No. 22-1074

In the Supreme Court of the United States

GEORGE SHEETZ, PETITIONER

v.

COUNTY OF EL DORADO, CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Pursuant to California law, the County of El Dorado's Board of Supervisors adopted a generally applicable legislative requirement that applicants for certain types of development permits pay a traffic impact mitigation fee as set forth in a non-discretionary schedule dividing the County into eight zones and calculating fees based on the type of development. The fee is not paid in lieu of any dedication of a real-property interest. The question presented is:

Whether the special application of the unconstitutional-conditions doctrine this Court recognized in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), applies to the County's traffic impact mitigation fee.

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INTEREST OF THE UNITED STATES

This case concerns the standard for determining whether a generally applicable legislative traffic impact mitigation fee that is not imposed in lieu of the dedication of an interest in real property constitutes a taking within the meaning of the Fifth Amendment. Although the United States does not administer traffic impact mitigation fees comparable to the one at issue here, federal agencies administer programs under federal statutes and regulations that contemplate monetary funding for mitigation activities as a condition of land-related permits. See, *e.g.*, 16 U.S.C. 797(e). More generally, federal agencies impose taxes, assessments, and fees that generally are not considered takings. The United States therefore has a substantial interest in the

standards that apply to claims that permit fees constitute takings.

STATEMENT

1. This case concerns a traffic impact mitigation fee imposed by respondent El Dorado County. Impact fees are "charges levied by local governments on new developments in order to pay a proportionate share of the capital costs of providing public infrastructure to those developments." Julian C. Juergensmeyer *et al.*, *Land Use Planning and Development Regulatory Law* 356 (5th ed. 2023). Early impact fees were used "to fund water and sewerage capital construction programs during the 1950s and 1960s." Andrew T. Carswell ed., *The Encyclopedia of Housing* 384 (2d ed. 2012). Over time, impact fees have come to be used to cover the costs of "nonutility programs such as roads, parks, and schools as well as other public services." *Ibid.* Impact fees "now exist in nearly all states." Juergensmeyer 356; see Carswell 385.

Impact fees are distinct from fees in lieu of a dedication of real property. In-lieu fees apply when a governmental entity "wishing to exact" an interest in real property—for example, an easement—"give[s] the owner a choice of either" dedicating the property interest "or making a payment equal to [its] value." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). Because in-lieu fees "are predicated on dedication requirements," "they can only be used where required dedications can be appropriately utilized." Juergensmeyer 359.

Impact fees, by contrast, apply where public facilities necessitated by new development do not require interests in land, but nonetheless impose additional costs on the surrounding community. Impact fees "[a]ct[] like

user fees" by "guarantee[ing] benefits to those who pay for them." Carswell 385; see, *e.g.*, Arthur C. Nelson & Mitch Moody, *Paying for Prosperity: Impact Fees and Job Growth*, in *The Brookings Inst. Ctr. on Urban & Metro. Pol'y* (June 2003).

2. Respondent El Dorado County is a largely rural county in California. The County has experienced considerable population growth in recent years, requiring upgrades to public infrastructure, including constructing new roads and widening existing ones. See Resp. Br. 4-5; Pet. App. A2-A3.

In 2004, the Board of Supervisors (Board) adopted a new General Plan. Administrative Record (A.R.) 74. Consistent with longstanding county policy, see, *e.g.*, *ibid.*; A.R. 1518, the General Plan directed that "[d]eveloper-paid traffic impact fees shall pay for the portion of road capacity improvements, which would not be paid for through other County revenue sources, necessary to offset and mitigate the traffic impacts reasonably attributable to new development." A.R. 1520. To implement that directive, the General Plan provided that the Board would "[r]evise and adopt traffic impact fee program(s) for unincorporated areas of the county and adopt additional funding mechanisms necessary to ensure that improvements * * * are fully funded and capable of being implemented concurrently with new development." A.R. 1527.

Before adopting the traffic impact mitigation fee program, respondent comprehensively studied the issue. Respondent's Department of Transportation "identified road improvements for construction," A.R. 2341-2342, relying on modelling designed to forecast the amount of new development that would occur in the County, its location, and the projected resulting number of trips on public roads, *e.g.*, A.R. 2341-2342, 3134, 3448-

3452; see A.R. 88-93, 131-137 (Board-enacted project lists). Respondent engaged civil engineering firms and conducted in-house analyses to estimate project costs, A.R. 3451, and subtracted other sources of funding, including state and federal project-specific grants, A.R. 3134, 3351.

After considering more than 20 fee scenarios and making various administrative and policy judgments, see, *e.g.*, A.R. 3081, 3100, the Board adopted the final traffic impact mitigation fee program in August 2006, A.R. 119-138; see Pet. App. A2-A3. The Board divided the County into eight geographic zones. A.R. 2313-2314, 3516. The total adjusted cost of each project under the fee program "was then spread to each of the eight fee zones proportionally, based on the [estimated] traffic volumes using that specific project from each of the zones." A.R. 3521.

As required by California law, the Board found that "the facts and evidence presented in the reports, analyses, and a public hearing * * * establish that there is a reasonable relationship between the need for the described public facilities and the impacts of the types of development described, for which the corresponding fee is charged"; and also a "reasonable relationship between the fee's use and the type of development for which the fee is charged." A.R. 120; see Cal. Gov't Code § 66001(a) (2022); *Tanimura & Antle Fresh Foods, Inc.* v. *Salinas Union High Sch. Dist.*, 34 Cal. App. 5th 775, 791-792 (2019); *Garrick Dev. Co.* v. *Hayward Unified Sch. Dist.*, 3 Cal. App. 4th 320, 336 (1992). The Board directly set the fees for each geographic zone and type of development, requiring successful "building permit applicants" after the fee structure's effective date to "pay the fee rate(s) listed in" the schedule. A.R. 121; see A.R. 129-130.

In 2012, the Board adopted a revised fee schedule to reflect, *inter alia*, development that had already occurred and updated estimates of new development. A.R. 243-245. Single-family residential, non-age-restricted fees ranged from $13,330 to $35,740 across the County's eight zones. A.R. 246-253. Those fees reflect two components: a Highway 50 component, focusing on the "County's main transportation corridor," A.R. 3517, and a local road component, see A.R. 246-253.

3. a. In December 2013, petitioner purchased property in El Dorado County. Resp. Br. 12. The property falls within Zone 6, a relatively remote portion of the County. Pet. App. A3; see Resp. Br. 6; A.R. 234 (map). It is in a "Rural Region," *i.e.*, an area with "limited availability of infrastructure and public services." Resp. Br. 12 (quoting A.R. 1461-1462).

In 2016, petitioner applied for a permit "to construct a 1,854-square-foot single-family manufactured home on his property." Pet. App. A3. Petitioner paid, under protest, the traffic impact mitigation fee of $23,420 mandated for single-family residential developments in Zone 6, and he received a permit. *Ibid.*; A.R. 5072-5084.

b. Petitioner then filed this suit challenging the fee. The state trial court rejected petitioner's contention that the fee violated federal and state law, and the court of appeal affirmed. See Pet. App. A, B.

Most relevant here, petitioner contended that the fee violated the Takings Clause of the Fifth Amendment to the U.S. Constitution. Specifically, petitioner asserted that the fee should be reviewed under the "special application" of the unconstitutional-conditions doctrine this Court adopted for permit conditions involving easements in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Pet. App. A4. Petitioner argued that, ap-

plying those decisions, the County "failed to make an individualized determination that an 'essential nexus' and 'rough proportionality' existed between the traffic impacts caused by or attributable to [petitioner's] project and the need for improvements to state and local roads." *Id.* at A4-A5; see *Koontz*, 570 U.S. at 603.

The court of appeal rejected that contention, explaining that *Nollan*, *Dolan,* and *Koontz* concerned ad hoc, discretionary permit exactions requiring the dedication of rights in real property, or fees "in lieu" of such dedications, whereas this case involves "legislatively mandated, generally applicable development fees." Pet. App. A10 (citation omitted); see *id.* at A17. The court thus held that the traffic impact mitigation fee "is not subject to the heightened scrutiny of the *Nollan/Dolan* test." *Id.* at A16. The court also rejected petitioner's state-law claims, holding that the fee comports with California's Mitigation Fee Act, Cal. Gov't Code § 66001(a) (2022). Pet. App. A23-A27.

c. The California Supreme Court denied review. Pet. App. C1.

SUMMARY OF ARGUMENT

Respondent's legislative impact fee, which is imposed pursuant to a non-discretionary schedule and is unrelated to any government attempt to obtain a dedication of real property, is not subject to the parcel-specific "nexus" and "rough proportionality" requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

A. The Fifth Amendment prohibits the government from taking private property without just compensation. U.S. Const. Amend. V. When the government physically appropriates property or an interest therein,

the Court recognizes a *per se* taking requiring just compensation. By contrast, the Court has long recognized that taxes and user fees are not takings. Between those two poles, most "use restrictions" on private property—including zoning laws and denials of land-use permits—constitute takings only when they "'go[] too far,'" a determination courts make by considering several factors. *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2071-2072 (2021) (citation omitted); see *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

In *Nollan* and *Dolan*, this Court adopted a different framework where a permitting authority makes an adjudicative, parcel-specific determination to condition the grant of a land-development permit on the requirement that the applicant dedicate an easement allowing public access to her property. In that context, the government must establish an "essential nexus" and "'rough proportionality'" between the required property dedication and the effects of the proposed land use. *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-606 (2013) (citation omitted). In *Koontz*, the Court held that a local government could not "evade" the requirements of *Nollan* and *Dolan* by giving the permit applicant the choice of *either* dedicating an easement *or* paying a fee in lieu of such a dedication. *Id.* at 606.

Three aspects of *Nollan*, *Dolan*, and *Koontz* demonstrate that those decisions are inapplicable here. *First*, those decisions involve a "'special application'" of the unconstitutional-conditions doctrine. *Koontz*, 570 U.S. at 604 (citation omitted): Because the easement in each case would have constituted a taking requiring just compensation outside of the land-permitting process, the Court adopted a special standard to ensure that the government's action did not unduly burden the land-

owner's right to just compensation. *Second*, each case involved a discretionary, adjudicative decision; the Court expressed concern that land-use permit applicants are "especially vulnerable" to "coercion" in that context. *Id.* at 605. *Third*, the Court emphasized that its decisions did not call into question the government's ability to impose land-use regulations or charge property taxes and other fees.

B. The traffic impact mitigation fee at issue here does not fall within the rationale of *Nollan*, *Dolan*, and *Koontz*.

First, as *Koontz* explains, "[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." 570 U.S. at 612. Here, however, the government could require petitioner to pay a fee for the infrastructure necessitated by new development, including his own, outside of the permitting context. The traffic impact mitigation fee is closely analogous to taxes, special assessments for local improvements, and user fees—none of which constitute takings requiring just compensation.

Second, this case differs from *Nollan*, *Dolan*, and *Koontz* because it concerns a widely applicable legislative fee that "classif[ies] entire areas of the [County]," *Dolan*, 512 U.S. at 384, and is unrelated to any dedication of an interest in real property, rather than the discretionary, adjudicative imposition of an easement (or fee in lieu of dedication). This case therefore does not implicate the concerns expressed in *Nollan*, *Dolan*, and *Koontz* regarding the breadth of the government's discretion and the potential for coercion.

Third, petitioner's proposed expansion of *Nollan*, *Dolan*, and *Koontz* to this context would threaten to

blur the line between dedication conditions (or in-lieu fees) on the one hand, and taxes, user fees, and the like on the other. Petitioner's approach would require parcel-specific determinations that legislatures are ill-suited to make, and that find no foothold in the Takings Clause, which has never required an individualized determination regarding a use restriction or fee unconnected to the dedication of a real-property interest. In addition, by requiring case-specific exercises of discretion, petitioner's approach would threaten to introduce the very concerns that *Nollan*, *Dolan*, and *Koontz* were intended to mitigate. And petitioner's proposal would invert the usual burden of proof for challenges to legislative actions.

C. Petitioner's destabilizing proposal is also unnecessary. Federal and state law already provide adequate protection from unduly burdensome permit-related fees. Such fees might constitute takings under the Court's regulatory-takings framework under *Penn Central*, and could potentially violate other constitutional provisions, including the Equal Protection Clause or the Due Process Clause. And state law, including California's Mitigation Fee Act, provides additional safeguards.

ARGUMENT

A GENERALLY APPLICABLE LEGISLATIVE TRAFFIC IMPACT MITIGATION FEE THAT IS UNCONNECTED TO ANY DEDICATION OF REAL PROPERTY IS NOT SUBJECT TO THE PARCEL-SPECIFIC "NEXUS" AND "ROUGH PROPORTIONALITY" REQUIREMENTS THIS COURT ADOPTED IN *NOLLAN* AND *DOLAN*

A. *Nollan*, *Dolan*, And *Koontz* Apply A Special Rule Where The Government Obtains A Real-Property Interest, Or Its Monetary Equivalent, As A Condition Of A Land Permit

1. The Fifth Amendment, which is made applicable to the States through the Fourteenth Amendment, states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V; see *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897). This Court has recognized that different standards apply to determine whether different types of government actions constitute takings requiring just compensation.

a. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). That "'clearest sort of taking'" occurs when the government "uses its power of eminent domain to formally condemn property" or "physically takes possession of property without acquiring title to it." *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2071 (2021) (citation omitted). In that situation, the Constitution imposes a "categorical obligation to provide the owner with just compensation." *Ibid.* (citing *Tahoe-Sierra Pres. Council* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002)).

This Court also has held that where a government action "completely deprive[s] an owner of '*all* economically beneficial use' of * * * property," a *per se* taking occurs. *Lingle*, 544 U.S. at 538 (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (brackets omitted)); see *Murr* v. *Wisconsin*, 582 U.S. 383, 393 (2017). As the Court explained in *Lucas*, "from the landowner's point of view," such a "total deprivation" is "the equivalent of a physical appropriation." 505 U.S. at 1017.

b. At the other end of the spectrum, many government actions do not fall within the Takings Clause even when they may affect property. Most pertinent here, "[i]t is beyond dispute that taxes and user fees . . . are not takings." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013) (brackets, citation, and internal quotation marks omitted). As this Court explained last Term, property taxes "are not themselves a taking, but are a mandated 'contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords.'" *Tyler* v. *Hennepin Cnty.*, 598 U.S. 631, 637 (2023) (quoting *County of Mobile* v. *Kimball*, 102 U.S. 691, 703 (1881)).

The Court also has recognized the closely related principle that government may "require the property specially benefited to bear the expense of local improvements" without effecting a taking. *French* v. *Barber Asphalt Paving Co.*, 181 U.S. 324, 344 (1901) (citation omitted); see, *e.g.*, *Houck* v. *Little River Drainage Dist.*, 239 U.S. 254, 264-265 (1915). Similarly, "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *United States* v. *Sperry Corp.*, 493 U.S. 52, 63 (1989).

c. In between those two poles, many "public program[s]" merely "adjust[] the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). Government actions within that class constitute takings only when they "go[] too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). As the Court recognized a century ago, "[g]overnment 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." *Id.* at 413.

To determine whether a government action constitutes a taking under the *Penn Central* framework, courts consider such factors as "[t]he economic impact of the regulation on the claimant"—"particularly, the extent to which the regulation has interfered with distinct investment-backed expectations"—and "the character of the government action." 438 U.S. at 124. The Court has applied the *Penn Central* framework in a variety of contexts in which the government "imposes regulations that restrict an owner's ability to use his own property," including "zoning ordinances, orders barring the mining of gold, * * * regulations prohibiting the sale of eagle feathers," *Cedar Point Nursery*, 141 S. Ct. at 2071-2072 (citations omitted), and challenges to the denial of a development permit, *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 611-612, 632 (2001). The *Penn Central* factors thus "have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* [*per se*] rules." *Lingle*, 544 U.S. at 539.

2. a. This Court has adopted a different framework in "the special context of land-use exactions." *Lingle*, 544 U.S. at 538. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of*

Tigard, 512 U.S. 374 (1994), the Court considered "adjudicative land-use exactions," *i.e.*, a permitting authority's parcel-specific determination to condition a development permit on the requirement "that a landowner dedicate an easement allowing public access to her property." *Lingle*, 544 U.S. at 546; see *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

In *Nollan*, the landowners submitted a coastal development permit application, which was granted subject to the condition that they provide the public an easement across a portion of their beachfront property. 483 U.S. at 827-829. In *Dolan*, the landowner sought a permit to redevelop the site of her store, which was granted subject to the condition that she dedicate approximately ten percent of her real property for improvements to a storm drainage system and a pedestrian/bicycle pathway. 512 U.S. at 379-383. The Court held that such conditions constitute takings where the government does not make an individualized determination that the required dedication of the property interest has a "'nexus'" (*Nollan*) and "'rough proportionality'" (*Dolan*) to "the effects of the proposed land use." *Koontz*, 570 U.S. at 599. In *Koontz*, the Court held that a permitting authority could not "evade" the requirements of *Nollan* and *Dolan* by requiring that a permit applicant *either* dedicate an easement *or*, in lieu of such dedication, "agree[] to hire contractors to make improvements to District-owned land several miles away." *Id.* at 601-602, 612.

b. Three aspects of *Nollan*, *Dolan*, and *Koontz* are especially relevant and demonstrate that those decisions are inapplicable here.

i. *First*, those decisions "'involve a special application'" of the unconstitutional-conditions doctrine, *Koontz*,

570 U.S. at 604 (citation omitted), and thus reflect the "overarching principle" that "the government may not require a person to give up a constitutional right * * * in exchange for a discretionary benefit," *Dolan*, 512 U.S. at 385 & n.12, nor "burden[] the Constitution's enumerated rights by coercively withholding benefits from those who exercise them," *Koontz*, 570 U.S. at 606. The special application of that principle adopted in *Nollan*, *Dolan*, and *Koontz* "protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id.* at 604.

In both *Nollan* and *Dolan*, the Court began its analysis by observing that if the government had demanded the easements outside of the permitting process, it would have engaged in a *per se* taking requiring just compensation. *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831; see *Cedar Point Nursery*, 141 S. Ct. at 2073-2074. In both cases, the Court emphasized that the demanded easement interfered with "one of the most essential sticks in the bundle of rights that are commonly characterized as property"—the right to exclude—and effectively created a permanent physical occupation. *Nollan*, 483 U.S. at 831-832 (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)); see *Dolan*, 512 U.S. at 384, 393; see also *Cedar Point Nursery*, 141 S. Ct. at 2072-2073.

Koontz held that the unconstitutional-conditions doctrine did not cease to apply because the permitting authority would have allowed the landowner "to spend money" as an alternative to its request that he relinquish "a more tangible interest in real property." 570 U.S. at 612. The Court observed that if it accepted that contention, "it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and

Dolan"—and thus of the Takings Clause—by giving the landowner a choice between "surrendering an easement" or paying an "'in lieu'" fee "equal to the easement's value." *Ibid.* (citation omitted). Thus, as in *Nollan* and *Dolan*, the Court in *Koontz* emphasized the need to protect the landowner against the imposition of a condition that would be unconstitutional if imposed outside of the permitting process.

ii. *Second*, *Nollan*, *Dolan*, and *Koontz* each arose in the context of a permitting authority's adjudicative, parcel-specific determination to condition the grant of a permit on a particular easement (or fee in lieu of an easement). *Dolan* expressly distinguished "land use planning" laws the Court had previously upheld—which involved "essentially legislative determinations classifying entire areas of the city"—from the city's "adjudicative decision to condition [Dolan's] application for a building permit on an individual parcel." 512 U.S. at 384-385. *Koontz* explained that in the latter context, "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." 570 U.S. at 604-605; see *Nollan*, 483 U.S. at 837 & n.5 (expressing concern that if government entities were permitted to "leverag[e]" the permitting process to obtain easements without paying just compensation, they might adopt "stringent land-use regulation which the State then waives to accomplish other purposes").

iii. *Third*, in these cases, the Court emphasized the limited nature of its decision and disclaimed any destabilizing effect on the government's ability to impose land-use regulations or charge taxes and other types of fees.

The Court's decisions in this area consistently recognize that "many proposed land uses threaten to impose costs on the public that dedications of property can offset," and that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy." *Koontz*, 570 U.S. at 605. The Court thus "ha[s] long sustained [land-use] regulations against constitutional attack." *Ibid.*; see *Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 834. And although *Koontz* applied the *Nollan*/*Dolan* framework to certain in-lieu fees imposed in the permitting process, the Court emphasized that its decision would "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.

B. A Legislative Traffic Impact Mitigation Fee That Is Calculated Under A Non-Discretionary Schedule And Unrelated To A Dedication Requirement Is Not Covered By *Nollan*, *Dolan*, And *Koontz*

The standard developed in *Nollan* and *Dolan*, and applied in *Koontz*, is inapplicable where, as here, the government imposes a legislative, non-discretionary impact fee on new development without attempting to obtain an interest in the landowner's real property.

1. The fee at issue here does not implicate the unconstitutional-conditions doctrine

Petitioner frames the question presented as "whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation." Pet. I; see, *e.g.*, Pet. Br. 25-26. That question—and much of petitioner's argument—presumes that the "special application" of the unconstitutional-conditions

doctrine this Court adopted in those cases would apply here but for the legislative nature of the fee. That is incorrect. As *Koontz* recognized—and as petitioner appears to agree, see Pet. Br. 14, 22, 28-29—"[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." 570 U.S. at 612. That predicate is lacking where the government charges an impact fee without any request for an interest in real property. Because the government could charge such a fee outside of the permitting process without engaging in a taking, its decision to do so within the permitting process does not burden landowners' constitutional right to just compensation.

a. "It is beyond dispute that taxes and user fees . . . are not takings." *Koontz*, 570 U.S. at 615 (brackets, citation, and internal quotation marks omitted). The fee at issue here is closely analogous to both types of assessments, and thus could have been imposed outside of the permitting process without constituting a taking.

i. "[T]axation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *Kimball*, 102 U.S. at 703. The Court has long considered "the authority to require the property specially benefited to bear the expense of local improvements" to be a "branch of the taxing power, or included within it." *French*, 181 U.S. at 343-344 (quoting 2 John F. Dillon, *Commentaries on the Law of Municipal Corporations* § 752 (4th ed. rev. and enlarged)). Thus, "the legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon

the owners of lands benefited thereby." *Id.* at 342 (discussing *Bauman* v. *Ross*, 167 U.S. 548 (1897)); see, *e.g.*, *Tonawanda* v. *Lyon*, 181 U.S. 389 (1901) (similar). In that context, legislative determinations about how to apportion fees receive significant deference. "The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners." *Houck*, 239 U.S. at 265; see *Spencer* v. *Merchant*, 125 U.S. 345, 356 (1888).

Similarly, "in the absence of flagrant abuse or purely arbitrary action a State may establish drainage districts and tax lands therein for local improvements, and * * * none of such lands may escape liability solely because they will not receive direct benefits." *Miller & Lux, Inc.* v. *Sacramento & San Joaquin Drainage Dist.*, 256 U.S. 129, 130 (1921). In this context, the "method of assessing the lands" is a "matter[] of detail in arriving at the proper and fair amount and proportion of the tax * * * which is open to the discretion" of the legislature. *Fallbrook Irrigation Dist.* v. *Bradley*, 164 U.S. 112, 176 (1896). Even if the method of assessment is "in some instance inequitable and unequal, * * * that is far from rising to the level of a constitutional problem." *Id.* at 177; see, *e.g.*, *Roberts* v. *Richland Irrigation Dist.*, 289 U.S. 71, 75 (1933). Rather, such special assessments are unconstitutional only if they violate due process because they are "palpably arbitrary, and therefore a plain abuse of power." *Kansas City S. Ry. Co.* v. *Road Improvement Dist. No. 3 of Sevier Cnty.*, 266 U.S. 379, 386 (1924); see, *e.g.*, *Myles Salt Co.* v. *Board of Comm'rs of the Iberia*, 239 U.S. 478, 482-483 (1916); *Houck*, 239 U.S. at 265; *Tonawanda*, 181 U.S. at 392.

The traffic impact mitigation fee at issue here is functionally equivalent to these types of special assessments. Respondent designed the fee schedule to re-

quire new development to pay for "road capacity improvements" that are "reasonably attributable to new development." A.R. 1520. The impact fee charges new development for the cost of expanding and building roadways by projecting the number of trips the development will add to those roads. See, *e.g.*, A.R. 1520, 2341-2342, 3134, 3448-3452. Thus, unlike the easements at issue in *Nollan*, *Dolan*, and *Koontz*, respondent could constitutionally impose such an assessment outside of the permitting context so long as it was not "palpably arbitrary," *Kansas City S. Ry. Co.*, 266 U.S. at 386.[1]

ii. The impact fee here is also closely analogous to a user fee, which respondent likewise could charge outside of the permitting context without engaging in a taking. Impact fees "[a]ct[] like user fees [by] guarantee[ing] benefits to those who pay for them." Carswell 385. As discussed, respondent imposed the fee on new development based on a legislative determination that such development creates the need for, and will benefit from, the building and widening of new and existing roads.

As in the case of special assessments, user fees generally do not constitute takings, see *Sperry*, 493 U.S. at

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[1] To be sure, the Court has sometimes "found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax." *Koontz*, 570 U.S. at 615; see *id.* at 615-616. But this case concerns not a specific "financial obligation[]," but instead a fee that can be paid from the payee's general resources or any other source. See pp. 20-22, *infra*. The point is not simply that respondent could have achieved "an economically equivalent result through taxation," *Koontz*, 570 U.S. at 616. It is instead that in form, substance, and effect, the traffic impact mitigation fee is substantially similar to taxes to pay for public improvements that do not constitute takings outside of the land-permitting context.

60-62, and they are reviewed deferentially. The "amount of a user fee" need not "be precisely calibrated to the use that a party makes of Government services[,] [n]or does the Government need to record invoices and billable hours to justify the cost of its services." *Id.* at 60. Rather, user fees need only be a "fair approximation of the cost of benefits supplied." *Ibid.* (citation omitted).

Given the close similarity between the traffic impact mitigation fee at issue here and the taxes and user fees this Court has approved, petitioner cannot establish the necessary predicate for an unconstitutional-conditions claim under *Nollan*, *Dolan*, and *Koontz*.

b. Petitioner's contrary arguments lack merit.

i. Petitioner errs in broadly suggesting (Pet. Br. 12-13, 25-26) that outside of the permitting context, the government engages in a taking whenever it obtains "money" from a private party. Most obviously, as just discussed, taxes and user fees are not takings. And while petitioner suggests (Br. 25) that the fee here would have constituted a taking "[h]ad the County singled out Mr. Sheetz, *qua* landowner and outside the permitting process, to make" the same "monetary payment * * * for road improvements," petitioner was *not* "singled out" to pay the fee. Rather, he was required to pay the same fee as any similarly situated permit applicant in the same use category (single-family residential) and zone (6). That type of assessment or user fee would not constitute a taking outside of the permitting process. See, *e.g.*, *Tonawanda*, 181 U.S. at 392 (upholding a special assessment where there was no evidence "that the burdens imposed on the property of the complainant were other than those imposed upon that of other persons in like circumstances").

ii. More generally, in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), five Justices of this Court took the

view that the Takings Clause does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest." *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part); see *id.* at 554-556 (Breyer, J., dissenting); but see *id.* at 522-537 (plurality opinion) (determining that the statute imposing retroactive liability on coal operators to fund healthcare benefits of certain retired coal miners effected a regulatory taking under *Penn Central*).

The decisions petitioner cites (Br. 12-13) are consistent with the more limited proposition of five Justices in *Eastern Enterprises* and the other decisions cited above. They involved the government's obtaining of identified funds, such as the interest in a particular bank account, see *Brown* v. *Legal Found.*, 538 U.S. 216, 235 (2003); *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 160 (1998); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162 (1980), or the seizure of a particular lien, *Armstrong* v. *United States*, 364 U.S. 40, 44 (1960), rather than an obligation to pay money from any source.[2]

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[2] As petitioner appears to acknowledge (Br. 26 n.9), *Norwood* v. *Baker*, 172 U.S. 269 (1898), involved "[s]pecial facts," *Wight* v. *Davidson*, 181 U.S. 371, 385 (1901): The local government there attempted to evade the Takings Clause by condemning the landowner's property to build a road; paying compensation; and then attempting to reclaim the money paid by demanding that the landowner pay it back as a purported assessment on her property. Contrary to petitioner's suggestion (Br. 13), that case does not stand for the proposition that *any* monetary fee—or even any monetary fee associated with land, see pp. 22-23, *infra*—constitutes a taking. See *Phillip Wagner, Inc.* v. *Leser*, 239 U.S. 207, 219 (1915) (explaining that "much that is said in" *Norwood* "must be read in connection with the [Court's] subsequent cases").

For that reason, "all circuits that have addressed the issue" following *Eastern Enterprises* "have uniformly found that a taking does not occur when the statute in question imposes a monetary assessment that does not affect a specific interest in property." *McCarthy* v. *City of Cleveland*, 626 F.3d 280, 285 (6th Cir. 2010) (collecting cases). As the Ninth Circuit recently explained, "money may still be subject to a per se taking if it is a specific, identifiable pool of money," but an ordinance that "imposes a general obligation to pay money and does not identify any specific fund of money * * * does not effectuate" a taking. *Ballinger* v. *City of Oakland*, 24 F.4th 1287, 1294-1295, cert. denied, 142 S. Ct. 2777 (2022).

iii. Petitioner's suggestion that *Koontz* applies a different rule whenever a "direct link" exists between a demand for money and a piece of real property is also mistaken. *E.g.*, Br. 26 (citation omitted). *Koontz* held that the government could not leverage its interest in obtaining an easement in property (and the accompanying right to exclude) to extract an in-lieu fee from the owner. 570 U.S. at 612-614. Although the Court at times expressed its holding broadly, see, *e.g.*, *id.* at 619, the Court did not purport to "apply [its] precedent from the physical takings context" to all "[l]and-use regulations" that involve money, *Tahoe-Sierra*, 535 U.S. at 323-324. Rather, the Court viewed its decision as consistent with the understanding of *Eastern Enterprises* discussed above. See *Koontz*, 570 U.S. at 617. And the Court explained that it was unnecessary to "say more" about whether a general obligation to pay money constitutes a taking because, in *Koontz*, "petitioner's money" was demanded as "a substitute for his deeding to the public a conservation easement," which outside of

the permitting context, would have constituted a taking. 570 U.S. at 617.

Koontz's statement that the "fulcrum" of its analysis was "the direct link between the government's demand and a specific parcel of real property," must be read in that "limited" context. 570 U.S. at 614. Especially so understood, *Koontz*'s holding does not extend to this case. Respondent did not attempt to extract a real-property interest from petitioner, but instead imposed a fee that may be paid from any source, and that (like a special assessment or user fee) will be used to fund government infrastructure that will be built or expanded in light of new development.

Indeed, a broad reading of *Koontz* would cause the very confusion the decision disclaimed. The Court there emphasized that its decision would 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. But if any "direct link" between real property and the requirement to pay a fee were sufficient to trigger application of the *Nollan/Dolan* standard, then (contrary to *Koontz*'s assurance) the government's ability to impose property taxes and other property-related fees would be questioned. Such fees are often connected to a particular parcel and its "position, frontage, area, [or] market value"—yet those fees have never been considered takings. *Houck*, 239 U.S. at 265; see, *e.g.*, *Ballinger*, 24 F.4th at 1297 (finding that a "relocation fee" associated with an apartment was not a taking, where the fee was "linked to real property, but no more so than property and estate taxes").

2. The fee at issue here does not implicate the core concerns underlying Nollan*,* Dolan*, and* Koontz

Respondent's traffic impact mitigation fee lacks another key feature of *Nollan*, *Dolan*, and *Koontz*: It is not assessed in discretionary, adjudicative proceedings, but rather is predetermined through legislative action "classifying entire areas of the [County]." *Dolan*, 512 U.S. at 385.

a. The Court's land-use exaction decisions rest on a determination "that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 570 U.S. at 604-605; see *Nollan*, 483 U.S. at 837 & n.5. Indeed, in *Dolan*, the Court distinguished "land use planning" laws it had previously upheld—which involved "essentially legislative determinations classifying entire areas of the city"—from the facts of that case, which involved the city's "adjudicative decision to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 384-385.

The concerns discussed in *Nollan*, *Dolan*, and *Koontz* do not apply to the broadly applicable legislative fee at issue here. Like other land-use regulations this Court has upheld, respondent's fee schedule "classif[ies] entire areas of the [County]," *Dolan*, 512 U.S. at 385, and it applies broadly to new development. Neither the formulation of that fee, nor its application to petitioner, rendered petitioner "especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits," *Koontz*, 570 U.S. at 605. To the contrary, the fee was derived through a legislative process that focused on balancing the legislature's considered

judgment that new development should pay its fair share of impacts on county roads with, *inter alia*, "the need to keep the fees financially feasible" considering affordable housing goals and business conditions. A.R. 3101; see A.R. 3080.

Legislative balancing of that kind does not present the same risk of abuse of the permitting process that animate *Nollan*, *Dolan*, and *Koontz*. Rather, like other land-use planning decisions made by legislative bodies, the impact fee here was a "change in the general law" that might constitute a taking only if it "goes too far." *Mahon*, 260 U.S. at 413, 415; see, *e.g.*, *Palazzolo*, 533 U.S. at 632 (remanding for state court to consider the assertion that a permitting authority's denial of a development permit constituted a taking "under the *Penn Central* analysis").

b. Petitioner contends (Pet. Br. 15-24) that *Nollan*, *Dolan*, and *Koontz* in fact concerned legislatively imposed exactions—and that, as a result, all permitting conditions in the land-use context are subject to those decisions. That argument flouts not only the Court's express statements in those decisions, but also its recognition in *Lingle* that "[b]oth *Nollan* and *Dolan* involved Fifth Amendment takings challenges to *adjudicative* land-use exactions—specifically, government 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 (emphasis added).

Petitioner is correct that legislation played some role in the facts of *Nollan*, *Dolan*, and *Koontz* by either requiring or authorizing the types of conditions the permitting authorities ultimately imposed. But in each case, the permitting authority made a parcel-specific determination whether the statutory requirement ap-

plied or how it should be achieved. See *Koontz*, 570 U.S. at 600-602; *Dolan*, 512 U.S. at 377-383; *Nollan*, 483 U.S. at 828-829. Petitioner is thus wrong to suggest that the Court understood those cases to involve only legislative enactments. Indeed, if that were the case, it would have made little sense for the Court to distinguish its prior decisions upholding land-use regulations on the ground that they "involved essentially legislative determinations classifying entire areas of the city," rather than "adjudicative decision[s]" regarding "individual parcel[s]." *Dolan*, 512 U.S. at 385.

c. Petitioner observes (Br. 29) that neither the unconstitutional-conditions doctrine nor the Takings Clause "exempts the legislative branch." See Pet. Br. 29-37. But no one suggests they do. Rather, the special application of the unconstitutional-conditions doctrine adopted in *Nollan* and *Dolan* does not apply here because respondent's fee could be constitutionally imposed outside of the permitting context. See pp. 16-23, *supra*.

As for the Takings Clause, the question is simply what standard courts use to determine whether the government has engaged in a taking requiring just compensation. The Court applies different standards to that inquiry depending on the type of action at issue. See pp. 10-13, *supra*. And while the branch of government that takes an action is not dispositive, "the manner of state action may matter" in determining whether a taking has occurred. *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion).[3]

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[3] As petitioner observes (Br. 31), *Cedar Point Nursery* rejected the suggestion that a physical invasion of property might not be a

3. Extending Nollan, Dolan, *and* Koontz *to this context would have problematic consequences*

As already discussed, applying the "special" rule of *Nollan*, *Dolan*, and *Koontz* to a legislative permitting fee that is imposed pursuant to a non-discretionary schedule and that is unrelated to a dedication requirement would unmoor that rule from its doctrinal underpinnings. It also would confuse the line between (1) easements and in-lieu fees, and (2) "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners" without constituting a taking. *Koontz*, 570 U.S. at 615.

Applying *Nollan*, *Dolan*, and *Koontz* to such fees would be problematic for two additional reasons. *First*, those decisions require an individualized determination that would be unworkable in the legislative context. *Second*, those decisions invert the usual burden of proof for challenges to legislative action, requiring the government to demonstrate that its action satisfies the nexus and rough-proportionality requirements.

a. i. *Nollan*, *Dolan*, and *Koontz* arose in the context of parcel-specific adjudicative determinations. In that situation, the decisions require the government to make "some sort of individualized determination that

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per se taking "because it arises from a regulation." 141 S. Ct. at 2072. The Court explained that the "essential question" was not "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," but "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Ibid.* This case does not concern a physical taking claim, and *Cedar Point Nursery* did not address a legislative permitting fee imposed under a non-discretionary schedule and unrelated to any dedication of the owner's property.

the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. But legislative bodies engaging in programmatic decision-making do not make individualized determinations. Rather, the fee at issue here illustrates the level of generality at which legislative bodies act. Before petitioner purchased or sought to develop his property, respondent divided El Dorado County into 8 zones based on projected future development, and 14 development types based on the projected number of trips on public roads that would result from each type of use.

Petitioner contends (Br. 42-43) that to satisfy the Takings Clause, respondent's permitting authority should have done what the legislature could not: provide a "mechanism" for making a parcel-specific determination that the impact fee has a nexus and is roughly proportional to "the actual public impacts of" "each proposed use or development." But nothing in the Takings Clause or this Court's decisions mandates that vast expansion of the role of local permitting authorities who, under state law, would otherwise ministerially apply a legislatively predetermined fee.

To the contrary, this Court's decisions illustrate the ill fit between petitioner's individualized standard and legislative enactments. For example, the Court has distinguished between legitimate user fees and potential takings by asking whether the fees are "so clearly excessive as to belie their purported character as a user fee." *Sperry*, 493 U.S. at 61-62. Similarly, the Court has recognized that "special assessments [may be] imposed * * * in proportion to position, frontage, area, market value, or to benefits estimated by commissioners," and that "there is no requirement of the Federal Constitution that for every payment there must be an

equal benefit." *Houck*, 239 U.S. at 265. Those standards comport with the general understanding of the Takings Clause, which "has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens * * * in excess of the benefits received" from a use restriction. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.21 (1987).

By requiring an individualized inquiry under the *Nollan/Dolan* standard, petitioner's proposal also would threaten grave and unwarranted administrative costs. As petitioner acknowledges (Br. 43), his rule would hamstring local governments from making predictive judgments, requiring instead that they justify fees on a parcel-specific basis. That requirement would be prohibitively costly for many local governments, "transform[ing] government regulation into a luxury few governments could afford," *Tahoe-Sierra*, 535 U.S. at 321. And it would deprive regulated parties of the notice and clarity that comes with predetermined, class-wide fees.

Moreover, petitioner's rule would create the very discretion that this Court found potentially problematic in *Nollan*, *Dolan*, and *Koontz*. In those cases, the Court expressed concern that the permitting authority's wide discretion introduced the risk of government burdening a landowner's right to just compensation. See p. 15, *supra*. By requiring parcel-specific adjudication, petitioner would introduce the concern that *Nollan*, *Dolan*, and *Koontz* sought to mitigate.

ii. Petitioner asserts (Br. 38) that his approach is workable on the theory that "[s]ince *Dolan*, lower courts have applied the nexus and proportionality tests to analyze legislative exactions designed to subsidize road construction and maintenance." But as petitioner

acknowledges, many of the cases he invokes involved "site-specific" conditions that a landowner "dedicate property" or pay an in-lieu fee. Pet. Br. 39 (discussing *B.A.M. Dev., L.L.C.* v. *Salt Lake Cnty.*, 282 P.3d 41, 43-46 (Utah 2012)); see *id.* at 40-41 (addressing cases requiring the dedication of "property for road widening and other traffic infrastructure"). Petitioner's reliance (Br. 42) on the Sixth Circuit's decision in *F.P. Dev., LLC* v. *Charter Township*, 16 F.4th 198 (2021), is misplaced for similar reasons: The parties there did not "raise" the question whether *Nollan*, *Dolan*, and *Koontz* applied to a tree-replacement or mitigation ordinance (which resembled an in-lieu fee), and the court therefore did not decide that "interesting" issue. *Id.* at 206. Petitioner thus provides no meaningful support for the proposition that it is workable to apply a parcel-specific analysis to legislatively predetermined fee schedules that are wholly divorced from any dedication requirement.

iii. Nor is petitioner correct that declining to apply *Nollan*, *Dolan*, and *Koontz* in this context would be "unworkable" because it would "require[] courts to draw difficult lines between legislative and *ad hoc* or adjudicatory exactions." Pet. Br. 43. Rules distinguishing between legislative enactments and adjudicative decisions are hardly novel to the law.

For example, this Court has long recognized that due process does not require individualized hearings where "[g]eneral statutes within the state power are passed that affect the person or property" of "more than a few people." *Bi-Metallic Inv. Co.* v. *State Bd. of Equalization*, 239 U.S. 441, 445 (1915). *Bi-Metallic* itself concerned a legislative enactment "increasing the valuation of all taxable property in Denver," *id.* at 443-444, and courts have applied the same distinction to due-process

challenges to land-use regulation, see, *e.g.*, *75 Acres, LLC* v. *Miami-Dade Cnty.*, 338 F.3d 1288, 1294 (11th Cir. 2003). A similar dichotomy between generally applicable legislative or administrative standards, on the one hand, and individualized determinations, on the other, exists in the Fourth Amendment context. See, *e.g.*, *Camara* v. *Municipal Ct.*, 387 U.S. 523, 538 (1967). Most relevant here, numerous courts already distinguish, without difficulty, between legislative, nondiscretionary, generally applicable fees and ad hoc determinations subject to this Court's land-use exactions framework. See, *e.g.*, *Krupp* v. *Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) (en banc); *Home Builders Ass'n* v. *City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.) (en banc), cert. denied, 521 U.S. 1120 (1997).

b. *Nollan*, *Dolan*, and *Koontz* are a poor fit for legislatively imposed, widely applicable fees for the further reason that they shift the burden to the government to demonstrate that its action is constitutional.

As a general matter, statutes are presumed constitutional because "absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and * * * judicial intervention is generally unwarranted no matter how unwisely [courts] may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted). The rule is generally the same in a suit challenging an alleged taking: As the Court explained in *Dolan*, "in evaluating most generally applicable" land-use laws, "the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights." 512 U.S. at 391 n.8 (citing *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926)); see *id.* at 385; see also, *e.g.*, *Sperry*, 493 U.S. at 60; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 596

(1962) (town ordinance on dredging and excavating property subject to "the usual presumption of constitutionality").

Dolan provides an exception where the government makes "an adjudicative decision to condition" a land-related permit on a dedication tied to "an individual parcel." 512 U.S. at 391 n.8. In that "situation," *Dolan* stated, "the burden properly rests on the city." *Ibid.* But as already discussed, that exception rests on two grounds, neither of which applies here. *First*, because the government's appropriation of an easement would constitute a *per se* taking if made outside of the permit context, the government bears the burden of avoiding what otherwise would be its obligation to pay just compensation. *Second*, the Court has suggested that the adjudicative context supports burden-shifting because the government's "broad discretion to deny a permit" makes "permit applicants * * * especially vulnerable to * * * coercion" in that situation. *Koontz*, 570 U.S. at 605. In the absence of those two conditions, no sound basis exists to displace the usual presumption that legislative bodies act constitutionally.

C. Federal And State Law Already Provide Sufficient Protection Against Undue Interference With Property Interests

Finally, petitioner's proposal to extend *Nollan*, *Dolan*, and *Koontz* to legislatively determined impact fees like the one at issue here is unwarranted in light of the significant protection already provided by federal and state law.

1. The Takings Clause provides adequate protection from unduly burdensome development fees. A land-use-related fee is permissible only if it is "a legitimate exercise of the government's police power." *Murr*, 582 U.S. at 400. And *Penn Central* sets out a general test

applicable to land-use regulations. Under that framework, a fee might constitute a taking if it went "'too far'" based on factors such as its "economic impact," "its interference with reasonable investment-backed expectations, and the character of the government action." *Cedar Point*, 141 S. Ct. 2072 (citation omitted). A fee that deprives the owner of all economically viable use of the land also could constitute a taking under *Lucas*, 505 U.S. at 1019. And other provisions of the Constitution would protect a landowner from being singled out from other similarly situated individuals without a rational basis, see, *e.g.*, *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000) (per curiam) (Equal Protection Clause); *Sioux City Bridge Co.* v. *Dakota Cnty.*, 260 U.S. 441, 445 (1923), or from arbitrary fees, see p. 18, *supra* (Due Process Clause).

2. State law provides additional protection. In California, the Mitigation Fee Act requires "a reasonable relationship between" "the fee's use" and "the need for the public facility," on the one hand, and "the type of development project on which the fee is imposed," on the other. Cal. Gov't Code § 66001(a)(3) and (4) (2022); see *id.* § 66001(g) (providing that the fee "shall not include the costs attributable to existing deficiencies in public facilities"). That standard, tailored to legislatively determined impact fees, is parallel to the one this Court adopted to focus on individual parcels in *Nollan* and *Dolan*, see *Dolan*, 512 U.S. at 391, and it has been adopted by a majority of States, Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 Utah L. Rev. 105, 112 (2016). Given this substantial protection, there is no reason to unmoor the nexus and rough-proportionality standards from their doctrinal underpinnings and apply them to generally applicable legisla-

tive fees unrelated to any government attempt to obtain a dedication of real property.

CONCLUSION

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

Respectfully submitted.

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