No. 22-1074

In The Supreme Court of the United States

GEORGE SHEETZ,
Petitioner,
v.
COUNTY OF EL DORADO, CALIFORNIA,
Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the parcel-specific "essential nexus" and "rough proportionality" standard from *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to impact fees charged to property developers based on a legislatively determined schedule or formula.

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INTRODUCTION

This case concerns whether *Nollan*/*Dolan*'s parcel-specific constitutional rule applies to development permit conditions implemented by legislation. The answer is no, where (as here) that legislation creates a fee schedule or formula that applies equally to categories of similar properties without seeking any dedicatory interest in land.

Respondent El Dorado County—like local governments across the country—requires development permit applicants to pay a fee to account for the impacts new development will have on county infrastructure. The County's fee addresses the burden on roads and highways from increased traffic, while other local governments use similar fees to provide parks, recreation facilities, schools, fire and police departments, and other vital services that growing communities need to thrive.

In rejecting Petitioner's challenge to the County's fee, the court below held that the "*Nollan*/*Dolan* test does not apply to legislatively mandated development impact fees that *** generally apply to a broad class of permit applicants." Far from creating a blanket "exception" for all permit conditions imposed by legislation, that tailored rule follows directly from *Nollan*, *Dolan*, and *Koontz*.

Nollan, *Dolan*, and *Koontz* created a heightened constitutional rule for ad-hoc exactions involving dedication of a real property interest (or the functional equivalent) to prevent circumvention of the Takings

Clause. At the same time, those decisions carefully reaffirmed longstanding government authority to enact programmatic land use regulations and to charge fees to groups of similarly situated property owners. Here, the County's fee—which applies across the board to similar properties and seeks no actual or functional interest in land—falls squarely within that sphere of traditional authority. It does not trigger any heightened constitutional review.

In arguing that *Nollan*/*Dolan*'s test categorically reaches "legislation," Petitioner seeks to extend parcel-specific heightened scrutiny to routine permit conditions with no Takings Clause implications. The Court should reject such an approach, which would shear the *Nollan*/*Dolan* rule from its constitutional roots. While *Nollan*, *Dolan*, and *Koontz* announced a version of the unconstitutional-conditions doctrine to guard against takings effectuated through a permitting process, purely monetary fees are not takings in the first place. And while those precedents address the risk that an individualized permit condition could force a property owner to bear an unfair share of public burdens, no comparable risk exists where the government acts on a programmatic basis that treats like landowners alike.

Petitioner's parcel-specific test is also unworkable. Petitioner openly seeks to prevent governments from using predictive judgments about community growth to impose fees on categories of similar properties. That drastic encroachment on local authority is unnecessary given existing federal and state constraints on legislative impact fees—constraints that operated just as intended in this case,

where the County acted rationally and complied with California state-law restrictions on development impact fees. As the record below demonstrates, the County's fee is based on reasonable estimates of the impacts of new development on local roads and highways—contrary to Petitioner's false claim that the County is foisting the entire cost of public improvement projects onto developers.

In answering Petitioner's question presented, it is enough for the Court to hold that *Nollan*/*Dolan*'s test does not apply to a legislative fee schedule or formula that applies to classes of similar properties without seeking a dedicatory interest in real property. The judgment below—which applied that rule—should be affirmed.

STATEMENT OF THE CASE

A. Factual Background

1. El Dorado County is a largely rural county in California that extends eastward from the edge of the Sacramento Valley, through the El Dorado National Forest, to Lake Tahoe and the crest of the Sierra Nevada Mountains. AR1194, 1197, 1499. The County has a population of roughly 200,000 people. Its two incorporated cities—South Lake Tahoe and Placerville—have populations of around 20,000 and 10,000 people respectively. More than 80% of the County's residents live in unincorporated areas.

A five-member board of elected supervisors governs the County. As a local government, the County provides municipal services, including road improvements, to residents.

2. Despite its predominantly rural character, the County has experienced high rates of recent development,[1] with its population growth outpacing the state average.[2] Like other local governments, Br. of Am. Planning Ass'n 3, the County has worked to ensure that its public infrastructure—*e.g.*, roads, parks, schools, fire departments, and water and sewer systems—can accommodate its growing population. *E.g.*, AR1448, 1450, 1683, 1690-1695, 1711-1712, 1727.

In 2004, pursuant to its obligations under state planning law, the County adopted a new "General Plan." AR67-73. The General Plan is the County's basic planning document through which it addresses a broad range of issues, such as economic growth, infrastructure development, and disaster preparedness.[3]

The section of the General Plan addressing "Transportation and Circulation *** establishes the standards that guide development of the transportation system, including access to the road and highway system required by new development[,] and provides a united[,] functionally integrated, countywide system that is correlated with" the General Plan's other land use policies. AR1225. To that end, the County "adopt[ed] traffic impact fee

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[1] https://edcgov.us/Government/CAO/Documents/2022-2023%20Budget/El%20Dorado%20County%20Profile%20Demographic%20Data%20FY22-23.FINAL.pdf.

[2] https://www.ppic.org/publication/californias-population/.

[3] https://www.edcgov.us/Government/planning/pages/adopted_general_plan.aspx.

program(s) for unincorporated areas of the county." AR1227, 1527.

The General Plan mandates that the "[d]eveloper-paid traffic impact fees shall pay for the portion of road capacity improvements *** necessary to offset and mitigate the traffic impacts *reasonably attributable to new development*." AR1227-1228 (emphasis added). In other words, the fee program does not "shift the entire burden of paying for existing and future road needs onto property owners with new projects" (Pet'r Br. 27), but instead identifies and funds projects that will be needed to address increased traffic levels caused by new development.

3. To enact the traffic impact mitigation fee schedule at issue here, the County's Department of Transportation commissioned several expert studies relating to new development. AR1229.

a. The Department's experts first projected growth attributable to new development. Across a "20-year time horizon," the Department used "land use growth" forecasts—based on "existing development," "housing," and "building permit data"—to determine the extent of projected development. AR1950-1959, 3517.

Traffic-modeling experts, applying "industry standard" methods, AR2348, then identified "basic road system improvement needs resulting from the growth forecasted," AR3517. That work was split into two portions, with one analysis covering County roads and state highways, and another analysis focusing on the "County's main transportation corridor," U.S. Route 50 (also known as Highway 50). AR3517-3518.

Both analyses identified specific road-improvement projects necessary to accommodate projected increases in traffic arising from new development, such as the construction of additional carpool lanes on segments of Highway 50, AR2297, and the widening of various County roads, AR2291-2293, 2348.

The costs of those projects were estimated using a methodology that accounted for a project's scale, construction materials, traffic control, and earthwork. Projects in the County's rural and mountainous area often required "slope excavation, ditch excavation, *** and embankment construction." AR2344-2350, 3518-3519.

b. After estimating the total costs of roadway projects attributable to new development, the Department allocated the costs across the various categories of anticipated development. That apportionment process relied on an "eight-zone structure" dividing the County along geographic lines. AR3516. That division was based on the "different land use characteristics of various areas of the County." *Id.* For example, whereas Zones 2 and 3 cover relatively dense areas of the County and are bisected by Highway 50, Zones 1 and 6 are more remote. AR234, 1194.

The Department's experts calculated the "percent of new traffic (growth)" attributable to each zone. AR2313-2314. Those apportionments were tied to specific road segments throughout the County. AR2315-2331. For example, because of their relative proximity to "Big Cut Road," development in Zones 3 and 6 was estimated as being responsible for 33.1%

and 37.16% of increased trips on that road respectively, whereas development in Zone 8 (located farther away) was responsible for only 2.47% of that increased traffic. AR2315.

c. "[N]umerous calculations" went into setting the actual fee rates. AR3521. First, the "cost for each individual [traffic improvement] project was adjusted based on the availability of" alternative sources of funds, including federal and state grant funding, such that new development would pay only a portion of the overall costs. *Id.* That portion of costs was "spread to each of the eight zones proportionally, based on the traffic volumes using th[e] specific [road-improvement] project from each zone." *Id.* "For example, if a project costs $12 million and [development in] Zone 5 contributes 10% of the traffic using the road where that project is located, then [development in] Zone 5 is responsible for 10%, or $1.2 million, of the project costs." *Id.*

Fee rates for categories of development projects were calculated by dividing the "total costs [of all traffic improvement projects] for each zone" by the "projected growth" of each category of development and the "applicable trip generation rates for each use." AR3521.[4] As a result, the fees accounted for the differing traffic impacts attributed to different types of

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[4] Trip generations are calculated using the Institute of Transportation Engineers' Trip Generation Manual, AR4257, a nationally recognized source for measuring trip generation associated with property development. *See, e.g.*, *Crawford v. County Council of Prince George's Cnty.*, 290 A.3d 571, 697 (Md. 2023) (manual is "industry reference guide").

developed property. For example, because expert analysis indicated that single-family homes, regardless of size, have "trip generation rates" that fall within a small range, AR2114, the County adopted a standard fee for that class of properties. In contrast, for offices or commercial buildings, which have "trip generation rates" that vary vastly by size and occupancy, the County adopted a per-square-foot rate formula for those categories of property. AR3543-3551.

d. The upshot of the Department's work was a series of fee schedules covering eight traffic impact zones and setting out applicable fees, which are imposed automatically based on the appropriate category. AR3543-3551. The schedules also reflect the specific components of each fee attributable to improvements to "Highway 50" and "Local Road[s]." The board of supervisors enacted the schedules in 2006. AR119-139, 243, 3958, 4346, 4864, 4880.

As enacted, the schedule for Zone 6—at issue in this case—was as follows:

Project	Highway 50 Component	Local Road Component	Fee Total
Single-family Residential	$2,450	$21,600	$24,050
Multi-family Residential	$1,600	$14,100	$15,700
High-Trip Commercial (per sq. foot)	$2.14	$16.30	$18.44
General Commercial (per sq. foot)	$1.00	$7.58	$8.58
Office (per sq. foot)	$0.25	$1.94	$2.19
Industrial (per sq. foot)	$0.16	$1.23	$1.39
Warehouse (per sq. foot)	$0.08	$0.62	$0.70
Church (per sq. foot)	$0.08	$0.62	$0.70
Gas Station (per sq. foot)	$997	$7,560	$8,557
Golf Course (per hole)	$819	$6,220	$7,039
Campground (per campsite)	$321	$2,440	$2,761
Bed & Breakfast (per rented room)	$161	$1,230	$1,391

AR3548.

4. The 2006 fee rates have been updated on multiple occasions. The County reviews the fees annually to account for changes in project costs. AR139-215, 243, 1230, 3648, 3650, 3691-3715, 3951-3953, 3958, 3969-3971, 4025, 4346-4347, 4905, 4918, 4924, 4935, 4960, 4972, 4991, 5003.

Additionally, in 2010, the County began a "major update" to the fee program. AR4026. That process involved consolidation of "vacant land inventory to reflect" development that had already occurred, reallocation of forecasted dwelling units across zones, revision to the inventory of necessary traffic improvement projects and cost estimates, and recalculation of fee rates based on those changes. AR4241, 4273-4281.

As a result, in 2012, the board of supervisors adopted a revised fee schedule that generally decreased rates. AR243, 246-254. The revised Zone 6 fees (applicable here) were as follows:

Project	Highway 50 Component	Local Road Component	Fee Total
Single-family Residential	$2,260	$21,160	$23,420
Multi-family Residential	$1,480	$13,760	$15,240
High-Trip Commercial (per sq. foot)	$1.98	$16.02	$18.00
General Commercial (per sq. foot)	$0.92	$7.40	$8.32
Office (per sq. foot)	$0.23	$1.89	$2.12
Industrial (per sq. foot)	$0.15	$1.20	$1.35
Warehouse (per sq. foot)	$0.07	$0.61	$0.68
Church (per sq. foot)	$0.07	$0.61	$0.68
Gas Station (per sq. foot)	$920	$7,390	$8,310
Golf Course (per hole)	$757	$6,090	$6,847
Campground (per campsite)	$297	$2,390	$2,687
Bed & Breakfast (per rented room)	$149	$1,210	$1,359

AR251.

The County's resolution adopting the revised rates provides that all building permit applicants must pay the fee associated with the relevant zone and property type. AR243-245.

5. In 2013, Petitioner purchased property in the County within a "Rural Region" under the County's General Plan.[5] As recognized in the General Plan, there is "limited availability of infrastructure and public services" within such Rural Regions. AR1461-1462.

In 2016, Petitioner applied for a building permit for a single-family residence. AR5063-5073. Pursuant to the 2012 fee schedule, Petitioner was charged the fee applicable to his zone and property development type: $23,420. AR5071. Petitioner paid that fee under protest and received his permit. AR5084.

B. Procedural History

1. Petitioner challenged the fee, on a variety of federal and state grounds, in California superior court. JA12-38. Most relevant, Petitioner asserted that the fee violated the unconstitutional-conditions doctrine, as applied in *Nollan* and *Dolan*, because the County failed to "make an individualized determination" that "an essential nexus or rough proportionality" existed between the traffic impact caused by his project and the need for improvements to state and local roads. JA24-25, 28-29.

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[5] https://edcapps.edcgov.us/building/DesignCriteria_ParcelData_trakit.asp?parcelnumber=077030049.

Petitioner also argued (JA26-28) that the fee violated California's Mitigation Fee Act, CAL. GOV'T CODE §§ 66000 *et seq.*, *see also* BIO 1-4, which requires impact fees to comply with various procedural and substantive limitations. Among other things, Petitioner claimed that the County had violated the Act's provisions prohibiting counties from charging development fees to pay for projects unrelated to the impact of new development. JA30.

The trial court held that the County's fee comports with applicable federal constitutional law and the Mitigation Fee Act. While declining to analyze the fee under *Nollan*/*Dolan*'s heightened scrutiny, Pet. App. B-29-30, the trial court found that the County's Department of Transportation had conducted "actual trip generation measurements *** sufficient to support an expert opinion setting forth a reasonable basis for *** calculating the reasonable relationship between the fee charged and the burden posed by the development of single family residences," Pet. App. B-64. The trial court accordingly held that the County had produced "evidence sufficient to demonstrate that it used a valid method for imposing the fee on [Petitioner]—one that established a reasonable relationship between the fee charged and the burden posed by the development." *Id.*; *see also* Pet. App. B-36-37, 72-76.

2. The California Court of Appeal affirmed.

The court of appeal summarized this Court's "unconstitutional conditions" jurisprudence and California Supreme Court precedent recognizing that both *Nollan* and *Dolan* involved dedicatory permit

exactions that were "imposed *** neither generally nor ministerially, but on an individual and discretionary basis." Pet. App. A-10-11 (ellipsis in original) (internal quotation marks and citations omitted). The California Supreme Court has thus distinguished (i) fees "imposed on an individual permit application on an ad hoc basis" and conditions requiring a landowner to "dedicate a portion of his property to the public," on the one hand, from (ii) "legislatively mandated, generally applicable development fees," on the other. Pet. App. A-9-11 (internal quotation marks and citations omitted). While the former conditions implicate *Nollan* and *Dolan*, the latter do not. Pet. App. A-11. Applying that distinction, the court of appeal held that the County's "fee is not subject to the heightened scrutiny of the *Nollan*/*Dolan* test." Pet. App. A-16.

The court of appeal also rejected Petitioner's state-law claims. It held that the County complied with the Mitigation Fee Act by "analyzing the impacts of contemplated future development on existing public roadways and the need for new and improved roads as a result of the new development" and then calculating "fee rates" based on "the expected increase in traffic volumes *** from each type of new development." Pet. App. A-26.

3. The California Supreme Court denied review.

SUMMARY OF ARGUMENT

I. *Nollan*, *Dolan*, and *Koontz* involved a "special application" of the unconstitutional-conditions doctrine. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). That "special application" prohibits governments from conditioning an individual land use development permit on the dedication of an interest in land—or its "functional[] equivalent"—unless the condition bears an "essential nexus" and "rough proportionality" to the development's impact. *Id.* at 606, 612.

But the Court's decisions disclaim any further intrusion on governments' land use authority. The decisions reiterate that governments possess expansive police power to address the impacts of new development, including by requiring that "landowners internalize the negative externalities of their conduct." *Koontz*, 570 U.S. at 605. They reaffirm that governments may carry out those responsibilities by adopting programmatic regulations (like zoning) that apply to categories of similarly situated properties. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 384-385 (1994). And they explicitly disavow that any particularized showing must justify commonplace fees charged to property owners, such as property taxes, user fees, and similar governmental assessments. *Koontz*, 570 U.S. at 615.

Under those precedents and their express limitations, legislatively imposed development impact fees—when (and only when) using a predetermined schedule or formula to assess fees on classes of similarly situated properties and seeking no actual or

functional dedication of land—do not warrant heightened, parcel-specific scrutiny. That was the rule applied below. The court of appeal created no categorical "legislative" exception; it held only that programmatic impact fees like the County's implicate none of the constitutional concerns present in *Nollan*, *Dolan*, and *Koontz*. This Court need go no further than that in answering the question presented here.

II. The decision below comports with the unconstitutional-conditions doctrine and the Takings Clause. Expanding the *Nollan*/*Dolan* rule to reach fees like the County's would unmoor *Nollan*/*Dolan* from those constitutional foundations.

As all agree, *Nollan*/*Dolan*'s rule applies when a land use permitting condition would be unconstitutional if imposed directly. That was true (and critical) in *Nollan*, *Dolan*, and *Koontz*, where the government sought a property conveyance—an easement or its "functional[] equivalent"—from a landowner as a condition for the approval of a development permit. In all three cases, there was "no doubt" that the condition would violate the Takings Clause if imposed directly. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).

By contrast, the County's development impact fee is not a condition that would otherwise be a taking. The fee requires the payment of money alone, not the conveyance of a property interest or its equivalent (such as a *Koontz*-like payment in lieu of a dedicatory exaction). While Petitioner suggests the Court has rewritten the Takings Clause to reach all monetary payments connected to a property interest, *Koontz*

unanimously eschewed that paradigm-shifting result. In the absence of a potential taking (and there is none here), the unconstitutional-conditions framework is inapposite.

The same is true of the Takings Clause's generalized purpose. *Nollan*, *Dolan*, and *Koontz* addressed the risk that ad-hoc land use exactions might unfairly burden individual landowners. But schedule-based development impact fees, by their very design, do not single out landowners. Instead, they apply programmatically to categories of similar properties. In that critical respect, they are indistinguishable from zoning regulations or other land use restrictions that operate across groups of properties and are not subject to any special constitutional treatment.

III. In asking that the Court extend *Nollan/Dolan* to reach all "legislative" permit conditions, Petitioner seeks a sweeping new rule that would always require parcel-specific heightened scrutiny of development impact fees—including those imposed by a programmatic schedule. In *Nollan*, *Dolan*, and *Koontz*, the Court logically required individualized review of the parcel-specific permitting conditions before it. That mode of analysis, however, does not translate to development impact fees like the County's, which apply to categories of similarly situated properties, based on predictive judgments (made using industry-standard methods) about their impacts on community infrastructure.

Indeed, requiring parcel-specific review would be inadministrable, if not impossible. Parcel-specific

review would effectively require governments to conduct individualized traffic studies for each permit application and to calculate a particularized fee reflecting each property's development impacts. That onerous requirement would cause the development permitting process to grind to a halt and leave governments little choice but to abandon impact fees altogether—denying them a crucial land use planning tool for addressing community growth. Nothing in the Takings Clause, or the Court's decisions interpreting it, compels that outcome.

Petitioner's hypothetical concerns about government overreach in this area are already addressed by federal and state-law protections. Beyond the basic constitutional floor of rationality, the California Mitigation Fee Act requires counties to demonstrate a reasonable relationship between the effects of new development and projects funded by impact fees. The courts below, reviewing an extensive factual record, found that the County unquestionably satisfied that standard. This Court should not enter the fray by unnecessarily announcing a new constitutional rule.

ARGUMENT

I. *NOLLAN*, *DOLAN*, AND *KOONTZ* DO NOT APPLY TO THE COUNTY'S IMPACT FEE

A. This Court's Precedents Respect The Takings Clause While Preserving Governments' Substantial Land Use Authority

Collectively, *Nollan*, *Dolan*, and *Koontz* represent "a special application" of the unconstitutional-conditions doctrine that subjects certain land use conditions to heightened scrutiny. *Koontz*, 570 U.S. at 604. Each decision recognized that some permit exactions risk circumvention of the Takings Clause. But each decision also reaffirmed that governments retain substantial authority to engage in programmatic land use planning—just as the County did here. Accordingly, *Nollan*, *Dolan*, and *Koontz* apply to exactions (i) imposed on particular landowners through an ad-hoc process (ii) demanding a property interest that would constitute a taking outside the permitting context. Where (as here) neither of those constitutionally significant features is present, no "special" rule applies.

1. *Nollan*, *Dolan*, and *Koontz* announced a rule flowing from the circumstances of those cases—the government's attempt to obtain an easement via an ad-hoc development permitting process—which created the "heightened risk" that governments might otherwise circumvent the Takings Clause. *Nollan*, 483 U.S. at 841.

In *Nollan*, the California Coastal Commission conditioned approval of the Nollans' development permit on their dedication of a public-use easement across their property. 483 U.S. at 828-829. As the Court observed, "[h]ad California simply required the Nollans to make an easement across their beachfront," there was "no doubt there would have been a taking." *Id.* at 831. The commission's demand arose from an "administrative" process in which the commission "recommended" an easement based on specific characteristics of the Nollans' property. *Id.* at 827-828. To ensure that the commission's request was a "valid regulation of land use" rather than "the obtaining of an easement *** without payment of compensation," the Court required an "essential nexus" between the request and the commission's "justification" for it. *Id.* at 837.

Dolan likewise addressed a particularized demand for an easement. There, the local planning commission conditioned the grant of Dolan's building permit on her agreement to "dedicate [a] portion of her property lying within [a] floodplain" and "an additional 15-foot strip of land adjacent to [that] floodplain." 512 U.S. at 380. As in *Nollan*, the commission's requested dedications were related to the particular features of Dolan's land. *Id.* at 379. Indeed, the Court emphasized that the commission had "made an *adjudicative* decision to condition petitioner's application for a building permit on an *individual* parcel." *Id.* at 385 (emphases added). As was true in *Nollan*, it was "[w]ithout question" that the demand for those easements would have constituted a "taking" if made directly. *Id.* at 384.

Koontz involved a variation on the same theme. When considering Koontz's permit application, the St. Johns River Water Management District suggested it would approve the application only "if [Koontz] agreed to one of two concessions." 570 U.S. at 601. He could either (i) deed to the government a larger conservation easement than what he originally offered in his application or (ii) keep to his initial proposal but also "pay" for improvements to "District-owned land several miles away." *Id.* at 601-602.

In holding that the "in lieu" fee was subject to *Nollan*/*Dolan*'s test, the Court focused on both the effect of the district's proposal and the process by which it was made. *Koontz*, 570 U.S. at 612. As to effect, the in-lieu fee was "functionally equivalent" to the easements sought in *Nollan* and *Dolan* because the district had proposed it as "a substitute" for a larger easement. *Id.* at 612, 617. As to process, the ad-hoc bargaining put Koontz to the choice of either granting an easement or paying the "equivalent" fee. *Id.* at 601-602, 612.

2. At the same time, all three decisions reinforced governments' authority to engage in land use planning and disavowed *Nollan*/*Dolan*'s impact on such routine programmatic decisions.

In *Nollan*, the Court acknowledged that California had "broad" powers to place restrictions on development, including through zoning regulations. 483 U.S. at 834-835. The Court reiterated that when a regulation is a "legitimate exercise of the police power rather than a taking," no heightened constitutional scrutiny applies. *Id.* at 836.

Dolan likewise disclaimed that its heightened standard applied to other forms of "land use regulation" or impeded governments' authority to "engage in land use planning." 512 U.S. at 384-385. The Court contrasted the "adjudicative," parcel-specific decision in *Dolan* from the mine run of land use restrictions, like zoning laws, which "involve[] essentially legislative determinations classifying entire areas" of a local community and where "deference to the legislature" is the usual rule. *Id.* at 385 & 391 n.8. For those laws, the burden "properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." *Id.* at 391 n.8.

Koontz adhered to *Nollan*/*Dolan*'s limitations. While holding that the "in lieu" fee there should be subject to heightened scrutiny, the Court was unanimous that the decision did not limit "the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Koontz*, 570 U.S. at 615; *see also id.* at 628 (Kagan, J., dissenting). After all, as the Court held, "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy," typically implemented on a programmatic basis. *Id.* at 605. The Court "ha[d] long sustained such regulations against constitutional attack." *Id.*

B. A Legislative Impact Fee Schedule Governing Groups Of Similar Properties Comports With This Court's Precedents

In upholding the County's fee, the court of appeal abided by both the principles and the limitations set forth in *Nollan*, *Dolan*, and *Koontz*. Those decisions rely on two critical premises: "[T]he takings clause is specially protective against *physical occupation* or invasion" of land, but a legislature is "given greater deference *** to impose broadly applicable fees, whether in the form of taxes, assessments, [or] user or development fees." *Ehrlich v. City of Culver City*, 911 P.2d 429, 443-444 (Cal. 1996) (plurality op.). California courts thus apply *Nollan*/*Dolan* scrutiny to both (i) exactions obtaining a dedicatory interest in land and (ii) permitting fees imposed "neither generally nor ministerially, but on an individual and discretionary basis." *Id.*; *see also id.* at 460-461 (Mosk, J., concurring).

The former category is tied directly to the Takings Clause. *See* pp. 30-31, *infra*. The latter category flows directly from *Dolan*'s recognition that specialized scrutiny applies to "adjudicative decision[s]" involving "individual parcel[s]" of land. 512 U.S. at 385. "The 'sine qua non' for application of *Nollan*/*Dolan* scrutiny" in the permitting-fee context is thus "the 'discretionary deployment of the police power'" exercised to impose "individualized development fees." *San Remo Hotel L.P. v. City & Cnty. of S.F.*, 41 P.3d 87, 105 (Cal. 2002) (quoting *Ehrlich*, 911 P.2d at 439).

The flip side is that where development fees are "generally applicable to a broad class of property owners through legislative action," that "'sine qua non' for application of *Nollan/Dolan* scrutiny is missing." Pet. App. A-10-11 (quoting *San Remo Hotel*, 41 P.3d at 105). That approach, too, flows directly from *Dolan* and *Koontz*. When adopting development impact fee schedules or formulas that apply to groups of similarly situated properties, the government exercises its land use authority in the same way that it makes the other "legislative determinations" that *Dolan* expressly distinguished. 512 U.S. at 385.

That distinction is reinforced by *Koontz*'s assurance that "property taxes, user fees, and similar laws and regulations" are not subject to *Nollan/Dolan* review. 570 U.S. at 615. Where development fees are charged equally across broad classes of property owners, and not in lieu of requests for an easement, *id.* at 617, they bear a "close resemblance" to the sorts of "excise taxes, assessment fees, and user fees" distinguished in *Koontz*. Pet. App. A-17 n.6 (internal quotation marks and citation omitted); *see also Ehrlich*, 911 P.3d at 457 (Mosk, J., concurring).

Applying those principles, the decision below correctly declined to require the County to meet *Nollan/Dolan*'s parcel-specific constitutional test. The fee charged to Petitioner was set by a fixed schedule adopted by the local legislature years before Petitioner bought his property. AR243-245. That fee schedule is a critical part of the County's long-term programmatic land use plan and was based on multi-year studies that identified the traffic impacts of different classes of new development and apportioned those costs (and

no others) to landowners engaging in that development. *See* pp. 4-12, *supra*. As the courts below found, that schedule accounts for the impacts of such new development by imposing fees equally on groups of similarly situated properties. Pet. App. A-26. And the County does not condition permits on the dedication of an interest in land, nor is the fee imposed as an in-lieu "substitute" for such a request. *Koontz*, 570 U.S. at 617; AR243-245.

C. Petitioner Ignores The Limits On The *Nollan/Dolan* Rule And Misrepresents The Decision Below

Brushing all that aside, Petitioner asks this Court to decide whether a permit condition is "exempt from the unconstitutional-conditions doctrine as applied in" *Nollan* and *Dolan* "simply because it is authorized by legislation." Br. i. But the court of appeal did not apply any sweeping "exemption" for conditions authorized by legislation. Nor have other courts. This Court should reject Petitioner's strawman attack on a rule that nobody endorses.

1. According to Petitioner, the decision below carves out a categorical "exception" from *Nollan/Dolan* scrutiny for any and all "legislative" exactions. Br. 28 (formatting omitted). That "exception," Petitioner says, has allowed governments to "appropriate[] *** land without compensation" and "coerce" landowners "into surrendering property." Br. 30, 37 (citations and internal quotation marks omitted).

As discussed above (pp. 23-25, *supra*), however, the court of appeal did not take such a blunderbuss approach. Instead, its decision turned on the

characteristics of the County's legislative impact fee and considered whether such a fee threatened to circumvent the Takings Clause and the limits set forth in this Court's precedents. Pet. App. A-10-11. There is simply no need for this Court to embrace any categorical "exemption" from *Nollan/Dolan* to uphold the County's unexceptional development fee schedule.

Courts throughout the country have likewise taken a more nuanced approach when deciding whether to subject permitting fees to parcel-specific analysis. While Petitioner describes various cases as applying a so-called "legislative exception" (Br. 28 (formatting omitted); Pet. 12-13), those cases addressed legislative fee measures similar to the County's. *See, e.g.*, *Douglass Props. II, LLC v. City of Olympia*, 479 P.3d 1200, 1202 (Wash. Ct. App. 2021) ("Transportation Impact Fee Rate Schedule" that calculated fees based on a set formula); *Dabbs v. Anne Arundel Cnty.*, 182 A.3d 798, 811 (Md. 2018) (road and school "impact fee" imposed on a "generalized district-wide basis *** based on a specific monetary schedule"); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404, 406, 409 (Or. Ct. App. 2003) ("Parks and Recreation System Development Charge" that applied equally to all "similarly situated properties"); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 691 (Colo. 2001) ("plant investment fee" calculated according to a "schedule"); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 994 (Ariz. 1997) ("water resources development fee [imposed] on all new realty developments"); *American Furniture Warehouse Co. v.*

Town of Gilbert, 425 P.3d 1099, 1100-1101 (Ariz. Ct. App. 2018) ("traffic signal" development fee schedule).

Petitioner's hyperbolic claim (Br. 8) that courts have adopted a legislative exception in an "attempt to skirt the compensation requirement of the Takings Clause" is not grounded in reality. To the contrary, lower courts have recognized that heightened scrutiny may apply when legislative decisions implicate the constitutional concerns at stake in *Nollan*, *Dolan*, and *Koontz*. Thus, those courts have made clear that *Nollan*/*Dolan*'s test likely applies not only to fees imposed on an ad-hoc basis, *see* pp. 23-24, *supra*, but also to legislation requiring the dedication of land or its practical equivalent, *see, e.g.*, *Ehrlich*, 911 P.2d at 457 (Mosk, J., concurring) (recognizing that "generally applicable measure that authorizes the physical occupation of a small portion of property *** is deemed to be a taking"); *Krupp*, 19 P.3d at 697 (emphasizing distinction between "purely *** monetary assessment" and "dedication of real property for public use"); *see also* pp. 34-36, *infra*.

2. Having asked an overbroad question, it is not surprising that Petitioner offers an unhelpful answer. According to Petitioner, the principal reason to reject a self-styled "legislative exception" to *Nollan*, *Dolan*, and *Koontz* is that those decisions all involved "legislatively mandated" conditions. Br. 8-9, 14-24. But by that Petitioner means simply that government officials exercised statutory authority in imposing them, not that the legislation dictated the outcome of the permitting process.

Indeed, Petitioner acknowledges that the background statutes and ordinances in *Nollan*, *Dolan*, and *Koontz* empowered permitting officials to determine the need for, "formulate[]," and "fashion" specific conditions for individual permit applicants. Br. 16, 23 (internal quotation marks omitted); *see, e.g.*, CAL. PUB. RES. CODE § 30212(a) (allowing officials in *Nollan* to determine on a parcel-specific basis whether and how to require "[p]ublic access" to coastline); Resp'ts' Br. on the Merits, *Nollan v. California Coastal Comm'n*, No. 86-133, 1987 WL 864769, at *8 n.3 (U.S. Feb. 17, 1987). That is the reason the Court in *Lingle v. Chevron U.S.A., Inc.* unanimously described the *Nollan*/*Dolan* rule as arising from "adjudicative land-use exactions." 544 U.S. 528, 546 (2005).

In stark contrast, the County's fee is calculated under a nondiscretionary fee schedule—a "ministerial" exercise of the permitting power vastly different from *Nollan*, *Dolan*, and *Koontz*. Pet. App. A-10-11. Accordingly, those cases do not come close to answering the question presented simply because the government executive's actions can be traced back to legislation. In arguing otherwise, Petitioner obscures the obvious difference between an ordinance that merely *authorizes* an agency to impose an exaction in its discretion and one that *itself* sets an impact fee condition according to a codified schedule. *See* Br. of Am. Planning Ass'n 16 n.5.

II. NEITHER THE UNCONSTITUTIONAL-CONDITIONS DOCTRINE NOR THE TAKINGS CLAUSE SUPPORTS EXTENDING *NOLLAN/DOLAN* TO THE COUNTY'S FEE

A. The County's Fee Does Not Implicate The Unconstitutional-Conditions Doctrine

Petitioner relies on the unconstitutional-conditions doctrine, arguing that it can be "applied to legislation." Br. 33. He also invokes *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), arguing that "whether a physical taking has occurred" does not depend on which government actor accomplishes the taking. Br. 31. All that misses the point. The question is not whether the doctrine ever applies to legislation involving property (of course it can). The question is whether the unconstitutional-conditions framework fits the type of legislation at issue here.

It does not. The doctrine, as its name suggests, applies only when a *condition*, if imposed directly, would be *unconstitutional*. Because the Takings Clause is not implicated by purely monetary fees unconnected to any property dedications—unlike in *Nollan*, *Dolan*, and *Koontz*—there is no unconstitutional condition.

1. This Court's "special application" of the unconstitutional-conditions doctrine prevents circumvention of the Takings Clause.

As all agree (Pet'r Br. 14), the unconstitutional-conditions doctrine provides that the government may not "deny a benefit to a person on a basis that infringes his constitutionally protected interests"—and thereby "produce a result which [the government] could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The unconstitutional-conditions decisions Petitioner cites all apply that rule. Br. 33-35 (citing, *e.g.*, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (condition would control "private speech"); *Sherbert v. Verner*, 374 U.S. 398, 400 (1963) (condition would control religious practice)).

But the "doctrine does *not* apply" when the condition is one the government *could* "command directly." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1377 n.4 (2018) (emphasis added). That is because the doctrine does not "*define* the content of constitutional liberties," but rather "identifies a characteristic technique by which government *** *burden[s]* those liberties." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1419 (1989) (emphases added).

As previously discussed (pp. 19-21, *supra*), the contours of the unconstitutional-conditions doctrine drove the reasoning in *Nollan*, *Dolan*, and *Koontz*. *Nollan*'s analysis began by assessing whether "there would have been a taking" had California "simply required" the permit condition at issue directly. 483

U.S. at 831. *Dolan* likewise focused on whether the government was "requir[ing] a person to give up a constitutional right—there the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit." 512 U.S. at 385. And *Koontz* reiterated that "[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." 570 U.S. at 612.

In each decision, the Court concluded that the challenged permitting condition satisfied that "predicate." *Nollan* and *Dolan* "involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 547. And *Koontz* addressed a "functionally equivalent" monetary exaction. 570 U.S. at 612. All three conditions thus sought "property for which the Fifth Amendment would otherwise require just compensation"—triggering the need for heightened and individualized scrutiny. *Id.* at 605, 612.

2. The County's impact fee would not be a taking if imposed directly.

Where (as here) a fee is divorced from any demand that a landowner dedicate property to the government, there is no actual or threatened taking on the table; no corresponding potential for circumvention of the right to just compensation; and thus no constitutional basis to apply *Nollan/Dolan*'s unconstitutional-conditions rule.

a. To start, the obligation to pay a fee is not—without more—a taking. An "obligation to perform *** the payment of benefits," which does not "operate upon or alter" a "specific and identified propert[y] or property right[]," is not a taking. *Eastern Enters. v. Apfel*, 524 U.S. 498, 540-541 (1998) (Kennedy, J., concurring in judgment and dissenting in part); *accord id.* at 554-555 (Breyer, J., dissenting). That is why the federal courts of appeals have consistently held that a law that "imposes a general obligation to pay money and does not identify any specific fund of money" adheres to the Takings Clause. *Ballinger v. City of Oakland*, 24 F.4th 1287, 1295 (9th Cir. 2022).

Petitioner offers the facile argument that the government's acquisition of "money" is a taking. But none of the cases Petitioner cites (Br. 12-13) applied such a rule. Several addressed the government's procurement of identifiable funds, which is effectively a "physical taking." *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233, 235 (2003) (lawyers' trust accounts); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 (1998) (same); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (interpleader fund). Similarly, *Armstrong v. United States* addressed the government's seizure of liens that entitled the holder to "resort to the *specific property* for the satisfaction of their claims." 364 U.S. 40, 44 (1960) (emphasis added). At no point did the Court hold (or remotely imply) that all monies, even if related to property, implicate the Takings Clause. *See Ballinger*, 24 F.4th at 1296 ("The money in all those cases was taken from known persons in the form of a specific,

identified property interest to which those persons were already entitled.").

Petitioner's reliance on *Village of Norwood v. Baker*, 172 U.S. 269 (1898), is even more inapt. *Norwood* addressed an attempted evasion of the Takings Clause by a local government that "condemned *** property for a road, paid compensation, then tried to reclaim the money by demanding that [the landowner] pay it back as an alleged assessment on her property." Br. 26 n.9 (citing 172 U.S. at 275-277). Far from suggesting that any property-related fee can be a taking, *Norwood* foreshadowed the anti-circumvention rationale underlying *Nollan*, *Dolan*, and *Koontz*—highlighting the *absence* of any similar circumvention here.

Nothing in *Koontz* suggests that this Court intended to extend the Takings Clause to "money"-based claims bearing no resemblance to *Brown*, *Armstrong*, or *Norwood*. *Koontz* itself involved a fee charged, on an ad-hoc basis, "in lieu" of an easement on Koontz's land. 570 U.S. at 612. It was within that "limited" context—where Koontz was given the choice between surrendering an easement or paying a "substitute" fee—that *Koontz* identified a "*direct link* between the government's demand and a *specific* parcel of real property," and described the fee as bearing "resemblance to" the government "tak[ing] a lien." *Id.* at 612-614 (emphases added).

Without such a link, the unconstitutional-conditions framework would not apply. *Koontz*, 570 U.S. at 613-614. That is why *Koontz* disclaimed application to other "laws and regulations that may

impose financial burdens on property owners." *Id.* at 615; *id.* at 628 (Kagan, J., dissenting). Property "tax[es]" or "assessments" are almost always tied to characteristics of a specific parcel of property, such as its "position, frontage, area, [and] market value." *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 265 (1915). But those general relationships to an individual's property have never been understood to give rise to takings claims. Otherwise, the limitation that the Court unanimously announced in *Koontz* would evaporate.

b. The federal courts of appeals have adhered to the foregoing unconstitutional-conditions principles when assessing the scope of *Nollan*/*Dolan* review. Time and again, the presence or absence of an actual taking—not just some relationship to property—has proven dispositive.

For example, while rejecting a categorical "legislative" exception to *Nollan* and *Dolan*, the Ninth Circuit held that those decisions did not apply to a legislative "requirement to pay tenants a relocation fee before an owner may move back into their home." *Ballinger*, 24 F.4th at 1290, 1297. As Judge Nelson explained, the "starting point" of any *Nollan*/*Dolan* analysis is "whether the substance of the condition *** would be a taking independent of the conditioned benefit." *Id.* at 1290, 1300. But a "relocation fee is not a compensable taking" because it is "a general obligation to pay money." *Id.* at 1295, 1300 (distinguishing *Brown*, *Phillips*, *Webb's Fabulous Pharmacies*, *Armstrong*, and *Koontz*). The fee is "linked to real property" only in the sense that it is "a monetary obligation triggered by a property owner's

actions with respect to the use of their property"; such a "link" is no stronger "than property and estate taxes," among many other examples. *Id.* at 1297. Nor is the fee "functionally equivalent to other types of land use exactions [that] amounted to a taking of an interest in the real property itself." *Id.* (internal quotation marks omitted).[6]

For similar reasons, Petitioner's heavy reliance (Br. 30, 32-33, 43, 44) on the Sixth Circuit's decision in *Knight v. Metropolitan Government of Nashville & Davidson County*, 67 F.4th 816, 829 (6th Cir. 2023), is misplaced. Applying the unconstitutional-conditions framework to a sidewalk ordinance, the Sixth Circuit emphasized that the "first step" is determining "whether the condition would qualify as a taking if the government had directly required it." *Id.* at 825. In *Knight*, that step was satisfied because Nashville required permit applicants to grant an easement, and just like in *Koontz*, the option "to pay *** in-lieu fees" did not change the analysis. *Id.* at 828. But that is not because *Koontz*'s reasoning extends to *all* fees; it is because of "*Koontz*'s logic" "that it would nullify the Takings Clause" if the government could "compel a

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[6] Many state courts have followed the same approach. *See Douglass Props.*, 479 P.3d at 1207 (*Koontz* addressed a fee imposed "in lieu of a *** conservation easement"); *West Linn Corp. Park LLC v. City of W. Linn*, 240 P.3d 29, 44 (Or. 2010) (a "clear distinction [exists] between a requirement that a property owner dedicate property to the public and a requirement that a property owner spend money to mitigate the effects of development"); *see also Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 1000 (differentiating a condition that would require a landowner to "cede a part of her property" from "a fee, a considerably more benign form of regulation").

landowner to either dedicate an easement or pay an [equivalent] amount." *Id.* at 827, 828. The Sixth Circuit expressly distinguished conditions—like the County's fee—that the government "could directly compel," as to which "no takings problem exists." *Id.* at 825-826.

B. The County's Fee Does Not Contravene The Takings Clause's Purpose Of Protecting Individual Landowners From Bearing Unfair Burdens

Petitioner also appeals to the purpose of the Takings Clause (Br. 29-33), which aims to prevent government actions that "for[ce] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Dolan*, 512 U.S. at 384 (quoting *Armstrong*, 364 U.S. at 49). But the uncontroversial proposition that legislation can contravene that purpose (Br. 29), says nothing about whether legislatively imposed development impact fee schedules like the County's do so. They do not.

1. Legislative fee schedules do not present the risks associated with ad-hoc administrative processes.

Nollan/*Dolan*'s rule reflects the risk that individual landowners will bear an unfair share of public burdens when an ad-hoc exaction is imposed on a "specific parcel of land." *Koontz*, 570 U.S. at 604, 613; *see also Dolan*, 512 U.S. at 384. When the government has the discretion to fashion and impose an individualized condition, *see* pp. 27-28, *supra*, it may craft a condition that "coerc[es]" a landowner to relinquish a constitutional right. *Koontz*, 570 U.S. at

604-605. That possibility is heightened in the ad-hoc permitting context, where officials are uniquely positioned to ascertain the "worth" that an individual landowner ascribes to the approval of a permit and extract a dedication of property (or its equivalent) commensurate with that value. *Id.* at 605-606, 612. Such "special, discretionary permit conditions," regardless of whether they consist of "possessory dedications or monetary exactions," carry a heightened risk of unfairness and thus necessitate a heightened constitutional standard. *Ehrlich*, 911 P.2d at 447.

But development impact fees implemented through a legislative schedule or formula are materially different. For one thing, this Court's precedents distinguish between "generally applicable economic regulations" and government actions that "singl[e] out" certain individuals or enterprises. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) (emphasizing how "[a] bill of attainder may affect the life of an individual" and that it is "[i]n this form [that] the power of the legislature *** is expressly restrained"). Those precedents support a distinction between particularized exactions imposed on a "specific parcel of land," *Koontz*, 570 U.S. at 613, and conditions assessed uniformly on groups of similarly situated properties. And they also protect against far-fetched scenarios—like legislation singling out a wealthy developer to fund a town football stadium—which would draw heightened constitutional scrutiny. *See* Pet. App. A-11; *see also San Remo*, 41 P.3d at 104 (distinguishing a "legislative

'class' artificially tailored to encompass *** a single property").

For another, such fees bind the government to consistent methodologies. Doing so removes the opportunity for permitting officials to use their "leverage" to extract valuable conditions from landowners. *Koontz*, 570 U.S. at 605-606. And landowners benefit from up-front clarity about the fees developers will be charged. Br. of Am. Planning Ass'n 14-17; *contra* Br. of U.S. Chamber of Commerce 8-9. Petitioner's circumstances are a perfect example: The County publicly developed and adopted its nondiscretionary fee schedule nearly two years before Petitioner purchased his property and more than four years before he sought to build on it. *See* pp. 10-12, *supra*. As this Court has recognized, such legislation minimizes burdens on property ownership. *See Murr v. Wisconsin*, 582 U.S. 383, 397-398 (2017) (a "reasonable restriction that predates a landowner's acquisition *** can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property").

2. *Legislative impact fees are functionally indistinguishable from other land use measures.*

a. More fundamentally, legislatively adopted development impact fee schedules, like myriad other land use laws and policies, address the broad impacts that various types of properties will have on community infrastructure. And like any number of other fees that governments routinely charge property owners, development impact fees account for those

costs in a programmatic fashion. As this Court already stated (repeatedly), those fees do not warrant heightened scrutiny. *See* pp. 21-22, *supra*; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 340-342 (2002). Neither does the County's fee.

This Court's century-old decisions addressing zoning laws and special property assessments make clear that governments act within the heartland of their authority when regulating land use in a programmatic manner. Zoning legislation, when "drawn in general terms," is no more constitutionally offensive than other generally applicable laws, even if zoning laws do not account for the particulars of each "individual case[]." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-389 (1926); *see also Village of Belle Terres v. Boraas*, 416 U.S. 1, 8 (1974) (upholding zoning regulation while acknowledging that "every line drawn by a legislature leaves some out that might well have been included"). *Village of Euclid* is instructive: allowing governments to enact generally applicable rules across legislatively divided zones was necessary to "provide fire apparatus suitable for the character and intensity of the development in each section" and to "reduc[e] the traffic and resulting confusion in residential sections." 272 U.S. at 394.

Likewise, a government may impose a district-based monetary "exaction" on a class of landowners to pay for public expenses because it is firmly within the "state power" to decide the "rule of apportionment according to which the persons or property taxed share the public burden." *Houck*, 239 U.S. at 264-266. That is true even if those landowners

believe they will "not be benefited" by the public infrastructure at issue. *Id.* at 264. "[T]here is no requirement of the Federal Constitution that for every payment there must be an equal benefit." *Id.* at 265. Such legislative "classification[s]" can be "assailed" only if "palpably arbitrary" and a "flagrant abuse." *Id.* at 262, 265.

The reality is that local governments typically act at a programmatic level to provide and fund critical community services related to public safety, health and welfare, and other vital (and typical) "police power" interests—including when those actions impose financial burdens on classes of landowners. *See, e.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-596 (1962). Rather than tag those actions as constitutionally suspect in view of the Takings Clause's purpose, the Court has recognized that property owners gain an "average reciprocity of advantage" when sharing the burden of complying with programmatic laws. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The same considerations require deference to legislative judgments regarding how to assess development impact fees across classes of similarly situated landowners. New development, like other changes in land use, has cascading effects on the surrounding community. *See Koontz*, 570 U.S. at 605 (acknowledging the public costs "threaten[ed]" by "many proposed land uses"); *Tahoe-Sierra*, 535 U.S. at 307-308 (describing how an "upsurge of development" affects the immediate environment). In addressing those impacts, programmatic decision-making allows governments to rely on "comprehensive land-use

plans, transportation plans, and other detailed studies" to accurately determine the "anticipated pro rata share of the projected cost[s] of system-wide *** improvements," and then to distribute those costs fairly and predictably across new development. Br. of Am. Planning Ass'n 20.

The County's fee exemplifies such programmatic decision-making. The traffic impact fee flows directly from the County's General Plan, which aims to address a wide range of community needs, including those arising from development. AR1448, 1450; *see* pp. 4-5, *supra*. It divides the County into zones based on predictive judgments (supported by evidence) about how development in those areas will affect the County's infrastructure. In those respects, the fee is comparable to zoning regulations and similar land use restrictions generally entrusted to legislative discretion. Br. of Am. Planning Ass'n 26. Indeed, in many counties, development impact fees are functionally intertwined with zoning regulations. *Id.* at 11 (development impact fees "expand the supply of developable property and offer localities the ability to zone more land for development"). For those reasons, *amici*'s effort to minimize *Dolan*'s distinction between legislative and adjudicative decisions is incorrect. *See, e.g.*, Br. of Cal. Bldg. Indus. Ass'n 24-26, Br. of Bldg. Indus. Ass'n of the Greater Valley 10-11.

b. Petitioner and supporting *amici* insist that different rules must apply because the County, instead of levying a property tax or user fee, sought an "exaction" imposed on only those "proposing new development." Br. 13 & n.3, 25, 27; *see also* Br. of Cal. Bldg. Indus. Ass'n 24-27; Br. of Bldg. Indus. Ass'n of

the Greater Valley 10-11. Those distinctions ring hollow.

That Petitioner labels the development impact fee an "exaction" (Br. 28-29), rather than a tax or a user fee, does not matter for constitutional purposes. Nothing in the Takings Clause suggests the relevance of formalistic labels. In *Houck*, this Court upheld a district-based monetary burden imposed to cover the costs of public infrastructure despite calling that burden a "tax," an "assessment[]," *and* an "exaction." 239 U.S. at 265. Elsewhere, the Court has stressed that governments "cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other." *National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012).

Nor does the fact that development impact fees are imposed on "developers," and not all landowners generally (*see, e.g.*, Br. of U.S. Chamber of Commerce 19-20), undermine the deference owed to such legislative judgments. *Tahoe-Sierra* forecloses such an argument. There, the government's development moratorium imposed heightened burdens on property developers, even though all residents may have contributed to the environmental conditions that justified the moratorium. 535 U.S. at 307-308. Recognizing that restrictions on development were simply regulations on the "use" of property, the Court explained that neither the "underlying purpose" of the Takings Clause nor broader "[c]onsiderations of 'fairness and justice'" supported a novel constitutional rule. *Id.* at 323, 332-333 & n.27. The same approach is warranted here, especially as the record firmly and unequivocally ties the County's fees to the added

burdens of new development. *See* pp. 5-11, 13-14, *supra*.

III. PETITIONER'S REQUEST FOR A PARCEL-SPECIFIC RULE MUST BE REJECTED

A. Requiring Individualized Review Of Legislative Fee Schedules Would Be Unworkable

1. Even if *Nollan*, *Dolan*, or *Koontz* were relevant to the County's fee program, those decisions do not mandate the parcel-specific review that Petitioner seeks. The permit conditions in those cases were imposed on individualized, property-specific grounds. *See* pp. 19-21, 27-28, *supra*; *see also Dolan*, 512 U.S. at 388-389. Where the government acts on an individualized basis, any standard for reviewing that action must necessarily apply on an individualized basis as well. *Id.* at 391.

But that construct does not map onto legislatively mandated fee schedules or formulas. The whole point of such legislation is that fees apply to categories of similarly situated properties and not on the basis of a parcel-specific analysis. *See* pp. 38-41, *supra*. Requiring the government to justify each individual fee, based on evidence tailored to specific properties, is doctrinally inconsistent and functionally incompatible with that category-based scheme. *See* Br. of Am. Planning Ass'n 22-23.

2. For similar reasons, requiring a parcel-specific test would effectively sound the death knell for impact fees altogether—as appears to be the very aim of Petitioner's case. *See, e.g.*, Br. of Nat'l Ass'n of

Realtors 8-10; Br. of Cal. Hous. Def. Fund 4-10. In Petitioner's view, any impact fee would have to be calibrated to the specific features of each development project. Br. 3 (seeking differentiated fees based on "size, location," and unspecified "other factors"). It would need to identify the property's "impact to state and local roads" based on the property's unique characteristics (potentially down to details like the number of cars the new home will accommodate or how many people will live there). Br. 6. *Amici* would pile on additional requirements, including that local governments "offset" those impacts by ascertaining and deducting any "new revenue" that housing development might generate. Br. of Cal. Hous. Def. Fund 23-24.

Petitioner's proposed expansion of *Nollan*/*Dolan* would disable governments from relying on "predetermined" (Br. 42) schedules or formulas when allocating the impacts of new development. That would be true even if the government relied on extensive generalized studies to estimate the impact of new development, as the County did here in compliance with state law. *See* pp. 5-11, 13-14, *supra*. Instead, the County would presumably have to conduct an individualized study modeling the traffic impact of not only Petitioner's home but also every other newly developed property. Pet'r Br. 11.

The burdens to local governments from individualized traffic studies and parcel-specific "revenue" modeling are self-evident. At a minimum, the development-permitting process would grind to a halt while planning departments conducted parcel-specific reviews. More likely, most counties

would stop charging development impact fees altogether.

3. Petitioner and supporting *amici* downplay the practical difficulties with a test requiring parcel-specific review: *e.g.*, it "should not be difficult" to satisfy the "nexus and rough proportionality requirements." Br. of Cal. Bldg. Indus. Ass'n 5 (citations and internal quotation marks omitted). But *Dolan* itself belies that assertion. There, the city had made specific findings that Dolan's development "would generate roughly 435 additional [vehicle] trips per day." 512 U.S. at 395. Despite agreeing that a dedication for a "pedestrian/bicycle pathway" would "avoid excessive congestion" from the proposed use, the Court found the city's further finding that the pathway "could offset some of the traffic demand" insufficient. *Id.* (internal quotation marks omitted).

Despite claiming otherwise (Br. 38-42), Petitioner has no meaningful examples of his parcel-specific rule in action. For instance, Petitioner contends that the court in *B.A.M. Development, L.L.C. v. Salt Lake County*, 282 P.3d 41, 43-46 (Utah 2012), applied *Nollan*/*Dolan* review to a "legislatively mandated traffic impact fee." Br. 38. But, as Petitioner admits (Br. 39), that case addressed a permitting authority's "site-specific" imposition of a condition that a landowner "dedicate property" (or pay a corresponding in-lieu fee). Accordingly, *B.A.M.* just resembles *Koontz*, and does not show that legislative fee schedules can be scrutinized on a parcel-specific basis.

Petitioner's other cited cases, addressing conditions "demanding land" "for road widening," are similarly inapposite. Br. 40; *see also Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998) (ad-hoc demand that landowner "dedicate to the city 22 percent of his property to be used for the expansion of an adjacent highway"). And while Petitioner points to the Sixth Circuit's decision in *F.P. Development, LLC v. Charter Township of Canton*, 16 F.4th 198 (6th Cir. 2021), as a case applying individualized review to a "preset fee formula" (Br. 42), Judge Bush's opinion conducted such a review only because both parties requested it. *F.P. Dev.*, 16 F.4th at 206. And in the end, the decision expressly reserved judgment on the "interesting question" of whether such a law even "falls into the category of government action covered by *Nollan*, *Dolan*, and *Koontz*" in the first place. *Id.*

If anything, the cases Petitioner marshals confirm that any *Nollan*/*Dolan* parcel-specific standard cannot apply to broadly applicable development impact fees. The few that have purported to apply some version of *Nollan*/*Dolan*'s "essential nexus" and "rough proportionality" test to similar fees have generally altered that test to apply at a programmatic level. In *Anderson Creek Partners, L.P. v. County of Harnett*, the North Carolina Supreme Court assumed that *Nollan*/*Dolan* scrutiny of a generally applicable water and sewage fee would not be individualized. 876 S.E.2d 476, 500 (N.C. 2022). Similarly, in upholding a city's fee program, the Ohio Supreme Court examined the programmatic features of the city's ordinance and the "methodology" the city used in enacting it. *Home Builders Ass'n of Dayton &*

the Mia. Valley v. City of Beavercreek, 729 N.E.2d 349, 356-358 (Ohio 2000). And where a Texas city—like the County here—rigorously created a "precise mathematical formulation of the impact of development," a state appellate court focused on the broader "projected impact" in rejecting a challenge. *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 97 (Tex. Ct. App. 2013).

Those cases all strongly suggest that parcel-specific review of a fee schedule applicable to categories of similar properties would force a square peg into a round hole. And they directly demonstrate that Petitioner's parcel-specific test would be largely unprecedented.

B. An Expanded Constitutional Rule Is Unnecessary Given Existing Federal And State Safeguards

Even if *Nollan*/*Dolan* were modified to operate at the programmatic level, divorced from its individualized-inquiry underpinnings, that standard would collapse into existing federal and state-law safeguards that already provide substantial protections from overbroad permitting fees. Those existing protections confirm that an extension of *Nollan*/*Dolan* is unnecessary.

1. To start, the federal Constitution already prevents untethered development impact fees. Like other land use regulations, a fee requirement is valid only if it is "a legitimate exercise of the government's police power." *Murr*, 582 U.S. at 400. Any fee that improperly burdens a landowner's right to use property could constitute a regulatory taking under

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) (or a "total" regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Separately, where a legislature, through the imposition of fees, "intentionally treat[s]" a landowner "differently from others similarly situated" with no "rational basis," there may be an Equal Protection Clause violation. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). And if a fee schedule assigns fees based on an "arbitrary and irrational" mechanism, a due process claim would be viable. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *cf.* Br. of Claremont Inst. Ctr. for Const. Juris. 2, 12 (raising "Due Process Clause" argument Petitioner has never advanced).

Given these existing federal constitutional protections, if a local government actually sought to "shift the entire burden of paying for existing and future road needs onto property owners with new projects" (Br. 27), or imposed an unempirical fee (*see* Br. of Citizen Action Def. Fund at 16 (raising the specter of a government enacting a fee schedule with "*zero* data-driven analysis")), developers have adequate legal recourse.

2. Additionally, as the Court recognized in *Koontz*, "state law normally provides an independent check on excessive land use permitting fees." 570 U.S. at 618. Indeed, many states have—through the democratic process—already outlawed Petitioner's asserted parade of horribles. *See, e.g.*, COLO. REV. STAT. § 29-20-104.5(1) ("No impact fee *** shall be imposed except pursuant to a schedule that is *** [i]ntended to defray the projected impacts on capital

facilities caused by proposed development."); N.M. STAT. ANN. § 5-8-5 (impact fees "shall not be imposed or used to pay for *** provi[ding] better service to existing development"); OR. REV. STAT. § 223.307(2) ("The portion of the improvements funded by improvement fees must be related to the need for increased capacity to provide service for future users."); WASH. REV. CODE § 82.02.050(4) (impact fees "[s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development").

California's Mitigation Fee Act (BIO 1-4) is another example. Passed by the state legislature "in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects," *Ehrlich*, 911 P.2d at 436 (citation and internal quotation marks omitted), the Act prohibits counties from using development impact fees to cover "the costs attributable to existing deficiencies in public facilities." CAL. GOV'T CODE § 66001(g). The Act also places various limits on a county's authority to enact a development impact fee program, including that the county must demonstrate a "reasonable relationship" between "the type of development project on which the fee is imposed" and both "the fee's use" and "the need for the public facility." *Id.* § 66001(a).

Those requirements ensure that development impact fees "are limited to the cost of increased services made necessary by virtue of the development," *Boatworks v. City of Alameda*, 247 Cal. Rptr. 3d 159, 166 (Ct. App. 2019) (internal quotation marks omitted). The statutory standards have teeth,

and California courts regularly invalidate non-compliant fees. *See, e.g.*, *id.* at 164 (striking down development impact fee); *Cresta Bella, LP v. Poway Unified Sch. Dist.*, 160 Cal. Rptr. 3d 437, 452-453 (Ct. App. 2013) (invalidating portion of school impact fee); *Home Builders Ass'n of Tulare/Kings Cntys., Inc. v. City of Lemoore*, 112 Cal. Rptr. 3d 7, 23 (Ct. App. 2010) (invalidating portion of fire protection impact fees).

Petitioner sued under the Mitigation Fee Act below, asserting—as he does here (Br. 27)—that the County sought to shift the burden of "existing deficiencies" in the County's traffic infrastructure to him and that the County had an "illegal policy requiring new development to fully fund" public infrastructure. JA-23, 27. Relying on a more than 5,000-page administrative record, both the trial court and court of appeal found otherwise. Pet. App. A-20-27, B-64-65. As the court of appeal observed, the County's fee schedule was premised on data "and studies analyzing the impacts of *contemplated future development* on existing public roadways and the need for new and improved roads *as a result of new development*." Pet. App. A-26 (emphases added). Despite Petitioner's contrary assertions (Br. 29), the Mitigation Fee Act prevented the unfair result that Petitioner claims should drive an expanded constitutional rule. No such expansion is necessary.

CONCLUSION

Under the guise of resolving a "loophole around *Nollan* and *Dolan*" (Br. 44), Petitioner asks this Court to extend parcel-specific review to fees that impair neither the Takings Clause nor its underlying purpose. But the "legislative exception" to *Nollan*/*Dolan* that Petitioner claims to have uncovered is anything but. Under the framework set forth in those decisions, including their express limitations, the County's fee does not warrant heightened constitutional scrutiny. Where a legislature imposes an impact fee on categories of similar properties, pursuant to a schedule and without seeking a dedication of property, *Nollan*/*Dolan*'s heightened standard does not and need not apply.

The Court should affirm the judgment.

Respectfully submitted.

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