No. 22-1074

In The
Supreme Court of the United States

GEORGE SHEETZ,
Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

In a major concession, El Dorado County agrees—as it must—that heightened scrutiny under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), can apply to permit exactions mandated by legislation. Respondent's Brief (RB) 29 ("[O]f course it can."). But it seeks a carve-out for a legislative fee that (i) "applies equally to categories of similar properties" and (ii) does not "seek[] any dedicatory interest in land." RB.1. In proposing its novel rule, the County asks the Court to venture beyond the Question Presented and revisit the Court's central holding in *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 619 (2013), that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* … even when its demand is for money." Further, the County's rule is even more extreme than the loophole endorsed by the California courts, which apply *Nollan*/*Dolan* review to certain impact fees even if they aren't *in lieu* of a real-property demand. Pet. App. A-10–11 (describing California cases).

The County's proposal has no basis in precedent, doctrine, or sound policy. Further, no reason exists for the Court to upend its exactions precedents just to accommodate legislative impact fees. The Court should reverse and remand for consideration whether the County's fee satisfies *Nollan*/*Dolan* review.

CORRECTIONS TO THE COUNTY'S STATEMENT OF THE CASE

The County relies on a selective description of the administrative record ("AR")—which George Sheetz strenuously disputes—to argue that its impact fee is sufficiently "rational[]" to satisfy "state-law restrictions." RB.3–12, 41. Even if true, that argument is beside the point. The question before the Court is whether *Nollan*/*Dolan*'s more exacting standard applies. If it does, the record reveals that, on remand, the County will be unable to show that its fee satisfies *Nollan* and *Dolan*.[1] Here's a sampling:

1. The County shifted much of the financial obligation to mitigate traffic impacts from new nonresidential uses (office, retail, churches) to new residential projects like Sheetz's house. AR2114. Although residential uses cause 60% of vehicle traffic, and nonresidential uses cause the remaining 40%, the County chose to allocate *94%* of the costs for improvements to new residential projects—in part, so as to not overburden and discourage new businesses from coming into the County. *Id.*

2. The County's fee program serves to cover the unfunded costs of needed road-improvement projects identified as far back as 2005 and 2006. AR2354–2392, 3137. One such unfunded cost—amounting to $150 million in 2005—was for mitigation for traffic impacts attributable to trips

[1] Efforts by the County to litigate the merits of Sheetz's *Nollan*/*Dolan* claim are premature. Since "[t]his case comes to" the Court on a demurrer, it can "take the facts in the [lawsuit] as true." *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1374 (2023); JA-20 (Petition ¶¶ 16–17, 21, 33(b)–(c) (alleging *Nollan*/*Dolan* violation)).

originating or ending outside the County. *See, e.g.*, AR2113. The record suggests that future projects, including Sheetz's, ultimately financed those unrelated improvements.

3. The record indicates that the County required Sheetz and other new projects to finance historic road deficiencies because the impact fee is based on the cost of repairs identified as early as 2004 (AR1233, 2110, 2342, 2354–2392) and is imposed "without regard to the cost specifically attributable to the particular project on which the fee is imposed" (Pet. App. A-3). The record is silent as to whether and the extent to which such preexisting deficiencies were repaired by the time Sheetz applied for his permit or whether he was forced to help finance those repairs.

4. The fee schedule reflects a significantly disproportionate allocation of fees. For example, a multi-family development—which houses multiple families with similar per-unit impacts—was subject to *one-third* the fee that Sheetz paid. AR251. His 1,854-square-foot home incurred the same fee applicable to a 34,441-square-foot mega-church or an 11,047-square-foot office building. *Id.*

ARGUMENT

I. *Nollan*, *Dolan*, and *Koontz* Apply to the County's Legislative Impact Fee

The County and United States claim that *Nollan*/*Dolan* review applies only to exactions "imposed on particular landowners through an ad-hoc process," not when they are "generally applicable to a broad class of property owners through legislative action." RB.19, 24; Brief of Amicus U.S. ("U.S. Br.") 15. They also claim such review applies only when the

exactions are "in lieu of requests for an easement"—an argument the County makes for the first time in its Respondent's Brief. RB.24; U.S. Br. 22. They are wrong.

A. *Nollan*, *Dolan*, and *Koontz* Involved Generally-Applicable Exactions

1. *Nollan*, *Dolan*, and *Koontz* did not involve "ad-hoc" or "particularized" demands. RB.20; U.S. Br. 15 ("parcel-specific"). They involved the kind of generally-applicable demand that the County here defends.

As to *Nollan*, the County asserts that "the commission 'recommended' an easement based on specific characteristics of the Nollans' property." RB.20. It was the agency's *staff* that made the recommendation, which the agency accepted as required by statute. *Nollan*, 483 U.S. at 828. It is beyond dispute that the exaction derived from the Coastal Act's mandate that "[p]ublic access ... shall be provided" in every "new development project[]" along the coast. Cal. Pub. Res. Code § 30212. It was not a one-off suggestion based on the property's particulars.

The County similarly claims that *Dolan* involved "particularized" exactions based on the "particular features" of Dolan's land. RB.20. But as *Dolan* itself states, the "conditions [were] imposed by the city's CDC"—*i.e.*, its Community Development Code, which dictated certain dedications for all new developments in the Central Business District encompassing Dolan's land. *Dolan*, 512 U.S. at 377, 379; Petitioner's Brief (PB) 18–21 (extensive discussion about generally applicable nature of *Dolan* exactions). The *Dolan* exactions were no more "parcel-specific" (U.S.

Br. 15) than the fee here, which was based partly on the location of Sheetz's land.

Finally, the County misdescribes *Koontz* as involving "ad-hoc bargaining." RB.21. There, the exaction was imposed by the state agency's generally-applicable mitigation ratios prescribing the amount of wetland creation, enhancement, or preservation required of development on wetlands. PB.23. Bargaining may have occurred over the *form* of mitigation, but mitigation as such was required for all applicable projects. *Koontz*, 570 U.S. at 601.

2. The County and United States also contrast the "administrative" or "adjudicative" processes in which the exactions in *Nollan*, *Dolan*, and *Koontz* were imposed with the "ministerial" or "non-discretionary" process by which the County imposed its monetary exaction on Sheetz. RB.20–21, 23, 28; U.S. Br. 15. But that distinction has no constitutional significance.

First, the fact that the *permits* in *Nollan*, *Dolan*, and *Koontz* were discretionary entitlements considered in an administrative or quasi-adjudicative process did not make the *conditions* attached to such permits discretionary. In each case, the condition was fundamentally nondiscretionary. PB, Part I.B–D.

Second, the County argues the "'sine qua non' for application of *Nollan*/*Dolan* scrutiny" is "the 'discretionary deployment of the police power.'" RB.23 (citation omitted); RB.36. But *any* level of government, not just a planning official or commission, can exercise discretion. A legislative body exercises discretion when, as here, it decides to enact legislation imposing exactions. *Disney v. City of Concord*, 194 Cal. App. 4th 1410, 1415 (2011) ("In the

exercise of its police power a legislative body is vested with a broad discretion….").

The County and United States lose sight of the fact that *Nollan*/*Dolan* review serves to abate "the risk that *the government* may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue." *Koontz*, 570 U.S. at 614 (emphasis added). That risk exists regardless of the *branch* of government exercising discretion or the forum in which the exaction is imposed. In all cases, the relevant government actor "might try to leverage its monopoly permit power to pay for unrelated public programs on the cheap." *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 825 (6th Cir. 2023). *That* is the "central concern" that *Nollan*/*Dolan* review addresses. *Koontz*, 570 U.S. at 614.

If anything, the risk may be especially acute where an exaction is imposed ministerially in a non-adjudicatory setting—for example, where (as here) a preset exaction is imposed in exchange for an over-the-counter building permit. In that situation, a landowner has no administrative forum to advocate for the exaction's reduction or elimination. Arguably, an exaction imposed in such peremptory circumstances—barren of even minimal administrative protections—should trigger more, not less, judicial scrutiny than an exaction imposed discretionarily through an adjudicative process affording minimum guardrails (e.g., a public hearing, an opportunity to be heard, administrative appeals).

3. The County's fee is not, as the County and United States contend, a "land use restriction[]," an "essentially legislative determination[] classifying entire areas of the city" as discussed in *Dolan*, or a "tax" or "user fee" as discussed in *Koontz*. RB.21–25, 39; U.S. Br. 24. The fee doesn't purport to limit where, how, or whether Sheetz can build on his land. The County's General Plan acknowledges that an "exaction" is a "contribution or payment required as an authorized precondition for receiving a development permit" (AR1848) and thus categorizes "impact fees"—like the fee here—differently from "taxes," "use fees," and "assessments" (AR3248–53). *Koontz*, 570 U.S. at 614 (highlighting difference between use restriction and exaction). Amicus American Planning Association ("APA") correctly observes that an "impact fee is both a personal liability of the owners of property that is the subject of new development and a lien upon the property"; that differs from a use restriction. APA, *Growing Smart, Legislative Guidebook: Model Statutes for Planning and the Management of Change*, 8-165 (Stuart Meck ed., 2002).[2]

Moreover, the fee schedule isn't a "legislative determination[] classifying entire areas" of the County. *Dolan,* 512 U.S. at 385. *Dolan* used that language to describe the land-use restrictions in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Neither *Euclid* nor *Agins* involved challenges to permit conditions. They were challenges to "*zoning restrictions* on the uses to which they and everyone else in the area could put their land." *Knight*, 67 F.4th

[2] https://bit.ly/3RBXJuO.

at 834 (emphasis added). An exaction is a property appropriation, not a limitation on how owners in an area may use their land.[3]

Lastly, the County and United States argue that applying *Nollan*/*Dolan* here would sweep in taxes and user fees.[4] RB.24, 39; U.S. Br. 17–19. But *Koontz* roundly rejected those same line-drawing concerns. *Koontz*, 570 U.S. at 615–17. Eleven years later, there's no evidence that governments or courts have been mired in confusion over the differences between (i) monetary exactions and (ii) taxes and user fees. This case does not call for a rehash of a debate that *Koontz* resolved.

Further, this case comes to the Court on the undisputed fact that the County's impact fee is a monetary exaction, not a tax or user fee. Pet. App. A-12–27 (treating fee as exaction, not tax, assessment, or user fee). The County never has defended its impact fee as a tax or user fee. And for good reason. Unlike taxes and user fees, the County's fee ostensibly offsets traffic impacts purportedly caused by new development. AR1227–28. It is not designed to generate revenue for the general fund, or to secure

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[3] Elsewhere, the County and United States repeat the mistake of conflating what's at issue here (a permit exaction) with land-use regulations, including by citing precedents and concepts that govern only the latter. RB.40, U.S. Br. 25 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), governing land-use restrictions); RB.48 (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), in relation to "land use regulations"); U.S. Br. 12 (same).

[4] Belying its argument that the line between impact fees and taxes is blurred, the County had no trouble considering tax hikes before turning to new development as its source of funding. AR2181–2219; AR437.

reimbursement for an owner's use of a public good or service, such as water, sewer, or trash collection.[5] Taxes and user fees, imposed outside the permit process, do not present the "heightened risk" identified in *Nollan* that the government will leverage its vast permitting power to circumvent the Takings Clause. *Nollan*, 483 U.S. at 841.

Ultimately, "teasing out the difference between taxes and takings is more difficult in theory than in practice." *Koontz*, 570 U.S. at 616. That was true when *Koontz* was decided, and it remains true today.

B. *Nollan/Dolan* Review Applies to All Monetary Exactions

1. *Koontz* held that "the government's demand for property from a land-use permit applicant must satisfy *Nollan* and *Dolan* … even when its demand is for money"—period. *Koontz*, 570 U.S. at 619. *Koontz* specifically rejects the argument that *Nollan* and

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[5] In California, a local tax is "any levy, charge, or exaction of any kind imposed by a local government, *except* [*inter alia*] … *[a] charge imposed as a condition of property development*." Cal. Const. art. XIII C § 1(e)(6) (emphasis added). "User fees" are "charged only to the person actually using the service" and "is generally related to the actual goods or services provided." *Isaac v. City of Los Angeles*, 66 Cal. App. 4th 586, 596–597 (1998). California also allows "assessments"—i.e., "impositions for improvements which are specially beneficial to particular individuals or property, and which are imposed in proportion to the particular benefits supposed to be conferred." *Howard Jarvis Taxpayers Ass'n v. Amador Water Agency*, 36 Cal. App. 5th 279, 298 (2019). Despite the U.S.'s contrary claim (U.S. Br. 18–20), the County's fee is designed, not to defray the costs of special benefits provided to Sheetz or to require reimbursement for his use of a good or service; rather, it is designed to offset public harms purportedly caused by his house. The U.S.'s reliance on assessment and tax cases is misplaced. U.S. Br. 11, 18–20.

Dolan are inapplicable when the government asks the owner "to spend money rather than give up an easement on his land." *Id.* at 612. Even the dissent recognized that the Court was "applying *Nollan* and *Dolan* to permit conditions requiring monetary payments—with no express limitation except as to taxes"—and that *Nollan*/*Dolan* henceforth applied "to *all* monetary exactions." *Koontz*, 570 U.S. at 626, 629 (Kagan, J., dissenting).

2. The County and United States erroneously argue that *Koontz* is limited to *in lieu* monetary exactions.[6]

a. "[R]ather than limiting the reach of the [Court's] decision," *Koontz*'s "reference to 'in lieu of' fees" was "a response to the ... conclusion that a government demand for money rather than an interference in tangible property rights did not constitute a taking." *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 28 (2022). Again, even the *Koontz* dissent acknowledged that *Nollan*/*Dolan* review applied to "*all* monetary exactions"—*in lieu* or otherwise. *Koontz*, 570 U.S. at 626, 629. "[T]his statement recognizes that the Court's holding was not limited to 'in lieu' fees." *Anderson*, 382 N.C. at 28 n.11.

b. Later, in describing the characteristics of a monetary demand triggering *Nollan*/*Dolan,* the Court focused on whether the demand "direct[s] the owner of a particular piece of property to make a monetary

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[6] Notably, the *in lieu* nature of the demand did not factor into the Florida Supreme Court's opinion that this Court was reviewing in *Koontz*. *Koontz*, 570 U.S. at 611–12 (reviewing the state court's "holding that [Koontz's] claim fails because [the agency] asked him to spend money rather than give up an easement on his land.").

payment." *Koontz*, 570 U.S. at 613. The "fulcrum" of *Nollan*/*Dolan* review "is the direct link between the government's demand [for money] and a specific parcel of real property." *Id.* at 614. That "direct link" occurs paradigmatically in the land-use permit context, where the owner's right to use a specific parcel of real property is conditioned on a monetary payment to mitigate impacts associated with the use. The monetary demand in that context "implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue." *Id.*

Here, the County "direct[ed]" Sheetz—as "the owner of a particular piece of property"—"to make a monetary payment" as the condition of receiving a permit. *Id.* at 613. Refusal to surrender the funds meant permit denial and his inability to build. A direct link clearly exists between the County's fee and Sheetz's land. That link implicates *Nollan*/*Dolan*'s central concern that the County leveraged its substantial permit authority to impose a "financial obligation" bearing no essential nexus or rough proportionality to his project's impacts. JA-25 (Petition ¶ 33(b)). The County's fee bears the characteristics of a monetary exaction as defined in *Koontz* and must therefore satisfy *Nollan*/*Dolan*.

c. The County imposed the impact fee, at least partly, *in lieu* of the dedication of rights of way needed for the widening and construction of public roads. AR1228, 2348, 2354–92. Indeed, a sum of money confiscated to offset land-based externalities can

always be used to acquire land interests for the public's benefit. After all, land-based externalities (like impacts to roads) typically require land-based mitigation (like rights of way for expanded or new roads). Yet a rule allowing a monetary exaction to escape heightened review because it is not expressly made *in lieu* of a real-property dedication only creates another way to "evade" *Nollan* and *Dolan*—the sort of result that *Koontz* repeatedly repudiates. *See, e.g.*, *Koontz*, 520 U.S. at 606, 612.

3. Lower courts have interpreted *Koontz* to apply to monetary exactions not imposed *in lieu* of real-property dedications. In *Anderson Creek*, the North Carolina Supreme Court held *Nollan*/*Dolan* applied to an ordinance conditioning residential permits on the one-time payment of an impact fee for water-and-sewer infrastructure. The fee was not *in lieu* of anything. Nevertheless, the court held the fee was a "monetary exaction" subject to *Nollan*/*Dolan*, because *Koontz* "encompassed a broader range of governmental demands for the payment of money as a precondition for the approval of a land-use permit." *Anderson Creek*, 382 N.C. at 28.

In *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), landlords challenged a San Francisco ordinance requiring them to "apply to the City for a permit" to remove tenants. *Id.* at 1082–83. As the condition of permit approval, the ordinance mandated relocation payments to displaced tenants. *Id.* at 1083. The court held that the ordinance violated *Nollan*/*Dolan*. *Id.* at 1084. The fact that the payment requirement was not "in lieu" of a real-property demand didn't matter. The court explained that, as in *Koontz*, the requirement was a condition of

a land-use permit and was therefore "directly linked to a property owner's desire to change the use of a specific, identifiable unit of property." *Id.* at 1083. *Nollan*/*Dolan* thus applied. *Cf. Ballinger v. City of Oakland*, 24 F.4th 1287, 1297–1300 (9th Cir. 2022) (rejecting *Nollan*/*Dolan* review of Oakland's relocation-payment requirement, not because it was not *in lieu* of a land dedication, but because it wasn't imposed "in exchange for granting a benefit" (a permit)).

This year, a Michigan court also rejected the notion that a monetary demand imposed in the permit process must be *in lieu* of a real-property dedication to trigger *Nollan*/*Dolan*. In *Charter Township of Canton v. 44650, Inc.*, No. 354309, 2023 WL 2938991 (Apr. 13, 2023), a landowner removed invasive trees on its property without a permit. Pursuant to an ordinance, the town required the owner to either (i) replace the trees at its expense or (ii) pay the market value of the removed trees into a "tree fund" for use by the town. *Id.* at *2–3. The owner challenged the requirement under *Nollan*/*Dolan*, which the town argued did not apply because the ordinance "requires no underlying dedication of real property." *Id.* at *10.

Applying *Nollan*/*Dolan*, the court held that the requirement failed the "rough proportionality" standard. *Id.* at *11. The court concluded that *Koontz* "did not expressly limit its holding to the factual circumstances before the Court or otherwise hold that *Nollan* and *Dolan* apply to monetary exactions only so

long as they are demanded as an alternative in lieu of a dedication." *Id.* at *12.[7]

The caselaw cited by the County is unpersuasive. RB.35 n.6. Two cases predate *Koontz*, which first established that *Nollan*/*Dolan* applies to all monetary exactions. *Id*. The third is *Douglass Props. II, LLC v. City of Olympia*, 16 Wash. App. 2d 158 (2021), where the court held that *Nollan*/*Dolan* doesn't apply to generally applicable fees. The court noted the "*in lieu*" nature of the *Koontz* exaction, but didn't explain how it was relevant to its holding. *Id.* at 171.

4. *Koontz* reflects the common-sense principle that, in certain contexts not including taxes, user fees, and the like, a property interest exists in a sum of money protected by the Takings Clause. Monetary demands imposed in the permit context are one example, but there are others. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164–65 (1980) (a county's taking of interest earned on principal held in a court fund was a taking); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (stand-alone monetary demand deemed taking).

The Court recently reaffirmed this principle in *Tyler*, 143 S. Ct. at 1369, holding that a property owner had a protected property interest in that portion of the government's proceeds from a tax sale of her house exceeding her tax debt. *Id.* at 1380.

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[7] The County cites *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (Cal. 1996), in support of its exemption for "broadly applicable fees." RB.23. *Koontz* repudiated any such exception. By contrast, *Ehrlich* agrees with *Koontz* that a monetary exaction can be subject to *Nollan*/*Dolan* review even where the exaction is not *in lieu* of a real-property demand. *Ehrlich*, 12 Cal. 4th at 868 (plurality); *id.* at 899 (Mosk, J., concurring).

Keeping that excess sum of money effected a taking. *Id.* at 1376. The county "could not use the toehold of the tax debt to confiscate more property than was due." *Id.* Similarly, the County here cannot use the toehold of land-use mitigation to confiscate from Sheetz more property than was due for mitigation.

II. Subjecting Legislative Impact Fees to *Nollan*/*Dolan* Review, As *Koontz* Requires, Is Both Workable and Necessary to Provide a Floor of Protection

A. It Is Workable

1. In the County and United States' telling, a "parcel-specific review" of legislative impact fees would be "unworkable." RB.43; U.S. Br. 27–28. If by "parcel-specific review," they mean "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development" (*Dolan*, 512 U.S. at 391), then their disagreement is with *Dolan*, not Sheetz.

Dolan's "individualized determination" language describes an analytical rule about the concepts that must be related: (i) the exaction and (ii) the particular project's impacts. That language does not, as the County and United States seem to think, prescribe a *procedural* rule dictating when or how such an analysis must be made as a matter of constitutional law. Whether or not a fee is preset, "individualized determination" means the focus is on whether a sufficient connection exists between the fee and the impact of "the *proposed* development." *Dolan*, 512 U.S. at 391 (emphasis added). That is the only way to ensure that an appropriation of money from a

particular landowner is for mitigation versus an uncompensated taking.

Like any other exaction, a legislative fee based on classes of development can survive *Nollan*/*Dolan* review only if the government establishes the fee's "essential nexus" and "rough proportionality" to "the impact of the proposed development." *Dolan*, 512 U.S. at 391. The substantive standard does not—and should not—turn on whether the fee is legislative. It is true that the *only* way for the government to be certain any permit exaction, including an impact fee, will pass constitutional muster is to perform a project-specific analysis before calculating and imposing the exaction. But this doesn't mean that *Nollan*/*Dolan* precludes such an analysis after the fee is imposed.

For example, a fee based on classes of development can survive *Nollan*/*Dolan* review if the government establishes (i) the proposed project's impacts on the public facility at issue is roughly within the range of impacts ascribed to the class to which the project belongs; (ii) the imposed fee mitigates the identified impacts—and not, say, impacts attributable to other classes of development or other sources. That's because *Nollan*/*Dolan* requires, not perfect correlation, but an *essential* nexus and *rough* proportionality. Since "[n]o precise mathematical calculation is required," a particular project's impacts could justify a range of fees, so that a fee drawn from that range could be applied consistent with *Nollan*/*Dolan*. *Dolan*, 512 U.S. at 391. It follows that a fee schedule premised on a range of fees for different development classes will not necessarily run afoul of *Nollan*/*Dolan*. Of course, to guarantee the fee is constitutional in the face of a landowner's challenge,

the government must make an individualized determination that the fee as applied to his project satisfies *Nollan*/*Dolan*.

Ultimately, there are many ways for legislative impact fees to exist alongside *Nollan*/*Dolan*'s requirement that they genuinely mitigate for a project's impacts. For example, until this year, Du Page County, Illinois, employed a default traffic-impact-fee schedule from which any particular applicant could deviate based on an individual assessment of his project's impacts. Du Page County, Ill., Ord. DT-O-0088-21, § 12.[8] If a fee drawn from a well-calibrated schedule is roughly proportional to any given project within a class, few, if any, will demand an individual assessment, let alone sue. *Nollan*/*Dolan* does not constitutionalize a particular method or procedure for establishing a lawful fee. But, however the fee is set, *Nollan*/*Dolan* requires that the government establish the requisite nexus and proportionality between the fee and the impact of "the proposed development." *Dolan*, 512 U.S. at 391.[9]

As occurred after *Nollan*, *Dolan*, and *Koontz*, governments will adjust to the reality that their legislative fees are subject to *Nollan*/*Dolan*. Governments have had little difficulty developing procedures to abide by these requirements in the

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[8] https://bit.ly/3TDYiqo.

[9] The U.S. claims that "the usual burden of proof for challenges to legislative action" rests with the challenger, not the government. U.S. Br. 27. But Sheetz doesn't challenge a "legislative action"—i.e., adoption of the fee program. Like the *Nollan*, *Dolan*, and *Koontz* plaintiffs, Sheetz challenges the fee imposed on him, placing the burden on the County to satisfy *Nollan*/*Dolan*. *Dolan*, 512 U.S. at 391.

thirty-plus years since *Dolan*.[10] Some legislative impact fees, like the County's here, will fail *Nollan*/*Dolan* review. Others will survive, even when based on so-called "categories of similarly situated properties." RB.43.

2. The County is currently implementing a more granular impact fee program, though it appears to suffer from the same burden-shifting deficiencies as its 2016 program. Since 2019, the program requires a determination of anticipated daily vehicle trips based, not just on *type* of dwelling, but on the dwelling's *square footage*.[11] Under the newer schedule, Sheetz would have paid substantially less, even without adjusting for inflation.[12] Thus, whatever the reason for the County's declining to impose a more tailored analysis based on square footage, surely it cannot be because it would be unworkable.

3. Applying *Nollan*/*Dolan* to legislative impact fees would not "sound the death knell for impact fees

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[10] *See* Roger D. Wynne, *Koontz: What it said, what it didn't say, and the implications for us in Washington State*, at 13b-8 (Washington State Assn. of Municipal Attorneys, Oct. 11, 2013), https://bit.ly/3vo6W28 (dismissing complaints about administrability as "overwrought" and contrary to the government's experience).

[11] *See* El Dorado County, Dep't of Transp., *Traffic Impact Fee Program*, https://bit.ly/48yiMp1. The reason for the County's change in fee structure was its belated recognition, *cf.* RB.8, that a residence's traffic impacts are in part a function of its size. El Dorado County Traffic Impact Fee Update, Technical Apps., App. A, at 13–14, https://bit.ly/3tAtaO6.

[12] According to the July 2023 fee schedule, a single-family dwelling in Zone 6 (now known as Zone A) between 1,500 and 2000 square feet (like Sheetz's dwelling) triggers a $11,716 exaction.

altogether."[13] RB.43. The Court need look no further than those jurisdictions, like Texas or Illinois, where legislative impact fees exist alongside heightened review. *See, e.g.*, *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 640–41 (Tex. 2004) (applying *Nollan*/*Dolan* to legislative exactions); *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 94 (Tex. App. 2013) (applying such review to generally-applicable park and other fees imposed by the City of Coppell, Texas); Coppell, Tex., Code of Ordinances, Ch. 17 (describing how generally-applicable fees are still calculated and applied)[14]; *Northern Illinois Home*

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[13] Impact fees are of relatively recent vintage. *See* Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 Wash. U.J. Urb. & Contemp. L. 55, 57 (1990) (noting, in 1990, that "[i]mpact fees are a relatively new local government technique for funding capital facilities needed to serve new development in high growth areas of the country."). In 1995, an Ohio court explained:

> Historically, general taxation (property and income) has been employed and imposed upon a city's residents to raise revenues to pay for the cost associated with providing general city services to the residents…. As the years have gone by and the ability and willingness of the municipality to assess increased broad-based taxation levels have been restricted and/or restrained, municipalities have devised novel, politically palatable methods for raising revenue to support the ever burgeoning need, real or supposed, for infrastructure and services occasioned by added economic and population growth.… One of the methods devised by municipalities to help alleviate the funding crisis in overburdened services is through the use of impact fees as an exaction placed upon developers and builders as a condition 'to development approval.'

Building Indus. Ass'n of Cleveland & Suburban Cntys. v. City of Westlake, 103 Ohio App. 3d 546, 550–51 (1995).

[14] https://bit.ly/48uAsBD.

Builders Ass'n v. Cnty. of Du Page, 165 Ill.2d 25, 33 (1995) (applying stricter "uniquely attributable" standard to legislative impact fees); Du Page County, Ill., Ord. DT-O-0088-21 (adopting traffic impact fee schedule, effective through March 2023).[15]

4. The County and United States decry the "burdens" and "administrative costs" that *Nollan*/*Dolan* would impose, suggesting that public policy requires its repudiation in the legislative-fee context.[16] RB.44; U.S. Br. 29. But "[a] strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan*, 512 U.S. at 396. Having chosen to impose a legislative impact fee on new development to fund its road improvements—after reviewing and rejecting alternative fundraising options available to it (AR2181–2219)—the County improperly appeals to necessity and convenience to invoke a deferential standard of review that would risk allowing some uncompensated takings committed under the guise of mitigation to slip under the radar.

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[15] https://bit.ly/3TDYiqo.

[16] Amicus APA argues legislative impact fees are somehow a boon to property owners. Brief of Amicus APA 14–16. But the adoption of legislative impact fees was a self-interested, tactical decision that California governments made after the California Supreme Court exempted such fees from *Nollan*/*Dolan* review. That tool became a more attractive—and lucrative—option than raising revenue through politically unpopular tax hikes. Brief of Amicus Bay Area Council 4.

B. State Laws Are No Substitute for the Constitutional Floor Established by *Nollan*/*Dolan*

Theoretically, state law could protect property owners, as the County argues. RB.48–50. But property owners need not depend on it. Since the Fourteenth Amendment incorporated the Takings Clause to govern the states and their subdivisions, property owners may rely on the Federal Constitution to protect their property rights when state law fails them. Unfortunately, it often does. State statutes often employ the lax scrutiny specifically *rejected* by this Court. *Dolan*, 512 U.S. at 391 (declining some states' "reasonable relationship" standard because, although close to the proportionality standard, it is "confusingly similar to … 'rational basis'"); *see also* APA, *Growing Smart*, *supra*, at 8-143 ("The most liberal standard for impact fees and other exactions is the 'reasonable relationship' test.").

The court below applied the deferential "reasonable relationship" standard applicable to legislative fees under the California Mitigation Fee Act to uphold the County's fee; the standard requires no consideration of a project's impacts. Pet. App. A-3, 20–21. Other cited statutes suffer similar inadequacies. Washington's Supreme Court, for example, has held that *Nollan*/*Dolan* scrutiny does not apply to impact fees, *City of Olympia v. Drebick*, 156 Wash.2d 289, 297 (2006) (upholding the statute's lesser "reasonably related" standard), and has additionally exempted state-mandated conditions from its impact fee statute. *Citizens for Rational Shoreline Plan. v. Whatcom Cnty.*, 172 Wash.2d 384, 395 (2011). And in Minnesota, the legislature

redefined nexus to require only that the exaction be related to "the municipal purpose sought to be achieved by the fee or dedication," not the impacts of development. Minn. Stat. § 462.358, subd. 2b(a). This Court should not cede established constitutional principles to state laws that so obviously seek to "manipulat[e] property interests to insulate themselves from takings liability." Note, *Fifth Amendment–Takings Clause–Tyler v. Hennepin County*, 137 Harv. L. Rev. 310, 314–15 (2023).

As for the purported availability of a regulatory taking, Equal Protection, or Due Process claim, the County misses the point. RB.48. None of those claims pertains to the peculiar evil that *Nollan* and *Dolan* were intended to guard against and that Sheetz here challenges: the leveraging of the permit process to confiscate property in violation of the Takings Clause. *Koontz*, 570 U.S. at 607. That other claims may lie against the fee does not render *Nollan*/*Dolan*'s unique protections against uncompensated takings superfluous.

The County also claims that *Nollan*/*Dolan* review of a legislative fee is unnecessary because the act of legislating "removes the opportunity for *permitting officials* to use their 'leverage' to extract valuable conditions from landowners." RB.37–38 (emphasis added). But, as noted above, officials are not the only government actors that can improperly leverage the permit process; legislators can, too, when they pass laws mandating confiscations of property from new developers (often from out-of-town) for the benefit of constituents. Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law 487, 510–14 (2006) (reviewing literature

showing legislative bodies are just as susceptible to improper leveraging as planners and commissions); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari) ("A city council can take property just as well as a planning commission can.").

The ordinary powers and protections that the County *doesn't* cite reveal why the *Nollan*/*Dolan* standard is needed. As this Court has long recognized, government can usually obtain what it wants not just through eminent domain but also through the taxing power. *Koontz*, 570 U.S at 616. Precisely because that latter power is so fearsome, *M'Culloch v. Maryland*, 17 U.S. 316, 431 (1819), states have imposed substantial limitations on its exercise. *See, e.g.*, Cal. Const. art. XIII C. It is because of the strength of these very restrictions that the County and local governments throughout the Nation look to less politically accountable, but equally lucrative, modes of raising revenue to pay for public goods. They target productive property owners like Sheetz to pay for public improvements that, "in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court didn't let that happen in *Koontz*. *See Koontz*, 570 U.S. at 617. And it shouldn't let it happen here.

CONCLUSION

The Court should reverse and remand with instructions to apply *Nollan*/*Dolan* review to the County's impact fee.

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