No. 25-1187

IN THE

Supreme Court of the United States

THE COALITION FOR FAIRNESS IN SOHO AND NOHO, INC., ET AL.,

Petitioners,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF OF THE MANHATTAN INSTITUTE, NATIONAL ASSOCIATION OF REALTORS®, NEW YORK STATE ASSOCIATION OF REALTORS®, NATIONAL ASSOCIATION OF HOME BUILDERS, AND NATIONAL APARTMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Ilya Shapiro
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017

Sam Spiegelman
Counsel of Record
SPIEGELMAN LAW GROUP
PO Box 1354
New York, NY 10028
201.314.9505
sam@spiegelmanlawgroup.com

Counsel for Amici Curiae

May 15, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici are proud to represent the tens of millions of Americans engaged in the design, development, sale, and purchase of homesteads across the United States. As the collective voice of this nation's housing industry and New York's in particular, *amici* write to impress upon the justices the urgent political, social, and economic stakes lurking behind the legal questions presented by this case. *Amici* are not a monolith, and do occasionally disagree with one another on political, social, and economic matters. Yet here there is little space for debate. The overwhelming empirical evidence confirms that exactions and other unconstitutional conditions imposed on development are one of, if not the most significant impediment to alleviating our nation's chronic housing shortage.

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.

---

[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.

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 **New York State Association of REALTORS®** ("NYSAR") is a state trade association representing more than 60,000 of New York State's real estate professionals. NYSAR provides a forum for professional development among its members and provides education and advocacy to the public and government for the purpose of promoting the right to sell, buy, own, and develop real property.

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 **National Apartment Association** ("NAA") serves as the leading voice and preeminent resource through advocacy, education and collaboration on behalf of the rental housing industry. As a federation of 139

state and local affiliates, NAA encompasses nearly 113,000 members representing over 13.5 million apartment homes. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, responsibility, inclusivity and innovation. NAA and its network of affiliated apartment associations seek the fair governmental treatment of multifamily housing organizations, including advocating the interests of the rental housing business community at large in legal cases of national concern.

This case interests *amici* because it starkly exemplifies what is, in far too many places, an underrated practice of local forces turning their regulatory powers into a profitable exercise in gatekeeping. This enterprise does not benefit the officials themselves, but serve to rescue the public fisc from their own misfeasance or, more often, simply to provide their treasury with a cash windfall. These "exactions," in legal (and increasingly ordinary) parlance, are more than a mere inconvenience to those charged.

In the aggregate, exorbitant development fees constitute one of the most substantial impediments to housing growth despite the urgent need for more housing. *See* Joseph Gyourko & Jacob Krimmel, *The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single Family Housing Markets*, 126 J. Urb. Econ. 103374, at 13 (2021) (estimating that supply-side land-use regulation has bid up the price of residential land in the San Francisco, Los Angeles, and Seattle metropolitan areas by amounts that "at least equal typical household income").

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is but one star within a constellation of conversion, impact, and in-lieu fees that local governments everywhere regularly impose upon development. Some of these "entry fees"[2] justifiably shift the resulting increased pressures on education, health, safety, and infrastructure back onto the very newcomers to whom these local services are adjusting. As the population of any functional American neighborhood grows, so too does its demand for more essential services. This episodic imbalance is a natural and expected consequence of orderly growth. And, in some instances, it is reasonable that those responsible for the rising demand for public services internalize the costs of such short-term supply shocks.

But the process is not immune to illegal and unconstitutional application. Far from it. There is the perennial risk that local land-use authorities and established homeowners will leverage their respective regulatory and voting powers to impose entry fees far above what is necessary to cover the costs of private development. *See* Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005) ("Over the past three decades, increasing numbers of local governments have turned to new methods of financing public works projects, especially land use exactions and impact fees.") Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 206, 262 (2006) ("All evidence

---

[2] See Snejana Farberov, *New Homebuyers Are Paying a Record "Entry Fee" to Own a Home*, Realtor.com: News & Insights (Mar. 19, 2026) (available at: https://perma.cc/C4KK-QBCK).

points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

Here, New York City seeks to exact a windfall from Noho and Soho residents wishing to sell their artist-restricted loft *sans* artists-in-residence.[3] Though uniquely audacious, the scheme is emblematic of a metastasizing national trend. For decades, counties, cities, and towns across the country have used development "impact" as a Trojan horse to sneak a phalanx of fees onto a narrow class of new entrants that "in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (declaring the Takings Clause "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). At a certain point, even the most well-intentioned development-mitigation fee program can cross the line from functional to superfluous, leaving the promulgating government vulnerable to the litany of tests the Court has formulated to gauge their constitutional muster.

Amici and the millions of housing professionals they represent are not new to creative interpretations of *Nollan*/*Dolan*. But the swiftness with which the New York Court of Appeals and others have *already* misread or creatively ignored *Koontz* and *Sheetz*

---

[3] *See Coalition for Fairness in SoHo and NoHo, Inc. v. City of New York*, ___ N.E.3d ___, 2026 WL 88133, at *3 (N.Y. 2026) (noting "the City asserts that by 2022, an estimated 1,600 out of 1,636 JLWQA-designated units were occupied by non-conforming households that did not comply with the use restrictions and only four artists received JLWQA certification in the last year").

makes finding a resolution resolving to the exactions muddle more urgent than ever. The reasons they provide for doing so—or, rather, why they believe there rulings do *not* depart from binding precedent—are an admixture of over-deference to official narratives on the one hand, and the employment of hollow categorical distinctions on the other. The upshot is an aggrandizement of local gatekeeping power, even where the Constitution demands it diminution. It is unclear which malpractice emerged first—likely the two developed in a gradual symbiosis. But because courts have the final say-so in exactions disputes, to appreciate the magnitude of social and economic costs requires understanding, first and foremost, why and how some state and lower federal courts circumvent the Court's clear instructions.

ARGUMENT

I. THE DECISION BELOW ADOPTS A RULE THIS COURT HAS ALREADY REJECTED

A. The Court's Exactions Doctrine Is Unambiguous

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that the conditions imposed on the development of real property 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 a developer pays only what is necessary to reimburse the public for the costs the development is reasonably expected to impose upon them.

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 imposed also had to be

in "rough proportionality" to the reasonably calculated harm. *Id.* at 391. While there is "[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 at its peak. Several state courts have abetted these efforts, ignoring the power imbalance between existing and aspirant residents, believing that a political process available only to the former will still protect the interests of the latter. *See, e.g.*, *St. Clair Cnty. Home Builders v. Pell City*, 61 So. 3d 992, 1007 (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, 670–71 (2002) (same); *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1103–04 (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, 580 (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 tried to close 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. County of El Dorado*, 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.

Some courts finally got the message, but others continue to use increasingly attenuated distinctions to shield monetary permit conditions from the heightened scrutiny *Sheetz* requires. *See, e.g.*, *Coalition for Fairness in SoHo and NoHo, Inc. v. City of New York*, ___ N.E.3d ___, 2026 WL 88133, at *1 (N.Y. 2026) (holding the JLWQA conversion fee a "standalone monetary fee" categorically outside *Koontz* and *Sheetz*); *Sheetz v. Cnty. of El Dorado*, 2025 WL 2116363, at *21 (Cal. Ct. App. 3d Dist. July 29, 2025) (on remand, sustaining the same legislatively enacted impact fee under deferential "reasonable relationship" test for class-based fees which *Dolan* had declined to endorsed); *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. New York City's Conversion-Fee Scheme Is of the Same Species as Those Confirmed Prohibited in *Koontz*

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. This would allow officials to evade takings scrutiny by making an exclusive demand for cash, without ever representing—at least on paper—that the fee is in lieu of an in-kind contribution of an interest in the underlying property. *Id.* at 614. While JLWQA is unique in that it permits New York City to use an *existing* use restriction to achieve this result, one can imagine any number of scenarios where officials pull off this sleight-of-hand without the luck of an existing (though long-unenforced) regulation encumbering Petitioners' properties.

The dissent to the ruling below rightly saw no substance in the majority's cash/real property distinction. Beyond all the bells and whistles, at its core the JLWQA conversion is "a monetary exaction demanded from a real property owner, linked to a specific, identifiable property interest, in exchange for a governmental benefit tied to their property." 2026 WL 88133, at *10 (Garcia, J., dissenting). The unconstitutional-conditions doctrine "vindicate[s] the Constitution's enumerated rights by preventing the government from coercing people into giving them

up." *Id.* at *11 (quoting *Koontz*, 570 U.S. at 604). The majority's escape hatches—that the fee is (1) "exempt as a purely monetary exaction and not a physical taking or a fee imposed in lieu of a physical taking," and (2) "somehow exempt because it is part of a zoning ordinance"—are, per the dissent, "clearly foreclosed by *Koontz*." *Id.* at *12. Left to stand, the majority's reasoning "would have the unacceptable effect of removing from constitutional scrutiny any conditions imposed by means of zoning ordinances, including not only monetary exactions but demands for easements." *Id.*

II. EXACTIONS ARE A PRIMARY CAUSE OF AMERICA'S CHRONIC HOUSING SHORTAGE

A. Homevoters Wield an Outsized Influence Over the Size and Scope of Market Entry Fees

Unlike taxes, penalties, or utilities, entry fees sit beyond the reach of local democratic processes. Indeed, by their very nature they are the price established residents charge newcomers for the privilege of living in their midst. These tolls come in several forms, from outright levies on new builds that are earmarked to specific public-works funds to inclusionary-zoning mandates compelling developers to set aside a fraction of units at below-market prices (or pay an equivalent fee in lieu), to "linkage" charges that condition market-rate or commercial development on contributions to affordable-housing trust funds. Rosenberg, *supra*, at 195–98.

At their simplest, all are means by which "homevoters . . . use their local votes and other political activities to protect and promote the value of their owner-occupied homes." William A. Fischel, *The*

Rise of Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day, in Lee Ann Fennell & Benjamin J. Keys, eds., EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 19 (2017).

The incentives for pursuing such measures are obvious. First, it is a means of raising funds without also raising public ire via statutory, on-book tax levies. Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 W. Mich. U. Thomas M. Cooley L. Rev. 1, 2 (2005). Second, thus far neither voters nor the courts have done much to stop it. Indeed, "[r]esidents now urge their elected officials to adopt impact fees when the locality has not yet done so." Rosenberg, *supra*, at 262. Overcharging developers does not, after all, tend to animate popular sympathies. "Without having to face the opposition of future residents who do not currently live or vote in the locality," land-use officials "find impact fees an irresistible policy option." *Id.*

Most homevoter opposition is directed at in-fill development—proposed high-scale "missing middle" builds like duplexes and triplexes. *See* David Garcia et al., *Making Missing Middle Pencil: The Math Behind Small-Scale Housing Development*, Terner Ctr. for Hous. Innovation, at 4 (2024) (units which "target middle-income households, who struggle to find affordable properties but earn too much to qualify for subsidized housing").

Local opposition is often the decisive factor in preventing denser and more affordable development. While only a small portion of existing residents *ever* involve themselves in local land-use questions, those who do frequently wield an outsized influence—sometimes just by showing up. *See* Katherine Levine

Einstein et al., *Who Participates in Local Government? Evidence From Meeting Minutes*, 17 Persp. on Pols. 28, 37 (2019) (noting that despite polls indicating the opposite popular sentiment, "our results reveal that zoning board and planning board officials are overwhelmingly hearing opposition to the construction of new housing").

1. Procedural Barriers to New Housing Construction

Once electoral 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 generally* David Schleicher, *City Unplanning*, 122 Yale L.J. 1670 (2013) (cataloging the procedural mechanisms by which incumbent residents drive up the time and cost of obtaining development approvals); Katherine Levine Einstein et al., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 95–126 (2019) (documenting how procedural participation rights are systematically deployed to delay or defeat new housing).

These procedural impediments come in a few forms:

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, for example, nearly *anyone* can bring construction to a screeching halt by filing a lawsuit alleging the build violates 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 seek federal intervention, in the conservation context, often via the National Environmental Policy Act ("NEPA"), which allows virtually any aggrieved party to challenge federal-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 predevelopment 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 reduce new construction, especially within historic districts).

2. Exorbitant Fees as a Last Resort to Stop Construction

After these delaying tactics have failed (or in anticipation of their expected failure), opponents 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 the *Nollan*/*Dolan* test requires. *Sheetz*, 601 U.S. at 275. *Sheetz* 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 the homevoter 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* 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. To confirm a clever mislabel 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, 102 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.").

B. Empirical Research Amply Demonstrates the Substantial Obstacle Exactions Impose on Housing Growth Everywhere

Decades of research all but confirm that housing production rates are 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—a nearly more than 25% drop, even with exactions still in their salad days).

The target of such fees need not be the entrant herself. *See* Vicki Been, *Impact Fees and Housing*

Affordability, 8 Cityscape 139, 156–57 (2005) (explaining that impact fees imposed on new development capitalize backward into existing-home values, raising prices for all transacting parties). As with the JLWQA, 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 sell their lofts and, presumably, put such properties to more efficient—read: denser—uses).

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).

1. Exactions Come in Many Shapes and Sizes

Below are some of the most common types of impact fees, followed by the nebulous public-benefit arguments New York City uses to justify its JLWQA conversion fee. Proponents of the JLWQA defend it as a way to compensate New Yorkers for the loss of artist housing stock the JLWQA designation was originally intended to preserve. *See Coalition for Fairness*, 2026 WL 88133, at *3.

All exaction fees are susceptible to abuse, though not by the same odds. A brief tour of the major categories illustrates how courts and economists have

come to identify the line between legitimate cost-recovery and naked revenue extraction.

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*, 601 U.S. at 271 (describing County's use of traffic-impact mitigation fees to fund road improvements addressing ever-increasing 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, as with infrastructure improvements, it is rare for courts to question the amounts charged. *See, e.g.*, *Krupp*, 19 P.3d at 697 (upholding impact 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"). School impact fees thus create a completely separate node for misfeasance that falls upon the courts to investigate. *See* Julian Conrad Juergensmeyer & Thomas E. Roberts, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW §9.8 (4th ed. 2018) (cataloging the bifurcated authority over school impact fees and the resulting administrative complexity). On the other hand, school districts have no direct involvement in the permitting process, and so generally lack the leverage to give developers ultimatums. *Id.*

On balance, courts have generally treated school-facilities fees as legitimate exercises of the police power so long as they are tied to the demonstrated capacity needs the development is projected to generate. *See, e.g.*, *Loyola Marymount Univ. v. L.A. Unified Sch. Dist.*, 45 Cal. App. 4th 1256, 1264–65 (1996) (upholding school-facilities fee where reasonably related to projected enrollment impact).

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, and 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., concurring in denial of certiorari) (recognizing the "important and unsettled" question whether legislatively imposed inclusionary-housing requirements 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 development-driven harm, the more reason a court has to scrutinize it.

v. Environmental Mitigation

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. Undefined Public Interests

How, exactly, did New York City arrive at $100 per square foot to remove an artist-only restriction that is now utilized by no more than 0.1% of units with that designation? That's the kind of inscrutable question that emerges from fees that are vaguely tied to the "public interest." The previous types of fees shared at least one commonality—they are all quantifiable in dollar terms. Some more readily than others, but calculable nonetheless. *See* Arthur C. Nelson, et al., PROPORTIONATE SHARE IMPACT FEES AND DEVELOPMENT MITIGATION 47–78 (2022) (describing the standard methodologies—needs assessment, level-of-service standards, cost allocation—by which

courts and engineers translate projected impacts into dollar figures). While ease of pricing is not the test for whether an entry fee is justified, its absence casts serious doubt on its bona fides. Indeed, City officials do not even deny the arbitrary nature of the JLWQA fees, seeking instead to categorically exclude the conversion fee from *Nollan*/*Dolan* view altogether.

By their very design, "impact" fees are limited to mitigating the discrete, identifiable costs that newcomers impose on existing residents. *Sheetz*, 601 U.S. at 276 (a permit condition must "mitigate harms resulting from" the proposed activity rather than serve some unrelated public purpose). Here, New York City is resurrecting an encumbrance that has long been a dead letter for a reason: by the City's own admission, only four artists received JLWQA certification in 2022, against a designated base of more than 1,600 units, the overwhelming majority of which are occupied by non-conforming households the City has made no effort to displace. *See Coalition for Fairness*, 2026 WL 88133, at *3. In short, almost no one is using the units to produce art, which makes an offsetting fee doubly strange. If the 1,600 units were teeming with artists who are beautifying the City, then *maybe* a fee could be warranted. But this exaction has all the hallmarks of local council members discovering that they can coerce money from property owners because they want to fund art that they like.

The City cannot properly explain the price of the fee because the actual dollar value cannot possibly come close. Almost none of the artist-restricted units still host a resident artist. If all of the JLWQA-designated units were sold tomorrow, and all their artist occupants left the five boroughs in consequence,

current New Yorkers would not absorb cultural losses approximating anything close to the *$450 million* that the Artists Fund would collect under the current fee schedule. Indeed, if the conversion fee stands, New Yorkers lose out on far more economic value generated by the sale of the restricted lofts than they ever would from the exit of 36 artists—already a worst case scenario that assumes all 36 would apply for the conversion and move.

New York City's conversion-fee scheme cannot escape *Nollan*/*Dolan*'s ambit. Nor should it survive under the twin-test's heightened scrutiny. *See Dolan*, 512 U.S. at 391 (requiring "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"). The scheme simply lacks anything close to the causative or even correlative links between use and harm required to pass constitutional muster. Nor are the costs of such inappropriate exercises of local land-use power limited to those directly impacted. Undue entry fees produce inefficiencies that extend far beyond the housing market alone.

2. The High Cost of Exactions

Schemes like the JLWQA conversion fee are especially egregious when the conditions imposed do not produce public benefits their promoters claim they will. 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.

The economic costs are not one-dimensional, however. 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, *supra*, at 8. Depressed housing stocks provably deflate the health, education, and labor potential of established and aspirant residents alike. In their exhaustive inquiry, *amici* did not find a single research product that even asked—let alone showed—that artificial impediments to housing help *any* population more than it hurts them.

CONCLUSION

Despite *Koontz* and *Sheetz*, there is still much work to be done to clarify the constitutional status of exactions. To start, it is crucial the Court reconcile why courts continue misapplying *Nollan*/*Dolan*, especially after *Koontz* and *Sheetz* clarified that legislative and monetary exactions (often in combination) must bear the same rough proportionality and essential nexus to the public costs the proposed project is expected to generate.

While the immediate controversy turns on whether *Nollan*/*Dolan*, *Koontz*, and *Sheetz* extend to legislative monetary exactions *not* made in lieu of surrendering a property interest, this case is about so much more. There are the broader social and economic implications, of course; but landmark and uncomplicated rulings of this Court are being ignored. Lower courts continue to invoke irrelevant distinctions to reach preferred outcomes, leaving the Court to play yet another round of doctrinal whack-a-mole. This case provides a clean vehicle for arriving at

a satisfactory end to what has become an almost interminable judicial voyage—more urgent than ever in view of America's ever-worsening housing crisis.

For these and the foregoing reasons, and those set forth in the Petition, *amici* respectfully request the Court grant certiorari and reverse the New York Court of Appeals in accordance with *Koontz* and *Sheetz*.

Respectfully submitted,

May 15, 2026

Ilya Shapiro
Trevor Burrus
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 10017

Sam Spiegelman
Counsel of Record
SPIEGELMAN LAW GROUP
PO Box 1354
New York, NY 10028
201.314.9505
sam@spiegelmanlawgroup.com

Counsel for Amici Curiae