No. 22-1074

IN THE
Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,

Respondent.

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

BRIEF OF AMICI CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, AND CALIFORNIA SPECIAL DISTRICTS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE[1]

Amici are groups representing the interests of local government entities tasked with providing public infrastructure, such as the roads, public transit, police and fire, and open space necessary to serve the needs of their communities. Petitioner seeks an interpretation of the Takings Clause of the Fifth Amendment, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) that would heighten the obstacles faced by local governments to fund this infrastructure through development impact fees. Because the Court's decision in this case could have a profound effect on one of the most essential functions of local government, Amici have a strong interest in this case.

This brief is filed on behalf of the following amicus organizations:

- The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to

[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or part, and no party or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission.

counties statewide and has determined that this case is a matter affecting all counties.

- The League of California Cities (Cal Cities) is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.
- The California Special Districts Association (CSDA) is a non-profit corporation with a membership of more than 1,000 special districts throughout California. CSDA was formed to promote good governance and to improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities, including irrigation, water, recreation and park, cemetery, fire protection, police protection, library, utilities, harbor, healthcare, community-service districts, and more. CSDA monitors issues of concern to special districts, identifies those matters that are of statewide significance, and has identified this case as being of statewide significance to special districts.

SUMMARY OF ARGUMENT

State and local governments have the "important responsibilities" of "protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342-43 (2007). These government entities have been tasked by the people to provide streets, street lighting, street cleaning, traffic lights, parking facilities, transit, schools and universities, police and fire protection, building inspection, health inspection, parks and open space, recreation, libraries, healthcare, fresh water, wastewater treatment, solid waste disposal, recycling, storm drainage, electric power, museums, convention centers, sports stadiums, a justice system, and other infrastructure necessary for a safe, prosperous, and well-balanced community.

Without this taxpayer-funded infrastructure, real estate and real estate development projects would have little value. In *Nollan*, this Court held that government cannot require a contribution to public infrastructure in exchange for a permit to develop real estate where the contribution has little or no relationship to the development project. *Nollan* and *Dolan*, however, limited heightened judicial scrutiny to the special case of exactions of interests in real property imposed on individual permit applications. To extend *Nollan* and *Dolan* to development impact fees adopted by legislation would ignore the massive government *givings* to development projects of taxpayer-funded infrastructure. Thus, Petitioner's view of *Nollan* and *Dolan* would allow developers to externalize many of the costs of their development projects, but to internalize the benefits.

Petitioner's view of funding public infrastructure also contradicts fundamental democratic decision-making. With regard to economic and social policymaking, modern democracies rely on average reciprocity of advantage. The principle of average reciprocity of advantage provides that over the long term, each person benefits from the cumulative regulations that burden others, with the result that each individual derives a net benefit from the sum total of government regulation. Under this system, fair distribution of the benefits and burdens of regulation—givings and takings—is achieved by the political branches of government, rather than the courts, through statutes and state common law. In cases of arbitrary regulation, the due process and equal protection clauses provide backstops. There is no place for heightened judicial review of social and economic regulation in such a scheme.

Petitioner's position here stretches *Nollan* to the breaking point. This Court has unanimously held that regulation can effect a taking only if it is the functional equivalent of a direct condemnation, by requiring the owner to submit to a physical occupation by strangers or severely impairing the economic value of the property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). Functional equivalency was an essential element of *Nollan*, where the Court held that a regulation cannot require a developer to dedicate a possessory interest in land to the public as a condition of development approval unless the exaction substantially advances legitimate state interests. The *Nollan* Court interpreted the substantially advance standard to require an essential nexus between the impacts of the project

and the mitigation. Eighteen years after *Nollan*, however, this Court ruled in *Lingle* that the substantially advance test is not a valid takings test because it does not address whether the regulation is the functional equivalent of eminent domain. Accordingly, *Lingle* effectively eliminated the foundation for *Nollan* heightened scrutiny.[2]

Nollan also rested on the notion that compelled dedication of a possessory interest in land, such as an easement, raises heightened concerns that the government is engaging in a physical taking by other means, which could meet the functional equivalency test if the dedication lacked an essential nexus with the impacts of the project. Legislative development impact fees—general obligations to pay money—are not a possessory interest in property. The impact of the fee obligation on the value of the developer's property is also irrelevant under *Nollan*. Accordingly, legislative development impact fees are not the functional equivalent of eminent domain and should not be subject to heightened scrutiny.

A reversal of the decision of the California Court of Appeal would represent a breakdown in the checks and balances embedded in the American system of government. Instead of our elected representatives making social and economic policy, those policies would be made by judges with little accountability to the public. Accordingly, the Court of Appeal decision should be affirmed.

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[2] As demonstrated *infra*, at pp. 25-27, the *Lingle* Court's preservation of *Nollan* and *Dolan* cannot be reconciled with the Court's core holding that there is no place for a means-ends test in regulatory takings doctrine.

ARGUMENT

I. Reading *Nollan* and its progeny to limit the contribution of new development to public infrastructure would unfairly burden the taxpayers, who already provide the infrastructure on which real estate developers rely to profit from their development projects.

Developers leverage taxpayers' investments in existing and future infrastructure to make profits. Petitioner's arguments, however, ignore this economic reality and instead assume that governments only ever *take* from private property owners. Under this view, taxpayers are left to bear the vast majority of costs associated with providing essential infrastructure, while development projects reap disproportionate economic benefits. This outcome is neither fair nor dictated by the Takings Clause.

A. In contemporary society, all property owners reap the advantages of significant governmental "givings."

Much of the jurisprudence involving the Takings Clause presupposes that government interaction with private property is a one-way ratchet. On this view, government only ever *seizes* value from private property owners—it commits "takings." And, when it does, it is obligated to pay just compensation. U.S. Const. amend. V.

But this is just half the story. Virtually everything that local governments do—from enacting and enforcing regulations, to funding and building public

infrastructure—*confers* added value to private property. *See* Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 Cath. U. L. Rev. 721, 732 (1993) ("To a considerable degree, the value of virtually all property held in this country reflects the social presence of our government, its laws and accompanying institutions."). In other words, local governments are constantly extending "givings" to private property owners. *See* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 Yale L.J. 547, 551 (2001). And yet, unlike takings, this reallocation of economic benefit goes largely uncompensated by the relative few who profit most from givings.

Givings take myriad forms. Significantly, private developers are often the indirect beneficiaries when governments develop or expand public infrastructure near their property. *Id.* The availability of this infrastructure substantially increases land and property values. *See id.* at 564; C. Ford Runge, *The Congressional Budget Office's "Regulatory Takings and Proposals for Change": One-Sided and Uninformed* 8-9, 12-15 (1999). Indeed, much private property would have no meaningful economic value absent this government-funded infrastructure. *See* Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 Harv. Envtl. L. Rev. 295, 303-04 (2003).

Givings of public infrastructure can also be more individualized and prospective. This occurs where local government approves real estate development without requiring the project to offset burdens on existing infrastructure, thereby diminishing the value or enjoyment of others' property, draining the public fisc, and degrading environmental resources. Mark

Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Calif. L. Rev. 609, 655 n.225 (2004). In either scenario, the outcome is the same: the property owner receives from the government an economic benefit that is subsidized by the public at large. *See* Bell & Parchomovsky, *supra*, at 554. Accordingly, limiting development impact fees because they may increase the cost of housing, as argued in the Amicus Curiae briefs filed in support of Petitioner by the California Building Industry Association, National Association of Realtors, Citizen Action Defense Fund, and California Housing Defense Fund, would fail to account for the offsetting benefits of taxpayer funded infrastructure that reduce developers' costs to build housing, resulting in lower costs to the buyer or renter.

B. Private developers enjoy a disproportionate share of the benefits associated with taxpayer-funded givings.

Private developers realize substantial economic benefits from taxpayer-funded givings. Whether a local government is financing roads, railways, parks, wastewater systems, or other public amenities, private landowners stand to profit through significantly increased land and property values. *See* Runge, *supra*, at 12 ("Empirical documentation of the net positive impacts of government actions on property values is widespread in the current literature on transportation planning, agricultural policy, and park and 'greenbelt' conservation."). Examples abound:

- The extension of a highway corridor in Austin, Texas, increased the value of lands adjoining the new highway by approximately $50,000 per acre compared to parcels one-half mile away. Brien ten Siethoff & Kara M. Kockelman, *Property Values and Highway Expansions: An Investigation of Timing, Size, Location, and Use Effects* 10 (2002).

- Residential properties within walking distance of light rail stations in Portland, Oregon, enjoyed a 10.6% value premium relative to other residential properties. Musaad A. Al-Mosaind et al., *Light Rail Transit Stations and Property Values: A Hedonic Price Approach*, 1400 Transp. Res. Rec. 90, 93 (1993).

- The value of residential properties bordering a government-designated greenbelt in Boulder, Colorado, were approximately 32% higher than those 3,000 feet away. Mark R. Correll et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 Land Econ. 207, 211 (1978).

Infrastructure-related givings confer especially pronounced benefits on certain classes of private landowners. Owners of undeveloped land in rural and agricultural areas tend to realize "disproportionate financial benefit" from new roads and related infrastructure projects—the very amenities that make their land developable in the first instance. Mark W. Cordes, *Takings, Fairness, and Farmland*

Preservation, 60 Ohio St. L.J. 1033, 1073 (1993) (noting this infrastructure is paid for "primarily by general tax revenues"); *see also* Runge, *supra*, at 8 ("[Although] all of us, including property owners, pay for public facilities and services . . . through taxation[,] . . . it also is true that some citizens, often including owners of undeveloped land, commonly benefit from larger 'givings' than other citizens."); Barnhizer, *supra*, at 324-28, 341 (explaining coastal landowners enjoy "increase[d] floodplain property values" as a result of being able to "externalize the true costs of coastal floodplain development," such as government-funded seawalls and jetties).

The development of the Transbay Transit Center Project in downtown San Francisco offers a powerful illustration of the magnitude of givings that accrue to private developers as a result of government infrastructure spending. The Transit Center Project includes construction of a five-level, multi-modal transit station for bus and rail lines, a public park, new retail space, and a tunnel connecting the Transit Center to the existing rail terminus. Transbay Joint Powers Authority ("TJPA"), *Transbay Transit Center: Key Investment in San Francisco's Future as a World Class City* 2 (Nov. 2013), https://www.tjpa.org/media/30393/download?inline ("*Transbay*"). The approximately $2.3 billion cost of the Transit Center was financed and developed by the Transbay Joint Powers Authority, a local governmental entity. *See ibid.*; TJPA, *Transbay Joint Powers Authority Board of Directors Notice of Meeting and Calendar* 4 (Dec. 14,

2023), https://live-tjpa-2023.pantheonsite.io/media/39197/download?inline.[3]

Economists project that the improved transit access, public spaces, and neighborhood amenities provided by the Transit Center Project will increase the value of private properties located within 0.75 miles of the project by a total of over *$3.9 billion*—a 5% premium on those properties' baseline values. TJPA, *Transbay*, *supra*, at 14. Commercial and residential properties alike would benefit. *Ibid.* (estimating over $2.7 billion in added value would accrue to privately owned commercial properties and over $1.2 billion to private residential properties). The benefits to properties located within 0.25 miles of the Transit Center were even more pronounced, with value premiums ranging from approximately 10 to 11%. *Id.* at 13. The Transit Center Project thus will provide givings to private entities in the form of property value premiums that are even greater than what the government spent to construct the Center. And the $3.9 billion figure does not even account for the broader economic benefits that will arise from the project, such as expansion of the regional labor market, improved travel efficiency, and reductions in greenhouse gas emissions. *See id.* at 17-18.

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[3] The Transit Center, retail space, and park are complete. The rail tunnel component of the Project is still in the planning and funding stages. TJPA, *Downtown Rail Extension (DTX)/The Portal Project Delivery Workplan Schedule* (Dec. 2023), https://www.tjpa.org/media/39207/download?inline.

C. Conditioning development approval on payment of legislative impact fees is a critical mechanism for recouping *some*—though by no means *all*—of the costs associated with givings.

Local governments have long struggled to recoup from those most benefited by tax-funded infrastructure the actual costs of those givings. Rather, the average taxpayer is left with the bill.

On their face, development impact fees—charges levied on new development to offset the incremental costs of providing new or expanded infrastructure to serve that development—are an obvious mechanism to require developer projects to internalize the costs of givings. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 204–10 (2006). Compared to other financing mechanisms or exactions of interests in land, impact fees have the potential to allocate the costs of infrastructure more fairly and efficiently, while providing governments a more flexible and consistent source of funding for capital improvement projects. *Id.* at 209-10.

Petitioner argues that courts should closely scrutinize legislatively adopted development impact fees to guard against fees that are disproportionate to the impact of the development. But, for several reasons, the theoretical promise of development impact fees has never been realized. First, the reach of impact fees is inherently limited. In particular, they offer no opportunity to recover the costs of any *existing* infrastructure support, such as roadways and trunk sewer

lines, which made the land developable in the first place. *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 Ecology L.Q. 187, 234-35 (1997) ("*Leapfrogging*"). Moreover, at best, development impact fees recoup only part of the expenses the surrounding community might incur to provide a giving; they do not address other foregone opportunities to which public funds otherwise could have been devoted, *See* Bell & Parchomovsky, *supra*, at 610.

Second, local governments face structural political hurdles when imposing impact fees. Developers acutely experience the economic advantages of givings, and conversely, any costs of impact fees. Fenster, *supra*, at 655-56. And they hold in their back pocket a constitutional cause of action—the takings claim—that they may brandish if they contend that the local government goes too far. *Id.* By contrast, the costs of givings are spread broadly across timescales and the community at large. *Id.* at 656. This diffuse group also lacks any countervailing constitutional mechanism to challenge government fee-setting that *does not* go *far enough* in recouping the costs of givings. Timothy M. Mulvaney, *Legislative Exactions & Progressive Property*, 40 Harv. Envtl. L. Rev. 137, 158 (2016). Against this backdrop, it is often easier—and politically expedient—for local governments to yield to the interests of givings recipients.

Nollan and its progeny also contributed to this problem. These cases have engendered significant confusion about *what* fees must satisfy the "essential nexus" and "rough proportionality" standards, and *how* local governments can go about satisfying those requirements. *See* Mulvaney, *supra*, at 146-48;

Fenster, *supra*, at 655-61. Confronted with this uncertainty, some local governments intentionally set fees significantly lower than would be necessary to recover the costs of givings, to create a margin of constitutional safety. Fenster, *supra*, at 661. Some do not attempt to recover particular costs of new development, like increased air pollution or habitat destruction, which are significant but difficult to quantify. *Id.* at 657–58. Similarly, the future and cumulative costs of development may go unaddressed. *Id.* at 659–60. And some local governments conclude that the whole enterprise of charging impact fees is not worth the trouble. *See id.* at 661.

The real-world consequence of this confluence of factors is that local governments have been able to rely on development impact fees to fund only a small—albeit important—fraction of their communities' infrastructure needs. For example, in Fiscal Year 2013-2014, impact fees offset only about 8.2% of annual capital improvement expenditures in Portland, Oregon; 2.1% in Los Angeles; and 1.7% in Phoenix.[4]

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[4] *See* Los Angeles City Controller, *City of Los Angeles: Audit of Impact Development Fees* 16, 54–57 (2015), https://wpstaticarchive.lacontroller.io/wp-content/uploads/R16_07_DevelopmtImpactFees.pdf (indicating in Fiscal Year 2013-2014, Los Angeles collected approximately $4.9 million in development impact fees; Phoenix, $20.6 million; and Portland, $31.0 million); City of Portland, Or., *Adopted Budget* 31 (2013), https://www.portlandoregon.gov/cbo/article/456883 (showing capital expenditures totaled approximately $379.7 million in Fiscal Year 2013-2014); City of Phoenix, *The Phoenix Summary Budget* 162 (2013), https://www.phoenix.gov/budgetsite/Documents/lowrescolorwversioncompleteboo.pdf ($1.2 billion); City of Los Angeles, *Budget Summary FY 2013-14*, at 14 (2013), https://cao.lacity.gov/budget/summary/2013-14budgetsummarybooklet.pdf ($229.3 million).

As a percentage of these cities' overall annual spending, development impact fees were even less significant, ranging from approximately 0.9% in Portland to *less than 0.1%* in Los Angeles.[5] Regardless of the proxies used, the basic reality is that the fees local governments impose on private development raise nowhere near the amounts needed to fund the infrastructure on which their developments rely. *See, e.g.*, Rosenberg, *supra*, at 215 (concluding "impact fees only result in the recovery of part of new development-related costs"); Barnhizer, *supra*, at 359 (noting impact fees "would recapture only a small portion of total government flood control givings to floodplain property owners").

D. Uncompensated givings implicate the exact same fairness concerns that have animated the Court's takings doctrine.

The current regime of uncompensated infrastructure givings raises concerns of constitutional magnitude. This Court has long cited "fairness and justice" as the core principles underlying its takings jurisprudence. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (explaining the Takings Clause is "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"); *see also Dolan*, 512 U.S. at 384 (quoting *Armstrong*, 364 U.S. at 49); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978) (same). Within a doctrine

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[5] *See* City of Portland, *supra* note 4, at 27; City of Los Angeles, *supra* note 4, at 10.

where "set formula[s]" have proven elusive and unwise, the question of whether a particular government action crosses constitutional lines has turned largely on the existence of a disproportionate economic impact. *See Penn Cent.*, 438 U.S. at 124.

These same principles dictate that the Constitution cannot tolerate a favored few reaping exclusive economic benefits that "in all fairness and justice" should be spread across the community as a whole. *See* Bell & Parchomovosky, *supra*, at 578 ("Unaccounted-for givings have the potential to create distributive injustice by allowing a select few to benefit disproportionately from the public's limited resources. . . . Distributive justice demands that the government allocate burdens and benefits in accordance with some principle of equity."); Cordes, *Leapfrogging*, *supra*, at 235 ("Any argument for compensation predicated on fairness must account in some fashion for government givings to property owners."). A doctrine that focuses solely on the relative costs and benefits of takings—to the total exclusion of givings—is not a doctrine genuinely concerned with "fairness and justice."

E. For much of its history, this Court acknowledged that average reciprocity of advantage, which accounts for both givings and takings, must inform its analysis of regulatory takings to uphold representative democracy.

This Court's takings jurisprudence has consistently recognized the principle of average reciprocity of advantage:

> While each of us is burdened somewhat by such restrictions [on the use of property], we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) (citations, internal quotes, and footnotes omitted); *see also Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("[A]n average reciprocity of advantage . . . has been recognized as a justification of various laws."); *id.* at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."); *Andrus v. Allard*, 444 U.S. 51, 67 (1979) ("It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure the advantage of living and doing business in a civilized community." (citation and internal quotes omitted)); *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341 (2002) ("[W]ith a moratorium there is a clear 'reciprocity of advantage,' because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted." (citation omitted)).

Balancing givings and takings is implicit in the doctrine of average reciprocity of advantage:

> The Takings Clause has never been read to require the States or the courts to calculate

> whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Keystone, 480 U.S. at 491 n.21; *see also Penn Cent. Transp.*, 438 U.S. at 134-35 (the owner had not been "solely burdened and unbenefited" because "the New York City law applies to vast numbers of structures in the city in addition to the Terminal" and "benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole"); *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) ("In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer."); *San Remo Hotel v. City & County of San Francisco*, 27 Cal. 4th 643, 675-76 (2002) ("[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.").

Average reciprocity of advantage, rather than heightened means-ends review of economic and social policy, is most consistent with separation of powers

and representative democracy. The separation of powers doctrine protects decisions of the legislature from lateral attack by another branch. *Gorieb v. Fox,* 274 U.S. 603, 608 (1927). And it is the legislative and executive branches that hold the authority to make social and economic policy. As this Court has consistently recognized, the Constitution limits the role of the judiciary to restraining the *arbitrary* exercise of this legislative authority. *E.g.*, *Dolan*, 512 U.S. at 391 n.8.

Moreover, to work effectively, a democratic system must allow citizens equal opportunity to control the decision-making agenda. Robert A. Dahl, Democracy and its Critics 112-13 (1989). Each citizen must also possess the right to express preferences for a decision, meaning that each citizen's vote should receive equal weight. *Id.* at 109. Majority rule promotes this self-determination. "[T]he strong principle of majority rule ensures that the greatest possible number of citizens will live under laws they have chosen for themselves." *Id.* at 138.

One of the primary roles of the judiciary is to rein in the excesses of the other branches of government. The judiciary ensures that legislative enactments and executive actions are within the Constitution. Robert A. Dahl, How Democratic is the American Constitution? 153 (2001). The role of the courts in reviewing legislation to protect fundamental liberties is well established. *Id.* When courts venture outside this realm into policy making that does not implicate fundamental rights, however, the courts frustrate democratic ideals. *Id.* at 153-54.

In recognition of these hallmark principles of our democratic system of government, this Court has

consistently limited the authority of judges to interfere with legislative control of purely economic activity, by confining searching judicial review to regulations that affect fundamental rights. *See, e.g.*, *Williamson v. Lee Optical,* 348 U.S. 483, 488-89 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'"); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) ("The Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.").

Determining where, when, and how much public infrastructure must be built—and how it should be financed—is a quintessentially legislative function. In *Lingle*, this Court unanimously reaffirmed that in a representative democracy, courts do not make these social and economic policy decisions:

> [The substantially advances takings test] would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

544 U.S. at 544.

In accordance with the separation of powers and the principle of average reciprocity of advantage, this Court has adopted a deferential standard of judicial review of virtually every type of economic legislation. Average reciprocity of advantage stems from a recognition that government takings are offset by government givings. Accepting Petitioner's invitation to extend *Nollan* and its progeny to legislative development impact fees would ignore average reciprocity of advantage and government givings. Petitioner has presented no principled basis to disregard these fundamental attributes of representative democracy. The standard of judicial review of development impact fees, therefore, should not be the heightened review of *Nollan* and *Dolan*. Rather, it should be similar to the deferential review applied to other economic legislation.

II. Legislative development impact fees are not the functional equivalent of eminent domain and, accordingly, cannot constitute regulatory takings under *Nollan* or any other regulatory takings test.

In addition to subverting fundamental principles of democracy and favoring developers with givings, *Nollan/Dolan* heightened scrutiny of legislative development impact fees cannot be justified under the Takings Clause. A legislative development impact fee bears no resemblance to the exaction of a possessory interest in property found to effect a regulatory taking in *Nollan*. This Court has declared that a regulatory taking must either deprive an owner of a possessory

interest in, or virtually wipe out the economic value of, property. A legislative development impact fee meets neither test. Similar to other economic and social regulation that does not invade private property or impose a severe economic burden on the use of the property, a legislative development impact fee constitutes an ordinary exercise of the police power. As such, it is entitled to deference from the courts rather than heightened judicial review.

A. A regulation can be deemed a taking only if it is the functional equivalent of eminent domain.

The framers understood the Takings Clause to require compensation only in cases of direct condemnation (eminent domain) that physically ousted the owner from the property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (Prior to *Mahon*, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'"); *id*. at 1028 n.15 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all.").

Since *Mahon*, however, this Court has interpreted the Clause to require compensation for government regulation of private property where the regulation is "functionally equivalent" to direct condemnation. *Mahon*, 260 U.S. at 415-16; *Lingle*, 544 U.S. at 539; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985) (court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or

physical possession"), *overruled on other grounds by Knick v. Township of Scott*, 139 S.Ct. 2162 (2019).

Functional equivalency has come to define a narrow category of government regulation. Since *Mahon*, the Court's jurisprudence has identified three basic regulatory takings tests. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court found that a New York City law requiring landlords to allow cable TV providers to cable equipment on their property denied the property owner the right to exclude others from their property, thus effecting a physical taking. 458 U.S. at 435-36.

In *Lucas*, a South Carolina law prevented Lucas from building houses on his beach-front lot to protect against damage caused by extreme weather. 505 U.S. at 1008-09. The Court held that the law wiped out the economic value of Lucas' property and therefore effected a categorical taking requiring compensation. 505 U.S. at 1015-16, 1027-28.

And, in *Penn Central*, the Court identified three factors to determine whether a regulation effects a taking: (1) economic impact, (2) interference with investment-backed expectations, and (3) the character of the regulation. 438 U.S. at 124. The Court applied the three-part test to reject a takings challenge to New York City's historic preservation law, which blocked the construction of a high-rise office building above Grand Central Terminal. *Id.* at 125-35. The *Penn Central* test allows compensation in cases where a regulation does not wipe out of 100% of the value of the property, but comes close. *See Lucas*, 505 U.S. at 1019 n.8.

In remarkably straightforward and sweeping language, a unanimous Court in *Lingle* confined these

regulatory takings tests to the rare set of regulations that are the functional equivalent of eminent domain:

> [T]he[] three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.

Lingle, 544 U.S. at 539.

Lingle also expressly rejected the test announced in *Agins*, that a regulation can effect a taking if it fails to "substantially advance legitimate state interests." *Lingle*, 544 U.S. at 539-40, 542, 544. The Court held that because the substantially advance test is concerned with the purpose and efficacy of a law rather than the impact of the law on the economic value of property, it is properly categorized as a substantive due process test and has no place in takings. *Id*. at 539-40. Accordingly, after decades of regulatory takings decisions, *Lingle* completed the circle begun with *Mahon*. The Court returned its jurisprudence of regulatory takings to the original, limited formulation, restricting compensable regulation to those that are the functional equivalent of eminent domain: either a physical taking or a virtual economic wipe out.

B. Legislative development impact fees do not meet the functional equivalency test for takings.

Because legislative development impact fees are not the functional equivalent of eminent domain, the Court should find that *Nollan* heightened judicial scrutiny is inapplicable to such fees.

1. A development impact fee is not the functional equivalent of eminent domain regardless of whether it substantially advances a legitimate state interest.

In *Lingle*, the Court eliminated a foundational element of *Nollan* heightened scrutiny by finding that the substantially advance test of *Agins* is not a valid takings test. The Court unanimously held that the *Agins* test is a means-ends inquiry rather than an assessment of whether the regulation is the functional equivalent of eminent domain, and therefore has no place in takings jurisprudence. *See supra*, at pp. 23-24. Accordingly, if a development impact fee is challenged as exceeding the cost necessary to mitigate the impacts of a development project, that claim might warrant review under a deferential substantive due process standard. But it should not be subject to heightened judicial review under *Nollan*.

Lingle's conclusion that a means-ends test has no place in regulatory takings should logically have required a reversal of *Nollan*, which is based squarely on the *Agins* means-ends formulation. *See Nollan*,

483 U.S. at 834, 841. The *Lingle* Court nonetheless preserved *Nollan*. Despite *Nollan*'s clear reliance on the substantially advance test to justify heightened judicial scrutiny of compelled dedications of property, the *Lingle* Court denied that *Nollan* depended on the substantially advance formulation. Instead, it cited language from *Dolan* that purported to shift the basis for heightened scrutiny from the substantially advances test to the unconstitutional conditions doctrine. 544 U.S. at 547.

The unconstitutional conditions doctrine provides that government cannot condition a governmental benefit on the recipient's waiver of a constitutional right unrelated to the benefit. *Id*. The *Nollan* majority, however, stated in dicta that "the right to build on one's own property—even though its exercise can be subject to legitimate permitting requirements—cannot remotely be described as a 'government benefit.'" *Nollan*, 483 U.S. at 833-34 n.2. Because the unconstitutional conditions doctrine applies only to the denial of a government benefit, *Nollan* would appear to exclude reliance on the unconstitutional conditions doctrine.

The *Dolan* Court nevertheless invoked the unconstitutional conditions doctrine as the basis for heightened scrutiny, holding that *Nollan* and *Dolan* involved a special application of the doctrine of unconstitutional conditions, which provides that

> the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the

> government where the benefit has little or no relationship to the property.

Dolan, 512 U.S. at 385.

After abolishing the substantially advance test for takings, *Lingle* relied on *Dolan* to transform the basis for the essential nexus test from the substantially advances doctrine to the unconstitutional conditions doctrine, preserving heightened judicial review of dedications. Whether the essential nexus test is based on the substantially advances or unconstitutional conditions doctrines, however, is of no consequence. Both formulations of the *Nollan* essential nexus test rely on the relationship between the means and ends of regulation rather than on whether the regulation is functionally equivalent to expropriation. Accordingly, the essential nexus test should be inapplicable to development impact fees.

2. A development impact fee does not exact a possessory interest in land and thus is not functionally equivalent to eminent domain.

The *Lingle* Court also justified its questionable resuscitation of *Nollan* based on the fact that *Nollan* and *Dolan* both involved the special case of exactions of a possessory interest in land, the equivalent of an eminent domain taking. *Lingle*, 544 U.S. at 539. Indeed, a physical taking was clearly the sine qua non of *Nollan*:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

483 U.S. at 831. The *Nollan* Court emphasized that required dedications of possessory interests in land—physical takings—warrant heightened attention from the courts. *See id.* U.S. at 831-32 (observing that the Court's "permanent physical occupation" cases "uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner").

Nollan further emphasized that the Court was "inclined to be particularly careful" about whether a government action "substantial[ly]" advances" a legitimate state interest where the government conditions a land use approval on the physical dedication of property, "since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Id.* at 841; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (*Dolan*'s rough proportionality test applies in the "the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.").

Lingle provided that despite the demise of the substantially advances takings test, heightened

scrutiny should continue to apply to "demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." 544 U.S. at 546-547. Thus, *Nollan* and *Dolan* continued to be viable after *Lingle* only because "both involved dedications of property so onerous that, outside the exactions context, they would be deemed per se physical takings." *Id*. at 547.

A requirement to pay a fee from general revenue, or any other condition of development approval that does not either require the owner to submit to physical occupation of its property by strangers or virtually wipe out the property's value, is not the functional equivalent of eminent domain. Accordingly, under the essential nexus test the Court adopted in *Nollan*, *Dolan*, and *Lingle*, a generalized obligation to pay a fee should not be deemed a taking, regardless of the fit between the amount of the fee and the cost to address the impacts of the development project.

Nonetheless, in *Koontz v. St. Johns Water Management District*, 570 U.S. 595 (2013), this Court expanded the *Nollan* test to apply to the requirement that a developer pay a mitigation fee as a condition of development approval. 570 U.S. at 612, 619. In doing so, the *Koontz* Court did not suggest that the fee effected a physical taking or that the impact of the fee on the economic value of the underlying property was relevant to the takings analysis. *Koontz* was concerned solely with whether the fee was a close enough fit to the project's impacts. *Id.* at 606. By decoupling the takings inquiry from an analysis of whether the regulation compelled the developer to submit to a physical occupation or wiped out the

economic value of the underlying property, the essential nexus test applied to impact fees has lost its moorings to the Constitution.

In seeking to extend *Nollan/Dolan* heightened scrutiny to a general obligation to pay a fee, the *Koontz* Court labored to equate a fee obligation to a physical taking, to no avail. "[W]e began our analysis in both *Nollan* and *Dolan* by observing that if the government had directly seized the easements it sought to obtain through the permitting process, it would have committed a per se taking." *Koontz*, 570 U.S. at 612. *Koontz* then attempted to distinguish a development impact fee from the obligation imposed on coal mining companies to pay the health care costs of their former employees in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). *Koontz*, 570 U.S. at 613. In his opinion concurring in the judgment in that case, Justice Kennedy joined the four dissenting justices to find that a generalized obligation to pay money did not "operate upon . . . an identified property interest," and thus could not be a regulatory taking. 524 U.S. at 540 (Kennedy, J., concurring); *id*. at 554 (Breyer, J., dissenting) ("The 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property."). Thus, a majority of the Court's justices identified the essential nature of a regulatory taking—that the regulation must be the functional equivalent of eminent domain.

Disregarding this crucial distinction between a regulatory taking and an ordinary exercise of the police power, the *Koontz* Court attempted to differentiate a fee to mitigate loss of wetlands proposed in *Koontz* from the monetary obligation in *Eastern Enterprises* on the basis that it "burdened"

and was "linked" to Koontz's land, which the Court equated to a lien secured by Koontz's property. 570 U.S. at 613-14. The Court held that the fee would "transfer an interest in property from the landowner to the government. For that reason, any such demand would amount to a per se taking similar to the taking of an easement or a lien." *Id.* at 615.

Under *Nollan*, the requirement that an owner dedicate an easement to the public without an essential nexus would constitute a physical taking. A generalized obligation to pay a fee is not remotely like an easement because it is not a possessory interest in that property. Development impact fees do not appropriate, transfer, or encumber an estate in land. *See E. Enters.*, 524 U.S. at 540 (Kennedy, J., concurring); *id.* at 542 (Breyer, J., dissenting) ("The difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending the regulatory takings doctrine to cases lacking this specificity."). Even the plurality in *Eastern Enterprises* agreed that monetary liability "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a **per se** taking." *Id.* at 529-30. As this Court held in *Sperry v. United States*, 493 U.S. 52 (1989): "Unlike real or personal property, money is fungible. . . . If the deduction in this case were a physical occupation, . . . [s]uch a rule would be an extravagant extension of *Loretto*." 493 U.S. at 62 n.9; *see also Concrete Pipe & Prods., Inc v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) (unanimously rejecting

argument that a monetary obligation is a per se taking).[6]

The *Koontz* Court also analogized a generalized obligation to pay money to the taking of money deposited in a bank account or the interest on that account, citing *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). 570 U.S. at 615-16. *Brown* involved a taking by the state bar of interest on discrete client trust accounts held by law firms, which the Court held was the property of the account owner and should be analyzed as a per se taking. 538 U.S. at 220, 235. Both *Webb's* and *Phillips* are cases in which the government took for itself a specific, identifiable fund of private money—the interest income generated by principal held in specific bank accounts. The Court was thus able to draw an analogy between the government action and a confiscation of real property. Impact fees, like the fees and obligations at issue in

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[6] *Koontz*'s dramatic expansion of the definition of property comes dangerously close to imposing heightened judicial scrutiny on any condition of real estate development approval. As Justice Kennedy warned in *Eastern Enterprises*:

> The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects a property interest, it does so in a manner similar to many laws; but until today, none were thought to constitute takings.

524 U.S. at 540 (Kennedy, J., concurring).

Sperry, *Eastern Enterprises*, and *Concrete Pipe* are simply liabilities that can be paid out of a developer's general revenue stream. They are not property. Accordingly, applying *Nollan* heightened scrutiny to legislative impact fees is not the functional equivalent of eminent domain and has no basis in the Court's takings jurisprudence.

CONCLUSION

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

Respectfully submitted,

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