No. 22-1074

In the Supreme Court of the United States

GEORGE SHEETZ, PETITIONER,

v.

COUNTY OF EL DORADO, CALIFORNIA

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ANDREW R. VARCOE
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in this case. American businesses rely on stable and predictable property rules, including in the field of takings and the Constitution's guarantee of just compensation. The Chamber and its members have significant doctrinal and practical concerns with judicial decisions, including the decision below, that purport to exempt a broad swath of so-called "legislative" takings from the scrutiny mandated by *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). The existence of this "loophole" for legislative exactions substantially undermines the durability, effectiveness, and pre-

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

dictability of the protections afforded by the Takings Clause, with wide-ranging negative consequences for private property holders throughout the nation, including businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should hold that a permit condition such as a fee or exaction is not exempt from constitutional scrutiny under *Nollan* and *Dolan* simply because it is authorized by legislation, even where such conditions are imposed in a "generally applicable," mandatory, or ministerial fashion. As Petitioner has explained, the supposed distinction between "legislative" and "administrative" exactions is legally unsound, illusory in practice, and meaningless from the perspective of a landowner seeking a permit or authorization needed to develop property. Petitioner and other *amici* have explained the many textual, historical, and doctrinal reasons for concluding that legislative fees or exactions are not categorically exempt from *Nollan* and *Dolan*. This brief will focus on two *practical* benefits of Petitioner's position, both of which are critically important to the Chamber's members.

First, applying *Nollan* and *Dolan* to legislative exactions would promote the certainty and predictability of protections for private property, which in turn would support property values, encourage investment, and stimulate economic development. See Section I, *infra*. If legislative exactions are exempt from judicial scrutiny, property owners would not be able to predict what kinds of exactions lawmakers might impose as a condition of future development

(or when or in what amount), and existing investments and property would be subject to disproportionate and potentially prohibitive exactions without constitutional constraint. That uncertainty, and the absence of any external check on runaway fees and exactions, would chill private investment, complicate allocative efficiency, and inhibit the use of property for its highest and best use.

Moreover, the supposed distinction between "legislative" and "administrative" exactions is arbitrary and unworkable in practice. Crediting the rule stated in the opinion below would encourage legislators to manipulate the loophole for "legislative" exactions by simply recharacterizing "administrative" or "discretionary" permit conditions as generally applicable legislative provisions. Indeed, empirical research confirms that, in the wake of this Court's recent exactions cases, many local governments accelerated their use of legislative exactions for the express purpose of avoiding *Nollan*/*Dolan* scrutiny.

Second, applying *Nollan* and *Dolan* to legislative exactions would appropriately account for the practical realities affecting landowner and developer interest groups in the modern American democratic process. See Section II, *infra*. In jurisdictions that follow the approach defended by Respondent here, the "only justification" offered for the distinction between legislative and adjudicative exactions has been "political reality." *Town of Flower Mound* v. *Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 640 (Tex. 2004). According to these courts, judicial scrutiny under *Nollan* and *Dolan* is unnecessary because the democratic process will provide an adequate check on the

legislative abuse of exactions. Under this theory, legislators will supposedly fear that imposing unreasonable exactions will jeopardize their re-election prospects by triggering widespread voter opposition. The exact opposite is true. Legislators have strong electoral incentives to attract voters by shifting costs for public-facing benefits onto developers and private property owners.

Exactions are popular among many voters. It is not hard to see why. Exactions allow many residents to enjoy the benefits of public improvements without paying for them. The Framers understood that dynamic, and in fact viewed distribution of property as the single most common and durable source of factions. Knowing that political actors would face the temptation to imperil the property rights of the minority to garner support among the majority of the voting public, they crafted the Takings Clause as an *anti*-majoritarian protection for property owners. Viewed against that backdrop, the "political accountability" argument embraced by the court below is profoundly ahistorical.

The democratic-check argument is also dead wrong, as a matter of both theory and practice. Political scientists have long understood that legislators converge to the preferences of the "median voter," who has every reason to *reward* legislators for implementing exactions that bring the voter great benefits and yet cost the voter nothing. It therefore comes as no surprise that many state and local legislators, including the ones who created the specific "mitigation fee" at issue in this case, have actively cam-

paigned on promises to saddle developers with the costs of unrelated public works projects.

Legislative exactions are just as worthy of judicial scrutiny as ad hoc exactions. Legislative exactions are particularly attractive for lawmakers: They create large and predictable revenue streams while avoiding the "third rail" of tax increases, and they allow politicians to seek voter support by "claiming credit" for public improvements funded by the exaction schemes they implemented. Thus, to the extent that the dynamics of the democratic process are relevant to determining what level of scrutiny ought to apply to different species of takings, political and practical realities suggest that legislative exactions are particularly ripe for abuse, and should be policed by the courts accordingly.

ARGUMENT

I. Exempting Legislative Exactions From *Nollan* and *Dolan* Would Discourage Development By Making Property Protections Uncertain and Unpredictable.

1. "The classic justification for private property ownership is to secure sufficient certainty and predictability to support private investment and efficient operation of the free market system." John D. Echeverria, *The Politics of Property Rights*, 50 Okla. L. Rev. 351, 373 (1997). The Framers' views on private property were heavily influenced by the classical liberal theorists of Enlightenment England, who emphasized that a well-functioning capitalist state required a system of predictable private property protections. See John Locke, *Two Treatises of Govern-*

ment 290-301 (Peter Laslett ed., 1988); Jeremy Bentham, *The Theory of Legislation* pt. 1, chs. 7-9 (C.K. Ogden ed., 1987). Locke and Bentham understood—as did James Madison—that "[a]n owner must have reasonably secure expectations of continued ownership" of property if the owner is "going to expend efforts to improve resources," and that "[p]eople are much more likely to plan carefully and work hard when they know that the fruits of their labors will be secure to them in the form of property rights." Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 268 (1996); see Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 102 (1985) ("Epstein, *Takings*").

The Framers protected the certainty of property interests via the Contracts and Takings Clauses, both of which were premised on anti-majoritarian principles. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); see also Akhil Reed Amar, *The Bill of Rights* 77-78 (1998) ("Amar, *Bill of Rights*") (discussing Takings Clause); Akhil Reed Amar, *America's Constitution: A Biography* 123 (2005) (discussing Contracts Clause). The "organizing principle" of these protections was "the desire to prevent collective interference with private ordering." Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 17 (1990).

2. "While certainty, predictability, and reliability are highly prized" goals in American property law, "recent decisions in land-use exactions cases * * * have begun to erode the protections for private property owners that the Fifth Amendment should guar-

antee." Catherine L. Hall, *Valid Regulation of Land-Use or an Out-and-Out Plan of Extortion?*, 41 Real Est. L.J. 270, 302 (2012). This case provides an important opportunity for this Court to provide additional clarity and certainty regarding the core proposition that the government must pay just compensation when it takes property for a public use, and to confirm that the government cannot evade that constitutional requirement by pressuring an owner into "voluntarily" giving up property in exchange for a permit or authorization, whether via an adjudication or a requirement imposed by legislation.

Lingering ambiguity on the question whether *Nollan* and *Dolan* apply to "legislative" exactions has had a profound impact on property owners nationwide, including many of the Chamber's members. Without knowing whether legislative exactions are exempt from judicial scrutiny, developers cannot know whether legislators will be permitted to foist unanticipated costs upon them, nor when or to what degree. And when legislators do impose those fees or exactions, property owners lack any meaningful judicial check or scrutiny. These uncertainties increase the risks of property ownership and development—risks that are not typically susceptible to being mitigated through insurance or other means. The natural and foreseeable result has been the chilling of investment—particularly with respect to projects that are unusually expensive or time-consuming. See Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 Va. L. Rev. 1435, 1449-1450 (2000).

Those concerns are made particularly acute by certain constitutional and prudential limitations on the role of American courts. Because federal and many state courts cannot issue advisory opinions, often "economic actors cannot obtain a prospective ruling from the court on whether a particular law will effect a taking." Rose-Ackerman & Rossi, 86 Va. L. Rev. at 1449. "They must wait until a concrete harm has occurred before the statute can be tested. In the face of this uncertainty, investors may forgo otherwise profitable activities," thus "produc[ing] an inefficiently low level of investment." *Ibid.*

Conversely, affirming that the protection of the Takings Clause fully applies to legislative fees and exactions would protect "property owners from the regulatory overreach of local, state, and federal governmental entities" by "smooth[ing] the 'frictions' caused by the struggles over regulatory indeterminacy and uncertainty." Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 Cal. L. Rev. 609, 620 (2004). The result would be that "property owners and investors * * * will commit more resources to capital projects, therefore enabling the highest and best use of property." *Ibid.* Such an outcome would also create positive externalities: Crediting Petitioner's arguments would "enhance decisional and allocative efficiency" and "ensure fair and value-neutral coherence, regularity, and predictability across disparate, individual cases." *Id.* at 619-620.

3. It is no answer to suggest that legislative exactions, as distinct from ad hoc adjudications, offer more "predictable" guidance about the range and

scope of conditions that developers might encounter. That proposition is empirically dubious, given that many schemes contain some element of discretion, even if limited to the power to grant exceptions or variances. And even accepting the notion that some legislative exaction schemes are sufficiently definite in their application to provide a measure of guidance and predictability *once enacted*, developers cannot know when a new scheme might be passed or implemented.[2] The very *prospect* that a new legislative exaction may be enacted in the future—one that is unconstrained by any substantive guardrails or judicial scrutiny—is sufficient to create intolerable uncertainty, regardless of whether such a scheme is ever enacted.

Nor do developers have any guarantee that existing exaction schemes will remain in place for the foreseeable future, depriving investors of ex ante certainty, particularly for development projects with long time horizons that may need permits or authorizations at different stages, including long after sub-

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[2] This case arrives at this Court from California, which has adopted a statewide statute governing the permissibility and amount of "mitigation" fees. See Cal. Gov't Code §§ 66000 et seq.; Pet. App. A2, A11-A14. But if Respondent is correct that the *Nollan*/*Dolan* framework does not apply to legislative exactions at all, there is nothing that requires California or other States to retain or adopt these "protections." Moreover, whatever protections may be afforded by California's Mitigation Fee Act are less robust than those provided by *Nollan* and *Dolan*. Pet. App. A14.

stantial capital has been committed. Legislatures can and often do change such statutes over time, as by expanding the class of situations to which they apply, increasing costs imposed, or replacing the old scheme with something new. This case is a telling example, given that the El Dorado County Board of Supervisors has repeatedly altered the scope and amount of its "traffic impact mitigation fee" since it was first enacted in 2006. See Pet. App. A2-A3.

4. Artificial distinctions between different classes of exactions—based on whether they are labeled "administrative" or "legislative" in nature, or on the degree to which a permit condition is "widely applicable," "discretionary," or "mandatory"—are unworkable in practice and ripe for manipulation.

Case reporters are replete with examples of governments attempting to impose unconstitutional conditions via permit fees or exactions. In modern America, the diversity of these exactions is limited only by the creativity of the human mind. Indeed, developers often encounter conditions that bear vanishingly little relationship to the activity being permitted or its impact, including situations in which an approval of a project has been conditioned on paying for public art, providing daycare centers, or establishing "ride-share programs." See Timothy A. Bittle, Nollan v. California Coastal Commission*: You Can't Always Get What You Want, but Sometimes You Get What You Need*, 15 Pepp. L. Rev. 345, 363 & n.114 (1988); see *Ehrlich* v. *City of Culver City*, 911 P.2d 429, 450 (Cal. 1996) (scheme conditioning certificate of occupancy for townhomes on monetary or in-kind

"donat[ion]" to "the city art fund" was held lawful because *Nollan*/*Dolan* scrutiny did not apply).

Even after this Court's 2013 decision in *Koontz* v. *St. Johns Water Management District*, 570 U.S. 595 (2013), States and localities around the country continue to impose permit conditions or exactions that are plainly unlawful under the *Nollan*/*Dolan* framework. To take just a few examples, the City of Los Angeles has legislatively adopted a so-called "transportation impact mitigation program," requiring that developers, as a condition of receiving a permit, pay fees that will be used for certain city-wide transportation-related improvements. Los Angeles also adopted an "affordable housing linkage fee," imposing fees on developers to generate funding for affordable housing. These fees—which can run to double-digit millions of dollars for a single large commercial building—are based on speculative predictions of long-term costs to fund the City's broader policy goals for transportation improvements or affordable housing, and both are imposed without any assessment of whether a particular project has individualized impacts attributable to the new developments.

Exempting certain types of exactions from *Nollan*/*Dolan* scrutiny will naturally cause legislators to reformulate whatever dubious exaction they wish to implement as one that fits within the scope of the exemption. See *Amoco Oil Co.* v. *Vill. of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995) ("[A] municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.") Indeed, affirming the approach of the California

court here would allow governments to bypass the Takings Clause, and continue abusive exactions of the type described above, by playing "semantic games." Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 502 (2006) ("Haskins, *Closing*"). So-called "legislative" exactions would remain exempt from scrutiny, and "adjudicative" exactions that are unlawful under *Nollan* and *Dolan* would simply be reframed by lawmakers to become "legislative."[3] Ep-

[3] In recent years, lower courts have invalidated a wide range of "adjudicative" exactions as violating *Nollan*, *Dolan*, and/or *Koontz*. See, *e.g.*, *Fassett* v. *City of Brookfield*, 975 N.W.2d 300, 309 (Wis. Ct. App. 2022) (city violated *Nollan*/*Dolan* by conditioning permit to subdivide lot on requirement that landowner dedicate part of her property for a new public street); *Skoro* v. *City of Portland*, 544 F. Supp. 2d 1128, 1137-1138 (D. Or. 2008) (similar); *Levin* v. *City & Cnty. of S.F.*, 71 F. Supp. 3d 1072, 1088-1089 (N.D. Cal. 2014) (ordinance violated *Nollan*/*Dolan* where landlord was required to pay displaced rent-controlled tenants 24 times the difference between current and fair-market monthly rent, even where landlord's withdrawal of rent-controlled unit from the market did not cause a rent differential); *City of Carrollton* v. *RIHR Inc.*, 308 S.W.3d 444, 451 (Tex. App.—Dallas 2010, pet. denied) (city violated *Nollan*/*Dolan* by conditioning building permits on landowner's remediating collapsed retaining wall located on a third-party's property, where the wall did not affect landowner's lots); *Amoco Oil*, 661 N.E.2d at 391 (ordinance failed to satisfy *Dolan* where it sought to expropriate 20% of a gas station's real property in exchange for approving redevelopment that would increase street traffic by 0.4%); see also Thomas Keefe, Annotation, *Determination Whether Exaction for Property Development Constitutes Compensable Taking*, 8 A.L.R.7th art. 7, §§ 3, 15, 19, 22 (2016) (collecting additional cases). If Respondent's position in this case were credited, many state and local legislatures

stein, *Takings*, at 95-96 ("[A] narrow construction of the eminent domain clause simply encourages government officials to redirect their behavior to those forms of exploitation that are beyond constitutional review.").

Indeed, empirical research confirms that, "[i]n the wake of the Court's exactions decisions, * * * local governments have turned increasingly to across-the-board fees that provide no discretion to the local decisionmaker, in the hopes of removing their actions from the purview of *Nollan-Dolan*'s heightened scrutiny." Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & Pol. 451, 467 (2005). One "empirical study of exactions in California conclude[d] that the number of legislative impact fees has increased significantly since *Nollan* and *Dolan* were decided." *Ibid.* (citing Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 122-125 (2001)). The fact that "local governments have responded to *Nollan-Dolan* by * * * imposing a greater number of legislative exactions" underscores the strength of the incentive and lawmakers' resulting willingness to exploit any loophole for shielding unconstitutional conditions from "the heightened scrutiny called for by [*Nollan* and *Dolan*]." *Id.* at 453, 467.

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would no doubt re-enact those invalidated exactions via legislation, thus rendering this Court's exactions case law a dead letter.

5. By contrast, Petitioner's proposed rule is legally sound and workable in practice. So too does it foreclose the risk that legislators can exempt exactions from meaningful scrutiny by relabeling them "legislative."

The workability of Petitioner's proposed rule is confirmed by the stability and predictability of case law in the many jurisdictions where that rule already applies. Even before *Koontz* was decided, "courts in many of our Nation's most populous States" (including Texas, Illinois, and Ohio) had applied *Nollan*/*Dolan* to both monetary exactions *and* legislative exactions. 570 U.S. at 618 (citing *Flower Mound*, 135 S.W.3d at 640-641; *Home Builders Ass'n* v. *City of Beavercreek,* 729 N.E.2d 349, 356 (Ohio 2000); and *Northern Ill. Home Builders Ass'n* v. *Cnty. of Du Page,* 649 N.E.2d 384, 388-389 (Ill. 1995)). The sky did not fall in those States; on the contrary, no "'significant practical harm' * * * c[a]me to pass," *ibid.*, and the "flood of litigation" that some commenters had feared never materialized, Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law:* Koontz*,* Arkansas Game & Fish*, and the Future of the Takings Clause*, Cato Sup. Ct. Rev., 2012-2013, at 215, 232.[4]

[4] The court below suggested that the day-to-day "discretion[ary]" functioning of local governments would supposedly be impaired if legislative exactions were reviewed under *Nollan* and *Dolan*. See, *e.g.*, Pet. App. A17 & n.6. Not so. As this Court explained in *Koontz*, the *Nollan*/*Dolan* framework is best understood as a *government-favoring* exception to the general rule requiring payment of compensation for a taking. *Nollan*

Conversely, litigation in California and other States that have adopted the contrary rule has been more prolific and less predictable. Experience has confirmed that the supposed distinction between legislative and adjudicative exactions is a confusing and "impracticable standard for courts to apply," plus one that is completely "meaningless from the landowner's point of view." J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 Wash. & Lee L. Rev. 373, 401 (2002) ("Breemer, *Evolution*"); accord *Greater Atlanta Homebuilders Ass'n* v. *DeKalb Cnty.*, 588 S.E.2d 694, 701 (Ga. 2003) (Carley, J., dissenting) ("It is prohibitively difficult and unrealistic to draw a line between legislative and adjudicative decisions." (internal quotation marks and brackets omitted)).

Among other things, exempting legislative exactions from *Nollan* and *Dolan* ignores the reality that "legislative bodies often act in an administrative capacity and vice versa" and that "there is no logically

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and *Dolan* allow exactions and fees that satisfy a minimal level of scrutiny to be imposed *without takings liability*. In that sense, the doctrine respects the state police power and recognizes that it is sometimes appropriate for developers to pay for externalities that are reasonably related to their activities. Applying this Court's prior exactions cases to "legislative" exactions will be workable in practice. Cf. *Koontz*, 570 U.S. at 606 ("Our precedents * * * enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out . . . extortion' (quoting *Dolan*, 512 U.S. at 387)).

consistent way to pinpoint the source of an exaction because they typically reach the landowner only after the involvement of both legislative and adjudicative bodies." Breemer, *Evolution*, at 405-406; see *Amoco Oil*, 661 N.E.2d at 390. Practically speaking, the distinction between legislative and adjudicative acts is impossible to police because it "obscures the true method by which local land use decisions are made. Most decisions are made through *a combination* of legislative and adjudicative acts; a bright-line dichotomy is false." Haskins, *Closing*, at 501.[5]

II. Abusive Legislative Exactions Are Induced—Not Checked—by the Democratic Process.

Some courts—including the one below—have relied on a "political accountability" theory in holding that legislative fees and exactions, unlike those imposed through ad hoc adjudications, present little risk to private property rights. See Pet. App. A14. These courts have reasoned that "the ordinary restraints of the democratic political process" will normally operate to prevent legislators from "improper[ly] leveraging" generally applicable exactions,

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[5] Drawing distinctions between supposedly "legislative" and "adjudicative" exactions is especially challenging at the local level, where separation-of-powers doctrines are often less robust and "the distinction between the executive and the legislative branches is" often "blurred." Christopher T. Goodin, Comment, Dolan v. City of Tigard *and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without A Constitutional Difference,"* 28 U. Haw. L. Rev. 139, 166-167 (2005).

since those legislators supposedly know that such exactions will spark "widespread and well-financed opposition at the next election." *San Remo Hotel L.P.* v. *City & Cnty. of S.F.*, 41 P.3d 87, 105 (Cal. 2002).

This argument has things exactly backwards. In fact, private property owners and developers are often a disfavored minority to whom elected officials have strong electoral incentives to shift costs "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

1. The Framers understood that "the most common and durable source of factions" is "unequal distribution of property." *The Federalist No. 10*, at 79 (James Madison) (Clinton Rossiter ed., 1961) ("*The Federalist*"). James Madison recognized that a factional political process would not always afford adequate checks against infringements of property rights, given that there is "no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice" than the levying of assessments or "taxes on * * * property." *Id.* at 80; see *ibid.* ("Every shilling with which they overburden the inferior number is a shilling saved to their own pockets."). "To secure * * * private [property] rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government," was the "great object" of our Constitution. *Ibid.*; see *The Federalist No. 85*, at 521 (Alexander Hamilton) (similar).

The Framers viewed the Takings Clause, in turn, as a bulwark against infringements of private-property rights by a majority faction. Indeed, the Takings Clause was "primarily designed to protect

individuals and minority groups," and in that sense ran "counter to the dominant majoritarian thrust of other provisions" in the Bill of Rights. Amar, *Bill of Rights*, at 77. The Takings Clause was intended to be a "limit[] * * * on government action, *even when government agents are acting on behalf of their constituents*." *Ibid.* (emphasis added); see I William Blackstone, *Commentaries on the Laws of England* 135 (Oxford: Clarendon, 1765) ("So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." (capitalization altered)); see also pp. 5-6, *supra*.

Importantly, the Framers also recognized an inverse relationship between the size of a political community and the risks of factionalism. The central insight of James Madison—author of both *Federalist No. 10* and the Takings Clause itself—was that "at a *local* level one 'faction' might well have sufficient clout to be able to tyrannize others." John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 80 (1980) (emphasis added); see *The Federalist No. 10*, at 82-84.

Although the Takings Clause was not originally applicable to local or state governments, see *Barron* v. *Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833), the protections of the Takings Clause were ultimately incorporated against the states (and thus against local governments) via the Fourteenth Amendment, see *Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 240-241 (1897). By the Reconstruction era, many Americans—including John Bingham, the primary author of the Fourteenth

Amendment—had developed "a particular desire to apply the Takings Clause against the states"; they viewed that step as necessary and appropriate to "protect[] the property interests of a group that was isolated from the normal give and take of the political process." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 861-862 (1995); see Amar, *Bill of Rights*, at 268 & n.143 (similar).

2. Against that backdrop, the "political accountability" argument embraced by the court below is both puzzling and remarkably ahistorical.

Voters have long understood that exactions allow the government to shift costs for public projects from the general public onto a small class of private property owners. Accordingly, in modern America, "exactions are a ubiquitous feature of the development process." See J. Peter Byrne & Kathryn A. Zyla, *Climate Exactions*, 75 Md. L. Rev. 758, 764 (2016).[6] That is not surprising. It is understandable that many citizens would support (and enjoy the personal benefit from) a widened road, an improved park, or a more effective floodplain, if they believe that someone else will be footing the bill.

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[6] As a general matter, takings "hav[e] been a common practice since colonial times." Noreen A. Murphy, Note, *The Viability of Impact Fees After* Nollan *and* Dolan, 31 New Eng. L. Rev. 203, 206 (1996). The use of exactions expanded following the New Deal, in large part to address concerns about population growth, suburban development, environmental impacts, and burdens on public facilities such as roads and parks. See Byrne & Zyla, 75 Md. L. Rev. at 764.

The suggestion that the democratic process will protect private property owners from legislative exactions that are popular among voters evinces a misunderstanding of why the Takings Clause was adopted (and why it was later incorporated). The Fifth Amendment was designed with the goal of "mark[ing] the substantive value of private property for special protection *from the political process*," such that it would operate as a "protection of the few against the many." Ely, *supra*, at 97 (emphasis added).

3. The "political accountability" argument offered by the court below is also highly dubious—if not outright wrong—from theoretical and empirical perspectives. Cf. Pet. App. A14. It therefore comes as no surprise that "[c]ourts rarely explain in depth the idea that legislators are less likely to abuse landowners via an exaction" than bureaucrats are to abuse them via adjudication. Breemer, *Evolution*, at 403.

Legislators are politicians. For decades, public choice economists and political scientists have understood that politicians will converge to the preferences of the median voter. See generally Duncan Black, *On the Rationale of Group Decision-Making*, 56 J. Pol. Econ. 23 (1948). The median voter problem presents especially pernicious concerns in the context of legislative exactions enacted by *local* governments, because in smaller units of government the median voters are often incumbent homeowners who will favor policies that maximize the value of their home, even if that policy imposes enormous costs on developers or non-incumbent property owners. See William A.

Fischel, *Regulatory Takings: Law, Economics, and Politics* 257-259 (1995).[7]

When the median voter has every incentive to favor an exaction, it is at best highly speculative to suggest—as did the court below—that a legislator will resist such an exaction for fear that it will purportedly trigger "widespread" opposition in the next election. Pet. App. A14 (quoting *San Remo Hotel*, 41 P.3d at 105). In truth, and consistent with the practical experience of property owners around the country, exempting legislative exactions from scrutiny based on the checks of the political process "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." *San Remo Hotel*, 41 P.3d at 124 (Brown, J., dissenting). Reliance on checks afforded by the "democratic legislative process" too "cavalierly dismisses the fact that procedural mechanisms designed to protect the minority often break down in the legislature as well as in the administrative context." Breemer, *Evolution*, at 403. For better

[7] See D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 720 (2006) ("[M]any owners of undeveloped land are hampered in combating confiscatory municipal regulatory behavior if only because homeowners, well-organized in common concern over property values, outnumber them. * * * [H]omeowners (and voting renters) favor stiff exactions [on new development], which generate immediate returns through lower property taxes, stable rents, and expanded municipal services.").

or worse, "[t]oday's democratic legislative process is entirely conducive to forcing a landowning minority to shoulder an unfair portion of * * * general public burdens, in accordance with the will of a non-landowning majority." *Id.* at 404-405.

The theoretical underpinning of California's case law—*i.e.*, that agencies are somehow more likely to be subject to undue influence than legislatures—withers under scrutiny. Elected legislators are naturally responsive to voter and interest group concerns, given a desire for re-election. The same is not necessarily true of the career civil servants or appointed officials who may administer agency schemes. See John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. Cal. L. Rev. 1327, 1331 (1988) ("Wiley, *Capture*"). That dynamic is often present in state and local elections, given the smaller size (and thus greater responsiveness) of the respective political communities, and the reality that local governments often combine legislative and adjudicative functions. See *ibid.*; Haskins, *Closing*, at 511. Thus, the distinction between administrative and legislative decisionmaking "falsely dichotomizes two branches that in reality are often players in a single game." Wiley, *Capture*, at 1331; see Haskins, *Closing*, at 510-511.

The problem is not just theoretical. In practical experience, politicians often campaign by promising to impose exactions on a minority group (or emphasizing a track record of having done so). Indeed, it is "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but ap-

plaud, so long as burdens they would otherwise bear were shifted to others." *Flower Mound*, 135 S.W.3d at 641.

This case is an apt example. The Traffic Impact Mitigation fee at issue in this case was originally adopted by the El Dorado County Board of Supervisors in August 2006, before being amended to its current form. See Pet. App. A2-A3. One County Supervisor, at the time the 2006 measure was passed, explicitly campaigned on the notion of making *developers* "rather than * * * taxpayers" "pick up [the] tab" for "transportation projects." Helen Baumann, *Diner's Dilemma at the Transportation Table*, Tahoe Daily Tribune (Apr. 3, 2008), https://tinyurl.com/55kvyy9p.

The "political accountability" argument also ignores the reality that, even if *national* politicians may sometimes be responsive to interest groups advocating for property rights or the interests of developers or other businesses, "*small-town* politicians" face the reality that "homeowners, well-organized in common concern over property values, [typically] outnumber" owners of undeveloped land. D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing A Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 720 (2006) (emphasis added). Homeowners may "favor stiff exactions" imposed on new development through legislation. *Ibid.* Local politicians—including the ones who adopted the fee at issue here—have little incentive to vote against such exactions; if they did, "homeowners could quickly punish the offending politicians at the polls." *Ibid.*

4. In sum, Respondent's supposed distinction between legislative and ad hoc exactions is unsound.

Legally speaking, demarcating exactions in this way makes no sense, because even ad hoc or discretionary exactions are an exercise of legislative power. See Haskins, *Closing*, at 510 ("[A]dministrative bodies wield *delegated legislative power*."). For an individual property owner under the thumb of the government, it does not matter whether an exaction is being imposed by a legislator or a bureaucrat. See *Parking Ass'n of Ga., Inc.* v. *City of Atlanta*, 515 U.S. 1116, 1117-1118 (1995) (Thomas, J., dissenting from denial of certiorari) ("It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can."). Nor does it matter under the text of the Takings Clause itself, which "seeks to protect a minority from the popular will as much as from the bureaucratic one." *Knight* v. *Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 836 (6th Cir. 2023).[8]

[8] Accord Haskins, *Closing*, at 488 ("The Takings Clause makes no mention of the difference between legislative and adjudicative decision making * * *."); James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Env't L. 143, 150 (1995) ("Although the distinction between legislative and adjudicative functions of government has important procedural implications, it is not at all clear that the distinction should have any relevance with respect to the substantive protection of property rights. From the point of view of the property owner, the consequence of a taking is the same.").

Practically speaking, any differences that may exist between legislative and ad hoc exactions suggest that the former are just as pernicious and problematic, and should equally be subject to robust scrutiny by courts.

Exactions are "particularly attractive to local * * * politicians" because they create an opportunity to "raise revenue without raising taxes and angering their constituency." Richard D. Rattner & Patrick M. Ellis, *After* Koontz*: Practical Considerations, Real Implications*, 40 Mich. Real Prop. Rev. 105, 107 (2014). Politicians, mindful of the need to balance budgets but also of the broad-based electoral consequences of tax increases, know that legislative exactions can provide a dependable avenue for generating revenue, without causing ire among most voters. The same cannot be said for ad hoc adjudications, which generate money in a manner that is less foreseeable in both amount and timing. Thus, legislative exactions seem just as worthy of judicial scrutiny as ad hoc adjudications, given that legislators have every incentive to abuse them in order to avoid voter backlash for raising taxes.[9]

Moreover, legislative exactions give politicians an opportunity to "credit claim"—*i.e.*, to seek support from constituents by emphasizing the public benefits attributable to the exaction. See Haskins, *Closing*, at

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[9] The Court can and should rule for the Petitioner without reaching the question of how, if at all, the *Nollan/Dolan* framework applies to generally applicable property taxes. Cf. *Koontz*, 570 U.S. at 615.

511 (discussing recent successes of "slow-growth" and "no-growth" politicians and their financial backers). "Credit claiming" for adjudicative exactions can be much more difficult, because the amount of the ad hoc exaction will often be discretionary, may be less predictable, less public, and may ultimately be attributable to the action of an intervening government employee or official.

Finally, legislative exactions pose special risks given that future residents do not vote in current elections. Consequently, politicians may focus on short-term policies that benefit current residents at the expense of future residents," resulting in "excessive exactions." Jack Estill et al., *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 B.U. Pub. Int. L.J. 1, 21-22 (2006).

It is here that the "political accountability" argument goes most obviously off the rails. The California courts' suggestion that developers will organize against legislators who impose unreasonable exactions ignores the fact that, "[i]n many cases, the developer and prospective purchasers of a tract of land neither have voting rights [n]or any direct political influence." Haskins, *Closing*, at 512; see Epstein, *Takings*, at 264. And even where property developers do have voting rights or political capital, many elect for practical reasons to pay monetary exactions demanded by legislatures, particularly if the costs can be passed to various downstream actors. Many of those downstream actors—such as the future purchasers of new housing units—may not be even residents of the state or locality at the time the exaction is imposed, and thus will not have the chance to op-

pose the relevant legislators or organize or vote against them. Contra Pet. App. A14.

CONCLUSION

The judgment of the California Court of Appeal for the Third Appellate District should be reversed.

Respectfully submitted.

ANDREW R. VARCOE
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for *Amicus Curiae*

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