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

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BRIEF OF AMICI CURIAE OF HOTEL DES ARTS, LLC; SAN FRANCISCO APARTMENT ASSOCIATION; CALIFORNIA APARTMENT ASSOCIATION; AND SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, HOTEL DES ARTS, LLC ("DES ARTS"), SAN FRANCISCO APARTMENT ASSOCIATION ("SFAA"), CALIFORNIA APARTMENT ASSOCIATION ("CAA"), and the SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE (SPOSFI) submit this Amici Curiae brief in support of Petitioner George Sheetz.[1]

Des Arts is a limited liability company in active standing with the California Secretary of State, and a mom-and-pop owner of a small hotel in the City and County of San Francisco, which is subject to onerous local land use ordinances. Des Arts is challenging a local regulation that, similar to the one challenged in this case, imposes onerous exactions through legislative action on Des Arts' right to use its property as a hotel rather than as "low-income housing."[2] These San Francisco ordinances eviscerate all viable economic use of Des Arts' hotel (and other hotels similarly situated)—***and force Des Arts to pay millions of dollars to ransom that viable use back***. Like the petitioner in *Sheetz v. El Dorado County*, Des Arts argues that a legislatively imposed exaction is an unconstitutional

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] U.S. District Court Northern District of California, *Hotel Des Arts v. City and County of San Francisco,* Case No. 3:23-cv-02933-TLT.

condition under *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987) ("*Nollan*") and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Dolan*"). San Francisco will argue that it is permitted to impose this egregious exaction under the legislative loophole to the unconstitutional conditions' doctrine endorsed by California state courts and the Ninth Circuit. Therefore, this Court's analysis of the unconstitutional exactions doctrine in this case will have a direct impact on the validity of this challenged regulation.

SFAA, founded in 1917, is a full-service, non-profit trade association of persons and entities who own residential rental properties in San Francisco. SFAA currently has more than 2,800 active members. SFAA and its members have a strong interest in preserving their constitutional rights with respect to real property they own or manage in San Francisco. As part of its mission, SFAA engages in public interest litigation to insure the protection of private property rights in San Francisco through court advocacy and litigation. The regulation challenged in this case is like regulations throughout San Francisco, including legislatively imposed development and permitting fees. Thus, this Court's determination of whether the California Court of Appeal's analysis of the unconstitutional exactions doctrine under *Nollan* and *Dolan* is correct may impact the validity of such regulations.

CAA is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property owners and operators who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of

high-quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local fora. CAA has members in the County of El Dorado, and thus who are subject to the regulation challenged herein. California is notorious for being one of the most expensive states to develop housing in, which in large part is caused by legislatively imposed "in lieu" or "mitigation" fees. Thus, this Court's analysis of *Sheetz v. El Dorado County* will likely provide guidance to CAA and its constituents about the validity of similar regulations, and will impact the development of new apartment construction throughout the state of California.

SPOSFI is a California nonprofit corporation and organization of small property owners that advocates for home ownership and the rights of residential rental property owners in San Francisco. SPOSFI's members range from young families to the elderly on fixed incomes, and with membership across all racial, ethnic, and socio-economic strata. SPOSFI's members own single-family and small multi-unit residential properties throughout San Francisco. SPOSFI is also involved in education, outreach and research. Through education, it helps owners better understand their rights and learn how to deal with local government; through outreach to community groups and to the public, it demonstrates how restrictive San Francisco regulations can harm small property owners. SPOSFI seeks to protect the rights of small property owners against unfair and burdensome regulations, like the one at issue in this case, and that are pervasive in San Francisco.

SUMMARY OF ARGUMENT

This case presents a critical opportunity for this Court to revive private property rights by construing the Fifth Amendment to impose meaningful limits on local California governments and their continued use of legislatively created property exactions to end-run this Court's precedents. California courts have imposed an unreasonably narrow view of the unconstitutional exaction doctrine under *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987) ("*Nollan*") and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Dolan*") resulting in "[a]rbitrary redistribution" of private property rights via a transfer of wealth from owners to the public, without payment of just compensation. *San Remo Hotel LP v. City and County of San Francisco*, 27 Cal.4th 643, 691 (2002) ("*San Remo*") (Brown, J., dissenting). Continued imposition of exactions through legislative action has made it increasingly difficult to afford to build residential units and increases rental housing costs statewide. Small property owners' private property rights have been and will continue to be decimated without this Court's intervention. *See, San Remo*, 27 Cal.4th 643*; Ballinger v. City of Oakland*, 24 F.4th 1287 (9th Cir. 2022).

And nowhere is this destruction of personal liberty more rampant than in San Francisco. *San Remo*, 27 Cal.4th at 692 (Brown, J., dissenting) ("[P]rivate property, already an endangered species in California, is now entirely extinct in San Francisco"). San Francisco's "neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political

process" (*ibid.*) has been most recently displayed through its 2023 amendments to the City's Residential Hotel Unit Conversion and Demolitions Ordinance, SF Admin Code Ch. 41 ("HCO"). San Francisco's 2023 HCO amendments are a form of an unconstitutional condition, **in that the amendments take away a vested property right, and then require owners to ransom it back in order to regain those rights.** First, the amendments take away the right of affected hotel owners to rent their units on a weekly basis, and require instead that these owners rent the units for 30 days or more, thus forcing hotel owners to become de facto landlords—a particularly unappealing prospect given the City's stringent rent and eviction controls. Then, if the owners want their hotel use rights back from the City, the HCO requires that the owners either physically construct affordable units to replace those that were taken by the City, or otherwise pay an in lieu fee, easily equaling millions of dollars.

Amicus Des Arts, a mom-and-pop hotel owner, and whose property is subject to the HCO, has been required to challenge San Francisco's attempts to take the viable use of its property away through legislative regulation—now twice. In 2017, San Francisco made its first attempt to take away the hotel use of Des Arts' property, and force Des Arts (and other owners similarly situated) into San Francisco's rent controlled landlord regime. After Des Arts' successful legal challenge, San Francisco rescinded the amendment.

But San Francisco is determined to confiscate small hotels for affordable housing use, and in 2023, enacted even more egregious constitutionally infirm amendments to the HCO. Only this time, it did so under the guise of a long-standing land use principle

known as the nonconforming use doctrine. Nonconforming uses are land uses that are no longer consistent with current zoning regulations. That is, San Francisco purported to phase out weekly, transient hotel uses in favor of month-long tenancies. But the glaring hole in San Francisco's strategy, is that this short-term traditional hotel use *is not* being phased out of the City—it is in fact expressly permitted throughout San Francisco.[3] And while the City purports to phase this land use out as "nonconforming," it simultaneously allows an owner *to ransom it back for millions of dollars paid to the City for an express public purpose of constructing affordable housing.*

Des Arts has once again been required to challenge these egregious legislative exactions in hopes of saving its small business. Sitting at the Dragon's Gate to Chinatown, Des Arts currently takes reservations from a variety of people: university students; people coming to work in San Francisco for short periods of time; people considering moving to San Francisco who want to visit the City for 1-2 weeks first; and, of course, some tourists. If Des Arts is forced to rent all of its residential rooms for at least 30 consecutive days, meaning that the occupants become rent and eviction controlled apartment tenants rather than hotel guests, it would have to terminate the employment of some of its employees and reduce the hours of others. Des Arts' 38 residential rooms are also currently used as a forum for local artists to display their work. Shuttering these rooms would force Des Arts to eliminate them as

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[3] SF Planning Code §§ 711, 712, 713, 714, 715, 716, 718, 719, 720, 721, 722, 723, 724, 725, 728, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 743, 744, 745, 751, 752, 753, 754, 755, 756, 757, 759, 760, 761, 762, 763, 764, 780.2.

such a forum, which would harm the local art community.

San Francisco's 2023 HCO amendments are a textbook example of how local government has fine-tuned an unlawful taking through the use of legislation while immunizing itself from a *Nollan*/*Dolan* unconstitutional conditions challenge. Eliminating commercial/hotel use through the artifice of the nonconforming use doctrine and then requiring the owner to buy it back in order to recoup a historically permitted land use is a prime example of obtaining a public benefit through gimmickry, as this Court confirmed in *Nollan* and *Dolan*. This Court should reverse *Sheetz v. El Dorado*, and hold that a higher level of scrutiny under the unconstitutional conditions doctrine applies to legislative enactments, to prevent further erosion of property rights in California and beyond.

ARGUMENT

I. THE HCO: BACKGROUND FACTS

A. A Short History of the HCO and Hotel Owners' California Supreme Court Challenge to the HCO's Legislatively Imposed Mitigation Fees.

On November 23, 1979, San Francisco enacted a moratorium on the demolition or conversion of residential, or single room occupancy ("SRO"), hotel units to "tourist" hotels in response to a perceived serious housing shortage for low-income and elderly residents caused by such conversions. In February of 1981, the

moratorium was replaced by permanent regulation when San Francisco enacted the HCO. Under the HCO as originally enacted, SRO hotel operators were allowed to rent SRO units for periods of 7 days or longer.

At the same time the HCO permitted weekly rentals for SRO units, the legislation expressly prohibits any shorter rental period unless an owner successfully "converted" that unit to "tourist" or "transient" use (*i.e.*, more akin to a traditional hotel use). A conversion of an SRO unit to a tourist unit under the HCO requires an owner to apply for a "permit to convert" and agree to a "one-for-one replacement" of the SRO unit the owner sought to convert. SF Admin Code § 41.13. A "one-for-one replacement" under the HCO requires an owner to either physically construct or replace the SRO unit the owner seeks to convert, or otherwise pay to San Francisco or qualified nonprofit "**an amount equal to 80% of the cost of construction of an equal number of comparable units plus site acquisition cost**." SF Admin Code § 41.13, emph add. The HCO provides that these funds obtained from an owner may be used to create affordable housing and defend against the legality of the HCO. SF Admin Code § 41.13(f).

The requirement that a hotel owner pay this substantial mitigation fee prior to San Francisco granting an owner a permit to convert under the HCO was challenged two decades ago as an unconstitutional condition in *San Remo*, 27 Cal.4th 643. There, San Francisco demanded the owner pay the City $567,000.00 to convert his SRO units to tourist use. *Id.* at 656. The owner sued the City, arguing that the mitigation fee imposed as a condition of his project was subject to the

Nollan/Dolan heightened standard of scrutiny, and that the HCO violated this standard. *Id.* at 670-671.

A four justice California Supreme Court majority disposed of the owner's argument. Relying on prior state precedent and applying an overly narrow analysis of *Nollan* and *Dolan*, the court majority in *San Remo* held that because the mitigation fee under the HCO was *legislatively* imposed on a class of people, rather than on a discretionary, individual basis, it was not subject to the unconstitutional conditions' doctrine. *Id.* at 670-671. Even though the majority recognized that "legislatively mandated fees do present some danger of improper leveraging," the majority reasoned that the danger could allegedly be remedied through citizens voting out the electoral body that imposed them in the first instance (that is, after the fact), and so "the heightened risk of the extortionate use of the police power to exact unconstitutional conditions is not present." *Id.* at 670, 671, 668 (Internal quotations omitted, citing *Ehrlich*, 12 Cal.4th at 876).

On the other hand, the dissent in *San Remo* vehemently disagreed, concluding: "This is *not* a tough case. Here, property unquestionably has been taken." *San Remo*, 27 Cal.4th at 670 (Brown, J., dissenting).

> [T]he majority's exception [to the unconstitutional conditions doctrine] for legislatively created permit fees ***is mere sophism***, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked . . . . A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can adjudicatively from a single property

> owner. The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over. . . .

San Remo, 27 Cal.4th at 697-98, 700 (Brown, J., dissenting) (Emphasis added).

> It was if San Francisco:
>
> . . . essentially said to 500 unlucky hotel owners: We lack the public funds to fill the need for affordable housing in San Francisco, so you should solve the problem for us by using your hotels to house poor people. ***The City might as well have ordered the owners of small grocery stores to give away food at cost*** . . . .
>
> [and] theft is still theft. ***Theft is theft even when the government approves of the thievery.*** Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government.

San Remo, 27 Cal.4th at 703-704 (Brown, J., dissenting) (Emphasis added). As a result of the majority-endorsed legislative loophole to the unconstitutional conditions doctrine, Justice Janice Rogers Brown concluded in her dissent: "***private property, already an endangered species in California, is now entirely extinct in San Francisco***." *Id.* at 692 (Emphasis added).

Indeed, San Francisco, emboldened by the holding in *San Remo*, believes it has *carte blanche* to extort private property through the legislation. Nowhere is

this belief clearer than the City's more recent amendments to the HCO. Also *see*, *Lambert v. City and County of San Francisco*, 529 U.S. 1045 (2000) (Dissent from denial of petition for writ of certiorari).

B. *SRO Hotel Coalition v. City and County of San Francisco*: San Francisco Takes the Value From SROs Without Payment of Just Compensation.

While the HCO has always prohibited daily rentals of SRO units during certain months (unless the owner pays an inordinate amount of money to the City to convert the units to tourist use), for decades the regulation permitted SRO owners to run profitable businesses by providing short-term commercial, weekly rentals, and a vital public service to economically disadvantaged residents of San Francisco. *See*, *San Remo*, 27 Cal.4th at 674 (SRO units, which typically lack private baths and kitchens "may not be an ideal form of housing, such units accommodate many whose only other options might be sleeping in public spaces or in a City shelter" and "residential hotel units serve many who cannot afford security and rent deposits for an apartment").

However, in 2017, San Francisco amended the HCO to change the permissible rental term of an SRO unit from 7 days to *32 days*. The result of this change in rental term was to trigger certain burdens under the City's rent control ordinance, thereby substantially devaluing the hotel business and forcing SRO owners into the landlord business.

In order to protect the viable economic use of their SRO businesses, Des Arts and other SRO owners challenged the 2017 HCO Amendments in San Francisco

Superior Court, *SRO Hotel Coalition v. City and County of San Francisco*, Case No. CPF-17-515656 ("*SRO Hotel Coalition*"). In 2018, the California Court of Appeal, First District, reversed the Superior Court's order denying those plaintiffs' preliminary injunction motion and remanded for determination of the balance of hardships. In doing so, the Court of Appeal stated:

> The 2017 [HCO] Amendments . . . do, on their face, require owners of SROs to forego more classically styled hotel rentals in favor of more traditional tenancies. This changes the fundamental nature of their business, by making them landlords rather than hotel operators.

San Francisco SRO Hotel Coalition v. City and County of San Francisco, A151847, 2018 WL 4959807, *5 (First District Court of Appeal, 2018). The challenge to the amendment was ultimately upheld at trial under state law (and thus the court never reached the constitutional arguments).

San Francisco's attempt to force Des Arts and other SRO hotel owners into the landlord business had thus been foiled in 2017. But, San Francisco is undeterred. It now seeks to phase out the short-term hotel use through the guise of the "nonconforming use" doctrine. The problem with San Francisco's strategy, is that the use it seeks to phase out is widely permitted throughout San Francisco, and therefore the SRO owner could actually retain this use—but *only* if the SRO owner paid a replacement housing fee to the City under the HCO. Absent a clarification that *Nollan*/*Dolan* apply to legislation, the California Courts' narrowed view on legislatively imposed exactions will make any challenge to the HCO much more difficult.

II. *HOTEL DES ARTS V. CITY AND COUNTY OF SAN FRANCISCO*: SAN FRANCISCO TAKES THE VALUE FROM SROS WITHOUT JUST COMPENSATION AND REQUIRES THE OWNER TO RANSOM IT BACK.

On March 14, 2023, San Francisco amended the HCO yet again to change the permissible rental term of an SRO unit from 7 days to 30 days. San Francisco Ordinance No. 36-23. Like the earlier 2017 amendments, the result of this change forces San Francisco SRO hotel owners to be de facto landlords, and therefore subject to the City's rent control and eviction restrictions. *Id*. But, in an attempt to evade the constitutional scrutiny it received in 2017, San Francisco added a two year "amortization" provision to the amendments and indicated in its stated intent that the City intended to phase out shorter-term rental use under California's nonconforming use doctrine. *See, e.g.*, *National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 880 (1970) (Discussing the object of the nonconforming use doctrine is eventual removal of the use altogether, and whether corresponding amortization period to phase out use was reasonable).

But the 2023 amendments to the HCO do not seek to eliminate a nonconforming use in San Francisco. Under the City's own Planning Code, a nonconforming use is one that is "incompatible with the purposes of this Code and with other uses, structures and lots in the City, and it is intended that these uses, structures and lots shall be brought into compliance with this Code as quickly as the fair interests of the parties will permit." SF Planning Code § 180(b). Tourist, or short term, hotel use is not "incompatible" with the purpose of the local code or uses in San Francisco; rather, it is permitted widely throughout City's districts. SF Planning

Code §§ 711, 712, 713, 714, 715, 716, 718, 719, 720, 721, 722, 723, 724, 725, 728, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 743, 744, 745, 751, 752, 753, 754, 755, 756, 757, 759, 760, 761, 762, 763, 764, 780.2. The HCO itself recognizes that "it is in the public interest" that tourist units be permitted in San Francisco because "[t]ourism is essential for the economic wellbeing of San Francisco." SF Admin Code § 41.3(j).

In short, the HCO amendments are not about eventually eliminating units for tourist use in the City, as would be the purpose under the nonconforming use doctrine. Also see, *Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.*, 83 Cal.App.4th 139, 146 n. 3 (2000) (Court confirmed that a tourist hotel was a permitted use in San Francisco, rejecting agency's claim that the use could be phased out under the nonconforming use doctrine). Rather, San Francisco is just *taking* the short-term rental use of 7 days away, and forcing owners to rent the SRO units for 30 days or more, thereby subjecting the units to some of the strictest rent and eviction controls in the state.

Confirming that San Francisco has zero desire to phase out widely permitted tourist use in the City, the amendments further require the SRO owners who want to maintain their short-term rental business *to buy the business back under the HCO's "permit to convert" provisions*. SF Admin Code § 41.13. That is, in order for owners to maintain their property use that the City has taken from them via the amendments, the owners need to either physically construct one-to-one replacement of SRO units, or pay to San Francisco or qualified nonprofit "an amount equal to 80% of the cost of construction of an equal number of comparable

units plus site acquisition cost." *Id.* In other words, ***millions of dollars***. The magnitude of this fee is itself a reflection of the high costs imposed on private property owners who seek to build much needed housing, as is discussed below in Section III.

The 2023 HCO amendments have recently been challenged in federal court by amicus Des Arts, who is desperately trying to save its small hotel business. U.S. District Court Northern District of California, *Hotel Des Arts v. City and County of San Francisco*, Case No. 3:23-cv-02933-TLT. Des Arts' SRO hotel is comprised of 13 "tourist" units for daily use, as well as 38 residential units that, for decades, have been rented on a weekly basis as permitted under the original HCO. Through the 2023 amendments to the HCO, San Francisco seeks to extract the value of these 38 units—and not only does San Francisco refuse to pay just compensation for taking this use, it demands *ransom* if Des Arts wants to preserve its decades profitable small business. Des Arts' lawsuit argues that the HCO amendments impose an unconstitutional condition on its face under the *Nollan/Dolan* doctrines. However, the Ninth Circuit's view of the unconstitutional conditions' doctrine suffers from the same legal infirmities that California State courts do, thereby threatening the owner's legal position with respect to this extortionate legislation. *See e.g. Ballinger*, 24 F.4th 1287.

The HCO amendments are a prime example of why a higher form of scrutiny for legislatively imposed property conditions is needed across the board. *See*, *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 1028 (Brown, J., dissenting) ("Why should the existence of a taking turn on the type of governmental

entity responsible for the taking? For constitutional purposes, a taking is a taking"). When put under the lens of the *Nollan/Dolan* doctrine, the HCO amendments clearly neither have the required "essential nexus" nor the "rough proportionality" needed to withstand constitutional muster. A condition imposed on the grant of a land use right must further the same governmental purpose advanced as justification for prohibiting the use. *Nollan*, 483 U.S. at 837. Here, San Francisco's purported purpose for prohibiting SRO weekly rentals is to phase out the use under the nonconforming use doctrine to add the units to the local housing supply. San Francisco Ordinance No. 36-23. But the condition—taking the use away but allowing an owner to ransom it back—fails to advance the alleged purpose of phasing this use out. Thus, because the condition under the HCO amendments fails to serve the same governmental purpose, the "restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (Quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584 (1981)).

And even if the nexus between the condition and purpose could be justified under *Nollan*, the degree of the exaction—holding a use hostage for millions of dollars—as compared to the impact of allowing an already-vested use, falls fall short of the rough proportionality standard under *Dolan*. *Dolan*, 512 U.S. at 387-388 (Rough proportionality test "requires us to determine whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development"). In short, taking away a permitted use for a public purpose through the guise of the nonconforming use doctrine and then

requiring the owner to buy it back is obtaining an unpaid public benefit through "gimmickry." *Dolan*, 512 U.S. 387.

Clearly, San Francisco views private ownership of SRO units as an opportunity to force these units into public use. But San Francisco shouldn't be allowed to legislatively force an owner into providing the public service that San Francisco wants—unless San Francisco pays just compensation for it. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). (The Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *San Remo*, 27 Cal.4th at 693 (Brown, J., dissenting) ("The police power permits the government to regulate that use so as to promote health, safety, and the general welfare, but it does not permit the government to achieve its social agenda by ordering a political minority to dedicate its property to the benefit of a group the government wishes to favor").

In sum, San Francisco understands it can impose these types of egregious exactions without consequence under the cloak of the legislative exception that California and the Ninth Circuit endorse. *See*, *San Remo*, 27 Cal.4th 643*; Ballinger*, 24 F.4th 1287. Allowing local government to impose such extortionate demands through legislation is "mere sophism" (*San Remo*, 27 Cal.4th at 697-98, 700 (Brown, J., dissenting)) that has effectively rendered the *Nollan/Dolan* doctrine a "dead letter" in California and the Ninth Circuit. *Koontz v. St. Johns Water Management Dist.*, 570 U.S. 595, 607 (2013).

III. CALIFORNIA'S LEGISLATIVE LOOPHOLE HAS HAD BROAD IMPLICATIONS FOR THE STATE'S HOUSING CRISIS.

The ramifications of California's legislative "exception" to the unconstitutional conditions' doctrine are not only seen in San Francisco; the loophole's devastating effects are seen statewide. It's no secret that California is in a housing crisis. Cal. Gov. Code § 65589.5(a)(1)(A) ("The lack of housing . . . is a critical problem that threatens the economic, environmental, and social quality of life in California"). The crisis "is partially caused by activities and policies of many local governments that . . . require that high fees and exactions be paid by producers of housing." Cal. Gov. Code § 65589.5(a)(1)(B). Local California governments are notorious for imposing legislatively high fees for development, often untethered to that development's impact, like those at issue in *Sheetz*. *See*, *California's High Housing Costs: Causes and Consequences*, Legislative Analyst's Office (March 2015). ("[D]evelopment fees-charges levied on builders as a condition of development-are higher in California than the rest of the country.")[4]

For example, affordable housing projects in California often cost more than $1 million per apartment to build, and "numerous factors within the control of state and local governments" contribute to these high costs, including stringent environmental and labor standards.[5] Under the legislative loophole at issue in

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[4] https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.aspx

[5] https://www.latimes.com/homeless-housing/story/2022-06-20/california-affordable-housing-cost-1-million-apartment

this case, local governments are freely permitted to pass on these exorbitant costs to private property owners, and at the same time, immunize themselves from any responsibility. In short, a judicial exemption of legislatively imposed conditions from the *Nollan/Dolan* doctrine has resulted in these unrestrained property exactions, which have thwarted residential development and exacerbated the state's housing crisis. *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, Terner Center for Housing Innovation at UC Berkeley, at 3 (March 2018); *Residential Impact Fees in California*, Terner Center for Housing Innovation at UC Berkeley, at 4 (August 2019).[6]

This Court should therefore close the legislative loophole once and for all and confirm that the higher scrutiny analysis under the unconstitutional conditions' doctrine applies to land use exactions, whether or not imposed by planning commissions on an ad hoc basis or by city councils through legislation.

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6 *Also see*, https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.aspx

CONCLUSION

Pursuant to the above, the Court should reverse the California Court of Appeal's holding in *Sheetz v. El Dorado*, and find that legislative exactions are subject a heightened scrutiny analysis under this Court's holdings in *Nollan* and *Dolan*.

Respectfully submitted,

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