No. 23-397

IN THE
Supreme Court of the United States

PRESERVE RESPONSIBLE SHORELINE ANAGEMENT, ALICE TAWRESEY, ROBERT DAY, BAINBRIDGE SHORELINE HOMEOWNERS, DICK HAUGAN, LINDA YOUNG, JOHN ROSLING, BAINBRIDGE DEFENSE FUND, POINT MONROE LAGOON HOME OWNERS ASSOCIATION, INC., AND KITSAP COUNTY ASSOCIATION OF REALTORS,

Petitioners,

v.

CITY OF BAINBRIDGE ISLAND, WASHINGTON STATE DEPARTMENT OF ECOLOGY, ENVIRONMENTAL LAND USE HEARING OFFICE, AND GROWTH MANAGEMENT HEARINGS BOARD CENTRAL PUGET SOUND REGION,

Respondent.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent City of Bainbridge Island ("City") updated its Shoreline Master Program after compiling an extensive scientific record. Although the science supported wider shoreline buffers, the City followed its consultant's recommendation that it adopt narrower buffers that were more consistent with its policy objectives. On judicial review, the Washington State Court of Appeals analyzed the buffer requirement under the nexus and rough proportionality standards set forth by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Washington court held that these standards were met because the City established the buffer widths by analyzing "valid scientific information in a reasoned process." App. 35a (quoting *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 160 Wash. App. 250, 267, 255 P.3d 696, *review denie*d, 171 Wash.2d 1030 (2011), *cert. denied*, 566 U.S. 904 (2012)).

Preserve Responsible Shoreline Management and the other petitioners in this matter (collectively "PRSM") have presented the following questions:

> 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))

The City objects that these questions, as formulated by PRSM, would not be presented by this case. The Washington court did not hold either that the City could avoid scrutiny under *Nollan/Dolan* by using "a legislative procedure that involved consideration of science" or that "legislative permit conditions" are exempt from such scrutiny. To the contrary, the Washington court specifically analyzed *Nollan/Dolan* and concluded that the standards set out in those cases were satisfied because the City based its buffer widths on an analysis of valid scientific information in a reasoned process. PRSM's proposed issue statements do not ask whether this standard is appropriate. Instead, they rephrase the issues in a manner which PRSM apparently believes is more likely to garner this Court's interest but which does not arise from the facts of this case.

STATEMENT OF THE CASE

PRSM seeks discretionary review of an unpublished opinion of an intermediate state appellate court in *Preserve Responsible Shoreline Management, et al. v. City of Bainbridge Island, et al.*, Wash. App., No. 568080-II (Dec. 13, 2022) ("Opinion"). In the Opinion, the Washington Court of Appeals affirmed a decision of the Washington State Growth Management Hearings Board upholding the shoreline buffers established in the City's Shoreline Master Program. Among the claims that the Washington court rejected was PRSM's argument that the buffers violate the doctrine of unconstitutional conditions. PRSM fails to show any error in the Opinion that would warrant this Court's review.

A. The City's Shoreline Buffers are Based on an Extensive Scientific Record.

The City conducted an extensive and robust scientific inquiry to form a basis for adopting shoreline buffers. The City commissioned and relied on numerous scientific studies, including the *Bainbridge Island Nearshore Assessment Summary of Best Available Science* (Battelle 2003), AR 3995-4148; the *Bainbridge Island Nearshore Habitat Characterization and Assessment, Management Strategy Prioritization, and Monitoring Recommendations* (Battelle 2004), AR 3265-3514; the *Bainbridge Island Current and Historic Coastal Geomorphic/Feeder Bluff Mapping* (Coastal Geologic Services, Inc. 2010), AR 4149-4230; the *Addendum to the Summary of Science Report* (Herrera 2011), AR 4232-4354; the *Memorandum re: Documentation of*

Marine Shoreline Buffer Recommendation Discussions (Herrera August 11, 2011), AR 4356-7; the *Memorandum re: Clarification on Herrera August 11, 2011 Documentation of Marine Shoreline Buffer Recommendation Discussions Memo* (Herrera August 31, 2011), AR 4374-78; and the *Cumulative Impacts Analysis for City of Bainbridge Island's Shoreline: Puget Sound* (Herrera and the Watershed Company 2012), AR 2121-2217.

These studies exhaustively documented the existing conditions and existing ecological functions of Bainbridge Island's shorelines. *See*, *e.g.,* AR 4031-70; AR 4160-70; AR 4243-81; AR 2129-40. They also exhaustively documented the impacts of anticipated development on the existing conditions. *See*, *e.g.*, AR 4071-94; AR 4187; AR 4254-4313; AR 2141-61. Finally, these studies made detailed recommendations for shoreline regulations, including the shoreline buffers that were ultimately adopted by the City, to ensure that the impacts of development would be mitigated and that no net loss of shoreline ecological functions would occur, *see*, *e.g.*, AR 4082-83; AR 4088-91; AR 4094-95; AR 4096-4100; AR 4314-16; AR 4362-67; AR 4374-77.

Based on this scientific record and the recommendations of the City's shoreline consultant, Herrera and Associates ("Herrera"), the City's shoreline regulations offer property owners two options for meeting the City's buffer requirements: (1) make a site-specific proposal for a Vegetation Management Area with buffer dimensions that "assure[] there is no net loss of shoreline ecological functions and associated ecosystem wide processes," or (2) "as an alternative to a Site-Specific Vegetation

Management Plan," maintain "a Shoreline buffer immediately landward of the [ordinary high water mark]" meeting the standard dimensions set forth in the Shoreline Master Program. SMP § 4.1.3.5(3)(a) and (b), AR 108-09. By offering these two options, the Shoreline Master Program ensures that property owners can choose to have the shoreline buffer tailored to their specific property, either through a Vegetation Management Plan, or through the application of standard, fixed-width shoreline buffers.

Herrera recommended a two-zone approach for the standard buffers under the second option, with differing buffer widths based on the property's shoreline designation and site characteristics. AR 4356-72; AR 4374-78. As the consultant detailed, shoreline buffers protect a wide variety of shoreline ecological functions, including water quality, fine sediment control, shade/microclimate, fish and invertebrate food from litterfall and large woody debris, and hydrology/slope stability. AR 4357-360; AR 4374-77. The buffer widths recommended by the scientific literature to protect these functions can vary considerably based on the site characteristics and the functions to be protected. For example, necessary buffers range from 16 feet to 1,969 feet for removing pollution from stormwater runoff, from 16 feet to 328 feet for maintaining marine food sources, and from 33 feet to 328 feet for large woody debris. AR 4358; AR 4375.

The more protective zone, Zone 1, is adjacent to the ordinary high water mark. AR 346. Within Zone 1, uses are highly restricted and existing vegetative cover must be retained, except that certain water-

related structures are allowed. *See, e.g.,* SMP § 4.1.3.7(1) and (3); AR 114-15; SMP §4.1.3.8 (1) and (2), AR 116-18; SMP § 4.1.3.10, AR 118-19. Within Zone 2, which extends landward from Zone 1 to the required buffer width, uses are less restricted. Uses such as decks, gardens, and even some residential development are allowed if impacts on shoreline ecological functions are mitigated. SMP §4.1.3.11, AR 120-22.

Herrera recommended preserving existing native vegetation and significantly restricting development in Zone 1 because the ecological functions provided by native vegetation adjacent to the shoreline are "fundamental to maintaining a healthy functioning marine nearshore." AR 4362-63. Herrera recommended that Zone 1 extend a minimum of 30 feet from the ordinary high-water mark in most shoreline designations or to the limit of the area of the site having a 65% canopy of native vegetation, whichever is greater, based "on the ability to achieve 70 percent or greater effectiveness at protecting water quality, and providing shade, microclimate moderation, large woody debris, litterfall, and insect food sources." AR 4376. According to Herrera, 30 feet was the "minimum area necessary" to achieve this measure of protection. AR 4440. The second tier of the buffer, Zone 2, was to serve as additional protection for Zone 1 and to provide some additional buffer functions. AR 4362.

B. The Only Policy Choices Used to Set the City's Shoreline Buffers were the Level of Protection Provided to Ecological Functions and the Desire to

Minimize the Number of Structures that Would be Made Nonconforming.

There is no question that the City's standard shoreline buffers are consistent with the science and are primarily driven by the Washington Shoreline Management Act's requirement to preserve and protect shoreline ecological functions. However, as the City has acknowledged throughout PRSM's appeal, policy considerations also played a role in the buffer widths adopted. The City's standard shoreline buffers are based on the scientific evidence tempered by two (and only two) policy choices. First, because there was science in the record to support buffers from as little as 16 feet to as large as 1,969 feet, the City's decision on the specific shoreline ecological functions to be protected and the desired degree of protection was necessarily a policy choice. AR 2879; AR 5824-25. The City chose to adopt the two-zone system that would "achieve 70 percent or greater effectiveness at protecting water quality, and providing shade, microclimate moderation, large woody debris, litterfall, and insect food sources." AR 4376. As Jose Carrasquero of Herrera testified before the Bainbridge Island City Council, "the specific width of [the buffer] is part of the policy recommendation" and is intended to be "within the range of buffer width[s] recommended in scientific documents." AR 2879. Thus, while the City could have chosen buffers of greater or lesser width, the City made a policy choice to achieve 70 percent or greater effectiveness in protecting the functions listed.

The City's second policy choice was based on its desire to limit the number of existing structures that

would be rendered nonconforming by the newly adopted buffers. AR 5824-25; AR 2877. The City's shorelines are 82% developed, thus limiting the City's ability to adopt wide buffers without making a significant number of structures nonconforming. AR 4362. The buffers recommended by Herrera and adopted by the City are therefore "based on existing distances to residential structures from the shoreline in addition to science-based recommendations for shoreline and nearshore protection." AR 4366, Table 1, footnote a; AR 2877 (the buffers are intended to "[m]eet the ecological protection requirements under the [Washington Administrative Code] guidelines" while "consider[ing] the land use patterns and minimiz[ing] the number of existing structures [that would be made nonconforming]").

As the Growth Management Hearings Board recognized, the City's policy choices resulted in buffers that were narrower than what science alone would have justified. AR 5824 ("If the buffers were driven solely by science, the buffers could be much greater").

C. The Washington Court of Appeals Affirms the City's Shoreline Master Program in an Unpublished Decision.

PRSM sought judicial review of the Growth Management Hearings Board's decision under the Washington Administrative Procedures Act. The state superior court conducted a hearing on the merits of PRSM's appeal and thereafter issued its final order, rejecting all PRSM's arguments and upholding the Growth Management Hearings Board's decision and the Shoreline Master Program

in all respects. CP 639–46. PRSM then appealed to the Washington Court of Appeals, an intermediate appellate court. The Court of Appeals likewise affirmed in all respects, in an unpublished opinion. App. 1a–38a. After the Washington Supreme Court denied review (App. 47a–48a), PRSM filed the present petition for certiorari in this Court.

REASONS FOR DENYING THE PETITION

Because the Opinion is unpublished, it has no precedential value under Washington law. Wash. Rev. Code § 2.06.040. Although it may be cited as nonbinding authority and accorded persuasive value, it is "not binding on any court." Wash. Gen. R. 14.1. PRSM fails to explain how the decision of an intermediate state appellate court, which is binding only on the parties, warrants this Court's involvement. In any event, this matter is not appropriate for review by this Court, for the reasons discussed below.

I. THE CITY'S STANDARD BUFFERS DO NOT REQUIRE SHORELINE OWNERS TO GIVE UP ANY PROPERTY RIGHTS, AND THE DOCTRINE AGAINST UNCONSTITUTIONAL CONDITIONS DOES NOT APPLY.

PRSM purports to raise a question under this Court's doctrine of unconstitutional conditions, which holds that "the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of*

Tigard, 512 U.S. 374, 385 (1994). But PRSM glosses over a threshold question, which is whether that doctrine applies to the government action at issue here. PRSM cites no federal authority addressing whether the buffers even implicate the doctrine.[1] Analysis of the doctrine's history shows that they do not.

The doctrine is rooted in the Takings Clause. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). This Court announced the doctrine in *Nollan*, which involved a landowner's application for a permit to build a beachfront house. The local government conditioned the permit on the landowner's dedication of an easement that would have granted public access to the beach between the landowner's seawall and the high-tide line. *Nollan*, 483 U.S. at 828. A crucial question was whether, if the local government had simply required the easement, rather than conditioning a permit on it, the action would have been a taking, requiring the government to compensate the landowner. *Id.* at 837. If so, then unless the condition had an adequate nexus to a valid governmental purpose, the purpose would be simply "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Id.*

The majority and the dissent debated whether the easement at issue was "the taking of a property

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[1] In a footnote, PRSM misconstrues Washington authority to argue that buffers are a dedication for public use that is subject to the doctrine of unconstitutional conditions. Pet. at 15 n. 4. The City disagrees with PRSM's analysis of Washington law. But, in any event, this is not a question of state law, but rather of this Court's jurisprudence.

interest" or "a mere restriction on its use." *Id.* at 831. And the majority acknowledged that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 834 (alteration in original) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). The majority acknowledged further that this Court has "made clear" that a "broad range of governmental purposes and regulations satisfies these requirements," including scenic zoning, landmark preservation, and residential zoning. *Id.* at 834–35.

The dispositive fact in *Nollan* was that the easement negated the landowner's right to exclude others, which is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 831. A taking occurs when governmental action results in a "permanent physical occupation" of property by the government or by others. *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433–35 (1982)). And "a 'permanent physical occupation'" occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed…." *Id.* at 832. A permit condition requiring the landowners to allow this type of "permanent physical occupation" of their property thus raised constitutional implications. *Id.*

Likewise, in *Dolan*, the key was the elimination of the landowner's right to exclude. There, a portion of the landowner's property was within a floodplain. *Dolan*, 512 U.S. at 379. As a condition to expanding a commercial structure on the property, the local

government required the landowner to dedicate the portion lying within the floodplain as a public greenway and to dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. *Id*. at 380. This Court observed that such "public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id*. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

The Court stressed that the local government "never said why a *public greenway, as opposed to a private one*, was required in the interest of flood control" and that the difference to the landowner was "the loss of her ability to exclude others." *Id*. at 393 (emphasis added). It was "difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems…." *Id*. This Court thus implied that the result would have been different if the local government had simply restricted use of the land adjacent to the floodplain, without opening it up to public use.

In between *Nollan* and *Dolan*, this Court decided *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). That decision addressed a state regulation of beachfront property that entirely prohibited the erection of any permanent habitable structure on the petitioner's land. *Id*. at 1007. The Court concluded that because the landowner was "called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property

economically idle, he has suffered a taking." *Id.* at 1019 (emphasis in original).

Here, PRSM has done nothing to establish that the City's buffer requirements involve the type of condition that would be a taking under this Court's jurisprudence. They do not allow the public to "pass to and fro" through private property. *Nollan*, 483 U.S. at 832. They do not raise the specter of "recreational visitors trampling" along a landowner's shoreline. *Dolan*, 512 U.S. at 393. They merely serve the City's legitimate interest in reducing the harms associated with shoreline development, while preserving the landowners' right to exclude others from their property. And they do not deprive land of "*all* economically beneficial uses." *Lucas*, 505 U.S. at 1019. To the contrary, because they are designed to avoid rendering existing structures nonconforming (AR 4366, Table 1, footnote a; AR 2877), they necessarily do not encroach into the upland areas on which waterfront structures in the area are typically built.

As noted above, property owners are given two choices for establishing shoreline buffers on their properties: (1) a site-specific Vegetation Management Area, or (2) the City's two-tiered shoreline buffers set forth in the Shoreline Master Program. Neither the Vegetation Management Area nor the standard shoreline buffer require the owner to give up any fundamental attribute of ownership. These buffer provisions do not require the owner to transfer any interest in the property to the City, do not take away the owner's right to exclude others (including the City), and do not take away the right of the owner to dispose of the property.

PRSM cannot reasonably ask this Court to consider whether these buffer regulations satisfy the nexus and rough proportionality requirements of *Nollan/Dollan*, when it has not even tried to establish that the regulations are subject to that analysis in the first place.

II. PRSM'S PROPOSED ISSUES DO NOT FOLLOW FROM THE COURT OF APPEALS' HOLDING.

Even if the City's buffers did implicate the doctrine of unconstitutional conditions (they do not), the specific issues offered by PRSM are not implicated by the Washington court's holding. PRSM's first issue presumes that the Washington court established a rule under which the *Nollan/Dolan* nexus and rough proportionality requirements are met *per se* if the local government's process involved a consideration of science, even if that science is completely ignored. The second presumes that the Washington court held that legislative exactions are exempt from the nexus and rough proportionality requirements. As explained below, neither characterization of the Opinion is accurate, and PRSM's proposed issues would not be properly before this Court if it granted certiorari.

A. The City did Not Ignore the Science, and the Washington Court did Not Say that it Could.

PRSM's first proffered issue relies on a distortion of Washington law under which, according to PRSM, the City had "the green light to collect and consider—then ignore—scientific evidence in favor of

policy-based buffers that significantly restrict property rights." Pet. at 10. But the Opinion gave the City no such green light, and the claim that the City ignored the science contravenes the findings of fact made below.

PRSM's claims appear to be based on the portion of the Opinion in which the Washington court noted the statutory requirement that the City use "a 'reasoned, objective evaluation' of the scientific and technical information when creating master programs." App. 35a (quoting Wash. Adm. Code 173-26-201(2)(a). The Washington court explained that when "the local government meets this standard, the nexus and rough proportionality tests are generally satisfied." *Id.* (citing *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash. App. 250, 273, 255 P.3d 696 (2011)). "Use of the best available science," the court explained, "is 'generally interpreted to require local governments to analyze valid scientific information in a reasoned process.'" *Id.* (quoting *Kitsap All.*, 160 Wash. App. at 267). The court concluded that meeting the statutory "requirement for a reasoned, objective evaluation of the scientific and technical information satisfies the nexus and proportionality tests." *Id.*

Contrary to PRSM's characterization, nowhere did the Washington court say that collecting and considering science was a purely procedural requirement or that the local government can freely ignore the science once that procedural box is checked. PRSM points to holdings in other, unrelated cases, which it claims support these propositions. Pet. at 9–10. But the Washington court in this case did not rely on those cases in its

Nollan/Dolan analysis. Rather, it relied on *Kitsap All.*, which held that it is not enough for "the best available science" to "be in the record." *Kitsap All.*, 160 Wash. App. at 267. There must also be evidence that the local government "considered the best available science substantively in its development of the critical areas ordinance." *Id.* (citing *Honesty in Envtl. Analysis & Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash. App. 522, 532, 979 P.2d 864 (1999)).

Moreover, the Washington court held that substantial evidence supports the Growth Management Hearings Board's finding of fact that "the City appropriately relied on the science from its multiple studies in making its determinations about the size and scope of the buffers." App. 27a. The substantial evidence included the facts that the City's technical consultant specifically suggested the buffers that the City adopted and that the scientific literature would have supported larger buffers. *Id.*

In short, nowhere did the Washington court say that scientific data could be collected and considered and then ignored. To the contrary, it held that the nexus and rough proportionality requirements were met because the City "used" and "relied on" the best available science in setting the buffers. App. 37a. And the Opinion makes clear that "use" and "rely" mean that the restrictions are the product of a reasoned, objective evaluation of the scientific and technical information and that this information is analyzed in a "reasoned process" and "considered substantively." App. 35a.

Finally, the fact that the City also considered policy, in addition to science, does not mean that the Washington court endorsed a rule allowing local governments to ignore "scientific evidence in favor of policy-based buffers that significantly restrict property rights." Pet. at 10. As the Washington court observed, there was conflicting science regarding the recommended buffer widths, and the selection of buffer widths within that range was necessarily a policy decision. App. 14a. Far from saying that local governments can ignore science in favor of policy, the Washington court stated that the buffer widths would fail the nexus and proportionality tests if they were "in excess of what the science would allow." App. 37a n. 11.

Thus, PRSM's first proffered issue statement—premised on its characterization of the Opinion as creating a loophole under which local governments can dispense with the nexus and rough proportionality tests by collecting, considering, and then discarding science—does not arise from the facts of this case.

B. The Court of Appeals did Not Hold that the City's Buffers are Exempt from the Nexus and Rough Proportionality Requirements as Legislative Exactions.

PRSM's second issue statement bears even less resemblance than the first to the issues presented by this case. PRSM proposes that the Court accept review of this case to consider 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))." Pet. at i. But the issue accepted for review in *Sheetz* is not presented here.

As an initial matter, it cannot rationally be claimed that the Washington court found the buffer widths exempt from *Nollan/Dolan* scrutiny, when it explicitly analyzed them under that test. *See* App. 34a–35a. PRSM tries to avoid this basic problem by claiming that the Opinion "adds a new dimension" to the issue presented in *Sheetz*. According to PRSM, the new dimension is a holding "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*." Pet. at 31 (emphasis in original).

In other words, in its effort to shoehorn this case into *Sheetz*'s ambit, PRSM distorts the Washington court's holding beyond all recognition. Nowhere did the court say that legislative compliance insulates an exaction from the *Nollan/Dolan* requirements. Rather, as explained above, it held that the use of and substantive reliance on the best available science to set buffer widths, in a reasoned process, satisfies *Nollan/Dolan* scrutiny. App. 35a.

PRSM's theory is that, because the consideration of the best available science is mandated by statute, the Washington court must have been holding that compliance with an ordinary legislative procedure, on its own, regardless of what that procedure entails, satisfies the test. But that is simply not what the Opinion says. Under the only reasonable reading of

the Opinion, the Washington court was focused on the fact that the process involved an objective evaluation of science, not on the fact that the process was required by statute.

Thus, the "new dimension" that PRSM purports to add to the *Sheetz* case is not implicated by this case.

III. PRSM FAILS TO SHOW THAT THE ISSUES PRESENTED ARE RIPE FOR THIS COURT'S REVIEW.

Even assuming, for the sake of argument, that PRSM's proposed issue statements were actually presented by the facts of this case, certiorari would still be inappropriate because PRSM has not shown that these issues are ripe for this Court's consideration. PRSM has not established that these issues—even under its skewed characterization of them—result from a split of authority, conflict with existing precedent, or otherwise meet the standards that this Court generally considers in deciding to accept review. For this reason as well, the Court should deny certiorari.

A. PRSM Fails to Show a Conflict with this Court's Precedent in a Rule Allowing a Local Government to Meet the *Nollan/Dolan* Standards by Basing Buffer Widths on Science.

Regarding the first issue, PRSM fails to identify any lower-court development of the extent to which a local government can satisfy the nexus and rough proportionality requirements by basing its decision

on science. PRSM does not claim that there is a split of authority on this issue. Its only argument for why this Court should review this issue is its claim that the Opinion conflicts with this Court's decisions in *Nollan*, *Dolan*, and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). There is no such conflict.

As an initial matter, *Nollan*, *Dolan*, and *Koontz* were all as-applied challenges. As such, they enabled this Court to analyze specific conditions imposed by local governments to address specific harms allegedly created by specific projects. Here, in contrast, PRSM brings a facial challenge. It asks this Court to find a lack of nexus and rough proportionality based entirely on speculation that some unidentified landowners' unidentified projects on unidentified properties might have impacts that could be adequately mitigated by buffers that are narrower than the City's standard buffers. A refusal to find the buffer widths unconstitutional across the board, based on such speculation, cannot conflict with the as-applied decisions in *Nollan*, *Dolan*, and *Koontz*.

PRSM purports to identify a conflict by claiming that the local governments in *Nollan*, *Dolan*, and *Koontz* had also considered scientific data in imposing the conditions that this Court ultimately rejected. Pet. at 23–27. But that point is immaterial here, where there is a connection among the perceived harm, the scientific data, and the remedy selected that was missing in those cases.

In *Nollan*, for example, the perceived harm was that a beachfront house would contribute to a wall of

structures blocking the public's view of the beach from the street. The condition imposed was a public easement *on the beach*. *Nollan*, 483 U.S. at 828. This Court could not see how allowing people already on the beach to use the landowners' property had any relation to the problem of people not being able to see the beach from the street. *Id*. at 838.

That nexus problem is not present here. There can be no rational dispute that shoreline buffers have a nexus to the harms potentially caused by shoreline development. The scientific data gathered by the City showed that buffers protect various shoreline ecological functions. AR 4357-360; AR 4374-77. There is no conflict with *Nollan* in finding that this scientific data satisfies the nexus requirement.

In *Dolan*, the harms associated with an expanded commercial structure were increased traffic congestion and increased impervious surfaces that would contribute to flooding dangers. The nexus requirement was met because the conditions imposed—a greenway in the floodplain and a pedestrian/bicycle pathway—were directed at those harms. Dolan, 512 U.S. at 387–88.

The problem was the lack of proportionality. The government could not explain why the greenway needed to be public to address flooding concerns. And the only justification for the pedestrian/bicycle path was the vague statement that such a system "*could* offset some of the traffic demand." *Id*. at 395 (emphasis in original). The Court concluded that while the analysis did not require any "precise mathematical calculation," the government "must

make some effort to quantify its findings in support of the dedication … beyond the conclusory statement that it could offset some of the traffic demand generated." *Id*. at 395–96.

The science considered by the City here greatly exceeds that standard. The City adopted the buffers that the City's technical consultant recommended, after an extensive scientific process, "to achieve 70 percent or greater effectiveness at protecting water quality, and providing shade, microclimate moderation, large woody debris, litterfall, and insect food sources." AR 4376. According to the City's consultant, 30 feet was the "minimum area necessary" to achieve this measure of protection. AR 4440. There is no conflict with *Dolan* in saying that this scientific data satisfies the rough proportionality requirement.

In *Koontz*, this Court did not analyze whether the concession demanded by the local government satisfied the nexus and rough proportionality tests. That issue had already been decided by the trial court, which found after a bench trial that the concession failed both tests. *Id*. at 603. This Court accepted review to clarify that permit conditions must satisfy the nexus and rough proportionality requirements even if they are demands for money, rather than land. *Id*. at 612.

Because *Koontz* did not address the standards for determining whether nexus and rough proportionality exist, the Washington court's reasons for finding those standards met here cannot conflict with the *Koontz* holding. It is noteworthy, however, that what the *Koontz* trial court found

unconstitutional was a demand to fund improvements to government land several miles away, in addition to the petitioner's offer to deed three quarters of his land to the government as a conservation easement. *Id*. at 602–03. The trial court does not appear to have taken issue with the onsite conservation easement. Rather, it found only that the demand to fund offsite mitigation violated nexus and rough proportionality. *See id*. at 603. There is no conflict between that finding and the Washington court's holding here, which relates only to onsite buffers.

Finally, yet another crucial distinction between this case and the cases relied on by PRSM is the fact that the City's Shoreline Master Program gives landowners the option, in lieu of the standard buffers, to propose a site-specific Vegetation Management Plan. The site-specific proposal must use "the scientific and technical information" compiled to support the standard buffers "and/or other appropriate technical information which, as determined by a qualified professional, demonstrates how the proposal protects ecological functions and processes…." App. 58a. PRSM fails to explain why a site-specific plan would not have nexus and rough proportionality to the development to which it applies.

Instead, PRSM complains that the site-specific plan is at the landowners' expense. Pet. at 16. But PRSM fails to explain why that expense would not meet the *Nollan/Dolan* test. The expense has a direct nexus to the development: it is the cost of identifying the measures necessary to protect against harms caused by the specific development. And,

because this is a facial challenge, PRSM can point to no cost comparison that would suggest that the cost is disproportionate to the potential harm.

In short, PRSM has shown no conflict between the Washington court's holding and this Court's precedent regarding unconstitutional conditions.

B. PRSM Fails to Identify any Split of Authority Regarding its Proposed "New Dimension" to the Issue Presented in *Sheetz*.

As for PRSM's second issue statement, PRSM bases its argument for certiorari on the fact that this Court accepted the *Sheetz* case to resolve a "longstanding and well-documented split" of authority. Pet. at 31.

As explained above, the issue presented in *Sheetz* is not raised by the facts here. The *Sheetz* issue is whether legislative exactions are exempt from *Nollan/Dolan* scrutiny. But the Washington court here did not hold that the City's buffers are exempt from such scrutiny; in fact, it specifically analyzed the buffers under *Nollan/Dolan*. PRSM does not dispute this but claims that the Opinion's practical effect is to exempt exactions imposed by legislative process from the analyses that *Nollan/Dolan* require.

In other words, the issue that PRSM purports to raise is something along the lines of: "Where the holding below adopted a doctrine providing that compliance with legislatively required procedures in enacting land-use restrictions meets the nexus and

rough proportionality requirements of *Nollan* and *Dolan*, did that holding create an improper loophole to the rule that PRSM anticipates this Court will announce in *Sheetz*?" For the reasons discussed above, that issue relies on a characterization of the Washington court's holding that is neither fair nor accurate.

But, assuming *arguendo* that PRSM could raise that issue, PRSM has not demonstrated that there is a split of authority on this point or that the issue has otherwise been developed in the lower courts. PRSM expends four pages discussing various opinions from federal circuit courts and state courts around the country that have reached opposite conclusions on whether legislative exactions are exempt from the *Nollan/Dolan* analysis. Pet. at 32–35. But PRSM does not identify a single case addressing the doctrine that it claims the Washington court adopted here.

To the contrary, PRSM admits that its proposed issue would be a "new dimension" to the issue that the lower courts have developed. Pet. at 31. And PRSM does not claim that this case presents an opportunity to resolve a split of authority, but rather "to stem new iterations of a legislative exactions rule like the one adopted below." Pet. at 35. A "new development" that could be "stemmed" is presumably not an issue that has been the subject of development by the lower courts. PRSM has not shown that its proposed issue is ripe for this Court's resolution.

CONCLUSION

Shoreline buffers that do not remove all economic value from a property are not a "taking" that would trigger scrutiny under this Court's doctrine of unconstitutional conditions. Moreover, PRSM fails to show that its proposed issues are either raised by the facts of this case or ripe for this Court's review. For these reasons, this Court should deny PRSM's petition.

Respectfully submitted,

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