No. 22-1074

In The Supreme Court Of The United States

GEORGE SHEETZ,
Petitioner,
v.
COUNTY OF EL DORADO, CALIFORNIA,
Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, Third Appellate District

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Brief For Amici Curiae City And County Of San Francisco, Local Government Legal Center, National Association Of Counties, National League Of Cities, International Municipal Lawyers Association, And Government Finance Officers Association In Support Of Respondent

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<u>TABLE OF CONTENTS</u>

<u>TABLE OF AUTHORITIES</u> iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. LOCAL GOVERNMENTS HAVE BROAD, ELASTIC POLICE POWERS WHICH THEY USE TO ADDRESS BURDENSOME COMMUNITY IMPACTS CREATED BY NEW DEVELOPMENT. 8

  A. Legislatively Enacted, Generally Applicable Development Impact Fees are a Ubiquitous and Necessary Tool of Responsible Land Use Planning. 8

  B. Impact Fees Do Not Present Circumstances Necessitating “Special Application” of the Unconstitutional Conditions Doctrine. 15

  C. State Enabling Statutes Provide An Additional, Independent Check On Land Use Permitting Fees. 17

  D. Nexus Studies Establish the Reasonable Relationship Between Impact Fees and New Development. 21

    1. Nexus Studies Are Robust Objective Economic Studies That Provide Substantial Evidence of the Relationship Between New Development and the Need for New or Improved Public Facilities. 21

2. Nexus Studies Account For Unique Local Needs And Conditions. 25

E. Additional Procedural Safeguards Protect New Development From Excessive Fees. 28

II. EXPANDING THE REQUIREMENTS OF HEIGHTENED SCRUTINY TO DEVELOPMENT IMPACT FEES WOULD TURN THE REASONING OF *NOLLAN* AND *DOLAN* ON ITS HEAD, AND SHIFT THE FINANCIAL BURDEN OF DEVELOPMENT ONTO LOCAL COMMUNITIES....30

CONCLUSION 34

TABLE OF AUTHORITIES

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Berman v. Parker,
348 U.S. 26 (1954)..9

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512 U.S. 374 (1994)................. 5-7, 15-17, 19, 30-33

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239 U.S. 394 (1915)..15

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570 U.S. 595 (2013)........................4-7, 15-17, 19, 33

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505 U.S. 1003 (1992)..34

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483 U.S. 825 (1987)........................ 5-7, 15-17, 30-33

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438 U.S. 104 (1978)..34

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416 U.S. 1 (1974)..4

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272 U.S. 365 (1926)...............................8, 15, 26, 34

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484 P.2d 606 (Cal. 1971)..11

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247 Cal. Rptr. 3d 159 (Cal. Ct. App. 2019) 20

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911 P.2d 429 (Cal. 1996)..31

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711 N.W.2d 871 (Neb. 2006) 10

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894 P.2d 836 (Kan. 1995) 11, 12, 18

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61 So. 3d 992 (Ala. 2010) 11

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890 S.E.2d 793 (N.C. Ct. App. 2023) 12

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45 R.I. Gen. Laws Ann. § 45-22.4-3(6) 18

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Ark. Code Ann. § 14-56-103(e)(2) 22, 23

Cal. Gov't Code § 66000(b) 8

Cal. Gov't Code § 66001(a)(2) 22

Cal. Gov't Code § 66001(e) 29

Cal. Gov't Code § 66001(g) 20, 23

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Cal. Gov't Code § 66016.5(a)(5)(A)-(B) 24

Cal. Gov't Code § 66020(d)(1) 20
Cal. Gov't Code § 66023 20
Cal. Gov't Code §§ 66000–66025 19
Cal. Pub. Res. Code § 30212(a) 16
Colo. Rev. Stat. Ann. § 29-20-104.5 .... 8, 24
Conn. Gen. Stat. Ann. § 8-2i 12
Del. Code Ann. tit. 29, § 9122(6) 18
Del. Code Ann. tit. 29, §§ 9121-9125 11
El Dorado Cnty. Code § 12.28.070. 28
Fla. Stat. Ann. § 163.31801(4)(d) 28
Ga. Code Ann. § 36-71-2(12) 22
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Haw. Rev. Stat. Ann. § 46-141 18
Haw. Rev. Stat. Ann. § 46-143(e) 28
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Ind. Code Ann. § 36-7-4-1305(a) 8
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Md. Code Ann., Local Gov't § 20-703(b) 28

Minn. Stat. Ann. § 462.358(2b) 12
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Mont. Code Ann. § 7-6-1601(6)................................. 18
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Mont. Code Ann. § 7-6-1602(7)(c)............................. 23
Mont. Code Ann. § 7-6-1602(7)(e) 23
N.J. Stat. Ann. § 27:1C-8.. 24
N.M. Stat. Ann. § 5-8-24... 28
Nev. Rev. Stat. Ann. § 278B.060............................... 22
Nev. Rev. Stat. Ann. § 278B.150(1)-(2) 29
Okla. Stat. Ann. tit. 62, § 895(C)(2) 21
Or. Rev. Stat. Ann. § 223.309................................... 23
S.C. Code Ann. § 6-1-920(17) 18
S.C. Code Ann. § 6-1-940.. 25
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Tex. Loc. Gov't Code Ann. § 395.014......................... 23
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Vt. Stat. Ann. tit. 24, § 5203(f).................................28
W. Va. Code Ann. § 7-20-3..23
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INTEREST OF AMICI CURIAE[1]

Like many cities, towns, and counties across the country, amicus curiae City and County of San Francisco ("San Francisco") must address a growing need for public recreational and open space, childcare, improved streets and roads, transit, library, police, fire, and other community facilities created by new development projects. This need for community infrastructure stems from projects containing critically needed housing, as well as those with mixed or non-residential uses. And meeting this need is essential to San Francisco's efforts to help ensure the livability and overall quality of life for its neighborhoods and its residents. In doing so, jurisdictions like San Francisco have exercised their long-established police power to enact land use ordinances of general application including development impact fees for new projects. Those fees must satisfy rigorous nexus requirements under applicable law, including the California Mitigation Fee Act ("MFA" or "Act"). The MFA ensures that the impact fees are objective and fair. As amici explain in this brief, these legislatively imposed impact fees are very different from the ad hoc exactions for individual projects that this Court has held require heightened scrutiny.

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[1] As required by Supreme Court Rule 37.6, amici affirm that no counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to educate local governments regarding the Supreme Court and its impact on local governments and local officials and to advocate for local government positions at the Supreme Court in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC, and the Government Finance Officers Association is an associate member of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC"), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal

matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The Government Finance Officers Association ("GFOA") is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government-finance professionals through research, education, and the identification and promotion of best practices. Its more than 21,000 members are dedicated to the sound management of government financial resources.

Amici represent cities, counties, and towns reflecting a wide range of communities throughout the United States. Amici represent the level of government most closely connected to our communities, providing the spectrum of essential programs, services, and public infrastructure to meet local needs. To that end, many local governments have enacted laws requiring new development to contribute their fair share to address the burdensome impacts of such development on the availability and quality of local infrastructure, facilities, programs, and services.

Amici have a substantial interest in the question before this Court. Local governments depend on their ability to adopt reasonable legislatively

imposed development fees to protect the health and welfare of their communities while ensuring that those who create the need for new community infrastructure fairly bear the costs. Without the ability to impose impact fees, local governments would need to resort to imposing new or increased taxes. Or they would have to displace the anticipated infrastructure costs necessary to meet the needs of new residential and commercial development onto existing residents and businesses, or even impose development moratoria in the absence of funds to pay for required infrastructure. To aid in the Court's understanding of how this decision could affect local governments, amici provide the following perspective on the ubiquity, the vital importance, and the constitutional soundness of legislatively imposed development fees.

SUMMARY OF ARGUMENT

This Court has long recognized that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and [the Court has] long sustained such regulations against constitutional attack." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013). This follows logically from the long-recognized authority of local governments to use zoning regulations to enhance public welfare. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 5 (1974).

The question the California Court of Appeal addressed in this case was whether a Transportation Impact Mitigation fee adopted pursuant to the MFA effects an unlawful taking of property violating the

special application of the "unconstitutional conditions doctrine" established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet. App. A-16. As the Court recognized in *Nollan*, *Dolan*, and *Koontz*, this special application of the unconstitutional conditions doctrine prevents the government from engaging in "out and out … extortion" of "land-use permit applicants [who] are especially vulnerable to … coercion." *Koontz,* 570 U.S. at 605. But that is nothing like what occurred here. El Dorado County ("County"), under a state law authorizing it to charge impact fees, imposed a transportation impact fee supported by a nexus study. The nexus study identifies the purpose of the fee, how the fee will be used, the reasonable relationship between the use of the fee and the development, and the reasonable relationship between the need for the public facility and the type of development.

Petitioners seek to recast the question presented to obtain an advisory opinion of this Court on the issue of whether an impact fee is exempt from the unconstitutional conditions doctrine merely by virtue of being legislatively enacted. As discussed in this brief, Appellant proposes a constitutional solution where there is no problem.[2] The fee at issue here,

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[2] Similarly, amici Hotel Des Arts and various San Francisco property trade groups attempt to reframe the question presented as whether heightened scrutiny under *Nollan* and *Dolan* applies to an ordinance that amortizes a nonconforming use over a two-year period–a claim that Hotel Des Arts is currently litigating against the City and County of San Francisco.

divorced as it is from any demand to dedicate property, would not constitute a taking if imposed directly on the property owner. Resp't Br. 31-32. Since no taking could occur, there is no risk that the County could use the fee as an end-run around its obligation to pay just compensation for a taking. Consequently, this case does not provide the Court with a basis for extending heightened scrutiny to legislatively adopted, generally applicable impact fees.

This brief demonstrates that legislatively adopted impact fees pass constitutional scrutiny by describing the need for and benefits of impact fees; the mechanisms for adopting these fees; and the detrimental consequences of imposing individualized nexus requirements on land use exactions by local governments across the country. Specifically, amici describe how the primary concerns identified in *Nollan*, *Dolan*, and *Koontz*–the compelled dedication of a possessory interest in land and the potential for unfettered discretion by permitting agencies to result in coercion in the land use context–are not implicated when local governments charge legislatively imposed, generally applicable development impact fees.

Also in this brief, amici address the many ways that local jurisdictions have gone beyond the inherent safeguards of non-adjudicative, legislatively imposed impact fees to further eliminate the risk of unfair distribution of the costs of new infrastructure. Under the reasoning of *Nollan* and *Dolan*, permitting agencies run afoul of the "unconstitutional conditions"

Br. of Hotel Des Arts et al. 13-14. The ordinance challenged in that case has no bearing on the issue presented here.

doctrine when exacting conditions that are "unrelated" to the development proposal. But local governments adopting impact fees under the authority of the MFA must demonstrate the reasonable relationship between the fee and new development, often quantified by a rigorous analysis–referred to in California as a "nexus study." In addition, the Act has procedural and fiscal limits that address the concerns necessitating the "heightened scrutiny" outlined in *Nollan* and *Dolan*. This Court should not apply those cases here.

In this case, the Court of Appeal carefully analyzed the Transportation Impact Mitigation Fee in light of this Court's prior rulings in *Nollan*, *Dolan*, and *Koontz*, and correctly concluded that the County's fee was not subject to heightened constitutional scrutiny. Reversing that court's judgment would turn the reasoning of those precedents on their heads. *Nollan*, *Dolan*, and *Koontz* do not support applying the same level of scrutiny to the objectively applied fee as the Court would have applied to a discretionary exaction of a possessory interest in the property owner's land. Moreover, such a ruling would slow and render more expensive, riskier, and less efficient the continued development of desperately needed new housing in many jurisdictions. This Court should affirm that legislatively enacted, generally applicable impact fees are not subject to heightened scrutiny. And this Court should hold that fees adopted under the MFA withstand constitutional scrutiny under *Nollan* and *Dolan*.

ARGUMENT

I. LOCAL GOVERNMENTS HAVE BROAD, ELASTIC POLICE POWERS WHICH THEY USE TO ADDRESS BURDENSOME COMMUNITY IMPACTS CREATED BY NEW DEVELOPMENT.

A. Legislatively Enacted, Generally Applicable Development Impact Fees are a Ubiquitous and Necessary Tool of Responsible Land Use Planning.

Whether called mitigation fees, mobility fees, system development charges, or facility fees, many local governments rely upon some form of development impact fee. Impact fees are one-time fees "charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project." Cal. Gov't Code § 66000(b); see also Colo. Rev. Stat. Ann. § 29-20-104.5; Ind. Code Ann. § 36-7-4-1305(a); Va. Code Ann. § 15.2-2329(A); Mont. Code Ann. § 7-6-1601(5)(a). This Court has long recognized that local governments' police powers in the area of zoning and land use planning must be broad and elastic to "'meet changing conditions'" and "'abate … the harm[s]'" of particular uses. *Vill. of Euclid, Ohio v. Ambler Realty Co.* (*Euclid*), 272 U.S. 365, 392 (1926) (internal citations omitted). Like restrictions on land use, impact fees are just one of the many tools local governments use as part of a comprehensive approach to zoning to ensure "that the community should be

beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

Impact fees cover a wide range of public necessities such as schools, parks, open spaces, utilities, and transportation systems–key elements that contribute to a livable and functional community. These types of fees are especially important in areas that have high infrastructure costs but lack an established tax base, because they ensure that sponsors of new developments contribute positively to the community's growth without overburdening public services or displacing the fiscal responsibility for meeting the new demand created by development onto existing users. William W. Abbott et al., *Exactions and Impact Fees in California* 17 (3d. ed. 2012). This includes new and growing suburban communities and rural communities, like El Dorado County. Impact fees are an equitable means to internalize burdens of new development, without unfairly apportioning those costs across the entire tax base, which includes existing resident taxpayers who neither created the need for, nor will benefit from, the infrastructure intended to serve new development. Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 144 (2005).

Jurisdictions rely to differing extents on impact fees to meet the costs of infrastructure necessitated by new development. Although Petitioners suggest that property owners are unfairly burdened by such fees (Pet'r Br. 27) in reality by setting the impact fees below the actual amount reflected in a nexus study, many jurisdictions charge new development only a

portion of the actual costs created by new development. The balance of the infrastructure costs needed for new construction is then met through other funding mechanisms, depending on the unique legal framework of the local jurisdiction. One survey of 40 California jurisdictions found that while newer, expanding communities with significant greenfield resources relied heavily on revenues from impact fees to fund infrastructure, older and more urban communities funded the majority of their infrastructure upgrades with other sources such as user charges and local bonds. Haley Raetz, David Garcia, Nathaniel Decker, Elizabeth Kneebone, Carolina Reid & Carol Galante, *Residential Impact Fees in California: Current Practices and Policy Considerations to Improve Implementation of Fees Governed by the Mitigation Fee Act*, Terner Ctr. for Housing Innovation, 14–17 (Aug. 2019), https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Residential_Impact_Fees_in_California_August_2019.pdf. In other words, impact fees are uniquely tailored to meet the needs of each community to address the burdens of new development.

It is not surprising, then, that all but six states use some form of impact fees.[3] In California, courts

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[3] In addition to the states with enabling legislation identified below, local governments in nine states adopt development impact fee legislation under their home rule authority or the police power. See Dickinson, N.D., Mun. Code §§ 2.70.010-2.70.110 (2023); *Home Builders Ass'n of Lincoln v. City of Lincoln*, 711 N.W.2d 871, 879 (Neb. 2006) (City of

have long affirmed the use of impact fees as a proper exercise of a local government's home rule authority. *Associated Homebuilders, Inc. v. City of Walnut Creek,* 484 P.2d 606 (Cal. 1971). In 1987, the state Legislature adopted the MFA, which explicitly authorizes impact fees, subject to certain statutory protections. Today, the majority of states have adopted similar enabling legislation: 35 states have legislation explicitly authorizing local governments to charge some form of impact fees.[4]

Lincoln's impact fee ordinance authorized under home rule charter); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995) (City of Leawood's traffic impact fee authorized under home rule); Nixa, Mo., Mun. Code §§ 109-1-109-14; Berea, Ky., Mun. Code §§ 82.001-82.018; *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1006 (Ala. 2010) (Pell City's imposition of sewer impact fees a valid exercise of the city's powers); Plaquemines Parish, La., Mun. Code § 7-7; Barnstable Cnty., Mass., Ordinance 98-6 (1998); *Home Builders Ass'n of Dayton and the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 353 (Ohio 2000) (home rule "grants municipalities the authority to impose exactions, provided that the municipality is not statutorily forbidden from doing so, and the exactions meet constitutional standards").

[4] Clancy Mullen, *State Impact Fee Enabling Acts, Duncan Associates*, 2 (Aug. 2018), http://impactfees.com/publications%20pdf/1stateacts.pdf (identifying 29 states with enabling impact fee legislation). Additionally, Delaware, South Dakota, Minnesota, Tennessee, North Carolina, and Connecticut authorize state and local governments to impose impact fees in certain circumstances. *See* Del. Code Ann. tit. 29, §§ 9121-9125; S.D. Codified Laws § 46A-10B-22 (South Dakota stormwater utility fee to fund "the planning, operation, maintenance, and administration of future stormwater facilities that may be established within the

In states without enabling legislation, many municipalities continue to charge impact fees under their home rule authority. See*, e.g.*, *McCarthy*, 894 P.2d at 845. And even in states that do not use impact fees, there has recently been a robust discussion about whether large cities like New York City should adopt impact fees to address the increased costs and pressures on physical and social infrastructure created by new development. See Adalene Minelli, *Impact Fees in New York City? Legal Authority, Constraints, and Potential Options*, 48 Colum. J. Envtl. L. 366, 371 (2023).

To accommodate growth in population, local governments need impact fees to address critical infrastructure associated with new housing and other development. For example, over the next 10 years, Missoula County, Montana is expected to add 12,000 new residents, 4,500 new homes, and 15,400 new jobs; unincorporated areas in the County are expected to add 4,400 new residents, 1,600 new homes, and 4,200 new jobs. This kind of growth requires infrastructure

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district"); Tenn. Code Ann. §§ 6-2-201(15) & 6-33-101(a) (authorizing certain local governments to "assess fees for the use of or impact upon such [public highways, streets, boulevards, parkways, sidewalks, alleys, parks, public grounds, public facilities, libraries and squares, wharves, bridges, viaducts, subways, tunnels, sewers and drains] ... and facilities"); Minn. Stat. Ann. § 462.358(2b) (authorizing acceptance of cash fees for subdivision dedication improvements); *Zander v. Orange Cnty., NC*, 890 S.E.2d 793, 795 (N.C. Ct. App. 2023) (discussing North Carolina school facility impact fee enabling act); Conn. Gen. Stat. Ann. § 8-2i (authorizing collection of payments into housing trust fund for affordable housing).

to support it, like new roads and changes to utility lines. Without impact fees, these costs may otherwise fall to county property taxpayers at large, instead of being internalized by those who create the need or benefit from the new infrastructure. See *Impact Fees*, Missoula Cnty. Voice (May 26, 2023), https://missoulacountyvoice.com/impact-fees.
Similarly, in 2021, Kitsap County, Washington Commissioners approved an increase in transportation impact fees for developers from $700 to $4,300 per new unit of development, which will generate funds for new road capacity in unincorporated Kitsap County. Josh Farley, *Kitsap County to Seek Higher Fee for Developers to Pay for New Road Capacity*, KITSAP SUN, (June 13, 2021, 06:00 AM), https://www.kitsapsun.com/story/news/2021/06/13/kitsap-seek-higher-fee-developers-pay-new-road-capacity/7544427002/; Christian Vosler, *Kitsap County Approves Increase in Transportation Impact Fees for Developers*, KITSAP SUN, (August 24. 2021, 05:01 PM), https://www.kitsapsun.com/story/news/2021/08/24/kitsap-county-approves-increase-transportation-impact-fees-developers/5580327001.

Maury, Tennessee–one of the fastest-growing counties in that state–also has a significant existing population that is being forced to pay higher property taxes as people move in and home values escalate. County officials see impact fees as a means not to slow down growth, but rather to keep the costs associated with new development fairly distributed, instead of "disproportionately burdening" longtime county

residents. Sam Stockard, *Counties Struggle to Push Impact Fee Legislation to Cover Growth*, TENNESSEE LOOKOUT, (March 7, 2023, 06:01 AM), https://tennesseelookout.com/2023/03/07/counties-struggle-to-push-impact-fee-legislation-to-cover-growth/.

Transportation impact fees are the most common type of impact fee, and local governments use them in nearly every state that charges impact fees. See Mullen, at 5. They are ubiquitous tools for helping to fund roadway improvements, as well as improvements to sidewalks, bike lanes, and pedestrian pathways in localities across the nation. *Id.* Without them, gridlock caused by new development could impact all community residents. To this end, most jurisdictions rely on nexus studies that quantify how new developments contribute additional vehicle trips during peak commute hours, increasing traffic and demands on public transit. See *id.* (noting that 21 of 29 enabling statutes expressly require a written analysis and that for the remaining eight states "it is hard to imagine how compliance with the general impact fee principles expressed by the acts could be demonstrated without some kind of written report"). Without mitigation and careful long-term planning, existing residents and businesses in the community are forced to bear the burdens of that additional traffic and transit demand.

B. Impact Fees Do Not Present Circumstances Necessitating "Special Application" of the Unconstitutional Conditions Doctrine.

In *Nollan*, this Court established the "essential nexus" test, holding that the governmental purpose of a land use dedication must be reasonably related to the cost burden created by the proposed development. In *Dolan*, the Court further held that such dedications must be "roughly proportional" to the impact of the proposed development. In *Koontz*, this court applied *Nollan* and *Dolan* to a payment in lieu of a land use dedication. *Koontz*, 570 U.S. at 612. As a threshold matter, an impact fee is neither a land use dedication, as in *Nollan* and *Dolan*, nor an ad hoc impact fee imposed in lieu of a dedication, as in *Koontz*. Instead, impact fees, like zoning regulations long recognized by this Court, seek to mitigate the burdens of new development on the existing community, in the same way a jurisdiction might require permeable, rather than paved, landscapes to minimize a project's burden on the sewer system (*e.g.*, S.F. Plan. Code § 132(h)), or restrict polluting industrial uses in close proximity to residential and community-serving uses. See, *e.g.*, *Euclid*, 272 U.S. at 388; *Hadacheck v. Sebastian*, 239 U.S. 394, 409 (1915).

Further, the mandatory, non-discretionary manner in which local governments assess impact fees distinguishes legislatively enacted, generally applicable impact fees from other ad hoc exactions scrutinized in this Court's precedents, which vested

significant discretion in the administrative official to fashion and impose the exaction.

For example, in *Nollan*, state law authorized the Coastal Commission to impose an access condition, but contained no objective, non-discretionary criteria against which the condition could be measured. See Cal. Pub. Res. Code § 30212(a) ("Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects…."). In *Dolan*, the city of Tigard's Comprehensive Plan and Development Code required dedication of "sufficient open land area for greenway adjoining and within the floodplain," but the Code did not quantify or place other objective limits on what constituted "sufficient." *Dolan*, 512 U.S. at 380. And the water district acknowledged that the mitigation in *Koontz* was imposed under "'general guidelines' that provided 'considerable flexibility to the District to determine whether a specific mitigation plan [wa]s adequate' in light of the condition of the affected wetlands and the wetlands to be enhanced, created, or preserved." Resp't Br., *Koontz v. St. Johns River Water Management District*, 2012 WL 6694053, at *11-12 (U.S. 2012) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

Whether imposed on the basis of detailed nexus studies, as discussed further below, or otherwise, the defining features of legislatively imposed, generally applicable impact fees distinguish them from the conditions that did "not meet even the most untailored standards." *Nollan*, 483 U.S. at 838. Impact fees do not require the transfer of possessory interests in land

or a payment in lieu of a possessory interest. And impact fees are not calculated at the discretion of local government agencies or officials. Instead, impact fees apply generally to defined uses in a defined geographic area, making them objective, transparent, easy to administer, and leaving little possibility that a property owner would be "especially vulnerable to … coercion." *Koontz*, 570 U.S. at 605. Local governments adopt impact fees through a legislative process, not adjudicative procedures. And, because they apply by category or size of use, and without regard to identity of the user, they are by definition not subject to the potential for abuse that raised the concern of this Court in *Nollan* and *Dolan*. As a consequence, such fees should not be subject to the heightened scrutiny in *Nollan* and *Dolan*.

C. State Enabling Statutes Provide An Additional, Independent Check On Land Use Permitting Fees.

Examining the reach of the *Nollan* and *Dolan* requirements, in *Koontz*, the Court acknowledged that "state law normally provides an independent check on excessive land-use permitting fees." *Koontz*, 570 U.S. at 618. The local jurisdictions represented by amici confirm this view. Often the independent check comes in the form of fee enabling statutes. For example, California and Arizona's laws, both adopted after *Nollan*, use the "reasonable relationship" standard. While other states, such as New Mexico, Georgia, and Utah apply both the "reasonably related" standard and some form of "proportionate share" considerations–"proportionate share" is often defined as the cost of improvements that "reasonably relates"

to the needs created by growth.[5] And even in states with no enabling statute, state courts generally consider the reasonableness of the fee. See, *e.g.*, *McCarthy*, 894 P.2d at 845.

This approach is consistent with *Dolan*, where the Court surveyed state laws and ultimately rejected

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[5] Mullen, at 2; Utah Code Ann. § 11-36a-102(16) ("'Proportionate share' means the cost of public facility improvements that are roughly proportionate and reasonably related to the service demands and needs of any development activity."); Wis. Stat. Ann. § 66.0617(6)(b) ("proportionate share"); *but see* Ga. Code Ann. § 36-71-2(16) ("Proportionate share" means that portion of the cost of system improvements which is reasonably related to the service demands and needs of the project within the defined service area."); Idaho Code Ann. § 67-8203(23) ("'Proportionate share' means that portion of the cost of system improvements determined under section 67-8207, Idaho Code, which reasonably relates to the service demands and needs of the project."); S.C. Code Ann. § 6-1-920(17) ("'Proportionate share' means that portion of the cost of system improvements determined under Section 6-1-990 which reasonably relates to the service demands and needs of the project."); 45 R.I. Gen. Laws Ann. § 45-22.4-3(6) ("'Proportionate share' means that portion of the cost of system improvements which reasonably relates to the service demands and needs of the project."); Haw. Rev. Stat. Ann. § 46-141 ("'Proportionate share' means the portion of total public facility capital improvement costs that is reasonably attributable to a development"); Mont. Code Ann. § 7-6-1601(6) ("'Proportionate share' means that portion of the cost of capital system improvements that reasonably relates to the service demands and needs of the project."); Del. Code Ann. tit. 29, § 9122(6) ("'Proportionate share' means that portion of the cost of system improvements that is reasonably related to the service demands and needs of the project.").

an "exacting" standard for the requirement to dedicate land to the public. *Dolan,* 512 U.S. at 389-90 ("Other state courts require a very exacting correspondence, described as the 'specifi[c] and uniquely attributable' test.... Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes 'a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations'.... We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.") (citations omitted). Instead, this Court determined that all the Constitution requires is a reasonable relationship between the proposed condition and the impact, which could be demonstrated through "rough proportionality" between the condition and the nature and extent of the impacts from the new development. *Dolan,* 512 U.S. at 394-95.

In California, the MFA reflects the independent check on excessive land use permitting fees identified in *Koontz*. See Cal. Gov't Code §§ 66000-66025. The Act regulates land use exactions by requiring local governments to "… (1) identify the purpose of the fee; (2) identify the use to which the fee is to be put; (3) determine the reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and (4) determine the reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed." *Id.* § 66001(a). Local California governments must comply with the MFA by making

robust nexus findings identifying the purpose of the fee and the use to which the fee will be put.

Local agencies must also deposit impact fees in a capital facilities account, and publish an annual report describing the use of the collected funds. Cal. Gov't Code § 66006. The MFA contains detailed public notice and hearing requirements for the adoption of new fees (*id.* § 66016), notice to project applicants, (*id.* § 66020(d)(1)), and, under certain circumstances, places the burden on the local government to provide evidence in support of its determination to impose the fee in question. *Id.* § 66023.

The MFA is a reasonable means of requiring new development to economically internalize the negative externalities of that development. Courts applying the MFA recognize that "[w]hile it is 'only fair' that the public at large should not be obliged to pay for the increased burden on public facilities caused by new development, the converse is equally reasonable: the developer must not be required to shoulder the entire burden of financing public facilities for all future users." *Boatworks, LLC v. City of Alameda*, 247 Cal. Rptr. 3d 159, 166 (Cal. Ct. App. 2019).

Fees adopted under the MFA may not be used to address existing infrastructure deficiencies or deferred maintenance. Cal. Gov't Code § 66001(g); *Bixel Associates v. City of Los Angeles*, 265 Cal. Rptr. 3d 347, 355 (Cal. Ct. App. 1989) (invalidating fee intended to remedy existing deficiencies in water delivery system); see also Hatch Consulting, *San Francisco Infrastructure Nexus Analysis* 17 (Dec.

2021),
https://sfplanning.org/sites/default/files/documents/reports/12222021_SF_Nexus_CitywideAnalysis.pdf
("*San Francisco Nexus Study*"). Thus, the MFA ensures that impact fees are assessed in an even-handed way to assign responsibility for new public facilities.

D. Nexus Studies Establish the Reasonable Relationship Between Impact Fees and New Development.

1. Nexus Studies Are Robust Objective Economic Studies That Provide Substantial Evidence of the Relationship Between New Development and the Need for New or Improved Public Facilities.

Nexus studies carefully evaluate and document the relationship between new development and the increased demand for certain categories of infrastructure needed to serve the new development. The foundation of all nexus methodologies is determining an appropriate level of public infrastructure for future development, the cost to provide this infrastructure, and a reasonable relationship between growth and cost by which to apportion the cost burden. Nexus studies are generally composed of several key elements.

First, a jurisdiction must forecast the amount of growth within a service area that will create new demands on the existing infrastructure. See, *e.g.*, Okla. Stat. Ann. tit. 62, § 895(C)(2); Ga. Code Ann. §

36-71-2(18); Nev. Rev. Stat. Ann. § 278B.060; Wash. Rev. Code Ann. § 82.02.050(5)(a)(ii). Often these growth projections originate from a jurisdiction's long-range plan. See, *e.g.*, W. Va. Code Ann. § 7-20-6(a)(2)-(3); Va. Code Ann. § 15.2-2320; 53 Pa. Stat. Ann. § 10502-A; Ga. Code Ann. § 36-71-3; Idaho Code Ann. § 67-8203(16); AR 1950-1965.

Next, the jurisdiction must determine the level-of-service, which serves as the baseline for the kind and amount of infrastructure necessary to support further growth while maintaining the quality of life for residents. See *San Francisco Nexus Study,* at 10; AR 3170-3197; AR 3513-3514. Specifically, a level-of-service study measures the provision of infrastructure–such as transportation and roadways, parks and open space, schools, and utilities–against a measure of population–for example residents and a share of employees. The level-of-service is the foundation of a nexus study. See, *e.g.*, Ark. Code Ann. § 14-56-103(e)(2); Utah Code Ann. § 11-36a-102(12); Ga. Code Ann. § 36-71-2(12); Idaho Code Ann. § 67-8203(17).

After identifying the level-of-service, the jurisdiction then calculates the cost of providing the infrastructure necessary to maintain or achieve the level-of-service that is attributable to new development. Enabling legislation generally requires that the jurisdiction identify the specific type of public facilities to be funded through the authorized fees, either through capital planning efforts, the general plan, or the nexus studies themselves. See, *e.g.*, *San Francisco Nexus Study*, at 4; AR 2339-2433; Cal. Gov't Code § 66001(a)(2); Ariz. Rev. Stat. Ann. § 9-

463.05(B)(7)(a); Tex. Loc. Gov't Code Ann. § 395.014; Ark. Code Ann. § 14-56-103(e)(2); Va. Code Ann. § 15.2-2321; Or. Rev. Stat. Ann. § 223.309.

To ensure that new developments are not charged for impacts they did not create, many states provide that a fee cannot remedy existing infrastructure deficiencies. See Cal. Gov't Code § 66001(g); Mont. Code Ann. § 7-6-1602(7)(c); Tex. Loc. Gov't Code Ann. § 395.013(4); Utah Code Ann. § 11-36a-202(1)(a)(i). Nor can an impact fee fund the costs of routine repair and maintenance. Tex. Loc. Gov't Code Ann. § 395.013(2); Mont. Code Ann. § 7-6-1602(7)(e); Utah Code Ann. § 11-36a-306(2); W. Va. Code Ann. § 7-20-3. For this reason, although a jurisdiction may have significant capital needs, the nexus study calculates the improvements necessary to accommodate only the increased usage or burden arising from new development. See AR 3521-3523 (detailing fair share calculations for infrastructure needs).

After estimating future growth, the proper level-of-service, and facility needs, nexus studies apportion the burden across the projected growth. To ensure that a project pays its proportionate share of the impact, nexus studies document how the impact varies across land uses–residential, commercial, industrial–and variations in size or building occupancy within a given land use category. For example, relying on industry-standard trip generation studies, El Dorado County found that new residential development drives the vast majority of growth and vehicle trip generation in the county and accordingly,

assigned a smaller share of the level of service impact to non-residential uses. See AR 3522-3523.

To address proportionality of impact fees, enabling legislation often requires that jurisdictions document the "means of assessing the impact associated with the development such as square footage or number of bedrooms", Vt. Stat. Ann. tit. 24, § 5203(a)(2), or the projected "vehicle trips generated by the development ... and the number of parking spaces located at the development." N.J. Stat. Ann. § 27:1C-8; see also Cal. Gov't Code § 66016.5(a)(5)(A)-(B) (fees for housing development on square foot basis unless alternative assessment means bears a reasonable relationship). Next, jurisdictions reduce the total calculated infrastructure costs by forecasted revenue from other sources or project-specific improvements that mitigate infrastructure impacts. See, *e.g.*, Wis. Stat. Ann. § 66.0617(2)(b); Ariz. Rev. Stat. Ann. § 9-463.05(B)(10)-(12); Mont. Code Ann. § 7-6-1602(7)(b)(ii); Colo. Rev. Stat. Ann. § 29-20-104.5. For roads and transportation, revenue sources often include federal and state funds. See, *e.g.*, AR 3519-3520; *El Paso County, Colorado 2016 Major Transportation Corridors Plan Update* 67 (Dec. 2016), https://publicworks.elpasoco.com/wp-content/uploads/Documents/MTCP-Adopted-Report-12-6-2016.pdf; *City of Bozeman 2018 Transportation Impact Fee Update Study* 25 (Jan. 2019), https://www.bozeman.net/home/showpublisheddocument/8912/638067026442770000. In addition to state or federal fund offsets, an impact fee to fund sidewalk improvements may be offset by the project's on-site sidewalk improvements that defray the impacts to the

pedestrian network. See, *e.g.*, *San Francisco Nexus Study*, at 28.

After completing the nexus study, the jurisdiction adopts its impact fee schedule. A predictable, nondiscretionary means to impose a fee–such as a fee formula–is a necessary component of the fee schedule. See, *e.g.*, W. Va. Code Ann. § 7-20-7(c) ("Each county shall assess impact fees pursuant to a standard formula so as to ensure fair and similar treatment to all affected persons or projects."); S.C. Code Ann. § 6-1-940 ("The governmental entity is bound by the amount of impact fee specified in the ordinance…."); Utah Code Ann. § 11-36a-402(1)(b); Vt. Stat. Ann. tit. 24, § 5203(a)(2) (local government must develop a "reasonable formula"); Ind. Code Ann. § 36-7-4-1320(b) ("A schedule or formula included in an impact fee ordinance must provide an objective and uniform standard for calculating impact fees that allows fee payers to accurately predict the impact fees that will be imposed on new development.")

Taken together, the components of a nexus study and the schedule or formula of fees adopted based on that study provide an objective, equitable basis for calculating the nature, amount, and fair distribution of infrastructure costs generated by proposed development.

2. Nexus Studies Account For Unique Local Needs And Conditions.

As described earlier, transportation impact fees are the most common type of impact fee. But each jurisdiction's impact fee must take into account the

unique circumstances of that locality. *Cf. Euclid*, 272 U.S. at 388 (recognizing that zoning and land use regulations must be "consider[ed] … in connection with the circumstances and the locality"). For example, in newly developing communities, a developer may build in a location with no existing road infrastructure–such as a new subdivision–and would appropriately bear a portion of the cost of connecting the development to the nearest public road. An established community, on the other hand, may have existing roadway infrastructure, but that infrastructure may not have sufficient capacity to adequately serve the increased demand from a proposed development.

Transportation-related levels-of-service vary considerably across jurisdictions due to differences in development patterns and transportation needs. In a rural or suburban county, where residents depend on vehicles and roads for their transportation needs, the level-of-service might measure roadway capacity by the volume of cars on a particular roadway segment during peak commute hours. AR 1517-1523. To determine a project's impact on the level-of-service, the nexus study could estimate the number of peak hours trips that project will generate. In an urban area, commuting patterns may vary, requiring multimodal transportation improvements. In these cases, a level-of-service might include the number of miles that passengers commute in an overcrowded subway. *San Francisco Nexus Study*, at 36. Jurisdictions with a large share of pedestrian and biking commuters might provide for a level-of-service of total improved sidewalk square footage per resident

or employee. *Id.* at 28-29. Also, a nexus study could evaluate the impacts from residential and non-residential development differently, based on the expected transportation demands created by each type of use in that locality.

Though local governments often assess impact fees on a large geographic scale, fee methodologies can also account for geographic variation and marginal cost differentials in several ways. In a county that covers a broad geographic area with varying degrees of urbanization, such as El Dorado County, transportation infrastructure needs may be greatest in the most exurban areas, which tend to require more extensive roadway facilities than in the more developed parts of the county. To appropriately apportion the burdens of new infrastructure, some local governments establish zones that account for geographic variation in impacts on infrastructure. See, *e.g.*, AR 3521.

In other jurisdictions, the underlying infrastructure needs may be the same, but the costs of constructing that infrastructure differ. For example, in a densely developed city, roadway infrastructure is typically already in place. But the costs of improving or updating that infrastructure to accommodate future growth could be higher in the downtown core, where high volumes of workers, tourists, and vehicle traffic complicate sidewalk or streetscape improvements. *San Francisco Nexus Study*, at 30. Similarly, an impact fee accounts for marginal cost differences in locations with higher land costs. Duncan Associates, *Impact Fee Study– City of Atlanta*, Georgia 2 (Feb. 2021),

https://www.atlantaga.gov/Home/ShowDocument?id=50431.

Nexus studies account for all these variables. The studies are objective, data-driven, and serve as the analytical base for most impact fees.

E. Additional Procedural Safeguards Protect New Development From Excessive Fees.

Procedural safeguards inherent in impact fee legislation further ensure the requisite link between the burden created by development and the costs to be borne by a specific project. As in the case of the MFA, described above, impact fee legislation often requires an appeal or other administrative process to enable a developer to contest the underlying fee assumptions by commissioning its own study. See, *e.g.*, Utah Code Ann. § 11-36a-402(1)(d); see also Va. Code Ann. § 15.2-2323; Idaho Code Ann. § 67-8212; Ind. Code Ann. § 36-7-4-1334; Vt. Stat. Ann. tit. 24, § 5203(f); Wash. Rev. Code Ann. § 82.02.060(7); Haw. Rev. Stat. Ann. § 46-143(e); S.F. Plan. Code § 406(a); El Dorado Cnty. Code § 12.28.070. Jurisdictions must also adopt nexus studies and fee schedules at noticed public hearings. See, *e.g.*, 605 Ill. Comp. Stat. Ann. 5/5-905; Idaho Code Ann. § 67-8206(3); Fla. Stat. Ann. § 163.31801(4)(d); N.M. Stat. Ann. § 5-8-24; Ind. Code Ann. § 36-7-4-1311; 45 R.I. Gen. Laws Ann. § 45-22.4-8; Md. Code Ann., Local Gov't § 20-703(b).

The legislative process also includes public notice requirements to encourage input and participation from the industries most affected by the fees. Many jurisdictions require the creation of impact

fee advisory committees to provide recommendations regarding land use assumptions and infrastructure needs and to monitor implementation. Advisory committees must contain representatives of the real estate, commercial, and residential development building industries. See, *e.g.*, Ga. Code Ann. § 36-71-5 (50% representatives); 53 Pa. Stat. Ann. § 10504-A(b)(1) (40% representatives); Va. Code Ann. § 15.2-2319 (same); 605 Ill. Comp. Stat. Ann. 5/5-907 (same); Nev. Rev. Stat. Ann. § 278B.150(1)-(2) (20% representatives).

Rigorous accounting and expenditure procedures ensure that local governments expend fees for their intended use and that new development benefits from the capital outlay. To this end, jurisdictions must account for funds and expend funds to construct the improvements within prescribed timeframes, although statutes build in flexibility for unforeseen circumstances. See, *e.g.*, Cal. Gov't Code § 66001(e) (expenditure deadline findings required 180 days after infrastructure is fully funded); Utah Code Ann. § 11-36a-601-602 (fees expended within six years of receipt, except in cases with extraordinary and compelling reasons); W. Va. Code Ann. § 7-20-8(e) (same); Idaho Code Ann. § 67-8210(4) (fees expended within eight of years of receipt, except for reasonable cause).

II. EXPANDING THE REQUIREMENTS OF HEIGHTENED SCRUTINY TO DEVELOPMENT IMPACT FEES WOULD TURN THE REASONING OF *NOLLAN* AND *DOLAN* ON ITS HEAD, AND SHIFT THE FINANCIAL BURDEN OF DEVELOPMENT ONTO LOCAL COMMUNITIES.

While new development offers an array of potential benefits for local communities, including increased availability and affordability of housing, increased tax base, new jobs, and opportunities to promote social equity, those benefits come at significant cost to those same communities in the form of existing infrastructure burdens and the need for new facilities and services. In many cities and towns, existing infrastructure for schools, roads, stormwater, drinking water, and other facilities cannot bear the increased burden of new users. Legislatively imposed development fees are one mechanism many local jurisdictions throughout the country use to address this fundamental cost-benefit equation.

Impact fees provide funding for the necessary physical infrastructure to support new development in a transparent, predictable way. But an expansion of the *Nollan/Dolan* "unconstitutional conditions doctrine" to generally applicable, legislatively enacted development fees would undermine state and local jurisdictions' police power to protect the health, safety, and welfare of their unique communities. This authority is crucial to ensure that new development is supported by appropriate levels of public facilities and infrastructure. Significantly, requiring local

jurisdictions to perform costly and time-consuming individualized nexus reviews on each development project would create additional risk and uncertainty for new developments and slow the approval of much-needed housing.

This level of intensive individualized review is unwarranted by the concerns that underpinned *Nollan* and *Dolan*. The heightened scrutiny requirements established by *Nollan* and *Dolan* apply to the limited circumstances in which agencies apply their discretion in an adjudicatory process to require dedication of a possessory interest in land as a condition of permit approval. With its decision in *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996), the California Supreme Court extended these heightened scrutiny requirements beyond the context of possessory interests in land to project-specific development fees imposed in lieu of a dedication on an ad hoc basis. *Id*. at 435. ("In lieu of the construction of four [public] tennis courts [built for the city] as a condition of approval, the city required the payment of $280,000…."). But the *Ehrlich* court refused to extend heightened scrutiny to legislatively enacted development fees imposed on a broad class of developers, like the fee at issue here. Instead, the Court acknowledged that "[f]ees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of 'extortionate' use of the police power to exact unconstitutional conditions is not present." *Id.* at 444.

The *Ehrlich* court further held that the MFA already requires public agencies to meet the same

"essential nexus" and "rough proportionality" burdens when they impose development impact fees. "[T]he Legislature incorporated into [the Act] a standard that generally corresponds to the one reflected in the high court's takings jurisprudence." *Ehrlich*, 911 P.2d. at 437. Therefore, in California, a local agency that meets the requirements of the MFA also meets the "essential nexus" and "rough proportionality" requirements of *Nollan/Dolan*. Indeed, where a local agency charges legislatively enacted, generally applicable development impact fees, it makes little sense to require an individualized assessment because the nexus already satisfies the "essential nexus" and "rough proportionality" requirements. As a result, applying an individualized assessment of heightened scrutiny to fees imposed under the Act–or similar state enabling statutes–would serve no constitutional purpose. Instead, by requiring individualized review of each specific project, such a holding would turn this Court's reasoning in *Nollan* and *Dolan* on its head, making the requirements for a legislatively imposed impact fee–including fees adopted under the MFA–as stringent as those for a compelled dedication of a possessory interest in land or a discretionary exaction.

As a practical matter, requiring individualized nexus review would create unwarranted and expensive delay as local governments will need to make individual nexus determinations for each project. If a local jurisdiction could not afford the time and expense of performing individualized nexus studies, it could also shift back to existing residents and to local governments themselves the financial burden of the increased demands on community

facilities and services caused by new development, contravening this Court's acknowledgment that responsible land use policy requires landowners to "internalize the negative externalities of their conduct [.]" *Koontz*, 570 U.S. at 605. In fact, the use of legislative impact fees can promote greater efficiency in land use planning by forcing developers and future buyers to share the costs of new infrastructure required by their projects. This can induce more efficient use of the available supply of buildable land by enabling growth, including new housing, in areas where existing infrastructure is not sufficient to support it and where local government cannot provide public facilities fast enough. Vicki Been, at 143.

Because impact fees enable growth that could not otherwise occur, local governments faced with the requirement of individual nexus review for every development project–especially those in areas with infrastructure at maximum capacity or limited access to infrastructure due to distance from the existing urban core–would be forced to choose between development moratoria, or alternate means of raising capital to fund the costs of improving or expanding infrastructure to support new development. In the absence of the risk factors that concerned this Court in *Nollan* and *Dolan*–the exaction of real property and unfettered permit discretion by local government officials–these impact fees simply do not warrant additional constitutional safeguards beyond those inherent in the legislative adoption of fees that do not allow for discretion in their application.

Finally, the question presented should not be answered in a manner that would undermine an even

more fundamental pillar of local police power. Legislated setbacks, height restrictions, and use districts are a universal feature of nearly every American community. As a result, a broad holding that heightened scrutiny inherently applies to legislatively-enacted permit conditions threatens the very heartland of zoning and land use planning. But this Court has long recognized local governments' ability to restrict the use of land to mitigate harms of new development see *Euclid*, 272 U.S. at 392, subject to limits set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), and this case presents no basis for undermining this long-recognized governmental function.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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