No. 23-397

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Court's exactions cases hold that the government must make a sufficiently "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development" before imposing such a demand on a land use permit approval. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). The lower court, however, did not assess the City's buffer dedication under that constitutional standard, App.35a–37a—a fact that the City doesn't contest. The court avoided that individualized determination pursuant to Washington's longstanding "consideration of science" rule. *Id*. (citing *Kitsap All. of Prop. Owners (KAPO) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wash.App. 250, 272–73 (2011)). Instead of addressing whether the rule subverts the Takings Clause, as enforced by the nexus and proportionality tests, the City insists that the rule doesn't exist. Opp.14–19. Not true. The Washington rule has been in place for 12 years and is commonly used by local governments to impose sweeping and clearly disproportionate property demands, while avoiding the meaningful judicial review standards required by this Court. App.35a–37a; *infra* at 5–6. Indeed, the City urged the lower court to apply such a rule in its pleadings below. *See infra* at 5.

The City's defense of the lower court's decision illustrates why this case is important. By focusing solely on *whether* the City "considered science" when legislating its buffer exaction, the court failed to ask *what* that scientific data said or *how* the City set its mandatory buffer widths based on that data. Thus, the decision below fails to establish whether the City's

standardized buffer dedication will provide mitigation (and no more) for any development proposal. Instead, it offers only the generalized observation that big buffers could advance the City's desire to protect and enhance shorelines. App.3a–7a, 36a–37a. In so doing, the decision below conflicts with the Court's exactions and takings precedents and numerous decisions of the state and lower federal courts. The Petition should be granted.

ARGUMENT

I. The City Misstates Facts

1. The City set standardized buffer dedications applicable to all shoreline property based on its policy preferences, as it concedes now, Opp.7–8, and below. AR.3970 (City relied on science only to establish the general "importance of maintaining and protecting" the shoreline); AR.3968–69 (City discussed "limited role" that science played in the development of the buffers). The trier of fact below concluded that the City set the mandatory buffer widths based on "city policy, not science-based information." AR.5824. It's too late for the City to change tack and argue that the buffers reflect scientific data. *Cf.* Opp.3–6, 14–17, 19–24.

2. The City also claims that it only considered policies related to the level of protection it wanted to achieve and to avoid creating nonconforming uses. Opp.7–8. However, the record shows that the City selected buffer widths to "provid[e] as much protection as feasible," AR.3969, thus demanding buffers that are "larger than the bare minimum needed for protection" to avoid a "worst case scenario" and "ensure [ecological] success in the face of uncertainty

about site-specific conditions." AR.4314; CP.304, 533–34; AR.42. The City's "fundamental thought" was that "we need to have this area" to improve citywide shoreline conditions. AR.2885. The City decided as a matter of policy to minimize the impact on existing homeowners by "allocat[ing] 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.

3. The City's description of the decision below is similarly flawed. *See* Opp.14–19. Despite its efforts to make it appear that the court below applied the nexus and proportionality tests, the court made no mention of *Nollan/Dolan*'s individualized determination requirement, and worse, did not in fact apply the test. The court, like the City, relied on sweeping generalities about the government's interest in protecting shoreline ecology from a wide range of potential development impacts. App.3a–7a, 36a–37a. The Shoreline Management Act's purpose—to protect shorelines—may be a sufficient public use to allow government to take property based on such non-specific observations,[1] but the Constitution requires that such takings be accompanied by just compensation. *Dolan*, 512 U.S. at 389 ("generalized statements" are "too lax to adequately protect" constitutional rights).

4. Finally, the City's reliance on the Vegetation Management Area as an alternative process for reconfiguring the default buffer, Opp.4–5, 13, omits

[1] "[P]rivate property rights are secondary to the [Act]'s primary purpose, which is 'to protect the shorelines as fully as possible.'" *Samson v. City of Bainbridge Island*, 149 Wash.App. 33, 49 (2009).

several critical facts that take the option far outside what *Nollan/Dolan* allow—which is why the government did not advance such an argument below. According to the Shoreline Management Plan, the reconfiguration process "is primarily intended as a means to restore or improve buffers [not] to reduce buffers." AR.304. To qualify for a buffer adjustment, the owner—not the City—must pay for technical studies that "clearly demonstrate" that the proposed buffer provides protection "greater than would be provided by the [default standardized] buffers." *Id*. That's a one-way ratchet that favors only the government. Additionally, under the "alternative" scheme, the owner must both dedicate the property and authorize the City on-site access to monitor the property for a minimum of five years. AR.104–05. The Vegetative Management Area alternative, therefore, presents conditions of equal or greater constitutional deficiency.

II. Washington's "Consideration of Science" Rule Raises Important Constitutional Conflicts

1. The City insists that Washington courts have not adopted a "consideration of science" rule that alleviates the government's burden to satisfy the nexus and proportionality tests. Opp.14–19. Wrong. The decision below cites *KAPO*, 160 Wash.App. at 273, for the categorical rule that, "[i]f the local government used … science in adopting its critical areas regulations …, the permit decisions it bases on those regulations *will* satisfy the nexus and rough proportionality rules." App.35a.

Applying that rule, the court upheld the City's buffer dedication without evaluating the City's

publicly established reasoning for setting the mandatory buffer widths, App.35a–37a, and without requiring the City to make an "individualized determination that the required [buffer] dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. This affirmed the lower court's categorical ruling that the City's "reasoned, objective analysis of the science" *alone* was "fatal" to PRSM's unconstitutional conditions claim. App.37a.

That rule, moreover, is precisely what the City asked for when it joined respondent Department of Ecology's briefing below arguing that *KAPO* eliminated *Nollan/Dolan*'s heightened scrutiny standard when evaluating exactions mandated by generally applicable land use regulations. Ecology Trial Br. at 18; Ecology Resp. Br. at 28. Since *KAPO*, government attorneys routinely argue that "consideration of science" alone satisfies *Nollan/Dolan*. *See*, *e.g.*, County Reply Br., *Olympic Stewardship Foundation v. State of Washington Environmental and Land Use Hearings Office*, No. 47641-0-II, 2016 WL 5867931, *10 (Wash.App. Div. 2, Apr. 27, 2016); County Resp. Br., *Common Sense Alliance v. San Juan County*, No. 72235-2-I, 2015 WL 231717, *23–24 (Wash.App. Div. 1, Jan. 5, 2015); *see also* County's Opening Br., *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Bd.*, No. 062022710, 2007 WL 9232332 (Wash.Super. Dec. 14, 2007) (a "local government's reliance on [science] necessarily satisfies the constitutionality requirements").

2. Washington's "consideration of science" rule is based on mischaracterization of *Nollan/Dolan* as a

"due process" doctrine focused on whether the government engaged in a "reasoned process" and whether the resulting property demands are "reasonably necessary to achieve a legitimate government objective." *KAPO*, 160 Wash.App. at 272–73.[2] The rule inevitably leads—as in this case—to courts categorically approving any exaction imposed after the government "considered science." App.35a–37a. The rule requires no individualized determination relating the buffer widths to project impacts before imposing the condition on a permit. App.6a; AR.365.

This approach cannot be reconciled with *Nollan/Dolan*, which analyze "unconstitutional conditions claims predicated on the Takings Clause," not the Due Process Clause. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 610 (2013). The rationality of a legislative procedure or the legitimacy of the government's objective cannot determine a *Nollan/Dolan* claim. *Nollan v. Cal. Coastal Commission*, 483 U.S. 825, 841 (1987); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005). *Nollan* makes this explicit: "[T]he actual conveyance of property ... a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the [actual] purpose is avoidance of the compensation requirement, rather than the stated police-power objective." 483 U.S. at 841; *see also Koontz*, 570 U.S. at 614 ("the risk that the government may use its substantial power and discretion in land-

[2] One municipal practice guide cites *KAPO* for the proposition that *Nollan/Dolan* is a "due process" doctrine. 5B Ordinance Law Annotations, Zoning § 1, *Controlling and directing property development; growth management* (2023).

use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.").

Nollan and *Dolan* establish a narrow exception from the Fifth Amendment's just compensation requirement only for those exactions demonstrated to mitigate only for a project's impacts. *Dolan*, 512 U.S. at 391; *Koontz*, 570 U.S. at 604–05. The nexus and proportionality tests thus distinguish "an appropriate exercise of the police power" from "an improper exercise of eminent domain." *Dolan*, 512 U.S. at 390. To that end, the government bears the burden to make a sufficiently "individualized determination that the required [buffer] dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. Only individualized determinations enable courts to ensure that exactions serve as true mitigation—and no more—for the public impacts caused by land use and development. Anything less than heightened *Nollan*/*Dolan* review is unmoored from the Takings Clause and allows uncompensated takings via legislatively mandated permit conditions to go unchecked.

Washington's "consideration of science" rule demonstrates precisely this problem. Here, the City's studies concluded, based on the incomplete data, that mitigation buffers might range from 16 feet to 1,969 feet depending on the proposed use, property characteristics, and the specific project impact to be mitigated. App.6a; AR.365. The City, however, *never* analyzed those dependent factors. Instead, seeking "as much protection as feasible" from new permit

applicants, AR.3969, the City selected a number within that exceptionally broad range, and applied it arbitrarily to all shoreline properties. *See* AR.2883 (a justification for buffer width "doesn't come out in the [science]"); AR.2879 (the "width of [the buffer] is part of the policy recommendation"); AR.373–74 (the same buffer requirement for a permit seeking to add a 120-square-foot patio to an existing home and for new construction of 3,500-square-foot mansion on a fully forested lot).

3. The court below concludes that "the buffer widths would [only] fail the nexus and proportionality tests if they were 'in excess of what the science would allow'" without any requirement that the scientific data be sufficiently individualized to the burdened property. App.37a, n.11. This subverts the principal purpose of the Takings Clause, "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That purpose demands that courts apply tests that, like the nexus and proportionality standards, consider "the actual burden imposed on property rights, [] how that burden is allocated, [or] when justice might require that the burden be spread among taxpayers through the payment of compensation." *Lingle*, 544 U.S. at 542–43. Applying a takings-based standard is especially important when the government demands exactions not to mitigate project impacts, but to address historic, cumulative, and future impacts to the shoreline—quintessential public burdens. AR.3969. Twelve years of Washington's "consideration of science" rule has only emboldened the government to make more sweeping and unsupportable demands for

property in exchange for permission to make productive use of one's property.

4. Although PRSM believes that the petition presents important constitutional issues that warrant immediate review, the Court may choose to hold the petition pending a final result on the merits in *Sheetz v. County of El Dorado*, No. 22-1074 (cert. granted Sept. 29, 2023). Pet.i, QP 2.

Like the decision below, the California intermediate appellate court in *Sheetz* held generally applicable permit conditions exempt from the heightened scrutiny nexus and proportionality tests due solely to the fact that the demand originated in the legislature. *Sheetz v. Cnty. of El Dorado*, 84 Cal.App.5th 394, 409 (2022). Certainly, there are differences in how the California and Washington court rules are applied. The California rule holds at the outset that legislative exactions are not subject to heightened scrutiny under *Nollan/Dolan*; whereas the rule at issue here nominally subjects such exactions to *Nollan/Dolan* but then holds that compliance with a legislative procedure automatically satisfies the doctrine without the need to analyze the property dedication demand under the nexus and proportionality tests. The effect is the same: permit conditions imposed by legislation are excused from the heightened scrutiny demanded by the nexus and proportionality tests. In both cases, the state courts upheld legislation that targeted only new development to dedicate property as part of a scheme to shift the cost of addressing existing and future impacts to a public resource. App.7a; *Sheetz*, 84 Cal.App.5th at 402. A ruling in *Sheetz* that legislative exactions must satisfy the heightened scrutiny nexus

and proportionality tests will likely determine the questions presented here.

There is no benefit to waiting to see how Washington's "consideration of science" rule plays out. Opp.19–20. The court below gives lip service to *Nollan/Dolan* while eviscerating the tests. Although Washington courts have come up with a somewhat novel twist to avoid individual mitigation determinations, no further percolation changes the state's premise that "consideration of science," alone, satisfies the Constitution. Washington's "consideration of science" rule has been in place for 12 years and shows no sign of abating without this Court's intervention.

III. There Are No Vehicle Problems

1. The decision below did not leave open the threshold question whether the buffer demand constitutes an exaction. Opp.9–14. The court's citation to Washington caselaw treating conservation buffers as exactions that "must ... satisfy the requirements of nexus and rough proportionality established in *Dolan* and *Nollan*," *KAPO*, 160 Wash.App. at 272; *Honesty in Env't Analysis and Legislation v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wash.App. 522, 533, (1999) (same), is determinative of this issue. The City never challenged those precedents below nor did it seek review of that aspect of the lower court's ruling here.

2. "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). This Court regularly grants certiorari to review unpublished decisions of

state and federal courts. *See Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906, 1925 (2022) (reversing unpublished decision of the California Court of Appeal); *Lange v. California*, 141 S.Ct. 2011, 2024 (2021) (same); *see also* Eugene Gressman, et al., Supreme Court Practice 263 (9th ed. 2007) (noting that, "[w]ith the increased use of unpublished and summary decisions in federal and state intermediate appellate courts," this Court "grants certiorari to review unpublished and summary decisions with some frequency") (citing cases).

Unpublished opinions continue to affect and transform the law. *See Smith v. United States*, 502 U.S. 1017, 1020, n.* (1991) (mem.) (Blackmun, J., dissenting from denial of certiorari) ("An unpublished opinion may have a lingering effect in the [jurisdiction]...."); *Cnty. of Los Angeles v. Kling*, 474 U.S. 936, 938–40 (1985) (unpublished decisions risk creating a body of "secret law" that results in "decisionmaking without the discipline and accountability that the preparation of [published] opinions requires."). In Washington, courts and litigants may cite unpublished opinions to show that a legal issue is so well-settled that it doesn't warrant a published ruling, *State v. Hixson*, No. 83877-6-I, 2023 WL 4876884, at *5 n.8 (Wash.App. Div. 1, July 31, 2023) (unpublished), or for estoppel purposes. *Johnson v. Allstate Ins. Co.*, 126 Wash.App. 510, 520 n.7 (2005). That basis is of great import here because the lower court ruled not only that, under the "consideration of science" rule, the challenged buffer condition facially satisfied *Nollan* and *Dolan*, but also prejudged future as-applied claims by ruling that, if the government relied on science when legislating a mandatory buffer dedication, "the permit decisions it

bases on those regulations *will* satisfy the nexus and rough proportionality rules." App.35a (emphasis added). Thus, the fact that the Washington court below chose to issue a sweeping constitutional ruling in an unpublished opinion does not shield its ruling from review.

3. As a rule, facial constitutional claims are neither "barred or especially disfavored." *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). Moreover, there is no basis here to draw such a distinction because the City "agree[d] that the nexus and proportionality tests apply to this facial challenge." App.35a.

CONCLUSION

The Court should grant the petition for a writ of certiorari. Or in the alternative, the Court should hold 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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Respectfully submitted,

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