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

BRIEF FOR PETITIONER

BRIAN T. HODGES
LAWRENCE G. SALZMAN
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111

PAUL J. BEARD II
Counsel of Record
FisherBroyles LLP
453 S. Spring St.
Suite 400-1458
Los Angeles, CA 90013
Telephone: (818) 216-3988
paul.beard@fisherbroyles.com

Counsel for Petitioner

QUESTION PRESENTED

Whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), simply because it is authorized by legislation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Constitution

Statutes

Other Authorities

OPINIONS BELOW

The decision of the California Court of Appeal is published at *Sheetz v. County of El Dorado*, 84 Cal. App. 5th 394 (3d App. Dist. Oct. 19, 2022), and reproduced in the Petition Appendix (Pet.App.) at A-1. The trial court opinion, *Sheetz v. County of El Dorado*, Case No. PC20170255 (Cal. Super. Ct., County of El Dorado, Feb. 4, 2021), is unpublished, and reproduced at Pet.App. B-1. The California Supreme Court order denying Petitioner's petition for review is reproduced at Pet.App. C-1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The California Court of Appeal's decision became final on November 18, 2022. The California Supreme Court denied Petitioner's petition for review on February 1, 2023. Pet.App. C-1. The Petitioner filed a timely petition for writ of certiorari on May 2, 2023. The Court granted the petition on September 29.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The relevant portions of the County of El Dorado resolution at issue in this case are reproduced at Pet.App. D-1.

STATEMENT OF THE CASE

A. The County Imposes a Generally Applicable, Legislative Exaction Related to Traffic Improvements on New Development

El Dorado County, California, is located immediately east of Sacramento and extends eastward to the California-Nevada border at South Lake Tahoe. In 2004, the County amended its General Plan to identify existing and future deficiencies in its road system and to determine the cost of addressing those needs over a 20-year time frame, based on a report prepared by its Department of Transportation. Pet.App. A-2, Pet.App. B-59, Administrative Record (AR) 2291–92. Because state and federal transportation funds would provide only a fraction of the estimated $840.5 million needed for the improvements, the County had to figure out how to raise the remaining $608.5 million. AR 3524; AR 4353 (the County revised the figures in 2012 to a total of $804.3 million, of which $572.3 million remained unfunded). Rather than relying on general taxes, the County chose to change the way that it finances the construction of new roads and the widening of existing roads within its jurisdiction. Pet.App. A-2. Specifically, the County sought to avoid raising taxes by shifting the remaining, unfunded cost of these public improvements onto the relative minority of developers and other property owners proposing new projects. *Id.* at A-3, A-25.

To that end, the County enacted legislation—a Traffic Impact Mitigation (TIM) Fee Program—that imposes a traffic-impact fee on any property owner who seeks permission to build on his property. Pet.App. A-3. The Program sets mandatory fees based on a legislatively adopted fee schedule and is comprised of the "Highway 50 Component" and the "Local Road Component." Pet.App. A-3; Pet.App. D-6 to D-18. In February 2012, the County's Board of Supervisors passed a resolution imposing new TIM fee rates, which established the fee at issue in this case. Pet.App. A-3 & D-1.

The rate schedule predetermines the fee applicable to a new development application based on the subject property's location in one of eight geographic "zones," as well as the general class of development proposed to be built (e.g., single-family residential, multi-family residential, commercial). Pet.App. A-3. Although the TIM Fee Program provides for some degree of individualized determination for nonresidential uses, Pet.App. D-6 to D-16 (adjusting fee based on project-specific data), in determining the fee applicable to a single-family home, "the County does not make any 'individualized determinations' as to the nature and extent of the traffic impacts caused by a particular project on state and local roads," including whether the project creates any need to construct new roads. Pet.App. A-3. Under the County's TIM Fee Program, single-family homes are deemed to have an identical impact on area roads, regardless of size, location, and other factors. Pet.App. B-63. The differences in fees by zone, too, are unrelated to any determination of a proposed development's impacts, but instead reflect the total unfunded costs of road improvements within each geographic zone. AR.3521. Thus, even if a

specific project produces *de minimis* or no impacts, the owner nevertheless must pay a substantial fee for the right to build on his land.

Significantly, the County's TIM Fee Program requires that "new development pay the full cost of constructing new roads and widening existing roads without regard to the impacts attributable to the particular development on which the fee is imposed." Pet.App. A-3. As the court below acknowledged, "the administrative record discloses" that the County enacted "policies that ensure that roadway improvements are developed concurrently with new development and paid for by that development and not taxpayer funds." Pet.App. A-25. The County adopted this approach even though existing County residents, as well as nonresidents traveling within and through the County, use and benefit from new and widened roads. Joint Appendix (JA) 20.

B. George Sheetz's Proposed Land Use and the Traffic Impact Fee

George Sheetz purchased land in El Dorado County, intending to build a small house where he and his wife could raise their grandson. AR 5063; Pet.App. A-3. In July 2016, he applied for a building permit from the County to construct an 1,854-square-foot manufactured house. Pet.App. A-3.

The County issued a permit conditioned on Mr. Sheetz paying a $23,420 TIM fee, ostensibly to mitigate his home's purported burdens on public roads. Pet.App. A-3. The fee was set by the County's legislatively adopted rate schedule based on the general type of project he proposed—a residential single-family home—and the zone in which his

property is located—Zone 6. Pet.App. A-3. The County made no individualized determination that Mr. Sheetz's home would result in a need to build or expand the County's roads, or that the fee was roughly proportional to any burdens on those roads. Pet.App. A-3. Mr. Sheetz did not believe that his construction of a small, manufactured house caused public impacts justifying a fee of $23,420 and so he paid the fee under protest pursuant to California's Mitigation Fee Act (MFA), Cal. Gov't Code § 66000 *et seq*.; Pet. App. A-3 to A-4.

The MFA authorizes a property owner like Mr. Sheetz to proceed with an approved project while simultaneously challenging, in court, the validity of "fees, dedications, reservations, or other exactions." Cal. Gov't Code § 66020(a). Under California law, "'other exactions' encompasses actions that divest the developer of money or a possessory interest in property." *Lynch v. Cal. Coastal Comm'n*, 3 Cal. 5th 470, 479 (2017).

C. Mr. Sheetz Challenges the Exaction Under *Nollan* and *Dolan*, but the Lower Courts Rule Against Him on the Ground That Those Precedents Do Not Apply to Legislative Exactions

In 2017, Mr. Sheetz filed a petition for writ of mandate in the California superior court, seeking an order requiring the County to refund the $23,420 fee on the ground, *inter alia*, that the exaction was an unconstitutional condition on his building permit under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). JA-13, 37. Those precedents place the burden on the government to establish an "essential

nexus" and "rough proportionality" between a permit condition and the adverse public impacts of a proposed use or development. *Dolan*, 512 U.S. at 391. Failure to do so unconstitutionally burdens the owner's right to just compensation under the Takings Clause. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–05 (2013) (describing holdings of *Nollan* and *Dolan*).

Mr. Sheetz alleged that the $23,420 fee violated *Nollan* and *Dolan* because it shifted the public's burden of addressing existing and future road deficiencies onto him as a builder of new development. JA-16 to 17, 20. He also alleged that the fee violated *Dolan*'s "rough proportionality" test because the County imposed the condition on his permit without any individualized determination regarding the nature and extent of his proposed home's impact to state and local roads. JA-19, 28.

The trial court dismissed Mr. Sheetz's *Nollan*/*Dolan* claim without addressing its merits, holding that those precedents do not apply to generally applicable, nondiscretionary legislative exactions. Pet.App. B-74 to B-75.

The California Court of Appeal affirmed. "Under California law," the court observed that, "only certain development fees are subject to the heightened scrutiny of the *Nollan*/*Dolan* test." Pet.App. A-10. Specifically, "the requirements of *Nollan* and *Dolan* apply to development fees imposed as a condition of permit approval where such fees are '"imposed . . . neither generally nor ministerially, but on an individual and discretionary basis."' Pet.App. A-10 to A-11 (quoting *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 666–70 (2002), and

citing *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 859–60, 866–67, 876, 869, 881 (1996)). Thus, the court concluded that the "requirements of *Nollan* and *Dolan* . . . do not extend to development fees that are generally applicable to a broad class of property owners through legislative action . . . as distinguished from a monetary condition imposed on an individual permit application on an ad hoc basis." Pet.App. A-11 (citing *California Building Industry Ass'n v. City of San Jose*, 61 Cal. 4th 435, 459 n.11 (2015) (*CBIA*)).

Given that rationale, the court of appeal declined to scrutinize Mr. Sheetz's exaction under *Nollan* and *Dolan*. "The fee," the court explained, "is not an 'ad hoc exaction' imposed on a property owner on an individual and discretionary basis," but is rather "a development impact fee imposed pursuant to a legislatively authorized fee program that generally applies to all new development projects within the County." Pet.App. A-16. Thus, the court reasoned, "the validity of the fee and the program that authorized it is only subject to the deferential 'reasonable relationship' test" required under state law. Pet.App. A-16. Because the court rejected Mr. Sheetz's *Nollan*/*Dolan* challenge to the exaction, it did not reach the merits of his claim that the exaction bears no "essential nexus" or "rough proportionality" to any public impacts that might be caused by his proposed manufactured home.

The California Supreme Court denied review of the court of appeal's decision (Pet.App. C-1), and this Court granted Mr. Sheetz's petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

In this Court's key exactions precedents—*Nollan*, *Dolan*, and *Koontz*—it held that when government exacts money or real property as a condition on the right to use or develop land, it must establish that the exaction bears an "essential nexus" and "rough proportionality" to an adverse public impact caused by the owner's proposed project. In this case, the Court should confirm that *Nollan*/*Dolan* review applies, not just to so-called *ad hoc* or discretionary conditions, but to legislatively mandated exactions as well, such as the fee that El Dorado County imposed on Mr. Sheetz. That rule follows inexorably from this Court's precedents, as well as the history and purpose of the Takings Clause and the unconstitutional-conditions doctrine. The rule is easy to implement. And the rule ensures that any exaction serves as genuine mitigation for public impacts attributable to the proposed use or development rather than a veiled attempt to skirt the compensation requirement of the Takings Clause.

First, there is no basis in *Nollan*, *Dolan*, or *Koontz* for exempting legislatively mandated exactions from the "essential nexus" and "rough proportionality" tests that those cases establish. Indeed, all three decisions involved conditions mandated by generally applicable legislation—a fact that each of the government defendants in those cases specifically touted. *See, infra*, at 14–24. In fact, the first case to invoke the unconstitutional-conditions doctrine in the takings context, *Nollan*, involved a legislatively mandated exaction—specifically, a statutory requirement that new development along the California coast be conditioned on the dedication of

public access to and along the beach. *Nollan*, 483 U.S. at 855 (Brennan, J., dissenting) (referring to Cal. Pub. Res. Code § 30212 as providing a "statutory directive" to the agency to "provide for public access along the coast in new development projects"). Applying the doctrine to *all* exactions, irrespective of which government actor authorized or required them, serves *Nollan*/*Dolan*'s objective of "curb[ing] governments from using their power over land-use permitting to extract for free what the Takings Clause would otherwise require them to pay for." *Koontz*, 570 U.S. at 635 (Kagan, J., dissenting).

Second, the text and history of the Takings Clause admit no exception for legislative takings. "The Takings Clause . . . is not addressed to the action of a specific branch or branches," but is instead "concerned simply with the act, and not with the governmental actor." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 713–14 (2010) (plurality op.). Holding *all* exactions accountable to the Takings Clause ensures the fulfillment of the Clause's fundamental purpose: "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).

Moreover, the Court never has exempted legislative action from the unconstitutional-conditions doctrine as applied outside the context of land-use permitting. Since the doctrine's appearance in the nineteenth century, it has been applied to a vast array of legislatively mandated conditions on the receipt of benefits or the exercise of constitutional rights. *See, e.g.*, *Memorial Hospital v. Maricopa County*, 415 U.S.

250 (1974) (interstate travel); *Sherbert v. Verner*, 374 U.S. 398 (1963) (free exercise).

Third, a rule subjecting legislative exactions to *Nollan*/*Dolan* review would not frustrate legitimate land-use planning, regulation, or financing of public infrastructure. Several states, including Florida, Illinois, Michigan, North Carolina, Ohio, Texas, and Utah, have adopted the rule,[1] and many jurisdictions have been successfully applying it for decades to protect property owners without ill effects. Importantly, there is no evidence that the rule has prevented state and local agencies in those jurisdictions from securing true mitigation for the adverse public impacts caused by the use and development of property. *See, infra*, 37–44. Applying *Nollan*/*Dolan* scrutiny to legislatively mandated exactions keeps all government actors—from legislative bodies to unelected officials—honest by verifying that they may extract property from owners only if and to the extent necessary to mitigate public impacts, and not to engage in an "out-and-out plan of extortion" to fund government wish lists. *Nollan*, 483 U.S. at 837 (cleaned up).

---

[1] *Charter Twp. of Canton v. 44650, Inc.*, __ N.W.2d __, No. 354309, 2023 WL 2938991, at *14 (Mich. Ct. App. Apr. 13, 2023); *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 34 (2022); *Highlands-In-The-Woods, L.L.C. v. Polk Cnty.*, 217 So. 3d 1175, 1178–79 (Fla. Dist. Ct. App. 2017); *B.A.M. Dev., L.L.C. v. Salt Lake Cnty.*, 128 P.3d 1161, 1164, 1167–68 (Utah 2006) (*B.A.M. I*); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 643 (Tex. 2004); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 89 Ohio St. 3d 121, 128 (2000); *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 941 (1995).

The Court should vacate the California Court of Appeal's judgment and remand this case with instructions to apply *Nollan*/*Dolan* review to the exaction imposed on Mr. Sheetz. Mr. Sheetz contends that, if remanded for review under *Nollan* and *Dolan*, the exaction imposed on him will not survive. The County failed to make an individualized determination, as required by *Dolan*, that the exaction bears an essential nexus and rough proportionality to his home's purported burden on the County's roads. Pet.App. A-3. As alleged in the petition for writ of mandate: "Mr. Sheetz' construction of one manufactured house on his property did not cause public impacts that justify imposition of the $23,420 fee demanded by and paid to the County." JA-21.[2]

[2] The case comes to the Court on an order sustaining a demurrer to Mr. Sheetz's *Nollan*/*Dolan* claim against the exaction. Pet.App. B-1. Thus, the allegations contained in his petition, including that the exaction fails *Nollan*/*Dolan* review, must be accepted as true. *See, e.g.*, *Haggis v. City of Los Angeles*, 22 Cal. 4th 490, 495 (2000) ("On appeal from dismissal following a sustained demurrer, we take as true all well-pleaded factual allegations of the complaint.").

ARGUMENT

I. *Nollan, Dolan*, and *Koontz* Support the Rule That Legislative Exactions Are Subject to the "Essential Nexus" and "Rough Proportionality" Tests

A. The Unconstitutional-Conditions Doctrine, as Applied in the Fifth Amendment Context, Broadly Protects Against Uncompensated Takings

As applied in *Nollan*, *Dolan*, and *Koontz*, the unconstitutional-conditions doctrine clearly reaches legislatively mandated exactions like the one imposed on Mr. Sheetz. The doctrine enforces "the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz*, 570 U.S. at 604. The Takings Clause of the Fifth Amendment states broadly that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *id.* amend. XIV (incorporating clause against state and local governments, as stated in *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897)). As discussed in Section II below, this basic command applies to all branches of government.

The Takings Clause protects a wide range of recognized property interests from appropriation by the legislature. Indeed, "property" under the Clause comprises both tangible property (e.g., real-property interests, personal property, money) and intangible property (e.g., intellectual property). *See, e.g.*, *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998) (accrued interest); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Webb's*

Fabulous Pharmacies, *Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Armstrong*, 364 U.S. at 44–46 (materialmen's liens); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts); *Vill. of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (money). Thus, for example, "[w]hen the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). It also applies to a government demand to "spend" or "relinquish[] . . . funds linked to a specific, identifiable property interest such as a bank account or parcel of real property." *Koontz*, 570 U.S. at 614; *id.* at 613 (holding that the Takings Clause applies to the government's "demand for money" when it "operate[s] upon . . . an identified property interest by directing the owner of a particular piece of property to make a monetary payment") (cleaned up).[3] Nothing in this Court's precedents suggests the Takings Clause's protection waxes and wanes based on the branch of government appropriating the property.

The doctrine of unconstitutional conditions is predicated on the Court's recognition that what the

---

[3] "Taxes and user fees," to be sure, "are not 'takings.'" *Koontz*, 570 U.S. at 615 (internal citation and quotation marks omitted). But the County never has disputed that the fee imposed on Mr. Sheetz was anything other than a monetary exaction. The County never has argued that it was "exercising [its] power to levy taxes" or to charge "user fees" when it took Mr. Sheetz's money. *Id.* at 615–16. Indeed, the County resolution approving the fee schedule from which Mr. Sheetz's exaction was calculated makes clear that the exaction purports to mitigate a project's traffic impacts. Pet.App. D-1 to D-3; *see also* Pet.App. A-25 (concluding that the fee program purports to mitigate the effects of new development).

government cannot do directly—appropriating property without paying just compensation—it also cannot do *indirectly*. *Parks v. Watson*, 716 F.2d 646, 667 (9th Cir. 1983) (Wallace, J., concurring in part and dissenting in part) (holding that "the unconstitutional conditions doctrine . . . is designed to prevent the government from doing indirectly what it cannot do directly") (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). Under that doctrine, courts scrutinize government action that requires an owner to waive his constitutional right to compensation for the property demanded in exchange for allowing him to exercise the right to use or develop his land. *Nollan*, 483 U.S. at 837; *see also id.* at 833 n.2.[4] Thus, in *Nollan* and *Dolan*, the Court applied the unconstitutional-conditions doctrine to limit the government's power to exact property in the land-use context. *Koontz*, 570 U.S. at 604.

B. *Nollan* Involved a Legislatively Mandated Exaction Like the One Imposed on Mr. Sheetz

In *Nollan*, a beachfront property owner and his family ("the Nollans") applied to the California Coastal Commission, a state agency, for a permit to rebuild their home. *Nollan*, 483 U.S. at 827–28. With exceptions not applicable to the Nollans, the State's Coastal Act mandates that "[p]ublic access from the nearest public roadway to the shoreline and along the

[4] Property owners have a *right* to use and develop their property, subject only to lawful regulation. As the Court in *Nollan* explained: "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan*, 483 U.S. at 833 n.2.

coast *shall* be provided in new development projects." Cal. Pub. Res. Code § 30212(a) (emphasis added). Consistent with that legislative mandate, the Commission conditioned approval of the Nollans' beach house remodeling project on their dedication of a public-access easement across the beachside of their property without showing that the easement demand addressed the purported public impact of the remodel project. *Nollan*, 483 U.S. at 828. The Commission claimed that the remodel might add to the psychological barrier experienced by motorists driving down the highway, who might not know a beach was on the other side of the wall of homes. *Id.* The Nollans challenged the condition as an uncompensated taking.

The Court invalidated the easement condition based on the unconstitutional-conditions doctrine. It explained:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

Id. at 831. That the State instead took the easement *indirectly*, by way of a permit condition, made no constitutional difference: The State's easement exaction bore no "essential nexus" to the Nollans' proposed use. *Id.* at 837. Because rebuilding the Nollans' home had no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement across their property without compensation. *Id.* at 838–39. In the absence of a sufficient nexus between a permit

condition and a project's alleged impacts, the State's purpose could only be understood as "the obtaining of an easement to serve some valid government purpose"—public access—"but without payment of compensation." *Id.* at 837. The Court concluded: "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (internal citation omitted).

Critically for this case, *Nollan* concerned a state agency that acted pursuant to a state legislative mandate when it required the Nollans to dedicate an access easement across their backyard as a condition of obtaining a permit. *Id.* at 828–30 (citing Cal. Pub. Res. Code § 30212). The Commission's defense rested primarily on the fact that section 30212 "mandate[d] the Commission to condition its approval of new beachfront development projects upon protection and provision of public access to and along the coast[.]" Respondent's Brief on the Merits, *Nollan v. California Coastal Comm'n*, No. 86-133, 1987 WL 864769, at *3 (U.S. Feb. 17, 1987); *see also id.* at *20 ("[T]he Commission would be in violation of the policies and its duties as spelled out under the [Coastal] Act if it had not formulated or imposed the challenged conditions.") (quoting *Sea Ranch Ass'n v. California Coastal Comm'n*, 527 F. Supp. 390, 393 (N.D. Cal. 1981)). According to the Commission, the legislative origin of the access condition should have shielded it from heightened scrutiny and triggered judicial deference. Resp. Br., *Nollan*, 1987 WL 864769, at *18–26.

The Court rejected the Commission's argument, ruling that a deferential standard, like the State's proposed rational-relation test, is not sufficient to satisfy the doctrine of unconstitutional conditions. *Nollan*, 483 U.S. at 840–42. That is because the State's determination that a dedication of private property will serve the public interest presumptively indicates that the Commission should pay for the property, as required by the Takings Clause. *Id.* at 841–42. Consistent with that conclusion, *Nollan* explains that the deference given to ordinary legislation is inappropriate where the government makes "the 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." *Id.* at 841.

Section 30212's mandate that the Coastal Commission condition development applications on public access to the beach remains on the books. In response to *Nollan*, however, the Coastal Commission, as the agency charged with carrying out that mandate, *now* acknowledges that it must make an individualized determination that any "public access" requirement bears an essential nexus and rough proportionality to the alleged impacts of an applicant's beachfront use or development. For example, after *Nollan*, the Commission issued an "Action Plan" on "Public Access," which called for project-specific "findings that must be made to support public access requirements placed on development approvals." *See* California Coastal Commission, *Public Access: Action*

Plan at 73 (June 1999).[5] Post-*Nollan*, the Commission continued to implement section 30212's mandate, but within the confines of *Nollan* and *Dolan* to ensure that access demands mitigate for project impacts and do not commit uncompensated takings.[6] Thus, a legislative mandate can coexist with the requirement that, as applied to a particular project, the mandate must bear the requisite constitutional connection to the project's impacts.

C. *Dolan* Involved Two Legislatively Mandated Permit Exactions

Seven years after *Nollan*, *Dolan v. City of Tigard* established how close a fit the government needed to demonstrate between an exaction and the public impacts of a proposed use or development. There, property owner Florence Dolan applied to the City of Tigard for a permit to expand her hardware store. *Dolan*, 512 U.S. at 379. The city's Community Development Code required her permit to be conditioned on the dedication of one part of her land for storm-drainage improvements and an additional part for a pedestrian/bicycle pathway. *Id.* at 378. Ms. Dolan challenged the exactions as unconstitutional conditions.

Dolan, too, involved permit conditions mandated by generally applicable legislation. The City of Tigard conditioned a permit on exactions required by its ordinance. *Dolan*, 512 U.S. at 377–78; *id.* at 378 (The

---

[5] https://bit.ly/3MwJe9U.

[6] *See, e.g.*, California Coastal Commission, *Staff Report for Application No. 5-22-1037* at 22–23 (May 18, 2023), https://bit.ly/3SuNAlO; California Coastal Commission, *Staff Report for Application No. 4-98-120* at 5–6 (May 18, 1998), https://bit.ly/3Qn7sEF.

city's development code "requires that new development . . . dedicate[] land for pedestrian pathways."); *id.* at 379 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."); *see also* Brief for Respondent, *Dolan v. City of Tigard*, No. 93-518, 1994 WL 123754, at *10 (U.S. Feb. 17, 1994) (In setting the stream buffer dedication, "the City's staff applied the standards set forth in CDC § 18.164.100, relating to storm drainage management."); *id.* at *12 (The city's ordinance "requires that development facilitate pedestrian/bikeway circulation through the dedication of land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan.").

The decision of Oregon's Land Use Board of Appeals (Board) confirmed the mandatory nature of Tigard's stream buffer and bicycle/pedestrian path conditions. *Dolan v. City of Tigard*, LUBA No. 90-029, at 20–21 (1991).[7] The city's development code imposed two mandatory conditions on the approval of any new development within the zone in which Ms. Dolan's property was located. First, the code demanded that:

> The development shall facilitate pedestrian/ bicycle circulation if the site is located . . . adjacent to a designated greenway/open space/park. Specific items to be addressed [include] Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of

[7] https://bit.ly/49tnW6K (last visited on Nov. 8, 2023).

> pedestrian and bikepaths identified in the comprehensive plan.

Dolan, LUBA No. 90-029, at 20 (quoting Tigard City Dev. Code § 18.86.040.A.1.b). And second, the code required:

> Where . . . development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include . . . a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan.

Dolan, LUBA No. 90-029, at 20 (quoting Tigard City Dev. Code § 18.120.180.A.8).

The City's legislatively-adopted comprehensive plan predetermined the size and location of the floodplain area, "depict[ing] a portion of [Ms. Dolan's] property adjoining Fanno Creek as greenway and show[ing] the existence of a bike path on this portion of [her] property." *Id*. at 21. Thus, the Board concluded that it was "clear that the disputed condition requiring dedication of a portion of [Ms. Dolan's] property was adopted pursuant to these [city code] provisions." *Id*.

As in *Nollan*, Tigard argued that the legislative origin of its nondiscretionary permit conditions should shield the exactions from *Nollan*'s heightened scrutiny. *See* Brief for Respondent, *Dolan*, 1994 WL 123754, at *24–25. Specifically, the city argued that legislative exactions should be given broad deference and presumed constitutional, subject only to minimal,

rational-relation review. *Id.* This Court rejected that argument, explaining that the doctrine of unconstitutional conditions, when applied in the context of the Takings Clause, demands heightened scrutiny to carry out its central purpose of distinguishing "an appropriate exercise of the police power" from "an improper exercise of eminent domain." *Dolan*, 512 U.S. at 390 (quoting *Simpson v. North Platte*, 206 Neb. 240, 245 (1980)).

Applying heightened scrutiny, the Court concluded that the city's exactions satisfied *Nollan*'s "essential nexus" test. *Id.* at 386–88. But the Constitution required more. The exactions had to be "rough[ly] proportional[]" to the project's impacts. *Id.* at 391. The Court explained that "[n]o precise mathematical calculation is required, but the city must make some sort of *individualized* determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* (emphasis added). Looking to the city's reasons as reflected in the administrative record, *Dolan* held that the city failed to demonstrate that the conditions were roughly proportional to the project's public impact. *Id.* at 394–96. Thus, the permit conditions unconstitutionally burdened Dolan's right to just compensation for a taking. *Id.* at 379–80, 391.

Significantly, *Dolan* makes clear that the "rough proportionality" standard—and, with it, *Nollan*'s foundational "essential nexus" standard—derive from the Takings Clause. As the Court held, "'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment." *Id.* at 391. *Nollan* and *Dolan*'s standards derive from the Fifth Amendment's Takings Clause because they best

enable courts to smoke out uncompensated takings and ensure that exactions serve as true mitigation—and no more—for the public impacts caused by land use and development. Anything less than *Nollan*/*Dolan* review—such as California's "deferential 'reasonable relationship' test" that dispenses with individualized determinations (Pet.App. A-16)—is unmoored from the Takings Clause and allows uncompensated takings cloaked as mitigation to go unchecked, in violation of the Clause's purpose of "bar[ring] 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*, 364 U.S. at 49. Given that the right to compensation for a taking is a fundamental, enumerated right, there is no valid reason—in precedent, history, or theory—to employ a deferential standard of review, including on the basis that the challenged exaction is legislatively mandated. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

D. *Koontz* Also Involved Legislatively Mandated Permit Conditions

In 2013, the Court held that the *Nollan* and *Dolan* tests apply, not just to a condition requiring the dedication of a real-property interest, but also to a "demand for money" that "'operate[s] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Koontz*, 570 U.S. at 613 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998)

(Kennedy, J., concurring in part and dissenting in part)). As the Court explained, "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property," which creates "the risk that the government may use its substantial power and discretion in land-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." *Id.* at 614.

Koontz involved an in-lieu impact fee that was based on a state agency's generally applicable schedule of mitigation ratios. *Koontz*, 570 U.S. at 600; *see also* Brief of Respondent, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2012 WL 6694053, at *5, *11–13 (U.S. Dec. 21, 2012) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)). While the state agency's regulations gave the local permitting agency discretion in how to fashion a permit condition, the agency could not diverge from the regulation's required mitigation ratios that applied to any new development within certain land designations. Brief in Opposition, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2012 WL 3142655, at *5 n.4 (U.S. Aug. 1, 2012) ("In 1988, Florida . . . established that preservation mitigation 'will not be granted [at] a ratio lower than 10:1.'") (quoting "Wetlands Preservation-as-Mitigation"); *see also* Amicus Br. of Florida Dep't of Environmental Protection, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2009 WL 4761534, at *5 (Fla. Nov. 20, 2009) (explaining that the government's predetermined mitigation ratios are mandatory). Despite this legislative origin,

the Court still held that the impact fee was subject to the nexus and proportionality tests. *Koontz*, 570 U.S. at 612–17.

Most recently, in *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2229 n.1 (2021), this Court vacated the Ninth Circuit's application of a rule categorically excluding legislative exactions from *Nollan*/*Dolan* scrutiny. *See Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1162 (9th Cir. 2020).[8] The Court remanded the case to the Ninth Circuit with direction to consider the merits of an unconstitutional-conditions claim challenging, under *Cedar Point*, a legislative demand that owners of a rental property offer current tenants a lifetime lease as a condition of converting a tenant-in-common building to a condominium. *Pakdel*, 141 S. Ct. at 2229 n.1.

In summary, there is no basis in this Court's exactions caselaw for a rule exempting legislatively mandated permit conditions from *Nollan*/*Dolan* scrutiny. Indeed, if that were the correct rule, the challenges in *Nollan*, *Dolan*, and *Koontz* would have been unsuccessful.

---

[8] In a subsequent case, the Ninth Circuit openly embraced the rule that legislative exactions are subject to *Nollan*/*Dolan* scrutiny: "In light of *Pakdel* and *Cedar Point Nursery*, we agree . . . that '[w]hat matters for purposes of *Nollan* and *Dolan* is not *who* imposes an exaction, but *what* the exaction does,' and the fact '[t]hat the payment requirement comes from a [c]ity ordinance is irrelevant.'" *Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022) (internal citations omitted).

E. The Permit Exaction at Issue Here Is Subject to *Nollan*/*Dolan* Scrutiny

This case falls squarely within the Court's exactions jurisprudence. Like the California Legislature in *Nollan* and the city council in *Dolan*, the County's Board of Supervisors here exercised its legislative discretion to compel certain owners to dedicate property as the condition of exercising their right to use or develop their land. Specifically, the County enacted the TIM Fee Program, requiring Mr. Sheetz and others proposing new development to make a significant monetary payment for road improvements as a condition of permit approval.

Had the County singled out Mr. Sheetz, *qua* landowner and outside the permit process, to make a monetary payment of $23,400 for road improvements, that demand would have effected a taking. *Koontz*, 570 U.S. at 614 (holding that a *per se* taking occurs "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property"); *see also Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003) (same); *Webb's Fabulous Pharmacies*, 449 U.S. at 163 (a taking occurs where an "exaction [of money interest] is a forced contribution to general governmental revenues"); *Armstrong*, 364 U.S. at 48 (liens—entitlements to money—"constitute compensable property"); *Vill. of Norwood*, 172 U.S. at 279 (a taking occurred when the

government demanded money to pay the public's cost to condemn owner's property for new roads).[9]

As *Nollan*, *Dolan*, and *Koontz* confirm, the fact that the seizure here occurred inside the permit process makes no constitutional difference. The required transfer of money to the County operated upon an identified property interest—Mr. Sheetz's land—so that a "direct link" existed between the County's permit demand and a "specific parcel of real property." *Koontz*, 570 U.S. at 613–14. The exaction sprang directly from and burdened his ownership and proposed use of land. Further, the amount was based entirely on the land's location and the general class of development he proposed to build on it; it was not based on an individualized determination of the impact his manufactured house would have on the need for road improvements. Pet.App. A-3.

Under the unconstitutional-conditions doctrine, the County bore the burden of establishing the requisite nexus and proportionality between its demand and the actual public impacts of Mr. Sheetz's proposed development—a showing necessary for a court to be able to determine whether a sufficient justification exists to exempt the property demand

---

[9] In *Norwood*, the government condemned Ms. Baker's property for a road, paid compensation, then tried to reclaim the money by demanding that she pay it back as an alleged assessment on her property. 172 U.S. at 275–77. She sued, claiming that the assessment effected an uncompensated taking. *Id.* at 277. The Court held that imposing upon the property owner the entire financial obligation of paying for the condemnation effected a taking. *Id.* at 279 (holding that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking").

from the Constitution's just compensation requirement. *Dolan*, 512 U.S. at 391. Mr. Sheetz alleges that the County did not meet that burden. But the California courts looked the other way, concluding that the County's failure to do so did not matter because *Nollan* and *Dolan* do not apply to legislatively mandated exactions.

Mr. Sheetz seeks to right this wrong. He seeks confirmation that the County's exaction is subject to *Nollan*/*Dolan* review. *Dolan*, 512 U.S. at 391 (the burden of demonstrating nexus and proportionality is on the government); *see also id*. at 391 n.8 (explaining that, under the doctrine of unconstitutional conditions, the government is not entitled to deference). Whether *Nollan*/*Dolan* review applies makes a difference in this case because the administrative record establishes the County's TIM Fee Program is designed to shift the entire burden of paying for existing and future road needs onto property owners with new projects; the County made no individualized determination that the fee bears the requisite nexus and rough proportionality to the actual impacts of Mr. Sheetz's 1,800-square-foot home. *See, e.g.*, *Town of Flower Mound*, 135 S.W.3d at 639 (Government bears the burden of proving nexus and rough proportionality, which "is essential to protect against the government's unfairly leveraging its police power over land-use regulation to extract from landowners concessions and benefits to which it is not entitled.").

II. There Is No Legislative Exception to the Takings Clause or the Unconstitutional-Conditions Doctrine

The California Court of Appeal categorically concluded that the County's exaction was exempt from *Nollan*/*Dolan* scrutiny: "*Nollan* and *Dolan* . . . do not extend to development fees that are generally applicable to a broad class of property owners through legislative action . . . as distinguished from a monetary condition imposed on an individual permit application on an ad hoc," and an "adjudicative . . . and discretionary" basis. Pet.App. A-11, A-17 (citing *CBIA*, 61 Cal. 4th at 459 n.11).

As a preliminary matter, attempts to draw lines among different kinds of exactions have no basis in the Court's precedents. The California Supreme Court has drawn a "distinction . . . between ad hoc exactions and legislatively mandated, formulaic mitigation fees." *San Remo Hotel*, 27 Cal. 4th at 670−71. But as *Nollan*, *Dolan*, and *Koontz* show, that is a distinction without a constitutional difference: those precedents involved legislatively mandated exactions, and no jurisdiction (not even California) disputes that *Nollan*/*Dolan* review applies to so-called *ad hoc* exactions. Also, the court below emphasized the "adjudicative" nature in which the exactions in *Nollan*, *Dolan*, and *Koontz* were imposed. Pet.App. A-17. But, again, *Nollan*, *Dolan*, *Koontz*, and this case teach that *all* exactions ultimately are imposed in the context of allowing a specific use or development to proceed subject to conditions. The purported distinction between legislatively and adjudicatively imposed exactions does not address the core constitutional concern—namely, to halt government

leveraging the permit process to evade the Takings Clause. Finally, the court below distinguished between nondiscretionary and "discretionary" exactions. Pet.App. A-17. Once again, this Court's precedents find no constitutional difference between the two kinds of exactions; in *Nollan*, the Coastal Commission had no discretion to decide whether to demand public access from the Nollans, whereas in *Koontz*, the water management district had some discretion in crafting its exaction based on a broad legislative mandate. And that makes sense. Any government body or official can exercise discretion to impose an exaction. When a legislative body—like the County here—imposes a fee schedule, it is exercising its legislative *discretion*, while a county planner may exercise discretion given to him by the legislature in imposing a similar exaction, or in determining the size and amount of an exaction.

In addition, and as explained below, the California rule is contrary to the Court's precedents interpreting the Fifth and Fourteenth Amendments; those precedents apply the Takings Clause to state and local governments without limitation to any single branch thereof. And it is contrary to the Court's precedents applying the unconstitutional-conditions doctrine.

A. The Takings Clause Protects Against Confiscation by Legislation

Nothing in the Taking Clause exempts the legislative branch (or any other branch) from its command that private property shall not be taken for public use, without just compensation. U.S. Const. amend. V. "The Takings Clause . . . is not addressed to the action of a specific branch or branches." *Stop the Beach Renourishment*, 560 U.S. at 713 (plurality op.).

"It is concerned simply with the act, and not with the governmental actor," given that "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Id.* at 713–14 ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."); *see also id.* at 734 (Kennedy, J., concurring in part and in the judgment) (agreeing that the legislative branch, as well as the executive branch, can take property within the meaning of the Takings Clause). As the Sixth Circuit recently explained in holding that *Nollan*/*Dolan* review applies to legislative exactions:

> The clause's passive-voice construction does not make significant who commits the "act"; it makes significant what type of act is committed. Just as the text bars the executive branch from appropriating someone's land without compensation, so too it bars the legislative branch from passing a law ordering that appropriation. And because the text treats these branches the same for a "classic" taking, why should it treat them differently for a permit condition?

Knight v. Metro. Gov't of Nashville, 67 F.4th 816, 829–30 (6th Cir. 2023) (cleaned up).

Indeed, the "very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of *majorities* and *officials* and to establish them as legal principles to be applied by the courts." *West*

Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943) (emphasis added) (noting that property is among those rights that "may not be submitted to vote" and "depend on the outcome of no elections"); *see also Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170–71 (2019) (The Takings Clause enjoys the "full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it.").

This Court's takings cases consistently apply that fundamental principle. For example, whether a physical taking has occurred does not depend on "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)," only that the property is taken by a government actor without compensation. *Cedar Point Nursery*, 141 S. Ct. at 2072. Similarly, "[n]either the . . . Legislature by statute, nor the . . . courts by judicial decree, may" take personal property, e.g., the interest accruing on a person's money, without compensation. *Webb's Fabulous Pharmacies*, 449 U.S. at 164. Neither the text of the Takings Clause nor this Court's precedents can justify exempting legislative acts from the Clause's protections.

Neither is there any basis in the Fourteenth Amendment for California's legislative exactions rule. U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *Chicago, Burlington & Quincy R.R. Co.*, 166 U.S. at 234 (The Fourteenth

Amendment, "extend[s] to all acts of the State, whether through its legislative, its executive, or its judicial authorities.") (internal quotation marks omitted). According to its plain text, the Fourteenth Amendment applies broadly to each "State"—"a subject . . . that covers all of a sovereign's branches without distinguishing among them." *Knight*, 67 F.4th at 830; *see also Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930) (same). This rule has been consistently applied. *See Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 368 (1936) ("The just compensation clause may not be evaded or impaired by any form of legislation."); *Neal v. Delaware*, 103 U.S. 370, 389–90 (1880) (recognizing that "an amendment of the Federal Constitution, from the time of its adoption, as binding on . . . every department of [state] government"); *cf. Daniels v. State Road Dep't*, 170 So. 2d 846, 851–53 (Fla. 1964) (state legislation may create an obligation for government to pay *more* compensation than required by the Fifth Amendment, but courts must disregard legislation to pay less).

Finally, the history preceding the enactment of the Takings Clause strongly supports its applicability to legislative action. "Before the Fifth Amendment's enactment in the United States, . . . only *legislatively* backed takings could take place in England because only Parliament could authorize them." *Knight*, 67 F.4th at 830 (emphasis added). "By the time of the American Revolution, therefore, it had long been established that the taking of land for public purposes was a power that could be exercised by Parliament alone." Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1245, 1263 (2002). Prior to the Takings Clause, "it was likewise the colonial

legislatures (not the other branches) that typically passed provisions authorizing the taking of property for projects like public buildings or public roads." *Knight*, 67 F.4th at 830 (citing James W. Ely, Jr., *"That Due Satisfaction May Be Made": The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 5–11 (1992)). "Given this history, many sources identified the Takings Clause as a limit on legislative power in between the passage of the Fifth and Fourteenth Amendments," which extended the Takings Clause's applicability to state and local governments. *Knight*, 67 F.4th at 830–31.

B. Legislation Has Always Been Subject to the Unconstitutional-Conditions Doctrine

The unconstitutional-conditions doctrine from which *Nollan*, *Dolan*, and *Koontz* spring has always applied to legislation. *See, e.g.*, *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541–49 (2001); *Rust v. Sullivan*, 500 U.S. 173, 177 (1991); *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 400 (1984). The doctrine finds its roots in mid-nineteenth century decisions concerning protectionist state legislation that placed conditions on foreign companies seeking permission to do business in the state. *See, e.g.*, *Lafayette Ins. Co. v. French*, 59 U.S. 404, 407 (1855) (invalidating a state statute conditioning business license for out-of-state companies on a waiver of the right to remove lawsuits to federal court). As originally expressed by the Court, the doctrine holds that "the power of the state"—a formulation that necessarily includes the legislature—"is not unlimited; and one of the limitations is that it may not

impose conditions which require the relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. Railroad Comm'n of State of Cal.*, 271 U.S. 583, 593–94 (1926); *see also Martin v. Hunter's Lessee*, 14 U.S. 304, 340 (1816) (The U.S. Constitution is "the supreme law of the land, and . . . every state shall be bound thereby."); *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532–33 (1922) ("[The] sovereign power[] [of a state] is subject to the limitations of the supreme fundamental law.").

This formulation allows states to legislate, provided that the legislation does not impose conditions forcing individuals to surrender rights secured by the Constitution. Indeed, this Court has repeatedly explained that, although state legislatures enjoy broad authority to attach conditions to licenses, permits, or other benefits, such authority ends when the government conditions the issuance of a benefit or exercise of a right upon the requirement that a person waive or surrender another constitutional right. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294–95 (1958); *see also Lafayette*, 59 U.S. at 407 ("This consent [to do business] may be accompanied by such conditions [a state] may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States."); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.").

Consistent with this understanding, this Court has often invalidated legislation that imposed

unconstitutional conditions on rights protected under a variety of constitutional provisions. For example, in *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013), the Court considered whether a federal statute imposed an unconstitutional condition on the First Amendment rights of nongovernmental organizations that received certain federal funds. The United States Leadership Against HIV/AIDs, Tuberculosis, and Malaria Act of 2003 ("Leadership Act") authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight against those diseases. *Id.* at 208. But one of the conditions the law imposed on funding—the so-called "Policy Requirement"—was that the recipient "have a policy explicitly opposing prostitution and sex trafficking." *Id.* The Court held that the legislative condition was unconstitutional:

> The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking. . . . Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds. . . . By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects protected conduct outside the scope of the federally funded program.

Id. at 213, 218 (cleaned up); *see also Memorial Hospital*, 415 U.S. 250 (invalidating state statue requiring a year's residence as a condition to receiving medical care violated the doctrine predicated on the right of interstate travel); *Sherbert*, 374 U.S. 398 (invalidating provision of state unemployment statute conditioning benefits on waiving one's religious practice contrary to the free exercise clause); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating provision of state constitution requiring individuals to swear an oath not to advocate for the overthrow of government as a condition to tax exemption benefits in violation of the free speech clause); *Frost & Frost Trucking*, 271 U.S. 583 (invalidating state law requiring out-of-state trucking company to dedicate personal property to public uses as a condition of permission to use state highways violated due process); *Baltic Min. Co. v. Mass.*, 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law[.]").

Indeed, the Court in *Dolan* relied on *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (invalidating a warrantless search condition placed on commercial businesses by the Occupational Safety and Health Act), to refute the dissenting opinion's argument that exactions imposed through neutral regulations did not warrant heightened scrutiny. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

The tests established by *Nollan* and *Dolan* reflect the same principles applied repeatedly in the cases above, and many others, against legislatively mandated conditions on constitutional rights. The rationale for the unconstitutional-conditions doctrine in the takings context is identical to that animating the broader doctrine: the need to police government demands that fall outside of the government's constitutional authority while at the same time preserving the government's discretion to impose lawful conditions. *Koontz*, 570 U.S. at 604–05; *see also Nollan*, 483 U.S. at 841. That rationale applies to all branches of government. Ultimately, the nexus and proportionality tests answer the question whether the government has gone beyond securing mitigation and instead has leveraged its land-use authority to coerce an owner into surrendering property. That question must be answered with respect to conditions imposed by legislative mandate just as it is for permit conditions imposed *ad hoc* or discretionarily. The nexus and proportionality tests are the proper tool for this task whether a bureaucrat or legislative body makes the demand.

III. *Nollan*/*Dolan* Review Is a Workable Standard That Courts Can Apply Without Depriving Governments of Mitigation for Projects' Public Impacts

The nexus and proportionality tests have been in place for several decades, and case law from across the nation shows that the tests provide a workable standard for adjudicating both legislative and *ad hoc* exactions—including in the context of impact fees. Indeed, *Dolan*'s adoption of the "rough proportionality" standard was predicated on the

Court's conclusion that development impacts can be sufficiently quantified to determine whether the government demand goes beyond impact mitigation. *Dolan*, 512 U.S. at 391. The government can satisfy its burden by "mak[ing] some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. Thus, when addressing the City of Tigard's traffic impact condition, the nexus and proportionality tests required the city to do more than merely assert that a bicycle/pedestrian path *could* alleviate some of the additional daily trips resulting from the proposed expansion of Ms. Dolan's hardware store. The city was required to "demonstrat[e] that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement." *Id*. at 395. That required data, not speculation.

Since *Dolan*, lower courts have applied the nexus and proportionality tests to analyze legislative exactions designed to subsidize road construction and maintenance. For example, in *B.A.M. Dev., L.L.C. v. Salt Lake County*, the Supreme Court of Utah, in a series of decisions, upheld a legislatively mandated traffic impact fee upon the government's showing that the fee did not exceed that portion of a road-widening project that was attributable to the proposed development's increased traffic demands.[10] 282 P.3d

[10] This case took six years and three trips to the Utah Supreme Court, not because of any difficulty with the application of *Nollan*/*Dolan* scrutiny, but because the court had to first (1)

41, 45–46 (Utah 2012) (*B.A.M. III*); *see also B.A.M. II*, 196 P.3d at 604 (concluding that the proper measure for proportionality in the case was to determine the percentage of traffic impacts attributable to the proposal then measure the fee against the cost that the city would spend to mitigate that impact). There, a Salt Lake City ordinance required that, as a condition on any new development, the owners dedicate property (or pay an in-lieu fee) to improve public streets abutting the proposed development. *B.A.M. I*, 128 P.3d at 1164. But unlike the TIM Fee Program at issue here, the Salt Lake City ordinance directed permitting officials to determine the size of the mandatory exaction based on a site-specific determination of traffic impacts. *B.A.M. III*, 282 P.3d at 45–46. After evaluating the government's evidence in the record, the Utah Supreme Court held the exaction to be proportional. *Id*. Because the city could empirically prove that its fee was proportional to the impacts caused by development, it had no reason to fear the court's application of *Nollan*/*Dolan* scrutiny, and the city constitutionally secured mitigation actually attributable to the project's impacts.

Similarly, in *Mira Mar Development v. City of Coppell*, a Texas appellate court reviewed a series of legislatively mandated permit conditions under the nexus and proportionality tests, upholding several of the permit conditions—including a roadway impact fee—while striking down others as unconstitutional.

---

decide that legislative exactions are subject to the doctrine, *B.A.M. I*, 128 P.3d at 1164, then (2) remand to the county with directions to address the nexus and proportionality standards, *B.A.M. Dev., L.L.C. v. Salt Lake Cnty.*, 196 P.3d 601, 604 (Utah 2008) (*B.A.M. II*), before (3) finally evaluating the county's evidence under *Nollan* and *Dolan*. *B.A.M. III*, 282 P.3d at 45–46.

421 S.W.3d 74, 85–101 (Tex. Ct. App. 2013). In developing the legislation requiring roadway impact fees, the city had provided "a precise mathematical formulation of the impact of development on the city's roadways," from which the city—and the court—could determine the proposal's "projected impact with precision that far exceeded the constitutional requirement of rough proportionality." *Id*. at 97. Knowing that its legislative exaction would be subject to *Nollan*/*Dolan* review, the city capably generated the necessary data to ensure that its legislative exaction would satisfy the nexus and proportionality tests. And the city was able to require genuine mitigation for the project's impacts.

Courts have also applied the nexus and proportionality tests to permit conditions requiring that a developer provide property for road widening and other traffic infrastructure compelled by legislatively adopted, general improvement plans like the County's TIM Fee Program. *See*, *e.g.*, *Amoco Oil Co.*, 277 Ill. App. 3d at 938 (ordinance requiring an owner dedicate 20% of his property as a condition of expanding a gas station was clearly disproportionate to the proposal's *de minimis* traffic impacts); *Bd. of Supervisors of W. Marlborough Twp. v. Fiechter*, 129 Pa. Cmwlth. 537, 539 (1989) (permit condition demanding land to widen a road was unconstitutional where the government set the size of the demand based on standards set by ordinance rather than the proposed development's impacts). Indeed, when the government identifies a public need in advance of a permit application, as the County has done here, the nexus and proportionality tests are especially necessary to ensure that government does not opportunistically tap permit applicants to satisfy

preexisting public needs by exceeding the unconstitutional-condition doctrine's impact mitigation standard. *All. for Responsible Plan. v. Taylor*, 63 Cal. App. 5th 1072, 1085 (2021) ("Laudable as traffic mitigation is, 'there are outer limits to how this may be done.'" (quoting *Dolan*, 512 U.S. at 396)); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

The analysis employed in cases like *Mira Mar* has been applied in the context of facial challenges as well to both uphold and strike down legislative exactions. In *North Illinois Home Builders Association, Inc. v. County of Du Page*, for example, the Illinois Supreme Court upheld a traffic fee ordinance against a facial proportionality challenge because the ordinance required the government to support a fee imposed on a new project with expert evidence that the "new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement." 165 Ill. 2d 25, 34 (1995) (internal citation and quotation marks omitted); *see also Levin v. City & Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1084–85 (N.D. Cal. 2014), *appeal dismissed and remanded*, 680 F. App'x 610 (9th Cir. 2017) (ordinance that set a predetermined tenant relocation fee schedule without any requirement that the government tailor its fees to the actual impacts of an owner's use of his property facially violated the Takings Clause).

In states already subjecting legislative exactions to *Nollan*/*Dolan* review, courts typically find that legislative exactions fail to meet the proportionality prong where municipalities adopt a predetermined schedule of fees, like the County's FIM Fee Program, without any mechanism for addressing the actual public impacts of a proposed development. *See Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) (invalidating a legislative traffic mitigation condition where the size of the demand was based on the city's clearly disproportionate assumptions about the impacts of future neighboring development, rather than an individualized assessment of the proposed development's impacts). For example, in *Charter Township of Canton v. 44650, Inc.*, a Michigan appellate court invalidated a legislatively mandated $446,625 tree replacement fee because the township's tree ordinance "requires preset mitigation" without any "evidence . . . that this required mitigation bears any relationship to the impact of defendant's tree removal." 2023 WL 2938991, at *4, *14 (Proportionality requires an "individualized assessment" of the land-use impacts, including "any positive impacts the tree removal may have had," such as "removal of invasive species and clearing debris from the property."). The Sixth Circuit reached the same conclusion in a companion case involving impact fees imposed under the same tree ordinance. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 206 (6th Cir. 2021). Significantly, the Sixth Circuit ruled that *Dolan* requires more than just running the number and type of trees through the ordinance's preset fee formula. *Id*. Like the Michigan appellate court, the Sixth Circuit concluded that the proportionality test demands that the government

identify and measure a land use's actual public externalities against any offsets resulting from the owner's activities. *Id.* The North Carolina Supreme Court has reached a similar conclusion. *See Anderson Creek Partners*, 382 N.C. at 40 (directing the appellate court on remand to determine whether the county's legislatively adopted schedule of "capacity use" fees "reflect[s] the impact of plaintiffs' proposed developments upon the County's water and sewer systems").

This body of case law applying the nexus and proportionality tests to legislative exactions acknowledges the ability of a legislative body to mandate the imposition of an exaction by ordinance. But that case law requires the government to have a mechanism to tailor the condition to meet the nexus and rough proportionality tests for each proposed use or development. The bare assertion that a fee or exaction was enacted legislatively does not address that requirement, much less satisfy it.

California's contrary approach is not just constitutionally insufficient, but it is unworkable. It requires courts to draw difficult lines between legislative and *ad hoc* or adjudicatory exactions,[11] or between mandatory and discretionary exactions. As the Sixth Circuit in *Knight* rightly observed, the "proposed distinction between 'legislative' conditions (those mandated across the board by a legislature)

---

[11] *See First Bancorporation v. Bd. of Governors of Federal Reserve Sys.*, 728 F.2d 434, 437 (10th Cir. 1984) ("The distinction between legislative and adjudicative facts is often subtle or blurred."); *Ray Indus., Inc. v. Liberty Mut. Ins. Co.*, 974 F.2d 754, 761 (6th Cir. 1992) ("In recent years, the lines between the branches of government have become blurred[.]").

and 'adjudicative' conditions (those imposed on an ad hoc basis by an administrator) would force courts to draw indiscernible lines." *Knight*, 67 F.4th at 834. "Most zoning schemes involve a mix of legislative and administrative choices . . . so how should courts decide which conditions are 'adjudicative' and which are 'legislative'?" *Id.* The level of protection against uncompensated takings should not turn on such arbitrary line-drawing, especially when neither the Takings Clause nor the unconstitutional-conditions doctrine is concerned with the identity of the government actor mandating the exaction.

CONCLUSION

Some state and federal courts, like those in California, have created a massive loophole around *Nollan* and *Dolan* for legislatively mandated exactions. But, as explained above, those courts are on the wrong side of the Takings Clause and the unconstitutional-conditions doctrine. The legislative loophole has only incentivized state and local agencies to cloak uncompensated takings in legislative garb.

The Court should hold that *all* demands for personal or real property that are packaged as conditions of approval to use or develop land must comply with the tests established by *Nollan* and *Dolan*. Doing so still allows the government to obtain mitigation for public impacts caused by the proposed use or development of property. But as important, it ensures that the government does not leverage the land-use approval process to require the dedication of something different from, or more than, mitigation, thereby skirting the Takings Clause.

The Court should vacate the California Court of Appeal's judgment and remand this matter with instructions to apply *Nollan*/*Dolan* scrutiny to the exaction imposed on Mr. Sheetz.

DATED: November 2023.

PAUL J. BEARD II
Counsel of Record
FisherBroyles LLP
453 S. Spring St.
Suite 400-1458
Los Angeles, CA 90013
Telephone: (818) 216-3988
paul.beard@fisherbroyles.com

BRIAN T. HODGES
LAWRENCE G. SALZMAN
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111

Counsel for Petitioner