

No. 22-1074

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IN THE  
**Supreme Court of the United States**

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GEORGE SHEETZ,

*Petitioner,*

*v.*

COUNTY OF EL DORADO, CALIFORNIA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

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**BRIEF OF *AMICI CURIAE* CHARLES GARDNER  
AND EMILY HAMILTON, PH.D. IN SUPPORT  
OF PETITIONER**

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**QUESTION PRESENTED**

Is a permit exaction exempt from the unconstitutional conditions doctrine, as applied 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), simply because it is authorized by legislation?

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## INTEREST OF THE AMICI CURIAE<sup>1</sup>

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The Mercatus Center, as an organization, takes no position on the arguments in this brief or issues in the case.

Petitioner's case is important to *amici* because it involves government authority to use the land-use permitting process to extract exactions from landowners. These exactions have important implications for the supply of new housing and housing affordability.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The so-called “legislative exception” to exactions, which some courts have carved out from the essential nexus and rough proportionality requirements in

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1. No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from amici curiae, the Mercatus Center and their counsel, made any monetary contribution intended to fund the preparation of this brief.

*Nollan/Dolan*, is premised on politics being a cure-all for constitutional infirmities. Not only is this wrong as a matter of law, it is wrong as a matter of political theory and economics. Shifting costs which rightfully should be borne by all citizens onto newcomers is a predictable result of local political realities, not an unintended or undesired outcome that the electoral process will remedy. To the extent cost-shifting enabled by the “legislative exception” imposes special burdens on housing development, it also worsens a longstanding housing affordability crisis in California and other states that recognize the “legislative exception.”

The core principle of *Nollan/Dolan* is that governments may not use the land use permitting process to take private property for which the Constitution requires payment. In *Koontz v. St. Johns River Water Mngmt. Dist.*, 570 U.S. 595 (2013), the Court confirmed that *Nollan/Dolan* principles apply to monetary demands made of land use applicants. *Id.* at 604-05. This Court has not prohibited all impact fees, but only those which lack an “essential nexus” and “rough proportionality” to the expected impacts of the project for which a permit is sought. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391.

These decisions draw no distinction between exactions made by elected legislatures or appointed boards, or exactions made through laws of general applicability or project-by-project review. *See Nollan*, 483 U.S. at 836 (making an analogy to a hypothetical state law as an example of unconstitutional monetary exactions). Instead, this Court has made clear that “[t]he Takings Clause is designed 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.” *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012) (emphasis added).

As the costs of public infrastructure have increased, the protections against takings guaranteed by the Fifth and Fourteenth Amendments have only grown in importance. In some cases, impact fees pave the way for needed housing supply by ensuring that new development pays for its own new government services. However, local policymakers may also find it politically expedient to use the permitting process as a vehicle to reallocate growing tax burdens. This is both unconstitutional and creates the risk for impact fees that are set so high as to dissuade development altogether, tightening housing supply and exacerbating unaffordability.<sup>2</sup> By holding that exactions, including legislative exactions, must meet nexus and proportionality requirements, this Court’s jurisprudence can facilitate new housing construction—or at least prevent disproportionate legislative exactions that discourage residential development.

Accordingly, this Court should reject the purported “legislative exception” to the exactions doctrine.

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2. See Alan A. Altshuler & Jose A. Gomez-Ibanez, *Regulation for Revenue* 19-20, 35-39 (1994).

## ARGUMENT

### I. The Takings Clause Applies to All Government Action.

This Court has never held that the level, branch, or instrumentality of state power is determinative of whether a particular government action constitutes a taking. Rather, a takings claim “is concerned simply with the act, and not with the governmental actor.” *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 560 U.S. 702, 713–14 (2010) (plurality opinion of Scalia, J.). See also *Arkansas Game & Fish*, 568 U.S. at 31 (stating that the takings clause applies to “government” action); *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116 (1995), (Thomas, J. and O’Connor, J., dissenting) (stating that “[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking”); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) citing *Virginia v. Rives*, 100 U.S. 313, 318 (1880) (“[A] State may act through different agencies, either by its legislative, its executive, or its judicial authorities... and the prohibitions of the [Fourteenth A]mendment extend to all action of the State...”).

The Constitution, and this Court’s jurisprudence, do not support creating a legislature-sized loophole in the Takings Clause. Tellingly, the courts that have endorsed a legislative exception do not ground the exception in the Constitution or the leading cases from this Court. See, e.g., *San Remo Hotel L.P. v. City and Cnty. of San Francisco*, 27 Cal. 4th 643, 670 (2002) (finding a legislative exception to *Nollan/Dolan* based only upon the California Supreme

Court's own interpretation of *Nollan* in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868-887 (1996)). Moreover, the decision in *San Remo* was issued more than a decade prior to this Court's decision in *Koontz*, and the uncertainty at that time as to whether monetary exactions were subject to the same takings analysis as physical intrusions influenced the *San Remo* court's reasoning. *San Remo*, 27 Cal. 4th at 671.

Governmental bodies considering land use applications can be variously elected or appointed, according to what is permitted under state law, and those appointed bodies typically act pursuant to a legislative grant of authority. See *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) (noting that, in *Dolan*, the conditions imposed on the property were pursuant to a city development code which had been adopted based on state law). The existence of hybridized exercises of governmental land use power—where state and local law intersect, elected and appointed bodies interact, and the exercise of discretion is authorized by statute—makes it difficult to separate governmental action into distinct categories.

## **II. The Electoral Process Is Not an Antidote for the Misuse of Exactions.**

The contention that the political process provides an adequate safeguard against confiscatory exactions rests on speculation and misapprehensions about the motivations of local government actors. For instance, California's Supreme Court wrote, without citation, that "[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 political controls.” *San Remo*, 27 Cal. 4th at 670. The *San Remo* assumption is wrong. First, *San Remo* assumed that standardized impact fees—which are set at disproportionately high levels—would affect a pool of residents large enough to spur them to political action. Second, *San Remo* assumed that individual examples of ad hoc exactions, even if extortionate, would engender less controversy and be less likely to result in blowback from state or local policymakers. The *San Remo* assumptions are unsupported and, indeed, contrary to fact.

New residential building permits in California for 2022 totaled only 119,700,<sup>3</sup> in a state with approximately 15 million housing units and 22 million registered voters as of 2023.<sup>4</sup> That is one new permit for every 183 voters. About 50 percent of permitted residential units are in apartment buildings.<sup>5</sup> Additionally, of the units sold in 2022 in California, over 24,000 were constructed by one of just ten homebuilders.<sup>6</sup> Accordingly, the number

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3. State of California Department of Finance, *Construction Permits, Annual Data from 1960* (November 13, 2023) <https://dof.ca.gov/forecasting/economics/economic-indicators/construction-permits/>.

4. California Secretary of State, *Report of Registration – February 10, 2023* (November 13, 2023) <https://www.sos.ca.gov/elections/report-registration/ror-odd-year-2023>.

5. State of California Department of Finance, *Construction Permits, Annual Data from 1975* (November 13, 2023) <https://dof.ca.gov/forecasting/economics/economic-indicators/construction-permits/>.

6. Professional Builder, *Special Report: Housing Giants 2023 Pacific Region* (November 16, 2023) <https://www.probuilder.com/2023-housing-giants-pacific-region>.



of individual California voters who have actually been charged an impact fee of any kind in connection with residential development—as Mr. Sheetz has—may be small, undermining the claim that excessive fees imposed by a legislature would “face widespread and well-financed opposition at the next election” due to more voters being affected. *San Remo*, 27 Cal. 4th at 670.

The public discourse surrounding development also lends credence to the view that standardized, legislative exactions can function as means of revenue generation aimed at “a possibly unpopular group—residential developers[.]”<sup>7</sup> *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 497, *reh’g denied*, 878 S.E.2d 145 (N.C. 2022) (considering and rejecting the reasoning of *San Remo* regarding remedies for legislative overreach). The potential for laws to be crafted in such a way as to apply only to a small subset of properties or property owners and thus avoid broad political opposition—such as by exempting projects according to number of units or acreage—has been recognized by legal commentators too. See James L. Huffman, *Dolan v. City of Tigard: Another Step in the Right Direction*, 25 ENV’T. L. 143, 147 (1995) (noting how the responsiveness of the democratic process can be impaired where governments are not

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7. For example, see statements from California elected officials over the years referring to home builders as “predatory” or “greedy.” See Tess Sheets, *Orange leaders pause some housing construction while they figure out balance with neighbors*, THE ORANGE COUNTY REGISTER, April 6, 2021; John Schwada, *Council Gives Up Fight to Block Warner Ridge*, THE LOS ANGELES TIMES, Jan. 30, 1992 (involving a California Superior Court case in which a developer won exemption from approximately \$25 million in impact fees which the City of Los Angeles had attempted to impose).

restricted from “taking advantage of minorities, including individuals who happen to own property peculiarly affected by government regulation . . . .”); *and see* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 262 (2006) (“Without having to face the opposition of future residents who do not currently live or vote in the locality . . . impact fees [are] an irresistible policy option.”).

Opposition to developers as a group may also reflect opposition to the arrival of new residents into a community. Prospective new residents, who reside in other localities or states, are not participants in the democratic process that leads to legislative exactions on new housing development.<sup>8</sup> As the Supreme Court of Texas has noted, in such cases a majority “would not only tolerate but applaud” the exactions, and the voting booth would offer no realistic remedy to the affected parties. *Town of Flower Mound*, 135 S.W.3d at 641.

To the extent homeowners maintain a large share of their wealth in their houses, they may be risk-averse about developments with even a small probability of reducing their home equity.<sup>9</sup> In an environment of growing demand for housing, restrictions on new housing supply often increase home values. Homeowners’ desire to protect and increase their property values may manifest through

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8. David Foster & Joseph Warren, *The Nimby Problem*, 34 J. THEORETICAL POLITICS 145 (2021).

9. William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (2005).

onerous or even prohibitive impact fees for residential building permits, particularly in cases where legislative exactions are not held to nexus and proportionality limits. Homeowners' risk aversion may be an important factor supporting the status quo in land use regulations, even as these policies cause widespread affordability problems and reduce opportunities for economic mobility.<sup>10</sup>

Further, it is doubtful that administrative exactions are "more likely to escape" democratic scrutiny than legislative exactions. Indeed, the opposite may be true: perceived instances of ad hoc overreach by local officials may provide political narratives more compelling to the wider public than the slowly rising tide of fees imposed by city ordinance. For example, in Wisconsin, the failure of a plan for a residential high-rise in the City of Wauwatosa in February 2023 was blamed on administrative delays and litigation.<sup>11</sup> That highly-publicized failure was followed in June 2023 with state legislation to streamline the process.<sup>12</sup>

Finally, research on local electoral politics shows that, in the realm of land use, local public policy often creates socially undesirable outcomes that go unresolved

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10. Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence Declined in the U.S.?* 120 *Journal of Urban Economics*, 76-90 (2017).

11. Tom Daykin & Quinn Clark, *Tosa tower is dead, and a car wash could be coming instead. Developer says delays played a role*, *Milwaukee Journal Sentinel*, February 20, 2023.

12. Wis. Act 16 (2023).

without state or judicial guardrails.<sup>13</sup> The superficial analysis provided by some courts fails to demonstrate that legislative exactions are subject to greater scrutiny in the political process than administrative exactions. *See San Remo*, 27 Cal.4th at 697 (Brown, J., dissenting) (“The majority’s exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked.”); *cf. Town of Flower Mound*, 135 S.W.3d at 641 (Supreme Court of Texas was unpersuaded “that a workable distinction can always be drawn between actions denominated adjudicative and legislative”). A legislative approach to exactions does not resolve issues of political accountability surrounding development fees any more than it cures constitutional violations.

### **III. The Misuse of Exactions Adversely Affects Housing Affordability.**

The shortage of lower cost housing in urban areas is particularly acute in California. Among the United States’ 100 largest cities, the state is home to eight of the ten most expensive.<sup>14</sup> In the context of housing affordability, however, impact fees can be a double-edged sword. On the one hand, such fees may facilitate political tolerance for new housing supply by ensuring that new development is not a net fiscal cost for the public. On the other hand, extortive impact fees—fees that unduly raise the price of

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13. David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127:1 Yale Law Journal, 78 (2017).

14. Zillow Research, Housing Data (database), *ZHVI All Homes Time Series (\$)*, (November 11, 2023), <https://www.zillow.com/research/data/>.

construction, untethered to the project’s actual impacts on public services—can exacerbate housing unaffordability. This Court’s decisions establishing constitutional guardrails on exactions support proportional impact fees that promote housing construction and affordability. Lower court decisions that excuse legislative exactions from these guardrails increase the potential for fees that reduce new housing construction and drive up housing costs.

### **The Political Economy of Impact Fees**

Besides their direct economic effects, impact fees play an important role in shaping attitudes toward policies that restrict housing construction. Support for restrictive growth management policies may be driven in part by a public finance system in which new housing construction does not cover its marginal costs. Accordingly, if the property tax revenues gained from new development are less than the public expenditures the development generates, incumbent residents may oppose development out of financial self-interest.

When impact fees mitigate the costs of new development for existing residents, they can reduce demand for other types of growth controls. In their research on impact fees in Florida, Millsap *et al.* explain that “[i]mpact fees may serve as a bulwark against more exclusionary land-use policies like minimum lot sizes, environmental regulations, parking requirements, and height limits.”<sup>15</sup> But these fees can also discourage new housing construction when they exceed proportionality requirements.

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15. Adam Millsap, Samuel Staley, & Vittorio Nastasi, *Assessing the Effects of Local Impact Fees and Land-use Regulations on Workforce Housing in Florida*, James Madison Institute (2019).

### Empirical Research on Impact Fees

While developers or homebuilders pay impact fees directly, such fees can have indirect effects on land prices, housing prices, and new construction. Because housing prices are determined by the market, impact fees can affect the price of both new and existing homes.<sup>16</sup> Research suggests that proportional impact fees have the potential to support housing construction.<sup>17</sup> By contrast, disproportionately high impact fees can limit new supply and increase housing costs. Judicial scrutiny to ensure that policymakers adhere to nexus and rough proportionality standards therefore increases the likelihood that impact fees are not abused by local government in a manner that hinders needed housing.

Most studies of impact fees find that they are associated with an increase in the price of new and/or existing housing, at least in some circumstances.<sup>18</sup>

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16. Vicki Been, *Impact Fees and Housing Affordability*, 8:1 Cityscape, 139-85 (2005).

17. *The Effects of Impact Fees on Multifamily Housing Construction*, *supra*.

18. These studies include Charles J. Delaney & Marc T. Smith, *Impact Fees and the Price of New Housing: An Empirical Study*, 17:1 AREUAE Journal, 41-54 (1989); Charles J. Delaney & Marc T. Smith, *Pricing Implications of Development Exactions on Existing Housing Stock*, 20 Growth and Change, 1-12 (1989); Larry D. Singell & Jane H. Lillydahl, *Housing Impact Fees*, 66:1 Land Economics, 82-92 (1990); ; Marla Dresch & Steven M. Sheffrin, *Who Pays for Development Fees and Exactions?* 9 Public Policy Institute of California (June 1997); Brett M. Baden & Don L. Coursey, *An Examination of the Effects of Impact Fees on Chicago's Suburbs*, (Working paper) 99:20 Harris School of Public Policy Studies,

Impact fees can result in higher house prices when the infrastructure that they fund adds value for homebuyers,<sup>19</sup> or when homebuyers anticipate that upfront impact fees will reduce future property tax rates (resulting in the capitalization of lower property tax rates into home values),<sup>20</sup> or both.

Several studies of the effects of impact fees on housing construction have focused on Florida, a state with strong judicial protections against abuse of impact fees. Those studies found that higher impact fees were associated with increased construction in suburban Florida.<sup>21</sup> The context

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University of Chicago (1999); Shishir Mathur, Paul Waddell, & Hilda Blanco, *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41:7 *Urban Studies*, 1303-1312 (2004); Gregory Burge & Keith Ihlanfeldt, *Impact fees and single-family home construction*, 60:2 *Journal of Urban Economics*, 284-306 (2006); Keith R. Ihlanfeldt & Timothy M. Shaughnessy, *An Empirical Investigation of the Effects of Impact Fees on Housing and Land Markets*, 34:6 *Regional Science and Urban Economics*, 639- 661 (2004); Shishir Mathur, *Do Impact Fees Raise the Price of Existing Housing?* 18:4 *Housing Policy Debate*, 635-659 (2007).

19. Studies that find that impact fees increase the value of vacant land provide support for this being the case. These include Arthur C. Nelson *et al.*, *Price Effects of Road and Other Impact Fees on Urban Land*, *Transportation Research Record* (1991); and Andrejs Skaburskis & Mohammad Qadeer, *An Empirical Estimation of the Price Effects of Development Impact Fees*, 29 *Urban Studies*, 653–667 (1992).

20. See the discussion of market conditions and impact fees in Been, *Impact Fees and Housing Affordability*, *supra*.

21. Burge & Ihlanfeldt, *Impact Fees and Single-family Home Construction* and *The Effects of Impact Fees on Multifamily Housing Construction*, *supra*. The authors do not identify an effect on housing construction in center cities or rural areas.

for the Florida studies is important, however. Crucially, Florida jurisprudence requires local impact fees to pass a “dual rational nexus test,” demonstrating a nexus between (1) population growth and the need for new infrastructure, and (2) a particular benefit of this new infrastructure to users of the new construction on which the fees are levied. *St. Johns Cnty. v. Ne. Fla. Builders Ass’n, Inc.*, 583 So. 2d 635, 637 (Fla. 1991), *citing Hollywood, Inc. v. Broward Cnty.*, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983).<sup>22</sup> Under this stringent test, Florida’s population has grown more than twice as fast as the country as a whole, reflecting Floridians’ openness to housing construction relative to their counterparts in places with less elastic housing supply.<sup>23</sup>

The second prong of Florida’s test goes further than *Dolan’s* standard for proportionality by requiring a specific nexus between the government services that impact fees will fund and the needs of new construction.<sup>24</sup> In contrast, California falls short of the *Nollan* and *Dolan* standards by exempting legislative exactions from all nexus and proportionality requirements.

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22. See also discussion in Adam Millsap, Samuel Staley & Vittorio Nastasi, *Assessing the Effects of Local Impact Fees and Land-use Regulations on Workforce Housing in Florida*, The James Madison Institute (2018).

23. Kevin Erdmann, *Shut Out: How a Housing Shortage Caused the Great Recession and Crippled Our Economy* (2019). Erdman finds that “nearly as many additional homes were being built in Florida for New Yorkers and former Boston residents as in New York City and Boston” in the period prior the Financial Crisis.

24. 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*, 59:2 W. & L. L. Rev. 389 (2002).



### **Constitutional Limits Support Affordability- Enhancing Impact Fees**

In places where legislative impact fees are unbound by nexus and proportionality standards, as in the case of El Dorado County, exactions may be set so high that they substantially reduce a locality's rate of housing construction. As discussed above, electoral remedies are unavailable to the people who would have moved into that housing from other jurisdictions.

Impact fees have the potential to support housing construction and improve affordability relative to what would be possible without them. However, they can also deter new housing construction, limiting supply and exacerbating affordability problems. The nexus and proportionality standards help ensure that impact fees—whether imposed administratively or legislatively—serve as a tool to increase housing construction and improve affordability, not as an impediment.

### **CONCLUSION**

Exactions that adhere to this Court's nexus and proportionality standards can be a helpful tool for localities seeking to balance residents' financial concerns with the economic and social need for housing construction in response to rising demand. However, when impact fees exceed these standards, they can worsen housing affordability and impede housing production while leaving many of the persons who are harmed—housing developers and the people who would have moved into new housing from other jurisdictions—without recourse through the electoral process. The argument for excluding legislative

exactions from this Court’s constitutional analysis for takings is therefore not only wrong as a matter of law, it is contrary to political and economic reality.

Accordingly, this Court should reject the “legislative exception” to the unconstitutional exactions doctrine and reverse the decision of the Court of Appeal of California.

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Respectfully submitted,

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