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 CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND ASSOCIATION OF METROPOLITAN WATER AGENCIES IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Clean Water Agencies ("NACWA") is a nonprofit trade association representing nearly 350 municipal clean water agencies that own, operate, and manage publicly-owned treatment works, wastewater and stormwater sewer systems, water reclamation districts, and infrastructure relating to all aspects of wastewater collection, treatment, and disposal. NACWA's members provide wastewater and stormwater services to the majority of the sewered population in the United States.

The Association of Metropolitan Water Agencies ("AMWA") is an organization of the largest publicly-owned drinking water systems in the United States. AMWA's members provide more than 160 million people across the United States with safe drinking water. AMWA's members include municipal agencies, and special purpose districts and commissions serving customers on either a local or regional basis. Some are wholesalers providing water to other utilities, some serve end-use customers directly, and some do both.

Water and wastewater services include both substantial infrastructure and operations elements. Wastewater service infrastructure includes collector sewers within residential neighborhoods and commercial areas, larger sewers that combine wastewaters and in many cases stormwater from multiple areas of collector sewers, pumping stations and force mains, treatment

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[1] No counsel for a party authored this brief in whole or in part, nor has such counsel or any party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than *amici* and their members have made a monetary contribution to the preparation and submission of this brief.

facilities, and often reuse or other specialized facilities. Drinking water service infrastructure is similarly complex, including lakes, reservoirs, dams, and other impoundments; intake pipes, tunnels, aqueducts, and other conveyances to move water from both surface and groundwater sources; treatment facilities to meet public health standards; and delivery systems that distribute treated water to residential and commercial customers.

Drinking water, wastewater, and stormwater facilities are sophisticated systems that are expensive to construct, operate, and maintain, and put substantial financial obligations on their public municipal owners and the millions of people they serve. To meet these needs, municipalities collect fees from customers through legislative or other governmentally authorized mandates. These fees are generally applicable to a broad base of property owners in a geographic area and formulaically calculated according to predetermined criteria. The most common type of fee for water, stormwater, and wastewater services is the user fee, which is associated with the contemporaneous provision and use of water and sewer service to an individual household, place of business, or multi-family dwelling. Customers typically pay a fee to cover the initial cost to connect to the water or sewer system and regular (e.g., monthly, quarterly, etc.) fees that cover the cost of the service provided by the utility.

While effective at collecting revenue for the direct costs of water services, user fees do not recoup the capital costs of additional infrastructure construction and maintenance or upgrades needed to service new developments. To this end, one of the most effective, fair, and equitable growth-management tools available to these public-serving utilities is a new customer impact fee. Impact fees (sometimes called development fees) are

monetary charges that allow a municipal water or wastewater system owner to assess from a developer a charge for existing or planned water and sewer infrastructure that will be required for and used by the new development. Those fees recover funds that the municipality has incurred or will incur for the infrastructure. Absent that recovery, the municipality's other customers would bear the developer's fair costs for the services to be provided to the influx of new customers through the imposition of increased rates.

At their core, water, wastewater, and stormwater user fees and impact fees are fees charged to the users of public services to cover the costs of providing those services. While this Court squarely held in *Koontz* v. *St. Johns River Water Management District*, 570 U.S. 595, 615 (2013), that user fees and similar laws that may impose financial burdens on property owners are not takings, it has not had the chance to directly address whether impact fees are takings. This case presents that opportunity. These formulaic and generally applicable fees, which do not seek to burden or appropriate any specific parcel of property, often go toward financing the construction and upgrades of critical water and wastewater infrastructure and otherwise mitigating the impacts on these complex and costly systems caused by new development.

NACWA and AMWA submit this brief to urge this Court to reaffirm its holding in *Koontz* that user fees and similar financial burdens are not takings and clarify that this rule includes fees such as water and wastewater impact fees. Such a ruling would preserve the ability of municipalities to impose fees essential to the provision of water and wastewater services to communities nationwide and give much needed certainty in this area after *Koontz*.

Should, however, this Court conclude that such fees can qualify as takings, *amici* ask this Court to hold, as the California Court of Appeal did, that the requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), do not extend to legislatively mandated monetary fees that are generally applicable to a broad class of property owners. Instead, those standards apply only to monetary land-use exactions imposed *ad hoc* on an individual and discretionary basis. Such a holding could help provide municipalities and *amici*'s members with the clarity they need to serve their customers and communities.

SUMMARY OF ARGUMENT

Safe and reliable water and wastewater services are vital to the health and well-being of every community. To be able to provide these critical services while keeping rates affordable, public drinking water, wastewater, and stormwater utilities often rely heavily on both user and impact fees.

User fees are a simple way for public utilities to recoup the regular costs of maintaining and operating the critical infrastructure necessary to provide essential health and environmental services. Additional funds are needed, however, to construct new infrastructure or upgrade and maintain existing infrastructure to accommodate new, additional users. To recoup the capital spent and debt incurred building such new infrastructure, municipalities often collect impact fees when new development occurs. These fees are generally applicable to a broad base of property owners in a geographic area and formulaically calculated according to predetermined criteria. They do not seek to burden or appropriate any specific property interest. Instead, they are a mere monetary obligation,

triggered by a property owner's new development, to offset the costs of providing a public service.

The financial needs of the U.S. water and wastewater sectors are no secret. One Government Accountability Office report from 2013 found that the gap between projected infrastructure needs and federal funding available was almost $335 billion for drinking water and $298 billion for wastewater. Government Accountability Office, *Water Infrastructure: Approaches and Issues for Financing Drinking Water and Wastewater Infrastructure* at 1 (Mar. 13, 2013).[2] Those funding gaps have only grown over the past decade despite efforts by the federal government to provide additional resources. Impact fees provide one means by which utilities can try to bridge that gap in a manner that places the onus of paying for the strain new development puts on wastewater and drinking water systems on new developers, and not on existing users who are often already struggling to pay the bills. A decision by this Court that deems such fees to be takings subject to the tests set forth in *Nollan* and *Dolan* could inflict great practical harm on municipalities' ability to operate and construct this infrastructure in their communities.

Fortunately, this Court has made clear that user fees are not takings. Its caselaw for over a century has held that reimbursing the government for the cost of providing a public service is not compensable under the Fifth Amendment because the payor receives benefits in exchange.

Petitioner acknowledges this well-settled caselaw but maintains that impact fees should not fall under this rule.

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[2] https://www.gao.gov/assets/gao-13-451t.pdf.

The Court should reject that proposition. First, impact fees have the same function as user fees. These fees all reimburse the government for providing a service and for the costs—both short-term and long-term—of doing so. They operate no differently than other sorts of revenue-raising mechanisms widely recognized as permissible non-takings. Second, impact fees do not demand an interest in real property. Under *Koontz*, a demand for a real property interest and a demand for a payment equal to the value of the desired interest are both treated as takings. But impact fees demand nothing of the sort. They simply require users and developers to defray the costs of the public services they receive.

Because these types of fees are not takings, they cannot constitute an exaction that imposes an unconstitutional condition on the property owner. The Court should therefore reaffirm its holding in *Koontz* that user fees and similar laws are not takings and clarify that this rule includes impact fees (including those charged by public water and wastewater utilities).

Even if the Court determines that impact fees can qualify as takings, they should not be subject to the standard of *Nollan* and *Dolan*. The California Court of Appeal properly held that the heightened scrutiny for development exactions established in *Nollan* and *Dolan* does not apply to these sorts of fees, but instead applies only to fees imposed on an individual and discretionary basis. This rule holds especially true for impact fees for water and wastewater services. The "fulcrum" on which *Koontz* turned and that required the Court to apply the *Nollan* and *Dolan* standard to a monetary exaction was the "direct link" between the government's demand and a specific parcel of real property. 570 U.S. at 614. But generally applicable and formulaic fees imposed by

legislation do not target a specific parcel of real property. Water- and wastewater-service impact fees, for example, do not seek to burden or appropriate any specific real property interest. They simply seek a monetary recovery of the costs incurred in building necessary infrastructure in advance of the new development.

This Court should affirm the judgment below.

ARGUMENT

I. USER AND IMPACT FEES ARE ESSENTIAL TO THE PROVISION OF PUBLIC CLEAN WATER AND DRINKING WATER SERVICES

Water and wastewater infrastructure is critical to human health, the environment, and the economy. But it does not come cheap: its construction, operation, and maintenance require significant public investment. With user fees, covering the costs of operating this infrastructure is straightforward. A regular (e.g., monthly, quarterly, etc.) fee approximates the cost of the service provided, while an initial connection fee approximates the cost of connecting the user to the utility system.

However, procuring the funds needed for construction of new infrastructure or upgrading existing infrastructure to be able to accommodate new, additional users is more challenging. Water and wastewater infrastructure projects have long-term planning horizons typically requiring that capacity be built ahead of the development that will use that new, additional capacity. New infrastructure and infrastructure upgrades may be paid for as the work is being done, utilizing user, connection, and impact fees, along with other sources of utility revenue (e.g., industrial user high-strength waste fees). More typically, however, and given the large size of many

of these projects, public utilities finance them—in whole or in part—by incurring long-term debt obligations such as loans or bonds. The costs of those obligations, including financing costs such as interest payments, must then be recovered and paid back over time using utility revenues, some of which are generated through impact fees paid to the municipality by new developments. Thus, impact fees are an essential part of a public utility's revenue and play a critical role in capital-recovery for the costs of long-term planning required for water and wastewater infrastructure. Without these fees, existing customers, many of whom already face significant affordability challenges, would have to subsidize new developments through increased user fees, instead of requiring new developments to cover their fair share of the cost.

These water- and wastewater-service impact fees are often imposed through legislative or other governmentally authorized mandates. They are generally applicable to a broad base of property owners in a geographic area, and formulaically calculated according to predetermined criteria. In short, they are a monetary obligation to help defray the costs imposed on public infrastructure by new development which are triggered by a property owner's new development. They do not (nor are they intended to) demand an interest in the owner's real property.

The financial issues posed by funding the nation's growing infrastructure needs are very significant for NACWA's and AMWA's members. The Environmental Protection Agency ("EPA") documented, in the most recent survey available, a nationwide need for $271 billion in new capital projects for wastewater systems. EPA, *Clean Watersheds Needs Survey – 2012 Report to*

Congress at 6 (2016).[3] Of the nationwide total, $52 billion represents public agency secondary wastewater treatment needs, the basic level of wastewater treatment required for all public agencies; $50 billion for new advanced wastewater treatment, addressing among other priorities reduction of wastewater nutrients and toxics, including emerging pollutant issues; and $45 billion in new conveyance systems, sewers, and pumping stations. *Id.* at 13, 15, 17, C-1.

For drinking water system capital projects, the situation is even more dire. In 2023, EPA estimated a need of $625 billion for pipe replacement, treatment plant upgrades, storage tanks, and other key assets. EPA, *Drinking Water Infrastructure Needs Survey and Assessment – 7th Report to Congress* at 9 (2023).[4] Approximately $421 billion is needed to replace or rehabilitate aging pipelines, and $55.3 billion is needed to construct, rehabilitate, or cover water storage reservoirs. *Id*. at 10. These costs associated with providing water and sewer services for both existing and new development underscore the critical role impact fees play for *amici*'s members.

Given the importance of impact fees to the growth, maintenance, and operation of the nation's drinking water, stormwater, and sewage systems, a decision by this Court holding that they are takings could "threaten[] significant practical harm" to local governments and public utility services. *Koontz*, 570 U.S. at 626 (Kagan, J., dissenting). Like user fees, impact fees are not Fifth-Amendment

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[3] https://www.epa.gov/sites/default/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf.

[4] https://www.epa.gov/system/files/documents/2023-09/Seventh%20DWINSA_September2023_Final.pdf.

takings at all because, far from demanding an interest in land, they merely require property owners to contribute to the cost of expanding a public service that they wish to use. See *infra* pp. 12-15. A contrary holding that these impact fees are subject to the requirements of *Nollan* and *Dolan* could jeopardize the ability of local governments to impose the sort of fees necessary to support vital public health and environmental services like the provision of safe, reliable drinking water and sanitation. See *Koontz*, 570 U.S. at 626-627 (Kagan, J., dissenting) (detailing types of permitting fees that could be impacted by *Nollan* and *Dolan* standard).

Requiring impact fees to meet the heightened *Nollan* and *Dolan* standard means "the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly." *Id.* at 627; see also *Anderson Creek Partners, L.P.* v. *Cnty. of Harnett*, 876 S.E.2d 476, 507 (N.C. 2022) (Earls, J., dissenting) (explaining that treating a "generally applicable impact fee" for water and sewer services as a "monetary exaction subject to the unconstitutional conditions doctrine" would "engender frequent litigation and may ultimately diminish the capacity of municipalities to recoup fees to offset the costs of maintaining vital public infrastructure for the public's benefit"). *Amici* ask the Court to take this opportunity to avert these potentially devastating consequences for communities nationwide by clarifying that routine water and wastewater impact fees, like user fees, are not takings.

II. IMPACT FEES, LIKE USER FEES, DO NOT TRIGGER TAKINGS CLAUSE SCRUTINY

The basis of the unconstitutional-conditions doctrine is that the government cannot coerce a person into giving up

an enumerated right. *Koontz*, 570 U.S. at 604. In the land-use context, the doctrine has been held to apply where the government conditions a permit necessary to develop property on the owner ceding an interest in that property to the government or, in lieu of that real property interest, paying a "monetary exaction." *Id.* at 612. As Petitioner acknowledges, Pet. Br. 13 n.3, this Court has already squarely held that user fees do not fall within this category and are not takings. *Amici* urge this Court to reaffirm its rule that user fees are not takings and clarify that impact fees follow the same rule. Impact fees serve the same function as user fees, and like user fees, they do not target or burden any specific property interest but instead offset a portion of the cost of providing and expanding infrastructure to new users and developments. Because none of these fees constitutes a taking, the unconstitutional-conditions doctrine does not apply.

"It is beyond dispute that taxes and user fees are not takings." *Koontz*, 570 U.S. at 615 (cleaned up). That is because such fees are "imposed for the reimbursement of the cost of government services." *United States* v. *Sperry Corp.*, 493 U.S. 52, 63 (1989) (holding that a fee required to be paid to the federal government from an award recovered before the Iran-United States Claims Tribunal was a permissible user fee rather than an uncompensated taking). "A governmental body has an obvious interest in making those who specifically benefit from its services pay the cost," and the provision of those benefits "justif[ies] the imposition of a reasonable user fee." *Id.* at 63-64. This Court recognized in *Koontz* that "[its] cases have been clear on that point" for over a century, and emphasized that its decision in that case "d[id] not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial

burdens on property owners." 570 U.S. at 615 (collecting cases). Thus, the baseline rule is that "the obligation to pay money in the tax and government services user fee context is not generally compensable under the Fifth Amendment because taxes and user fees are collected in exchange for government benefits to the payor." *Ballinger* v. *City of Oakland*, 24 F.4th 1287, 1296 (9th Cir. 2022), cert. denied sub nom. *Ballinger* v. *City of Oakland, California*, 142 S. Ct. 2777 (2022).

While Petitioner acknowledges the well-settled rule that taxes and user fees are not takings, Pet. Br. 13 n.3 (citing *Koontz*, 570 U.S. at 615), Petitioner contends that this rule is inapplicable to an impact fee assessed to mitigate the effects of a new development. *Ibid.*; see also *id.* at 25-27. Petitioner is wrong: impact fees should receive the same treatment as user fees because they function to reimburse the government for providing a service that the payee intends to avail himself of, and do not demand an interest in real property.

First, impact fees have the same function as user fees. Impact fees lack any meaningful economic difference from user fees and permissible forms of taxation. Because they are "intended to reimburse the [government] for its costs in connection with" providing a service, they are not takings. See *Sperry Corp.*, 493 U.S. at 60. For example, water and wastewater system user fees and impact fees all go toward reimbursing local governments for the costs of providing a critical service to the property owner: they both pay for the contemporaneous provision of clean water and sanitation, and defray the costs of expanding and otherwise developing the water and wastewater systems. In short, these fees cover the short- and long-term costs of those public services.

A comparison to the monetary exaction in *Koontz* makes clear that such impact fees do not implicate the unconstitutional-conditions doctrine. The monetary exaction sought in *Koontz* was not levied to offset the costs of any particular service provided to the landowner. 570 U.S. at 600-602. Instead, the Court held that the monetary exaction was the price of obtaining the right to build. *Id.* at 602. In contrast, impact fees ask that developers pay an amount of money to offset the costs of providing a particular public service to them.

Additionally, an impact fee operates no differently than other sorts of revenue-raising mechanisms widely accepted as permissible non-takings. Impact fees resemble commonplace taxes on new developments that are calculated according to preestablished legislative formulae, such as the size of the development. *Ehrlich* v. *City of Culver City*, 911 P.2d 429, 457 (Cal. 1996) (Mosk, J., concurring). Courts have always given "considerable discretion" to municipalities to impose these fees and routinely uphold them against takings and related challenges. *Ibid.*; see also *Sperry Corp.*, 493 U.S. at 60-62 (explaining that the government is afforded wide latitude to compute the amount of the user fee). If such a fee is permissible when directly imposed, the level of constitutional scrutiny should not change simply because of how it is collected. *Ehrlich*, 911 P.2d at 455 (Mosk, J., concurring).

Second, impact fees do not demand an interest in real property and therefore do not trigger the Takings Clause. This Court held for the first time in *Koontz* that the unconstitutional-conditions doctrine may apply to the government's demand for monetary payment of a fee. 570 U.S. at 612. The Court reasoned that a choice between dedicating an easement and being unable to develop

property was not meaningfully different from the choice between dedicating an easement or paying money equivalent to the easement's value and being unable to develop the property. *Ibid.* ("[A] permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value.").

The "fulcrum" on which *Koontz* turned was "the direct link between the government's demand and a specific parcel of real property." *Id.* at 614. The Court held that the municipality had demanded an easement or its monetary equivalent, and the monetary demand was therefore a particularized burden on a specific parcel of land. *Id.* at 613-614. When government makes such a demand, it is the equivalent of commanding the relinquishment of a specific, identifiable property interest. *Id.* at 614. Because "the monetary obligation burdened petitioner's ownership of a specific parcel of land," *Koontz* "[bore] resemblance to [the Court's] cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property." *Id.* at 613.

No such direct link exists between the government's demand for money in the form of an impact fee related to a public service and the owner's real property. Water- and wastewater-service impact fees demonstrate this well. Of course, an impact fee "is linked to real property, but no more so than property and estate taxes." *Ballinger*, 24 F.4th at 1297 (holding that municipality's requirement that landlord pay to tenant a relocation fee before moving back into property upon expiration of lease was not a taking). Rather than demand an interest in the land itself, impact fees require only that a property owner defray the costs of a public utility's provision of a service to his

development on that land. Unlike the monetary exaction at issue in *Koontz*, "there is no demand for an interest in land lurking behind the [municipality's] requirement that the developers help defray the cost of the public service they wish to obtain." *Anderson Creek Partners*, 876 S.E.2d at 508 (Earls, J., dissenting).

In short, impact fees are merely "a monetary obligation triggered by a property owner's actions with respect to the use of their property, not a burden on the property owner's interest in the property," *Ballinger*, 24 F.4th at 1297, and they bear no resemblance to the sort of takings-disguised-as-monetary-payments animating the Court's reasoning in *Koontz*. See *Ehrlich*, 911 P.2d at 454 (Mosk, J., concurring) (comparing impact fees to land use regulations since neither involves "a physical invasion of property" and reasoning that "[a]s such, development fees may be placed in a class not only with such land use regulations, but also with other sorts of economic regulations" that merely affect the profit or value derived from property). Contrary to Petitioner's contentions, impact fees, especially for water and wastewater systems, fall squarely within *Koontz*'s rule that "user fees[] and similar laws and regulations that may impose financial burdens on property owners" are not takings. 570 U.S. at 615.

Because these fees are not takings, the unconstitutional-conditions doctrine of *Nollan* and *Dolan* cannot apply. *Id.* at 612 ("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.").

* * *

In sum, the Court should reaffirm its holding in *Koontz* that user fees and similar laws are not takings and clarify that this rule includes impact fees.

III. EVEN IF IMPACT FEES COULD EFFECT TAKINGS, THEY SHOULD NOT BE SUBJECT TO THE STANDARD OF *NOLLAN* AND *DOLAN*

Fees related to the provision of drinking water and wastewater services are generally and ministerially applied and often imposed through legislative mandates. As the California Court of Appeal held below, "the requirements of *Nollan* and *Dolan* apply to development fees imposed as a condition of permit approval where such fees are imposed neither generally nor ministerially, but on an individual and discretionary basis." Pet. App. A-10-A-11 (cleaned up). "The requirements of *Nollan* and *Dolan*, however, do not extend to development fees that are generally applicable to a broad class of property owners through legislative action." *Id.* at A-11. "[L]egislatively prescribed monetary fees—as distinguished from a monetary condition imposed on an individual permit application on an ad hoc basis—that are imposed as a condition of development are not subject to the *Nollan/Dolan* test." *Ibid.* (citation and internal quotation marks omitted).

The California Court of Appeal's decision was correct, and it holds especially true for impact fees for water and wastewater services. The "fulcrum" on which *Koontz* turned was "the direct link between the government's demand and a specific parcel of real property." 570 U.S. at 614. Generally applicable and formulaic fees imposed by legislation simply do not target "a specific parcel of real property." *Ibid.* To the extent property is involved in the

fee, there is no meaningful relationship between the fee and the property. Water- and wastewater-service impact fees do not seek to burden or appropriate any specific real property interest. They simply seek a monetary recovery of the costs incurred in building necessary infrastructure in advance of the new development.

"[M]erely because a property owner can recast his challenge to a fee as a takings claim, asserting that he was being asked to pay for a disproportionate share of public improvements or services in exchange for a development permit," should not dictate the legal standard applied. *Ehrlich*, 911 P.2d at 457 (Mosk, J., concurring). Such fees and tax schemes have always received deferential review. *Id.* at 457-458. "This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *Sperry Corp.*, 493 U.S. at 60. "All that we have required is that the user fee be a fair approximation of the cost of benefits supplied." *Ibid.* (citation and internal quotation marks omitted).

In sum, ordinary economic legislation with general and formulaic application should not receive the same scrutiny as *ad hoc* determinations made with unbridled discretion. Heightened scrutiny is necessary for the latter, but relaxed review suffices for the former in light of the ordinary restraints inherent in the democratic political process. See Resp. Br. 36-38. Should this Court determine that impact fees can in certain circumstances rise to the level of a taking, it should clarify that *Nollan/Dolan* scrutiny does not apply.

CONCLUSION

For the foregoing reasons, this Court should reaffirm its holding in *Koontz* that user fees are not takings and clarify that this rule encompasses impact fees, including

public drinking water, wastewater, and stormwater impact fees. Should the Court determine that impact fees may constitute takings, it should also hold that the requirements of *Nollan* and *Dolan* do not extend to fees that are generally applicable to a broad class of property owners through legislative action. This Court should affirm the judgment below.

Respectfully submitted,

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