

A. Legislative Exactions Are Widespread.

Land-use exactions require property owners to pay for public facilities or amenities as a precondition to obtaining a land-use permit. Development impact fees are a type of exaction assessed by local governments to cover the costs imposed by the new development on the community. NATIONAL ASSOCIATION OF REALTORS, GROWTH MANAGEMENT FACT BOOK 33–34 (2022) (NAR FACT BOOK). These exactions take various forms to meet site- and community-specific needs. Some exactions require developers to dedicate land for roads, schools, or parks. HUD IMPACT FEES & HOUSING AFFORDABILITY: A GUIDE FOR PRACTITIONERS 48–50 (June 2008). Others take the form of requirements to expand or improve infrastructure. *See, e.g.*, *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000) (roads); *Ford v. Georgetown Cnty. Water & Sewer Dist.*, 532 S.E.2d 873 (S.C. 2000) (per curiam) (water and sewage); *Zander v. Orange County*, 890 S.E.2d 793 (N.C. Ct. App. 2023) (schools).

In theory, "[i]mpact fees … shift the cost for capital improvements necessitated by a development to the developer and new residents." *Town of Londonderry v. Mesiti Dev., Inc.*, 129 A.3d 1012, 1016 (N.H. 2015). When tethered to the particular costs associated with a particular development, impact fees provide an equitable way to finance infrastructure improvements by imposing the financial burden on those who most

benefit from the improvements. ARTHUR C. NELSON, ET AL., IMPACT FEES: PRINCIPLES AND PRACTICE OF PROPORTIONATE-SHARE DEVELOPMENT FEES 123 (2009) (IMPACT FEES). But when impact fees are divorced from the actual costs associated with a particular development, they often amount to an extortionary tool to extract general revenues from a select class of resourced property owners. *Nollan*, 483 U.S. at 837.

Legislative impact fees are widespread. More than 270 jurisdictions nationwide require some form of impact fees. NAR FACT BOOK 37 & n.26 (citing CLANCY MULLEN, DUNCAN ASSOCS., NATIONAL IMPACT FEES SURVEY: 2019, at 1 (2019)) (2019 NATIONAL IMPACT FEES SURVEY); Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 141–42 (2005). Many of these fees are authorized by state laws allowing localities to require payment of the costs of infrastructure improvement. A recent study concluded that 29 states have these impact-fee acts on the books. CLANCY MULLEN, DUNCAN ASSOCIATES, STATE IMPACT FEE ENABLING ACTS 1 (Sept. 15, 2018). Other states, however, do not have impact-fee acts, and instead permit the assessment of impact fees pursuant to municipalities' general police power. *Id.* at 1–2.

The common feature of impact fees is that they are an important source of revenue for local governments. Been, *supra* at 141–42. Growing municipalities are often under fiscal pressure to fund community services. *Id.* Given that local taxes are generally unpopular, permitting exactions present an attractive source of funds. By conditioning permits on a property owner's willingness to surrender their property or pay exorbitant fees, local governments can

boost revenues and fund general operations while avoiding politically unpopular tax increases. *Id.*; IMPACT FEES, *supra* at 123.

Impact fees provide the government with an easy way to raise revenue off the books without widespread scrutiny, because the government's incentive to boost revenues meets a property owner whose frustration with exorbitant fees is outweighed by the economic incentive to build. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 262 (2006) ("Without having to face the opposition of future residents who do not currently live or vote in the locality, [local governments] find impact fees an irresistible policy option."). This is especially true because impact fees are charged to property owners (and eventually paid by new residents) rather than being assessed against all voters. HAYLEY RAETZ ET AL., TERNER CENTER, RESIDENTIAL IMPACT FEES IN CALIFORNIA: CURRENT PRACTICE AND POLICY CONSIDERATIONS TO IMPROVE IMPLEMENTATION OF FEES GOVERNED BY THE MITIGATION FEE ACT 21 (Aug. 5, 2019).

B. Legislative Exactions Increase the Cost of Real Estate.

The government's prolific use of impact fees to fund infrastructure development increases the cost of real estate. Expensive impact fees price some developers out of the market and decrease the quantity of new construction, driving up the value of property. MARLA DRESCH & STEVEN M. SHEFFRIN, PUBLIC POLICY INSTITUTE OF CALIFORNIA, WHO PAYS FOR

DEVELOPMENT FEES AND EXACTIONS? 17–18 (JUNE 1997).

In absolute dollars, local impact fees impose substantial costs on the real estate market. Nationally, average impact fees on single-family homes exceeded $13,627 in 2019. *See* 2019 NATIONAL IMPACT FEES SURVEY, *supra* at 7. But the costs are actually much higher in many states. In California, for example, the average impact fee for a single-family home is $37,471. *Id.* Moving up the West Coast, the average impact fee assessment in Oregon exceeds $21,900. *Id.* And in Washington average impact fees on a single-family home exceed $16,000. *Id.* In many communities, the cost imposed by impact fees may exceed ten percent of the median new home price. *See* JOHN LANDIS ET AL., DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, PAY TO PLAY: RESIDENTIAL DEVELOPMENT FEES IN CALIFORNIA CITIES AND COUNTIES 3 (2001). Those figures show no signs of slowing. Some municipal impact fees have increased at nearly twice the rate of inflation, while non-utility-based fees increased at an even greater clip. *See* NAR FACT BOOK at 37–38.

These are dramatic impositions no matter the metric. Each dollar in impact fees assessed increases a property's sale price by between 66 and 210 percent of the actual cost of the impact fee. Rosenberg, *supra* at 212 & n.115 (increase of 70 percent to 210 percent of the actual cost of the impact fee); Shishir Mathur et al., *The Effect of Impact Fees on the Price of New Single-family Housing*, 41 URB. STUDIES 1303 (2004) (66 to 88 percent of the actual cost of the impact fee). Impact fees drive up both the price of the property and the value of neighboring properties, which benefit

from the public infrastructure improvements paid for by new developments. Shishir Mathur, *Do All Impact Fees Affect Housing Prices the Same?*, J. OF PLANNING EDUC. & RESEARCH 442, 452–53 (2013).

Impact fees have real consequences for homeownership in America, particularly with today's high interest rates and limited housing inventory. A recent study found that a mere $1,000 increase in the median price of a new home would push more than 140,436 households out of the real estate market. NA ZHAO, NATIONAL ASSOCIATION OF HOME BUILDERS, NAHB PRICED-OUT ESTIMATES FOR 2023 (Mar. 2023). Homeownership offers a bridge to financial security, and every American who can afford to buy a home should have access to one. But many prospective homebuyers are priced out of the market by the tens of thousands of dollars in impact fees imposed on the average property owner.

C. Legislative Exactions Coerce Property Owners Into Surrendering Their Constitutional Rights.

Real-world examples confirm that the government often uses legislative exactions with coercive purpose and effect. In *San Remo Hotel L.P. v. City and County of San Francisco*, a 62-room hotel sought a city permit to rent its rooms to tourists. 41 P.3d 87, 91–92 (Cal. 2002). The San Francisco administrative code made it city policy to minimize the adverse impact on housing supply to low income, elderly, and disabled citizens. *Id.* at 92. The city feared that authorizing the permit would decrease housing available for some low-income residents under the city's law. *Id.* at 92–94. So, after several rounds of negotiation, the city

authorized a use permit on the condition that the hotel offer long-term residents lifetime leases or pay a $567,000 fee to fund construction of low- and moderate-income housing. *Id.* at 95. The hotel owner chose the fee and sued over the condition, but the California Supreme Court held that the property owner had no remedy under the Takings Clause, because this legislative exaction could not be challenged under *Nollan/Dolan*. *Id.* at 103–06.

A property owner faced a similar legislative exaction in *Levin v. City and County of San Francisco*. 71 F. Supp. 3d 1072 (N.D. Cal. 2014). There, a property owner sought permission to withdraw a rent-controlled property from the rental market. *Id.* at 1078. A San Francisco ordinance required property owners seeking to withdraw rent-controlled units from the market to pay renting tenants the greater of: (i) $4,500 per tenant up to $13,500 per unit, plus an additional payment of $3,000 to any elderly or disabled tenant; or (ii) 24 times the difference between the rent-controlled units' monthly rate and a fair-market value of a comparable unit. *Id.* at 1077. To obtain permission to withdraw their unit from the rent-controlled market, the property owner had to pay the tenant a hefty $117,958.89 windfall to reclaim the home for personal use. *Id.* at 1078. The district court, however, rejected the California Supreme Court's carveout of legislative conditions from constitutional scrutiny, and found the massive exaction to violate the unconstitutional conditions doctrine. *Id.* at 1083 & n.4, 1089 & n.8.

Last, *Building Industry Association–Bay City v. City of Oakland*, concerned a city ordinance requiring property owners to display or fund art as a

precondition to permit approval. 289 F. Supp. 3d 1056 (N.D Cal. 2018), *aff'd* 775 F. App'x 348 (9th Cir. 2019) (mem.). Under that ordinance, owners of multifamily projects with more than twenty units must (i) spend 0.5 percent of the development cost on art displays on the site or on a nearby right of way; or (ii) pay an equivalent amount in lieu of the display to allow the city to fund public art installations. *Id.* at 1057. Developers of certain commercial projects must also purchase and install art valued at one percent of development costs or pay an equivalent fee for public art installations. *Id.* The court found the legislatively imposed condition to be permissible. *Id.*

These legislative exactions may serve laudable goals, but the common flaw in each is that the government sought to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That is precisely the evil that the Takings Clause protects against.

II. LEGISLATIVE TAKINGS ARE NOT IMMUNE FROM CONSTITUTIONAL SCRUTINY.

All government action, including legislation, may be subject to constitutional scrutiny. The Constitution applies broadly to *government* action and, as incorporated by the Fourteenth Amendment, limits the conduct of *states*, not particular *state actors*. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment ... protects the citizen against the State itself and all of its creatures—Boards of Education not excepted."); *Owensboro Waterworks Co. v. City of Owensboro*, 200

U.S. 38, 45 (1906) (collecting cases describing the "14th Amendment" as applicable "to all the instrumentalities of the state—to its legislative, executive, and judicial authorities"). It would make no constitutional sense to proscribe unconstitutional conditions imposed by executive officials while excusing those enacted by legislators. From the property owner's perspective, the effect is the same—his property is taken by the government without just compensation.

If anything, legislative exactions are even more suspect than those imposed by executive officials on an individualized basis. For one thing, as Madison recognized, "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST No. 48, at 309–10 (Clinton Rossiter ed. 1961). For another, the risk of unconstitutional conditions is more acute in the legislative context because legislative exactions do not take into account particularized facts—the whole point of the *Nollan* and *Dolan* test. And because they have "access to the pockets of the people," *id.*, legislatures have every incentive to increase their exactions because they affect a small number of property owners while shielding current taxpayers from politically unpopular tax increases to pay for public improvements.

A. The Unconstitutional Conditions Doctrine Applies to All Government Actions.

The government sometimes tries to accomplish through indirect means that which it could not

achieve directly. A classic government maneuver to circumvent the Constitution is to offer a benefit it is not obligated to provide on the condition that a person surrenders a constitutional right. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). But the Constitution "deals with substance, not shadows", and is not so easily evaded. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 230 (2023) (citation omitted). Under the unconstitutional conditions doctrine, the government cannot grant (or withhold) a benefit on the condition that the beneficiary surrender a constitutional right, even if the benefit could be withheld altogether. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). If the Constitution would restrict the government from violating a constitutional right directly, it also restricts the conditioning of benefits on voluntary waiver of a constitutional right. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (government could not condition public benefit on submission to restriction on speech).

The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. Without it, the government could leverage its vast spending, permitting, law-enforcement, and other powers to trample constitutional rights indirectly—and all under the banner of voluntary waiver.

Over the past 160 years, this Court has applied the doctrine to vindicate a wide variety of constitutional guarantees. Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26–102 (1988) (documenting the

history and legal basis for the unconstitutional conditions doctrine). In *Perry*, for example, the Court held that a public college could not, consistent with the First Amendment, refuse to renew a professor's contract based on the content of his critical speech. 408 U.S. at 598–99. Relatedly, in *Rutan v. Republican Party of Illinois*, the Court held that a hiring practice conditioning government employment on political association and belief violated the First Amendment. 497 U.S. 62 (1990).

But the doctrine does not end with the First Amendment. It has also been deployed to invalidate encroachments on the right to travel, *see Memorial Hospital v. Maricopa County*, 415 U.S. 250, 267–69 (1974), the right to be free of unreasonable searches, *see Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313–15 (1978), and the right to be free from uncompensated takings of private property, *see Dolan*, 512 U.S. 374.

Nor is the doctrine limited to any particular branch of government. The Court has consistently applied the unconstitutional conditions doctrine in cases involving the government regardless of the branch of government imposing the condition. *See, e.g.*, *Agency for Int'l Dev.*, 570 U.S. at 208, 221 (congressional act imposed an unconstitutional condition by forcing parties to give up First Amendment rights as prerequisite to funding); *Rutan*, 497 U.S. at 78 (governor's hiring decisions on the basis of political belief and association constituted an unconstitutional condition). These holdings reflect the basic principle that the Constitution typically constrains the government generally without distinguishing between particular branches. *See generally Stop the*

Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713–14 (2010) (plurality op.).

Given the Constitution's broad reach, this Court scrutinizes legislation to ensure unconstitutional conditions are not attached to government benefits. Legislative enactments, this Court has regularly held, may be unconstitutional if they condition access to benefits on the waiver of a constitutional right. *See, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 403–06 (1963) (state law imposed an unconstitutional condition by denying benefits to religious employees who refused to work on holy day); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 400–02 (1984) (federal law authorizing broadcast permits in exchange for agreement not to "engage in editorializing" imposed unconstitutional condition). The unconstitutional conditions doctrine thus focuses on any coercive government action from any government actor seeking to grant a benefit in exchange for a citizen surrendering his constitutional rights.

B. The Takings Clause Applies to All Branches of Government.

The unconstitutional conditions doctrine also vindicates the Fifth Amendment's Takings Clause. *Koontz*, 570 U.S. at 604–05 (explaining that *Nollan* and *Dolan* created a "special application" of this doctrine for when the government conditions a permit on a citizen's agreement to surrender property rights). The text of the Takings Clause itself recognizes no distinction regarding the branch of government or type of government action that effects a taking: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST., amend. V. Like the

unconstitutional conditions doctrine more generally, 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." *Stop the Beach Renourishment, Inc.*, 560 U.S. at 713–14 (plurality op.). The passive-voice construction of the provision—"nor shall private property be taken"—deemphasizes "*who* commits the act" and instead emphasizes "*what* type of act is committed." *Knight v. Metro Gov't of Nashville & Davidson County*, 67 F.4th 816, 829–30 (6th Cir. 2023) (citation omitted). There is simply "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc.*, 560 U.S. at 714 (plurality op.).

This Court's cases accordingly make no distinction between takings effectuated through legislative or executive action. Rather, the Court has consistently explained that the Takings Clause cannot be evaded by cleverly couching government action as legislative, judicial, or executive. The essential inquiry is "not … whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). It is instead "whether the government has … taken property for itself or someone else … or has … restricted a property owner's ability to use his own property." *Id.* So the Court has found takings in legislative action, *id.*, executive action, *see Horne v. Department of Agriculture*, 576 U.S. 350, 354 (2015), and even judicial decisions, *see Stop the Beach Renourishment,*

Inc., 560 U.S. at 713–14 (plurality op.) ("It would be absurd to allow ... by judicial decree what the Takings Clause forbids it to do by legislative fiat."); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting from denial of certiorari) (arguing judicial decisions could amount to unconstitutional takings).

Put simply, "the government must pay for what it takes," *Cedar Point Nursery v. Hassid*, 141 S. Ct. at 2071, no matter who does the taking or how they do it. There is no textual or precedential basis to subject executive takings to constitutional scrutiny while giving legislative takings a free pass.

C. Legislative Exactions Are Subject To Constitutional Scrutiny.

Despite all of this, some lower courts only apply the *Nollan/Dolan* test to "the imposition of land-use conditions in individual cases," holding that exactions imposed through legislation are immune from constitutional scrutiny. *San Remo Hotel*, 41 P.3d at 105. That supposed distinction between executive and legislative exactions does not withstand scrutiny.

1. Neither *Nollan* nor *Dolan* distinguished between executive and legislative exactions. In those cases, property owners were seeking a benefit in the form of a permit to develop their land. *Dolan*, 512 U.S. at 379–80. There are two competing "realities of the permitting process" that must be balanced in that situation. *Koontz*, 570 U.S. 595. On one hand, property owners are at the mercy of the government, which may leverage its authority to extract extortionary fees as a condition of granting the permit. *Nollan*, 483 U.S. at 831. So long as the value of the

improvements exceeds the cost of the exaction, property owners have the economic incentive to waive their constitutional rights. *Koontz*, 570 U.S. at 605.

The government, on the other hand, must consider the public interest in granting a permit. If a permit would impose so-called "negative externalities" on the public—for example, by increasing traffic congestion—officials may condition approval of a permit on the property owner's agreement to give up land to widen the road. *Id.* As the Court explained, obligating landowners to internalize negative externalities is a "hallmark of responsible land-use policy." *Id.*

Acknowledging these competing interests, the Court established a framework rooted in the unconstitutional conditions doctrine to distinguish permissible conditions from unconstitutional ones. The first question is whether the permitting condition would qualify as a taking if the government had directly required it outside of the permitting context. *Nollan*, 483 U.S. at 837. If the exaction would be a taking, then the government must show an "essential nexus" between the "legitimate state interests" and the permit condition at the second step—in other words, the exaction must mitigate the *actual* costs imposed by the project rather than serve as a disguise for the exaction of a fee. *Id.* Last, the condition must bear "rough proportionality" to the costs imposed by the project—put simply, the amount of the exaction must be tethered to the "negative externalities" in nature and scope imposed by the proposed development. *Dolan*, 512 U.S. at 391.

Applying this framework, *Nollan* and *Dolan* addressed both legislative and executive action that together effectuated takings of private property. In *Nollan*, the California Coastal Commission sought to impose an exaction compelled by the California Public Resources Code. 483 U.S. at 828. That law, "directly authorized by California citizens," was designed "to ensure public access to the ocean," and thus required the Commission to "preserve overall public access to the California coastline," by protecting easement access across beachfront property. *Id.* at 846, 859 (Brennan, J., dissenting). And pursuant to that legislative mandate, the Commission applied the same condition to every other similarly situated lot in the neighborhood—43 in all. *Id.* at 829 (majority op.).

Likewise, in *Dolan*, the city enforced a legislatively enacted ordinance by conditioning a building permit on the property owner agreeing to an exaction of some property to pay for flood control and a pedestrian path. 512 U.S. at 379. That obligation was not imposed on an *ad hoc* basis, but instead was directly traceable to the city's Community Development Code. *Id.* at 379–80. Thus, neither of the exactions at issue in *Nollan Dolan* were executive decisions untethered to legislative action. Both were executive actions enforcing legislation that generally applied to all similar permits.

So too here. George Sheetz applied for a permit to erect an 1,854-square-foot manufactured home on his property. Pet. App. A-3. Under a county ordinance, no permit for a single-family home may be issued without payment of an impact fee to finance general road improvements. *Id.* at A-3–A-4. Respondent enforced that ordinance against Mr. Sheetz by

requiring him to pay a $23,420 impact fee to obtain a permit. *Id.* at A-3.

The lower court departed from *Nollan* and *Dolan* by upholding Respondent's exaction without requiring an individualized determination about the nexus and proportionality of the fee to Mr. Sheetz's development of his particular property. *Id.* at A-14–15. Under *Nollan* and *Dolan*, all exactions—whether they stem from executive or legislative action—are subject to the nexus and rough proportionality test. The lower court's judgment should be vacated and remanded for shielding Respondent's exaction from constitutional scrutiny.

2. Nor does the lower court's rationale for excusing legislative exactions from constitutional scrutiny hold up on its own terms. Some courts do not view exactions imposed by legislation as implicating concerns about the government extorting fees in exchange for specific permits because these legislative exactions are "generally applicable" and non-discretionary. *Dabbs v. Anne Arundel County*, 182 A.3d 798, 810–13 (Md. 2018). They insist that elected legislatures passing generally applicable laws will not extort property owners to the same extent as unelected administrators in the context of a specific negotiation because they view the democratic process as a sufficient check on legislative extortion. *San Remo Hotel L.P.*, 41 P.3d at 105; *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist.*, 62 P.3d 404, 409 (Or. 2003).

But the concern about the government exercising its coercive power over property owners through "out-and-out plan[s] of extortion" is heightened when

legislatures impose exactions. *Nollan*, 483 U.S. at 837. Legislatures "are collectively responsive to the popular will" because they consist of those selected by a majority to advance majoritarian interests. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Legislative exactions enable the majority to mandate that a minority of citizens seeking to improve their properties bear "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. And because legislatures are politically accountable to the people, they have natural incentives to extort developers to the maximum extent possible to avoid politically unpopular tax increases to fund unrelated community improvements. Legislative exactions allow the government to offload the costs of prized social programs "off budget" with "relative invisibility and thus relative immunity from normal democratic processes." *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (quotation marks omitted). This sort of government funding on the backs of some property owners boosts public coffers while avoiding the political costs of raising taxes on all the people.

In the end, subjecting legislative exactions to constitutional scrutiny will not prevent the government from regulating private property. To the contrary, the government will still be able to impose permitting exactions that meet the nexus and rough proportionality standard. What the government may not do, however, is force property owners to pay for public improvements untethered to a particular development as a precondition for a permit. Such extortion is contrary to the Constitution.

CONCLUSION

The Court should vacate and remand.

Respectfully submitted,

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November 20, 2023