

No. 22-1074

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

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GEORGE SHEETZ,

*Petitioner,*

*v.*

COUNTY OF EL DORADO, CALIFORNIA,

*Respondent.*

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

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**BRIEF OF ATLANTIC LEGAL FOUNDATION  
AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONER**

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**INTEREST OF THE *AMICUS CURIAE***<sup>1</sup>

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. Its mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. See [atlanticlegal.org](http://atlanticlegal.org).

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The Fifth Amendment's Just Compensation Clause (also known as the Takings Clause), applicable to each State and its political subdivisions through the Fourteenth Amendment, recognizes that private property ownership secures our economic liberty and is intrinsic to our heritage of freedom and individual liberty. ALF's mission includes the vigorous protection of private property rights considered essential by the framers of the Constitution and is woven into our nation's social fabric. ALF has participated as *amicus*

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<sup>1</sup> No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

*curiae* in many cases where, as here, overly aggressive and confiscatory governmental actions raise serious taking concerns.<sup>2</sup>

The question presented here—whether a permit exaction is exempt from the unconstitutional conditions doctrine under *Nollan* and *Dolan* simply because the exaction is authorized by legislation—falls squarely within ALF’s mission of vigorously protecting private property rights from unjust and uncompensated governmental taking.

## INTRODUCTION

Under the County of El Dorado’s General Plan, adopted in 2004 and amended in 2006, the County proposed constructing new roads and widening existing ones. The County planned to finance its “Traffic Relief” program by imposing an across-the-board traffic mitigation fee on all applicants for building permits. The County designated eight zones and set “mitigation” fees, which are updated periodically (most recently in 2012), and imposed fees on all building applicants based on the zone in which the property was located and the type of development proposed—single or multi-family residences or commercial.

The County has made no individualized determinations of what “the cost specifically

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<sup>2</sup> See, e.g., Br. of Atl. Legal Found. as *Amicus Curiae* in Support of Petitioner, *Tyler v. Hennepin County, Minnesota*, No. 22-166 (U.S. filed Mar. 3, 2023).

attributable”<sup>3</sup> to any particular project is when determining the mitigation fee to be charged, including the fee the County charged Petitioner, George Sheetz. Under the County’s Plan, even when a proposed project might have *no impact* on traffic, the applicant is liable for the full mitigation fee.

Here, Respondent El Dorado County, in compliance with California law, required Petitioner Sheetz to pay \$23,420 as a condition of obtaining permission to build a modest, manufactured home on his property without showing that his development would negatively affect traffic. Had Sheetz not agreed to pay the fee, he would not have been granted a permit to make beneficial use of his property.

### **SUMMARY OF ARGUMENT**

This case involves a deliberate plan adopted by the County’s Planning Commission to fund new road construction and widening by imposing fees on all building permit applicants. The facts demonstrate that the mitigation fee imposed on Sheetz’s proposed construction came first—long before Sheetz applied for a building permit. The County’s mitigation permit exaction scheme was never intended to address traffic burdens created by a specific permit applicant’s proposed development. Rather, the County’s Plan is a transparent means of obtaining funding for a public project without paying for it. Had Sheetz’s property been in another zone, he might have obtained a building permit for a significantly lower price, even if

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<sup>3</sup> App. A-3.



the proposed development would have a more significant impact on traffic concerns.

Under the unconstitutional conditions doctrine, “the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”<sup>4</sup>

In *Nollan*,<sup>5</sup> the Court held that there must be an “essential nexus” “between the ‘legitimate state interest’ and the permit condition.”<sup>6</sup> And under *Dolan*,<sup>7</sup> there must be a “rough proportionality” between the exaction and any burden created by the proposed development. Although “[n]o precise mathematical calculation is required”<sup>8</sup> to establish this rough proportionality, the local agency “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>9</sup>

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<sup>4</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *see also* App. A-8.

<sup>5</sup> *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

<sup>6</sup> *Dolan*, 512 U.S. at 386 (quoting *Nollan*, 483 U.S. at 837).

<sup>7</sup> *Dolan*, 512 U.S. 374.

<sup>8</sup> *Id.* at 391.

<sup>9</sup> *Id.*

The California Court of Appeal acknowledged that normally the unconstitutional conditions doctrine would require heightened scrutiny to survive Fifth Amendment scrutiny.<sup>10</sup> But here, the court explained, these standards did not apply because, under California law, “only certain development fees are subject to the heightened scrutiny”<sup>11</sup> of the *Nollan* and *Dolan* tests. Specifically, the tests only apply where the fees are “imposed . . . neither generally nor ministerially, but on an individual and discretionary basis.”<sup>12</sup>

Here, the California Court of Appeal concluded that the permit exaction scheme is constitutional because, under California law, a local “government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation”<sup>13</sup> and “leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts,”<sup>14</sup> because the

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<sup>10</sup> App. A-10.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (internal citations and quotations omitted).

<sup>13</sup> *Id.* at 405 (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604–605 (2013)).

<sup>14</sup> *Id.* at 406 (quoting *Koontz*, 570 U.S. at 606).

permit exaction is prescribed to a “generally applicable”<sup>15</sup> broad class of property owners.

The Court of Appeal also found that the County did not violate the Mitigation Fee Act, which “provides a ‘statutory standard against which monetary exactions by local governments subject to its provisions are measured.’”<sup>16</sup> According to the court, the County need only show a rational basis between the fee demanded and that the proposed development contributes to the traffic concerns to survive a legal challenge.<sup>17</sup> The burden then shifts to the property owner to show that the fee was unreasonable, an almost impossible burden under a rational basis standard.<sup>18</sup>

The appellate court’s analysis turns the constitutional guarantee against uncompensated takings on its head. As this case illustrates, there is no practical difference between a legislatively imposed permit exaction and a particularized administratively imposed permit exaction in terms of the constitutional injury inflicted. As Justice Thomas once observed in a dissenting opinion:

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<sup>15</sup> *Id.* at 407.

<sup>16</sup> App. A-11 (quoting *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 865 (1996)).

<sup>17</sup> See *Home Builders Ass’n of Tulare/Kings Cntys., Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 562 (2010).

<sup>18</sup> See *id.* at 562.

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. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.<sup>19</sup>

## ARGUMENT

### **A. The Fifth Amendment contains no exception to its guarantee of just compensation for a taking**

The Just Compensation Clause contains no exceptions to the Government's duty to pay just compensation when it takes private property for public use. In *Dolan*, the Court emphasized that, regardless of the laudable goals the Government may seek to achieve, the Government still has to prove the constitutionality of the exactions it imposed on the use of private property.<sup>20</sup>

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<sup>19</sup> *Parking Ass'n of Ga., Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J, dissenting from denial of certiorari); see also Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 95 (1985) (“Instead of providing a bulwark against the excesses of government power, 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.”).

<sup>20</sup> See *Dolan*, 512 U.S. at 396.

As this Court has stated on several occasions, the just compensation mandate in the Fifth Amendment is intended to prevent the Government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>21</sup> Yet, under what is referred to as the legislative exception to the unconstitutional conditions doctrine, the County here has done just that. Mr. Sheetz has been forced to pay a substantial fee to construct a manufactured home on his property with no showing that the proposed construction will generate more traffic or contribute in any way to a need for new roads or widened roads. In short, the County has made no showing of any proportionality between the fee assessed and the amount of traffic burden his construction will create.

That Mr. Sheetz has been required to pay a fee for the benefit of the County as a whole is not disputed. Had this mitigation fee been imposed in the context of a particularized administrative process, the County would have been required to demonstrate a nexus between the stated purpose of the mitigation fee and the burdens created by Sheetz’s development and a rough proportionality between the fee and the impacts of Sheetz’s proposed use. Lacking a nexus and rough proportionality would render the County’s exaction of this fee unconstitutional, triggering the protection of

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<sup>21</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

the Fifth Amendment: “[N]or shall private property be taken for public use, without just compensation.”<sup>22</sup>

The just compensation requirement does not invite exceptions. As the only express money damages provision in the Constitution, the clause demands that money be paid to an owner of private property whenever that property is taken for public use. And where the property taken is money, the Fifth Amendment operates as a bar on the fee exaction.<sup>23</sup> As the Court explained in its 1893 decision in *Monongahela Navigation*,<sup>24</sup> the Fifth Amendment checks the power of the Government and stops the Government from forcing some individuals to bear “more than his just share of the burdens of government. . . .”<sup>25</sup> When the Government requires an individual to “surrender[] to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”<sup>26</sup>

This Court has also stated that a State (or its political subdivisions) may not refuse to pay just

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<sup>22</sup> U.S. Const. amend. V; see *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (applying the Just Compensation Clause to the States via section 1 of the Fourteenth Amendment).

<sup>23</sup> See *Koontz*, 570 U.S. at 612.

<sup>24</sup> *Monongahela Nav. Co. v United States*, 148 U.S. 312 (1893).

<sup>25</sup> *Id.* at 325.

<sup>26</sup> *Id.*

compensation when a taking has occurred.<sup>27</sup> The obligation for just compensation attaches whenever government action works a taking of private property rights.<sup>28</sup> This constitutional obligation is so evident that this Court has also held that an aggrieved property owner need not look to a statute or other legislative authorization to obtain the remedy to which he is entitled if private property is taken.<sup>29</sup>

In *Jacobs v. United States*,<sup>30</sup> the Court rejected the state's position that it could *legislatively limit* an individual's right to just compensation. The Court

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<sup>27</sup> See *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 316 n.9 (1987) (“Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.”).

<sup>28</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

<sup>29</sup> See *United States v. Clarke*, 445 U.S. 253, 257 (1980) (“As defined by one land use planning expert, [i]nverse condemnation is a *cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.”) (internal citation omitted).

<sup>30</sup> *Jacobs v. United States*, 290 U.S. 13 (1933).

stated that the right to just compensation is a right guaranteed by the Constitution.<sup>31</sup>

As Justice Ginsburg emphasized in *Arkansas Game & Fish Commission*,<sup>32</sup> when the Court rejected another court-created exception to the just compensation requirement: “In view of the nearly infinite variety of ways in which government actions or regulations can affect property interest, the Court has recognized few invariable rules in this area.”<sup>33</sup> Likewise, in *Koontz*, the Court refused to accept monetary exactions as a categorical exception to the just compensation requirement.<sup>34</sup>

**B. Exempting legislatively created exactions from the just compensation requirement is constitutionally unsound**

Although some have suggested that legislative bodies are less likely to treat the land use permitting process as an opportunity to force valuable concessions from landowners, this argument cannot withstand scrutiny. There is no principled, constitutional basis for distinguishing legislatively and administratively required exactions in the taking

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<sup>31</sup> *See id.* at 16-17.

<sup>32</sup> *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012).

<sup>33</sup> *Id.* at 31.

<sup>34</sup> *Koontz*, 570 U.S. at 612.



context,<sup>35</sup> and no practical difference between the two, as this case confirms. In addition, as some commentators have noted, “administrative bodies wield *delegated legislative power*. The underlying power remains in the legislative branch, and it is that power targeted”<sup>36</sup> by the Fifth Amendment. And “it is hard to understand why the Founders, who were chiefly concerned with checking the *political* branches of government, would support a doctrine allowing legislatures to perform takings.”<sup>37</sup>

Further, in practice many exactions that occur have their origin in the legislative process. In *Dolan*, for instance, the challenged permit exaction grew out of a comprehensive land use plan enacted by the State of Oregon.<sup>38</sup> The statute required all Oregon

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<sup>35</sup> See generally *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

<sup>36</sup> Steven A. Haskins, *Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law, 487, 510 (2006); see also Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 271 (2000) (concluding that “legislative land use decisions made at the local level may reflect classic majoritarian oppression.”).

<sup>37</sup> *Id.*; see also Richard A. Epstein, *More Fidelity, Less Translation: A Loyalist’s Response to Professor Treanor*, 1 Green Bag 185, 188 (1998) (stating that in the legislative distinction is simply not relevant where the question is not whether the taking is “fair,” but whether the taking is “justly compensated.”).

<sup>38</sup> See generally *Dolan*, 512 U.S. 374; see also Or. Rev. Stat. §§ 197.005–197.860 (1991).

municipalities to adopt new comprehensive land use plans consistent with the statewide planning goals. In compliance with the state legislation, the city of Tigard developed a comprehensive plan and codified it in the city's Community Development Code. The City's exaction of Florence Dolan's property as a condition of obtaining a permit to enlarge her plumbing supply store originated in state law.<sup>39</sup>

Likewise, here, in 1987 the California Legislature passed the Mitigation Fee Act "in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects."<sup>40</sup> "The Mitigation Fee Act provides a "statutory standard against which monetary exactions by local governments subject to its provisions are measured."<sup>41</sup> The Act also "provides uniform procedures for local agencies to follow in imposing development fees."<sup>42</sup>

"Consistent with the Mitigation Fee Act, in 2004 the County of El Dorado adopted a General Plan for constructing new roads and widening existing roads within the County. In 2006, the County amended the Plan to impose a Traffic Mitigation Permit Fee on all

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<sup>39</sup> *Dolan*, 512 U.S. at 377–79.

<sup>40</sup> *Hamilton & High, LLC v. City of Palo Alto*, 89 Cal. App. 5th 528, 543 (2023) (quoting *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 864 (1996)).

<sup>41</sup> App. A-11 (quoting *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 865 (1996)).

<sup>42</sup> App. A-12.

building permit applications, the amount contingent only on the zone in which the property is located and the type of construction proposed.

The California Court of Appeal upheld the fee exaction, concluding a rational relationship existed between the fee imposed and the public burden related to the development project.<sup>43</sup> The Court of Appeal found that the County's General Plan was "guided by policies that limit traffic congestion, including policies that ensure that roadway improvements are developed concurrently with new development and paid for by that development and not taxpayer funds."<sup>44</sup>

That the fee exaction unfairly burdened Mr. Sheetz, whose proposed property development was not shown to increase traffic or necessitate new road construction, was dismissed as irrelevant in the Court of Appeal's decision-making.

## CONCLUSION

The constitutional infirmity in the legislative exemption to the unconstitutional conditions doctrine means that a permit exaction can evade Fifth Amendment scrutiny even when the constitutional injury to individuals such as Mr. Sheetz is exactly as

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<sup>43</sup> App. A-12.

<sup>44</sup> App. A-25.

if the permit exaction had been imposed at the County's discretion.

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

Respectfully submitted,

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