COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

GEORGE SHEETZ, Plaintiff and Appellant, vs. COUNTY OF EL DORADO, Defendant and Respondent.	Case No. C093682 El Dorado County Superior Court No. PC20170255

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF and AMICUS CURIAE BRIEF of THE CITY AND COUNTY OF SAN FRANCISCO; LEAGUE OF CALIFORNIA CITIES; CALIFORNIA STATE ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; and THE CALIFORNIA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION

The Honorable Dylan Sullivan

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: October 18, 2024

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TABLE OF CONTENTS

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 5

APPLICATION TO FILE *AMICI* CURIAE BRIEF 10

I. INTRODUCTION 10

II. INTEREST OF *AMICI* CURIAE 10

III. CONCLUSION 14

SUMMARY OF ARGUMENT 15

ARGUMENT 19

I. IMPACT FEES ARE NECESSARY TO ADDRESS BURDENSOME IMPACTS ON THE COMMUNITY CREATED BY NEW DEVELOPMENT. 19

II. THE SUPREME COURT HAS NOT DECIDED WHETHER IMPACT FEES MUST BE REVIEWED UNDER THE "UNCONSTITUTIONAL CONDITIONS" DOCTRINE. 23

A. The Supreme Court Expressly Reserved the Threshold Question in This Case. 23

B. The Unconstitutional Conditions Doctrine Only Applies Where an Exaction Would Constitute a Taking Outside of the Permit Context. 25

C. Impact Fees Do Not Meet the Threshold Requirement Necessitating "Special Application" of the Unconstitutional Conditions Doctrine. 27

III. THE MFA ALREADY REQUIRES LOCAL GOVERNMENTS TO DEMONSTRATE AN ESSENTIAL NEXUS AND ROUGH PROPORTIONALITY 35

A. The MFA Was Enacted After *Nollan* and Incorporates the Essential Nexus Requirement 35

B. Subsequent Amendments Go Beyond the Essential Nexus and Rough Proportionality Requirements. 37

C. The MFA Contains Additional Procedural Safeguards....38

D. The MFA Requires Local Jurisdictions to Rely on Nexus Studies to Charge Impact Fees....40

E. Nexus Studies Provide Evidence of Essential Nexus and Rough Proportionality to Support the Creation, Increase and Imposition of Development Fees....41

F. Nexus Studies Account for Unique Local Needs and Conditions....43

IV. APPLICATION OF *NOLLAN/DOLAN* REVIEW TO IMPACT FEES DOES NOT REQUIRE INDIVIDUALIZED NEXUS ANALYSIS. 46

CONCLUSION 51

CERTIFICATE OF COMPLIANCE 53

TABLE OF AUTHORITIES

Federal Cases

Ballinger v. City of Oakland
(9th Cir. 2022) 24 F.4th 1287 .....31, 33

Beck v. City of Whitefish
(D. Mont. 2023) 653 F. Supp. 3d 813.....30

Berman v. Parker
(1954) 348 U.S. 26 19

Dolan v. City of Tigard
(1994) 512 U.S. 374 .....*passim*

Eastern Enterprises v. Apfel
(1998) 524 U.S. 498 33

F.P. Dev., LLC v. Charter Twp. of Canton, Michigan
(6th Cir. 2021) 16 F.4th 198 34

Hadacheck v. Sebastian
(1915) 239 U.S. 394 28

Knight v. Metro. Gov't of Nashville & Davidson Cnty., Tennessee
(6th Cir. 2023) 67 F.4th 816 34

Koontz v. St. Johns River Water Mgmt. Dist.
(2013) 570 U.S. 595 .....*passim*

Levin v. City and County of San Francisco
(N.D. Cal 2014) 71 F. Supp. 3d 1072.....33

Lucas v. S.C. Coastal Council
(1992) 505 U.S. 1003 51

City of Monterey v. Del Monte Dunes at Monterey, Ltd.
(1999) 526 U.S. 687 32

Nollan v. California Coastal Commission
(1987) 483 U.S. 825 .....*passim*

Penn Cent. Transp. Co. v. City of New York
(1978) 438 U.S. 104 51

Sheetz v. County of El Dorado
(2024) 601 U.S. 267 .....*passim*

Tap House Real Est., LLC v. City of Rochester
(D. Minn. July 19, 2024) No. 22-CV-492 (ECT/DTS), 2024 WL 3470824 34

Vill. of Belle Terre v. Boraas
(1974) 416 U.S. 1 15

Vill. of Euclid, Ohio v. Ambler Realty Co.
(1926) 272 U.S. 365 ..... 19, 25, 28, 43, 51

State Cases

Associated Homebuilders, Inc. v. City of Walnut Creek
(Cal. 1971) 484 P.2d 606 21

Big Creek Lumber Co. v. Cnty. of Santa Cruz
(2006) 38 Cal.4th 1139 15

California Bldg. Indus. Assn. v. City of San Jose
(2015) 61 Cal.4th 435 .....26, 30, 31

Discovery Builders, Inc. v. City of Oakland
(2023) 92 Cal.App.5th 799 27

Ehrlich v. City of Culver City
(1996) 12 Cal.4th 854 ..... 32, 35, 36, 48, 49

Hamilton & High, LLC v. City of Palo Alto
(2023) 89 Cal.App.5th 528 .....31, 35

Sheetz v. County of El Dorado
(2022) 85 Cal.App.5th 394 18

Zander v. Orange Cnty.
(N.C. Ct. App. 2023) NC, 890 S.E.2d 793, 795.....21

State Statutes & Codes

Colo. Rev. Stat. Ann. § 29-20-104.5 19

Cal. Ed. Code § 17620-17626 26
Cal. Gov. Code § 53311 15
Cal. Gov. Code § 65913.8 42
Cal. Gov. Code § 65970 15
Cal. Gov. Code § 65995-65998 26
Cal. Gov. Code § 66000 15
Cal. Gov. Code § 66000(b) 19
Cal. Gov. Code § 66001(a) 18
Cal. Gov. Code § 66001(a)(2) 42
Cal. Gov. Code § 66001(b) 18
Cal. Gov. Code § 66001(e) 39
Cal. Gov. Code § 66001(g) 18, 37, 42
Cal. Gov. Code § 66006 .....18, 39
Cal. Gov. Code § 66016 38
Cal. Gov. Code § 66016.5(a) 38
Cal. Gov. Code § 66016.5(a)(1) 18, 40
Cal. Gov. Code § 66016.5(a)(2) 41
Cal. Gov. Code § 66016.5(a)(3)-(4) 40
Cal. Gov. Code § 66016.5(a)(5)(A)-(B) 38
Cal. Gov. Code § 66016.5(a)(6) 41
Cal. Gov. Code § 66020 39
Cal. Gov. Code § 66020(d)(1) 38
Cal. Gov. Code § 66023 39
Cal. Gov. Code § 66410 15

Cal. Gov. Code § 66475 26

Cal. Gov. Code § 66475.4 26

Cal. Gov. Code § 66477 .....15, 26

Cal. Gov. Code § 66479 26

Ind. Code Ann. § 36-7-4-1305(a) 19

Minn. Stat. Ann. § 462.358(2b) 21

Mont. Code Ann. § 7-6-1601(5)(a) 19

S.D. Codified Laws § 46A-10B-22 21

Tenn. Code Ann. § 6-2-201(15) 21

Tenn. Code Ann. § 6-33-101(a) 21

Va. Code Ann. § 15.2-2329(A) 19

San Francisco Statutes, Codes & Ordinances

S.F. Plan. Code § 132(h) 28

S.F. Plan. Code § 406(a) 39

Treatises

California Land Use Practice (Cal. CEB 2024) §18.55 40

Other References

Assem. Bill No. 1600 (1987-1988) Reg. Sess. 36

Assem. Bill No. 2751 (Wyland, 2006) Reg. Sess. 36

Assem. Bill No. 3638 (Bradley, 1988) Reg. Sess 37

Office of Local Government Affairs, Enrolled Bill Report re: Assem. Bill No. 3638, (1987-1988 Reg. Sess.) as amended Aug. 26, 1988 37

1 American Land Planning Law § 6:34 (Rev. Ed.).....19

Clancy Mullen, State Impact Fee Enabling Acts, Duncan Associates, 2 (Aug. 2018), http://impactfees.com/publications%20pdf/1stateacts.pdf ..21, 22

Duncan Associates, *Impact Fee Study –City of Atlanta*, Georgia 2 (Feb. 2021), https://www.atlantaga.gov/Home/ShowDocument?id=50431…45

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Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 144 (2005) 20, 50

William W. Abbott et al., *Exactions and Impact Fees in California* 17 (3d. ed. 2012) 20

APPLICATION TO FILE *AMICI* CURIAE BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.200(c), *amici* curiae The City and County of San Francisco; League of California Cities; California State Association of Counties; International Municipal Lawyers Association; and The California Chapter of The American Planning Association respectfully request leave to file the accompanying brief of amici curiae in support of the County of El Dorado. This application is timely made within 14 days after the filing of the reply brief on the merits.

II. INTEREST OF *AMICI* CURIAE[1]

Like many cities, towns, and counties across the country, amicus curiae City and County of San Francisco ("San Francisco") must address a growing need for public recreational and open space, childcare, improved streets and roads, transit, library, police, fire, and other community facilities created by new development projects. This need for community infrastructure stems from projects containing critically needed housing, as well as those with mixed or non-residential uses. And meeting this need is essential to San Francisco's efforts to help ensure the

[1] *Amici*'s counsel has examined the briefs on file in this case, are familiar with the issues involved and the scope of their presentation, and do not seek to duplicate that briefing. Proposed *Amici* confirm, pursuant to California Rule of Court 8.520(f)(4), that no one and no party other than Proposed *Amici*, and their counsel of record, made any contribution of any kind to assist in preparation of this brief or made any monetary contribution to fund the preparation of the brief.

livability and overall quality of life for its neighborhoods and its residents. In doing so, jurisdictions like San Francisco have exercised their long-established police power to enact land use ordinances of general application, including development impact fees for new projects. Those fees must satisfy rigorous nexus requirements under applicable law, including the California Mitigation Fee Act ("MFA" or "Act"). The MFA ensures that the impact fees are objective and fair. This case, which challenges the constitutional sufficiency of mitigation fees like those relied on by San Francisco and other local jurisdictions, poses questions that are central to San Francisco's ability to impose impact fees that defray the social costs of private development.

The League of California Cities ("Cal Cities") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's

Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The California Chapter of the American Planning Association, the largest of the 47 chapters of the American Planning Association, is an organization of over 5,000 professional planners planning commissioners, elected officials, and informed citizens, whose mission is to provide vision and leadership in addressing important planning issues and advocate for excellence in planning to enhance communities' environmental, social and economic well-being. To that end, the Chapter's Amicus Curiae Committee, comprised of experienced planners and land use attorneys from throughout California, monitors litigation of concern to California planners and participates in cases of statewide or national significance that

raise issues affecting land use planning and regulation in California. The Chapter's Committee has identified this case as having such significance. Although nominally about development fees, the significance of this case extends much further, and its outcome could affect how local agencies develop and implement plans to accommodate future growth and how infrastructure necessary to support development is provided. As the California Chapter of the American Planning Association's members strive to plan for future growth and the supporting infrastructure necessary to support development, the Chapter has a vested interest in this Court's decision.

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

Amici have a substantial interest in the questions before this Court. Local governments depend on their ability to adopt reasonable legislatively imposed development fees to protect the health and welfare of their communities while ensuring that those who create the need for new community infrastructure

fairly bear the costs. Without the ability to impose impact fees applicable to categories of projects or property owners, local governments would need to resort to imposing new or increased taxes, which has the effect of unfairly socializing the costs from new development to existing residents and businesses. Alternatively, local governments might impose development moratoria in the absence of funds to pay for required infrastructure.

III. CONCLUSION

To aid in the Court's understanding of how this decision could affect local governments, *amici* provide the following perspective on the ubiquity, the vital importance, and the constitutional soundness of legislatively imposed development fees. On this basis, *Amici* respectfully request that the Court accept the accompanying brief for filing in this case.

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SUMMARY OF ARGUMENT

A municipality's authority to regulate land use primarily derives from its police powers. The United States Supreme Court recognizes that "[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and [the Court has] long sustained such regulations against constitutional attack." (*Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595, 605 (*Koontz*).) This perspective follows logically from the long-recognized authority of local governments to use zoning regulations to enhance public welfare. (*Vill. of Belle Terre v. Boraas* (1974) 416 U.S. 1, 5; *Big Creek Lumber Co. v. Cnty. of Santa Cruz* (2006) 38 Cal.4th 1139, 1151, as modified (Aug. 30, 2006) ["Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution. 'We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power[.]'"].) To this end, the California Legislature has authorized local governments to impose fees and exactions for public infrastructure, such as schools (Gov. Code § 65970 *et seq*.), parks and recreational facilities (Gov. Code § 66477 *et seq*.), subdivisions (Gov. Code § 66410 *et seq*.), assessment districts (Gov. Code § 53311 *et seq*.), and to mitigate specified project impacts (Gov. Code § 66000 *et seq*.).

The question before this Court is whether a Transportation Impact Mitigation fee ("TIM fee") adopted pursuant to the MFA

effects an unlawful taking of property violating the special application of the "unconstitutional conditions doctrine" established in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*). (Appellant's Opening Supplemental Brief ["App. Br."] at p. 9; Respondent's Supplemental Opposition ["Resp. Opp."]) at p. 8.) The answer is clearly no.

As the Supreme Court recognized in *Nollan*, *Dolan*, and *Koontz*, this special application of the unconstitutional conditions doctrine prevents the government from engaging in "out-and-out extortion" of "land-use permit applicants [who] are especially vulnerable to … coercion." (*Koontz, supra,* 570 U.S. at p. 605.) But that is nothing like what occurs when, as here, a local jurisdiction adopts a fee under the MFA.

Impact fees adopted under the MFA, like the County's TIM fee, are a common means for local governments to ensure development projects pay their fair share of the costs they impose on neighboring uses and users. These fees do not require either a demand to dedicate property or an exaction that impacts the owner's interest in its land. In other words, they are not the "functional equivalent" of a physical taking. (*Koontz*, 570 U.S. at 612.) Thus, the TIM fee would not constitute a taking if imposed directly on the property owner. And, since no taking could occur, there is no risk that a local government could use the fee as an end-run around its obligation to pay just compensation for a taking. Consequently, this case does not meet the "foundational" requirements for an unconstitutional condition, as was recognized

by at least four justices of the Supreme Court. (See *Sheetz v. County of El Dorado* (2024) 601 U.S. 267, 281 (Sotomayor, J., Jackson, J. concurring); 601 U.S. at 284 (Kavanaugh, J., concurring); Transcript of Oral Argument, *Sheetz v. County of El Dorado*, U.S. Supreme Ct. No. 22-1074, Jan. 9, 2024) 2024 WL 250550 ("Transcript") at 6:23-7:12 (Roberts, C.J.) ["in all of the other takings cases, there was an identifiable property interest that was at issue. So, unless your argument is that money is property, this is a very different application of the Takings Clause, isn't it?"], 55:15-19 (Gorsuch, J.) ["…whether this is a tax is a really interesting question. Whether it's a user fee is a really interesting question."], 70:13-20 (Jackson, J.) ["We have very clear, very well-established legal principles as to what qualifies as a taking. And whatever this is, I think we can say that since it isn't the kind of dedicated property appropriation that occurs in *Nollan*, *Dolan*, and *Koontz*, that it's not a taking, so this particular formula doesn't apply."].)

Moreover, even if impact fees could be considered as potential takings, impact fees adopted under the strict regime created by the MFA necessarily pass constitutional muster. These fees simply do not implicate the primary concerns identified in *Nollan*, *Dolan*, and *Koontz* because they do not create the potential for unfettered discretion by permitting agencies which may result in coercion or compel the dedication of a possessory interest in land. Instead, the MFA requires that local jurisdictions demonstrate the reasonable relationship between the fee and new development, quantified by a rigorous

analysis—referred to in California as a "nexus study." (Gov. Code § 66016.5(a)(1).) The fees are calculated according to objective formulas and schedules, and are not the functional equivalent of a possessory interest in land. In addition, the Act includes procedural and fiscal limits that address the concerns necessitating the "heightened scrutiny" outlined in *Nollan* and *Dolan*. (Gov. Code §§ 66001(a),(b),(g), 66006.)

Although it is unnecessary to apply the special application of the unconstitutional conditions doctrine to the TIM fee, this Court could additionally (or alternatively) find that all fees adopted pursuant to the MFA satisfy the *Nollan/Dolan* standard. This Court has already rejected the argument that the MFA requires local jurisdictions to apply the same level of individual scrutiny to the objectively applied TIM Fee as the Court would have applied to a discretionary exaction of a possessory interest in the property owner's land. (*Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394, 413.) Nothing in the Supreme Court's decision in this case changes that analysis. (See, generally, *Sheetz, supra,* 601 U.S. 267; see also Transcript at 68:23-69:4 (Kavanaugh, J.) [Asking how "reticulated" the analysis of impact fees must be to pass constitutional muster.].) Moreover, requiring an individualized nexus study for each project proposal would slow the continued development of desperately needed new housing in many jurisdictions and render it more expensive, riskier, and less efficient.

This Court should affirm that impact fees are not subject to *Nollan*/*Dolan*, or alternatively, that impact fees adopted pursuant to the MFA withstand constitutional scrutiny under *Nollan*/*Dolan*.

ARGUMENT

I. IMPACT FEES ARE NECESSARY TO ADDRESS BURDENSOME IMPACTS ON THE COMMUNITY CREATED BY NEW DEVELOPMENT.

Impact fees are so ubiquitous that one author has described them as "a near-universal practice among localities" (§ 6:34. Sheetz and New Horizons For Regulatory Takings, 1 American Land Planning Law § 6:34 (Rev. Ed.).) They are one-time fees "charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project." (*Ibid.*; Gov. Code § 66000(b); see also Colo. Rev. Stat. Ann. § 29-20-104.5; Ind. Code Ann. § 36-7-4-1305(a); Va. Code Ann. § 15.2-2329(A); Mont. Code Ann. § 7-6-1601(5)(a).) These fees are among the many tools employed under local governments' police powers in the area of zoning and land use planning to "'meet changing conditions'" and "'abate … the harm[s]'" of particular uses. (*Vill. of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 392 (*Euclid*) (internal citations omitted).) Like restrictions on land use, impact fees are part of a comprehensive approach to zoning that ensures "that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (*Berman v. Parker* (1954) 348 U.S. 26, 33.)

In an efficient market, "standard economic theory holds that the price of housing must include all the benefits and costs that the development brings to or imposes on society." (Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 144 (2005)(Vicki Been).) Impact fees help local governments fund a wide range of public necessities such as schools, parks, open spaces, utilities, and transportation systems—key elements that contribute to a livable and functional community. Without impact fees, new development would place uncompensated increased demands on public commons available to others, thus reducing public benefits. (*Ibid.*)

These types of fees are especially important in areas that have high infrastructure costs but lack an established tax base, because they ensure that new developments contribute positively to the community's growth without overburdening public services or displacing the fiscal responsibility for meeting the new demand created by development onto existing users. (Abbott, et al., Exactions and Impact Fees in California 17 (3d. ed. 2012).) Impact fees are an efficient and equitable means to require new development to internalize the burdens of new development, without unfairly apportioning those costs across the entire tax base, which includes existing resident taxpayers who neither created the need for, nor will benefit from, the infrastructure intended to serve new development. (Vicki Been, *supra,* 8 Cityscape at p. 144.)

It is not surprising, then, that all but six states use some form of impact fees. In California, courts have long affirmed the

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

Local governments rely on impact fees to address critical infrastructure necessitated by new housing and other development while accommodating growth in population. For example, between 2023-2031, the State of California has required the City and County of San Francisco alone to add more than 82,000 new homes in order to meet its share of Regional Housing

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[2] Clancy Mullen, State Impact Fee Enabling Acts, Duncan Associates, 2 (Aug. 2018), http://impactfees.com/publications%20pdf/1stateacts.pdf

(identifying 29 states with enabling impact fee legislation). Additionally, Delaware, South Dakota, Minnesota, Tennessee, North Carolina, and Connecticut authorize state and local governments to impose impact fees in certain circumstances. (See Del. Code Ann. tit. 29, §§ 9121-9125; S.D. Codified Laws § 46A-10B-22 (South Dakota stormwater utility fee to fund "the planning, operation, maintenance, and administration of future stormwater facilities that may be established within the district"); Tenn. Code Ann. §§ 6-2-201(15) & 6-33-101(a) (authorizing certain local governments to "assess fees for the use of or impact upon such [public highways, streets, boulevards, parkways, sidewalks, alleys, parks, public grounds, public facilities, libraries and squares, wharves, bridges, viaducts, subways, tunnels, sewers and drains] ... and facilities"); Minn. Stat. Ann. § 462.358(2b) (authorizing acceptance of cash fees for subdivision dedication improvements); *Zander v. Orange Cnty., NC*, 890 S.E.2d 793, 795 (N.C. Ct. App. 2023) (discussing North Carolina school facility impact fee enabling act); Conn. Gen. Stat. Ann. § 8-2i (authorizing collection of payments into housing trust fund for affordable housing).)

Needs Allocation ("RHNA"). (See San Francisco General Plan, 2022 Housing Element (Housing Element) (January 31, 2023) https://generalplan.sfplanning.org/I1_Housing.htm [as of Oct. 17, 2024].) This target, set by the Association of Bay Area Governments ("ABAG"), a regional planning agency, and certified by the California Department of Housing and Community Development ("HCD") is based on San Francisco's unmet housing need at every income level and projected population growth. Such significant growth in residential capacity requires infrastructure to support it, like new and improved public roads, public facilities (e.g. parks and libraries), increased water capacity and changes to utility lines. Without impact fees, these costs might otherwise fall to property taxpayers at large, instead of being internalized by those who create the need for the new infrastructure.

TIM fees, like the County's, are the most common type of impact fee, and are imposed by local governments in nearly every state that charges impact fees. (See Mullen, State Impact Fee Enabling Acts, Duncan Associates (Aug. 2018) (Mullen), at p. 5.) TIM fees help to fund roadway improvements, as well as improvements to sidewalks, bike lanes, and pedestrian pathways in localities across the nation. (*Ibid.)* Without them, new development could impact all community residents through gridlock, overcrowded transit lines, and insufficient bike and pedestrian infrastructure. To reduce these impacts, most jurisdictions rely on nexus studies that quantify how new developments contribute additional vehicle trips during peak commute hours, and place demands on public transit. (*Ibid.)*

Without mitigation through infrastructure funded by such fees, and careful long-term planning, existing residents and businesses in the community would be forced to bear the burdens of that additional traffic and transit demand.

II. THE SUPREME COURT HAS NOT DECIDED WHETHER IMPACT FEES MUST BE REVIEWED UNDER THE "UNCONSTITUTIONAL CONDITIONS" DOCTRINE.

A. The Supreme Court Expressly Reserved the Threshold Question in This Case.

The Supreme Court accepted certiorari in this case to resolve the split between state and lower courts on the narrow issue of "whether the Takings Clause recognizes a distinction between legislative and administrative conditions on land-use permits." (*Sheetz*, 601 U.S. at p. 273.) Contrary to Appellant's argument (App. Br. at 30), the Court *did not* address whether an impact fee, like the TIM fee, may ever be subjected to scrutiny under *Nollan/Dolan*. Rather, the Court narrowly held that there was no "legislative exception to the ordinary takings rules," but "d[id] not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." (*Sheetz* at p. 280; *see also id*. at p. 284 (Kavanaugh, J., concurrence, joined by Justices Kagan and Jackson).) And as explained in Justice Sotomayor's concurrence, joined by Justice Jackson, the Court "did not include that

antecedent question: whether the traffic impact fee would be a compensable taking if imposed outside the permitting context and therefore could trigger *Nollan/Dolan* scrutiny. The California Court of Appeal did not consider that question and the Court does not resolve it." (601 U.S. at 281.) Similarly, Justice Kavanaugh's concurrence stated that the "decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property." (*Sheetz, supra*, 601 U.S. at p. 284.) Chief Justice Roberts also expressed his skepticism that a TIM fee would be subject to *Nollan/Dolan* scrutiny (Transcript at 6:23-7:12), and Justice Gorsuch suggested that the lower courts should consider whether the TIM fee is a tax or a user fee (*id*. at 55:15-19, 56:7-14) – two forms of monetary burden that the *Koontz* Court expressly exempted from its holding that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan*/*Dolan* even when the government denies the permit and even when its demand is for money." (*Koontz*, *supra*, 570 U.S. at 597, 615 ["It is beyond dispute that '[t]axes and user fees ... are not 'takings.'"].)

It is incumbent on this Court to resolve the threshold question in order to determine whether impact fees — a long-established "hallmark of responsible land-use policy" (*Koontz, supra,* 570 U.S. at p. 605) — are subject to *Nollan/Dolan* scrutiny.

B. The Unconstitutional Conditions Doctrine Only Applies Where an Exaction Would Constitute a Taking Outside of the Permit Context.

As several of the Supreme Court's Justices conceded when this case was before them, "[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." (See, e.g., *Sheetz*, 601 U.S. at 281 (Sotomayor, J., Jackson, J. concurring) [citing *Koontz, supra*, 570 U.S. p. 612].) Simply put, the inquiry is whether the government action would constitute a taking if imposed outside the permitting process. (*Ibid.*) In *Nollan/Dolan*, the permitting authorities each demanded a possessory interest, or payment in lieu of the possessory interest, as a condition of issuing the permit. Similarly, the fee at issue in *Koontz* was demanded as an alternative to dedication of an interest in land. (*Koontz*, 570 U.S. at pp. 601-602.) As Justice Kagan made clear in this case, it is not obvious that a demand for generally applicable impact fees meets this initial, threshold question.

The U.S. Supreme Court recognizes that local governments have substantial authority to regulate land use based on their police powers. (See generally, *Euclid, supra*, 272 U. S. 365 [upholding authority to enact zoning ordinance restricting use of property].) California's Constitution similarly provides that "a municipality has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare." (*California Bldg.*

Indus. Ass'n. v. City of San Jose (2015) 61 Cal.4th 435, 455 [citing Cal. Const., art. XI, § 7].) And the California Legislature has expressly authorized local governments to impose dedications and fees, as necessary to ensure the public welfare.

> The variety and range of permissible land use regulations are extensive and familiar, including, for example, restrictions on the types of activities for which such property may be used (commercial or residential, or specific types of commercial ventures or specific types of residential developments—single family, multiunit), limitations on the density and size of permissible residential development (permissible lot size, number of units per lot, minimum or maximum square footage of units, number of bedrooms), required set-backs, aesthetic restrictions and requirements, and price controls (for example, rent control). As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible.

(*California Bldg. Indus. Ass'n.,* 61 Cal.4th at p. 455.)

California codes are full of examples authorizing this use of the police power. For example, under the California Subdivision Map Act, local governments are authorized to require dedications such as easements (Gov. Code § 66475), transit facilities (Gov. Code § 66475.4), and reservations of land for public services and amenities (Gov. Code § 66479). The Quimby Act authorizes local agencies to require the dedication of land or impose fees for park or recreational purposes as a condition to the approval of a tentative or parcel subdivision map, if specified requirements are met. (Gov. Code § 66477 *et seq*.) The Education Code permits school districts to impose exactions for schools. (Cal. Ed. Code § 17620-17626 and Cal. Gov. Code § 65995-65998.) Dedications and

fees assessed under these, and similar, statutes are "hallmarks of responsible land use policy" (*Koontz*, 570 U.S. at p. 605) and have long been acknowledged as proper exercises of local authority. (See, e.g., *Discovery Builders, Inc. v. City of Oakland* (2023) 92 Cal.App.5th 799, 810 [holding that imposing development fees is an exercise of the police power].)

C. Impact Fees Do Not Meet the Threshold Requirement Necessitating "Special Application" of the Unconstitutional Conditions Doctrine.

In *Nollan*, the United States Supreme Court established the "essential nexus" test, holding that the governmental purpose of a land use dedication must be reasonably related to the cost burden created by the proposed development. (*Nollan*, 483 U.S. at p. 837.) In *Dolan*, the Court further held that such dedications must be "roughly proportional" to the impact of the proposed development. (*Dolan*, 512 U.S. at p. 391.) In *Koontz*, the Court applied *Nollan / Dolan* review to an ad hoc fee payment that was required in lieu of a land use dedication. (*Koontz*, 570 U.S. at p. 612.) But an impact fee is neither a land use dedication, as in *Nollan* and *Dolan*, nor an ad hoc fee imposed in lieu of a dedication, as in *Koontz*. Instead, impact fees, like zoning regulations long recognized by the Supreme Court as being proper exercises of the police power, seek to mitigate the burdens of new development on the existing community in the same way a jurisdiction might require permeable, rather than paved, landscapes to minimize a project's burden on the sewer system

(*e.g.*, S.F. Plan. Code § 132(h)) or restrict polluting industrial uses in close proximity to residential and community-serving uses. (See, *e.g.*, *Euclid*, 272 U.S. at p. 388; *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 409.)

Impact fees are imposed based on "reasonable formulas or schedules" and involve no discretion. This is unlike the situations in *Nollan*, *Dolan*, or *Koontz*. In each of those cases, the applicable law required a possessory interest in land or a payment in lieu of that possessory interest, and vested the permitting agency with discretion to determine how to satisfy the legal mandate. (*See generally*, *Nollan, supra* [Cal. Pub. Resources Code § 30212 required public access on property, but did not specify how or in what form]; *Dolan, supra* [Community Development Code §18.164.100 required "dedication of sufficient open land area, and pedestrian/bicycle pathway]; *Koontz, supra* [Florida law 373.414(1)(b) required District to work with landowner on developing a menu of options].)

In this case, by way of contrast, the local fee was adopted pursuant to the provisions of the MFA, and did not include a possessory interest in property. That requirement is likewise a far cry from the highly subjective hypothetical in Justice Barrett's opinion in *Sheetz*. (*Sheetz* at p. 275 [describing a hypothetical commission's condition to require property owner to either host or subsidize a city's holiday party.]) Instead, as described below, impact fees are calculated based on objective fee schedules that ensure both an essential nexus, and rough proportionality between the proposed development and the

amount of the fee. As a result, it makes little sense to apply the heightened scrutiny to an impact fee.

Appellant overstates the holding in *Koontz* to support its claim that impact fees are categorically subject to heightened scrutiny under *Nollan*/*Dolan*. (See, e.g., Appellant's Supplemental Reply Brief ("Supp. Reply") at p. 20.) In *Koontz*, the Court considered only whether a monetary condition that was a substitute for the property owner's compelled dedication of an interest in real property was subject to the doctrine. The plaintiff in *Koontz* faced the choice between reducing the size of its project from 3.7 acres to 1 acre plus a dedicated conservation easement on the remainder of its property, or development of the larger project plus an easement over 11.2 acres of its property and payment of an in lieu fee. (See *Koontz*, 570 U.S. at pp. 612, 619.) Because it found that such in lieu fees are "functionally equivalent" to the land use exactions examined in *Nollan* and *Dolan*, the Supreme Court concluded that such fees must satisfy *Nollan* and *Dolan's* "essential nexus" and "rough proportionality" requirements. (*Id*. at p. 612.) Nor does the Court's statement that "the fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property…" (*Koontz,* 570 U.S. at p. 614) broaden the reach of *Koontz* to all monetary demands associated with real property. If that were so, then every property tax or user fee, which by definition are linked to a specific parcel of land, would be similarly subject to *Nollan*/*Dolan* review. But *Koontz* expressly underscored that taxes and user fees are not subject to takings analysis. (*Koontz,*

570 U.S. at pp. 597, 615.) Thus, *Koontz* does not go as far as Appellant suggests. Nor have the California courts.

The California Supreme Court agrees that "there can be no valid unconstitutional-conditions takings claim without a government exaction of property…." (C*alifornia Bldg. Indus. Ass'n.,* 61 Cal.4th at p. 457.) And the Court recognized that *Koontz* does not reach *every* conceivable monetary exaction, nor purport to resolve the question of precisely *which* monetary exactions are subject to the unconstitutional conditions doctrine. Instead, while

> [i]t is clear from the decision in *Koontz* [] that the *Nollan/Dolan* standard applies to the type of "so-called 'monetary exactions' " [] involved in *Koontz* itself—that is, a monetary payment that is a substitute for the property owner's dedication of property to the public and that is intended to mitigate the environmental impact of the proposed project [—] the full range of monetary land-use permit conditions to which the *Nollan/Dolan* test applies under the *Koontz* decision remains at least somewhat ambiguous.

(*California Bldg. Indus. Ass'n.,* 61 Cal.4th at p. 459.)

Other courts agree. (See, e.g., *Beck v. City of Whitefish* (D. Mont. 2023) 653 F. Supp. 3d 813, 821 ["Notably, the Court in *Koontz* expressly did not address the question of whether 'the government can commit a regulatory taking by directing someone to spend money.'"].) And the Ninth Circuit has rejected Appellant's argument, refusing to apply heightened scrutiny where a fee "merely imposes an obligation on a party to pay money on the happening of a contingency, which happens to be related to a real property interest, but does not seize a sum of

money from a specific fund." (*Ballinger v. City of Oakland* (9th Cir. 2022) 24 F.4th 1287, 1294 (9th Cir.), cert. denied sub nom. *Ballinger v. City of Oakland, California* (2022) 142 S. Ct. 2777.) In *Ballinger*, the Ninth Circuit held that where an ordinance "imposes a general obligation to pay money and does not identify any specific fund of money ... it does not effectuate an unconstitutional physical [or per se] taking." (*Ballinger, supra,* 24 F.4th at p. 1295.) Appellant cites no California case applying heightened scrutiny to impact fees where the fee was not the "functional[] equivalent" of a demand for a possessory interest in the owner's land. (*See Koontz, supra,* 570 U.S. at p. 612.)

Both the United States and California Supreme Courts clearly distinguish between compensable and non-compensable restrictions on the use of property.

> Where a restriction on the use of property would not constitute a taking of property without just compensation if imposed outside of the permit process, a permit condition imposing such a use restriction does not require a permit applicant to give up the constitutional right to just compensation in order to obtain the permit and thus does not constitute 'an exaction' so as to bring into play the unconstitutional conditions doctrine.

(*California Bldg. Indus. Assn.,* 61 Cal.4th at p. 462.) The courts also recognize that not all development fees trigger heightened scrutiny. (*See Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal.App.5th 528, 551 ["[A] mitigation fee that is not subject to the heightened scrutiny of *Nollan* and *Dolan* must nonetheless satisfy the generally applicable 'reasonable relationship' standard between the fee, its intended use, and the 'deleterious public

impact of the development.'"); *City of Monterey v. Del Monte Dunes at Monterey, Ltd*. (1999) 526 U.S. 687, 702 ["[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."].) Thus, for example, the *Ehrlich* court concluded the art in public places fee challenged in that case was not a development exaction of the kind subject to the *Nollan/Dolan* takings analysis. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.) Rather,

> [a]s both the trial court and the Court of Appeal concluded, the requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.

(*Ehrlich*, *supra*, 12 Cal.4th at p. 886.) The "requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose." (*Id*.)

To determine whether an impact fee triggers *Nollan/Dolan* scrutiny, "[t]he key question then is: Independent of the permitting process, does requiring a person to pay money to the government, or spend money on its behalf, constitute a taking

requiring just compensation? Only if the answer is yes does the *Nollan–Dolan* test apply. [] But we have already answered that question no." (*Koontz, supra,* 570 U.S. at p. 623 (Kagan, J. dissenting) [citing *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498].) The Ninth Circuit recently appeared to agree with Justice Kagan's view, but Appellant ignores the very language it cites from the decision in *Ballinger v. City of Oakland.* There, the court held, "as other circuits have, that in *certain circumstances not argued here*, money can be the subject of a taking. But here, the City's Ordinance imposes a general obligation to pay money and does not identify any specific fund of money; therefore, it does not effectuate an unconstitutional physical taking. (*Ballinger, supra,* 24 F.4th at p. 1295 [emphasis added].) Here, the Court must determine whether impact fees imposed to place the burden of constructing infrastructure necessitated by a project on that project's sponsor are proxies for dedication of an interest in land, like the Court faced in *Koontz.* It should answer that question in the negative.

The cases cited in Appellant's briefs similarly fail to reflect the promised "growing body of state and federal caselaw" supporting Appellant's thesis that courts must apply heightened scrutiny to all impact fees. (See Reply at 21-22.) The one California federal case cited in the Reply Brief, *Levin v. City and County of San Francisco* (N.D. Cal. 2014) 71 F.Supp.3d 1072, examined a tenant relocation fee, not an impact fee associated with new development. (See Reply at 22.) Some of the cited cases simply did not reach the foundational question. In *F.P.*

Dev., LLC v. Charter Twp. of Canton, Michigan (6th Cir. 2021) 16 F.4th 198, 206, the court asked, but did not answer the question. (["There is an interesting question whether Canton's application of the Tree Ordinance to F.P. falls into the category of government action covered by *Nollan, Dolan,* and *Koontz*. But the parties do not raise it. And we decline to do so on our own accord. So we proceed, as the parties request, and apply the essential nexus and rough proportionality test provided in those cases."]; see also *Tap House Real Est., LLC v. City of Rochester* (D. Minn. July 19, 2024) No. 22-CV-492 (ECT/DTS), 2024 WL 3470824.)

Other cases cited in the Reply addressed permit conditions that were demonstrably distinguishable from the TIM impact fee at issue here. In *Knight v. Metro. Gov. of Nashville & Davidson Cnty., Tennessee* (6th Cir. 2023) 67 F.4th 816, 827, for example, the challenged ordinance required all permit applicants to grant an easement, not pay a scheduled fee. At least one examined a permit condition that included the requirement that the property owner dedicate a portion of its property for a new public street and pay to construct it. (*Fassett v. City of Brookfield* (Wis. Ct. App. 2022) 402 Wis.2d 265, 268.) And another failed to answer the question at all, holding only that "the City has not established that, as a matter of law, Plaintiffs' takings claim necessarily fails under any legal theory." (*Beck, supra,* 653 F. Supp. 3d at p. 822.) Only one of Appellant's cases expressly argued in favor of expanding *Koontz* in the way Appellant advocates. (See *Anderson Creek Partners, L.P. v. Cnty. of Harnet*t

(2022) 2022-NCSC-93, ¶ 42, 382 N.C. 1, 28, reh'g denied, (N.C. 2022) 878 S.E.2d 145.)

III. THE MFA ALREADY REQUIRES LOCAL GOVERNMENTS TO DEMONSTRATE AN ESSENTIAL NEXUS AND ROUGH PROPORTIONALITY.

Even if the Court concludes that *Nollan/Dolan* scrutiny is appropriate in examining the imposition of an impact fee, the MFA satisfies the requirements of those cases. The California Supreme Court interprets the MFA's "reasonable relationship" standard as 'embodying the standard of review formulated by the high court in its *Nollan* and *Dolan* opinions—proof by the local permitting authority of both an 'essential nexus' or relationship between the permit condition and the public impact of the proposed development, and of a 'rough proportionality' between the magnitude of the fiscal exaction and the effects of the proposed development." (*Ehrlich*, 12 Cal.4th at 860.) In fact, the MFA also goes further than the *Nollan*/*Dolan* standard of review, because it "creates uniform procedures for local agencies to follow in establishing, imposing, collecting, accounting for, and using development fees." (*Hamilton & High, supra,* 89 Cal.App.5th at pp. 543–544.)

A. The MFA Was Enacted After *Nollan* and Incorporates the Essential Nexus Requirement.

The Mitigation Fee Act was introduced in 1987 as Assembly Bill 1600. (Assem. No. 1600 Reg. Sess, 1987-

1988.) This bill was introduced to amend earlier legislation– Senate Bill 892, which was originally enacted in 1983, and required only that local agencies deposit any fees paid to provide improvements to serve residential development "in a separate capital facilities trust fund and expend those fees solely for the purpose for which the fee was originally collected." (former Gov. Code § 53077.)

AB 1600 (Cortese, 1987) was introduced in response to allegations that developer fees were being improperly charged and spent, and amended to bring California law in line with *Nollan*. (See Assem. Cortese, sponsor of Assem. No. 1600 Reg. Sess. 1987-1988, letter to Governor, Sept. 11, 1987. ["The most recent amendments ensure consistency with case law."]; *Ehrlich*, supra, 12 Cal.4th at p. 860.) The bill reflected a years-long negotiation between the California Building Industry Association and the California League of Cities. (*Ibid.*) The relevant provisions of Section 66001 subd. (a) and (b) have not been amended since they were enacted in 1987.

By requiring findings identifying the reasonable relationship between purpose, use, type, and need for the fee and the proposed development, the MFA provides a framework for local agencies to demonstrate an essential nexus between the fee and the new development, and that the amount of the fee is proportionate to the costs attributable to the new development.

B. Subsequent Amendments Go Beyond the Essential Nexus and Rough Proportionality Requirements.

In 1988, AB 3638 (Bradley, 1988), which was supported by the California Building Industry Association, created a new code section generally prohibiting local agencies from using any funds from fees levied against a development project for purpose of maintenance and operation of a facility, with limited exceptions. (Office of Local Government Affairs, Enrolled Bill Report re: Assem. Bill No. 3638, Reg. Sess, 1987-1988, as amended Aug. 26, 1988, p. 3.) The bill clarified that, while ongoing maintenance could be funded through maintenance or assessment districts, impact fees were limited to one-time payments for necessary capital improvements. In 2006, the MFA was amended by AB 2751 (Wyland, 2006) to further address the appropriate use of development fees. That bill prohibits development fees from being used for costs attributable to existing deficiencies in public facilities, with limited exceptions. (Cal. Gov. Code § 66001(g).)

These amendments require local agencies to carefully assess the impacts created by new development, have a plan to use the fee, and ensure that the amount of the fee being assessed is reasonably related to the project, and not existing deficiencies. Collectively, these amendments function similarly to the rough proportionality requirement, and go beyond the holding in *Dolan* that the permit condition be "related both in nature and extent to the impact of the proposed development". (*Dolan, supra,* 512 U.S. at p. 391; see also, *Home Builders Assn.*

of Tulare/Kings Counties, Inc. v. City of Lemoore (2010) 185 Cal.App.4th 554 [upholding some fees as meeting requirements of MFA while invaliding others.].)

Most recently, the MFA was amended to ensure that fees are proportional to the impacts from new development. For example, the MFA now requires that jurisdictions document the fees for housing development on a square foot basis unless an alternative assessment method bears a reasonable relationship between the fees charged and the burden posed by the development. (Gov. Code § 66016.5(a)(5)(A)-(B).) Collectively, these state law requirements ensure that any fee that is imposed as a permit condition is "related both in nature and extent to the impact of the proposed development." (*Dolan, supra,* 512 U.S. at p. 391.)

C. The MFA Contains Additional Procedural Safeguards.

In addition to the findings required to adopt and impose impact fees, the Act also contains many additional protections that ensure public participation and limit the potential for "excessive land use permitting fees." The MFA contains detailed public notice and hearing requirements for the adoption of new fees (Gov. Code § 66016) and notice to project applicants (*id.* § 66020(d)(1)). Jurisdictions must also adopt nexus studies and fee schedules at noticed public hearings. (See, e.g., Gov. Code § 66016.5(a).) Under certain circumstances, the MFA places the burden on the local government to provide evidence in support of its determination to impose the fee in question. (Gov. Code

§ 66023.) The MFA also requires an appeal or other administrative process to enable a developer to contest the underlying fee assumptions by commissioning its own study. (Cal. Gov. Code § 66020; See also S.F. Plan. Code § 406(a).)

Although the *Dolan* Court clarified that "no precise mathematical calculation is required" (512 U.S. at p. 391), most development impact fees are developed pursuant to a schedule, meaning that the fees are actually assessed based on a mathematical calculation. In addition, the MFA already requires local agencies to develop robust, economic studies described below to establish or increase any development fee.

In addition, there are many rigorous accounting requirements for local agencies that collect MFA fees. The MFA requires local agencies to deposit impact fees in separate capital facilities accounts, and publish an annual report describing the use of the collected funds. (Cal. Gov. Code § 66006.) These provisions mean that local jurisdictions must account for and expend funds to construct the improvements within prescribed timeframes, although statutes build in flexibility for unforeseen circumstances. (See, *e.g.*, Cal. Gov. Code § 66001(e) [expenditure deadline findings required 180 days after infrastructure is fully funded].)

The MFA's procedural safeguards further ensure the requisite link between the burden created by development and the costs to be borne by a specific project. For these reasons, the

MFA exceeds both the essential nexus and rough proportionality standards articulated in *Nollan/Dolan.*

D. The MFA Requires Local Jurisdictions to Rely on Nexus Studies to Charge Impact Fees.

Recent changes in state law, AB 602 (Grayson, 2021), now require local governments to adopt nexus studies before enacting any new development impact fee. (Cal. Gov. Code § 66016.5(a)(1).) The nexus study must include information required by Section 66001, subd. (a), and if the nexus supports an increase in an existing fee, the agency must review assumptions in the prior nexus study. (Cal. Gov. Code § 66016.5(a)(3)-(4).) But even prior to those changes, local governments complied with the Act by preparing robust nexus studies. (See e.g. California Land Use Practice (Cal. CEB 2024) §18.55 ["Prior to 2022, although the Mitigation Fee Act, Proposition 26, and the just compensation clauses of the U.S. and California Constitutions did not expressly require them, California public agencies often commissioned written nexus studies to demonstrate a reasonable relationship between project impacts and development impact fees out of abundance of caution and to demonstrate the legitimacy and fairness of the exaction. A well-designed, thorough study substantially reduces the risk of legal challenge and invalidation of the exaction."]

E. Nexus Studies Provide Evidence of Essential Nexus and Rough Proportionality to Support the Creation, Increase and Imposition of Development Fees.

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

First, a jurisdiction must forecast the amount of growth within a service area that will create new demands on the existing infrastructure. (Cal. Gov. Code § 66016.5(a)(2); See *San Francisco Infrastructure Nexus Analysis* (December 2021), https://sfplanning.org/sites/default/files/documents/reports/12222021_SF_Nexus_CitywideAnalysis.pdf, at p. 10 (*San Francisco Nexus Study*).) Often these growth projections originate from a jurisdiction's long-range plan. (Cal. Gov. Code § 66016.5(a)(6); See *San Francisco Nexus Study,* at p. 10.)

Next, the jurisdiction must determine the level-of-service, which serves as the baseline for the kind and amount of infrastructure necessary to support further growth while maintaining the quality of life for residents. (See *San Francisco Nexus Study,* at p. 10.) Specifically, a level-of-service study measures the provision of infrastructure–such as transportation

and roadways, parks and open space, schools, and utilities–against a measure of population–for example residents and a share of employees. The level-of-service is the foundation of a nexus study. (*Ibid*.)

After identifying the level-of-service, the jurisdiction then calculates the cost of providing the infrastructure necessary to maintain or achieve the level-of-service that is attributable to new development. Enabling legislation generally requires that the jurisdiction identify the specific type of public facilities to be funded through the authorized fees, either through capital planning efforts, the general plan, or the nexus studies themselves. (See, *e.g.*, *San Francisco Nexus Study*, at p. 4; Cal. Gov. Code § 66001(a)(2).)

To ensure that new developments are not charged for impacts they did not create, the MFA is explicit that a fee cannot remedy existing infrastructure deficiencies. (See Gov. Code § 66001(g).) Nor can an impact fee fund the costs of routine repair and maintenance. (Gov. Code § 65913.8.) For this reason, although a jurisdiction may have significant capital needs, the nexus study calculates the improvements necessary to accommodate only the increased usage or burden arising from new development.

After estimating future growth, the proper level-of-service, and facility needs, nexus studies apportion the burden across the projected growth. To ensure that a project pays no more than its proportionate share of the impact, nexus studies document how the impact varies across land uses–residential, commercial,

industrial–and variations in size or building occupancy within a given land use category.

Next, jurisdictions reduce the total calculated infrastructure costs by forecasted revenue from other sources or project-specific improvements that mitigate infrastructure impacts. (See, *e.g.*, *San Francisco Nexus Study*, at p. 40.) For roads and transportation, revenue sources often include federal and state funds. In addition to state or federal fund offsets, an impact fee to fund sidewalk improvements may be offset by the project's on-site sidewalk improvements that defray the impacts to the pedestrian network. (See, *e.g.*, *San Francisco Nexus Study*, at p. 28.)

After completing the nexus study, the jurisdiction adopts its impact fee schedule. A predictable, nondiscretionary means to impose a fee – such as a fee formula – is a necessary component of the fee schedule. Taken together, the components of a nexus study and the schedule or formula of fees adopted based on that study provide an objective, equitable basis for calculating the nature, amount, and fair distribution of infrastructure costs generated by proposed development.

F. Nexus Studies Account for Unique Local Needs and Conditions.

Transportation impact fees like the County's TIF are the most common type of impact fee. But each jurisdiction's impact fee must take into account the unique circumstances of that locality. (*Cf. Euclid*, *supra*, 272 U.S. at p. 388 [recognizing that zoning and land use regulations must be "consider[ed] … in

connection with the circumstances and the locality"].) For example, in newly developing communities, a developer may build in a location with no existing road infrastructure – such as a new subdivision–and would appropriately bear a portion of the cost of connecting the development to the nearest public road. An established community, on the other hand, may have existing roadway infrastructure, but that infrastructure may not have sufficient capacity to adequately serve the increased demand from a proposed development.

Transportation-related levels-of-service vary considerably across jurisdictions due to differences in development patterns and transportation needs. In a rural or suburban county, where residents depend on vehicles and roads for their transportation needs, the level-of-service might measure roadway capacity by the volume of cars on a particular roadway segment during peak commute hours. To determine a project's impact on the level-of-service, the nexus study could estimate the number of peak hours trips that project will generate. In an urban area, commuting patterns may vary, requiring multimodal transportation improvements. In these cases, a level-of-service might include the number of miles that passengers commute in an overcrowded subway. (*San Francisco Nexus Study*, at p. 36.) Jurisdictions with a large share of pedestrian and biking commuters might provide for a level-of-service of total improved sidewalk square footage per resident or employee. (*Id.* at pp. 28-29.) Also, a nexus study could evaluate the impacts from residential and non-residential development differently, based on the expected

transportation demands created by each type of use in that locality.

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

In other jurisdictions, the underlying infrastructure needs may be the same, but the costs of constructing that infrastructure differ. For example, in a densely developed city, roadway infrastructure is typically already in place. But the costs of improving or updating that infrastructure to accommodate future growth could be higher in the downtown core, where high volumes of workers, tourists, and vehicle traffic complicate sidewalk or streetscape improvements. (*San Francisco Nexus Study*, at 30.) Similarly, an impact fee accounts for marginal cost differences in locations with higher land costs. (See, e.g., Duncan Associates, *Impact Fee Study –City of Atlanta*, Georgia 2 (Feb. 2021), https://www.atlantaga.gov/Home/ShowDocument?id=50431.)

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

IV. APPLICATION OF *NOLLAN/DOLAN* REVIEW TO IMPACT FEES DOES NOT REQUIRE INDIVIDUALIZED NEXUS ANALYSIS.

The Supreme Court expressly reserved another important question when it heard this case in January. Specifically, the Court "[did] not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." (*Sheetz*, *supra,* 601 U.S. at p. 280.) In fact, Justice Kavanaugh, joined by Justices Kagan and Jackson, found it sufficiently important to write a separate concurrence in order to underscore that "the Court has not previously decided—and today explicitly declines to decide—whether 'a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.'" (*Id*. at pp. 283–84 (Kavanaugh, J. concurring).)

Although Appellant Sheetz argues for a vague "individualized determination" for the imposition of impact fees (see, e.g., App. Br. at 36-39), neither the Supreme Court's opinion in this case, nor those in *Nollan* and *Dolan*, require individualized analyses where fees are imposed on a class of

properties. Instead, as Justice Kavanaugh explains in his concurrence,

> Importantly, therefore, today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property. Moreover, as is apparent from the fact that today's decision expressly leaves the question open, no prior decision of this Court has addressed or prohibited that longstanding government practice. Both *Nollan* and *Dolan* considered permit conditions tailored to specific parcels of property. [] Those decisions had no occasion to address permit conditions, such as impact fees, that are imposed on permit applicants based on reasonable formulas or schedules that assess the impact of classes of development.

(*Id*. at p. 284 (Kavanaugh, J. concurring).) In fact, imposing such individualized nexus review would impose excessive and unsupportable costs on local jurisdictions and render new development impossible in some locations.

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

An expansion of individualized nexus review under the guise of the *Nollan/Dolan* "unconstitutional conditions doctrine" to generally applicable, legislatively enacted development fees would undermine state and local jurisdictions' police power to protect the health, safety, and welfare of their unique communities. This authority is crucial to ensure that new development is supported by appropriate levels of public facilities and infrastructure. Significantly, requiring local jurisdictions to perform costly and time-consuming individualized nexus reviews on each development project would create additional risk and uncertainty for new developments and slow the approval of much-needed housing.

This level of intensive individualized review is unwarranted by the concerns that underpinned *Nollan* and *Dolan*. As Justice Kavanaugh correctly observed, *Nollan* and *Dolan* addressed circumstances where agencies applied their discretion to individual parcels of property. Moreover, in both those cases, the agencies required dedication of a possessory interest in land as a condition of permit approval. (*Nollan,* 483 U.S. at pp. 827, 825.) With its decision in *Ehrlich*, the California Supreme Court extended the heightened scrutiny requirements of these cases beyond the context of possessory interests in land to project-specific development fees imposed in lieu of a dedication on an ad hoc basis. (*Ehrlich,* 12 Cal.4th 854 at p. 862 ["In lieu of the construction of four [public] tennis courts [built for the city] as a condition of approval, the city required the payment of $280,000…."].) But the *Ehrlich* court refused to extend

heightened scrutiny to development fees imposed on a broad class of developers, like the fee at issue here. Instead, the Court acknowledged that "[f]ees of this nature may indeed be subject to a lesser standard of judicial scrutiny than that formulated by the court in *Nollan* and *Dolan* because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." (*Id.* at p. 876.)

The *Ehrlich* court further held that the MFA already requires public agencies to meet the same "essential nexus" and "rough proportionality" burdens when they impose development impact fees. "[T]he Legislature incorporated into [the Act] a standard that generally corresponds to the one reflected in the high court's takings jurisprudence." (*Ehrlich, supra*, 12 Cal.4th at p. 866.) Therefore, in California, a local agency that meets the requirements of the MFA also meets the "essential nexus" and "rough proportionality" requirements of *Nollan*/*Dolan*.

Indeed, where a local agency charges generally applicable development impact fees, it makes little sense to require an individualized assessment because the study required to support the fee already satisfies the "essential nexus" and "rough proportionality" requirements. As a result, requiring an individualized assessment of heightened scrutiny to fees imposed under the Act would serve no constitutional purpose. Instead, by requiring individualized review of each specific project, such a holding would turn the Supreme Court's reasoning in *Nollan* and *Dolan* on its head, making the requirements for categorically applied impact fees–including fees adopted under the MFA–as

stringent as those for a compelled dedication of a possessory interest in land or a discretionary exaction.

As a practical matter, requiring individualized nexus review would create unwarranted and expensive delay as local governments would need to prepare individual nexus determination studies for each project. Alternatively, if a local jurisdiction could not afford the time and expense of performing individualized nexus studies, it could also shift back to existing residents and to local governments themselves the financial burden of the increased demands on community facilities and services caused by new development, contravening the Supreme Court's acknowledgment that responsible land use policy requires landowners to "internalize the negative externalities of their conduct [.]" (*Koontz*, 570 U.S. at p. 605.) In fact, the use of generally applicable impact fees can promote greater efficiency in land use planning by forcing developers and future buyers to share the costs of new infrastructure required by their projects. This can induce more efficient use of the available supply of buildable land by enabling growth, including new housing, in areas where existing infrastructure is not sufficient to support it and where local government cannot provide public facilities fast enough. (Vicki Been, 8 Cityscape at p. 143.)

Because impact fees enable growth that could not otherwise occur, local governments faced with the requirement of individual nexus review for every development project–especially those in areas with infrastructure at maximum capacity or limited access to infrastructure due to distance from the existing urban core–

would be forced to choose between development moratoria, or alternate means of raising capital to fund the costs of improving or expanding infrastructure to support new development. In the absence of the risk factors that concerned the Supreme Court in *Nollan* and *Dolan*–the exaction of real property and unfettered permit discretion by local government officials–these impact fees simply do not warrant additional constitutional safeguards beyond those inherent in the MFA.

Finally, the question presented should not be answered in a manner that would undermine an even more fundamental pillar of local police power. Legislated setbacks, height restrictions, and use districts are a universal feature of nearly every American community. As a result, a broad holding that heightened scrutiny in the form of individualized nexus analysis is required for broadly applicable permit conditions threatens the very heartland of zoning and land use planning. But courts have long recognized local governments' ability to restrict the use of land to mitigate harms of new development (*see Euclid*, 272 U.S. at 392), subject to limits set forth in *Penn Cent. Transp. Co. v. City of New York* (1978) 438 U.S. 104, and *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003), and this case presents no basis for undermining this essential and long-recognized governmental function.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court conclude that impact fees like the County's TIM are not subject to the special application of the unconstitutional

conditions doctrine embodied in *Nollan* and *Dolan*. Alternatively, the Court should hold that impact fees adopted pursuant to the MFA withstand constitutional scrutiny under *Nollan/Dolan* because the MFA ensures that such fees have an essential nexus to the impacts created by the particular development, and are roughly proportional to those impacts.

Dated: October 18, 2024

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Century Schoolbook typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 9,183 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 18, 2024.

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