No. 25-1241

IN THE

Supreme Court of the United States

ARRON BENEDETTI; ARTHUR BENEDETTI; ESTATE OF WILLIE BENEDETTI,

Petitioners,

v.

COUNTY OF MARIN, CALIFORNIA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California First Appellate District, Division Four

BRIEF OF THE MANHATTAN INSTITUTE, NATIONAL ASSOCIATION OF REALTORS®, REALTORS® LAND INSTITUTE, NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA FARM BUREAU FEDERATION, AND YIMBY LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The **Manhattan Institute for Policy Research** ("MI") 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, MI has historically sponsored scholarship and filed briefs opposing government overreach, including in the land-use context.

The **National Association of REALTORS®** ("NAR") is a national trade association representing over 1.4 million members, including its institutes, societies, and councils involved in all aspects of the residential and commercial real estate industries. Members are residential and commercial brokers, salespeople, property managers, appraisers, counselors, and others engaged in the real estate industry. Members belong to one or more of the approximately 1,200 local and 54 state and territory associations of REALTORS® and support private property rights, including the right to own, use, and transfer real property.

The **REALTORS® Land Institute** ("RLI") is a nonprofit advocacy organization focused on developing and advocating on behalf of a network of professionals who broker, lease, develop, and manage all types of land, including farms, ranches, recreational, timberland, vineyards, orchards, undeveloped tracts of land, transitional and

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[1] Pursuant to Rule 37, counsel for *amici* affirm that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici*, their members, or counsel, made any monetary contribution to its preparation or submission. All parties received timely notice of *amici*'s intention to file.

development land, subdivision and lot wholesaling, site selection and assemblage of land parcels, appraisals and land valuation, and auctions.

The **National Association of Home Builders** ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing, whether they choose to buy a home or rent. Founded in 1942, NAHB is a federation of more than 700 state and local associations. NAHB's approximately 140,000 members consists of home builders, suppliers, remodelers and other professionals supporting the home building industry. NAHB's membership builds 80% of all new homes constructed in the United States, both single-family and multifamily.

The **California Farm Bureau Federation** ("CFBF") ***joins only in support of Arguments I and II of this Amicus Brief***. CFBF is a voluntary nonprofit mutual benefit corporation. As a trade association, its purposes include working for the solution of the problems of the farm and representing and protecting the economic interests of California's farmers and ranchers. Its members are 54 separately incorporated county Farm Bureau organizations representing farmers in 57 of California's 58 counties. Those 54 organizations have in total among them more than 23,300 members. CFBF strives to improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable food and fiber supply through responsible stewardship of California's resources. CFBF also aims to improve the ability of individuals engaged in production

agriculture to utilize California resources to produce food and fiber in the most profitable, efficient, and responsible manner possible guaranteeing our nation a domestic food supply. To that end, CFBF is involved in state and federal legislative, regulatory, and legal advocacy efforts on behalf of its members.

YIMBY Law is a 501(c)(3) charitable non-profit organization dedicated to making housing more accessible and affordable by promoting and enforcing compliance with state housing law in California. The voice of the housing consumer has traditionally been absent and ignored in litigation involving housing and environmental issues, as developers, cities, and neighborhood groups litigate their respective concerns while no one speaks for the consumer. YIMBY Law's role is to provide that voice.

Amici support the millions of Americans engaged in the sale and purchase of residential properties, builders constructing new homes nationwide, and agricultural interests in California who are directly impacted by covenants like the one at issue here. This case interests *amici* because overregulation remains one of the chief impediments to healthy housing growth across the United States. While more egregious than most, Marin County's covenant exemplifies municipal officials' all-too-common practice of invoking the state's police powers to avoid subjecting even obvious unconstitutional land-use conditions from heightened scrutiny.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2021, Marin County amended its Local Coastal Program (LCP) to bar the construction of new residential dwellings inside the Coastal Agricultural

Production Zone (C-APZ)—within which Petitioners' land is situated—*unless* the owner records a restrictive covenant that obliges them and all future freeholders to remain "actively and directly engaged" in commercial agriculture. As Petitioners note, "[t]hese requirements apply regardless of the landowner's suitability or interest in being a farmer or rancher. They apply whether or not farming is commercially feasible. They even apply if the land is not agriculturally viable." Pet. Br. at 6.

For decades, Petitioners' father Willie ran a successful turkey farm on the property. By the time the "greater than fiction, cigar-puffing country character" died in 2018, he was already long at loggerheads with Marin County. Chris Smith, "Willie Benedetti, Legendary Rancher, Turkey Farmer and Restaurateur, Dies at 69," *The Press Democrat*, Sep. 28, 2018 (https://perma.cc/9Z4L-Y5SE). Keen to retire, Willie was shocked to learn that he could not build an additional residence for his son unless he continued running an agribusiness or leased it to others who would. That put Willie in a bind: he was tired and his sons are plumbers with neither the knowhow nor the interest in farming or supervising an agribusiness.

Despite conforming with all existing zoning and use rules, the home remains unbuilt—with only the County's demand for an agricultural covenant standing in its way. The County has long argued that the covenant will account for the loss of agricultural utility the additional residence would ostensibly cause. Never mind that the dwelling is specifically planned to "not affect surrounding land uses or interfere with any agricultural activity" in the area, and falls well within the C-APZ's "intergenerational

family" residential carveout. Pet. Br. at 7. That is, it would create no negative externalities on local agriculture and, crucially, was legally permitted long before the LCP was amended to create the covenant.

The County's agricultural covenant fits within a larger pattern of governmental overreach whereby local officials nationwide leverage their police powers to extract from owners a patchwork of in-kind or cash contributions to "pay," ostensibly, for harms tethered only loosely, if at all, to the development at issue. The decision below is the latest in a steady drumbeat of state-court rulings employing creative but incredulous distinctions to insulate unconstitutional conditions from the heightened scrutiny longstanding precedent demands. Not even the recent decision in *Sheetz v. El Dorado County*, 601 U.S. 267 (2024), has been able to break this impasse. Accordingly, the Court should take this case and reconfirm that the unconstitutional-conditions doctrine means what it says—and that recharacterizing an exaction's form does not change its constitutional substance.

ARGUMENT

I. LAND-USE OFFICIALS CANNOT BE ALLOWED TO DISGUISE UNCONSTITUTIONAL CONDITIONS AS MERE EXERCISES OF THEIR POLICE POWER

A. The Court's Exactions Doctrine Is Well-Settled and Unambiguous

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that the conditions imposed on real-property development must bear an "essential nexus" to the government's land-use interest. That is, the conditions must "further the end advanced as the justification for the prohibition" now being lifted. *Id.* at 837. This limit ensures that

developers pay only what is necessary to reimburse the public for the costs their development are reasonably expected to impose.

This rule proved insufficient to cover all exactions, so in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court elaborated that the fees also had to be in "rough proportionality" to the reasonably calculated harm. *Id.* at 391. While "[n]o precise mathematical calculation is required," officials "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." *Id.*

Undeterred, local officials have still looked for loopholes and carveouts, settling on two in particular. First, they claimed that fees imposed via legislation were not subject to *Nollan*/*Dolan* because they did not involve the kind of adjudicative, permit-specific decision wherein the risk of official coercion is presumed to be at its peak. Several state courts have abetted these efforts by overlooking the power imbalance between existing and prospective residents, reasoning that a political process available only to current residents can still sufficiently safeguard broader community interests. *See, e.g.*, *St. Clair Cnty. Home Builders v. Pell City*, 61 So. 3d 992, 1007–08 (Ala. 2010) (per curiam) (holding *Dolan* "does not apply to generally applicable legislative enactments"); *City of Olympia v. Drebick*, 156 Wash.2d 289, 301–02 (2006) (same); *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal.4th 643 (2002) (same); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1103–06 (Ariz. Ct. App. 2018) (same).

Other courts abet official efforts to circumvent *Nollan*/*Dolan* by upholding fees presented as purely

monetary exactions and ignoring that permit-seekers weighing their options obviously know these are conditional alternatives to in-kind contributions. *See, e.g.*, *McCarthy v. City of Leawood*, 257 Kan. 566, 569 (1995) (declining to extend *Nollan*/*Dolan* to a cash exaction because it was not presented as a conditional alternative to an encumbrance on real property); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 697 (Colo. 2001) (same); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 485–86 (1997) (en banc) (same).

In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), the Court closed the pure-monetary loophole, confirming that the doctrine reaches both outright permit denials and monetary demands extracted in lieu of land. The majority held that literal cash grabs also "must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Id.* at 612. Then, in *Sheetz v. El Dorado County (Sheetz I)*, 601 U.S. 267 (2024), a unanimous Court expressed what had long been obvious to most—that the Takings Clause "does not distinguish between legislative and administrative permit conditions." *Id.* at 270.

While some courts have begun to shift their approach and follow these principles, others—like the one below—continue deploying increasingly attenuated distinctions to shield even the most obvious exactions from the heightened scrutiny *Nollan*/*Dolan* demands. *See Benedetti v. Marin Cnty.*, 113 Cal.App.5th 1185, 1201 (1st Dist. 2025) (declining to apply *Nollan*/*Dolan* scrutiny on the theory that a perpetual agricultural covenant imposed as a condition of residential construction is a generally applicable land-use regulation rather than an

exaction); *City of Gridley v. Superior Court*, 104 Cal. App. 5th 1201, 1215 (3d Dist. 2024) (confining the unconstitutional-conditions doctrine to "the land-use permitting context" and exempting levies labeled as "user fees" from *Nollan*/*Dolan* analysis).

B. The County's Covenant Fails *Nollan*, *Dolan*, *Koontz*, and *Sheetz*

The Court has long-recognized that the Takings Clause does not limit itself to real property, offering the same vigorous protection to chattel and intangibles. *Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (equity interest). In *Koontz*, the Court warned that drawing the exaction line at in-kind dedications would render *Nollan* and *Dolan* "a dead letter." 570 U.S. at 614.

Two recent petitions for certiorari have advanced arguments similar to those here. These three petitions together present some of the most common iterations of unconstitutional conditions in practice. The first, *Sheetz v. El Dorado Cnty. (Sheetz II)*, 2025 WL 2116363 (Cal. Ct. App. 3d Dist. July 29, 2025), *pending review* No. 25-958 (U.S. Feb. 9, 2026), marks this case's second appearance before the Court, with the California courts dealing its successful remand a wall of convolution to avoid a head-on ruling. The second, *Coalition for Fairness in SoHo & NoHo, Inc. v. New York City*, 2026 WL 88133 (N.Y. 2026), *pending review* No. 25-1187 (U.S. Apr. 13, 2026), turns on a question this Court has already answered but that some recalcitrant state courts remain committed to avoiding.

Each presents a different fact pattern—a road-impact fee in *Sheetz II*, a property-conversion fee in *Coalition for Fairness*, and an agricultural servitude

here—but each the same architecture: a permit conditioned on a transfer the government could not constitutionally compel outright, dressed up in language designed to elude this Court's exactions framework. Together they confirm that *Sheetz I* has not stopped lower courts from cabining *Nollan*/*Dolan* through ever-more imaginative machinations whenever the underlying transfer can be relabeled.

Below, Respondents essentially argued that the government can commandeer Petitioners' right to work (or not work) in the service of maintaining "agriculture as a viable industry in the coastal zone by preventing the incursion of residential development and residential property values into agricultural lands." *Benedetti*, 113 Cal.App.5th at 1205. Even if this were a legitimate public purpose and Petitioners were *not* entitled to heightened scrutiny—it is not and they are—this excuse would still fail the lowest-grade rational-basis test. It would crumble under the false premise that the exercise of a narrow, longstanding residential carveout built into the zoning code could have a material adverse impact on the C-APZ's commercial design—even in aggregate.

As the California Court of Appeal portrayed it, the California Coastal Commission "intended to ensure that the values of agricultural land would be driven by agricultural uses rather than residential uses, to maintain the economic appeal of agriculture and control the cost of agricultural land." *Benedetti*, 113 Cal.App.5th at 1193. To this end, "if the owners of a farm tract build a second residential dwelling to live in while leaving the farm unused (as Petitioners themselves state they intend to do), the development de facto converts the property into a residential property and contributes to a market for residential

real estate in agricultural areas." *Id.* Its reasoning is flawed on several grounds.

First, the court below ignored that the Benedettis are attempting to utilize an existing carveout so narrow it could not, even in aggregate, permit largescale residential development in the C-APZ. Pet. Br. at 7 (describing the intergenerational-family residential allowance).

Second, the court mischaracterized the covenant as "only" a limit on Petitioners "ability to work in fields other than agriculture on a specific property." *Id.* at 1205. Put another way, Petitioners' fundamental right to choose their vocation (and avoid others) is either abridged in full or not at all. In the court's estimation, the state's conscription of one's labor is *only* unconstitutional when it encompasses all aspects of his or her life and is not limited to just one facet thereof—here, tied in with the Benedettis' status as landowners. This contradicts a mountain of precedent from this Court on down. *See, e.g.*, *Truax v. Raich*, 239 U.S. 33, 41 (1915) (the right to "work for a living in the common occupations of the community" is "of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Fourteenth Amendment liberty includes the right "to engage in any of the common occupations of life"); *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (reaffirming the right to choose one's field of private employment as a component of substantive due process). In contrast, the court below reviewed a "partial" interference with the "right to work" under rational basis, instead of through the heightened lens such a substantive due-process inquiry deserves—and requires. *Cf. Sheetz I*, 601 U.S.

at 275 (rejecting formal labels that would let governments "leverag[e their] permitting monopoly to exact private property without paying for it").

Third, but not least, the court below hyper-focused on the alleged public interests at stake without giving private interests their complementary due. Specifically, the court misread *Nollan* as having "required only a reasonable relationship between a condition and the public need or burden to which a development contributes . . ." *Benedetti*, 113 Cal.App.5th at 1201. This simply is not true.

Nollan made crystal clear that "our cases describe the condition for abridgement of property rights through the police power as a 'substantial advancing' of a legitimate state interest." 483 U.S. at 841 (cleaned up). An individual's fundamental rights cannot concede to anything less, or else the state thereby acquires the means to achieve with its police powers what it could not via uncompensated takings. *See Nollan*, 483 U.S. at 837 (warning that absent the nexus requirement, the permit power becomes "an out-and-out plan of extortion") (internal quotations omitted); *Sheetz I*, 601 U.S. at 275 (same). Of particular concern is the threat such a doctrinal inversion would pose to some of the most cherished and fundamental rights in the Anglo-American pantheon.

II. THE COUNTY'S COVENANT INFRINGES ON THE MOST FUNDAMENTAL OF INDIVIDUAL RIGHTS

A. The Right to Exclude

The right to exclude others is "one of the most treasured" sticks in the bundle of property rights. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). This Court recently reaffirmed

that government-compelled access to private land—even for limited periods, or for ostensibly benign purposes—effects a *per se* physical taking. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149–52 (2021). The covenant Marin County demands of Petitioners is a near-perfect inversion of that principle.

The Benedettis are plumbers, not farmers. To unlock the right to build a residence already permitted under the C-APZ's intergenerational-family carveout, they must agree, in perpetuity and on behalf of all successors-in-title, to work the land themselves *or* to lease the property to commercial agricultural operators who will. The County treats the latter option as an off-ramp for landowners disinclined to farm, but it is no off-ramp at all: it is the very access regime invalidated in *Cedar Point*, where the Court held that California's regulation requiring growers to admit union organizers to their land was a per se taking because it "appropriate[d] a right to invade the grower's property." 594 U.S. at 149. Petitioners confront the same Hobson's choice: farm themselves, or surrender the right to exclude to a third party.

B. The Right to Use

The right to use one's property as one sees fit—within the lawful constraints of the police power—is no less fundamental. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019–20 (1992). The covenant exacted here strips Petitioners of any meaningful choice in that bundle of uses. Even the property's existing acreage must, on the County's terms, be returned to commercial agricultural production *in perpetuity* and bound to every successor-in-title. That is not a regulation of use—it is conscription. The covenant takes the cleanest path to a *Lucas*-style

wipeout while leaving the formalism of ownership intact: the Benedettis still hold title, but the title has been winnowed to a narrow, government-prescribed end. Title without the right of choice is no title at all—and this Court has long warned that the police power cannot be used to demand what the Takings Clause forbids. *Nollan*, 483 U.S. at 837.

C. The Right to Work

As Petitioners correctly note, the "right to work" is at least as fundamental to the Anglo-American conception of liberty as is the bundle of property rights. Indeed, the two are inexorably linked. As John Locke famously observed, "Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property." Locke, SECOND TREATISE ON GOVERNMENT, Ch. V, §27 (1689).

As plumbers, the Benedettis have neither the training nor the inclination to be farmers, and they have never represented otherwise. The court below nonetheless concluded that the County may condition their right to build a residence on the assumption—by them and every future owner of the parcel—of an agricultural vocation in perpetuity.

That conclusion cannot be reconciled with the foundational understanding, traceable from Locke through this Court's substantive-due-process cases, that one's labor is one's own. To hold otherwise would license governments to use the permit power as a labor-allocation tool, channeling owners into unchosen occupations on pain of forfeiting otherwise-lawful uses of their land. The combination of property and labor that Locke described is no less foundational

today than in 1689; this Court should not allow Marin County to sever it.

III. LOCAL LAND-USE OFFICIALS WIELD AN OUTSIZED INFLUENCE OVER THE SIZE AND SCOPE OF MARKET ENTRY FEES

The ruling below, if allowed to hold, will give crucial doctrinal cover for land-use officials anywhere to strengthen or, in some cases, simply return the sort of "out-and-out plan[s] of extortion" that the Court has labored for decades to prevent. *Nollan*, 483 U.S. at 837. Each fee type in isolation may seem manageable; in the aggregate they tend to re-create the very "out-and-out plan of extortion" that *Nollan* condemned and which together make housing growth above a certain level well-night impossible. *Id.* The result is a system in which the right to develop is sold back to the would-be developer at whatever price the local government can extract—a regime in which the costs land-use scholarship has been documenting for decades will fall, as they always have, on the housing consumer rather than the regulator. *See* Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139, 156–57 (2005).

Once existing procedural avenues have been exhausted without achieving their desired results, opponents of new construction still have a smorgasbord of alternative delaying tactics at their disposal. By the time a stall tactic has been fully adjudicated, affected developers might have already spent millions in litigation costs challenging it. For many, the mere prospect of a dragged-out legal battle is enough to discourage some from seeking development in the first place. *See* David Schleicher, *City Unplanning*, 122 Yale L.J. 1670, 1696–1701 (2013) (cataloging the procedural mechanisms by

which incumbent residents drive up the time and cost of obtaining development approvals). Common procedural impediments include:

i. Process-Stacking

The sheer volume of procedural steps developers must overcome—especially in cities—saddle permit-seekers with a mountain of application documents and a seemingly interminable merry-go-round of bureaucratic hurdles. Any one of these can generate its own timeline. Whether intentional or not, the effect is to drown developers in red tape. For those but the biggest players this pileup can be too much to bear. *See* Schleicher, *supra*, at 1696–1704 (discussing the labyrinthine nature of modern permitting and upzoning regimes, with America's largest cities among the worst culprits).

ii. Environmental Reviews

In California, nearly *anyone* can bring construction to a screeching halt by filing a lawsuit alleging a violation of the California Environmental Quality Act ("CEQA"). The allegations need not be true to cost developers dearly. *See generally* Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Envt'l L.J. 21 (2018) (discussing how CEQA's glacial process massively dissuades development in the first place).

Officials will also often seek federal intervention, in the conservation context, often via the National Environmental Policy Act ("NEPA"), which allows virtually any aggrieved party to challenge agency approvals of qualifying projects on the ground that the agency failed to take a "hard look" at environmental consequences and prepare an adequate

environmental impact statement. *See* Michael Bennon & Devon Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, 53 Envtl. L. Rep. 10836, 10840–43 (2023) (documenting litigation on 28% of major federal infrastructure projects requiring an environmental impact statement, 89% of which allege a NEPA violation).

iii. Historic Preservation Laws

Finally, abuse of historic-preservation laws is another mechanism opponents will use, blocking demolitions necessary to site new builds. Vicki Been, Edward Glaeser et al., *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. Urb. Econ. 16, 17–18 (2016) (finding such designations reduces new construction, especially within historic districts).

After these delaying tactics have failed (or in anticipation of their expected failure), recalcitrant land-use officials often find that their last major strategic option is to weaponize the permitting power itself, padding newcomers' entry fees in a final excise. This is the direct antithesis of what *Nollan* and *Dolan* require. *Sheetz I*, 601 U.S. at 275. *Sheetz I* described the nexus requirement as "ensur[ing] that the government is acting to further its stated purpose, not leveraging its permitting monopoly to exact private property without paying for it." *Id.* The proportionality element prevents overreach because "[a] permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from [their proposed activity] has the same potential for abuse as a condition that is unrelated to that purpose." *Id.*

As discussed below, the sociological and economic literature amply demonstrates that exorbitant entry fees—those priced higher than what is calculated as necessary to avoid existing residents from subsidizing the newcomers access to public services—are a major drag on housing growth. The continuation of the doctrinal muddle among state and lower federal courts *after Koontz* and *Sheetz I* is reason enough for the Court to review this case and confirm that *Nollan*/*Dolan* governs any conditions placed on the granting of a use-change. Clever mislabels cannot paint over constitutional deficiencies and reduce the inquiry to whether an official has a "stupid staff" who could not even fake a justified basis for the challenged exaction. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 n.12 (1992) ("Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.").

IV. EMPIRICAL RESEARCH DEMONSTRATES THE OBSTACLES UNCONSTITUTIONAL CONDITIONS IMPOSE ON HOUSING GROWTH

Decades of research confirm that housing production is inversely correlated to the magnitude of undue entry fees imposed. Even where opposition fails to prevent densification, it often succeeds in charging exorbitant fees to curtail new entries far below what the market would otherwise bear. *See* Mark Skidmore & Michael Peddle, *Do Development Impact Fees Reduce the Rate of Residential Development?*, 29 Growth & Change 383, 397–98 (1998) (analysis of 29 suburbs in DuPage County, Illinois, finding that

adoption of impact fees reduced the rate of new residential development from 4.3% to 3.0% per year).

The target of such fees need not be the entrant herself. *See* Vicki Been, *Impact Fees and Housing Affordability*, *supra*, at 156–57 (explaining that impact fees imposed on new development capitalize backward into existing-home values, raising prices for all transacting parties). As with the County's covenant here, the increased cost to the *seller* can also qualify if it achieves the same result of excluding newcomers (here by making it harder for Petitioners and those similarly situated to make preferred use of their properties).

Economists have tracked the relationship since at least the 1980s, with the first national study finding that nearly 45% of 220 responsive jurisdictions levied entry fees. *See generally* Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 Law & Contemp. Probs. 51 (1987). By 2000, that number had reached 59% among cities with more than 25,000 residents. U.S. Government Accountability Office, GAO/RCED-00-178, *Local Growth Issues—Federal Opportunities and Challenges*, at 102 (2000). Most of this expansion was the justified, organic reaction to a decades-long explosion of suburban sprawl that only reached its apogee in the mid-1990s. *See* Christopher Barrington-Leigh & Adam Millard-Ball, *A Century of Sprawl in the United States*, 112 Proc. Nat'l Acad. of Scis. 8244, 8246 (2015).

Official leverage of local revenue-raising power is essential to bridging the short-term imbalances between supply and demand, even as the locus of growth shifts away from sprawl to in-fill development and increased density. As one scholar aptly put it:

> Many public services can be characterized as having large initial costs associated with capacity creation, combined with lower costs associated with ongoing use. Framed in that light, impact fees create a direct link between the upfront capital costs and the subsequent beneficiaries of those services, and could be characterized as efficient prices—internalizing a previously unaddressed externality that new residents impose on existing residents.

Gregory S. Burge, *The Effects of Development Impact Fees on Local Fiscal Conditions*, in Gregory K. Ingram & Yu-Hung Hong, eds., Municipal Revenues and Land Policies 183 (2010). But these programs are still susceptible to abuse, and this has long proven a decisive handicap to advancing the vital project of drastically expanding the nation's severe understock of housing. According to the NAHB, for the average house worth $394,000, regulation accounts for $93,870 of the final sales prices. Paul Emrath, *Government Regulation in the Price of a New Home*, Nat'l Ass'n Home Bldrs., at 1 (2021).

A. Exactions Come in All Shapes and Sizes

Below are some of the most common types of leverage points upon which land-use officials will condition development. The type at issue here can best be described as "economic mitigation" to compensate or outright reduce (via encumbrance) the anticipated *economic* damage a proposed development will cause to a zone's prescribed use. Applied here, the idea is that a new residence on the Benedetti land would *so* undermine the C-APZ's agricultural focus that a *perpetual* agricultural servitude somehow passes the Nollan/Dolan test. While all exactions are susceptible to abuse, those ostensibly designed to

mitigate economic harms are especially vulnerable. It is easily the least precise and therefore most manipulable of the group. Unlike impact fees to build out infrastructure or augment school budgets, "economic mitigation" is tethered to no objective cost measure. There is no road to build, no classroom to fund, no service to provide. The "harm" to be mitigated is the gap between what an applicant proposes and what the zoning scheme prefers—one defined, measured, and priced by the same officials who decide when it has been closed. Under *Nollan*, it makes no difference that the County demanded an in-kind contribution instead of a cash payment. *Koontz*, 570 U.S. at 612–14.

i. Infrastructure Improvements

The most common type of entry fee is for improvements to infrastructure deemed necessary to accommodate more and denser households. Such fees pay for more lanes (sometimes new roads), replacing stop signs with traffic lights, and the like. *See Sheetz I*, 601 U.S. at 271 (describing county's use of traffic-impact mitigation fees to fund road improvements addressing strain on local infrastructure). Like any fees, their price can be inflated. Sensibly, though, courts tend to accept all but the most obvious overpricing. *See, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 643–44 (Tex. 2004) (applying *Nollan*/*Dolan* to a road-improvement exaction and invalidating the portion not roughly proportional to projected traffic impact).

ii. Increased Utilities Capacity

Also common are fees for increasing the capacity of utilities like water, sewer, garbage-collection, and electricity. New homes inevitably raise the demand

for these services, so it is rare for courts to question the amounts charged for improvements. *See, e.g.*, *Krupp*, 19 P.3d at 697 (upholding sewer plant-investment fee on rational-relationship grounds).

iii. Education

Fees earmarked to alleviate pressures on the local school district—*e.g.*, to build or expand campuses and hire new teachers—are also given great deference, but not as much as infrastructure and utilities fees. These fees are also typically imposed by the school districts themselves, independent of what the county or municipal government is charging, and at much higher rates. *See* Nat'l Ass'n Home Builders, Impact Fee Handbook 109 (rev. 2016) (surveying one model county, finding that its "aggressive capital improvement program resulting in marginal additions to existing schools rather than constructing new schools to meet enrollment demand").

iv. Affordable Housing

One can easily see the problem in charging housing providers with the very costs their projects are expected to alleviate. Courts have not missed the problem either, so "impact" fees slated for subsidized housing elicit more exacting scrutiny than the previous categories. *See, e.g.*, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 461–62 (2015), *cert. denied*, 577 U.S. 1179, 1179 (2016) (Thomas, J., respecting denial of certiorari) (recognizing the "important and unsettled" question whether legislatively imposed inclusionary-housing rules are subject to the unconstitutional-conditions doctrine). In all events, the underlying logic remains: the closer a fee's purpose drifts from mitigating an actual

externalized harm, the more reason a court has to scrutinize it.

v. Environmental Conservation

Fees to alleviate the apparent environmental toll of new development are likewise scrutinized for strong causative or even correlative links between the nature of the proposed use and the supposed ecological harms inflicted. *See Koontz*, 570 U.S. at 605–06 (holding that monetary exactions imposed to mitigate the environmental effects of proposed development must bear an "essential nexus" and "rough proportionality" to the impacts of the specific use). *See generally* Timothy M. Harris, *The Takings Clause and the Environment*, 99 St. John's L. Rev. 543 (2026).

vi. Economic Mitigation

Marin County's attempt to draft the Benedettis into agricultural work rests on the most attenuated species of "economic mitigation" imaginable. The "harm" to be mitigated is not lost crop yield, lost agricultural employment, or lost tax revenue—none of which a single additional dwelling on a long-fallow turkey farm could meaningfully cause. The "harm" is the diffuse possibility that residential use, multiplied across an unknown number of future owners and an unknown span of decades, *might* erode the agricultural character the County prefers for the C-APZ. That theory collapses on contact with the carveout the Benedettis seek to invoke—a narrow, longstanding intergenerational-family allowance whose use the LCP itself blesses. Worse, the price the County demands is not a calibrated payment but a perpetual servitude binding the Benedettis and every successor-in-title to work the land themselves or arrange for others to do so. No road, no school, no

water main calls for that exaction. It exists to convert a residential use that the LCP otherwise permits into an agricultural use the LCP prefers—an objective the County could not pursue by ordinance without paying for it, but which it now seeks to achieve free of charge by connecting it to a permit. The danger is not merely doctrinal. If "economic mitigation" can compel an owner's labor in perpetuity without having to pass *Nollan*/*Dolan*, there is no exaction it cannot cover—and no plausible limit on what local governments may demand in exchange for permission to build.

B. The High Cost of Exactions

Schemes like Marin County's are especially egregious when the conditions imposed do not even proclaim to produce their nominal public benefits. According to land-use scholar Vicki Been, "[w]hen impact fees do not provide infrastructure or financing advantages worth their costs"—*i.e.*, conditions that are not roughly proportional to the external costs the target project will impose—"impact fees can be analogized to a one-time excise tax that produces no benefits to the taxpayer." Been, *Impact Fees and Housing Affordability*, *supra*, at 150. Another study concludes that impact fees increase housing costs at a per-unit rate of $1.66 for each $1.00 in fees imposed. Shishir Mathur et al., *The Effect of Impact Fees on the Price of New Single-Family Housing*, 41 Urb. Stud. 1303, 1310 (2004).

But the economic costs are not one-dimensional. Studies focused on individual policy areas reveal substantial, negative downstream effects. "The failure to construct sufficient housing comes with significant social, economic, and environmental costs." Einstein et al., Neighborhood Defenders: Participatory Politics and America's Housing Crisis 8 (2019). Depressed

housing stocks provably deflate the health, education, and labor potential of established and aspirant residents alike.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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