No. ____

In the
Supreme Court of the United States

Preserve Responsible Shoreline Management, et al,

Petitioners,

v.

City of Bainbridge Island, et al,

Respondents.

On Petition for Writ of Certiorari to the Washington Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To allocate the burden of mitigating regional development impacts, a City of Bainbridge Island ordinance requires shoreline property owners to dedicate large portions of their residentially zoned property as a condition on any new development, use, or activity. Although the City considered scientific studies during the legislative process, it chose to adopt a standardized schedule of buffer widths—unrelated to proposed uses or impact—based on its policy preference to gain as much waterfront property as feasible from new permit applicants to make up for lost opportunities to exact land from earlier-issued permits. Landowners challenged the City's exaction as violating the nexus and proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), on its face. The court below held that the government automatically satisfies *Nollan* and *Dolan* if it *considers* scientific studies as part of a legislative process, even when it does not rely on scientific data when demanding a dedication of property through legislation.

The questions presented are:

1. Whether the government may avoid the nexus and proportionality standards by asserting that an exaction resulted from a legislative procedure that involved consideration of science.

2. Whether legislative permit conditions are exempt from the heightened scrutiny nexus and rough proportionality tests (a question currently on review in *Sheetz v. County of El Dorado*, No. 22-1047 (cert. granted Sept. 29, 2023)).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners Preserve Responsible Shoreline Management, Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. were the petitioners-appellants in all proceedings below.

Respondents City of Bainbridge Island and Washington State Department of Ecology were the respondents in all proceedings below. Respondents Environmental Land Use Hearing Office and Growth Management Hearings Board Central Puget Sound Region are also named as respondents but did not participate in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

All Petitioners are listed in the caption. The Petitioners that are not individuals have no parent corporations and no publicly held companies own 10% or more of their stock.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the trial and appellate courts identified below are directly related to the above-captioned case in this Court.

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Court of Appeals, No. 80092-2-I, 11 Wash. App. 2d 1040 (Dec. 9, 2019).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Supreme Court, No. 98365-8, 195 Wash. 2d 1029 (July 8, 2020).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Kitsap County Superior Court, No. 15-2-00904-6 (final decision dated Dec. 3, 2021).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Court of Appeals, 24 Wash. App. 2d 1047 (Dec. 13, 2022) (unpublished).

Preserve Responsible Shoreline Management v. City of Bainbridge Island, Washington Supreme Court, 1 Wash. 3d 1014 (June 7, 2023).

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PETITION FOR WRIT OF CERTIORARI

Preserve Responsible Shoreline Management (PRSM), Alice Tawresey, Robert Day, Bainbridge Shoreline Homeowners, Dick Haugan, Linda Young, John Rosling, Bainbridge Defense Fund, and Point Monroe Lagoon Home Owners Association, Inc. petition for a writ of certiorari to review the judgment of the Washington Court of Appeals.

OPINIONS BELOW

The unpublished decision of the Washington Court of Appeals is available at *Preserve Responsible Shoreline Management v. City of Bainbridge Island* (Div. II, No. 568080-II), reprinted at Appendix (App.) 1a. The court's January 19, 2023, Order Denying Reconsideration is reprinted at App.49a. The Washington Supreme Court's order denying the petition for review is available at 195 Wash. 2d 1029 (2023) and reprinted at App.47a.

The unpublished decision of the Superior Court for Kitsap County is reprinted at App.39a.

JURISDICTION

The decision of the Washington Court of Appeals sought to be reviewed was issued on December 13, 2022, and denied reconsideration of that decision on January 19, 2023. On July 7, 2023, the Washington Supreme Court denied discretionary review. On June 28, 2023, this Court granted an application for an extension of time to file a petition for writ of certiorari, to and including October 16, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The "Shoreline Master Program" ordinance at the center of the case is City of Bainbridge Island City Code Ch. 16.12, excerpts of which are reproduced at App.51a–71a.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Government may not condition a land-use permit application on a public dedication of private property without compensation unless the demand mitigates a proportionate adverse public impact of the property's use. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013). Protection against such extortionate demands is secured by the "essential nexus" and "rough proportionality" tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825, 836–37 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). These tests require the government to show that a permit condition is tailored to mitigate *only* those public impacts caused by a proposed land use. *Dolan*, 512 U.S. at 391. The government's failure to prove sufficient tailoring violates the doctrine of unconstitutional conditions, rendering the government's demand invalid as a taking without just compensation. *Id.*

But that constitutional guarantee is not enforced in a uniform and predictable manner across the nation. For decades, some lower courts have distinguished between exactions imposed on an *ad hoc* adjudicative basis (in which case they apply the *Nollan* and *Dolan* tests) and permit exactions authorized by legislation (in which case they do not). This Court recently granted certiorari to resolve this longstanding and entrenched split of authority in *Sheetz v. County of El Dorado*, No. 22-1074 (Order granting certiorari, Sept. 29, 2023).

This Petition presents a further aspect of the legislative versus adjudicative exactions controversy that warrants review—one that is being advanced by the government respondent in *Sheetz*—that compliance with a statute can automatically satisfy the *Nollan* and *Dolan* tests.[1] The court below held that regulations demanding land dedications purporting to "allocate the burden" of addressing regional impacts to the shoreline, App.7a, automatically satisfied the heighted scrutiny required by *Nollan*/*Dolan* because the City engaged in the standard legislative procedure of considering scientific studies prior to issuing the regulations. The court accepted the City's legislative process in lieu of any site-specific findings as to how individual properties affected the environment to justify its across-the-board, "standardized" buffer dedication requirements. App.9a, 35a. Had the

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[1] *See* Opposition to Petition for Writ of Certiorari, *Sheetz v. County of El Dorado*, No. 22-1074, at 7–19 (July 5, 2023) (arguing that the County's compliance with "the procedures and processes set forth in California's legislatively enacted [Mitigation Fee Act]" should automatically satisfy *Nollan* and *Dolan*).

dedications been imposed as permit conditions by executive officials, without express legislative authority, there would be no question that *Nollan* and *Dolan* apply. But because the City imposed the dedication by general ordinance (its Shoreline Management Program (Program)), the court rubber-stamped across-the-board exactions of large conservation buffers that clearly violate the nexus and proportionality tests. The City shifts the burden of addressing offsite and historic impacts onto new development through buffers that are bigger than necessary to mitigate anticipated project impacts because the size of the dedication is based solely on "city policy, *not* science-based information." Administrative Record (AR).5824 (conclusion of adjudicative agency) (emphasis added).

Although the Washington state court nominally held the City's buffer condition subject to *Nollan* and *Dolan*, App.34a, it avoided the substance of the nexus and proportionality tests entirely. It adopted a rule that a local government *automatically* satisfies *Nollan* and *Dolan* if it engages in "a reasoned, objective analysis of the science" when it legislates a land-use law mandating the dedication of property—even if the government doesn't rely on scientific data when restricting property rights. App.35a, 37a. This new rule adds to a growing body of Washington caselaw holding legislative exactions subject either to a lesser standard of constitutional protection, *see Kitsap All. of Prop. Owners (KAPO) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash. App. 250, 272 (2011) (concluding that *Nollan* and *Dolan* establishes a "due process argument that the [buffers] must be reasonably necessary to achieve a legitimate government objective" and that when "the local

government use[s] the best available science in adopting its critical areas regulations, the permit decisions it bases on those regulations will satisfy the nexus and rough proportionality rules"), or to no protection at all. *See Douglass Props. II, LLC v. City of Olympia*, 16 Wash. App. 2d 158, 172 (2021) ("We hold that the *Nollan/Dolan* test does not apply to . . . legislatively prescribed generally applicable fees . . . .").

The lower court's reasoning wrongly conflates the purpose and function of ordinary legislative procedures (reviewing and synthesizing often incomplete and contradictory information) with the purpose and function of the nexus and proportionality tests (rough mathematical calculation based on actual data). The court below did not understand that "consideration of science" is a process, *Brooks Mfg. Co. v. Nw. Clean Air Agency*, 14 Wash. App. 2d 1, 9 (2019) ("science" is "a method, study, or a process"); *In re Coles*, 839 F. App'x 455, 457 (Fed. Cir. 2020) ("'science' refers generally to 'a systematic method or body of knowledge in a given area'"), and "relevant scientific data" are the results of the process. *See GenOn REMA, LLC v. U.S. E.P.A.*, 722 F.3d 513, 526 (3d Cir. 2013) (agency "examined the relevant scientific data and clearly articulated a 'satisfactory explanation for its action, including a rational connection between the facts found and the choice made'") (citation omitted). A rule that requires only that the City consider "science" allows it to engage in an incomplete process with no consideration of how the City weighed the resulting data (i.e., facts) under the nexus and proportionality tests. Consequently, the court improperly filled the gaps in the actual data and supplied its own reasons for the property exactions.

See Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (an appellate court cannot substitute its reasons in place of those given by the agency). Even these court-generated reasons cannot justify the dedications under the nexus and proportionality tests, leaving property owners subject to the very type of predetermined and coercive land demands that *Nollan* and *Dolan* forbid.

The Court, which is set to determine whether legislative exactions are subject to *Nollan* and *Dolan*, should grant this petition to provide nationwide uniformity on the critically important and related question whether legislative exactions are reviewed subject to the same heightened nexus and proportionality standard as adjudicative exactions, or whether the existence of a legislative process alone satisfies those tests. In the alternative, it should consider holding the petition until *Sheetz* is decided to consider whether it is appropriate to grant the petition, vacate the lower court decision, and remand for further consideration in light of any judgment in *Sheetz* that is contrary to the judgment below.

STATEMENT OF THE CASE

A. The Parties and Context of the Case

The City of Bainbridge Island is a bedroom community of more than 25,000 residents located a short eight-mile ferry ride across Puget Sound from Seattle. The island is approximately twelve miles long and five miles wide. The geography of the island's 53-mile shoreline varies widely—from sandy beaches and tideflats to rocky outcrops and cliffs. AR.4001.

The City's shoreline is zoned primarily for single-family residential use. By 2012, approximately 82% of

the island's 2,262 shoreline lots were fully developed with single-family homes, housing roughly one-third of the City's residents. AR.4074. In addition to homes and apartment buildings, the historic development of bulkheads, docks, public roads, and drainage ditches along the shoreline removed much of the native vegetation and altered the natural ecological functions of the area, such that only a tiny percentage of the island's shoreline property warrants a "natural" designation. AR.4011, 4096 ("Only two areas [of the island] . . . are relatively unmodified."). The following map shows the land use designations on the City shoreline:[2]

[2] Reprinted from the City's website at https://www.bainbridgewa.gov/DocumentCenter/View/4352/Official-Shoreline-Designations-Nov-18-2014c?bidId=. *Cf.* AR.42 (same map with different legends and legibility).

In 2014, when beginning the process of updating its Program, the City sought to drastically expand the size and scope of its conservation buffers, within which property owners cannot develop or use their land, with very limited exceptions. AR.109, 114–16. To do so under Washington's Shoreline Management Act ("Act"), cities must collect and consider "the most

current, accurate, and complete scientific and technical information available." Wash. Rev. Code § 90.58.020; Wash. Admin. Code § 173-26-201. The Act ties mitigation requirements such as conservation buffers to the actual conditions of area shorelines by directing the city to develop a scientific record establishing the shorelines' conditions "as they currently exist." Wash. Admin. Code § 173-26-201(2)(c). The Act thus appears to incorporate pre-existing caselaw holding that sufficiently site-specific scientific data is essential "to an accurate decision about what policies and regulations are necessary to mitigate and will in fact mitigate the environmental effects of new development." *Honesty in Env't. Analysis and Legis. (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App. 522, 531–33 (1999) (citing *Bennett v. Spear*, 520 U.S. 154 (1997) (the science requirement ensures that regulations are not based on "speculation and surmise" or the result of overzealous ambitions)).

But a change in Washington law carved a massive loophole into the Act's original science-focused process, undercutting *HEAL*, and setting the stage for the decision in this case. First, the Growth Management Hearings Board ("Growth Board")—a "quasi-judicial agency" charged with interpreting the Act[3]—construed the Act's science provisions to be only procedural in nature. *Lake Burien Neighborhood v. City of Burien & Dep't of Ecology*, No. 13-3-0012, 2014 WL 3710018, at *6 (Wash. Cent. Puget Sd. Growth Mgmt. Hrgs. Bd., June 16, 2014). According to the Growth Board, the Act requires only that a local

[3] *Thurston Cnty. v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 164 Wash. 2d 329, 358 (2008).

government collect and consider the required studies during the update process. There is no requirement, however, that the science be sufficient to address the necessity for a buffer. App.15a (acknowledging that the required record contained "gaps in scientific data and uncertainties"). Nor is there any requirement that a Program's mitigation measures be based on those studies. Instead, once the local government collects a folio of studies and "considers" them, it may freely ignore any reported data gaps or conflicts, and set conservation buffer sizes to achieve its policy goals. *Id.* Second, an appellate court compounded the effect of the Growth Board's ruling by holding that "private property rights are secondary to the SMA's primary purpose, which is to protect the state shorelines as fully as possible." *Olympic Stewardship Found. v. State Env't & Land Use Hrgs. Off. through W. Wash. Growth Mgmt. Hrgs. Bd.*, 199 Wash. App. 668, 690 (2017).

These rulings gave the City of Bainbridge Island the green light to collect and consider—then ignore—scientific evidence in favor of policy-based buffers that significantly restrict property rights.

B. The City Set Its Buffer Widths Based on Policy, Not Science

When the City began updating its Program in 2010, it wanted to increase the size of its "standardized shoreline buffer" dedication, App.9a, in order to "allocate the burden of these cumulative impacts among development opportunities." Ecology Resp. Br. at 32. Pursuant to the Act, the City commissioned studies documenting the ecological conditions of its shoreline and the potential impacts of new and existing land uses along with a variety of

potential mitigation strategies, including buffers. AR.348–59.

But the City's science consultant warned that the scientific record was "dated and lacked accuracy" and identified significant "data gaps." AR.4097. Moreover, a councilmember observed that the science regarding buffers was "inconsistently applied" and riddled with "uncertainties." AR.2868. The City's consultant documented that the only available studies were so generalized that they could suggest buffers ranging "from as little as 16 feet to as large as 1,969 feet." AR.359. He explained that the existing studies could not justify the necessity and effectiveness of *any* buffer within that exceptionally broad range without data on multiple, *unaddressed* factors such as whether portions of shoreline were forested or already cleared or developed. AR.3968. Indeed, the City's consultant noted that the studies were based on a false *assumption* that all shoreline properties are fully forested and free of conditions that limit the effectiveness of buffers. AR.4307–08. On that point, a City councilmember acknowledged that "[m]ost of the properties that this [buffer] would apply to would be those that have lawn up to the beach." AR.2883.

In light of these inadequacies, the City's consultant recommended that, to develop scientifically supportable buffers, the City must engage in "site-specific" studies "to . . . understand . . . the potential direct, indirect and cumulative impacts" of existing and future development, AR.4100, which would provide the data necessary to determine the width necessary for a buffer to mitigate the impacts of proposed development. AR.4310 (warning that, on marine shorelines, site-specific information is "more

important" for determining effectiveness of buffers). The consultant further advised the City to identify the sources of existing environmental stressors (such as stormwater runoff from public roads, ditches, and other upland uses) and the currently existing range of impacts that neighboring development may have on shoreline conditions. AR.4097–4100; AR.4299–4302. Without new studies addressing those factors, the consultant could not recommend any science-based, site-appropriate buffers consistent with the City's desire to increase the Program's mandatory buffer widths. AR.4314.

The City ignored its consultant's warnings and calls for additional scientific data prior to making buffer recommendations. AR.2882. Instead, the City forged ahead and established a table of "standardized" buffer widths, App.9a, based on its policy preferences. AR.5824 (agency finding); AR.2879 (consultant testifying that the "specific width . . . is part of the policy recommendation").

The City's key policy demanded "as much protection as feasible" from new development because of its "severely limited" ability to address the preexisting impacts of historic development. AR.3969–70; *see also* App.7a (the City chose to target only new "development opportunities" to achieve these goals). That is, rather than paying for conservation easements to address the unmitigated shoreline impacts of existing development, the City chose to target only property owners seeking new uses to bear the burden of mitigating preexisting damage to the shoreline ecology. It made no effort to establish mitigation requirements on a parcel-by-parcel basis. AR.4285–86. According to the City's consultant, the

City chose "to focus its buffer efforts" on new uses because it could use the permitting process to force the owner, via the buffer dedication, to replant previously cleared portions of the waterfront in order to create "intact marine riparian areas" sufficient in size to meet its goal of protecting the shoreline against all existing and future impacts. AR.3969, AR.2878–79. This reasoning resulted in buffers up to 100% larger than those it had previously demanded from the majority of the island's established shoreline residential property owners. AR.96, 364.

C. The City's Buffer Requirement Demands Dedication of Private Property

As a mandatory condition on any new "development, use, or activities" on shoreline property, the owner must dedicate a perpetual conservation area encompassing between 50–200 feet of private shoreline property. App.53a. The Program divides the conservation buffer into two zones. App.9a–10a. The more restrictive area—Zone 1—extends from a minimum of 30 feet from the shoreline or to the limit of any existing native vegetation on the lot, whichever is greater. App.61a–62a. Zone 1 expands automatically based solely on the presence of a native plant, whether it is a stand of mature cedar trees or a single sword fern. *Id.*; AR.388–401. Within Zone 1, the City does not consider the specific land-use proposal or its anticipated impacts. The Program flatly bans nearly all residential structures, uses, and activities in order to separate and maintain the property "in a predominantly natural, undisturbed and vegetated condition." App.59a; AR.115–16 (the three structures that may be permitted within Zone 1 are a boathouse, a permeable deck/patio, or a

staircase); App.63a–64a (requiring a permit to engage in routine "activities" like landscape maintenance and minor pruning within the buffer zone).

"Zone 2" is the area landward of Zone 1 and covers the remainder of the prescribed conservation area, App.9a–10a, the size of which is established based on the property's zoning designation and its primary geographic characteristics—again, the width of the buffer is "standardized," App.9a, and determined with no consideration of project-specific impacts. App.62a. While less highly restrictive than Zone 1, the Zone 2 buffer still operates as a presumptive restriction on structures, uses, and even the types of plants that an owner can put in his or her garden. *Id.* Because, like Zone 1, it restricts property without regard to any specific land use proposal, owners must dedicate the same buffer area to build a small 120-square-foot patio extension or a new 3,500-square-foot home. App.53a; AR.373–74.

To ensure that property owners will maintain the most restrictive portion of the buffer in perpetuity, the Program was crafted to "set that [land] aside" from the owner. AR.2889–90. Indeed, the "fundamental thought" behind the "Zone 1" buffer was the City's recognition that "we need to have this area" to meet its goal of improving areawide conditions. AR.2885 (City consultant's testimony). The City also demanded buffers that are "larger than the bare minimum needed for protection" to implement a policy to avoid a "worst case scenario" and "ensure [ecological] success in the face of uncertainty about site-specific conditions." AR.4314; *see also* AR.42 (City relied on the "precautionary principle . . . as guidance in updating the policies and regulations of this

[Program]." App.51a. The City's buffers were thus designed to "allocate the burden of addressing cumulative impacts" onto only those landowners who seek permission to make a new use of their property. App.7a; City Resp. Br. at 24.

To implement the City's burden-shifting policy, the Program requires all current and future owners to perpetually maintain and manage the conservation area "in a predominantly natural, undisturbed and vegetated condition" in order to "protect," "enhance," and "restore" the marine shoreline.[4] App.56a; AR.106. The Growth Board appropriately characterized the

[4] The lower court's decision to hold the Program's buffer provisions subject to *Nollan* and *Dolan*, App.33a—37a, is consistent with Washington property law, which recognizes that a buffer area represents an independent property interest that may be taken in the public interest and holds that shoreline buffers "must . . . satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*." *KAPO*, 160 Wash. App. at 272; *see also City of Tacoma v. Welcker*, 65 Wash. 2d 677, 683 (1965) (the acquisition of a riparian buffer to protect water quality constitutes an exercise of eminent domain); *Klickitat Cnty. v. Wash. State Dep't of Revenue*, No. 01-070, 2002 WL 1929480, at *5–6 (Bd. Tax App., June 12, 2002) (a buffer area is a separate interest from the lot; the holder of the conservation interest owns that interest); Wash. Rev. Code § 64.04.130 ("A development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect . . . or conserve for open space purposes . . . constitutes and is classified as real property."). Washington property law imposes no formal requirements on how a dedication may be achieved, recognizing that an owner need only show an intent to bind his property. *Richardson v. Cox*, 108 Wash. App. 881, 884, 890–91 (2001); *see also* Wash. Rev. Code § 58.17.020(3) (defining a dedication as "the deliberate appropriation of land by an owner for any general public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted").

buffer dedications as "conservation easements." AR.5849–52; AR.3847 (Department of Ecology adopting the Board's "conservation easement" characterization).

Critically, the Program provides no mechanism to reduce the size of the standardized conservation buffer to an area necessary only to mitigate for the impacts of their proposed property use. Property owners must either accept the City's default easement requirement, App.53a–54a, or, at their own expense, prepare a "site-specific analysis of potential impacts and a mitigation plan," AR.101, to justify a differently configured conservation area of equal or greater size. App.57a–61a. The Program includes no option for reducing the size of the easement. The reconfiguration option does not address the constitutional inadequacies of the standardized buffer demand because it requires the owner—not the government—to bear the cost of preparing a site-specific study based only on the same science the City found inadequate and using only City-approved experts. App.58a–59a; AR.306–07. It also requires that the buffer go beyond *Nollan* and *Dolan*'s mitigated-development standards by demanding that the owner "clearly demonstrate" that the reconfigured buffer will provide environmental benefits "*greater than* would be provided by the prescribed . . . buffers." App.71a (emphasis added). Altered buffers must also mitigate "effects that may occur off-site," App.54a, and account for "cumulative impacts of similar developments over time." App.55a.

An owner who fails to comply with the City's buffer requirements is subject to civil and criminal penalties, including fines of up to $1,000 per day and jail time if

an owner commits two or more violations within any 12-month period. App.67a.

D. Procedural History

Petitioners are homeowners and associations on Bainbridge Island who formed Preserve Responsible Shoreline Management (PRSM). PRSM's mission is to protect landowners' rights by advocating for a balanced and scientifically supportable approach to land use laws. It engages in education and outreach, and provides public comment on proposed land use regulations. PRSM is the primary local association in the City representing the interests of landowners faced with increasing regulation of their property. PRSM represents the interests of landowners who wish to develop their residential properties and who are subject to the Program's preset buffer dedication demands. AR.6–7.

As required by state law, PRSM challenged the City's Program by petitioning the Growth Board, which upheld the buffers even though the "[b]uffer widths [are] set by city policy, not science-based information," AR.5824, and may not, therefore, meet any of the recommendations contained in the incomplete scientific record. AR.5825 n.77. PRSM timely petitioned a Washington state court for judicial review of the Board's decision. Clerk's Papers (CP).1–166; CP.183–200. PRSM alleged that the City's decision to rely on burden-shifting policy grounds to set buffer widths facially violated the doctrine of unconstitutional conditions because it is undisputed that the standardized buffers are larger than necessary to mitigate only the impacts of new residential use, and that they improperly address both the preexisting impacts of historic uses and the

potential impacts of future uses.[5] *See Dolan*, 512 U.S. at 384 ("One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

PRSM's claim relied on state and federal decisions holding that a legislatively mandated exaction facially violates the nexus and proportionality tests where it "imposes a uniform requirement . . . on each lot, unrelated to any evaluation of the demonstrated impact of proposed development." *Citizens' All. for Prop. Rts. v. Sims*, 145 Wash. App. 649, 668 (2008) (applying *Nollan* and *Dolan*); *Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1084–85 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017) (ordinance that set a predetermined tenant relocation fee schedule without any requirement that the government tailor its fees to the actual impacts of an owner's use of his property facially violated the Takings Clause); *see also Beck v. City of Whitefish*, No. CV 22-44-M-KLD, 2023 WL 6379334, at *11 (D. Mont. Sept. 29, 2023) (certifying class upon conclusion that there is no barrier to a facial *Nollan/Dolan* claim). The trial court, however, never addressed the merits of this argument, dismissing the constitutional claim as nonjusticiable. CP.639–46.

PRSM appealed, reasserting its unconstitutional conditions claim and relying on record evidence that proved that the preset buffer widths were based on

[5] CP.252–56, 265–78, 570–91; AR.3708.

policy preferences that make no attempt to satisfy nexus and proportionality. The appellate court agreed that the homeowners' facial unconstitutional conditions claim was justiciable, reversing the trial court on that threshold question. App.34a ("In the context of a facial challenge to a land use ordinance, the ordinance 'must comply with the nexus and rough proportionality limits the United States Supreme Court has placed on governmental authority to impose conditions on development applications.'") (citation omitted). The court also agreed that the buffers are imposed on any new development, use, or activity in a "standardized" manner, App.9a, and held the demand subject to *Nollan* and *Dolan*.[6] App.34a.

But on the merits, the state appellate court did not analyze the dedication requirements under the nexus and proportionality test. Instead, the court followed a state court-created rule that the government *automatically* satisfies the doctrine of unconstitutional conditions if it engages in "a reasoned, objective analysis of the science" when developing regulations that exact a mandatory dedication of property. App.35a (citing *KAPO*, 160 Wash. App. at 273 (ruling that legislatively mandated

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[6] Washington law holds that buffer demands are exactions subject to *Nollan* and *Dolan* and must satisfy the nexus and proportionality test in both as-applied and facial challenges. *KAPO*, 160 Wash. App. at 272; *HEAL*, 96 Wash. App. at 533; *see also Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022) (a facial unconstitutional conditions challenge asks whether the enactment of the statute demands a transfer of a property interest that is not sufficiently related to the impacts of a proposed property use); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (applying the same standard in a facial takings claim).

buffers will automatically satisfy *Nollan* and *Dolan* if the government considers science when developing the law)).

Applying that rule, the court noted that the City *knew* that the scientific record contained "assumptions made concerning, and data gaps in, the scientific information" and "uncertainties" regarding the buffers. App.14a–15a. But the court believed that the City did everything it was constitutionally required to do when it considered the limited scientific evidence available and, having done so, held that the City could choose buffer widths based on its preferred burden-shifting policy. App.37a n.11. Thus, the court ruled that the City's exaction "passe[d] these nexus and proportionality tests" simply because the City considered generalized "science" during its update process, App.37a, and further suggested that the only way it could violate *Nollan* and *Dolan*'s tests would be "if the buffer widths [were] in excess of what the [concededly uncertain and incomplete] science would allow," *id.* at n.11, dicta that, taken at face value, authorizes the government to demand buffers of up to nearly a half mile (1,969 feet) without ever demonstrating nexus and proportionality and without paying just compensation.

PRSM moved for reconsideration, which was denied. App.49a. The Washington State Supreme Court thereafter denied PRSM's petition for review. App.47a. This petition follows.

REASONS TO GRANT THE PETITION

I.

THE WASHINGTON COURT'S "CONSIDERATION OF SCIENCE" RULE CONFLICTS WITH DECISIONS OF THIS COURT

The Washington Court of Appeals adopted a rule that a local government satisfies *Nollan* and *Dolan* if it engages in "a reasoned, objective analysis of the science" when developing regulations that demand a dedication of property for a public environmental use. App.35a. This rule operates categorically, allowing the government to disregard the "considered" science when regulating the size of the dedication. App.37 n.11. A showing the government considered science, alone, cannot satisfy the nexus and proportionality requirements. *See Group of Institutional Investors v. Chicago, M., St. P. & P.R. Co.*, 318 U.S. 523, 570 (1943) ("lip service" cannot replace adherence to legal principles). Indeed, the lower court's ruling conflicts with *Nollan*, *Dolan*, and *Koontz* by elevating an ordinary legislative procedure—the same procedure the government followed when developing the conditions at issue in *Nollan*, *Dolan*, and *Koontz*—over the substance of the nexus and proportionality tests. It operates as a rubber stamp because, so long as the government follows a statutory process, courts may ignore the lack of actual scientific data necessary to evaluate easement dedications under the nexus and proportionality tests. *Id*. This rule renders *Nollan* and *Dolan* dead letters in Washington, at least with regard to legislative exactions.

The nexus and proportionality tests exist to protect property owners' *constitutional* right to just compensation when the government takes property for a public use. The Court designed the *Nollan* and *Dolan* tests to ensure that individual landowners are not singled out during the permitting process to bear the burdens of public policies—like reversing historic damage to shoreline vegetation—that should be distributed among the public as a whole. *Dolan*, 512 U.S. at 84 (quoting *Armstrong*, 364 U.S. at 49). Faithful application of those tests is essential because landowners "are especially vulnerable to the type of [impermissible burden shifting] 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 605. Together, therefore, the nexus and proportionality tests ensure that: (1) the government may require a landowner to dedicate property to a public use *only* when necessary to mitigate adverse impacts of proposed development, *Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use . . . in exchange for a discretionary benefit [that] has little or no relationship to the property."); and (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz*, 570 U.S. at 604–06.

This Court's exactions trilogy shows that mere procedural consideration of "science" prior to adopting regulations cannot alone satisfy the constitutional concerns addressed by *Nollan* and *Dolan*. Instead, *Nollan* and *Dolan* require a complete record

memorializing a local government's use of scientific data and other information as necessary evidence of the decision-making process, allowing the court to evaluate whether a property demand satisfies the nexus and proportionality standards. *See Atchison v. Career Service Council of Wyo.*, 664 P.2d 18, 25 (Wyo. 1983) (Thomas, J., dissenting) (in unconstitutional conditions case, noting that "[t]he majority of the court choose to treat this as an issue with respect to whether the agency observed the procedure required by law, [but] [f]or me this disposition simply fails to recognize the more significant question as to whether this is agency action 'contrary to constitutional right'").

In *Nollan*, this Court emphasized that a showing of rationality alone cannot satisfy the doctrine of unconstitutional conditions. *Nollan*, 483 U.S. at 840–41. There, the California Coastal Commission, acting pursuant to state legislation,[7] required Patrick Nollan to dedicate an easement over a strip of his private beachfront property as a condition for obtaining a permit to rebuild his home. 483 U.S. at 827–28. The Commission justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they

[7] *Nollan*, 483 U.S. at 828–30 (citing California Coastal Act and California Public Residential Code); *see also id.* at 858 (Brennan, J., dissenting) (pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract").

have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828–29 (quoting Commission staff report). Nollan refused to accept the condition and brought a federal takings claim against the Commission in state court, arguing that the condition was a taking because it bore no logical connection to the impact of his proposed development.

The California Court of Appeal upheld the condition, specifically noting that the Commission had relied on multiple studies when fashioning the permit condition. *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719, 722 (1986). This Court nonetheless reversed because, even crediting those studies, the permit condition still lacked an "essential nexus" to the alleged public impacts that would result from the Nollans' project. *Nollan*, 483 U.S. at 837. Because rebuilding the Nollans' home could have no impact on public-beach access, the Commission could not justify a permit condition requiring them to dedicate an uncompensated easement over their property. *Id.* at 838–39. Without a sufficient nexus between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted). In reaching this conclusion, this Court explained that the various studies showing that the dedication would serve the public interest cannot satisfy the nexus test; instead, such studies indicate that the Commission should pay for the property. *Id.* at 841–42.

Dolan, too, refused to give determinative significance to the government's consideration of science when developing its permit conditions. There, acting pursuant to the City of Tigard's development

code,[8] the city imposed two conditions on Florence Dolan's permit to expand her plumbing and electrical supply store: to dedicate approximately 10 percent of her land as a stream buffer and for a bicycle path. 512 U.S. at 377, 380. Dolan refused to comply with the conditions and sued the city in state court on a federal takings claim. This Court held that although the city established a nexus between both conditions and Dolan's proposed expansion, the conditions nevertheless effected an unconstitutional taking because they lacked a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. Looking to the justifications memorialized in the city's record, *Dolan* held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's change in land use. Thus, the permit conditions unconstitutionally took Dolan's property without just compensation. *Id.* at 379–80, 391.

Like *Nollan*, this Court acknowledged that the City of Tigard had relied on valid studies showing the beneficial effects of dedications to mitigate traffic and stormwater impacts when enacting its development code. *Dolan* held, once again, that this consideration and reliance is *not enough* to satisfy the doctrine of unconstitutional conditions. *Id.* at 392, 395. The rough proportionality test requires the government to engage in an individualized, site-specific determination of impacts requiring mitigation because "generalized statements as to the necessary connection between the required dedication and the proposed development [are] too lax to adequately

[8] *Dolan*, 512 U.S. at 379–80.

protect petitioner's right to just compensation if her property is taken for a public purpose." *Id.* at 389. The bicycle path condition failed the test because the city made no showing that a bicycle path could offset any of the increased traffic resulting from a plumbing store expansion. *Id.* at 395–96. The stream buffer condition similarly lacked rough proportionality because lesser regulatory restrictions (such as setbacks and open space requirements) could sufficiently mitigate the project's increased stormwater flow. *Id.* at 393–95 ("The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.").

Koontz also involved a legislatively mandated exaction that set in-lieu impact fees based on a state agency's schedule of wetland mitigation ratios. 570 U.S. at 600. Like *Nollan* and *Dolan*, the state had considered extensive ecological data when developing its wetland protection laws. Brief of Respondent, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2012 WL 6694053, at *4–*13 (U.S. June 20, 1988) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation"). Once again, the government's consideration and reliance on scientific studies did not deter this Court from ruling that the impact fee must still satisfy the questions asked by the nexus and proportionality tests. *Koontz*, 570 U.S. at 616. Thus, this Court remanded to the Florida courts to assess whether the record showed that the exaction passed those tests. *Id.* at 619.

Applying the nexus and proportionality tests on remand, the Florida Court of Appeals held that the exaction was an unconstitutional taking. *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398

(Fla. App. 2014), adopting rationale and holding of *St. Johns River Water Mgmt. Dist. v. Koontz*, 5 So. 3d 8, 10 (Fla. App. 2009) (affirming trial court that applied the constitutional standards of *Nollan* and *Dolan*, heard conflicting evidence, ruled that the District effected a taking of Koontz's property, and awarded damages).

The Washington court's ruling below conflicts with this Court's precedent in three ways.

1. First, the "consideration of science" rule assumes that the City's compliance with a procedural requirement to collect and consider "science" prior to mandating a buffer dedication necessarily satisfies *Nollan* and *Dolan*. App.35a. That reasoning, however, wrongly conflates the purpose of the Shoreline Management Act—"to protect the state shorelines as fully as possible," *Olympic Stewardship Found.*, 199 Wash. App. at 690—with the purpose of the nexus and proportionality tests—to protect private property rights from uncompensated takings. The Act explicitly downgrades property rights in the service of its primary goal by directing local governments to assess the maximum amount of land to fully protect the entire shoreline from existing and future impacts. *Id.* "Considering science," moreover, is part of a legislative body's standard investigative process. *See Pegram v. Herdrich*, 530 U.S. 211, 221 (2000) (legislative process includes "comprehensive investigations and judgments of social value"). In contrast, the nexus and proportionality tests protect landowners from unconstitutional takings by limiting exactions to only those necessary to mitigate a proposed use of the land. Merging these disparate legal analyses results in incoherence. *Cf. Concrete*

Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 628 (1993) (describing "incoherence" wrought by combining terms describing the burden of proof with terms describing a standard of review).

2. Second, the "consideration of science" rule cannot protect property owners against unfair and unconstitutional burden-shifting. *Dolan*, 512 U.S. at 384. After considering its incomplete scientific studies, the City enacted preexisting policy preferences for the largest possible undevelopable buffer zone dedications. AR.5824 (buffer widths based on "city policy, not science-based information"). Incomplete data sets and inadequate studies—which are expressly allowed by the Act—are not grounds for reliable assessments; they are reasons to impeach it. *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 996 (1988). Here, the preset buffer zones reflect the City's refusal to address the "wide variations in the width of recommended buffers based on the characteristics of the particular site involved," AR.3968, the precise information needed to address nexus and proportionality. Far from obviating the need for nexus and proportionality scrutiny, a policy-based exaction amplifies the risks of gimmickry and coercion that the unconstitutional conditions doctrine is intended to curtail. *Dolan*, 512 U.S. at 387; Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 513, 551 (1995) (the nexus and proportionality tests were intended to stop the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation").

The court below acknowledged that the City developed the Program to comply with the Act's directive to "allocate the burden of addressing cumulative impacts" to the shoreline environment. App.7a. The City's preferred allocation demands "as much [land] as feasible" from new development because of its "severely limited" ability to address the preexisting impacts of historic development (such as stormwater runoff from public roads, ditches, and upland development) through prospective regulation. AR.3969–70. The City recognized that existing homes might be rendered nonconforming by failure to mitigate historic and cumulative development impacts. AR.3969. To protect existing homeowners (at the expense of new owners/developers), the City "focus[ed] its buffer efforts" on new uses to force the owners to replant previously cleared portions of the waterfront and create new, "intact marine riparian areas" to protect the shoreline against all existing and future impacts. AR.3969; AR.2878–79; *see also* AR.2883 ("[m]ost of the properties that this [buffer] would apply to would be those that have lawn up to the beach"). In sum, the City's policy requires landowners seeking new or expanded uses of their property to remedy environmental harm caused by public roads, drainage ditches, and also both their longer-established and future neighbors, a goal flatly prohibited by this Court for decades. *Armstrong*, 364 U.S. at 49; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

3. Third, the "consideration of science" rule is so lax that it permits courts to replace the City's analysis

of the studies with new judicial speculation contrary to the findings entered by the quasi-judicial agency below. *Compare* AR.5824 (Growth Board found that "[b]uffer widths [were] set by city policy, not science-based information."), *with* App.36a–37a (Washington appellate court stating that the City had "relied on the valid scientific information to establish the shoreline buffers" and this new conclusion is "fatal"). In this way, the decision below replaced the nexus and proportionality test with one that is indistinguishable from Washington's exceptionally lax rational basis standard, which allows courts to "assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." *See Chong Yim v. City of Seattle*, 194 Wash. 2d 651, 675 (2019). Such a freewheeling standard has no place in the law. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."); *see also Chenery Corp.*, 318 U.S. at 87 ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

A rule that looks only to the *procedure* by which the government enacts a law demanding a dedication of property cannot address *substantive* constitutional concerns that arise under the Takings Clause and unconstitutional conditions doctrine. Such a rule, moreover, would wrongly empower local governments to veto the Fifth Amendment through a mere

ordinance. *Frost v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593–94 (1926) ("It is inconceivable that guarantees embedded in the Constitution of the United States may thus [by regulation] be manipulated out of existence."). This Court should grant the petition to enforce the constitutional limitation that the doctrine places on local government, requiring courts to evaluate the government's stated reasoning for imposing exactions under the nexus and proportionality standards.

II.

COURTS ARE DIVIDED ON WHETHER AND HOW *NOLLAN* AND *DOLAN* APPLY TO EXACTIONS MANDATED BY LEGISLATION

The decision below adds a new dimension to a longstanding and well-documented split among state and lower federal courts as to whether the nexus and proportionality test applies to legislatively imposed permit conditions as well as to conditions placed on an individual permit applicant. *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of certiorari) (recognizing a decades-old, nationwide split of authority). It does so by adopting a rule that substantially changes how those tests are applied when evaluating a legislative exaction. As discussed above, the Washington court held that a local government's compliance with an ordinary legislative procedure *itself* satisfies nexus and proportionality scrutiny without any further inquiry to determine if the ordinance demands more land than is allowed by *Nollan* and *Dolan*. App.35a. In this way, Washington's "consideration of science" rule insulates *all* exactions mandated by local land use and environmental ordinances from the doctrine of

unconstitutional conditions—a result that raises the same conflicts as a rule that explicitly exempts legislative exactions from the nexus and proportionality standards.

Like California's categorical legislative exactions rule at issue in *Sheetz*, the Washington rule wrongly emphasizes the identity of the body that is demanding property, rather than the substance of its decision and the nature of the property demand itself. *See Common Sense Alliance v. Growth Mgmt. Hearings Bd.*, Nos. 72235-2-I & 72236-1-I, 2015 WL 4730204, at *7 (Wash. Ct. App. Aug. 10, 2015) ("An ordinance requiring a buffer zone is a legislative act, [and] legislative determinations do not present the same risk of coercion as adjudicative decisions."); *see also Sheetz v. Cnty. of El Dorado*, 84 Cal. App. 5th 394, 409 (2022), *cert. granted* (U.S. Sept. 29, 2023) (No. 22-1047) ("While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election.").

That diminished concern for legislative exactions' coercive effect, or outright dismissal as something to be remedied in the political realm, conflicts with this Court's insistence that a taking may occur "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration" regardless of "whether the government action at issue comes garbed as regulation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *see also Parking Ass'n v. City of*

Atlanta, 515 U.S. 1116, 1118 (1995) ("A city council can take property just as well as a planning commission can.") (Thomas, J., dissenting from denial of certiorari); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("If . . . the uses of private property were subject to unbridled, uncompensated qualification under the police power, the 'natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'") (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Indeed, resort to the political process will not cure a taking caused by laws that shift the cost of solving preexisting public burdens onto future development because *future* residents have no voice in local politics. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 S.M.U. L. Rev. 177, 206, 262 (2006) ("Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find [legislative exactions] an irresistible policy option.").

The Washington rule, moreover, directly conflicts with recent, notable decisions refusing to give legislative exactions special treatment under the Constitution. The Ninth Circuit in *Ballinger* overruled a past Circuit precedent holding legislative exactions categorically exempt from the nexus and proportionality test: "any government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim." *Ballinger*, 24 F.4th at 1299 (overruling *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), in light of *Cedar Point*, 141 S. Ct. at

2022). "What matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does, and the fact that the [dedication] comes from a city ordinance is irrelevant." *Id.* (cleaned up). Insofar as the Washington court's decision also relied on an assumption that a local government's compliance with an ordinary legislative process ensures constitutional results, that assumption conflicts with the North Carolina Supreme Court decision in *Anderson Creek Partners, L.P. v. County of Harnett*, 382 N.C. 1, 34 (2022). There, the court held that *Nollan* and *Dolan* apply to legislative action that conditions use of property even when the ordinance "more likely represent[s] a carefully crafted determination of need tempered by the political and legislative process." *Id.* This is because the nexus and proportionality tests are "designed to address the *risk* that local governments might use their permitting power to coerce landowners into relinquishing property," *id.* at 32, and legislative bodies as well as adjudicative agencies are equally prone to such risks. *Id.* at 33–34 (noting that this Court "consistently describe[s] the 'unconstitutional conditions' doctrine as 'preventing the *government* from coercing people into giving up' a constitutional right rather than preventing a particular branch of government from acting in a particular manner") (citing *Koontz*, 570 U.S. at 604, and *Dolan*, 512 U.S. at 385).

Until this Court resolves the question, "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively." *CBIA*, 577 U.S. at 1179 (Thomas, J., concurring in denial of certiorari); *see also Washington Townhomes,*

LLC v. Washington Cnty. Water Conservancy Dist., 388 P.3d 753, 758 n.3 (Utah 2016) ("The difficulty in answering this question stems in part from the Supreme Court's lack of clear guidance."). Such uncertainty harms tens of millions of property owners nationwide, who are regularly compelled to bear unfair public burdens as a condition of homeownership. *See, e.g.*, *Anderson Creek*, 382 N.C. at 43 (the cost of exactions is often passed along to the purchaser of new homes).

This petition provides the Court with an excellent opportunity to stem new iterations of a legislative exactions rule like the one adopted below.

CONCLUSION

The petition for a writ of certiorari should be granted. Or in the alternative, the Court should consider holding the petition until *Sheetz* is decided to consider whether to grant the petition, vacate the lower court decision, and remand for further consideration in light of any judgment in *Sheetz* that is contrary to the judgment below.

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