No. 22-1074

IN THE

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO,

Respondent.

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

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BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE PUBLIC INTEREST LAW PROJECT IN SUPPORT OF RESPONDENT

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December 20, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee")[2] is a nonprofit civil rights organization founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to secure equal justice for all through the rule of law, targeting the inequities confronting Black Americans and other people of color. The Lawyers' Committee uses legal advocacy to achieve racial justice to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee has advocated for policies that foster inclusive, integrated communities that are free from discrimination and that provide access to opportunity for all of their residents, including for Black families that have been subjected to a litany of discriminatory housing policies. The Lawyers' Committee has worked extensively with local governments, private fair housing nonprofits, and community organizing groups to lift up inclusionary zoning as a model policy for achieving that vision. The Lawyers' Committee has an interest in this case because a decision in favor of Petitioner would make it significantly more difficult and cost-intensive for state

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission.

[2] The Lawyers' Committee includes the following independent affiliates: The Washington Lawyers' Committee for Civil Rights and Urban Affairs; Lawyers for Civil Rights; The Chicago Lawyers' Committee for Civil Rights Under Law, Inc.; Colorado Lawyers' Committee; Mississippi Center for Justice; Public Counsel, Los Angeles, California; The Public Interest Law Center; and Lawyers' Committee for Civil Rights of the San Francisco Bay Area.

and local governments to use their police powers to promote affordable housing development through legislatively imposed impact or linkage fees and could deter the adoption of inclusionary zoning by creating confusion and the unwarranted perception of litigation risk.

The Public Interest Law Project (PILP) is a nonprofit support center for California legal services and other public interest law programs, providing training, research, and litigation and advocacy support on law and policy issues related to housing, public benefits, homelessness, anti-displacement, fair housing, and other civil and economic rights. Founded in 1996 to preserve the capacity of legal services organizations to represent lower income persons and people of color engaging in affirmative litigation and advocacy, it has remained steadfast in its mission ever since. PILP attorneys were co-counsel representing intervening parties in defense of San Jose's inclusionary zoning ordinance in *Cal. Bldg. Ind. Ass'n v. City of San Jose*, 61 Cal. 4th 435 (Cal. 2015), cert denied, 577 U.S. 1179, 136 S. Ct. 928, 194 L. Ed. 2d 239 (2016). It also has represented intervenors in the successful defense of other California local inclusionary housing requirements and has conducted trainings not only for legal services attorneys, but also for local government and community based groups.

SUMMARY OF ARGUMENT

Since deciding *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court has curtailed the ability of state and local administrative agencies to obtain dedications and exactions from property owners in exchange for permits that the government has the power to withhold. *See also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). It did so

by requiring – in each instance, in a case involving conditions imposed by administrative agencies – that the government demonstrate that there is an essential nexus between the impact of a proposed land use and the condition imposed, *Nollan*, 483 U.S. at 837, and that the scale of the condition be roughly proportional to that impact. *Dolan*, 512 U.S. at 391. These doctrinal constraints respond to real concerns about governmental actors using the leverage to withhold administrative approvals unless property owners agree to pay for or directly provide public goods, the responsibility for which should fall on the entire public. However, extending the application of the essential nexus and rough proportionality tests beyond the contexts in which they have been applied and in situations that do not raise concerns about governmental misuse of such leverage risks significant unintended consequences and lacks any constitutional basis, without any countervailing benefit. Among the types of policies that could be thrown into legal uncertainty if this Court decides to expand the reach of these tests are policies that state and local governments often use to foster the development of affordable housing in an equitable and inclusive way.

This case involves legislatively enacted impact fees that require property owners to mitigate the effects of their proposed land uses on traffic and road usage. *Sheetz v. County of El Dorado*, 84 Cal. App. 5th 394, 401-02 (Cal. Ct. App. 2022). Many municipalities impose similarly structured fees with the goal of offsetting the ways in which new residential and commercial development can increase the need for affordable housing. *Linkage Fees/Affordable Housing Impact Fees*, Local Housing Solutions (last visited Dec. 15, 2023), https://localhousingsolutions.org/housing-policy-library/linkage-fees-affordable-housing-impact-

fees/. These types of fees – whether mitigating the impact of development on affordable housing need or on traffic – do not risk the potential coercion that animated the Court in *Nollan*, *Dolan*, and *Koontz*. That is true because of some of the hallmarks of the legislative process: the lack of individual discretion on the part of decisionmakers, the transparency built into legislative bodies' deliberations, and the broad and prospective nature of legislatively imposed requirements.

These factors illustrate the lack of need for more intensive scrutiny of affordable housing fees and inclusionary zoning requirements whereby state or local governments require developers to make a portion of units in new residential developments affordable to low- and/or moderate-income households, but it is equally important to note the potential harms of applying the essential nexus and rough proportionality tests in more contexts. Setting aside whether any particular socially valuable policy would survive those tests, subjecting such policies to the tests would increase administrative costs for both state and local governments and application and pre-application costs for property owners, incentivize some governments to adopt restrictive policies that impede growth, and incentivize other governments to allow growth to occur without any consideration given to mitigating negative externalities. Outcomes like these are at odds with this Court's reasoning in *Dolan*, in particular.

And policies like legislatively enacted affordable housing fees and inclusionary zoning are indeed socially valuable. In the face of an affordable housing crisis, such policies help remedy a litany of harms that hit Black households especially hard, a result that is but one long-term consequence of this Nation's legacy of de jure segregation. State and local governments have

both legal and moral obligations to address both the present crisis and its historical roots, and inclusionary zoning and affordable housing fees are invaluable arrows in their quiver as they seek to do so. In places where inclusionary zoning, in particular, has been implemented, the policy has fostered more integrated communities and boosted educational achievement.

It is important to note that a decision from this Court holding that legislation setting impact fees and exactions are subject to the essential nexus and rough proportionality tests would not and should not mean that legislation regulating aspects of land use including density and affordability is subject to those tests, notwithstanding representations to the contrary from *amici* in support of Petitioner. *See* Br. of *Amici Curiae* Bldg. Ass'n of the Greater Valley et al. at 12-13. That is the case because, regardless of whether the tests apply to legislatively imposed impact fees and exactions, they still only apply to policies that would constitute Takings if imposed directly, outside of the conditional context, and, as a land use regulation subject to the Court's test from *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), courts have generally held that inclusionary zoning is not a taking when imposed directly. *Cal. Bldg. Ind. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 466-69 (Cal. 2015). Despite that fact, a holding that legislative conditions are not subject to the essential nexus and rough proportionality tests would be valuable to municipalities considering the enactment of inclusionary zoning ordinances because it would deter the filing of lawsuits that are burdensome to defend.

Because of the safeguards in the legislative process that ensure that legislative conditions on development do not run the risk of coercion and because of the

immense social value of legislative conditions relating to affordable housing, the Court should affirm the judgment of the California Court of Appeals and hold that legislative conditions are not subject to the essential nexus and rough proportionality tests.

ARGUMENT

I. Inclusionary zoning and affordable housing impact fees are critical to efforts to address the nationwide affordable housing crisis in a way that remedies the lingering effects of de jure segregation.

A. The affordable housing crisis is inflicting significant harm on low-income households, in general, and low-income Black households, in particular.

The United States is in the midst of a prolonged affordable housing crisis that is exacting devastating consequences on low-, moderate-, and even middle-income households. The impact is falling on Black households, as well as other people of color, at disproportionate rates. In light of this untenable situation, it is imperative that state actors at every level of government use the lawful tools at their disposal – including inclusionary zoning and affordable housing fees – to ensure access to safe, decent, affordable housing.

In the worst-case scenario, individuals and families are living in homelessness. The number of unhoused people is high and rising, increasing from 549,928 in 2016 to 582,462 in 2022. *State of Homelessness: 2023 Edition*, National Alliance to End Homelessness (last visited Dec. 13, 2023), https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/. An increasing share of that population is also unsheltered. As of 2016, 32% of unhoused

people were unsheltered, whereas, as of 2022, 40% of unhoused people were unsheltered. *Id.* People of color are significantly more likely to experience homelessness than are whites. For Black people, the rate of homelessness is about four times the rate of homelessness for whites. *Id.* Although other factors play a causal role, as well, the lack of affordable housing is the principal driver of homelessness. Gregg Colburn & Clayton Page Aldern, *Homelessness Is a Housing Problem* 32-68 (2022). Homelessness shortens the lifespans of the people who experience it, inflicts trauma, and increases costs that are borne societally in the health care, education, and criminal legal systems. Lisa Goodman et al., *Homelessness as Psychological Trauma: Broadening Perspectives*, 46 Amer. Psych. 1219, 1220 (1991) (summarizing unpublished findings of a 53% prevalence of full-blown post-traumatic stress disorder among a sample of 300 randomly selected homeless single women and mothers in St. Louis); Robert Rosenheck & Catherine Leda Seibyl, *Homelessness: Health Service Use and Related Costs*, 36 Med. Care 1256, 1260-64 (1998) (finding higher Veterans Administration health care costs for unhoused veterans than for domiciled veterans); Margot B. Kushel et al., *Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population*, 95 Am. J. Pub. Health 1747, 1752 (finding that "[h]igh rates of imprisonment among homeless populations may be the end result of a system that does not provide access to timely services, including access to housing"); Barrett A. Lee et al., *The New Homelessness Revisited*, 36 Ann. Rev. of Soc. 501, 505-06 (2010) (summarizing research finding higher absenteeism and lower achievement test scores among unhoused youth).

Although homelessness has increased nationally, it has not done so evenly. Increased homelessness and, in particular, increased unsheltered homelessness are regional phenomena, with the greatest increases in western states including California. *State of Homelessness: 2023 Edition*, National Alliance to End Homelessness (last visited Dec. 13, 2023), https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/. These are often states that have experienced robust economic and population growth but where policymakers have failed to ensure an adequate supply of affordable housing to meet the needs of everyone, including low-wage workers, who has been integral to that growth. *See* Colburn & Aldern at 32-68. These are also the kinds of places to which policies like inclusionary zoning and affordable housing fees are best suited because of the strong demand for market-rate housing that exists there. Rick Jacobus, *Inclusionary Housing: Creating and Maintaining Equitable Communities* 16-17 (2015).

Although homelessness is the worst-case housing outcome, it is not the only way in which households are struggling in the present moment. Housing cost burden – paying more than 30% of income on housing costs – is also unsustainably high. *CHAS Background*, U.S. Department of Housing and Urban Development (last visited Dec. 13, 2023), https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html. As of the 2016-2020 American Community Survey, 29% of households for which data was available were cost-burdened. *Query Tool*, U.S. Department of Housing and Urban Development (last visited Dec. 13, 2023), https://www.huduser.gov/portal/datasets/cp.html#query_2006-2020 (select "2016-2020" for Data Year, then "Nation" for Geographic Summary Level). Black households,

as with homelessness, experience cost burden at disproportionately high rates. *The State of the Nation's Housing: 2023*, Joint Center for Housing Studies of Harvard University 27, 37 (2023), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf. Housing cost burden, like homelessness, causes harmful ripple effects throughout the lives of individuals and families, leading people to forgo needed food and medicine and to take on unsustainable debt. Shomon Shamsuddin & Colin Campbell, *Housing Cost Burden, Material Hardship, and Well-Being*, 32 Hous. Pol'y Debate 413, 419-21 (2022).

The shortage of new, safe, decent affordable housing also forces households to accept accommodations with uninhabitable conditions. Such conditions, which are more likely to exist in older housing, can leave people cold in the winter, hot in the summer, and exposed to lead, mold, and vermin. Paula Braveman et al., *Housing and Health*, Robert Wood Johnson Foundation (May 1, 2011), https://www.rwjf.org/en/insights/our-research/2011/05/housing-and-health.html. Children living in uninhabitable housing struggle to learn at school, and all residents experience adverse health consequences, some of which can be lasting. Mary Shaw, *Housing and Public Health*, 25 Ann. Rev. of Pub. Health 397 (2004).

Lastly, the high cost of housing renders homeownership unattainable for many. As a society, we have not gotten back to the rates of both overall homeownership and Black homeownership that we had achieved prior to the subprime foreclosure crisis of the 2000s. In the third quarter of 2023, the median sales price for a home nationwide was $431,000. *Median Sales Price of Houses Sold for the United States*, Federal Reserve

Bank of St. Louis (last visited Dec. 13, 2023), https://fred.stlouisfed.org/series/MSPUS. Assuming a 20% downpayment, a household would need an annual income of approximately $110,000 to be able to afford a home at that price point at current interest rates. However, the median household income in the United States is just $75,149. *B19013: Median Household Income in the Past 12 Months (in 2022 Inflation-Adjusted Dollars)*, 2022: ACS 5-Year Estimates Detailed Tables, U.S. Census Bureau (last visited Dec. 13, 2023), https://data.census.gov/table/ACSDT5Y2022.B19013. For Black households, the median household income is just $50,901. *B19013B: Median Household Income in the Past 12 Months (in 2022 Inflation-Adjusted Dollars) (Black or African American Alone Householder)*, 2022: ACS 5-Year Estimates Detailed Tables, U.S. Census Bureau (last visited Dec. 13, 2023), https://data.census.gov/table/ACSDT5Y2022.B19013B. This extreme mismatch between income levels and home prices has contributed to a significant home-ownership gap. Just 45.5% of Black households own their homes, *Homeownership Rates by Race and Ethnicity: Black Alone in the United States*, Federal Reserve Bank of St. Louis (last visited Dec. 13, 2023), https://fred.stlouisfed.org/series/BOAAAHORUSQ156N, as opposed to 74.5% of non-Hispanic white households. *Homeownership Rates by Race and Ethnicity: Non-Hispanic White Alone in the United States*, Federal Reserve Bank of St. Louis (last visited Dec. 13, 2023), https://fred.stlouisfed.org/series/NHWAHORUSQ156N. This gap not only points to lower security of tenure among Black households (since homeowners with fixed-rate mortgages are protected against price shocks in ways that renters are not) but also contributes to the racial wealth gap. *Closing the African American Homeownership Gap*, PD&R Edge (Mar 22., 2021),

https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-032221.html. White Americans have six times as much wealth per capita as Black Americans. Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, National Bureau of Economic Research 2 (June 2022), https://www.nber.org/papers/w30101.

Avoiding these harms – homelessness, cost burden, unsafe conditions, and a homeownership gap that fuels wealth inequality – has long been an explicit goal of federal policy. *See, e.g.*, 42 U.S.C. § 1437(a)(4) ("our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector"); 42 U.S.C. § 12701 ("The Congress affirms the national goal that every American family be able to afford a decent home in a suitable environment."). Accordingly, housing insecurity of the magnitude described above is just the type of challenge that states and municipalities, in addition to the federal government, must try to surmount.

B. Inclusionary zoning and affordable housing impact fees increase the availability of affordable housing without depressing housing supply.

Inclusionary zoning and affordable housing impact or linkage fee policies are powerful tools for addressing the affordable housing crisis and the toll that it exacts on Black households and other people of color. Inclusionary zoning is a policy whereby developers must make a portion of units within new housing developments affordable to low- and/or moderate-income households. Jacobus at 7. Local governments

frequently provide developers with incentives, such as density bonuses or reductions of parking requirements, in tandem with affordability requirements. *Id.* Inclusionary zoning ordinances vary widely with respect to what types of developments they apply to (with regard to size and anticipated tenure), what proportion of units must be affordable (i.e., 10%, 15%, etc.), and at what income level those units must be affordable (i.e., 50% of the area median income, 80% of the area median income, etc.). *Id.* at 24-35. Some inclusionary zoning ordinances give developers the option of paying a fee that goes into a local affordable housing trust fund "in lieu" of providing affordable units on-site. *Id.* at 28. Affordable housing fee policies require property owners to pay money to offset the impact of proposed land uses on the need for affordable housing. *Id.* at 29. Both commercial development and market-rate residential development can increase affordable housing need by increasing demand for workers in job categories, such as retail, service, and logistics, for which wages are insufficient to render market-rate housing affordable. *Id.* at 12-13.

Both inclusionary zoning and affordable housing fees have long track records of success. Montgomery County, Maryland first enacted inclusionary zoning through its Moderately Priced Dwelling Unit ordinance in 1973. *MPDU Program – General*, Montgomery County, MD (last visited Dec. 13, 2023), https://www.montgomerycountymd.gov/DHCA/MPDU/mpdu-program.html. Under the ordinance, 15% of units in developments with 50 or more units must be affordable to low-income households. Montgomery Cnty., Md., Code § 25A-5. Through 2022, the program had produced an impressive 16,703 units, and 3,145 rental units and 1,733 for-sale units remained under regulation. *Number of MPDUs Produced Since 1976*, Montgomery County, MD (last

visited Dec. 13, 2023), https://www.montgomerycountymd.gov/DHCA/housing/singlefamily/mpdu/produced.html. The ordinance has become an integral component of Montgomery County's approach to meeting the housing needs of its residents and low-income households throughout the region.

What is true in Montgomery County is true nationwide: well-designed inclusionary zoning helps to meet affordable housing need and does not cause significant unintended consequences. As of 2019, the nation's inclusionary zoning programs had produced 110,000 units of affordable housing. Ruoniu Wang & Sowmya Balachandran, *Inclusionary Housing in the United States: Prevalence, Practices, and Production in Local Jurisdictions as of 2019*, Grounded Solutions Network 5 (2021), https://groundedsolutions.org/sites/default/files/2021-01/Inclusionary_Housing_US_v1_0.pdf. These programs are most prevalent in high-income coastal states and other growing metropolitan regions, places where the need for affordable housing is particularly acute and where the high demand for market-rate housing makes inclusionary zoning more than economically feasible for property owners. *Id.* at 7 (map showing inclusionary zoning programs clustered in the mid-Atlantic, the northeast, and on the west coast, as well as in Florida, the Research Triangle area of North Carolina, Colorado's Front Range, and the Twin Cities). In addition to the raw numbers of units produced by inclusionary zoning programs, research shows that the suspension of inclusionary zoning in places that had it does not result in lower rents in the market overall and that removal of inclusionary zoning specifically increased rents in the lower quartile of the housing market. Ann Hollingshead, *Do Inclusionary Housing Policies Promote Housing Affordability? Evidence from the Palmer Decision in*

California, Lincoln Institute of Land Policy 12, 15 (Dec. 2015), https://go.lincolninst.edu/hollingshead_wp15ah1.pdf?_ga=2.244461900.831195374.1702478904-265368707.1701787714&_gl=1*13319qa*_ga*MjY1MzY4NzA3LjE3MDE3ODc3MTQ.*_ga_26NECLE3MM*MTcwMjU2NDgyNC4zLjEuMTcwMjU2NDgzNi4wLjAuMA. In places where this housing has been built, in addition to increased affordability, inclusionary zoning is associated with better educational outcomes and better health. Heather L. Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, The Century Foundation (Oct. 16, 2010), https://tcf.org/content/report/housing-policy-school-policy-economically-integrative-housing-promotes-academic-success-montgomery-county-maryland; Courtnee Melton-Fant, *The Relationship between State Preemption of Inclusionary Zoning and Health*, National League of Cities 4-6 (last visited Dec. 14, 2023), https://www.nlc.org/wp-content/uploads/2021/10/Preemption-Brief-1-The-Relationship-Between-State-Preemption.pdf.

The overwhelming weight of the evidence also suggests that inclusionary zoning does not have the unintended consequence of undermining affordability goals by stymieing overall housing production. Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. of the Amer. Plan. Ass'n 441, 451-52 (2009); Vinit Mukhija et al., *Can Inclusionary Zoning Be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties*, 32 J. of Urb. Aff's 229, 244-45 (2010). Other public sector and market-driven constraints on development such as restrictive zoning, difficulties with site assembly in infill areas, and high interest

rates are likely much more important to developers' decisions about whether and when to build than is inclusionary zoning. Jared Bernstein et al., *Alleviating Supply Constraints in the Housing Market*, The White House (Sept. 1, 2021), https://www.whitehouse.gov/cea/written-materials/2021/09/01/alleviating-supply-constraints-in-the-housing-market/. Indeed, building housing is still profitable for developers with inclusionary zoning in place. Jacobus at 14. The incentives offered by local governments typically offset the cost of providing affordable units, and the cost of providing those units (just like the cost of impact fees) is also priced in, at least in part, to the cost of land. *Id*.

C. Inclusionary zoning and affordable housing fees foster residential racial integration and improve health outcomes, educational achievement, and economic mobility.

Although inclusionary zoning and affordable housing fees are powerful tools for creating affordable housing, they are not equally effective in all places. In general, local governments are most likely to attempt to implement inclusionary zoning and to find success in doing so in areas with robust demand for market-rate housing. *See* Wang & Balachandran at 7. The logic behind this is self-evident: 20% of 100 market-rate units that a developer wants to build is twenty units, but 20% of zero is zero. Similarly, even though inclusionary zoning does not render market-rate development infeasible in most circumstances because of the kinds of offsetting incentives and/or reductions in land costs discussed above, it would be more likely to do so in places where the incentives are worth less and/or where land is already inexpensive. Thus, local govern-

ments are most likely to utilize inclusionary zoning in places where demand is strong.

Such places are often, though not always, places where incomes are high, jobs are plentiful, schools are proficient, and streets are safe. Growing up in such areas is associated with a broad range of positive outcomes in adulthood. Raj Chetty et al., *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, National Bureau of Economic Research 2-3 (May 2017), https://www.nber.org/system/files/working_papers/w23001/w23001.pdf. In light of the United States' long history of residential racial segregation, much of it imposed by state actors, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that state court enforcement of racially restrictive covenants was state action violative of the Equal Protection Clause of the Fourteenth Amendment); *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that a Louisville, Kentucky ordinance prohibiting Black households from moving to majority-white blocks and vice versa violated the Equal Protection Clause of the Fourteenth Amendment), Black and Latinx households are often shut out of these kinds of communities and denied the life chances associated with living in them.

In light of the persistent correlation between race and ethnicity, on the one hand, and socioeconomic status, on the other, Black and Latinx households are more likely to be able to move to these higher opportunity areas if dedicated affordable housing is available in them. *Dismantling Exclusionary Zoning: New Jersey's Blueprint for Overcoming Segregation*, Fair Share Housing Center 22-28 (Apr. 2023), https://www.fairsharehousing.org/wp-content/uploads/2023/04/Dismantling-Exclusionary-Zoning_New-Jerseys-Blueprint-for-Overcoming-Segregation.pdf (finding large increases in

racial and ethnic diversity in higher opportunity areas where affordable housing units were built as a result of inclusionary development pursuant to state court settlements). Inclusionary zoning and affordable housing impact fees increase the supply of affordable housing in these areas and thus foster more integrated, inclusive communities. *Id.* Once this housing is built, the residents of it are more likely to be Black and/or Latinx than are the residents of the surrounding neighborhood or municipality. *Id.* This development-level diversity, in turn, contributes to more integrated neighborhoods, municipalities, and regions. This is especially true when local governments require affordable units in developments that are subject to inclusionary zoning to be provided on-site and require that projects funded with affordable housing fees be located near to the developments that generated those fees. Christina Plerhoples Stacy et al., *Inclusionary Zoning: How Different IZ Policies Affect Tenant, Landlord, and Developer Behaviors*, Urban Institute 9-10 (July 2021), https://www.urban.org/sites/default/files/publication/104631/inclusionary-zoning-how-different-iz-policies-affect-tenant-landlord-and-developer-behaviors_0.pdf/

The potential of inclusionary zoning and affordable housing fees to redress this sordid legacy counsels strongly in favor of preserving the current balance reflected in the Court's Takings jurisprudence and thereby not calling the constitutionality of these programs into question. The federal courts have uniformly agreed, upholding inclusionary zoning at every turn, on the grounds that it is a land use regulation that does not effectuate a taking when imposed directly, on the grounds that legislative exactions adopted pursuant to local police powers to reasonably further legitimate governmental purposes do not need to

satisfy the essential nexus and rough proportionality tests, or both. *Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011) (rejecting Takings claim to ordinance requiring developers to sell a percentage of land as affordable housing and record associated deeds); *see also Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 462 (Cal. 2015) (determining developer's obligation to make 15% of new units affordable and record deed restrictions was not a taking). But inclusionary zoning is not merely constitutionally permissible, under some circumstances, the policy might be a critical remedy for a constitutional violation. *See Mhany Mgmt., Inc. v. Inc. Vill. of Garden City*, 4 F. Supp. 3d 549, 560 (E.D.N.Y. 2014) (ordering a municipality that had been held liable for violating the Equal Protection Clause through its exclusionary zoning to adopt an inclusionary zoning ordinance). In interpreting the Takings Clause, the Court should take heed to do so in a way that is consistent with the demands of the later-ratified Equal Protection Clause.

Inclusionary zoning is not just important to efforts to remedy the effects of unconstitutional public sector housing discrimination, it is also pivotal to efforts to fully realize the promise of the Fair Housing Act. 42 U.S.C. §§ 3601-3631. In light of this Court's recognition of "the Fair Housing Act's continuing role in moving the Nation toward a more integrated society," *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project*, 576 U.S. 519, 546-47 (2015), local governments, with direction from the U.S. Department of Housing and Urban Development (HUD), seek to foster integrated communities in order to comply with their duty to affirmatively further fair housing under 42 U.S.C. § 3608(d). *See* 42 U.S.C. § 5304(b)(2) (requiring that states and local governments that receive certain

HUD funds certify that they will affirmatively further fair housing).

II. Legislatively Imposed Inclusionary Zoning and Affordable Housing Fees Do Not Result in a Taking.

A. A legislatively imposed fee or zoning measure differs in material respects from an individualized administrative exaction.

Legislatively mandated fees and zoning regulations, such as inclusionary zoning, stand "worlds apart" from the unconstitutional exactions the Court intended *Nollan* and *Dolan* to ward against. *Lingle v. Chevron*, 544 U.S. 528, 547 (2005) (holding that *Nollan* and *Dolan* did not establish a requirement that governments demonstrate that their regulation of property substantially advances a legitimate government interest); *Nollan v. Cal. Coastal Com'n,* 483 U.S. 825, 829 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Based on these precedents, this Court devised the "essential nexus" and "rough proportionality" tests as a "special application" of its unconstitutional conditions doctrine meant to strictly apply to Takings Clause challenges brought within the context of individually adjudicated land use exactions and has expressly declined to extend this standard beyond this "special context." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013);[3] *Lingle*, 544 U.S. at 547. Contrary to Petitioner's assertion that there is no meaningful

[3] While its decision in *Koontz* extended the unconstitutional conditions doctrine to monetary exactions, the holding accords with this precedent citing its prior opinions maintaining that *Nollan* and *Dolan* "involve a special application" limited to the land use context. 570 U.S. at 604.

difference between adjudicative exactions imposed by administrative officials and legislative ones, this Court has made clear that there is. *Compare* Pet'r's Br. at 26; *with Dolan*, 512 U.S. at 385 (categorically distinguishing land use regulations involving "essentially legislative determinations" based on this "relevant particular" from the adjudicative exaction at issue).

The official discretion inherent in administrative conditions that are the product of individual interactions between property owners and government officials distinguishes administrative exactions from legislative conditions. The controlling precedent reflects this reality, highlighting the relative vulnerability to coercion applicants can encounter when negotiating with a government official who exercises "broad discretion" over a particular permit application. *Koontz*, 570 U.S. at 604-05. The power dynamics that define this exchange between permit applicants and administrative officials risk creating an opportunity for officials to impose extortionate conditions on permit applicants. *Dolan*, 512 U.S. at 387 (admonishing the gimmickry involved that transforms a valid land use plan into an "an out-and-out plan of extortion") (internal citation omitted).

Petitioner glosses over the greater importance of individualized discretion in the administrative context than in the context of the legislative adoption of general requirements and blithely asserts that, since all potentially challengeable conditions originate from some legislative act and because legislatures exercise their own discretion when enacting laws, legislatively mandated fees and zoning requirements are indistinguishable from adjudicative exactions imposed by officials whose positions exist by virtue of legislation and who exercise power pursuant to legislation that

grants them the discretion to act. Pet'r's Br. at 29. Setting aside the fact that "[u]nder our system of government, Congress makes laws and the President, acting at times through agencies faithfully execute[s] them," U.S. Const., Art. II, § 3; *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014), Petitioner's view ignores this Court's instruction in *Dolan* that action that "involv[es] essentially legislative determinations classifying entire areas of the city" does not merit application of the essential nexus and rough proportionality tests. 512 U.S. at 385.

B. Legislatively imposed fees and land use regulations do not pose the risk of governmental abuse.

Legislatively mandated fees and land use regulations diminish the risk of abuse that animated the Court in *Nollan* and its progeny. The cases of *Nollan*, *Dolan*, and *Koontz* each involved broad statutory mandates conferring discretion on administrative bodies to determine on an ad-hoc basis what specific conditions an individual permittee must satisfy to comply with the law. The statute in *Nollan* gave the California Coastal Commission leeway to decide how much "public access from the nearest public roadway to the shoreline and along the coast shall be provided" by the developer to satisfy § 30212 of California's Public Resource Code. 483 U.S. 825, 829 (1987). In *Dolan*, the ordinance deferred to the discretion of the City Planning Commission to determine what qualifies as a "dedication of sufficient open land area for a greenway" when development intrudes on a 100-year floodplain, City of Tigard, CDC § 18.120.180.A.8, and define how the permittee satisfies its obligation that"[t]he development shall facilitate pedestrian/bicycle circulation" with particular attention to "efficient,

convenient and continuous" pedestrian and access. City of Tigard, CDC § 18.86.040.A.1.b.; 512 U.S. at 392 (admonishing the agency for extracting "more" benefits than what it deemed fair). Indeed, even Petitioner admits that in *Koontz*, the administrator operated under a broad mandate to regulate "construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state," Fla. Stat. § 373.403(5) (2010), and that granted the administration the broad discretion to impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district." Fla. Stat. § 373.413(1). Pet'r's Br. at 29 (conceding the water management district in *Koontz*, "had some discretion"). Delegating this degree of discretion to the individual administrator in the land use context is the "fulcrum" of the dynamic the Court desired to subject to guardrails via the essential nexus and rough proportionality tests announced in *Nollan* and *Dolan*. *Dolan*, 512 U.S. at 385; *Koontz*, 570 U.S. at 621 (emphasizing "the risk that the government may use its substantial power and discretion in land-use permitting to pursue" illegitimate ends). By contrast, Respondent enacted its challenged fees through a process whereby a legislative body determined what was required of a permittee with a level of specificity that would obviate the need for administrative officials to exercise their discretion.

Inflating the degree of discretion involved in law-making does not eliminate the relevant distinctions between adjudicative exactions and legislative conditions. *See* Pet'r's Br. at 29. Legislative conditions like affordable housing fees and inclusionary zoning do not create a risk of similarly extortionate conduct because no single official has the discretion to determine considerations like what properties conditions are applied

to, the scale of those conditions, and whether exceptions or exemptions are available. Rather, city councils, county boards, and state legislatures enact policies like affordable housing fees and inclusionary zoning through processes that require significant compromise by the collective elected body. *The Federalist No. 10* (James Madison) ("legislation often results only from persuasion and interest group convergence").

Legislative conditions differ from administrative exactions, because, when passing ordinances or statutes of the type at issue in this case, individual legislators do not exercise the wide breadth of discretion that characterizes the ad hoc conditions that this Court found problematic in *Nollan*, *Dolan*, and *Koontz*. To the contrary, legislative bodies publicly announce bright-line obligations a permittee must satisfy, severely curtailing the scope of discretion afforded administrative officials in *Nollan*, *Dolan*, and *Koontz*.

Property owners subject to inclusionary zoning and affordable housing fee requirements know their obligations in advance, know the bases of those obligations, and know that administrative officials do not have free rein to ratchet up their obligations when property owners have already sunk costs into developing the plans for which they are seeking permits. Because of these design features, these affordable housing fees and inclusionary zoning regulations are "indifferent" to the particulars of the individual applicant. *Koontz*, 570 U.S. at 623 (Kagan, J., dissenting). The transparency of the legislative process also distinguishes these kinds of enactments. The elected officials who pass these laws are subject to measures like open meetings laws that subject their deliberations to the public eye. For instance, California's Ralph M. Brown Act, Cal. Gov't Code § 54950, guarantees the public – including

property owners affected by legislative conditions – the right to attend and participate in local legislative meetings and ensures transparency and deters abusive conduct. Cal. Gov't Code § 54953(a); *See* Louis Brandeis, *Other People's Money and How Bankers Use It* 92 (1914) ("[s]unlight is said to be the best of disinfectants"). Moreover, post-enactment, municipalities must widely disseminate their ordinances, giving permittees due notice of what specific conditions they must meet in order to develop their property. Cal. Gov't Code § 54953(c).

In essence, administrative officials have limited discretion when effectuating truly legislative conditions. Contrary to some administrative exactions, the features of the legislative process require compromise and ensure transparency, thereby greatly diminishing any risk of arbitrary or abusive conduct by the state of the type that could justify the further extension of the essential nexus and rough proportionality tests.

C. Inclusionary zoning and affordable housing fees facilitate sustainable and inclusive growth.

Sustainable and inclusive growth is unlikely to occur unless development meets the needs of and is financially viable for incumbent residents, future residents, and developers. On the one hand, states and localities must cultivate the regulatory conditions that encourage financial investment. But they also must balance this aim with their equally important obligation to ensure that the negative externalities of growth do not eclipse the benefits accrued. States and localities are vested with the general police power to determine the appropriate policies to balance these competing demands. *Vill. of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 386-87 (1926) (upholding

constitutionality of zoning because with the "great increase and concentration of populations, problems have developed . . . which require, additional restrictions" on land use); *Keystone Bituminous Coal Ass'n v. DeBenedictis* 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property."); *see also W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937) ("The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest."). Accordingly, states and localities depend on a range of policy tools including inclusionary zoning and affordable housing fees to balance these competing local priorities and achieve some degree of regulatory equilibrium. Deborah Wang, *Seattle Mayor Unveils Grand Bargain for Affordable Housing*, KUOW (July 13, 2015), https://kuow.org/stories/seattle-mayor-unveils-grand-bargain-affordable-housing/ (describing Seattle's Mandatory Inclusionary Zoning law" championed by both developers and community leaders as the "grand bargain"); *Housing Strategy Profiles*, Local Housing Solutions (last visited Dec. 14, 2023), https://localhousingsolutions.org/housing-strategy-profiles/; *All-in-Cities Policy Toolkit*, PolicyLink (last visited Dec. 13, 2023), https://www.policylink.org/resources-tools/tools/all-in-cities/housing-anti-displacement.

This regulatory equilibrium assumes the principle of "reciprocity of advantage," which this Court has relied upon to uphold a host of land use laws. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 341 (2002) (finding a moratorium on development constitutionally permissible in part because of the reciprocity of advantage conferred on class of affected landowners); *see also Keystone*

Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (rejecting Takings claim against landmark law restriction given the "health, safety, morals, or general welfare" aims of regulation); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (stating that "reciprocity of advantage. . .has been recognized as a justification of various laws"); *Nollan*, 483 U.S. at 856 (Brennan, J., dissenting) (characterizing intensified development interfering with public access to the beach in exchange for a public right away as a "classic instance of government action that produces a reciprocity of advantage"). As the California Supreme Court observed, this principle recognizes,

> "the interlocking system of benefits, economic and noneconomic, that all participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or non-economic, for the common good."

San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 109 (Cal. 2002).

Inclusionary zoning and affordable housing fees are policies that are grounded in this indispensable principle underlying land use regulation. "Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491–92 (pointing to the

determination in *Mugler v. Kansas*, 123 U.S. 623, 664 (1887), that regulations of land use are not a taking of private property for public use, but a salutary restraint on a noxious use by the owner). "When interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good," the character of the government action is unlikely to implicate the Takings Clause. *Penn Centr. Transp. Co.*, 438 U.S. at 124.

Future development is likely to generate increased economic and non-economic benefits for the property owner; however, this development will also predictably result in social costs borne by the larger community by displacing residents no longer able to afford escalating real estate costs or exposing existing residents to higher concentrations of air and water-borne contaminants. Ingrid Gould Ellen & Gerard Torrats-Espinosa, *Gentrification and Fair Housing: Does Gentrification Further Integration?*, 29 Hous. Pol'y Debate 835, 845-46 (2019); Robert D. Bullard, *Smart Growth Meets Environmental Justice*, *in* Growing Smarter: Achieving Livable Communities, Environmental Justice, and Regional Equity 40-41 (Robert D. Bullard ed., 2007). Requiring those who are directly responsible for new development and who stand to gain the lion's share of its advantages to also bear the external costs of this development is consistent with this principle of "reciprocal advantage" and with this Court's Takings jurisprudence. *Koontz,* 570 U.S. at 605 (emphasizing that forcing landowners to "internalize the negative externalities of their conduct is a hallmark of responsible land-use policy"); *Lingle*, 544 U.S. at 538 (reminding the Court that its Takings inquiry must be "cognizant—that government regulation—by definition—involves the adjustment of rights for the public good");

Arthur C. Nelson et al., *Proportionate-Share Impact Fees And Development Mitigation* (2022).

As Respondent notes, increased requirements for state and local governments to conduct nexus studies raise significant practical concerns. Resp's Br. at 43-47. More extensive nexus study requirements would also result in unintended consequences such as municipalities increasing both land use application fees (in order to recoup the cost of reviewing applications and conducting nexus studies) and the amount of information to be included within applications (in order for municipalities to have the information necessary to conduct nexus studies). Christina M. Martin, *Nollan and Dolan and Koontz-Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, but No More*, 51 Willamette L. Rev. 39, 43 (2014). The resulting surge in pre-development costs would reduce development potential overall, thereby undermining the purported basis of litigation challenges like that in the instant case. Ralph Rosado, *Regulatory Barriers to Home Construction and Rehab*, The Project for Lean Urbanism, Center for Applied Transect Studies (last visited Dec. 14, 2023), https://leanurbanism.org/regulatory-barriers-to-home-construction-and-rehab/. Additionally, in light of these burdens and risks, local governments may decide to deny permits outright automatically. Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill? - the Likely Impact of Koontz on the Local Government/developer Relationship*, 30 Touro L. Rev. 455, 471-72 (2014).

Other state and local governments—keen on capitalizing on potential development—may adopt the opposite stance, choosing to rubberstamp applications without regard for the detrimental impacts produced, many of which will be borne by communities least

positioned to politically or economically mitigate the harms suffered. In localities without sufficient regulation of land uses to protect incumbent residents, Black residents and other people of color, particularly those who are low-income, will bear the costs of unrestrained development. "Cancer Alley" in Southeast Louisiana is just one example of how unchecked development can imperil an entire community's collective well-being. Tristan Baurick, *Polluter's Paradise: Welcome to Cancer Alley Where Toxic Air Is About to Get Worse*, ProPublica (Oct. 30, 2019), https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse. This is an outcome explicitly forsworn by the majorities in *Dolan* and *Koontz*, both of which caveated their decisions by stating that state actors must be able to force developers to account for these harms. *Dolan*, 512 U.S. at 391 (generally agreeing with the premise that government may request developers compensate for needs generated by development); *Koontz,* 570 U.S. at 605 (affirming that developers should be required to internalize costs of development).

Legislatively mandated affordable fees and inclusionary zoning laws are designed to deliver on this principle. Demanding that legislative measures designed to offset the negative consequences of development be subjected to the essential nexus and rough proportionality tests would disrupt the ability of state actors to promote equitable, inclusive growth.

CONCLUSION

The judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,

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December 20, 2023