No. 25-958

IN THE

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, Third Appellate District

BRIEF OF CITIZEN ACTION DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SAM SPIEGELMAN
Counsel of Record
JACKSON MAYNARD
Citizen Action Defense Fund
111 21st Avenue SW, Ste. 13
Olympia, Wash. 98501
850.519.3495
sam@spiegelmanlawgroup.com
sam@citizenactiondefense.org
jackson@citizenactiondefense.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE*0F 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Exactions Everywhere Impede Much-Needed Housing Growth 2

II. Elections Do Not Protect Against Legislative Exactions 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Pennell v. City of San Jose, 485 U.S. 1, 22 (1988)....12

Other Authorities

APA Policy Guide on Smart Growth (2002) 9

Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 W. Mich. U. Thomas M. Cooley L. Rev. 1 (2005) 7

Chris Carr et al., *The CEQA Gauntlet: How the Californian Environmental Quality Review Act Caused the State's Construction Crisis, and How to Reform It*, Pac. Res. Inst. (Feb. 2022).........3

Daniel Beekman, *Seattle's Mandatory Housing Affordability Program Ramped Up in 2021, New Data Shows*, Seattle Times, May 12, 2022 4

Duncan Assocs., *National Impact Fees Survey: 2019* (2019)...8

Elise Cordle Kennedy et al., *Oregon System Development Charges Study*, ECONorthwest (2022)..6

Emry Dinman, *After Passing Controversial Fee Increases for Developers, Spokane City Council Considers Plan B*, Spokesman-Review, Mar. 14, 2023 5

Gregory K. Ingram & Yu-Hung Hong, *Municipal Revenues and Land Policies* (2010).......................10

Hayley Raetz et al., *Residential Impact Fees in California*, Terner Ctr. Hous. Innovation at

U.C. Berkeley, 8, 22 (2019)......................................3

Jennifer Evans-Cowley et al., *The Effect of Development Impact Fees on Housing Values*, 18 J. Hous. Res. 173 (2003) 13

Jeremy Mattson, *Relationships Between Density, Transit, and Household Expenditures in Small Urban Areas*, Transp. Res. Interdisc. Persps. (2020)...4

Katherine Anne Long, *Homeowners Told Permits for Their Home Renovation Will Cost an Extra $11,000, Thanks to Upzoning in Seattle*, Seattle Times, July 27, 2020 4

Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459 (2005) 7

Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177 (2006)..7, 12

Ryan Packer, *As Development Slows, Seattle Eyes Transportation Impact Fee Projects*, The Urbanist, Apr. 17, 2023...4

Sarah Grace Taylor, *Central District Couple Sues Seattle Over Affordable Housing Program*, Seattle Times, Dec. 16, 2022..5

Sarah Mawhorter et al., *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, Terner Ctr. Hous. Innovation at U.C. Berkeley (2018)..8

Shishir Mathur et al., *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urb. Studs. 1303 (2004)......................................9

Soyoung Kim, *Integration of Policy Decision Making*

for Sustainable Land Use Within Cities, Sustainability (2021) 13

Spencer Pauley, *Yakima Explores New and Increased Taxes Ahead of Expected Deficit, Mum on Cuts*, Ctr. Square: Wash., Oct. 12, 2023....................5

Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139 (2005)....................9

Vittorio Nastasi, *Poorly Designed Impact Fees Make Housing More Expensive*, Reason Found., Jan. 10, 2022....................10

Washington's Housing Supply Shortage, Build. Indus. Ass'n Wash., https://rb.gy/gt0etc (last visited Nov. 14, 2023)....................6

INTEREST OF *AMICUS CURIAE*[1]

This *amicus* brief is submitted by the **Citizen Action Defense Fund** ("CADF"), an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. *Amicus* has a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

INTRODUCTION AND SUMMARY OF ARGUMENT

For further discussion of the factual and procedural history, *amicus* defers in full to Petitioner's **Petition for a Writ of Certiorari**, filed on February 9, 2026. Note, however, that this is the *second* time this lawsuit comes before the Court. As with the first petition—which the Court granted, ultimately ruling in Petitioner's favor—this latest petition stems from the California Court of Appeal's continued refusal to rule in accordance with this Court's earlier published opinion. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024) (*Sheetz I*).

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

Petitioner and his counsel expertly dismantle the appellate court's flawed reasoning upon which it declined to follow the Court's remand. This new petition thus involves novel legal arguments neither presented nor contemplated previously, including the evidentiary standard for determining whether a permit condition is unconstitutional and if impact fees that charge one class for the externalities of another may meet *Dolan*'s "rough proportionality" requirement. Even with these new legal questions involved, *amicus* and other interested parties and observers remain rightfully concerned with the host of adverse legal and political consequences that will almost certainly result should the lower court be allowed a repeat failure to accord with the Court's earlier opinion.

In particular, *amicus* wishes to address why exactions remain so widespread, and how can the Court properly delimit their use to within constitutional contours?

ARGUMENT

I. Exactions Everywhere Impede Much-Needed Housing Growth

Obviously, it takes time to strike those that violate high-court precedent. But it is crucial that the inevitable wave of corrective litigation be made with a more airtight version of *Sheetz I*. One which has the rhetorical and logical force to confront Washington State's particularly ambiguous laws on impact fees. To wit, "Washington's enabling act does not require localities to conduct an individualized assessment, however, it does confer local governments the discretion to consider an individual development's

'unusual' attributes that would lead to an unfair fee imposition." Andrew Klemm, *A Trap for Local Governments: Legislative Exactions After Sheetz v. County of El Dorado*, 75 Case W. Rsrv. L. Rev. 795, 814–15 (2024).

For as long as they remain in force, laws permitting generalized legislative exactions substantially impede the construction of new housing units in nearly every corner of the United States. An unfortunate example—beyond the instant one—is the notorious California Environmental Protection Act ("CEQA"), with a review process which *anyone* can bring at *any time* and, once lodged, immediately pauses the target project until resolution—which can take years, if not more than a decade to reach a final decision. Various interest groups routinely weaponize CEQA to stop projects they simply do not like. *See generally* Chris Carr et al., *The CEQA Gauntlet: How the Californian Environmental Quality Review Act Caused the State's Construction Crisis, and How to Reform It*, Pac. Res. Inst. (Feb. 2022). Meanwhile, a recent state-commissioned study criticized several elements of California exaction practices. These include the widespread failure to "adequately analyze the impact of total fee amounts on housing supply" and "high fees" that "have been shown to limit or preclude the development of lower-cost housing." Hayley Raetz et al., *Residential Impact Fees in California*, Terner Ctr. Hous. Innovation at U.C. Berkeley, 8, 22 (2019).

Other examples abound. Seattle's City Council repeatedly proposed across-the-board transportation impact fees on future development, including in-fills. Ryan Packer, *As Development Slows, Seattle Eyes*

Transportation Impact Fee Projects, The Urbanist, Apr. 17, 2023, https://rb.gy/mj1xx6. But denser housing and mixed-use growth tends to *reduce* per capita road use. *See generally* Jeremy Mattson, *Relationships Between Density, Transit, and Household Expenditures in Small Urban Areas*, Transp. Res. Interdisciplinary Perspectives 8 (2020). Once again empirical data takes a back seat to political expedience.

The same goes for Seattle's Mandatory Housing Affordability ("MHA") Program. *2024 Mandatory Housing Affordability Annual Report*, Seattle Off. Of Housing (June 2025). The MHA requires developers seeking build permits in certain upzoned districts to fill the City's Office of Housing's coffers (to the tune of $246.1 million as of Dec 31, 2022) or to dedicate variable portions (2% to 11%) of their planned units far under market prices. Daniel Beekman, *Seattle's Mandatory Housing Affordability Program Ramped Up in 2021, New Data Shows*, Seattle Times, May 12, 2022, https://tinyurl.com/5835wp5v.

The MHA fee does not just apply to large developers constructing significant apartment buildings but also to single-family homeowners wishing to renovate their home or build an additional unit on their parcel. In the first instance, Seattle once demanded an additional $11,000 in MHA fees and in the second, more than $75,000. Katherine Anne Long, *Homeowners Told Permits for Their Home Renovation Will Cost an Extra $11,000, Thanks to Upzoning in Seattle*, Seattle Times, July 27, 2020, https://rb.gy/jnsllf; Sarah Grace Taylor, *Central District Couple Sues Seattle Over Affordable Housing*

Program, Seattle Times, Dec. 16, 2022, https://tinyurl.com/4zajpywa.

If a developer or individual owner refuses, Seattle can deny the permit out of hand. And the MHA applies across the board, with the city undertaking no project-specific nexus studies or the like. Decisions like the California Court of Appeal's here—if permitted to stand—will only further embolden local officials in Seattle and beyond to impose *legislative* land-use conditions, knowing that in *any* other form the exaction would fail *Nollan*/*Dolan*.

One observes similar boundary-pushing elsewhere in Washington State. In Spokane, lawmakers this year increased impact fees for the first time in decades, a move the Spokane Association of Realtors estimates will halt 2,000 construction projects of varying sizes throughout the area. Emry Dinman, *After Passing Controversial Fee Increases for Developers, Spokane City Council Considers Plan B*, Spokesman-Review, Mar. 14, 2023, https://rb.gy/bszmw5.

Officials in Yakima, in Washington's wine country, are also considering impact fees as a means to make up for their own budgetary mismanagement. Spencer Pauley, *Yakima Explores New and Increased Taxes Ahead of Expected Deficit, Mum on Cuts*, Ctr. Square: Wash., Oct. 12, 2023, https://rb.gy/rfcnr1. These and similar measures across the state inflict real costs—not just on individual builders and buyers—but on the state's general economic health. According to a Building Industry Association of Washington study, the state requires at least 250,000 new housing units to meet current demand, whereas only about 49,000 were built in all of 2022. Washington's Housing

Supply Shortage, Build. Indus. Ass'n Wash., https://rb.gy/gt0etc (last visited Nov. 14, 2023).

Oregon's story is woefully similar to Washington's. Impact fees there are called "system development charges" ("SDCs")—though they are no less onerous despite the pseudonym. One recent study prepared for the state's Housing and Community Services office found that SDCs "increase the cost of building new housing in ways that can skew housing development towards higher-cost homes and can impact buyers and renters," so not just the developers themselves. Elise Cordle Kennedy et al., *Oregon System Development Charges Study*, ECONorthwest, ii (2022). Though developers also feel the pinch and reduce affordable projects as a result. *Id.* at iii ("SDCs on affordable housing development can increase the difficulty of securing adequate funding for the development and, *even as a small percentage of total development costs*, likely consume millions of dollars per year in funding for affordable housing statewide.") (emphasis added). But those costs inevitably redound to renters and buyers anyway, since "investors, lenders, and developers are unlikely to absorb SDCs by accepting lower returns except in very unusual circumstances or when SDC costs increase unexpectedly during development and cannot be passed on to others." *Id.* at 10.

These are hardly isolated incidents, nor are they limited to the West Coast. "Over the past three decades," one land-use scholar noted, "increasing numbers of local governments have turned to new methods of financing public works projects, especially land use exactions and impact fees." Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev.

459, 480 (2005). *See also* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

The incentives for pursuing these measures are obvious. First, it is a means of raising funds without also raising public ire via statutory, "on-book" tax levies. Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 W. Mich. U. Thomas M. Cooley L. Rev. 1, 2 (2005). Second, thus far neither voters nor the courts have done anything to stop it. Indeed, "[r]esidents now urge their elected officials to adopt impact fees when the locality has not yet done so." Rosenberg, *supra*, at 262. Overtaxing developers does not, after all, tend to elicit great popular sympathy. Further, "[w]ithout having to face the opposition of future residents who do not currently live or vote in the locality," land-use officials "find impact fees an irresistible policy option." *Id.* Their mantra of "growth should pay for growth" should really be "growth should pay costs unrelated to the growth".

The direct and downstream effects these "irresistible" policies have on housing costs are substantial. In a detailed survey, real estate firm Duncan Associates noted that in California, impact fees on average add $37,471 to the price of a home. The story is the same in other states that liberally permit legislative exactions, including $16,079 per home in Washington and $21,911 in Oregon. Duncan

Assocs., *National Impact Fees Survey: 2019*, at 4 (2019). These figures are especially egregious when the conditions imposed do not confer on the public the benefits its advocates tend to claim they will.

If developers had to pay just one lump-sum impact or offset fee in addition to planning and building service fees, it might not be so egregious (though questions of constitutionality under *Nollan/Dolan* would most certainly remain). However, in a 2018 study by the Terner Center for Housing Innovation at U.C. Berkeley, local fees tended to cover schools, transportation, environmental impact, public safety, parks and recreation, affordable housing, capital improvements, and utility upgrades—often without site-specific studies of individual impacts on these local items. Sarah Mawhorter et al., *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, Terner Ctr. for Hous. Innovation at U.C. Berkeley, 8 (2018). In Berkeley, perhaps unsurprisingly, "city staff were unable to provide us with the information requested to develop an accurate estimate" of all fees for a particular project, "and so we could not develop fee estimates and include Berkeley in the following analysis." *Id.* at 12. What's more, the complexities of structuring this many levies "also makes it difficult for developers to estimate the fees they will be charged as they plan and try to finance a particular project," thus making development in California that much more risky and that much less attractive to investors. *Id.* at 9. The total cost of the smorgasbord of fees at local officials' disposal in Fremont, California, for example, was *$157,000 per home*. *Id.* at 3.

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

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

As officials are now attempting in Yakima, many local governments use it as a low-political-cost budget-padding mechanism rather than as a real tool for expanding infrastructure and public amenities apace with population growth. *See generally* Gregory S. Burge, "The Effects of Development Impact Fees on Local Fiscal Conditions," *in* Gregory K. Ingram & Yu-Hung Hong, *Municipal Revenues and Land Policies* 182 (2010). And their execution often leaves much to be desired. For instance, "[m]any municipalities impose flat fees that are not adjusted to the size or impact of individual housing units." Vittorio Nastasi, *Poorly Designed Impact Fees Make Housing More Expensive*, Reason Found., Jan. 10, 2022, https://rb.gy/eon60x. According to a report from Strong Towns, impact fees do not even "do what they're purported to do." "They don't actually make development pay its own way." Daniel Herriges, *Impact Fees Don't Mean Development Is Paying for Itself*, Strong Towns, Aug. 23, 2018.

In Lafeyette, Louisiana, for example, "residents would have to accept somewhere between a 330% and a 533% tax hike just to break even on the costs of maintaining existing infrastructure," regardless of who paid the upfront costs. *Id.* In the end, impact fees, "by reducing the up-front fiscal impact of growth, might actually be" no more than "a dangerous"—and costly—"temptation." *Id.*

The ease with which so many jurisdictions' impact fees and other exactions escape full *Nollan*/*Dolan* scrutiny plays an outsized role in this growing disparity. The Court's clarification of the test's scope—to include exactions closer to their legislative origins than, apparently, are so-called "adjudicative"

ones (for, as discussed, these also originate as legislation)—is not merely a legal imperative. The practical consequences of continuing to permit lower courts to misread the test rise into the many billions of dollars and prevent millions of Americans from realizing even the modest dream of a comfortable home, to say nothing of full homeownership. Reversing the California Court of Appeal and explicitly broadening the *Nollan/Dolan* test will go a long way to alleviating this simmering public crisis.

II. Elections Do Not Protect Against Legislative Exactions

There are few—if any—electoral protections against legislative exactions. Existing residents—who Professor William Fischel has called "homevoters"—simply have too much, if not all of the collective action and political largesse to keep would-be residents out via exorbitant "impact" fees designed precisely for this ulterior purpose. William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* 21 (2001) (noting the convenient "marriage of environmentalism and suburban concerns" against growth, enabled by collective action at the local level, but offering existing residents an "[e]nvironmental justification for policies that just happen to increase existing home values"). This is how despite am ever-worsening national housing shortage, zoning laws have actually "become much stricter of the last thirty or so years," and "in ways not predicted by those who study the political economy of urban development." David Schleicher, *City Unplanning*, 122 Yale L.J. 1670, 1674 (2013)..

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

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

So, whether the electoral consequences are nil or even net-positive, officeholders need not concern themselves with the grievances of any minority that the majority tends not to support—*e.g.*, housing developers. Rosenberg, *supra*, at 262. This is

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

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

Across the country exactions are becoming ever more frequent, yet we have witnessed little to no electoral backlash. Outside of the academy and commentariat, failures in collective action and incentive structures leading to inefficient exaction programs illustrate the effective limits of public power to change local land-use decision-making. The result

is the system we now see across the country: local officials charging developers "off-budget," with existing residents—unaware or unwilling to believe they will eventually foot the bill—either indifferent to or in full support of such measures. Unless and until the courts hold local governments to account for the unconstitutional conditions they impose upon developers, the cycle will continue to worsen. And no amount of voting alone will correct it.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should reverse the ruling below.

Respectfully submitted,

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/S/ SAM SPIEGELMAN
Counsel of Record
JACKSON MAYNARD
Citizen Action Defense Fund
111 21st Avenue SW, Ste. 13
Olympia, Wash., 98501
850.519.3495
sam@spiegelmanlawgroup.com
sam@citizenactiondefense.org
jackson@citizenactiondefense.org

Counsel for Amicus Curiae