No. 25-958

IN THE

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,

Respondent.

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

AMICI CURIAE BRIEF OF TEXAS PUBLIC POLICY FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., MANHATTAN INSTITUTE, AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a land-use permit exaction exempt from traditional *Nollan/Dolan* review simply because it is applied on a class-based or formulaic basis?

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INTERESTS OF *AMICI*[1]

Texas Public Policy Foundation

The Texas Public Policy Foundation (TPPF) is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, TPPF has worked to advance these goals through research, policy advocacy, and impact litigation.

In pursuit of its broad mission, TPPF has represented property owners subject to unconstitutional permit requirements across the country. For instance, TPPF recently successfully represented F.P. Development in the Sixth Circuit in *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198 (6th Cir. 2021)—a case that struck down a legislative exaction as unconstitutional. Furthermore, TPPF is familiar with the legal and political landscape in Texas, which has allowed state courts to review legislative exactions for at least four decades.

National Federation of Independent Business Small Business Legal Center, Inc.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide

1. The parties were timely notified of the intention to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

NFIB Legal Center takes interest in this case to continue its tradition of promoting the protection of property rights for small businesses and individuals.

Manhattan Institute

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting economic freedom and property rights against government overreach.

Southeastern Legal Foundation

Southeastern Legal Foundation (SLF), is a national, nonprofit legal organization dedicated to rebuilding the American Republic by reclaiming civil liberties, protecting free speech, securing property rights, and restoring constitutional balance. Since 1976, SLF has advocated, both in and out of the courtroom, to secure property rights.

SLF regularly represents property owners challenging overreaching government actions and unconstitutional conditions placed on their private property. *See, e.g.*, *Knight v Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816 (6th Cir. 2023) (holding that the *Nollan/Dolan* test applies to legislatively imposed exactions). Additionally, SLF frequently files *amicus curiae* briefs in support of property owners before the Supreme Court. *See, e.g., Sheetz v. Cnty. of El Dorado,* 601 U.S. 267 (2024); *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

Two years ago, this Court answered a question that had divided lower courts for decades: can the government evade meaningful review of landuse exactions by adopting them through legislation rather than individualized permitting decisions? The answer was simple. No. An exaction is an exaction.

This case presents the next—and nearly identical—attempted workaround. The lower court held that even though *Nollan/Dolan* review applies to legislative exactions in general, the "individualized" assessment of impact required under *Dolan* does not apply when the government targets a class of properties through a preset formula rather than a single parcel at a time. Under that view, courts need only ask whether the formula is "reasonable" in the abstract. That approach cannot be reconciled with the text of the Constitution, the theory underlying *Nollan/Dolan*, or more than a century of this Court's takings jurisprudence.

The Takings Clause prohibits the government from taking private property for public use without just compensation. It does not qualify that command based on how many property owners are affected at once. Nothing in the Fifth Amendment—or in its incorporation through the Fourteenth Amendment—suggests that constitutional protections weaken when property is taken in bulk rather than piecemeal.

Nor does constitutional theory support a class-based carveout. The purpose of the *Nollan/Dolan* framework is to distinguish between legitimate mitigation of real externalities and demands for public benefits imposed at private expense. That distinction turns on facts—*i.e.*, the impacts actually created by a proposed use of property and whether the government's demand is roughly proportional to those impacts. The risk that an exaction is untethered from mitigation does not disappear when officials rely on generalized assumptions. It increases. Abstract formulas, untethered from conditions on the ground, are precisely how mitigation demands drift toward extortion.

History confirms the point. From *Norwood v. Baker* in 1898 forward, this Court has scrutinized class-wide, formulaic exactions for the same reason it scrutinizes all exactions: because requiring property owners to bear costs in excess of the benefits or burdens attributable to their land effects a taking. *Dolan* itself arose from a generally applicable development scheme. Yet this Court still required an individualized assessment of impact and proportionality. And various state and federal courts have applied the same approach to class-based impact fees for decades.

The lower court's new standard would invert that settled understanding. By allowing governments to avoid *Nollan/Dolan* through categorical, preset demands, it would insulate from review the very exactions most likely to bear no relationship to real-world impacts. Absurd results would become effectively unchallengeable—not because mitigation is justified, but because it is imposed by formula.

Nor do concerns about administrability or disruption justify a departure from *Nollan/Dolan's* individualized assessment requirement. *Nollan/Dolan* does not require mathematical precision, bespoke engineering, or parcel-perfect tailoring. It merely requires *some* evidence—grounded in the property's location and use—that the demand imposed mitigates harms actually caused. Jurisdictions have applied that modest requirement for decades. The sky has not fallen.

This Court should grant review to make clear what the logic of its precedents already establish: whenever the government conditions the use of private property on an exaction, it must show—through some individualized assessment—that its demand mitigates impacts caused by that property's proposed use. Until the Court says so unequivocally, lower courts will continue to invent new ways to convert the permitting process into a means of taking property without compensation.

ARGUMENT

The right to own property includes the right to use it. *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 3176 (1982). Like all other rights, however, this right is not absolute. It does not include the right to use property in ways that harm or create significant externalities for one's neighbors. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992). Local governments therefore have the authority to either prohibit such uses of property, or condition such uses on the property owner agreeing to take action, provide property, or provide funding to internalize those externalities. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

The problem is that local governments can, and often do, abuse this authority. *Koontz*, 570 U.S. at 604–05. Rather than simply policing externalities, government officials may abuse the permitting process to extort public benefits at private expense. *Id.* When that happens, the excess demanded from the property owner is a taking. *Id.* This case turns on how courts can tell the difference.

In what has become known as the *Nollan/Dolan* test, this Court built a three-part framework for separating the wheat from the chaff. First, the exaction demanded in exchange for a permit must have a sufficient nexus to some legitimate interest—*i.e.*, it must address some externality actually created by the proposed property use. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987).

Second, the exaction demanded must address that externality in a roughly proportional way—*i.e.,* the

government cannot demand substantially more than what is required to mitigate the externality. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994); *Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1046 (2000) (Scalia, J., dissenting from denial of *certiorari*) ("[A] burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit, and must be roughly proportional to what is needed to eliminate that harm.").

Finally, any determination of rough proportionality must be based on an "individualized" assessment both as to the impact of the proposed property use and the exaction's ability to address that impact in a roughly proportional way. *Dolan*, 512 U.S. at 391. Mathematical precision is not required. But government must make some effort to "quantify" its claims. *Id.* This test balances the deference owed to local decision making with the duty to ensure that property is not taken without compensation.

Here, the lower court held that this modest individualized approach is not required when the exaction is applied to a large class of property owners through a pre-set formula. *Sheetz v. Cnty. of El Dorado*, 113 Cal. App. 5th 113, 156-58, 335 Cal. Rptr. 3d 316, 349 (2025). All that is required is that the general formula be reasonable. *Id.*

But, as explained below, this carveout has no basis in the text of the Constitution, the theory behind *Nollan/Dolan*, or the history of this Court's exaction jurisprudence. It should be rejected here.

I. The Text of the Takings Clause Does Not Support Applying a More Lenient Level of Review to Class-based or Formulaic Exactions

As with other constitutional provisions, we begin with the text. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). In doing so, we look specifically to see if there is any textual predicate that would justify treating class-based, formulaic exactions differently than other exactions. There is not.

The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. As Justice Thomas has previously noted, nothing in that straightforward language suggests that the "general applicability of the ordinance" should be "relevant in a takings analysis." *Parking Ass'n v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

Nor does the text of the Fourteenth Amendment—which incorporates the Takings Clause against the states—provide any basis for more lenient standards for class-based exactions. It states that "…No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…." Nothing in that language suggests that courts should be more lenient if a local government abridges privileges or immunities of numerous people at once, or denies life, liberty, or property on a class-wide basis, rather than targeting an individual.

In short, if there is to be a more lenient standard for class-based or formulaic exactions, it cannot be found in the text of the relevant constitutional provisions.

II. A Lesser Standard For Class-Based or Formulaic Exactions Is Inconsistent With the Constitutional Theory Behind the *Nollan*/*Dolan* Test

The theory behind the *Nollan*/*Dolan* test is likewise inconsistent with providing more lenient standards for class-based or formulaic exactions. As noted above, the *Nollan*/*Dolan* test is designed to answer a simple question: Is the exaction demanded *actually* mitigation for externalities, or is it a demand for public benefits at private expense? *Koontz*, 570 U.S. at 604-606.

In *Dolan*, this Court rightly concluded that the only way to answer that question reliably was based on an "individualized," "quantif[iable]," assessment of "rough proportionality." *Dolan*, 512 U.S. at 391, 395. It specifically rejected an abstract "reasonable relationship" test that was completely removed from the reality of the property at issue in favor of an "individualized" approach. *Id.* at 391. That conclusion was not based on notions of convenience or fairness. It is derived from the nature of property itself.

As this Court has recognized for a century, the externalities created by a given property use—and therefore the rationality of any government restriction on that use—are inherently tied up in the property's location and circumstances. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

For example, paving over a portion of a lot will generally have some impact on run-off and local flooding.

However, the magnitude of that effect turns on local factors—topography, vegetation, and surrounding uses. Paving a fifteen-foot driveway on a steep hillside directly above a neighbor's backyard could flood the neighbor's yard every time it rains. The same fifteen-foot driveway on flat, grassy land might create no discernable externalities at all.

As such, a driveway permitting regime that demanded uniform exactions based on a pre-set formula rather than on local conditions would almost certainly result in a significant mismatch between externalities and alleged mitigation. That is why *Dolan* demands *some* individualized assessment of impact when determining rough proportionality.

A recent set of cases proves the point. Several years ago, the Township of Canton, Michigan adopted a tree preservation ordinance. *Charter Twp. of Canton v. 44650, Inc.*, 346 Mich. App. 290, 299, 12 N.W.3d 56, 62 (2023). The stated purpose of the ordinance was to offset the externalities created by tree removal, such as flooding and erosion. *See*, *id.*

In furtherance of this goal, the ordinance required property owners to apply for a permit before removing trees from their own property. *Id.* at 299-300. To receive a permit, a property owner was required to plant a pre-set number of replacement trees for each tree removed or pay the market value of such trees into a tree replacement fund. *Id.* at 300-301.

This tree-for-tree approach was certainly "reasonably related" to addressing potential concerns about tree loss in the abstract. But it took no consideration of the actual

impact of tree removal on a given property. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 207 (6th Cir. 2021). The results quickly became absurd.

For example, in 2018, F.P. Development cleared trees and other vegetation from a ditch on its land that had become clogged and was therefore causing flooding on neighboring properties. *Id.* at 202. The Township admitted that the removal of trees had not produced negative externalities for F.P.'s neighbors. To the contrary, the clearing had reduced flooding. Nevertheless, applying its tree-for-tree formula, the Township demanded that F.P. pay $47,898 in "mitigation" for tree removal. *Id.*

That same year, two brothers cleared a blighted industrial property they owned in the Township and planted 1,000 Norway Spruce trees for a tree farm. *44650, Inc.*, 12 N.W.3d at 63. Again, the Township could not point to any externalities caused by tree removal during clearing. *Id.* at 77. Nevertheless, applying its tree-for-tree approach to the cleared vegetation, it demanded that the brothers pay $ 446,625 in mitigation—an amount greater than the purchase price for the entire parcel. *Id.* at 63.

Both Federal and State Courts rightly concluded that the Township's approach ran afoul of *Dolan*. As those courts explained, the Township's formula may have been reasonable in the abstract, but "*Dolan* requires more." *F.P. Dev.*, 16 F.4th at 206. It was not enough to simply add up the trees. *Id.* The Township had to make some "individualized" assessment of the *impact* of tree removal on *those* properties, and the ability of the proposed mitigation to address that impact in a roughly proportional way. *F.P. Dev.*, 16 F.4th at 206-207.

By contrast, the lower court's approach in this case would render these sorts of absurd mismatches effectively unreviewable. After all, the Township's exactions from the property owners arose under a general ordinance based on the class of the development and a pre-set formula. And no one could argue that a tree-for-tree replacement formula is not "reasonably related" to addressing the effects of tree loss. It was only when the actual facts on the ground were considered that the mismatch became clear. In short, the workaround proposed by the lower court here would effectively gut *Nollan*/*Dolan* in the very circumstances where it is most needed.

III. Something Like the *Nollan*/*Dolan* Test Has Been Applied to Class-Based Formulaic Exactions For Over a Century

Creating exemptions for class-based or formulaic exactions is also inconsistent with court practice. Indeed, one of this Court's first exaction cases addressed a class-based formulaic road impact fee almost identical to the one presented here. *Norwood v. Baker,* 172 U.S. 269, 279, 19 S. Ct. 187, 191 (1898).

Dolan likewise involved a class-based exaction. *Dolan*, 512 U.S. at 379-80. In that case, every new development in certain areas was required to contribute to public trails based on a comprehensive plan. *Id*. Yet this Court still required an individualized assessment of impact. *Id*. at 391.

Courts around the country have applied the same approach for decades. *See, e.g.*, *Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) (holding that local

traffic mitigation requirements did not satisfy *Dolan's* rough-proportionality test because they were based on pre-set assumptions, rather than an individualized impact assessment); *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 40, 876 S.E.2d 476, 504 (2022) (holding that rough proportionality test applied to legislatively adopted water and sewer impact fee); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 644-45 (Tex. 2004) (holding that the Town's monetary exaction was not roughly proportional because the rationale for it was too abstract and because the town provided no real evidence of impact); *Mira Mar Development Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. Ct. App. 2013) (striking down tree-preservation ordinance with mitigation based on a pre-set formula rather than an individualized assessment of impact). The lower court provides no basis for a departure here.

IV. The Alleged Prevalence of Class-Based Exactions Does Not Justify Ignoring Constitutional Text, Theory, or Precedent

The principal response to applying *Nollan/Dolan* to class-based exactions is a concern that doing so may unsettle "longstanding" or "common" permitting regimes. *Sheetz*, 601 U.S. at 284 (Kavanaugh, J., concurring). That concern is overstated—and, in any event, constitutionally irrelevant.

For one thing, class-based, formulaic exactions have long been viewed with skepticism. *Norwood*, 172 U.S. at 279. It cannot be assumed that local governments are uniformly violating constitutional limits, or that generally applicable schemes would fail the modest individualized

assessment *Nollan/Dolan* requires. Experience confirms the point. Texas has applied individualized review to all exactions for decades, and the Eighth Circuit has subjected impact fees to such review since at least 1998. *Town of Flower Mound*, 135 S.W.3d at 643; *Goss*, 151 F.3d at 863. The sky has not fallen.

More fundamentally, the prevalence of a regulatory practice does not alter the Takings Clause. This Court has repeatedly applied ordinary takings analysis to longstanding regimes, including those dating back to the 1930s. *Koontz*, 570 U.S. at 612 (noting that monetary exactions were "utterly commonplace"); *Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1375-76 (2023) (striking down law that had been on the books since the 1930s); *Horne v. Dep't of Agric.*, 576 U.S. 351, 355 (2015) (same). Local governments may not erode the meaning of the Takings Clause by adverse possession. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 611, 121 S. Ct. 2448, 2454 (2001) (rejecting the notion that the ordinances in effect when a property is purchased define the scope of property rights under the Takings Clause).

To the extent historical practice bears on constitutional meaning at all, only practices closely tied to ratification are relevant. *United States v. Rahimi*, 602 U.S. 680, 737, 144 S. Ct. 1889, 1924 (2024) (Barrett, J., concurring). Class-based, formulaic exactions are a comparatively recent development. Traditional zoning classifications (and therefore class-based restrictions) did not proliferate until this Court's landmark 1926 ruling in *Euclid*, 272 U.S. 365. Modern land-use categories did not become common until the Warren Court unilaterally expanded the scope of the zoning authority again nearly three decades later

in *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 102 (1954). Such late-breaking practices cannot define the original meaning of the Takings Clause.

CONCLUSION

As long as governments are populated by human beings, they will be tempted to acquire property and public benefits without paying for them. *See* John Adams, *A Defence of the Constitutions of the Government of the United States of America*, 1787.[2] It is therefore unsurprising that, for decades, local governments have fought to avoid the meaningful check provided by the *Nollan/Dolan* test.

But an explanation is not an excuse. Whatever benefits may accrue from such permitting regimes do not justify achieving those ends "by a shorter cut than the constitutional way of paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 160 (1922). When the government demands an exaction as a condition on the use of private property, it is not too much to ask that it produce *some* individualized evidence that its demand is justified.

This Court should take this case to clarify, yet again, that *Nollan/Dolan* applies to exactions—all of them. Until it makes that point crystal clear, the attempted workarounds will continue to pop up in the lower courts.

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2. Available at: https://press-pubs.uchicago.edu/founders/documents/v1ch16s15.html.

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