No. 22-1074

In the
Supreme Court of the United States

GEORGE SHEETZ,
Petitioner,
v.

COUNTY OF EL DORADO, CALIFORNIA,
Respondent.

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

BRIEF OF AMICUS CURIAE BAY AREA COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Bay Area Council is a business-sponsored advocacy organization whose members include over 330 of the largest companies in the San Francisco Bay Area.[1] The Council promotes a strong economy, a vital business environment, and a better quality of life for everyone who lives in the Bay Area. We regularly survey our member employers, and the lack of housing production that has caused the Bay Area region to become one of the most expensive in the world consistently ranks at or close to the top of their concerns.

The Council submits this brief to explain to the Court that meaningful judicial review of development impact fees is not available, under federal or state law, in California state courts. One result is that fees imposed on development are often excessively high, contributing to the high cost to produce housing in California. For that reason, the Council supports the petitioner and urges the Court to revive the *Nollan* and *Dolan* doctrine in California state court.

At the same time, the Council is an organization devoted to finding solutions. We understand that local governments and agencies must have secure funding streams in order to provide infrastructure and services. A ruling in favor of petitioner is likely to affect the manner in which local governments and agencies in

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[1] No attorney for any party authored this brief in whole or in part. No party, attorney for any party, or any person other than Bay Area Council and its attorneys made a monetary contribution intended to fund the preparation or submission of this brief.

California collect revenue. If that occurs, we plan to partner with those affected groups, along with all of our members, to work towards solutions that ensure local jurisdictions receive the funding they need, while also ensuring that much-needed housing and other development are not burdened with excessive fees.

SUMMARY OF ARGUMENT

California state courts afford no meaningful judicial review of the impact fees that local jurisdictions impose on development projects. As petitioner explains in his brief, by categorically exempting from review under *Nollan* and *Dolan* fees that are imposed pursuant to legislatively adopted fee schedules, the California courts have largely precluded permit applicants from bringing as-applied challenges to particular fees under federal law. But, contrary to respondent's claim, California state law provides no adequate substitute for the federal doctrine, because the California courts have also eliminated applicants' ability to bring as-applied challenges to particular fees under state law. Although facial challenges to fee schedules under state law remain technically cognizable, the California courts have severely constricted their review of such challenges by (1) holding that a 90-day limitations period runs from the date that a fee schedule takes effect, even if an applicant has not sought a permit as of that time and (2) applying a legal standard that is highly deferential to the local government.

Because the California courts decline to enforce legal constraints on local jurisdictions' ability to impose development fees, permit applicants in California face

excessively high fees and wide variation among jurisdictions in fee amounts.

ARGUMENT

I. California state courts afford no meaningful judicial review of the impact fees that local jurisdictions impose on development projects.

A. California state courts have eliminated the ability to bring as-applied challenges under federal law to particular fees.

Under this Court's precedents, a local government that imposes a fee on an applicant for a development permit violates the Fifth Amendment of the United States Constitution unless the fee is roughly proportional to and has an essential nexus with the adverse impacts of the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). According to this Court, "[u]nder *Nollan* and *Dolan* the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013).

For challenges brought in California state courts, however, this constitutional check on local governments is all but dead. California courts do not apply *Nollan* and *Dolan* if the challenged fee was imposed pursuant to a fee schedule that the local jurisdiction enacted by ordinance or resolution. *See*

San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 105–06 (Cal. 2002) (holding that only "ad hoc exactions" warrant *Nollan*/*Dolan* scrutiny, while "legislatively mandated, formulaic mitigation fees" do not) (citing *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996)); *Cal. Building Industry Ass'n v. City of San Jose*, 351 P.3d 974, 990 n.11 (Cal. 2015) ("Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan*/*Dolan* test.").

This exception is so broad that it has largely eclipsed the rule and deprived the federal doctrine of effect in state court. Legislatively adopted impact fee schedules are now widespread in California, and nearly all California development projects are charged impact fees under such schedules. After the *San Remo Hotel* and *Ehrlich* decisions, local jurisdictions in California were advised to move away from ad hoc fees and instead adopt general fee schedules by ordinance or resolution. Peter N. Brown et al., *A Short Overview of Development Impact Fees*, League of California Cities 5 (2003), https://impactfees.com/publications%20pdf/CA_Brown2003.pdf (advising city attorneys to "avoid imposing ad hoc, project-specific fees if possible" because "[u]nder *Ehrlich*, a project-specific fee that is imposed on an ad hoc basis is subject to the *Nollan / Dolan* heightened scrutiny standard," whereas "[l]egislative fees of general application, on the other hand, are subject to a more deferential standard of review").

Today, many, if not all, Bay Area jurisdictions impose development fees under schedules that they

adopt legislatively. *See, e.g.*, City of San Francisco, San Francisco Citywide Development Impact Fee Register (2022), https://sfplanning.org/sites/default/files/forms/Impact_Fee_Schedule.pdf; City of Berkeley, Development Fees and Affordability Requirements (2023), https://berkeleyca.gov/sites/default/files/documents/List%20of%20devt%20fees%20rev%20082923.pdf; City of San Jose, Departmental Fees and Charges (2022), https://www.sanjoseca.gov/home/showpublisheddocument/85581/637874569599970000 (affordable housing impact fee); City of Cupertino, Fees Effective September 17, 2023, Schedule B - Engineering (2023), https://www.cupertino.org/home/showpublisheddocument/33517/638312341128830000 (transportation impact fee and park land dedication in-lieu fee). If an ad hoc fee is imposed on a California project, it is typically "*in addition* to set fees" that are "codified" in fee schedules. Sarah Mawhorter et al., *It All Adds Up: the Cost of Housing Develop Fees in Seven California Cities*, Terner Center for Housing Innovation UC Berkeley 21 (2018), https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Development_Fees_Report_Final_2.pdf (emphasis added). Thus, excluding legislatively adopted fees from the purview of this Court's *Nolan*/*Dollan* doctrine created an exception that largely gutted the constitutional protections established in those cases.

B. California state courts have eliminated the ability to bring as-applied challenges under state law to particular fees.

The California Supreme Court has claimed that legislatively imposed impact fees, though not subject to

Nollan/*Dolan* scrutiny, still must satisfy "meaningful means-ends review" under California's Mitigation Fee Act, which requires that impact fees "bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." *San Remo Hotel L.P.*, 41 P.3d at 105 ("Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development."). Respondent contends that California's Mitigation Fee Act therefore provides an adequate substitute for the constitutional protections afforded under the Fifth Amendment. Br. in Opp., at 8–16 ("[T]he reasonable relationship test in the MFA that applies to legislative exactions satisfies the same constitutional concerns articulated in *Nollan*/*Dolan*.").

A state statute cannot replace a federal constitutional right. But even setting aside that problem with respondent's position, the reality is that the promise in *San Remo Hotel* has not been fulfilled. Since that decision, the California courts of appeal have rejected as-applied challenges brought under the state Mitigation Fee Act and refused to consider whether the amount of any particular fee that is imposed on a project is reasonably related to the impact that the fee is purportedly remediating. For example, in *616 Croft Avenue, LLC v. City of West Hollywood*, an applicant for a permit to build an 11-unit condominium complex in the City of West Hollywood attempted to

challenge an affordable housing fee it was charged in the amount of $540,393.28. Refusing to address the merits of the challenge, the state appellate court ruled that "the inquiry" under the Mitigation Fee Act "is not about the reasonableness of the individual calculation of fees related to Croft's development's impact on affordable housing"; instead, "[t]he inquiry is whether the fee schedule *itself* is reasonably related to the overall availability of affordable housing in West Hollywood." *616 Croft Ave., LLC v. City of W. Hollywood*, 207 Cal.Rptr.3d 729, 738 (Cal. Ct. App. 2016). *See also AMCAL Chico LLC v. Chico Unified Sch. Dist.*, 270 Cal.Rptr.3d 868, 871 (Cal. Ct. App. 2020) ("For a general fee applied to all new residential development, a site-specific showing is not required. . . . The school district is not required to evaluate the impact of a particular development project before imposing fees."); *Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High Sch. Dist.*, 246 Cal.Rptr.3d 622, 631 (Cal. Ct. App. 2019) ("For a general fee applied to all new residential development, a site-specific showing is neither available nor needed."); *Cresta Bella, LP v. Poway Unified Sch. Dist.*, 160 Cal.Rptr.3d 437, 443 (Cal. Ct. App. 2013) ("The district is not required to evaluate the impact of a particular development project before imposing fees on a developer; rather, the required nexus is established based on the justifiable imposition of fees 'on a class of development projects rather than particular ones.'"). As a result, only facial challenges to "the fee schedule itself" remain available under the Mitigation Fee Act. *616 Croft Ave., LLC*, 207 Cal.Rptr.3d at 738 (emphasis omitted).

C. California state courts have nearly eliminated the ability to bring facial challenges to fee schedules.

The only state-court avenue remaining to a California permit applicant wishing to challenge impact fees is to bring a facial challenge under the state Mitigation Fee Act to invalidate the ordinance or resolution that set the applicable fee schedule. Yet California courts have narrowed their review of such challenges, both procedurally and on the merits.

Procedurally, a permit applicant has a window of only 90 days to bring a facial challenge. *See 616 Croft Ave., LLC,* 207 Cal.Rptr.3d at 734–35. That 90-day period runs not from the date that a fee is charged to the applicant, but from the date that the fee schedule takes effect. *Id.* at 735 ("Here, Croft challenges the City's enactment of the Ordinance and its attendant fee schedule. Croft's challenge is untimely because Croft brought it more than 90 days after the City enacted the Ordinance and adopted the fee schedule."). The obvious problem is that no one will have an incentive to bring an action challenging a fee schedule before they have a development project in mind for that jurisdiction. It is often the case that the governing fee schedule has been in effect for years by the time a permit applicant becomes interested in building in the jurisdiction, and the case at bar is one example. *See* Br. for Pet. at 3–4 (resolution adopting applicable TIM fee rates was passed in February 2012; petitioner did not seek a building permit until 2016). If a local jurisdiction enacted its fee schedule more than 90 days before the applicant takes an interest in developing in

the jurisdiction, the applicant is without recourse. A facial challenge under the Mitigation Fee Act will be time-barred.

Moreover, the few Mitigation Fee Act facial challenges that reach the merits are evaluated under a "reasonable relationship" standard, a standard that "accord[s] substantial judicial deference" to the local jurisdiction. *Home Builders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 112 Cal.Rptr.3d 7, 15 (Cal. Ct. App. 2010) (*City of Lemoore*). Although the local government nominally bears "the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question," that burden is easily satisfied. *Sheetz v. County of El Dorado*, 300 Cal.Rptr.3d 308, 323 (Cal. Ct. App. 2022) (quoting *City of Lemoore*, 112 Cal.Rptr.3d at 16). "All that is required of the [agency] is that it demonstrate that development contributes to the need for the facilities, and that its choices as to what will adequately accommodate the [new population] are reasonably based." *Sheetz*, 300 Cal.Rptr.3d at 323 (quoting *Boatworks, LLC v. City of Alameda*, 247 Cal.Rptr.3d 159, 166 (Cal. Ct. App. 2019)). "[T]he figures upon which the public agency relies . . . need not be exact" and "will necessarily involve predictions regarding population trends and future building costs." *Id.*

If the local government satisfies that initial burden, the applicant bears the burden of proving that the fee schedule is "arbitrary, capricious or entirely lacking in evidentiary support." *Sheetz*, 300 Cal.Rptr.3d at 323 (quoting *Boatworks, LLC*, 247 Cal.Rptr.3d at 166). The

applicant will be unable to meet its burden unless it can prove "that the record before the local [government] clearly did not support the underlying determinations regarding the reasonableness of the relationship between the fee and the development." *City of Lemoore*, 112 Cal.Rptr.3d at 15. The fee schedule will be upheld if "the City adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." *Boatworks, LLC*, 247 Cal.Rptr.3d at 166 (quoting *City of Lemoore*, 112 Cal.Rptr.3d at 14). A fee schedule is almost always upheld under this deferential legal framework.

In *Dolan*, this Court considered and rejected a reasonable relationship standard in favor of the rough proportionality test, finding the reasonable relationship standard to be "confusingly similar to the term 'rational basis,'" which describes only a "minimal level of scrutiny" that fails to advance the protections of the Fifth Amendment. 512 U.S. at 391. California's state statute and its governing standard provide no adequate substitute for the rights guaranteed under the United States Constitution.

II. The lack of a judicial check on impact fees has led to excessively high fees in many California jurisdictions and extreme variations among California jurisdictions.

Without judicial oversight, many jurisdictions in California impose exorbitant impact fees on development projects. The Terner Center at the University of California, Berkeley, found that 6 to 18 percent of the median price of a California home is

attributable solely to impact fees that are legislatively imposed. Hayley Raetz et al., *Residential Impact Fees in California: Current Practices and Policy Considerations to Improve Implementation of Fees Governed by the Mitigation Fee Act*, Terner Center for Housing Innovation UC Berkeley 17 (2019), https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Residential_Impact_Fees_in_California_August_2019.pdf. High fees have been shown to limit or prelude construction of starter homes and lower-cost housing in California cities. *Id.* at 22. The issue of excessively high fees is described further in another amicus brief submitted to this Court. *See* Br. of Amici Curiae California Building Industry Association and National Association of Home Builders In Support of Petition for Writ of Certiorari, at 23–24 (noting that fees are "higher in California than the rest of the country" and "continue to rise" in California "while nationally fees have decreased").

The lack of judicial oversight has also led to extreme variation in fees as between jurisdictions. "Impact fee amounts vary widely across localities" in California. Hayley Raetz et al., *Residential Impact Fees in California: Current Practices and Policy Considerations to Improve Implementation of Fees Governed by the Mitigation Fee Act*, Terner Center for Housing Innovation UC Berkeley 7 (2019), https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Residential_Impact_Fees_in_California_August_2019.pdf. For instance, a study by the Terner Center noted that one California city among seven it evaluated "requires new developments to pay a park impact fee of $350 per single family home, while another city

requires a park impact fee of $55,000 per single family home." Sarah Mawhorter et al., *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, Terner Center for Housing Innovation UC Berkeley 23–24 (2018), https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Development_Fees_Report_Final_2.pdf.

Even within the San Francisco Bay Area, the amount of fees imposed on the same type of development diverges widely:

- According to a survey of fourteen jurisdictions in Santa Clara County, California, impact fees imposed on single-family home projects range from a high of $146,631 per home in Los Altos Hills to a low of $9,919 in San Jose. Cities Association of Santa Clara County, *Constraints Survey Data Summary 2022*, https://citiesassociation.org/documents/constraints-survey-data-summary-2022/.

- According to a survey of eighteen jurisdictions in San Mateo County, California, impact fees imposed on single-family home projects range from a high of $104,241 in East Palo Alto to a low of $6,760 in Colma. City of Menlo Park, *6th Cycle Housing Element: 2023-2031* 236 (2023) https://menlopark.gov/files/sharedassets/public/v/1/community-development/documents/projects/housing-element-update/housing-element-updated-20231103-clean-copy-version.pdf .

- According to a survey of impact fees in several jurisdictions within Contra Costa County, California, fees imposed on single-family home projects range from a high of $105,634 in Walnut Creek to $30,927 in Pleasant Hill. City of Walnut Creek, *2023-2031 Housing Element* 173 (2023) https://walnutcreek_redesign.prod.govaccess.org/home/showdocument?id=30730.

- According to a survey by the City of Oakland of impact fees imposed in Oakland, Berkeley, Emeryville, Richmond, San Francisco, and San Jose, impact fees per single-family home range from $85,078 in Berkeley to $38,766 in the neighboring jurisdiction of Emeryville. City of Oakland, *2023-2031 Housing Element Update* 72 (2022) https://cao-94612.s3.us-west-2.amazonaws.com/documents/Appendix-F-Housing-Constraints_11.28.22.pdf.

The differing impacts of development in each jurisdiction may well justify these differences in some cases. But the courts should deploy a mode of review that allows applicants to test those justifications to ensure that fees are tied to the impacts of the development projects.

CONCLUSION

This Court should reverse the decision of the California Court of Appeal.

Respectfully submitted,

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