No. _____

In The
Supreme Court of the United States

GEORGE SHEETZ,
Petitioner,

v.

COUNTY OF EL DORADO,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

George Sheetz applied to the County of El Dorado, California, for a permit to build a modest manufactured house on his property. Pursuant to legislation enacted by the County, and as the condition of obtaining the permit, Mr. Sheetz was required to pay a monetary exaction of $23,420 to help finance unrelated road improvements. The County demanded payment in spite of the fact that it made no individualized determination that the exaction—a substantial sum for Mr. Sheetz—bore an "essential nexus" and "rough proportionality" to the purported impacts associated with his modest project as required in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

Mr. Sheetz challenged the exaction as an unconstitutional condition under *Nollan* and *Dolan*. A California trial court upheld the exaction, holding that, because it was authorized by legislation, the exaction was immune from *Nollan/Dolan* review. In a published decision, the California Court of Appeal affirmed, and the California Supreme Court denied review. California's judicially-created exemption from *Nollan/Dolan* scrutiny for legislative exactions conflicts with the decisions of other federal and state courts across the country, and is in strong tension with this Court's more recent precedents.

The question presented is whether a permit exaction is exempt from the unconstitutional-conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation.

PARTIES TO THE PROCEEDING

Petitioner George Sheetz was the plaintiff and appellant below.

Respondent County of El Dorado, California, was the defendant and appellee below.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court:

Sheetz v. County of El Dorado, 84 Cal. App. 5th 394 (Third App. Dist. Oct. 19, 2022).

Sheetz v. County of El Dorado, Case No. PC20170255 (Cal. Super. Ct., County of El Dorado, Feb. 4, 2021).

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PETITION FOR WRIT OF CERTIORARI

George Sheetz respectfully requests that this Court issue a writ of certiorari to review the decision of the California Court of Appeal for the Third Appellate District.

OPINIONS BELOW

The decision below of the California Court of Appeal is published at 84 Cal. App. 5th 394 (2022) and is reproduced in the Appendix beginning at A-1. The opinion of the California Superior Court for the County of El Dorado is not published, but is reproduced in the Appendix beginning at B-1. The California Supreme Court's denial of Mr. Sheetz's petition for review is reproduced in the Appendix beginning at 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 a petition for review on February 1, 2023. *See* App. C-1.

CONSTITUTIONAL PROVISIONS

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.

INTRODUCTION

For decades, some lower courts—including the California Court of Appeal below—have drawn a distinction between permit exactions authorized by legislation (e.g., a statute, ordinance, or resolution) and those imposed on a so-called discretionary, *ad hoc* basis in the absence of specific legislation (hereinafter referred to as "administrative exactions"). On the premise that state legislatures, county boards of supervisors, and city and town councils somehow are less likely to leverage the land-use permit process to extort property owners, these courts refuse to closely scrutinize legislative exactions to determine if they are unconstitutional conditions that violate the Takings Clause, as set forth in *Nollan* and *Dolan*. As explained below, the California Court of Appeal's opinion here stands against the decisions of other state and federal courts, as well as more recent precedents of this Court—none of which recognizes a constitutional difference between legislative and administrative exactions for purposes of *Nollan/Dolan* review.

"This case implicates an important and unsettled issue under the Takings Clause" that has remained unresolved for decades, leaving "property owners and governments . . . uncertain about . . . whether cities [and other state and local governments] can legislatively impose exactions that would not pass muster if done administratively." *Cal. Bldg. Indus.*

Ass'n v. City of San Jose, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of petition raising the exact same issue of whether legislative exactions are subject to *Nollan/Dolan* scrutiny, but denying cert on procedural grounds). Unlike many prior petitions that have sought a resolution of this decades-old question, this Petition squarely presents the question on a clean record, on undisputed material facts, and without any procedural ambiguities or concerns that would otherwise militate against review. As such, this Petition offers the Court the chance to finally put to rest perhaps the most vexing and disputed "takings" question in land-use law.

Through his Petition, Mr. Sheetz represents the many ordinary Americans across the country who at one point or another in their lives must seek permission from their government to use or develop their lands, but regularly face legislative demands that they dedicate to the public real or personal property as the condition of exercising their constitutional right to do so. As this Petition demonstrates, those Americans with properties in certain jurisdictions enjoy the full constitutional protections afforded by *Nollan* and *Dolan*; those with property in other jurisdictions, such as California, do not.

The Court should provide nationwide uniformity on this important federal question and grant this Petition.

STATEMENT OF THE CASE

A. *Nollan*/*Dolan* Scrutiny Protects Property Owners Against Unconstitutional Permit Exactions, But Many Lower Courts Have Reacted To Those Precedents By Carving Out Exceptions

The unconstitutional-conditions doctrine teaches that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983). That doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 604 (2013). *Nollan* and *Dolan*, decided by this Court in 1987 and 1994 respectively, "involve a special application" of the doctrine "that protects 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. Those decisions recognize that land-use permit applicants "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take," thereby creating a situation in which the government can "pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.* at 604-05 (citing *Dolan*, 512 U.S. at 385, and *Nollan*, 483 U.S. at 831).

Under *Nollan* and *Dolan*, the government may condition approval of a land-use permit on the owner's dedication of property to public use—including in the form of money to finance public projects—if the government can prove that an "essential nexus" and "rough proportionality" exist between the demanded property and the impacts of the owner's project. *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837. If the government fails to make the requisite showing, it risks committing an uncompensated taking of private property in violation of the Fifth Amendment. Or, as this Court has described it, the government engages in "an out-and-out plan of extortion." *Koontz*, 570 U.S. at 606 (quoting *Dolan*, 512 U.S. at 387).

Following this Court's decisions in *Nollan* and *Dolan*, some lower courts began carving out large exceptions to the circumstances under which *Nollan/Dolan* scrutiny applied, thereby depriving property owners of the robust protection against extortionate demands that the unconstitutional-conditions doctrine was intended to guarantee. For example, some courts declared that *Nollan/Dolan* scrutiny applied only to real-property exactions. *See, e.g.*, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2011) (holding that *Nollan* and *Dolan* applied only to "real property" exactions), *rev'd*, 570 U.S. 595; *Iowa Assur. Corp. v. City of Indianola*, 650 F.3d 1094, 1098-99 (8th Cir. 2011) (holding *Nollan/Dolan* scrutiny applied only to real-property exactions); *McClung v. City of Sumner*, 548 F.3d 1219, 1224, 1228 (9th Cir. 2008) (holding that *Nollan/Dolan* scrutiny does not apply to "monetary exactions," because "money is fungible"); *but see Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996) (holding

that "the combined test of *Nollan* and *Dolan* applies to the *monetary* exaction imposed by Culver City in this case").

In 2013, this Court resolved the lower-court conflict on that issue and clarified that, like real-property exactions, "'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*" as well. *Koontz*, 570 U.S. at 612. *Koontz* closed an important loop-hole. However, another significant loophole persists in some jurisdictions, such as California. Courts in those jurisdictions have held that generally applicable, legislative exactions are not subject to the nexus and rough proportionality requirements of *Nollan* and *Dolan*. With that powerful exemption in hand, governments have turned to cloaking their exactions in legislation—knowing that, in doing so, their exactions can escape *Nollan/Dolan* scrutiny. That's precisely what happened to Mr. Sheetz in this case. Other jurisdictions, such as North Carolina, Texas, Ohio, and some federal courts, have held the exact opposite, subjecting legislative exactions to *Nollan/Dolan* review.

Over the last several decades, many petitions have come before the Court on the question whether the unconstitutional-conditions doctrine, as applied in *Nollan* and *Dolan*, somehow exempts legislative exactions from rigorous scrutiny.[1] To date, the Court has declined to take up the issue.

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[1]Petitions in the last ten years that have sought review of the legislative/administrative loophole include: *616 Croft Ave., LLC v. City of W. Hollywood*, 3 Cal. App. 5th 621 (2016), *cert. denied*, 138 S. Ct. 377 (2017); *Cal. Bldg. Indus. Ass'n v. City of*

B. The County Imposes a Generally Applicable, Legislative Exaction Related to Traffic Improvements

The County has enacted a Traffic Impact Mitigation ("TIM") Fee Program to finance the construction of new roads and the widening of existing roads within its jurisdiction. App. A-2 to A-3. Under the TIM Fee Program, the County imposes a traffic-impact fee on any property owner who seeks a permit to build a project on his property. App. A-3. The fee is comprised of two components: the "Highway 50 Component" and the "Local Road Component." App. A-3; App. D-6 to D-18.

The applicable fee is based on the project site's geographic "zone" within the County (of which there are eight), as well as the type of construction proposed to be built (e.g., single-family residential, multi-family residential, office, etc.). App. A-3. This fee is imposed without regard to the nature or extent of a specific project's actual impacts on existing roads or on the need to construct new ones in the County. App. A-3. Thus, even if a specific project produces *de minimis* or even no impacts, the owner nevertheless must pay a substantial fee for the right to obtain a building permit. Significantly, the TIM Fee Program requires that all new development pay the full cost of constructing new roads and widening existing roads—

San Jose, 351 P.3d 974 (Cal. 2015), *cert. denied*, 577 U.S. 1179 (2016). Many other petitions on the same question were filed and denied prior to 2013. *See* Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 195 n.109 (2019) (listing fifteen petitions prior to the Court's 2013 decision in *Koontz*).

irrespective of the fact that existing residents of the County and nonresident motorists from outside the County use and benefit from new and widened roads. App. A-3. In February 2012, the Board passed a resolution imposing new TIM Fee rates, from which the fee applied to Mr. Sheetz was taken. App. A-3; App. D-1.

Mr. Sheetz owns land located in the County. App. A-3. In July 2016, he applied for a building permit from the County to construct a 1,854-square-foot manufactured house on his property for him and his family. App. A-3. The County issued a permit for the house on the condition that Mr. Sheetz first pay the County $23,420 in traffic-mitigation fees, ostensibly to mitigate for the project's purported impacts on state and local roads. App. A-3. The fee was based on the type of project (residential single-family) and the "zone" in which his property is located (Zone 6). App. A-3. He did not believe that construction of a modest manufactured house on his property caused public impacts justifying a fee of $23,420. App. A-3 to A-4. Nevertheless, Mr. Sheetz paid the fee under protest in order to obtain his permit. App. A-3.

The County did not consider whether Mr. Sheetz's project would have any appreciable effect on state or local roads. App. A-3. Indeed, the County made no individualized determination whatsoever about the relationship between the project's alleged impacts and the $23,420 exaction. App. A-3 to A-5. The County does not dispute the absence of such an individualized determination.

C. Mr. Sheetz Challenges the Exaction Under *Nollan* and *Dolan*, and the Trial Court Rules Against Him, Saying Legislative Exactions Are Exempt from *Nollan/Dolan* Review

In 2017, Mr. Sheetz filed this action against the County alleging a number of claims against the exaction and the TIM Fee Program pursuant to which it was imposed. App. A-4. This Petition concerns only his first claim for a writ of mandate under section 1094.5 of the California Code of Civil Procedure. Mr. Sheetz seeks a writ requiring the County to refund the fee he paid under protest, on the grounds (*inter alia*) that the permit exaction is an unconstitutional condition under *Nollan* and *Dolan*. App. A-5.

The County demurred to all claims, including the writ claim. App. A-5. The superior court sustained the County's demurrer, without leave to amend, as to all claims except the first cause of action (i.e., the writ petition). App. A-5. But, as to that writ petition, the court's demurrer ruling precluded argument that the exaction imposed on Mr. Sheetz violates the unconstitutional-conditions doctrine under *Nollan* and *Dolan*. App. A-5. Following the superior court's subsequent denial of the writ petition, Mr. Sheetz timely appealed the final judgment. App. A-6 to A-7.

D. The California Court of Appeal Upholds the Trial Court's Decision, and the California Supreme Court Denies Review

In a published decision, the California Court of Appeal affirmed. As to the unconstitutional-conditions claim at issue in this Petition, the court

held that *Nollan* and *Dolan* do not apply to legislative exactions.

The Court of Appeal observed that, "[u]nder California law, only certain development fees are subject to the heightened scrutiny of the *Nollan/Dolan* test." App. A-10. The Court explained that "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." App. A-10 to A-11 (quoting *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002) and citing *Ehrlich*, 911 P.2d at 444) (internal quotation marks omitted)). The Court concluded that the "requirements of *Nollan* and *Dolan*, however, 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." App. A-11 (citing *Cal. Bldg. Indus.*, 351 P.3d at 990 n.11).

Given that rationale, the Court of Appeal refused to scrutinize Mr. Sheetz's exaction under *Nollan* and *Dolan*. The court explained that "[t]he fee 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." 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." App. A-16. The court rejected Mr. Sheetz's unconstitutional-conditions challenge to the exaction.

Mr. Sheetz timely petitioned the California Supreme Court for review of the Court of Appeal's decision. The California Supreme Court denied the petition. App. C-1.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Deepens a Decades-Long Conflict Among State and Federal Courts Regarding *Nollan* and *Dolan*'s Applicability to Legislative Exactions

Lower courts across the country are deeply divided over whether legislatively imposed permit conditions are subject to *Nollan*/*Dolan* review. They "continue to struggle as they decide how and when" *Nollan and Dolan* "should apply." Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 488 (2006). As one scholar recently observed, the question of whether "legislatively-established" exactions are exempt from the unconstitutional-conditions doctrine as applied in *Nollan* and *Dolan* is "[o]ne of the most pressing questions across the entire realm of takings law." Mulvaney, *supra*, at 194.

A. The State Courts Are Divided

At the state level, jurisdictions that have joined California in exempting legislative exactions from *Nollan*/*Dolan* scrutiny include Arizona, Colorado, Maryland, Oregon, and Washington. *Douglass Props.*

II, LLC v. City of Olympia,479 P.3d 1200 (Wash. 2021) ("We hold that the *Nollan/Dolan* test does not apply to . . . legislatively prescribed generally applicable fees . . . ."); *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 353-54 (Md. 2017) (refusing to apply *Nollan/Dolan* scrutiny to "generally applicable," legislative exaction); *Homebuilders Ass'n of Metro. Portland v. Tualatin Hills Park & Rec. Dist.*, 62 P.3d 404, 409 (Or. 2003) (same); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001) (same); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997) (same).

By contrast, courts in Florida, Illinois, Ohio, North Carolina, and Texas have held that *Nollan/Dolan* scrutiny *does* apply to legislative exactions. *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 500 (N.C. 2022) ("[A]s a constitutional matter, we believe that a decision to limit the applicability of the test set out in *Nollan* and *Dolan* to administratively determined land-use exactions would undermine the purpose and function of the 'unconstitutional conditions' doctrine."); *Highlands-In-The-Woods, L.L.C. v. Polk Cnty.*, 217 So. 3d 1175, 1178-79 (Fla. Dist. Ct. App. 2017) (applying *Nollan/Dolan* to permit condition requiring improvements and dedication of land derived, in part, from legislation); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 643 (Tex. 2004) (applying *Nollan/Dolan* to permit condition requiring developer to improve abutting street, where condition was mandated by ordinance); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (applying a "dual rational nexus test" based on *Nollan/Dolan* in

"evaluating the constitutionality of an impact fee ordinance when a Takings Clause challenge is raised" and holding—as in *Nollan/Dolan*—that the burden is on the *government* to establish the requisite nexus); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. Dist. Ct. App. 1995) (concluding, in applying *Nollan/Dolan* to a legislative exaction requiring dedication of real property as mandated by ordinance, that "a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property").

In the 2022 decision of *Anderson Creek*, the North Carolina Supreme Court extensively surveyed the lower-court conflict over *Nollan* and *Dolan*'s applicability to legislative exactions, including through the lens of *Koontz*. The court concluded: "[A]fter carefully reviewing the relevant decisions, we agree . . . that nothing in *Nollan*, *Dolan*, or *Koontz* supports a view that those decisions only apply in the context of 'administrative' decisions, with the Supreme Court having consistently described the 'unconstitutional conditions' doctrine as 'preventing the *government* from coercing people into giving up' a constitutional right rather than preventing a particular branch of government from acting in a particular manner." *Anderson Creek*, 876 S.E.2d at 499-500 (quoting *Koontz*, 570 U.S. at 604).

The conflict among state courts can be explained partly by the extent to which the opposing jurisdictions trust legislative bodies to resist imposing extortionate demands on property owners who need permits. For example, the California Supreme Court

has speculated—without any evidence—that property owners are adequately protected against extortionate legislative exactions because, "[w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process." *San Remo*, 41 P.3d at 105. In that court's view, "[a] city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election," whereas "[a]d hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls." *Id.*

The Texas Supreme Court has taken a more skeptical view of the ability of legislative bodies to protect the constitutional right of property owners against uncompensated takings. As that court explained in rejecting the legislative/administrative distinction:

> While we recognize that an *ad hoc* decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.

Town of Flower Mound, 135 S.W.3d at 641.

After considering the competing views of the California and Texas Supreme Courts, the North Carolina Supreme Court found the latter's reasoning more persuasive. That court observed that a local government's "incentive [is] to increase the impact fees that it charged because it could generate significant amounts of revenue from a possibly unpopular group"—e.g., the residential or commercial developer. *Anderson Creek*, 876 S.E.2d at 502 (internal citation and quotation marks omitted). Indeed, when faced with the choice between (1) making individual property owners fund public projects as the condition of permit approval, and (2) raising taxes on their entire constituency to fund those projects, members of legislative bodies—with an eye to reelection—have a political incentive to deploy targeted permit exactions over community-wide tax hikes.

Perhaps that is why at least two members of this Court have cast doubts about the purported ability of legislative bodies to resist imposing—through legislation—extortionate conditions on property owners who need permits. In *Parking Ass'n v. City of Atlanta*, 515 U.S. 1116 (1995), this Court denied review in a case raising the question whether legislative exactions are subject to *Nollan/Dolan* scrutiny. Justice Thomas, joined by Justice O'Connor, dissented from the denial, observing—even as early as 1995—that "[t]he lower courts are in conflict over whether [*Nollan/Dolan*'s] test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature." *Id.* at1117. The dissenting Justices saw little reason for the conflict:

> It is hardly surprising that some courts have applied [*Dolan's*] rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18.

Scholars and other commentators have been similarly skeptical of the notion that the legislative process is inherently more protective of property owners than *ad hoc* decision-making. As one commentator has noted, "[t]oday's democratic legislative process is entirely conducive to forcing a landowning minority to shoulder an unfair portion of [] general public burdens, in accordance with the will of a non-landowning majority." J. David Breemer, *The Evolution of the 'Essential Nexus': How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373, 404-05 (2002). Indeed, "legislative land use decisions made at the local level may reflect classic majoritarian oppression, with "developers, whose interests judicial rules like [*Nollan* and] *Dolan* aim to

protect, are precisely the kind of minority whose interests might actually be ignored" by the legislative body. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 271 (2000).

B. The Federal Courts Are Divided

A conflict exists among federal courts, too. The Tenth Circuit has held that *Nollan/Dolan* scrutiny does not apply where the challenged requirement "appl[ies] to *all* property owners, not just Plaintiffs"—i.e., where it is generally applicable. *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1209 (10th Cir. 2009). Recently, the Sixth Circuit left unresolved the "interesting question" of whether *Nollan* and *Dolan* apply to legislative actions. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 206 (6th Cir. 2021). But a federal district court within that circuit—the Middle District of Tennessee—concluded that legislative exactions do *not* trigger *Nollan*/*Dolan* review. *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, 572 F. Supp. 3d 428, 442 (M.D. Tenn. 2021). Similarly, in *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994), the federal district court for Kansas held that *Dolan* does not apply to "legislative rather than adjudicative" decisions.

Other federal courts have reached the opposite conclusion, especially since this Court's decision in *Koontz*. A recent example comes from the Ninth Circuit. In *Ballinger v. City of Oakland*, 24 F.4th 1287, 1296 (9th Cir. 2022), *cert. denied*, 142 S. Ct. 2777 (2022), plaintiff brought a *Nollan/Dolan* challenge to legislative impact fees deriving from city ordinances. The city argued *Nollan* and *Dolan* did not

apply, because the fees were uniformly calculated based on a framework specified in ordinances rather than discretionary decisions applied to individual property owners.

In light of recent precedents of this Court—including *Koontz*—the Ninth Circuit rejected the city's argument. In so doing, it reversed one of its earlier decisions on the issue—*McClung*, 548 F.3d at 1227—that had established the rule in the Ninth Circuit that *Nollan/Dolan* applied only to administrative exactions. Guided by a 2021 decision of this Court, the *Ballinger* court explained that the "[t]he essential question is not . . . whether the government action at issue comes garbed as regulation (or statute, or ordinance, or miscellaneous decree)," so that "*any* government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim [under *Nollan/Dolan*]." *Ballinger*, 24 F.4th at 1299 (emphasis added) (quoting in part *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021) (internal quotation marks omitted)); *see also Beck v. City of Whitefish*, 2023 U.S. Dist. LEXIS 14458, 2023 WL 1068239 (D. Mont. 2023) (confirming that *Ballinger* rejects the legislative/administrative distinction for the Ninth Circuit).

Other federal courts have similarly held that *Nollan/Dolan* applies to legislative exactions. *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1083 (N.D. Cal. 2014) (applying *Nollan/Dolan* scrutiny to city ordinance imposing exaction in light of *Koontz*); *Heritage at Pompano Hous. Partners, L.P. v. City of Pompano Beach*, 2021 U.S. Dist. LEXIS

239647, 2021 WL 8875658 (S.D. Fla. Dec. 15, 2021) ("Based on the reasoning in *Koontz*, and the cases finding that *Nollan/Dolan* applies to general legislation, the Court finds that *Nollan/Dolan* applies here" to a generally applicable, legislative exaction).

II. The Lower Court's Decision Is in Strong Tension with This Court's More Recent Takings Precedents

A. The Decision Below Is in Tension with *Koontz*

As *Ballinger* and other recent lower-court decisions conclude, this Court's 2013 decision in *Koontz* leaves little room for doubt that *Nollan* and *Dolan* apply to all permit exactions—whether legislative or administrative. *Koontz* holds that *Nollan* and *Dolan* "provide important protection against the misuse of the power of land-use *regulation*." *Koontz*, 570 U.S. at 599 (emphasis added). That means *all* regulation, not just *ad hoc* decision-making.

Indeed, the *Koontz* Court had a capacious view of the kind of government action required to trigger a taking when it referred to "the misuse of the power of land-use regulation"—namely, "the government . . . pressur[ing] an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.* at 605. *Koontz* paints with an extraordinarily broad brush—referring to "the government" generally and its tendency to make "[e]xtortionate demands" of property owners in the permit process, not only to a building official or planning commission who may

impose *ad hoc* conditions. *Id.* at 619. *Koontz* states the rule as follows: "*a unit of government* may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Id.* at 599 (emphasis added). It strains credulity to argue that a legislative body passing a statute or ordinance authorizing a permit exaction is *not* a "unit of government" covered by *Nollan* and *Dolan*.

Moreover, *Koontz*'s discussion of the underpinnings of the unconstitutional-conditions doctrine supports the conclusion that the *Nollan/Dolan* standard applies to all permit exactions, including legislative ones. The decision draws from the doctrine's application in other areas of constitutional law to underscore its purpose and scope. *Id.* at 604. Many of the cases *Koontz* cites involved legislatively imposed and generally applicable burdens on constitutional rights. *Id.* (citing *Regan*, 461 U.S. at 545 (challenge to an internal revenue statute as imposing an unconstitutional condition on First Amendment rights), *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 51 (2003) (challenge to the Solomon Amendment, a legislative act, as imposing an unconstitutional condition on First Amendment rights), *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (challenge to a generally applicable executive order as imposing an unconstitutional condition on First Amendment rights), and *Memorial Hospital v. Maricopa Cty.*, 415 U.S. 250, 251 (1974) (challenge to state statute as imposing unconstitutional condition

on Equal Protection rights)). As *Koontz*'s reliance on those precedents shows, the unconstitutional-conditions doctrine is concerned with *any* government action that burdens a constitutional right regardless of which government actor imposes the burden.

In fact, contrary to conventional wisdom, *Nollan* and *Dolan* themselves involved legislative exactions. They did not involve administrative or *ad hoc* decision-making. Even so, this Court easily applied the unconstitutional-conditions doctrine to strike down the exactions in those cases without reference to the legislative/administrative distinction.

In *Nollan*, the Court invalidated the requirement of a state agency, the California Coastal Commission, that property owners dedicate a public-access easement across their property in exchange for a building permit. *Nollan*, 483 U.S. at 841-42. The exaction was imposed pursuant to a legislative enactment—specifically, section 30212 of the California Public Resources Code. *Id.* at 855 (Brennan, J., dissenting) (referring to section 30212 as providing a "statutory directive" to the Coastal Commission to "provide for public access along the coast in new development projects"). Section 30212 requires the Commission to exact public-access easements from all property owners proposing new developments along the coast; indeed, until *Nollan*, the Commission had dutifully imposed that legislatively required and generally applicable exaction on over 40 similarly situated property owners. *Nollan v. Cal. Coastal Comm'n*, 177 Cal. App. 3d 719, 724 (1986) ("Public Resources Code section 30212 requires public access to be provided in new

development projects except, among other things, where adequate access exists nearby."), *rev'd*, 483 U.S. 825; *see also Nollan*, 483 U.S. at 859 (Brennan, J., dissenting) (observing that a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract").

Similarly, in *Dolan*, the City of Tigard, Oregon, acted under a legislatively enacted and generally applicable ordinance designed to address transportation congestion when it conditioned a property owner's building permit on dedication of some of her land in the 100-year floodplain, along with an additional area adjacent to the floodplain for a pedestrian/bicycle path. *Dolan*, 512 U.S. at 379. As the Supreme Court explained, "[t]he City Planning Commission . . . granted petitioner's permit application subject to conditions *imposed by the city's CDC* [i.e., its Community Development Code]." *Id.* (emphasis added). There can be no dispute that it was the legislatively enacted "Community Development Code standards"—not an *ad hoc* decision—that "requir[ed] among other things dedication of area of the subject parcel that is within the 100-year floodplain . . . and dedication of additional area adjacent to the 100-year floodplain for a pedestrian/bicycle path." *Dolan v. City of Tigard*, 854 P.2d 437, 439 n.4 (Or. 1993), *rev'd*, 512 U.S. 374. Thus, in both *Nollan* and *Dolan*, the Court applied the unconstitutional-conditions doctrine to legislatively mandated and generally applicable exactions.

To prop up the legislative/administrative distinction, the County may point to language in *Dolan* contrasting "legislative determinations classifying entire areas of the city" and "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." *Dolan*, 512 U.S. at 385. But legislation classifying areas of a city into residential, commercial, industrial, and other zones are nothing like legislation authorizing permit exactions. As for an "adjudicative decision to condition" a permit, such a decision may be made either *ad hoc*—in the absence of specific legislative authority—or pursuant to generally applicable legislation. In both cases, the exaction is imposed in a quasi-*adjudicative* process that begins with the submission of a permit application and ends with the government's quasi-judicial determination as to whether the application complies with land-use requirements. That is precisely the context in which *Nollan* and *Dolan* arose. *Nollan*, 483 U.S. at 833 n.2; *id.* at 859 (Brennan, J., dissenting); *Dolan*, 512 U.S. at 379. The above-quoted language from *Dolan* clarifies only that the unconstitutional-conditions doctrine does not apply to legislation classifying areas of a jurisdiction—i.e., general zoning laws. Mr. Sheetz does not challenge a zoning law or anything like it.

That this Court's decisions in *Nollan* and *Dolan* did not turn on the legislative/administrative distinction is unsurprising. After all, from a property owner's perspective, that distinction is utterly irrelevant. It matters little whether legislation or an *ad hoc* decree requires him to bargain away his rights in exchange for a permit; the exaction results in the same injury. The irrelevance of the

legislative/administrative distinction also flows from *Nollan*'s roots in the unconstitutional-conditions doctrine. The doctrine itself "does not distinguish, in theory or in practice, between conditions imposed by different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENVTL. L.J. 397, 400 (2009). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise of government power and not the specific source of that power." *Id.* at 438. Besides there being no doctrinal justification for the legislative/administrative distinction, it is often difficult to distinguish one from the other anyway. Haskins, *supra*, at 514.

In sum, *Koontz* affirms what the facts in *Nollan* and *Dolan* bear out: all exactions in the land-use permitting context, whether or not garbed in legislation, are subject to scrutiny under the unconstitutional-conditions doctrine.

B. The Decision Below Is in Tension with This Court's Decisions in *Cedar Point* and *Pakdel*

While not a land-use exactions case, this Court's decision in *Cedar Point*, 141 S. Ct. 2063, underscores the irrelevance to a takings analysis of which government actor performs the taking or by which specific means the taking occurs. *Cedar Point* involved a takings challenge to a state regulation granting labor organizations a "right to take access"

to an agricultural employer's property to solicit support for unionization. *Id.* at 2069. The State argued that government action arising from *regulation*—versus, say, an administrative decision—cannot constitute a taking. *Id.* at 2072. The Court disagreed:

> Government action that physically appropriates property is no less a physical taking because it arises from a regulation. That explains why we held that an administrative reserve requirement compelling raisin growers to physically set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking. *The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree).* It is whether the government has physically taken property for itself or someone else—*by whatever means* . . . .

Id. (emphasis added)).

Consistent with *Cedar Point,* the Court seemed to suggest in *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226 (2021), that a legislative exaction could be challenged under *Nollan/Dolan*. In *Pakdel*, a couple had a tenancy-in-common with other owners in a multiunit residential building in San Francisco. *Id.* at 2228. Under the tenancy-in-common, owners have the right to possess and use the entire property, but in practice contract among themselves to divide the

property into individual residences. *Id.* Tenants-in-common often convert their interests into "modern condominium-style arrangements" so that each owner owns his or her own residence. *Id.*

San Francisco allows such conversions upon payment of a filing fee and agreement to certain conditions. *Id.* One of the conditions is that *nonoccupant* owners who rent out their residences must offer their tenants a lifetime lease. *Id.* The couple were nonoccupant owners of their unit, so when they applied to the city for a conversion, they agreed to offer their tenant a lifetime lease. *Id.* However, a few months later, they changed their mind, asking the city to either excuse them from the lifetime lease or compensate them for it. *Id.* The City refused. *Id.*

The couple sued San Francisco in federal court, challenging the lifetime-lease law as a taking under a number of alternative theories, including that the requirement was an unconstitutional condition in violation of *Nollan* and *Dolan*. *Id.* & n.1. The district court, then the Ninth Circuit, dismissed the couple's taking claim as unripe. *Id.* However, the Ninth Circuit also concluded that they had failed to state a claim that the lifetime-lease requirement resulted in an unconstitutional condition. *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1162 n.4 (9th Cir. 2020), *rev'd*, 141 S. Ct. 2226.

With respect to that claim, the Ninth Circuit relied on the legislative/administrative distinction: "The Lifetime Lease Requirement is not an exaction under *Nollan* . . ., and *Dolan* . . ., because it is a general requirement imposed through legislation, rather than an individualized requirement to grant property

rights to the public imposed as a condition for approving a specific property development." *Pakdel* 952 F.3d at 1162 n.4. For the proposition that *Nollan* and *Dolan* did not apply to legislative exactions, the Ninth Circuit relied on one of its earlier precedents—*McClung*, 548 F.3d 1219.

This Court granted review, vacated the Ninth Circuit's decision, and remanded the case. It held that the couple's takings claim was ripe. Significantly, the Court also instructed the Ninth Circuit to reconsider its rejection of the couple's claims—including the *Nollan/Dolan* claim—in light of *Cedar Point*:

> The Ninth Circuit rejected several of petitioners' alternative theories on the merits. *See, e.g.*, 952 F. 3d 1157, 1162, n. 4 (2020) (considering whether "the Lifetime Lease Requirement effects an *exaction*, a physical taking, [or] a private taking"). On remand, the Ninth Circuit may give further consideration to these claims in light of our recent decision in *Cedar Point* . . . .

Pakdel, 141 S. Ct. at 2229 n.1 (emphasis added).

The Ninth Circuit subsequently vacated its decision and remanded the matter to the federal district court for the Northern District of California. The district court proceeded to apply *Nollan* and *Dolan* to the legislative lifetime-lease requirement. *Pakdel v. City & Cty. Of San Francisco*, 2022 U.S. Dist. LEXIS 194257 at *23, 2022 WL 14813709 (N.D. Cal. Oct. 25, 2022). Thus, as California state courts have doubled down on exempting legislative exactions

from *Nollan/Dolan* scrutiny, the Ninth Circuit—including California's federal district courts—has reversed course and concluded that the unconstitutional-conditions doctrine applies equally to all permit exactions.

CONCLUSION

The question presented by this Petition strikes at the heart of a fundamental right enshrined in the Takings Clause: the right to be free from arbitrary property confiscations in the land-use permit process. The issue touches every American who seeks to build a home, business, or other project on his or her land. But unfortunately, there is inconsistent recognition and enforcement of that right across the Nation. As long as the lower-court conflict remains unresolved, Americans in some jurisdictions—like Mr. Sheetz, in California—will continue to have substantially *less* federal constitutional protection against extortionate permit exactions than those in other jurisdictions. The constitutional right against uncompensated takings in the land-use permit process should not turn on one's geography. The Court should grant this Petition.

DATED: May 2023

Respectfully submitted,

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