No. 08-1102

In the
Supreme Court of the United States

DANIEL and ANDREA McCLUNG,

Petitioners,

v.

CITY OF SUMNER, WASHINGTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, THE CATO INSTITUTE, AND BUILDING INDUSTRY ASSOCIATION OF WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan* and *Dolan* by imposing development exactions by legislative enactment?

2. May a local government avoid the "nexus" and "rough proportionality" tests of *Nollan* and *Dolan* by imposing development exactions in the form of "impact" fees?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF), the Cato Institute, and the Building Industry Association of Washington (BIAW) submit this brief amicus curiae in support of Petitioners Daniel and Andrea McClung.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has extensive litigation experience in the area of property rights, having participated as lead counsel or amicus curiae in several takings cases before this Court, including *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF and its supporters, many of whom are property owners, have an interest in the constitutional issues raised in this case. PLF seeks to underscore the need for this Court to address how to properly apply constitutional protections for private property.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for private property.

The BIAW is a trade association organized under Washington laws. BIAW's more than 12,500 members include corporations, partnerships, and sole proprietors who seek to meet the residential housing needs of Washington's citizens. BIAW's institutional goals include challenging unreasonable land-use regulations which affect property rights and undermine the free-market system.

The opinion below holds that the heightened scrutiny set forth by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), is not applicable to monetary or legislatively imposed exactions. Thus, the lower court's ruling provides that when conditions are attached to the approval of development permits via legislative authorization, there is no requirement for an essential nexus or rough proportionality. The ruling also categorically excludes monetary exactions from heightened scrutiny under *Nollan* and *Dolan*. Amici believe that the Ninth Circuit's ruling is

incorrect and if left unreviewed will severely impact property rights and the availability of affordable housing.

STATEMENT OF THE CASE

The nexus and rough proportionality standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), are important constitutional safeguards of private property rights. Together these decisions limit government authority to impose exactions on development that are not qualitatively and quantitatively related to the impact of the proposed development. Since these cases were decided, government entities have expanded the application of exactions to mitigate the impact of development not only on public facilities, but also impacts on public programs such as affordable housing, day care facilities, senior care facilities, and the protection of endangered species.

Local governments impose impact fees as a condition for development approval in order to generate revenue for infrastructure and government programs allegedly necessitated by new development. Approximately 80% of jurisdictions impose impact fees on new development. Duncan Associates, *National Impact Fee Survey: 2008*, at 8 (Oct. 2008).[2] Between 2004 and 2008, the amount of money charged as an impact fee (generally ranging from thousands to tens of thousands of dollars per new housing unit) grew an average of 76%, with some jurisdictions increasing fees up to 225% in that four-year period. *Id.* at 7. In some

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[2] *Available at* http://www.impactfees.com/publications%20pdf/2008_survey.pdf (last visited Mar. 23, 2009).

areas of California, for example, impact fees are estimated to have grown to approximately $80,000 to $90,000 per new home in 2008. Jim Wasserman, *Home Front: Impact Fees May Be the Next Battlefield for Area Builders*, The Sacramento Bee, Dec. 19, 2008, at 8B.[3] Impact fees are so pervasive that they affect nearly every aspect of housing, and have a serious detrimental impact on housing affordability. *See* Theo S. Eicher, *Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State*, at 10 (Feb. 2008) (estimated cost of regulation and impact fees constitute nearly half the value of Seattle area homes).[4]

Over the past 15 years, state and federal courts have developed a deep conflict regarding whether the exaction of impact fees as a condition on development is subject to nexus and rough proportionality. As a result, governments increasingly rely on impact fees as a vehicle for raising revenue. *See* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513 (2006) (discussing the marked shift in local government financing from general revenue taxes to "nontax revenue-raising devices" like exactions); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth With Impact Fees*, 59 SMU L. Rev. 177, 256-57 (2006) (noting the increasing use of development impact fees, and the

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[3] *Available at* http://www.sacbee.com/736/story/1485548.html (last visited Mar. 23, 2009).

[4] *Available at* http://depts.washington.edu/teclass/landuse/Seattle.pdf (last visited Mar. 23, 2009).

split regarding application of *Dolan*'s rough proportionality test to fees).

In this case, the City of Sumner placed a condition on a development permit that required the property owner to pay for and build infrastructure improvements to the city's sewer system. The required improvements cost approximately $50,000. The property owner challenged the impact fee as an unlawful exaction subject to heightened scrutiny under *Nollan/Dolan*. The city argued that its exaction was not subject to the nexus and proportionality tests, because the exaction had been authorized by legislative enactment and only sought payment of money.

The McClungs point out that the exaction in their case involved off-site improvements that had to conform to legislatively adopted standards, but which were individually imposed due to the location and specific nature of the property. *See* McClung Petition for Writ of Certiorari at 3-4, 16-17. But, the Ninth Circuit framed the issue more broadly:

> [W]hether a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of [*Penn Central Transportation Co. v. City of New York*, 438 U.S. 825 (1987)], or the nexus and rough proportionality standards of [*Nollan* and *Dolan*].

McClung v. City of Sumner, 548 F.3d 1219, 1222 (9th Cir. 2008). Despite recognizing a nationwide split of authority on this issue, the Ninth Circuit concluded

that the exaction was categorically excluded from heightened scrutiny under *Nollan* and *Dolan* because (1) it was legislatively adopted, and (2) the property owner was required to expend money rather than dedicate property. *Id.* at 1226-28.

This case demonstrates how far some courts have strayed from the purpose of the regulatory takings tests established in *Nollan* and *Dolan*, and the need for this Court to clarify the reach of the nexus and rough proportionality tests. The protections of *Nollan* and *Dolan* should not be undermined by artificial distinctions that focus on the manner or form by which property is taken. This Court ought to resolve this conflict by affirming that the Constitution's protections apply to all forms of exactions imposed as conditions on development, whether applied by legislative or adjudicative action, and whether demanded in the form of money or an interest in property.

ARGUMENT

The Fifth Amendment's Takings Clause provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. As Justice Harlan recognized over 100 years ago, this fundamental guarantee does not draw any distinction between the manner by which property is taken, or the type of property that is taken:

> The power of the legislature . . . is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go,

> consistently with the citizen's right of property . . . .
>
> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

Village of Norwood v. Baker, 172 U.S. 269, 278-79 (1898). Indeed, the purpose of the Takings Clause is "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 488-89 (2006); James L. Huffman, *Colloquium on* Dolan*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

In *Nollan* and *Dolan*, this Court formulated the two-part essential nexus and rough proportionality test for use in determining whether an exaction constitutes an impermissible taking.[5] First, the court must

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[5] An exaction is a requirement that a property owner provide a benefit to the government in return for receiving permission to use (continued...)

determine whether there is a connection between the exaction and the impact that would otherwise be caused by the unregulated use of the owner's property. *Nollan*, 483 U.S. at 836-37. If an essential nexus exists, the court must decide whether the required exaction "is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The burden of proving nexus and proportionality is on government, not the property owner. *Id.* at 391 n.8. Proper application of this burden is essential to prevent government using its permit approval authority to coerce illegal exactions. An exaction that is not supported by nexus and proportionality is "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837 (citations omitted).

I

THERE IS A SPLIT OF AUTHORITY AMONG STATE AND FEDERAL COURTS THAT MUST BE SETTLED BY THIS COURT

Various state and federal courts interpret *Nollan* and *Dolan* in an inconsistent manner resulting in a nationwide split of authority and confusion about whether the nexus and rough proportionality tests apply to some forms of exactions. The Ninth Circuit's opinion in this case clearly demonstrates the distinctions forming the two major splits: whether the exaction was imposed legislatively or adjudicatively, and whether the exaction requires a dedication of land

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[5] (...continued)
land. Exactions can take any form including dedications of land and cash payments. Haskins, *supra*, at 490-91.

or money. The Ninth Circuit determined that *Nollan* and *Dolan* only apply to adjudicative land-use exactions requiring a landowner to dedicate real property as a condition for permit approval. *McClung*, 548 F.3d at 1226-28. The court concluded that legislative and monetary exactions are categorically excluded from heightened scrutiny under the nexus and rough proportionality tests. *Id.*

A. There Is a Nationwide Split of Authority on Whether *Nollan* and *Dolan* Apply to Legislatively Imposed Exactions

One year after *Dolan*, two members of this Court recognized the burgeoning conflict over whether *Nollan* and *Dolan* should be applied to legislatively imposed exactions.

> It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legislative enactment. 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. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Parking Ass'n of Georgia, Inc. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., and O'Connor,

J., dissenting from denial of certiorari) ("the lower courts should not have to struggle" with this issue). In the following 14 years, the conflict has only grown deeper, with no resolution in sight. *See* Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 Stetson L. Rev. 675, 693-701 (2000); (recognizing "nationwide split of authority" on whether *Nollan/Dolan* apply to legislatively enacted impact fees); Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 251 (2000). As demonstrated below, the lower courts continue to struggle with this issue, resulting in inconsistent, conflicting, and confusing decisions.

1. Some Federal and State Courts Apply *Nollan* and *Dolan* to Legislatively Adopted Exactions

One federal circuit court and six state courts of last resort have concluded that *Nollan* and *Dolan* apply to legislatively imposed exactions. In these jurisdictions, the courts generally take an ad hoc, fact-intensive approach to determine whether the exaction constitutes a taking of property, regardless of how the exaction was imposed.

First Circuit: *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995) (*Dolan* applied to a low-income housing impact fee that was imposed by ordinance.).

Illinois: *N. Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) (*Dolan* applied to exaction imposed pursuant to transportation fee ordinance.).

Maine: *Curtis v. Town of S. Thomaston*, 708 A.2d 657, 660 (Me. 1998) (*Dolan* applied to fire protection ordinance requiring developers to construct fire pond.).

New York: *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance.).

Ohio: *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000) (*Dolan* applied to impact fee ordinance because there is no reason to distinguish between adjudicative and legislatively imposed exactions.).

Texas: *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 641-42 (Tex. 2004) (*Dolan* applied to impact fee ordinance, refusing to adopt a bright line adjudicative/legislative distinction.).

Washington: *Trimen Dev. Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994) (*Dolan* applied to generally applicable ordinance imposing park development fees.).[6]

2. *McClung* and Seven State Courts of Last Resort Hold That *Nollan* and *Dolan* Do Not Apply to Legislatively Adopted Exactions

Seven state courts of last resort—and now the U.S. Court of Appeals for the Ninth Circuit in

[6] *But see City of Olympia v. Drebick*, 126 P.3d 802, 810 (Wash. 2006) (distinguishing mitigation impact fees that are subject to *Nollan/Dolan* from general infrastructure fees that are not).

McClung—hold that legislatively imposed exactions are categorically excluded from heightened scrutiny under *Nollan* and *Dolan*.[7] In these jurisdictions, the method by which an exaction is imposed serves as a threshold question, the answer to which decides whether the claim will be reviewed for compliance with the nexus and rough proportionality tests.

> **Arizona:** *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997) (*Dolan* does not apply to generally applicable legislative exactions.).
>
> **California:** *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002) (*Nollan* and *Dolan* do not apply to legislatively imposed exactions.).
>
> **Colorado:** *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-97 (Colo. 2001) (*Nollan* and *Dolan* only apply to cases involving property exactions and discretionary adjudicative determinations specific to one landowner and one parcel of land.).
>
> **Georgia:** *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (*Dolan* does not apply because the required exaction was the

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[7] Oregon's Supreme Court has not addressed this issue, but its appellate court recently concluded that *Nollan* and *Dolan* do not apply to legislatively adopted impact fees. *See Rogers Mach., Inc. v. Washington County*, 45 P.3d 966, 979-80 (Or. Ct. App. 2002), *cert. denied*, 538 U.S. 906 (2003) (*Dolan* does not apply to legislatively adopted and generally applicable traffic impact fee.).

result of a legislative determination affecting many landowners.).

Maryland: *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 724 (Md. 1994) (*Dolan* does not apply to legislatively imposed development impact fees.).

Minnesota: *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 286 (Minn. 1996) (*Dolan* held inapplicable to ordinance requiring that mobile home park owners pay relocation costs for residents.).

North Dakota: *Se. Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995) (*Dolan* inapplicable to exactions imposed by legislature.).

B. The Ninth Circuit's Decision Creates a Split of Authority Regarding Whether Monetary Exactions Are Categorically Excluded from Review Under *Nollan* and *Dolan*

The decision below also raises the issue whether a monetary exaction can ever be subject to heightened scrutiny under the nexus and rough proportionality tests. A majority of courts have concluded that *Nollan* and *Dolan* apply to an exaction requiring the payment of money. *See, e.g.*, *Schlesinger*, 57 F.3d at 16; *N. Illinois Home Builders Ass'n*, 649 N.E.2d 384; *Beavercreek*, 729 N.E.2d at 353-56; *Town of Flower Mound*, 135 S.W.3d at 641-42; *Trimen*, 877 P.2d at 191. Indeed, several of the state courts that rely on the legislative/adjudicative distinction have held that monetary exactions are subject to the nexus and rough proportionality tests. *See San Remo Hotel*, 41 P.3d at

102 (monetary exaction subject to *Nollan/Dolan* scrutiny); *Krupp*, 19 P.3d at 697-98 (recognizing that some monetary exactions fall within the purview of *Nollan* and *Dolan*).

Until the Ninth Circuit's decision below, only two state courts and one federal circuit court have gone so far as to adopt a bright line rule that monetary exactions can never be subject to the nexus and rough proportionality tests. *See Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995). The Ninth Circuit's conclusion that all monetary exactions are categorically excluded from review under *Nollan/Dolan* exacerbates the nationwide split of authority and warrants review by this Court. *McClung*, 548 F.3d at 1227.

II

WHETHER CONSTITUTIONAL TAKINGS STANDARDS APPLY BROADLY IN THE CONTEXT OF DEVELOPMENT EXACTIONS PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

A. There Is No Basis for Adopting a Rule Excluding All Legislative Exactions from Review Under *Nollan* and *Dolan*

Nollan and *Dolan*'s requirements protect property owners from government actions that target particular individuals arbitrarily and unevenly. *See* Huffman, *supra*, at 152. There is "little doctrinal basis beyond blind deference to legislative decisions to limit [the]

application [of *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999); *see also* D.S. Pensley, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 Cornell L. Rev. 699, 704 (2006) (No principled basis exists "for giving greater deference to exactions imposed through legislative enactment than to those imposed through adjudication."). The courts that have elevated the legislative/adjudicative distinction to a threshold test make too much of this distinction, "drawing a bright line where none exists, and none was intended." Haskins, *supra*, at 501.

Indeed, there is no basis for such a distinction in *Nollan* and *Dolan*, which involved mixed legislative and adjudicative government action. The *Nollan* Court noted the Coastal Commission's "public announcement of its intention to condition the rebuilding of houses on the transfer of easements"—a generally applicable quasi-legislative act. 483 U.S. at 833 n.2. Similarly, in *Dolan*, the city acted under a generally applicable and legislatively enacted statute designed to address transportation congestion when it conditioned Ms. Dolan's permit on her dedication of a pedestrian/bicycle pathway. *Dolan*, 512 U.S. at 377-78 (the ordinance "requires that new development facilitate this plan by dedicating land for pedestrian pathways"). In both cases, just as in the present case, the government entity's exaction policy was applied on a uniform and consistent basis. *See, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 483 ("[T]he

Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test."); Callies, *supra*, at 567 (The *Nollan* and *Dolan* decisions involved property dedications, but the nexus and proportionality rules are of more universal application.). The determinative factor present in *Nollan* and *Dolan* was that a government policy was applied to the property owner in a manner that demanded an exaction in exchange for development approval.

As a practical matter, the legislative/adjudicative distinction is neither a meaningful nor viable method for determining whether to apply the nexus and rough proportionality tests. As *Nollan* and *Dolan* demonstrate, it is difficult to classify local government action as solely legislative, administrative, or judicial. Local governments are not structured under strict separation of powers principles, but combine these functions in land-use decision making. *See* Reznik, *supra*, at 257-61. *See also* Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1042 (2000) ("The problem of discerning which statutes are legislative and which are adjudicative for purposes of a *Dolan* analysis is apt to be open-ended and chronic."). Predictably, the most comprehensive article on the problems encountered when attempting to distinguish legislative from adjudicative land use decisions found a general confusion and inconsistency about how to characterize government action. Reznik, *supra*, at 252-56.

Because states and municipalities vary in how land use decisions are processed, reliance on a legislative/adjudicative distinction as a touchstone for whether heightened scrutiny will apply only

guarantees continued unequal treatment of citizens under the Takings Clause. This Court should take the opportunity to reaffirm that the fundamental guarantee of the Takings Clause focuses on the impact of an action on property—not the type of government action used to take the property.

B. There Is No Basis for Adopting a Rule Limiting *Nollan* and *Dolan* to Exactions of Real Property

The courts that categorically exclude monetary exactions from scrutiny under *Nollan* and *Dolan* rely on *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. at 702, for the proposition that this Court expressly limited the appellation of *Dolan* to exactions of real property. *See McClung*, 548 F.3d at 1227; *Sea Cabins*, 548 S.E.2d at 603 n.5. But there is no basis in *Del Monte Dunes* for adopting a bright line rule limiting *Nollan* and *Dolan* to exactions of real property. *See* 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, 397-401 (2002).

In *Del Monte Dunes*, this Court explained that *Dolan* "was not designed to address, and is not readily applicable to . . . [a situation where] the landowner's challenge is *based not on excessive exactions but on denial of development*." 526 U.S. at 703 (emphasis added). The limitation in that case was not meant to limit *Dolan*'s application to conditions on development, but rather prevent application of *Dolan* to the denial of a permit. The denial of a permit does not involve conditions on development. *See* Breemer, *supra*, at 400. Read in its proper context, *Del Monte Dunes* does

not impose a bright line rule limiting the factual circumstances in which a property owner can invoke the protections of the Takings Clause.

To the contrary, the *Del Monte Dunes* Court reiterated that takings cases rely on complex factual assessments concerning the impacts and purposes of government actions. *Del Monte Dunes*, 526 U.S. at 720 (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992)). Applying this standard, several state courts conclude that an impact fee should be reviewed subject to *Nollan* and *Dolan*. *See, e.g.*, *Town of Flower Mound*, 135 S.W.3d at 641 ("[W]e can find no meaningful distinction between the condition imposed on Stafford and the conditions imposed on Dolan and the Nollans. All were based on general authority taking into account individual circumstances."); *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. Ct. App. 1996) ("[W]e reject the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions. When such exactions are imposed . . . on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."); *Dudek v. Umatilla County*, 69 P.3d 751, 758 (Or. Ct. App. 2003) (Holding that a monetary exaction requiring the property owner to purchase a 10-foot easement on the neighboring lot for a public purpose was the equivalent of a dedication of land.).

C. Reliance on Legislative/Adjudicative and Monetary/Possessory Distinctions Does Nothing To Protect Property Owners from the Risk of Government Coercion

Nollan and *Dolan*'s close nexus and rough proportionality tests are meant to prevent coercive and unfair government behavior when a property owner seeks government's permission to use property in a particular way. *Nollan*, 483 U.S. at 837; *see, e.g.*, *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d at 481, 483 (Rent stabilization ordinance unconstitutional because it placed an "indeterminate and unjustifiable burden draped disproportionately on the particular owners' shoulders."). Courts limiting the application of *Nollan* and *Dolan* to purely adjudicative exactions, on the other hand, reason that the risk of government extortion is lessened in the legislative process. *See San Remo Hotel*, 41 P.3d at 102-04.

But the risk of coercive or unfair government behavior is not obviated when an exaction is imposed legislatively as opposed to adjudicatively, or when an exaction is imposed in the form of money rather than land. *See* Ball & Reynolds, *supra*, at 1518; Breemer, *supra*, at 397-98. To the contrary, "[t]he extortion and inequitable economic burdens that local governments potentially impose on landowners through administrative processes can occur just as easily in the legislative context." Reznik, *supra*, at 267. As the Texas Supreme Court recently noted, without *Nollan* and *Dolan* as a check on their power, government officials are free to "'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as the burdens

they would otherwise bear were shifted to others." *Town of Flower Mound*, 135 S.W.3d at 641. Grossly disproportionate exactions are extremely likely to result from broadly applicable, generalized exaction programs. *See Citizens' Alliance for Property Rights v. Sims*, 187 P.3d 786, 796 (Wash. Ct. App. 2008) (invalidating legislatively adopted ordinance that imposed a preset exaction on all rural property owners, but did not impose a similar exaction on majority of County's property owners); *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1996) ("Certainly, a municipality should not be able to insulate itself from a taking challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."); Reznik, *supra*, at 271-72; and William S. Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 Colum. L. Rev. 1581, 1582 (1988).

The over-reliance on arbitrary distinctions undermines the holdings of *Nollan* and *Dolan*, and provides government with a gaping loophole whereby it can escape heightened scrutiny by simply converting individualized exactions of property into legislatively imposed fees. A predictable and broad based application of *Nollan* and *Dolan* would benefit both property owners and government. Artificial distinctions do not further the Takings Clause's substantive protection of private property.

CONCLUSION

The standard of review in a constitutional takings claim should be uniform across this nation's courts and must not depend on ill-defined distinctions like the

manner by which an exaction is imposed. Allowing excessive development exactions to escape the *Nollan/Dolan* nexus and rough proportionality standards effectively vitiates the Fifth Amendment in those cases.

Amici respectfully request that this Court grant certiorari to resolve the important issues raised by the Ninth Circuit's decision in this case.

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Respectfully submitted,

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