No. 23-397

IN THE

Supreme Court of the United States

PRESERVE RESPONSIBLE SHORELINE MANAGEMENT, *et al.*,
Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, WASHINGTON, *et al.*,
Respondents.

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

BRIEF OF CITIZEN ACTION DEFENSE FUND, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, AND WASHINGTON BUSINESS PROPERTIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"), the **Building Industry Association of Washington** ("BIAW"), and the **Washington Business Properties Association** ("WBPA"). CADF is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files *amicus* briefs when the state enacts laws that violate the state or federal constitutions, when government officials take actions that infringe upon the First Amendment or other constitutional rights, and when agencies promulgate rules in violation of state law.

BIAW represents more than 8,000 members of the home building industry. BIAW is made up of 14 affiliated local associations across Washington State. BIAW's members are engaged in every aspect of the residential construction industry. The economic benefit of residential construction includes jobs, income for thousands of working families, and continued tax revenue for state and local governments. Nonetheless, Washington is experiencing a severe shortage of homes, an issue further exacerbated by unlawful conservation buffers

[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amici*'s intention to file.

that unnecessarily raise the costs of housing production.

WBPA is a member-based non-profit organization advocating for property owners against burdensome taxation and encroaching regulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, and retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

Amici have a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, *amici* worry that if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Bainbridge ("City" or "Bainbridge") merely "considered" science when setting the area range for shoreline conservation easements, imposed on all owners wishing to build or renovate on parcels abutting Puget Sound. This occurred despite the Washington Shoreline Management Act's ("Act") directive that states cities must collect "the most current, accurate, and complete scientific and technical information available," when making such decisions. Wash. Rev. Code § 90.58.020; Wash. Admin.

Code § 173-26-201. Under well-established precedent, such efforts are 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 Envtl. 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 regulations are not based on "speculation and surmise")). Regardless of these clear requirements, in 2014 the state's Growth Management Hearings Board ("Board") misconstrued the Act's reference to "science" to be merely procedural rather than substantive. That is, once officials have merely collected and "considered" the science, they may then proceed with sizing the shoreline buffer to whatever specifications they wish—even if the science collected does not address whether the Act requires a buffer of the particular dimensions proposed. Pet. App.15a. In fact, even science that counsels *against* the proposed dimensions is enough to satisfy the Board's reading of the Act. *Id.*

The City began revising its Shoreline Management Program, and, in accordance with the Board's misreading of the Act, greatly expanded the size of its "standardized shoreline buffer." It did so despite its own expert's warning that the scientific data the City was ostensibly relying on was "dated and lacked accuracy," and included substantive "data gaps." The consultant recommended "site-specific" studies to determine buffer size on a per-parcel basis. Pet. Br. at 11. The City ignored its expert's findings and recommendations, opting instead for "as much protection as feasible"—meaning as much as on-the-

ground practicalities permit, rather than what the science simply requires.

The City's standardized buffer program imposes an unconstitutional condition—an "exaction"—on any shoreline owner seeking to build or renovate on their land. It puts permit-seekers in a Hobson's choice, forcing them to decide between their freedom of action on the one hand, and their constitutional right to compensation for a taking on the other. This outcome is not only unjust; it is unconstitutional.

Under the Court's precedent, the government cannot, without compensation, demand individuals surrender interests in their property unrelated to the uses for which they seek official approval. In the decades since the Court outlined its exactions test in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), several lower courts have refused to apply it to "legislative exactions"—*i.e.*, those imposed by a lawmaking body instead of by an adjudicative one (*e.g.*, an executive agency). Nothing in the Court's takings jurisprudence supports this interpretation, however. Indeed, it strongly suggests the opposite—that the *Nollan*/*Dolan* test applies to adjudicative and legislative actions *in equal measure*.

> The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property.

Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2072 (2021). So, while legislative actions are *not* immune to *Nollan*/*Dolan* scrutiny, the test is apparently ambiguous enough that lower courts feel they can indeed exempt this entire category of unconstitutional conditions. *Amici* ask the Court to hear this case in order to *expressly* incorporate "legislative exactions" into the *Nollan*/*Dolan* test.

ARGUMENT

I. Lower Courts Remain Unclear on Whether the *Nollan*/*Dolan* Test Applies in Equal Measure to Adjudicative *and* Legislative Exactions

A. The Proper Scope of The Court's Exactions Doctrine

In *Nollan v. California Coastal Commission*, the Court held that for an exaction to pass constitutional muster, its substance must bear an "essential nexus" to the costs the proposed project would impose on the surrounding area. 483 U.S. at 837. For example, a zoning board may condition the approval of a permit to construct an apartment complex in a single-family neighborhood on the developer's agreement to fund road expansions around the site, to account for the *resulting* increase in automobile traffic. Thus, an exaction does not violate the Takings Clause if it simply compels an owner to internalize the external *public* costs their *private* land uses would otherwise generate. *See* Christina M. Martin, Nollan *and* Dolan *and* Koontz—*Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, But No More*, 51 Willamette L. Rev. 39, 42–50 (2014).

In *Nollan*, the owner had proposed to reconstruct their beach house in exurban Ventura County. The California Coastal Commission ("Commission") conditioned approval of Nollan's permit request on his dedication of a portion of his land for public beach *access*, to internalize the new home's apparent obstruction of the public's beach *view*. The majority easily found no nexus between the public's loss of beach views and the private price of legalized trespass over part of Nollan's land. 483 U.S. at 838–39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollan property reduces any obstacles to viewing the beach created by the new house."). The externality—the "'wall' of residential structures" preventing the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit"—was categorically distinct from the right of public access to that discrete swath of sand. On the flipside, to address the legitimate public interest of maintaining public *visual* (as opposed to physical) access to the beach—assuming Nollan's new home would indeed have disrupted this—the Commission would be well within its constitutional power to require, without compensation, that the family "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836.

In *Nollan*'s estimation, "constitutional propriety disappears . . . if the condition substituted" for an unconditional rejection of a build permit "utterly fails to further the end advanced as the justification for the prohibition." 483 U.S. at 837. The opinion then likened the incongruence between the public costs and the private penalty imposed to a law that prohibits

"shouting fire in a crowded theater," unless one "contribute[s] $100 to the state treasury." Obviously, the $100 contribution will not directly militate the public harms resulting from its payor freely yelling "fire" amid a crowd. While this analogy well illustrates the test's core argument—that the conditions placed on a permit must seek to achieve the same public purpose as outright rejecting it would, and at a private price reasonably commensurate to the public costs the underlying project would impose—lower courts have repeatedly missed or distorted this message. And unfortunately, *Koontz v. St. Johns River Water Management District* did not put an end to the lower courts' confusion (or willful blindness). 570 U.S. 595 (2013). Many continue to ignore *Koontz*'s stipulation that the exaction label applies when a permit condition "would transfer an interest in property from the landowner to the government," 570 U.S. at 615, regardless of which officials and what branch initiate it.

In *Dolan v. City of Tigard,* the Court elaborated that, beyond the "essential nexus" requirement, an exaction is only constitutional if "the *degree* of the exactions demanded by the . . . permit conditions bears the required relationship to the projected impact of the petitioner's proposed development." 512 U.S. 374, 403 (1994) (emphasis added). While "no precise mathematical calculation is required," officials "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

In this context, "individualized determination" does not protect legislative actions from exactions

scrutiny. Rather, it is a procedural qualification to ensure that the claimant in an exactions case has indeed suffered an injury as a result of the public action, whatever its provenance. In a footnote, the majority emphasizes that the "city made an adjudicative decision" against a discrete property, but that doing so merely places the burden on the city "to justify the required dedication," rather than on the owner to show there is no conceivable justification. *Id.* at 391, n.8. The false dichotomization of adjudicative and legislative exactions is particularly suspect in the local-government context, where it is often difficult to precisely determine what type of decision is being made.[2]

Until the Court *explicitly* broadens the *Nollan*/*Dolan* test to include legislative exactions, lower courts will continue claiming (whether willfully or in ignorance) that the rule is limited to case-by-case adjudications, even though the governmental actions struck down in *Nollan*, *Dolan*, and *Koontz* were *all* at least partly legislative and not purely discretionary. *Nollan*, 483 U.S. at 829 (discussing the Commission's power to impose public-beach-access dedications (Cal. Pub. Res. Code Ann. §30000 et seq. (West 1986))); *Dolan*, 512 U.S. at 377 (noting that the City of Tigard's Community Development Code "requires property owners in the area . . . to comply with a 15%

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[2] *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 247 (2000) ("Local government structure combines legislative and administrative functions, and the land use process relies heavily on administrative discretion and flexible piecemeal decisionmaking, making it difficult for courts to determine when a decision is sufficiently legislative in character.").

open space and landscaping requirement, which limits total site coverage . . . to 85% of the parcel"); *Koontz*, 570 U.S. at 601 ("Consistent with the Henderson Act, the St. Johns River Water Management District . . . requires that permit applicants wishing to build on wetlands offset the resulting environmental damage by creating, enhancing, or preserving wetlands elsewhere."). This disparate treatment is especially striking considering that all *intra vires* agency actions—even ones described as "discretionary"—inevitably begin with legislation.

Rulings from recent decades highlight the extent to which lower courts continue to complicate the Court's exactions doctrine. Most recently, in *Sheetz v. County of El Dorado*, now pending before the Court, the California Court of Appeal held that "while the *Nollan*/*Dolan* test applies to monetary land-use exactions which are imposed ad hoc on an individual and discretionary basis, it does not apply to generally applicable development impact fees imposed through legislative action." 84 Cal.App.5th 394, 409 (2022). Even though both *Nollan* and *Dolan* involved "legislatively *prescribed*, generally applicable exactions," *Sheetz* insists that "neither case involved legislatively *mandated*, formulaic development impact fees that applied to a broad class of proposed developments." *Id.* at 320 (emphases added). Thus even after *Cedar Point*'s announcement that it is the *function* and not the *form* of the governmental action that determines whether a taking has occurred, the California Court of Appeal is still stuck differentiating between prescriptions and mandates *just* within the legislative setting—a distinction far too fine for the unconstitutional-conditions doctrine. Either the

government has compelled a certain action in exchange for granting a permit, or it has not. Full stop.

Other courts have made similar errors. *St. Clair Cnty. Home Builders Ass'n v. Pell City*, 61 So. 3d 992, 1007–08 (Ala. 2010) (per curiam) (holding that *Dolan* "does not apply to generally applicable legislative enactments"); *City of Olympia v. Drebick*, 156 Wash.2d 289, 126 P.3d 802, 807–09 (2006) (same); *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal.4th 643, 117 Cal.Rptr.2d 269, 41 P.3d 87, 101–06 (2002) (same); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 245 Ariz. 156, 425 P.3d 1099, 1103–06 (Ariz. Ct. App. 2018) (same).

For the sake of justice and uniformity, the Court should confirm within the exactions context what it has already made explicit in the property-rights space in general—that proving a taking does not depend upon "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," but instead on whether the government has physically taken property for itself or someone else—by whatever means—or has otherwise restricted a property owner's ability to use their own property. *Cedar Point Nursery*, 141 S.Ct. at 2072. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) ("But the particular state *actor* is irrelevant. If a legislature . . . declares that what was once an established right of private property no longer exists, it has taken that property . . ."") (emphasis original); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) ("It is not clear why the existence of a taking should turn on the type of governmental entity

responsible for the taking. A city council can take property just as well as a planning commission can.") (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). *See also* James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 438 (2009) ("Giving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power.") *and* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567–68 (1999) (there is "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application [of *Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators").

Consistent with the understanding that the function of a public action is far more consequential than its form, the Court has continually invalidated legislative acts that impose unconstitutional conditions on individuals well into the modern era. *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (invalidating provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that compelled certain speech as a condition of receiving funds); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (invalidating a county ordinance that conditioned the amounts of fees to be placed on a

permit to hold a rally upon the content of the intended message); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (invalidating section 399 of the 15 Public Broadcasting Act because it imposed the condition to refrain from "editorializing" on noncommercial educational broadcasters in exchange for public grants); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, and holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of press because it forced a newspaper to incur additional costs by adding more material to an issue or removing the material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (provisions of an unemployment compensation statute were held unconstitutional where the government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958) (a state constitutional provision authorizing denial of a tax exemption for refusal to take a loyalty oath violated the unconstitutional-conditions doctrine).

In sum, *Nollan* and *Dolan* are simply property-centered extensions of the Court's longstanding interdisciplinary practice of invalidating *any* governmental action that violates the Constitution, regardless of the form in which it appears. Together they stand for the simple proposition that the government cannot force individuals to choose between their constitutional rights on the one hand,

and their freedom of action on the other. If any governmental entity demands an interest in property as a condition of permit approval, then a taking may be underway, and the dispute is subject to heightened scrutiny under the nexus and proportionality test. *Koontz*, 570 U.S. at 615. The Court should correct the lower court's essential misunderstanding of the doctrine and hold that legislatively ordained permit conditions are subject to the same scrutiny as their adjudicative counterparts.

B. Explicating the Full Scope of the Nollan/Dolan *Test*

In pleasant contrast to the aforementioned opinions, other courts *have* extended the *Nollan*/*Dolan* test to legislative exactions, recognizing that the distinction is essentially meaningless for takings purposes. In *Knight v. Metropolitan Government of Nashville & Davidson County*, the Sixth Circuit held that "Nollan's unconstitutional-conditions test applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones," and Nashville's insistence otherwise "conflicts both with the Supreme Court's unconstitutional-conditions precedent and with its takings precedent." 67 F.4th 816, 829 (6th Cir. 2023). Referencing *Stop the Beach Renourishment*, the Sixth Circuit noted that the Takings Clause's "passive-voice construction"—"nor shall private property be taken"—"does not make significant *who* commits the 'act'; it makes significant *what* type of act is committed." *Id.* at 829–30 (emphases original); U.S. Const. amend. V. "If anything," *Knight* continued, the [F]ramers designed the Takings Clause precisely to protect against legislative action—a historical fact

that undercuts Nashville's claim that we should review legislative conditions with a more deferential eye." *Id.* at 830.

In *Anderson Creek Partners, L.P. v. Harnett County*, the North Carolina Supreme Court derided the County's interpretation of *Dolan*'s "individualized determination" requirement. 382 N.C. 1, 24 (2022). According to the County, "'generally applicable fees, by their nature, cannot contain an individualized determination.'" *Id.* (internal citations omitted). Of course this is not true, as eventually *any* "generally applicable fee" will be enforced against individuals, with such determinations inevitably made on a case-by-case basis. That "all landowners are aware of the fees in advance" is totally irrelevant to the underlying takings question. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."). *Dolan* was only concerned with "individualized determinations" to establish that that offending action has in fact caused injury to a particular property, not for the purposes of determining which branch of government actually authorized the offending action, in order to then exempt certain branches from its reach. 512 U.S. at 391, n.8.

As the Sixth Circuit reminds us in *Knight*, it is *what* is taken, not *who* takes it, that matters. 67 F.4th at 829–30. Thus, in the exactions context, as long as the "fee . . . is, in fact, linked to a specific piece of property, in each case the specific parcel of land has been proposed for development." 382 N.C. at 29. Other rulings that have refused to distinguish legislative

and adjudicative exactions along these and similar lines include *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 640–42 (Tex. 2004) (noting "we are [not] convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative"); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 658–60 (Me. 1998) (reasoning that the legislative character of an exaction is just one variable for measuring whether it is public-purpose-justified); and *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 388–90 (Ill. 1995) (evaluating a *Dolan* claim against legislation, premising that measures of this type can produce unconstitutional conditions).

In line with *Knight*, *Anderson Creek Partners*, and these other prior opinions, *amici* urge the Court to make the following elements of the *Nollan*/*Dolan* test explicit.

First, per *Knight*, remind the lower courts that the Takings Clause was a direct response to centuries of legislative confiscation of private property. 67 F.4th at 829–32.

Second, again echoing *Knight*, emphasize that the Court "has never drawn" a legislative-adjudicative exactions "divide" for the substantive purpose of determining whether an unconstitutional condition has occurred at all. *Id.* at 832. Rather, like Nashville in *Knight*, here Bainbridge has "identifie[d] no case in which" the Court "has treated legislative conditions differently from administrative ones." *Id.* at 833. "As far as we can tell," the Sixth Circuit continued, "the [Supreme] Court typically applies the same test no matter the condition's source." *Id.*

Third, as the North Carolina Supreme Court endeavored, with some success, to do in *Anderson Creek Partners*, explain why *Dolan*'s "individualized determination" language is not relevant to the question of who or what branch of government is seeking to impose the offending condition. Rather, it simply goes to the procedural questions of whether there is a specific property interest injured, and who has the burden of justifying, or showing no public-purpose justification for, the condition imposed. 382 N.C. 29 ("[B]y requiring the payment of the challenged 'capacity use' fees as a precondition for its concurrence in applications for the issuance of the necessary water and sewer permits, the County is 'directing the owner[s] of [each] particular piece of property to make a monetary payment,' regardless of whether the same fee is applicable to all tracts of property and regardless of who owns the property. In other words, the fee at issue in this case is, in fact, linked to a specific property, in each case the specific parcel of land that has been proposed for development.") (internal citations omitted).

Once the Court expressly incorporates these elements into a revised *Nollan*/*Dolan* test, defiant lower courts will find it far more difficult to exempt legislative actions from its sweep. Requiring courts analyzing either adjudicative *or* legislative land-use conditions to properly consider common-law history, the Court's precedent, and the meaning of *Dolan*'s "individualized determination" proviso, will together foster uniformity across jurisdictions, and will allow owners, land-use officials, and practitioners to better prepare for and navigate these sorts of disputes.

II. Exactions Everywhere Impede Much-Needed Housing Growth

Unempirical exactions like the Bainbridge's shoreline proviso are now omnipresent in American land-use law. Whether in adjudicative or legislative form, in aggregate these measures substantially impede the construction of new housing units in nearly every corner of the United States. And much like Bainbridge's, a sizable portion—if not an outright majority—of these exactions rely upon unsubstantiated claims to legitimize them. In Bainbridge, officials merely *considered* "science" in calculating per-parcel coastal preservations zones, a "process"—if one can call it that—which involves little to no data-driven analysis. Other jurisdictions have done the same, at best paying lip-service to "science" and "data," and at worst foregoing *any* claim of a nexus or proportionality between a development's externalities and the fees or dedications imposed in consequence.

In Seattle, members of the city council have repeatedly proposed across-the-board transportation impact fees on future development, including in-fills. Ryan Packer, *As Development Slows, Seattle Eyes Transportation Impact Fee Projects*, The Urbanist, Apr. 17, 2023, https://rb.gy/mj1xx6. But denser housing and mixed-use growth tends to *reduce* per capita road use. *See generally* Jeremy Mattson, *Relationships Between Density, Transit, and Household Expenditures in Small Urban Areas*, Transp. Res. Interdisciplinary Perspectives 8 (2020). Once again empirical data takes a back seat to political expedience.

Then there is California's notorious review process under the Environmental Protection Act ("CEQA"), which anyone can bring and, once brought, immediately stalls the target project. Various interest groups routinely weaponize CEQA to stop projects they simply do not like. *See generally* Chris Carr et al., *The CEQA Gauntlet: How the Californian Environmental Quality Review Act Caused the State's Construction Crisis, and How to Reform It*, Pac. Res. Inst. (Feb. 2022).

These are hardly isolated incidents. "Over the past three decades," one land-use scholar put it, "increasing numbers of local governments have turned to new methods of financing public works projects, especially land use exactions and impact fees." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005). *See also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

The incentives for pursuing such measures are obvious. First, it is a means of raising funds without also raising public ire via statutory, "on-book" tax levies. Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 W. Mich. U. Thomas M. Cooley L. Rev. 1, 2 (2005). Second, thus far neither voters nor the courts have done anything to stop it. Indeed, "[r]esidents now urge their elected officials to adopt impact fees when the locality has not yet done so." Rosenberg, *supra*, at 262. Overtaxing

developers does not, after all, tend to elicit great popular sympathy. Further, "[w]ithout having to face the opposition of future residents who do not currently live or vote in the locality," land-use officials "find impact fees an irresistible policy option." *Id.*

The direct and downstream effects these "irresistible" policies have on housing costs are substantial. In a detailed survey, real estate firm Duncan Associates noted that in California, impact fees on average add $37,471 to the price of a home. The story is the same in other states that liberally permit legislative exactions, including $16,079 per home in Washington and $21,911 in Oregon. Duncan Assocs., *National Impact Fees Survey: 2019*, at 4 (2019). These figures are especially egregious when the conditions imposed do not confer on the public the benefits its advocates tend to claim they will.

According to land-use scholar Vicki Been, "[w]hen impact fees do not provide infrastructure or financing advantages worth their cost"—*i.e.*, conditions that are not roughly proportional to the external costs the target project will impose—"impact fees can be analogized to a one-time excise tax that produced no benefits to the taxpayer." Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 150 (2005). Surveying the relevant literature from the 1980s on, Been finds that the vast majority—all except one—conclude that impact fees indeed increase housing costs, at a per-unit rate of $1.66 for *each* $1.00 in fees imposed, according to one relatively recent study. Shishir Mathur et al., *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urban Studies 1303, 1310 (2004).

The general consensus among planners is that one of the most efficient ways to achieve healthy housing growth is through urban and suburban in-fill development, instead of via continual sprawl. Am. Plan. Ass'n, *APA Policy Guide on Smart Growth* (2002) ("Infill development and redevelopment, increased density of development, and the adaptive re-use of existing buildings result in efficient utilization of land resources, more compact urban areas, and more efficient delivery of quality public services."). Yet almost wherever developers follow this advice and initiate urban projects they face a litany of artificial obstacles. Ensuring incoming residents have access to basic health and safety amenities is one thing. So too is shielding current residents from eating any portion of these costs. But achieving these twin aims drives only a small portion of the conditions land-use officials—especially those in urban and suburban areas—impose.

Many local governments use it as a low-political-cost budget-padding mechanism rather than as a real tool for expanding infrastructure and public amenities apace with population growth. *See generally* Gregory S. Burge, "The Effects of Development Impact Fees on Local Fiscal Conditions," *in* Gregory K. Ingram & Yu-Hung Hong, *Municipal Revenues and Land Policies* 182 (2010). And their execution often leaves much to be desired. For instance, "[m]any municipalities impose flat fees that are not adjusted to the size or impact of individual housing units." Vittorio Nastasi, *Poorly Designed Impact Fees Make Housing More Expensive*, Reason Found., Jan. 10, 2022, https://rb.gy/eon60x. According to a report from Strong Towns, impact fees do not even "do what they're purported to do." "They don't actually make

development pay its own way." Daniel Herriges, *Impact Fees Don't Mean Development Is Paying for Itself*, Aug. 23, 2018, https://rb.gy/s9z46l. In Lafeyette, Louisiana, for example, "residents would have to accept somewhere between a 330% and a 533% tax hike just to break even on the costs of maintaining existing infrastructure," regardless of who paid the upfront costs. *Id.* In the end, impact fees, "by reducing the up-front fiscal impact of growth, might actually be" no more than "a dangerous"—and costly—"temptation." *Id.*

The ease with which so many jurisdictions' impact fees and other exactions escape full *Nollan*/*Dolan* scrutiny plays an outsized role in this growing disparity. The Court's clarification of the test's scope—to include exactions closer to their legislative origins than, apparently, are so-called "adjudicative" ones (for, as discussed, these also originate as legislation)—is not merely a legal imperative. The practical consequences of continuing to permit lower courts to misread the test rise into the many billions of dollars and prevent millions of Americans from realizing even the modest dream of a comfortable home, to say nothing of full homeownership. Granting certiorari in this case—and finding in Petitioner's favor along the lines set forth in Part I—will go a long way to alleviating this simmering public crisis.

III. Elections Do Not Protect Against Legislative Exactions

There are few—if any—electoral protections against legislative exactions. When courts improperly draw the exactions "line" closer to the end-user and thus further away from its legislative origins, all they

are doing is immunizing lawmakers from any popular liability for their own unconstitutional behavior. There is strong evidence demonstrating that elected officials pay little to no political cost for punting more unpopular governing tasks to unelected bureaucrats. As the Sixth Circuit noted in *Knight*, the opposite argument—that elections do serve to hold extortionist officials to account—has "no empirical support" to back it up. 67 F.4th at 835. Indeed, "[a] majority of local taxpayers may well 'applaud' the lower taxes that their politically sensitive legislators can achieve through . . . cost shifting" "valid programs that society 'as a whole' should finance" to a "subset of individuals (those seeking permits)." *Id.* at 836.

In reality, officeholders almost never pay for shifting costs from the majority to a minority of its current and future constituents. Indeed, that is the entire point of such "off budget" schemes. Justice Scalia argued as much in *Pennell v. City of San Jose*, writing that "[t]he politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise." Instead, "it permits them to be achieved 'off budget,' with relative invisibility and thus immunity from normal democratic processes." 485 U.S. 1, 22 (1988) (Scalia, J., joined by O'Connor, J., concurring in part and dissenting in part).

So, whether the electoral consequences are nil or even net-positive, officeholders need not concern themselves with the grievances of any minority that the majority tends not to support—*e.g.*, housing developers. Rosenberg, *supra*, at 262. This is especially unfortunate in light of the fact that most add-on costs imposed on developers will merely shift

to new residents in the form of increased rents and purchase prices, which can, in turn, hike housing costs for everybody, including established residents. *See* Jennifer Evans-Cowley et al., *The Effect of Development Impact Fees on Housing Values*, 18 J. Hous. Res. 173, 188 (2003) ("[A] $1,000 increase in impact fees results in a 1.44% increase in new home prices and a 6.5% increase in the price of existing homes after controlling for the number of years since the fee was implemented.").

It is unrealistic to expect even the most well-informed voter to weigh every pertinent consideration when electing representatives, especially if so many of those considerations are hidden from view. And even if local voters could find and integrate all the information on local land-use policies necessary to change their ballot—assuming that such policies are more important to their vote than any other issue—the officials never have as much control over the policymaking as the accountability theory suggests. This is especially the case for land use, "which cross-cuts multiple functional and policy issue areas." Soyoung Kim, *Integration of Policy Decision Making for Sustainable Land Use Within Cities*, Sustainability, 1 (2021).

Across the country exactions are becoming ever more frequent, yet we have witnessed little to no electoral backlash. Outside of the academy and commentariat, failures in collective action and incentive structures leading to inefficient exaction programs illustrate the effective limits of public power to change local land-use decision-making. The result is the system we now see across the country: local officials charging developers "off-budget," with

existing residents—unaware or unwilling to believe they will eventually foot the bill—either indifferent to or in full support of such measures. Unless and until the courts hold local governments to account for the unconstitutional conditions they impose upon developers, the cycle will continue to worsen. And no amount of voting alone will correct it.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant review, reverse the lower court, and remand this case for proper consideration under the *Nollan*/*Dolan* test.

Respectfully submitted,

NOVEMBER 2023

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