No. 22-1074

IN THE

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO,

Respondent.

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

BRIEF OF CALIFORNIA HOUSING DEFENSE FUND, CALIFORNIA YIMBY, AND YES IN MY BACK YARD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are nonprofit organizations committed to legal and policy advocacy to address California's housing crisis. To provide affordable, sustainable, and equitable housing for the current and future residents of the state, *amici* believe that local jurisdictions must permit significantly more housing, particularly in coastal areas in close proximity to jobs. *Amici* have a strong interest in assisting this Court in understanding the practices of California's local governments in imposing exactions that have little relationship to the actual costs of new housing. *Amici* also have an interest in explaining ways that new housing generates new revenue for local governments to illuminate how those costs should be contextualized for the purposes of the constitutional test. *Amici* are:

- The California Housing Defense Fund ("CalHDF") is a nonprofit organization focused on increasing California's housing supply, with an emphasis on multi-family and affordable housing. CalHDF monitors local governments for compliance with laws governing land use planning and permitting for residential construction, and sues to correct any violations it uncovers.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for any party authored this brief in whole or in part, and that no party or counsel other than the *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

- California YIMBY is a nonprofit organization that works to make California an affordable place to live, work, and raise a family.

- Yes In My Backyard ("YIMBY") is a nonprofit organization whose mission is to end the housing shortage and achieve affordable, sustainable, and equitable housing for all.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about California's housing crisis.

The crisis, which stems from a shortage of three million homes, has devastating effects on Californians. It causes sky-high housing costs and rates of homelessness. It disproportionately impacts people of color, who already suffer the legacy of systemic racism in housing. And it worsens the climate crisis, as it forces people to live further inland, often in wildfire-prone areas from which they must make multi-hour commutes to job centers.

Disproportionately high exactions like the one imposed on Petitioner contribute to this shortage. In imposing impact fees, local governments employ faulty methodologies that vastly overestimate the impacts of new housing. The exactions lack the requisite "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the applicant's proposal." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605–06 (2013) (citations omitted). Impact fees exacerbate the housing shortage by making it more costly to build much-needed housing. California courts have manifestly failed to provide a remedy for these fees.

In addition to overstating the negative impacts of housing, local governments also fail to ask whether new housing generates revenue to offset those impacts. When new housing is built, the owners immediately begin paying local governments a much larger stream of property taxes. Solely because that

new housing is built, government revenue increases significantly. To determine the appropriate impact fee, local governments must consider not only the costs that housing imposes on society but also the extent to which that housing automatically pays those costs. No local governments currently do so. Instead, local governments effectively demand that new housing pay for its costs twice. Paying twice is not "rough proportionality."

This Court should reverse. In doing so, it should clarify the "rough proportionality" test so that lower courts can better monitor extortion by local governments. High impact fees are not just hurting the landowners or developers with the resources to apply for a permit. They are hurting us all—especially those struggling or unable to afford a place to live.

ARGUMENT

I. California Faces a Devastating Housing Crisis.

California is in the midst of a massive housing affordability crisis. The average rent price in California is $1,958—more than 40% higher than the national average of $1,372.[2] The median price of an existing condominium or townhome in California is

[2] *See* Josh Patoka, *Average Rent by State*, https://perma.cc/Z6XD-JWXQ (citing August 2023 data from Apartment List).

$650,000 and that of a single-family home is $843,340.[3]

Although the crisis has recently grown worse, it is not new. Home prices were already 80% above the national average in 1980.[4] Of course, in an ordinary market, higher prices incentivize building more houses. But California is no ordinary market. In fact, each year between 1980 and 2010, California built an average of 90,000 *fewer* units than were necessary to keep cost growth in line with that in other states.[5] Moreover, most of the units built during this period were in inland and rural areas with the least housing need; the coastal counties with the greatest housing need built one-third (or less) of what was needed.[6] During these thirty years, the typical U.S. metropolitan area increased its housing stock by 54%, while Los Angeles and San Francisco increased theirs by only 20%.[7] California now faces a housing shortage of around three million homes.[8]

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[3] *See* Cal. Ass'n of Realtors, *September Home Sales and Price Report* (Oct. 18, 2023), https://perma.cc/2QPL-349Z.

[4] Cal. Legis. Analyst's Off., *California's High Housing Costs: Causes and Consequences* 7 (2015), https://perma.cc/98R5-2W3V [hereinafter *California's High Housing Costs*].

[5] *Id.* at 21.

[6] *Id.* at 21–22.

[7] *Id.* at 10.

[8] *Id.* at 21 (estimating 2.7 million from 1980 to 2010). In 2016, McKinsey estimated that California needed 3.5 million homes by 2025 to address the shortage. *See* Jonathan Woetzel et al.,

The shortage exists because local governments erect legal barriers to prevent homes from being built. One common explanation is the political power of certain incumbent residents, who perceive new development as a threat to their home values or to the status quo.[9] Many of these existing residents claim that new housing will lead to higher crime, traffic congestion, and school overcrowding. Some are also motivated by class- or race-based animus. *E.g.*, *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 608, 611 (2d Cir. 2016) (noting the forceful protests of citizens in an "overwhelmingly" white town about "affordable housing and associated undesirable elements" that would change the town's "flavor"). Impact fees are one of the legal barriers that raise the cost of building housing or impede its construction altogether. But these barriers come in many shapes and sizes, including single-family zoning, minimum lot sizes, parking requirements, height limits, environmental and historical review, and floor area ratio requirements.[10]

Because of its housing costs, California has a poverty rate among the highest in the nation—despite high incomes and a robust welfare state. The state's

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McKinsey Global Inst., *Closing California's Housing Gap* (Oct. 24, 2016), https://perma.cc/PV7W-SAWN.

[9] *See* Katherine Levine Einstein et al., *Neighborhood Defenders* 15–16 (2020).

[10] *See* Christopher S. Elmendorf et al., *State Administrative Review of Local Constraints on Housing Development: Improving the California Model*, 63 Ariz. L. Rev. 609, 620 (2021).

supplemental poverty measure, a poverty rate that takes into account cost of living, is 13.2%—the highest of any state.[11] As a result, many can no longer afford to stay. Every year for the past decade, tens of thousands more low- and middle- income households have left California than have migrated to California, and this trend is accelerating.[12] Because so many low- and middle-income people are leaving the state, the rates of Californians in poverty (13.2%) and California renters who are cost-burdened (56%), while high, are misleadingly low. Many Californians who would be counted as low-income or cost-burdened go uncounted because they have effectively been pushed out.[13] With the housing affordability crisis falling particularly hard on younger adults, many are delaying starting families.[14]

While many housing-insecure Californians have left, many others lack the resources to leave. Despite having only 12% of the total population, California is home to 35% of the nation's unhoused population and more than half of the nation's unsheltered homeless

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[11] *See* U.S. Census, *Poverty in the United States: 2022*, at 47, https://perma.cc/6DWA-T4KB. The District of Columbia is the only jurisdiction with a higher rate.

[12] *See* Hans Johnson et al., Public Policy Inst. of California, *What's Behind California's Recent Population Decline—and Why It Matters* (Oct. 2023), https://perma.cc/43DB-VX3Z.

[13] Apartment List, *More than Half of All Renters Are "Cost-Burdened" According to New Census Data* (Oct. 17, 2023), https://perma.cc/46QN-PTYX.

[14] Johnson et al., *supra*.

population. The problem is getting worse: California's homeless population increased by at least 10,000 people between 2020 and 2022—almost four times the increase in the state with the next highest increase.[15]

People of color are disproportionately likely to be negatively impacted by California's housing costs. Black and Latino residents are more likely than white residents to spend more than 30% of their income on rent. Just 37% of Black Californians and 44% of Latino Californians own a home, compared to 63% of white Californians.[16] And although only about 7% of Californians identify as Black, they account for nearly 26% of the state's homeless population.[17]

These disparate impacts are the legacy of structural racism. For nearly a century after Reconstruction, people of color confronted an

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[15] U.S. Dep't of Hous. & Urban Dev., *The 2022 Annual Homelessness Assessment Report to Congress* 28, https://perma.cc/6TZC-NQZX. These values are based on the Department's annual Point in Time count, which is likely a significant underestimate. *See* Nat'l Law Ctr. on Homelessness & Poverty, *Don't Count On It: How the HUD Point-in-Time Count Underestimates the Homelessness Crisis in America* 6–7 (2017), https://perma.cc/UN77-QUFH.

[16] Marisol Cuellar Mejia et al, *California's Housing Divide*, Public Policy Inst. of Cal. (May 13, 2022), https://perma.cc/D5HA-4M47.

[17] Margot Kushel et al, UCSF Benioff Homelessness & Hous. Init., *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness* 25 (June 2023), https://perma.cc/GB37-9JCS.

unbroken series of federal, state, and local laws that enforced segregation and prevented people of color from buying houses and building wealth.[18] California began restricting its housing supply—and locking newcomers out of the market—only shortly after the Fair Housing Act of 1968 ended *de jure* segregation. That people of color have been disproportionately left out is not surprising (and perhaps not accidental).

Finally, the housing shortage causes serious environmental consequences. Local barriers to housing in coastal job centers require workers to live further inland and take longer commutes. In forcing more people into motor vehicles for longer periods of time, the housing shortage increases vehicle miles traveled as well as emissions of conventional air pollutants and greenhouse gases (GHGs). Transportation emissions now form around half of all of California's GHG emissions.[19] Unless further growth occurs mainly in transportation-efficient, resource-rich areas, California will not meet its goal of carbon neutrality by 2045.[20] And development further inland poses other environmental risks. Under current development patterns, more than

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[18] *See* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 75 (2017).

[19] Cal. Energy Comm'n, *Transforming Transportation*, https://perma.cc/SQ4Z-GDZW.

[20] Cal. Air Res. Bd., *2022 Scoping Plan Appendix E: Sustainable and Equitable Communities* 22–23 (Nov. 2022), https://perma.cc/P65Y-9S5W.

600,000 homes will be built in very high fire-hazard severity zones by 2050.[21]

II. The Crisis Is Getting Worse Because California's Impact Fees Lack the Requisite "Nexus" and "Rough Proportionality" to the Impacts of Housing.

One key barrier to new housing is disproportionately high impact fees, which local governments set based on fanciful overestimates of the impacts of new housing. As a result, fewer homes are built, and the crisis continues to worsen. Neither state law nor the federal constitutional test has been meaningfully enforced in California to address these exactions.

A. Impact fees in California do not have "nexus" and "rough proportionality" to the impacts of new housing.

Local governments may impose exactions on new development to "[i]nsist[] that landowners internalize the negative externalities of their conduct." *Koontz*, 570 U.S. at 605. Those negative externalities include impacts that the development directly imposes on the public, including additional needs for sewer and water infrastructure. But the Takings Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice,

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[21] Karen Chapple et al., Next 10 & UC Berkeley, Ctr. for Cmty. Innovation, *Rebuilding for a Resilient Recovery Planning in California's Wildland Urban Interface* 9 (June 2021), https://perma.cc/W99T-MTJ8.

should be borne by the public as a whole." *Tyler v. Hennepin Cnty., Minnesota*, 598 U.S. 631, 647 (2023) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Accordingly, when a government demands an exaction in exchange for a permit, the Constitution requires an "individualized determination" that the exaction is "related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). There must be a "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the applicant's proposal." *Koontz*, 570 U.S. at 605–06.

An "individualized determination" of the "extent" of the impacts logically requires marginal cost pricing. *See Dolan*, 512 U.S. at 391. Rather than charging the average cost over all units, local governments must charge the additional cost that a given unit imposes. This furthers both efficiency and fairness.[22] After all, the "extent" of social costs depends on the type of housing, its location, and other factors. Landowners who build housing that will be more expensive for the public to service ought to internalize those higher costs. Compared to single-family homes in an exurban greenfield, a new multifamily building in an infill area with existing sewer service will have fewer impacts on sewer and roads, as it will not require new

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[22] *See* John Landis et al., Cal. Dep't. of Hous. & Comm. Dev., *Pay to Play: Residential Development Fees in California Cities and Counties, 1999*, at 16–17 (Aug. 2001), https://perma.cc/94PG-F49S [hereinafter *Pay to Play*].

infrastructure and its residents are less likely to use a motor vehicle.[23]

Many exactions in California clearly flunk both parts of the constitutional test. Under current practice, governments adopt fees based on so-called "nexus studies" in which consultants use inaccurate methodologies to estimate the purported impacts of development on an array of amenities that new development likely does not affect.

Nexus studies generally determine fees based on average cost. Jurisdictions "typically multiply a set fee amount by a characteristic of a building, such as square feet, dwelling units, or bedrooms," essentially assuming that all infrastructure needs will increase proportionally.[24] This approach ignores both the actual "extent" of the costs of a specific development and economies of scale in providing city services. Nexus studies only sometimes point to specific capital improvement projects.[25]

Many impact fees are imposed to fund projects without a "nexus" to the impacts of new housing. For example, some of the most exorbitant impact fees purport to be addressing negative impacts on parks. But more residents enjoying a park is as likely to be a

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[23] *See* Vicki L. Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 143–44 (2005).

[24] Hayley Raetz et al., Terner Ctr. for Hous. Innovation, *Residential Impact Fees in California* 37 (Aug. 2019), https://perma.cc/VZ3E-BVGV [hereinafter *Residential Impact Fees*]; *Pay to Play*, *supra*, at 55–56.

[25] *Pay to Play*, *supra*, at 2.

positive externality as a negative one. At most, there might be a nexus with increased maintenance expenditures. Instead, California jurisdictions postulate that existing parks are full and cannot be enjoyed by one more person. They then require that each new unit of housing pay to buy new parkland necessary to replicate existing per-capita park acreage. In Pasadena, as of 2020, new parkland was projected to cost $4.6 million per acre.[26] Accordingly, Pasadena's nexus study matter-of-factly recommended increasing the parks fee from $19,622 to $29,379—for each *studio apartment*.[27] There is no "nexus" between a new studio apartment and a hypothetical brand new park the city of Pasadena would like to build. Nor is there a nexus when local governments demand that homebuilders pay a set amount into a "city art fund" or "contribute an approved work of art of an equivalent value." *Ehrlich v. City of Culver City*, 911 P.2d 429, 450 (Cal. 1996). In lacking a "nexus" and "rough proportionality" with real impacts, these exactions "forc[e] some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Tyler*, 598 U.S. at 647.

Local governments sometimes do not even have plans to build the facilities that supposedly have a "nexus" with the impacts of housing. In the mid-

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[26] Brion Econ. Inc., *Final Nexus Study: Park and Recreation Residential Impact Fee 2020 Update - City of Pasadena*, at 21, https://perma.cc/F47G-26Z3. Pasadena did not increase the fee that year.

[27] *Id.* at 25.

2000s, the city of Lemoore, a town 30 miles south of Fresno, imposed high impact fees based on its purported need for recreational facilities such as "an aquatic center, a gymnasium and fitness center, and a naval air museum." *Home Builders Assn. of Tulare/Kings Ctys., Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 565 (Ct. App. 2010) (*Lemoore*). The reviewing court did not mind that the city lacked "any actual plan or commitment" to build them. *Id.*

These disproportionate impact fees are ubiquitous and they accumulate. Cities, water districts, and school districts set up their own impact fees. So do different departments within a jurisdiction, often without coordination.[28] Impact fees can add up to anywhere from 6% to 18% of the (very high) local median home price.[29] In 2015, California's impact fees were nearly three times the national average.[30] It is unlikely that the social costs of new housing in California are somehow three times the social costs of new housing everywhere else.

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[28] *See* Sarah Mawhorter et al., Terner Ctr. for Hous. Innovation, *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities* 4 (Mar. 2018), https://perma.cc/SV9J-JGZ7 [hereinafter *It All Adds Up*].

[29] *It All Adds Up*, *supra*, at 3.

[30] *Id.* at 5.

B. Disproportionately high impact fees exacerbate the housing crisis.

Impact fees now make up "a significant portion of the cost to build new housing in California cities."[31] By increasing the cost of construction, they exacerbate the housing shortage at the root of the crisis.

When impact fees exceed the costs directly attributable to new homes, homes that can be built feasibly and at public benefit never break ground. In some jurisdictions, impact fees now comprise 17% of the cost of building new housing.[32] Because of these costs, less housing can be financed and built. And even when it can be built, homebuilders will build fewer affordable units, as they need the guarantee of greater upside from higher rents and sale prices.[33] Further, although impact fees for apartments are generally lower than those for single-family homes, they are higher per dollar of valuation.[34] Impact fees often disincentivize construction of precisely the types

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[31] *Id.* at 3.

[32] *Id.* at 5.

[33] *See Residential Impact Fees in California*, *supra*, at 21–22. For some jurisdictions, this may be a feature rather than a bug. Local governments may intentionally "boost fees to discourage the construction of building forms regarded as onerous or costly (e.g., apartments or starter homes)." *Pay to Play*, *supra*, at 17. In other words, impact fees are another means of excluding people considered undesirable because of their class or race.

[34] *Pay to Play*, *supra*, at 66.

of housing that is most urgently needed—starter homes and apartments.[35]

These high impact fees have exacerbated the current crisis. California's impact fees have been unusually high since the 1980s. As far back as 1999, owners of new infill homes paid an average of $20,327 per unit and apartment developers paid $15,531 per new apartment.[36] And it has gotten worse. Between 2008 and 2015, impact fees in California grew 2.5% while the national average decreased by 1.2%.[37]

A 2018 study estimated that the impact fees in the San Francisco Bay Area city of Fremont averaged $75,000 per multi-family unit.[38] (About one-fifth was "Parks and/or Art.")[39] This number is likely much higher now: Fremont raises impact fees annually "to keep pace with increases in construction costs"—and did so by 13.65% in 2023 alone.[40] It is not surprising, then, that it is now more expensive to buy a home in

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[35] *See Residential Impact Fees in California*, *supra*, at 21–22.

[36] *Pay to Play*, *supra*, at 1.

[37] *It All Adds Up*, *supra*, at 5.

[38] *Id.* at 3.

[39] *Id.* at 19.

[40] *City of Fremont Development Impact Fees* (June 13, 2023), https://perma.cc/P3JL-F6CY.

Fremont than in San Francisco. The typical home value there is $1.4 million.[41]

C. State law continues to provide no remedy.

This Court has previously suggested that "state law normally provides an independent check on excessive land-use permitting fees." *Koontz*, 570 U.S. at 618. Not so, unfortunately, in California.[42]

The Mitigation Fee Act is the California law that sets the rules local governments must follow in imposing impact fees. *See* Cal. Gov't Code §§ 66000–66025. First passed in 1987, the act requires local governments to make nexus findings: they must identify the purpose of the fee, how it will be used, and a "reasonable relationship" among the type of development project, the fee's use, and "the need for the public facility." *Id.* § 66001(a)(1)–(4). In addition, they must make findings of rough proportionality—i.e., a "reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." *Id.* § 66001(b). Local

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[41] *San Francisco Is No Longer the Most Expensive Large Bay Area City to Buy a Home*, S.F. Chron. (Sept. 23, 2023), https://perma.cc/N6X9-NQK8.

[42] There is one small exception. In 2017, the Legislature preempted local government impact fees on accessory dwelling units (ADUs) less than 750 square feet. *See* Cal. Gov't Code § 65852.2(f)(3)(A). Since then, construction of ADUs has increased considerably: from 5,154 in 2017 to 24,831 in 2022. Cal. Dep't of Hous. & Comm. Dev., *HCD Dashboard – Construction – Structures*, https://perma.cc/7MY7-9GVS.

governments must deposit the impact fees they collect in a capital facilities account and publish a report annually as to its uses of those funds. *Id.* § 66006. The law requires local governments to make nexus findings every five years, if any funds have not yet been spent. *Id.* § 66001(d). The Legislature has updated the law as recently as 2021, now requiring local governments to consider cost information submitted by the public, to review the assumptions of nexus studies, to use a methodology based on square footage as a default, and to make their reports and studies available on their websites. *See* A.B. 602 (Cal. 2021), Cal. Gov't Code §§ 66019(d), 66016.5(a)(4)–(5), 65940.1(a).

California courts have effectively gutted the Mitigation Fee Act. The California Supreme Court has intoned that legislatively-imposed fees are "subject to [ ] meaningful means-ends review" under the Mitigation Fee Act. *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 41 P.3d 87, 105 (Cal. 2002). In fact, courts have held that § 66001(b)'s "rough proportionality" requirement—a reasonable relationship between the fee and the cost of the public facility attributable to the development—does not apply at all to legislatively-imposed fees. *See* Pet.App. A-20–21 (citing cases). Moreover, in showing a violation of the nexus requirement, the plaintiff has the burden of proof, *see Lemoore*, 185 Cal. App. 4th at 562, and the standard of review is incredibly deferential. Courts ask "only whether the action taken was arbitrary, capricious or entirely lacking in evidentiary support, or whether it failed to conform to procedures required by law." *Boatworks, LLC v. City of Alameda*, 35 Cal. App. 5th 290, 298 (Ct. App. 2019)

(citation omitted). "This limited review recognizes the legislative delegation of authority to the [local government] and its presumed expertise within its scope of authority." *Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High Sch. Dist.*, 34 Cal. App. 5th 775, 786 (Ct. App. 2019). In short, local governments have a financial incentive to demand as much revenue as they can, and courts "presume" that they have "expertise" when they do exactly that.

State courts routinely uphold impact fees under the Mitigation Fee Act, even when the jurisdiction makes little or no showing that the fees relate to the costs of new housing. *See, e.g.*, *Tanimura*, 34 Cal. App. 5th at 803–04 (school district impact fees may be imposed on agricultural workforce housing despite no evidence it will house dependent children); *AMCAL Chico LLC v. Chico Unified Sch. Dist.*, 57 Cal. App. 5th 122, 128 (Ct. App. 2020) (same as to university student housing); *Lemoore*, 185 Cal. App. 4th at 563–64 (impact fees may be imposed to fund a naval air museum despite no evidence that it relates to the social costs of new housing). And although the Legislature continues to make minor procedural tweaks to the act, it has proven unable to address the substantive problems. *See, e.g.*, A.B. 516 (Cal. 2023) (amending the act to require local governments' annual reports to explain why capital projects are delayed and to allow an applicant to request an audit to determine whether an impact fee is reasonable).

If anything, the published California case law understates the ubiquity of exorbitant impact fees because homebuilders rarely challenge them. Fees in nearby jurisdictions are often just as high, so builders

are accustomed to extortionate exactions as a cost of doing business. Moreover, in light of the above precedent, they likely believe they cannot prevail in court. Finally, even when they might be able to win, litigation may not make business sense: if you plan to build homes in the future, it is imprudent to sue the government from which you will need permits.

Although California law provides no remedy, the "nexus" and "rough proportionality" test does. The Court should provide guidance to lower courts to properly analyze these exactions. *Koontz*, 570 U.S. at 605–06. In the absence of this guidance, the Constitution will remain underenforced and the housing crisis will continue to get worse.

III. The "Rough Proportionality" Test Requires Considering Government Revenue From New Housing.

As noted above, local governments in California violate the "nexus" and "rough proportionality" test by vastly overstating the costs attributable to new housing. But they also make another accounting error. As *Dolan* indicates, the "rough proportionality" test requires local governments to ask a threshold question: Will some of the costs of new housing automatically be paid for? If a local government is already guaranteed to receive some of that payment, it cannot collect it again. Local governments do not ask this fundamental question. The Court should clarify that they must do so.

A. Local governments must consider the extent to which the costs of new housing are already paid for.

To establish "rough proportionality" between "the property that the government demands and the social costs of the applicant's proposal," *see Koontz*, 570 U.S. at 605–06, the government must ask to what extent the "social costs" of the proposal are already paid for. Local governments cannot demand double recovery for the same costs.

Dolan commands this common-sense approach. There, the Court held that two of the City of Tigard's exactions—a 15-foot strip of public greenway adjacent to the Fanno Creek floodplain and a pedestrian/bicycle pathway—failed to meet the "rough proportionality" test. 512 U.S. at 392–96. The Court held that there was a nexus between these exactions and the legitimate governmental purposes of "prevention of flooding" and "reduction of congestion," respectively. *Id.* at 387–88. But it explained that the public greenway was not "roughly proportional" to the costs the development imposed on the public because the purpose of preventing flooding was met by existing law *without* the exaction. The city's zoning scheme "already required that petitioner leave 15% of [her property] as open space and the undeveloped floodplain would have nearly satisfied that requirement." *Id.* at 393. The problem was that "the city demanded more—it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its greenway system." *Id.* In short, the "rough proportionality" analysis rested on the preliminary

question of whether existing law already addressed the social costs of the development (i.e., increased risk of flooding) by requiring "payment" to the government (i.e., leaving open space in the undeveloped floodplain). Neither *Nollan* nor *Koontz* in any way suggests a contrary approach to the analysis.[43]

Analysis of whether existing law already pays the government is especially important when it comes to monetary exactions. In *Dolan*, it was almost self-evident that the zoning code largely addressed the flooding risk. But with the proliferation of monetary exactions, there is increased potential for local governments to obscure whether these costs are already addressed. Local governments can slice and dice their demands into dozens of opaque exactions that sound plausible but are already compensated. Without analysis of whether these costs are already paid for, "it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *See Koontz*, 570 U.S. at 612.

It "goes without saying that the courts can and should preclude double recovery by an individual." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (citation omitted). The same must be true of local governments with monopoly power over land-use permitting.

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[43] *Nollan* predates the "rough proportionality" test, and *Koontz* did not reach the issue. 483 U.S. at 837; 570 U.S. at 619.

B. New housing offsets costs by directly increasing local government revenue.

When new housing is built, local governments automatically collect significantly more revenue from the owners of that housing. This increased revenue occurs directly because of the new housing. This effect is even more pronounced in California due to the state's unique tax scheme. Local governments must consider to what extent the costs of new housing are offset by the new revenue they generate.

1. After new housing is built, it automatically generates a stream of new revenue.

The owner of a lot with newly-constructed housing pays significantly more property tax than he did before it was developed. Before construction, tax was assessed based on the value of the vacant or underutilized lot. After construction, it is assessed to include the much higher value of new housing. The increased annual revenue is the difference between the prior assessed value and the new assessed value, times the state's property tax rate. California's property tax rate is 1% of the assessed value plus additional *ad valorem* taxes approved by the voters, but some states have rates as high as 2.23%.[44] And this revenue stream continues in perpetuity. In

[44] Cal. Legis. Analyst, *Understanding California's Property Taxes* 7–8, 17–18 (Nov. 2012), https://perma.cc/LT4L-DU89; Andrey Yushkov, Tax Found. *Where Do People Pay the Most in Property Taxes?* (Sept. 12, 2023), https://perma.cc/M9JH-XW6J.

imposing fees, local governments must offset the costs of new housing with the revenue from new housing.

Consider the following example. In the late-2000s, a Los Angeles resident developed his 0.4-acre parcel—of which 40% housed a duplex and 60% was undeveloped—into a 20-unit apartment building. Pursuant to its legislatively-imposed fee schedule, the city charged him $89,240 in park and recreation impact fees. He contested some of these fees in California court, arguing that they lacked "rough proportionality" to the impacts of the proposed use. The court rejected his claims under the Mitigation Fee Act and held that *Nollan* and *Dolan* did not apply because the fees were legislatively imposed. *See Goodrich v. City of Los Angeles*, No. B216421, 2010 WL 797539 (Cal. Ct. App. Mar. 10, 2010).

As discussed above, it is questionable whether this new housing actually had a "nexus" and "rough proportionality" with $89,240 in impacts on Los Angeles' park and recreation system. But even if it did, the preliminary question is whether the new housing was automatically going to pay for some of those costs. The above property is located in Tax Rate Area #13, which now has a total tax rate of about 1.2%.[45] At the time of construction, the underutilized lot was assessed at about $500,000. Following construction, it was reassessed at about $2.7 million.[46]

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[45] Auditor-Controller, Los Angeles Cty., *Tax Rate Area Lookup*, https://perma.cc/ED9W-UUNX. Although this number is from the most recent year, the past-year tax rate was likely similar.

[46] *See Los Angeles County Assessor Portal*, AIN 2357-027-007, https://perma.cc/X48L-325E.

Where the property owner previously paid local governments $6,000 per year, he was now paying $32,400 per year. The housing automatically generated $26,400 in annual revenue that local governments would never have received if the housing had not been built.

Admittedly, not all of this additional $26,400 goes to the city, as a good share goes to the school district or other governments. But assuming one-third of it goes to the city, the park costs would be paid off in about a decade. By now, the property owner would have more than paid off the purported costs on the parks—without any impact fee at all. Moreover, the rest of that $26,400 in annual revenue goes to other governments, many of which independently charge their own impact fees.[47] Those costs would also be paid off by now through the additional tax revenue. None of these governments consider this obvious fact in imposing impact fees. They scrutinize—and exaggerate—the costs of new housing while "g[iving] [the benefits] no thought *at all*." *Michigan v. EPA*, 576 U.S. 743, 750–51 (2015).[48]

These tax payments are cognizable for the purposes of the "rough proportionality" analysis. First, the revenue is significantly more direct and inevitable than many of the costs put forth in nexus

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[47] Los Angeles Unified School District currently charges $4.79 per square foot. *LAUSD Developer Fee Program Office*, https://perma.cc/5HT4-CACX.

[48] In addition, of course, local governments may receive indirect fiscal benefits of new housing, including those that might flow from agglomeration effects.

studies. *E.g.*, *Lemoore*, 185 Cal. App. 4th at 563–64 (naval air museum). Second, it is of no consequence that these costs are paid in the guise of taxes. Of course, *Koontz* affirmed that taxes are not themselves takings. 570 U.S. at 615 (citing cases). But *Dolan* makes clear that, to assess whether an exaction is a taking, a court must consider it in context of existing laws that are not takings. 512 U.S. at 393. No one argued that the city's zoning code, which required maintaining 15% of the property as open space, was a taking. *Id.*; *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Nonetheless, the Court's essential first step was to ask to what extent existing laws already compensated the public for the relevant costs. *Dolan*, 512 U.S. at 393. Precisely the same is required here.[49]

This Court need not wade into the fiscal accounting of local governments. And "rough" proportionality does not necessarily require "precise mathematical calculation." *Id.* at 391. But a local government cannot achieve any proportionality at all if it has not attempted to assess the extent to which new housing will offset its own costs.

Local governments can do this. They know the proportion of revenue they receive from property taxes. Counties—and online sites like Zillow—already publish property assessment information. Nor is it difficult to estimate the expected appraised value of new housing. If local governments are to

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[49] For this reason, there is no slippery slope: this analysis would not suggest that all taxes are takings any more than *Dolan* suggested that all zoning laws are takings.

engage in an individualized proportionality analysis as to each property, as they must, they must try to do it right.

2. California's Proposition 13 further maximizes the revenue from new housing.

This is all the more important in California, where local governments benefit even more from new housing than do those in other states. By slowing the growth of government revenue in the absence of new construction, Proposition 13 magnifies the benefits when new construction finally occurs.

Proposition 13, passed by the voters in 1978, bases a property owner's tax assessment on his original acquisition price plus an annual increase up to 2%—i.e., far below the rate that home prices appreciate. *See* Cal. Const. art. 13A, §§ 1(a), 2(a)–(b). Assessments increase to market value only when the property is purchased or "newly constructed" or there is a change in ownership. *Id.* § 2(a).

Because new construction is one of the few events that increases a property's assessment to market value, it can maximize the increase in revenue for California's local governments. On the 300-block of Lowell Avenue in wealthy Palo Alto—in the center of Silicon Valley—are two neighboring and roughly similar single-family homes. Each has 6 or 7 bedrooms and sits on a lot slightly under one third of an acre. However, one was last purchased in 1971, probably for under $100,000, and the other was last

purchased in 2016 for $7.2 million.[50] Because Proposition 13 capped growth of the former property's assessment over decades of price appreciation, its owner now pays less than $4,000 in property tax per year. The latter, whose property was assessed much later, pays over $92,000 per year.[51]

Suppose each lot is sold and redeveloped into a 20-unit building. Given high demand for housing in this bikeable suburb near jobs, the assessment of a 20-unit building could very well reach $20 million. The associated annual tax bill would be around $250,000. For the reasons explained above—and as would be true in any state—this $250,000 in tax represents a significant increase over the prior baseline when the lots had single-family homes and were comparatively underutilized. For the property last purchased in 2016 and that previously paid $92,000 in taxes, the new housing would send local governments an additional $158,000 each year.

But for the property last sold in 1971, there is an *additional* stream of revenue. Because Proposition 13

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[50] *Compare* Zillow, *Property Details*, https://www.zillow.com/homes/315-Lowell-Ave-Palo-Alto,-CA-94301_rb/19496554_zpid/, *with* Zillow, *Property Details*, https://www.zillow.com/homes/301-Lowell-Ave-Palo-Alto,-CA-94301_rb/19496555_zpid/.

[51] Cal. Property Tax Map, https://perma.cc/V4FB-KJ22; *see Nordlinger v. Hahn*, 505 U.S. 1, 6 (1992) ("Proposition 13 has been labeled by some as a 'welcome stranger' system—the newcomer to an established community is 'welcome' in anticipation that he will contribute a larger percentage of support for local government than his settled neighbor who owns a comparable home.").

caused its property tax ($4,000) to be set far below market value of the property, resetting it to market value means local governments net even more new revenue than in the prior example—$246,000 more per year. This is uniquely a consequence of Proposition 13, and it maximizes the benefits California's local governments can collect when new housing is built on older properties.

As this example underscores, new housing (and particularly infill development) can be a significant fiscal benefit to local governments. Simply by allowing a 20-unit building to be built on an old lot in a wealthy, high-amenity neighborhood, Palo Alto and other local governments could collect $1 million every four years. Of course, this new housing would also pose some costs. The city might need to upgrade the sewer and water system to accommodate the additional units. But local governments cannot treat new housing as a "mere parasite" that only imposes costs. *See Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926). After all, that housing pays them a quarter-million dollars a year.

The Court should reverse and clarify that the "rough proportionality" test requires considering government revenue from new housing. In deciding the appropriate impact fee, Respondent must determine not only what traffic-related costs Petitioner's house will impose, but also how much additional revenue it will receive from him. Such a clarification will provide a bit of relief not only for Petitioner, but for all those who struggle to pay rent or lack shelter in the wealthiest state in the country.

CONCLUSION

For the reasons set forth above, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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