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 OF CITIZEN ACTION DEFENSE FUND,
WASHINGTON BUSINESS PROPERTIES ASSOCIATION,
AND SOUNDBUILT HOMES, LLC,
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PETER LUKEVICH
Washington Business
Properties Association
123 Fir Street NE
Olympia, Wash. 98506
peter@thewbpa.org

JACKSON MAYNARD
Counsel of Record
SAM SPIEGELMAN
Citizen Action Defense Fund
111 121st Avenue SW, Ste. 13
Olympia, Wash. 98501
850.519.3495
jackson@citizenactiondefense.org
sam@citizenactiondefense.org

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"), the **Washington Business Properties Association** ("WBPA"), and **SoundBuilt Homes, LLC** ("SoundBuilt"). CADF is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the First Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

WBPA is a member-based non-profit organization advocating for property owners against burdensome taxation and encroaching regulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, and retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

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[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission.

SoundBuilt Homes, LLC is a homebuilder and land developer building predominantly in the Puget Sound region of Washington. SoundBuilt has constructed more than 5,000 homes and has developed more than 10,000 building lots across more than 30 jurisdictions.

Amici have a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, *amici* fear that if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

INTRODUCTION AND SUMMARY OF ARGUMENT

To avoid raising taxes across the board and thereby protect their offices and livelihoods from irate voters, El Dorado County lawmakers devised a new plan for funding roadwork that imposes a traffic-impact fee on all owners seeking to build within certain zones. El Dorado, Cal., *Traffic Impact Mitigation Fee Program* ("TIM"). The fee applies regardless of the extent—if any—to which the subject build or renovation would impact nearby traffic. In other words, there is little to no nexus nor rough proportionality between the burden created and the fee to be paid.

The program includes a fee schedule, with individual rates generally depending upon the zone in which the project sits, and whether it will be commercial, single-family, or multi-family residential (there is some marginal discretion to adjust fees

within these categories). As Petitioners note, under the TIM Program, "single-family homes are deemed to have an identical impact on area roads, regardless of size, location, and other factors." Pet. Br. at 3.

George Sheetz is a grandfather seeking to build a modest single-family home within which he and his wife can raise their grandson and enjoy their golden years. The County conditioned approval of his permit request on Sheetz's depositing $23,420 into the TIM Program, *without* first assessing whether the project would impact surrounding traffic to the same or similar tune—in which case the condition *might* be justified. But without any site-specific analysis, under the Court's exactions precedent there is no way of knowing whether this condition bears an "essential nexus" to the public costs the project would impose, and whether the amount the County is charging Sheetz is "roughly proportionate" to that public price tag. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

That is, the government cannot, without compensation, demand individuals surrender property (including money), or interests therein, for reasons unrelated to the uses for which they seek official approval, and in an amount that is not commensurate with the costs the public would shoulder as a result. In the decades since the Court outlined this exactions test in *Nollan* and *Dolan*, several lower courts—including the California Court of Appeal, below—have refused to extend it to "legislative exactions"; *i.e.*, those imposed by a lawmaking body instead of by an adjudicative one (*e.g.*, an executive agency). But nothing in the Court's

takings jurisprudence supports this interpretation. Indeed, it strongly suggests the opposite:

> The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property.

Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2072 (2021).

So, while legislative actions are *not* immune to *Nollan/Dolan* scrutiny, the test is apparently ambiguous enough that lower courts feel they can indeed exempt that entire category of conditions. As the Court reviews this case and authors its majority opinion, *amici* ask that it make explicit what has always been at least implicit—that the *Nollan/Dolan* test applies to adjudicative and legislative actions *in equal measure*.

ARGUMENT

I. Lower Courts Remain Unclear on Whether the *Nollan/Dolan* Test Applies in Equal Measure to Adjudicative *and* Legislative Exactions

A. The Proper Scope of The Court's Exactions Doctrine

In *Nollan v. California Coastal Commission*, the Court held that for an exaction to pass constitutional muster, its substance must bear an "essential nexus"

to the costs the proposed project would impose on the surrounding area. 483 U.S. at 837. For example, a zoning board may condition the approval of a permit to construct an apartment complex in a single-family neighborhood on the developer's agreement to fund road expansions around the site, to account for the *resulting* increase in automobile traffic.

Thus, an exaction does not violate the Takings Clause if it simply compels an owner to bear the external *public* costs their *private* land uses would otherwise generate. *See* Christina M. Martin, Nollan *and* Dolan *and* Koontz—*Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More*, 51 Willamette L. Rev. 39, 42–50 (2014).

In *Nollan*, the owner had proposed to reconstruct their beach house in exurban Ventura County. The California Coastal Commission ("Commission") conditioned approval of Nollan's permit on his dedication of a portion of his land for public beach *access*, to internalize the new home's alleged obstruction of the public's beach *view*. The majority easily found no nexus between the public's loss of beach views and the private price of legalized trespass over part of Nollan's land. 483 U.S. at 838–39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan property reduces any obstacles to viewing the beach created by the new house."). The externality—the "'wall' of residential structures" preventing the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit"—was categorically distinct from the right of public access to that discrete swath

of sand. On the flipside, to address the legitimate public interest of maintaining public *visual* (as opposed to physical) access to the beach—assuming Nollan's new home would indeed have disrupted this—the Commission would be well within its constitutional power to require, without compensation, that the family "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836.

In *Nollan*'s estimation, "constitutional propriety disappears . . . if the condition substituted" for an unconditional rejection of a build permit "utterly fails to further the end advanced as the justification for the prohibition." 483 U.S. at 837. The opinion then likened the incongruence between the public costs and the private penalty imposed to a law that prohibits "shouting fire in a crowded theater," unless one "contribute[s] $100 to the state treasury." Obviously, the $100 contribution will not directly militate the public harms resulting from its payor freely yelling "fire" amid a crowd. While this analogy well illustrates the test's core argument—that the conditions placed on a permit must seek to achieve the same public purpose as outright rejecting it would, and at a private price reasonably commensurate to the public costs the underlying project would impose—lower courts have repeatedly missed or distorted this message. And unfortunately, *Koontz v. St. Johns River Water Management District* did not put an end to the lower courts' confusion (or willful blindness). 570 U.S. 595 (2013). Many continue to ignore *Koontz*'s stipulation that the exaction label applies when a permit condition "would transfer an interest in property from the landowner to the

government," 570 U.S. at 615, regardless of which officials and what branch of government initiates it.

In *Dolan v. City of Tigard,* the Court elaborated that, beyond the "essential nexus" requirement, an exaction is only constitutional if "the *degree* of the exactions demanded by the . . . permit conditions bears the required relationship to the projected impact of the petitioner's proposed development." 512 U.S. 374, 403 (1994) (emphasis added). While "no precise mathematical calculation is required," officials "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

In this context, "individualized determination" does not protect legislative actions from exactions scrutiny. Rather, it is a procedural qualification to ensure that the claimant in an exactions case has indeed suffered an injury because of the public action, whatever its provenance. In a footnote, the majority emphasizes that the "city made an adjudicative decision" against a discrete property, but that doing so merely places the burden on the city "to justify the required dedication," rather than on the owner to show there is no conceivable justification. *Id.* at 391, n.8. The false dichotomization of adjudicative and legislative exactions is particularly suspect in the local-government context, where it is often difficult to precisely determine what type of decision is being made.[2]

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[2] *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 247 (2000) ("Local government structure combines

Until the Court expressly clarifies the *Nollan*/*Dolan* test to include legislative exactions, lower courts will continue claiming (whether willfully or in ignorance) that the rule is limited to case-by-case adjudications, even though the governmental actions struck down in *Nollan*, *Dolan*, and *Koontz* were *all* at least partly legislative and not purely discretionary. *Nollan*, 483 U.S. at 829 (discussing the Commission's power to impose public-beach-access dedications (Cal. Pub. Res. Code Ann. §30000 et seq. (West 1986))); *Dolan*, 512 U.S. at 377 (noting that the City of Tigard's Community Development Code "requires property owners in the area . . . to comply with a 15% open space and landscaping requirement, which limits total site coverage . . . to 85% of the parcel"); *Koontz*, 570 U.S. at 601 ("Consistent with the Henderson Act, the St. Johns River Water Management District . . . requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."). This disparate treatment is especially striking considering that all *intra vires* agency actions—even ones described as "discretionary"—inevitably begin with legislation.

Rulings from recent decades highlight the extent to which lower courts continue to complicate the Court's exactions doctrine. *St. Clair Cnty. Home Builders Ass'n v. Pell City*, 61 So. 3d 992, 1007–08

legislative and administrative functions, and the land use process relies heavily on administrative discretion and flexible piecemeal decision-making, making it difficult for courts to determine when a decision is sufficiently legislative in character.").

(Ala. 2010) (per curiam) (holding that *Dolan* "does not apply to generally applicable legislative enactments"); *City of Olympia v. Drebick*, 156 Wash.2d 289, 126 P.3d 802, 807–09 (2006) (same); *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal.4th 643, 117 Cal.Rptr.2d 269, 41 P.3d 87, 101–06 (2002) (same); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 425 P.3d 1099, 1103–06 (Ariz. Ct. App. 2018) (same).

Thus, even after *Cedar Point*'s announcement that it is the *function* and not the *form* of the governmental action that determines whether a taking has occurred, here the California Court of Appeal is still stuck differentiating between *prescriptions* and *mandates*, and *just* within the legislative setting—a distinction far too fine for the unconstitutional-conditions doctrine. *Sheetz v. El Dorado Cnty.*, 84 Cal.App.5th 394, 411 (finding that *Nollan*, *Dolan*, and *Koontz* only involved "legislatively *prescribed*" conditions instead of "legislatively *mandated*" conditions, as here) (emphases added). But either the government has compelled a certain action in exchange for granting a permit, or it has not. Full stop. Simply put, a public condition's provenance is irrelevant to the *Nollan*/*Dolan* question.

For the sake of justice and uniformity, the Court should confirm within the exactions context what it has already made explicit in the property-rights space in general—that proving a taking does not depend upon "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," but instead on whether the government has physically taken property for itself or someone else—by whatever means—or has otherwise

restricted a property owner's ability to use their own property. *Cedar Point*, 141 S.Ct. at 2072. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("But the particular state *actor* is irrelevant. If a legislature . . . declares that what was once an established right of private property no longer exists, it has taken that property . . .") (emphasis original); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) ("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.") (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). *See also* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 438 (2009) ("Giving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power.") *and* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567–68 (1999) (there is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators").

Consistent with the understanding that the function of a public action is far more consequential than its form, the Court has continually invalidated

legislative acts that impose unconstitutional conditions on individuals well into the modern era. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (invalidating provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that compelled certain speech as a condition of receiving funds); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (invalidating a county ordinance that conditioned the amounts of fees to be placed on a permit to hold a rally upon the content of the intended message); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (invalidating section 399 of the 15 Public Broadcasting Act because it imposed the condition to refrain from "editorializing" on noncommercial educational broadcasters in exchange for public grants); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, and holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of press because it forced a newspaper to incur additional costs by adding more material to an issue or removing the material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (provisions of an unemployment compensation statute were held unconstitutional where the government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958) (a state constitutional provision authorizing denial of a tax exemption for refusal to take a loyalty

oath violated the unconstitutional-conditions doctrine).

In sum, *Nollan* and *Dolan* are simply property-centered extensions of the Court's longstanding interdisciplinary practice of invalidating *any* governmental action that violates the Constitution, regardless of the form in which it appears. Together they stand for the simple proposition that the government cannot force individuals to choose between their constitutional rights on the one hand, and their freedom of action on the other. If any governmental entity demands an interest in property as a condition of permit approval, then a taking may be underway, and the dispute is subject to heightened scrutiny under the nexus and proportionality test. *Koontz*, 570 U.S. at 615. The Court should correct the California Court of Appeal's essential misunderstanding of the doctrine and hold that legislatively ordained permit conditions are subject to the same scrutiny as their adjudicative counterparts, regardless of whether the former are "mandated" or simply "prescribed."

B. Explicating the Full Scope of the Nollan/Dolan *Test*

In pleasant contrast to the aforementioned opinions, other courts *have* extended the *Nollan/Dolan* test to legislative exactions, recognizing that the distinction is essentially meaningless for takings purposes. In *Knight v. Metropolitan Government of Nashville & Davidson County*, the Sixth Circuit held that "Nollan's unconstitutional-conditions test applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones," and Nashville's

insistence otherwise "conflicts both with the Supreme Court's unconstitutional-conditions precedent and with its takings precedent." 67 F.4th 816, 829 (6th Cir. 2023).

Referencing *Stop the Beach Renourishment*, the Sixth Circuit noted that the Takings Clause's "passive-voice construction"—"nor shall private property be taken"—"does not make significant *who* commits the 'act'; it makes significant *what* type of act is committed." *Id.* at 829–30 (emphases original); U.S. Const. amend. V. "If anything," *Knight* continued, the [F]ramers designed the Takings Clause precisely to protect against legislative action—a historical fact that undercuts Nashville's claim that we should review legislative conditions with a more deferential eye." *Id.* at 830.

In *Anderson Creek Partners, L.P. v. Harnett County*, the North Carolina Supreme Court derided the County's interpretation of *Dolan*'s "individualized determination" requirement. 382 N.C. 1, 24 (2022). According to the County, "'generally applicable fees, by their nature, cannot contain an individualized determination.'" *Id.* (internal citations omitted). Of course, this is not true, as eventually *any* "generally applicable fee" will be enforced against individuals, with such determinations inevitably made on a case-by-case basis. That "all landowners are aware of the fees in advance" is totally irrelevant to the underlying takings question. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). *Dolan* was only concerned with "individualized determinations"

to establish that that offending action has in fact caused injury to a particular property, not for the purposes of determining which branch of government actually authorized the offending action, in order to then exempt certain branches from its reach. 512 U.S. at 391, n.8.

As the Sixth Circuit reminds us in *Knight*, it is *what* is taken, not *who* takes it, that matters. 67 F.4th at 829–30. Thus, in the exactions context, as long as the "fee . . . is, in fact, linked to a specific piece of property, in each case the specific parcel of land has been proposed for development." 382 N.C. at 29. Other rulings that have refused to distinguish legislative and adjudicative exactions along these and similar lines include *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 640–42 (Tex. 2004) (noting "we are [not] convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative"); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 658–60 (Me. 1998) (reasoning that the legislative character of an exaction is just one variable for measuring whether it is public-purpose-justified); and *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 388–90 (Ill. 1995) (evaluating a *Dolan* claim against legislation, premising that measures of this type can produce unconstitutional conditions).

In line with *Knight*, *Anderson Creek Partners*, and these other prior opinions, *amici* urge the Court to make the following elements of the *Nollan*/*Dolan* test explicit.

First, per *Knight*, remind the lower courts that the Takings Clause was a direct response to centuries of

legislative confiscation of private property. 67 F.4th at 829–32.

Second, again echoing *Knight*, emphasize that the Court "has never drawn" a legislative-adjudicative exactions "divide" for the substantive purpose of determining whether an unconstitutional condition has occurred at all. *Id.* at 832. Rather, like Nashville in *Knight*, here the County has "identifie[d] no case in which" the Court "has treated legislative conditions differently from administrative ones." *Id.* at 833. "As far as we can tell," the Sixth Circuit continued, "the [Supreme] Court typically applies the same test no matter the condition's source." *Id.*

Third, as the North Carolina Supreme Court endeavored, with some success, to do in *Anderson Creek Partners*, explain why *Dolan*'s "individualized determination" language is not relevant to the question of who or what branch of government is seeking to impose the offending condition. Rather, it simply goes to the procedural questions of whether there is a specific property interest injured, and who has the burden of justifying, or showing no public-purpose justification for, the condition imposed. 382 N.C. 29 ("[B]y requiring the payment of the challenged 'capacity use' fees as a precondition for its concurrence in applications for the issuance of the necessary water and sewer permits, the County is 'directing the owner[s] of [each] particular piece of property to make a monetary payment,' regardless of whether the same fee is applicable to all tracts of property and regardless of who owns the property. In other words, the fee at issue in this case is, in fact, linked to a specific property, in each case the specific parcel of

land that has been proposed for development.") (internal citations omitted).

Once the Court expressly incorporates these elements into a revised *Nollan*/*Dolan* test, defiant lower courts will find it far more difficult to exempt legislative actions from its sweep. Requiring courts analyzing either adjudicative *or* legislative land-use conditions to properly consider common-law history, the Court's precedent, and the meaning of *Dolan*'s "individualized determination" proviso, will together foster uniformity across jurisdictions, and will allow owners, land-use officials, and practitioners to better prepare for and navigate these sorts of disputes.

II. Exactions Everywhere Impede Much-Needed Housing Growth

Unempirical exactions like the County's TIM proviso are now omnipresent in American land-use law. Whether in adjudicative or legislative form, in aggregate these measures substantially impede the construction of new housing units in nearly every corner of the United States. And much like the County's, a sizable portion—if not an outright majority—of these exactions rely upon unsubstantiated claims of need to legitimize them. Here, County officials declared that it "does not make any 'individualized determinations' as to the nature and extent of the traffic impacts caused by a particular project on state and local roads." Pet. Br. at 3. This "process"—if one can call it that—thus involves *zero* data-driven analysis. Other jurisdictions have done the same, at best paying lip-service to "data," and at worst foregoing *any* claim of a nexus or

proportionality between a development's externalities and the fees or dedications imposed in consequence.

An excellent but unfortunate example—beyond the instant one—is California's notorious Environmental Protection Act ("CEQA") review process, which anyone can bring at any time and, once brought, immediately stalls the target project. Various interest groups routinely weaponize CEQA to stop projects they simply do not like. *See generally* Chris Carr et al., *The CEQA Gauntlet: How the Californian Environmental Quality Review Act Caused the State's Construction Crisis, and How to Reform It*, Pac. Res. Inst. (Feb. 2022). Meanwhile, a recent state-commissioned study criticized several elements of California exaction practices. These include the widespread failure to "adequately analyze the impact of total fee amounts on housing supply" and "high fees" that "have been shown to limit or preclude the development of lower-cost housing." Hayley Raetz et al., *Residential Impact Fees in California*, Terner Ctr. Hous. Innovation at U.C. Berkeley, 8, 22 (2019).

Examples abound across the country but are especially egregious in the other continental Pacific states—Washington and Oregon. In Washington, members of Seattle's City Council have repeatedly proposed across-the-board transportation impact fees on future development, including in-fills. Ryan Packer, *As Development Slows, Seattle Eyes Transportation Impact Fee Projects*, The Urbanist, Apr. 17, 2023, https://rb.gy/mj1xx6. But denser housing and mixed-use growth tends to *reduce* per capita road use. *See generally* Jeremy Mattson, *Relationships Between Density, Transit, and*

Household Expenditures in Small Urban Areas, Transp. Res. Interdisciplinary Perspectives 8 (2020). Once again empirical data takes a back seat to political expedience.

The same goes for Seattle's Mandatory Housing Affordability ("MHA") Program. MHA Program, Seattle Off. Hous., https://shorturl.at/ceDJ4 (last visited Nov. 14, 2023). The MHA requires developers seeking build permits in certain upzoned districts to fill the City's Office of Housing's coffers (to the tune of $246.1 million as of Dec 31, 2022) or to dedicate variable portions (2% to 11%) of their planned units far under market prices. Daniel Beekman, *Seattle's Mandatory Housing Affordability Program Ramped Up in 2021, New Data Shows*, Seattle Times, May 12, 2022, https://tinyurl.com/5835wp5v.

The MHA fee does not just apply to large developers constructing significant apartment buildings but also to single-family homeowners wishing to renovate their home or build an additional unit on their parcel. In the first instance, Seattle once demanded an additional $11,000 in MHA fees and in the second, more than $75,000. Katherine Anne Long, *Homeowners Told Permits for Their Home Renovation Will Cost an Extra $11,000, Thanks to Upzoning in Seattle*, Seattle Times, July 27, 2020, https://rb.gy/jnsllf; Sarah Grace Taylor, *Central District Couple Sues Seattle Over Affordable Housing Program*, Seattle Times, Dec. 16, 2022, https://tinyurl.com/4zajpywa.

If a developer or individual owner refuses, Seattle can deny the permit out of hand. And the MHA applies across the board, with the city undertaking no project-specific nexus studies or the like. Decisions like the

California Court of Appeal's here—if permitted to stand—will only further embolden local officials in Seattle and beyond to impose *legislative* land-use conditions, knowing that in *any* other form the exaction would fail *Nollan*/*Dolan*.

One observes similar boundary-pushing elsewhere in Washington State. In Spokane, lawmakers this year increased impact fees for the first time in decades, a move the Spokane Association of Realtors estimates will halt 2,000 construction projects of varying sizes throughout the area. Emry Dinman, *After Passing Controversial Fee Increases for Developers, Spokane City Council Considers Plan B*, Spokesman-Review, Mar. 14, 2023, https://rb.gy/bszmw5.

Officials in Yakima, in Washington's wine country, are also considering impact fees as a means to make up for their own budgetary mismanagement. Spencer Pauley, *Yakima Explores New and Increased Taxes Ahead of Expected Deficit, Mum on Cuts*, Ctr. Square: Wash., Oct. 12, 2023, https://rb.gy/rfcnr1. These and similar measures across the state inflict real costs—not just on individual builders and buyers—but on the state's general economic health. According to a Building Industry Association of Washington study, the state requires at least 250,000 new housing units to meet current demand, whereas only about 49,000 were built in all of 2022. Washington's Housing Supply Shortage, Build. Indus. Ass'n Wash., https://rb.gy/gt0etc (last visited Nov. 14, 2023).

Oregon's story is woefully similar to Washington's. Impact fees there are called "system development charges" ("SDCs")—though they are no less onerous despite the pseudonym. One recent study prepared for

the state's Housing and Community Services office found that SDCs "increase the cost of building new housing in ways that can skew housing development towards higher-cost homes and can impact buyers and renters," so not just the developers themselves. Elise Cordle Kennedy et al., *Oregon System Development Charges Study*, ECONorthwest, ii (2022). Though developers also feel the pinch and reduce affordable projects as a result. *Id.* At iii ("SDCs on affordable housing development can increase the difficulty of securing adequate funding for the development and, *even as a small percentage of total development costs*, likely consume millions of dollars per year in funding for affordable housing statewide.") (emphasis added). But those costs inevitably redound to renters and buyers anyway, since "investors, lenders, and developers are unlikely to absorb SDCs by accepting lower returns except in very unusual circumstances or when SDC costs increase unexpectedly during development and cannot be passed on to others." *Id.* At 10.

These are hardly isolated incidents, nor are they limited to the West Coast. "Over the past three decades," one land-use scholar noted, "increasing numbers of local governments have turned to new methods of financing public works projects, especially land use exactions and impact fees." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005). *See also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

The incentives for pursuing such measures are obvious. First, it is a means of raising funds without also raising public ire via statutory, "on-book" tax levies. Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 W. Mich. U. Thomas M. Cooley L. Rev. 1, 2 (2005). Second, thus far neither voters nor the courts have done anything to stop it. Indeed, "[r]esidents now urge their elected officials to adopt impact fees when the locality has not yet done so." Rosenberg, *supra*, at 262. Overtaxing developers does not, after all, tend to elicit great popular sympathy. Further, "[w]ithout having to face the opposition of future residents who do not currently live or vote in the locality," land-use officials "find impact fees an irresistible policy option." *Id.* Their mantra of "growth should pay for growth" should really be "growth should pay costs unrelated to the growth".

The direct and downstream effects these "irresistible" policies have on housing costs are substantial. In a detailed survey, real estate firm Duncan Associates noted that in California, impact fees on average add $37,471 to the price of a home. The story is the same in other states that liberally permit legislative exactions, including $16,079 per home in Washington and $21,911 in Oregon. Duncan Assocs., *National Impact Fees Survey: 2019*, at 4 (2019). These figures are especially egregious when the conditions imposed do not confer on the public the benefits its advocates tend to claim they will.

If developers had to pay just one lump-sum impact or offset fee in addition to planning and building service fees, it might not be so egregious (though

questions of constitutionality under *Nollan/Dolan* would most certainly remain). However, in a 2018 study by the Terner Center for Housing Innovation at U.C. Berkeley, local fees tended to cover schools, transportation, environmental impact, public safety, parks and recreation, affordable housing, capital improvements, and utility upgrades—often without site-specific studies of individual impacts on these local items. Sarah Mawhorter et al., *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, Terner Ctr. Hous. Innovation at U.C. Berkeley, 8 (2018). In Berkeley, perhaps unsurprisingly, "city staff were unable to provide us with the information requested to develop an accurate estimate" of all fees for a particular project, "and so we could not develop fee estimates and include Berkeley in the following analysis." *Id.* at 12. What's more, the complexities of structuring this many levies "also makes it difficult for developers to estimate the fees they will be charged as they plan and try to finance a particular project," thus making development in California that much more risky and that much less attractive to investors. *Id.* at 9. The total cost of the smorgasbord of fees at local officials' disposal in Fremont, California, for example, was *$157,000 per home*. *Id.* at 3.

According to land-use scholar Vicki Been, "[w]hen impact fees do not provide infrastructure or financing advantages worth their cost"—*i.e.*, conditions that are not roughly proportional to the external costs the target project will impose—"impact fees can be analogized to a one-time excise tax that produced no benefits to the taxpayer." Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 150 (2005). Surveying the relevant literature from the 1980s on,

Been finds that the vast majority—all except one—conclude that impact fees indeed increase housing costs, at a per-unit rate of $1.66 for *each* $1.00 in fees imposed, according to one relatively recent study. Shishir Mathur et al., *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urban Studies 1303, 1310 (2004).

The general consensus among planners is that one of the most efficient ways to achieve healthy housing growth is through urban and suburban in-fill development, instead of via continual sprawl. Am. Plan. Ass'n, *APA Policy Guide on Smart Growth* (2002) ("Infill development and redevelopment, increased density of development, and the adaptive re-use of existing buildings result in efficient utilization of land resources, more compact urban areas, and more efficient delivery of quality public services."). Yet almost wherever developers follow this advice and initiate urban projects they face a litany of artificial obstacles. Ensuring incoming residents have access to basic health and safety amenities is one thing. So too is shielding current residents from eating any portion of these costs. But achieving these twin aims drives only a small portion of the conditions land-use officials—especially those in urban and suburban areas—impose.

As officials are now attempting in Yakima, many local governments use it as a low-political-cost budget-padding mechanism rather than as a real tool for expanding infrastructure and public amenities apace with population growth. *See generally* Gregory S. Burge, "The Effects of Development Impact Fees on Local Fiscal Conditions," *in* Gregory K. Ingram & Yu-Hung Hong, *Municipal Revenues and Land Policies*

182 (2010). And their execution often leaves much to be desired. For instance, "[m]any municipalities impose flat fees that are not adjusted to the size or impact of individual housing units." Vittorio Nastasi, *Poorly Designed Impact Fees Make Housing More Expensive*, Reason Found., Jan. 10, 2022, https://rb.gy/eon60x. According to a report from Strong Towns, impact fees do not even "do what they're purported to do." "They don't actually make development pay its own way." Daniel Herriges, *Impact Fees Don't Mean Development Is Paying for Itself*, Strong Towns, Aug. 23, 2018, https://rb.gy/s9z46l.

In Lafeyette, Louisiana, for example, "residents would have to accept somewhere between a 330% and a 533% tax hike just to break even on the costs of maintaining existing infrastructure," regardless of who paid the upfront costs. *Id.* In the end, impact fees, "by reducing the up-front fiscal impact of growth, might actually be" no more than "a dangerous"—and costly—"temptation." *Id.*

The ease with which so many jurisdictions' impact fees and other exactions escape full *Nollan*/*Dolan* scrutiny plays an outsized role in this growing disparity. The Court's clarification of the test's scope—to include exactions closer to their legislative origins than, apparently, are so-called "adjudicative" ones (for, as discussed, these also originate as legislation)—is not merely a legal imperative. The practical consequences of continuing to permit lower courts to misread the test rise into the many billions of dollars and prevent millions of Americans from realizing even the modest dream of a comfortable home, to say nothing of full homeownership.

Reversing the California Court of Appeal and explicitly broadening the *Nollan/Dolan* test will go a long way to alleviating this simmering public crisis.

III. Elections Do Not Protect Against Legislative Exactions

There are few—if any—electoral protections against legislative exactions. When courts improperly draw the exactions "line" closer to the end-user and thus further away from its legislative origins, all they are doing is immunizing lawmakers from any popular liability for their own unconstitutional behavior. There is strong evidence demonstrating that elected officials pay little to no political cost for punting more unpopular governing tasks to unelected bureaucrats. As the Sixth Circuit noted in *Knight*, the opposite argument—that elections do serve to hold extortionist officials to account—has "no empirical support" to back it up. 67 F.4th at 835. Indeed, "[a] majority of local taxpayers may well 'applaud' the lower taxes that their politically sensitive legislators can achieve through . . . cost shifting" "valid programs that society 'as a whole' should finance" to a "subset of individuals (those seeking permits)." *Id*. at 836.

In reality, officeholders almost never pay for shifting costs from the majority to a minority of its current and future constituents. Indeed, that is the entire point of such "off budget" schemes. Justice Scalia argued as much in *Pennell v. City of San Jose*, writing that "[t]he politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise." Instead, "it permits them to be achieved 'off budget,' with relative invisibility and thus immunity from

normal democratic processes." 485 U.S. 1, 22 (1988) (Scalia, J., joined by O'Connor, J., concurring in part and dissenting in part).

So, whether the electoral consequences are nil or even net-positive, officeholders need not concern themselves with the grievances of any minority that the majority tends not to support—*e.g.*, housing developers. Rosenberg, *supra*, at 262. This is especially unfortunate in light of the fact that most add-on costs imposed on developers will merely shift to new residents in the form of increased rents and purchase prices, which can, in turn, hike housing costs for everybody, including established residents. *See* Jennifer Evans-Cowley et al., *The Effect of Development Impact Fees on Housing Values*, 18 J. Hous. Res. 173, 188 (2003) ("[A] $1,000 increase in impact fees results in a 1.44% increase in new home prices and a 6.5% increase in the price of existing homes after controlling for the number of years since the fee was implemented.").

It is unrealistic to expect even the most well-informed voter to weigh every pertinent consideration when electing representatives, especially if so many of those considerations are hidden from view. And even if local voters could find and integrate all the information on local land-use policies necessary to change their ballot—assuming that such policies are more important to their vote than any other issue—the officials never have as much control over the policymaking as the accountability theory suggests. This is especially the case for land use, "which crosscuts multiple functional and policy issue areas." Soyoung Kim, *Integration of Policy Decision Making*

for Sustainable Land Use Within Cities, Sustainability, 1 (2021).

Across the country exactions are becoming ever more frequent, yet we have witnessed little to no electoral backlash. Outside of the academy and commentariat, failures in collective action and incentive structures leading to inefficient exaction programs illustrate the effective limits of public power to change local land-use decision-making. The result is the system we now see across the country: local officials charging developers "off-budget," with existing residents—unaware or unwilling to believe they will eventually foot the bill—either indifferent to or in full support of such measures. Unless and until the courts hold local governments to account for the unconstitutional conditions they impose upon developers, the cycle will continue to worsen. And no amount of voting alone will correct it.

CONCLUSION

We see how lower courts remain unclear on whether the *Nollan*/*Dolan* test applies in equal measure to all state exactions, whatever their source from within the promulgating government. As a result, many courts continue, erroneously, to keep legislative exactions outside the test's ambit. This mistake, repeated *ad infinitum* across the country, poses a serious impediment to finally resolving the national chronic housing shortage, one which is only worsening with each passing year. And given the dynamics of state and local politics, voters are essentially powerless to change course. It is up to the courts, applying *Nollan*/*Dolan* comprehensively to include legislatively prescribed *and* mandated build-permit conditions, to ensure that individual builders

are not forced to choose between economic freedom and constitutional protection. For the foregoing reasons and those stated in the Petition, the Court should reverse the California Court of Appeal and remand this case for proper consideration under the full *Nollan*/*Dolan* test.

Respectfully submitted,

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/S/ JACKSON MAYNARD
Counsel of Record
SAM SPIEGELMAN
Citizen Action Defense Fund
111 121st Avenue SW, Ste. 13
Olympia, Wash., 98501
850.519.3495
jackson@citizenactiondefense.org
sam@citizenactiondefense.org

PETER LUKEVICH
Washington Business Properties Association
123 Fir Street NE
Olympia, Wash. 98506
peter@thewbpa.org

Counsel for Amici Curiae