

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE SHEETZ, )  
 )  
 Petitioner, )  
 )  
 v. ) No. 22-1074  
 )  
 COUNTY OF EL DORADO, CALIFORNIA, )  
 )  
 Respondent. )  
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Pages: 1 through 98  
Place: Washington, D.C.  
Date: January 9, 2024

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5 v. ) No. 22-1074

6 COUNTY OF EL DORADO, CALIFORNIA, )

7 Respondent. )

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9

10 Washington, D.C.

11 Tuesday, January 9, 2024

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13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:02 a.m.

16

17 APPEARANCES:

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19 on behalf of the Petitioner.

20 AILEEN M. McGRATH, ESQUIRE, San Francisco, California;  
21 on behalf of the Respondent.

22 ERICA L. ROSS, Assistant to the Solicitor General,  
23 Department of Justice, Washington, D.C.; for the  
24 United States, as amicus curiae, supporting the  
25 Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-1074, Sheetz versus the County of El Dorado.

Mr. Beard.

ORAL ARGUMENT OF PAUL J. BEARD, II

ON BEHALF OF THE PETITIONER

MR. BEARD: Mr. Chief Justice, and may it please the Court:

The county refused to give George Sheetz a permit to build a home unless he paid a substantial fee to finance public road improvements. He was faced with an impossible choice: the taking of over \$23,000 or the ability to use his land. Though the fee went beyond mitigation, he did submit to the fee and paid under protest. After all, the permit was worth far more than the fee.

That's the same improper leveraging that led to this Court's rule in Nollan, Dolan, and Koontz that all permit exactions should be subject to heightened scrutiny. Such review is needed to ensure that the government is not committing a taking in the guise of the police

1 power to mitigate for land use impacts. Yet,  
2 the lower court refused to apply Nollan/Dolan  
3 simply because the fee came from a legislative,  
4 preset, generally applicable schedule that the  
5 county had adopted.

6 The decision below is as wrong as it  
7 is dangerous. First, nothing in the Court's  
8 exactions precedents, the Takings Clause, or the  
9 unconstitutional conditions doctrine justifies  
10 that broad exception.

11 Second, it's a perversion of Nollan  
12 and Dolan to say that because an exaction is  
13 generally applicable, therefore, it requires no  
14 heightened review. The exact opposite is true.  
15 Such an exaction only amplifies the risk that  
16 the government hasn't tailored its exaction to a  
17 project's impacts, and that cries out for  
18 Nollan/Dolan review.

19 Finally, upholding the lower court's  
20 decision would just invite the government to  
21 monetize across the country all of their permit  
22 exactions and to preset legislative fees in  
23 order to escape heightened review. The  
24 exception would swallow the rule.

25 All permit exactions, whether monetary

1 or otherwise, generally applicable or ad hoc,  
2 should be subject to Nollan and Dolan to ensure  
3 the government doesn't take more than it is  
4 entitled to under its police power to mitigate  
5 for land use impacts. The Court should reverse  
6 and remand with instructions to apply heightened  
7 review to the court -- to the county's fee.

8 I look forward to the Court's  
9 questions.

10 JUSTICE THOMAS: Do we have to decide  
11 any more than whether Nollan/Dolan scrutiny  
12 applies to -- can apply here to legislative  
13 exaction?

14 MR. BEARD: Justice Thomas, the Court  
15 is -- is able to just answer the question  
16 presented, which is simply whether there's some  
17 kind of a legislative generally applicable  
18 exception to Nollan and Dolan, yes.

19 JUSTICE THOMAS: If -- if the -- if --  
20 if Respondent concedes that, is there anything  
21 else we should do?

22 MR. BEARD: There's nothing for the  
23 Court to do. That is the question presented.  
24 They -- they've essentially conceded that  
25 primary point that there is no legislative

1 generally applicable exception.

2 JUSTICE JACKSON: Can I ask a --

3 CHIEF JUSTICE ROBERTS: In all --

4 JUSTICE JACKSON: -- fundamental --

5 oh, sorry.

6 CHIEF JUSTICE ROBERTS: I was just  
7 going to say, in -- in all of the other takings  
8 cases, there was an identifiable property  
9 interest that was at issue. So, unless your  
10 argument is that money is property, this is a  
11 very different application of the Takings  
12 Clause, isn't it?

13 MR. BEARD: We think it's -- it's very  
14 consistent with the Takings Clause and, in  
15 particular, with the Court's decision in Koontz,  
16 where -- where the Court held explicitly, if the  
17 money demand has a direct link to an  
18 identifiable property interest, which in that  
19 case and in this case was the land that was  
20 proposed for use, that direct link is sufficient  
21 to render the mone- -- monetary demand a  
22 monetary exaction subject to Nollan and Dolan.

23 CHIEF JUSTICE ROBERTS: Well, it  
24 involves land, but they're not taking any  
25 particular property interest. They're not

1 taking any part of the land. They're not taking  
2 an easement. It's just use to which the land is  
3 -- is being put. You can argue it's the value  
4 of the land, but, you know -- and even in the  
5 other cases where we're talking about money,  
6 it's usually money in a particular pot, whether  
7 it's, you know, in the legal fees case or those  
8 sorts of situations.

9 I don't think there's another case  
10 under Nollan and Dolan and Koontz where what's  
11 involved is simply value as opposed to a  
12 concrete, identifiable property interest.

13 MR. BEARD: It's true that it is  
14 Koontz that we are relying on for that  
15 identifiable property interest link to the  
16 property demand. It comes within the unique  
17 context of a land use permitting process where  
18 there -- there's a concern about the improper  
19 leveraging of the permit to extort money or  
20 land.

21 And as Koontz again said, so long as a  
22 monetary demand operates on or burdens a  
23 particular piece of property, as in Koontz and  
24 as here, that is sufficient to --

25 JUSTICE SOTOMAYOR: Taxes --



1 JUSTICE GORSUCH: Could your --

2 JUSTICE SOTOMAYOR: -- and user fees  
3 do that. General building permits do that.  
4 There's all -- and Koontz was very clear that,  
5 I'm quoting from it, "This case does not affect  
6 the ability of government to impose property  
7 taxes, user fees, and similar laws and  
8 regulations that may impose financial burdens on  
9 property owners."

10 Now I don't think we need to reach  
11 this question, but it wasn't really argued below  
12 and it wasn't even argued in the presentation on  
13 cert of what's the difference between this and  
14 those kinds of impositions.

15 MR. BEARD: Justice Sotomayor --

16 JUSTICE SOTOMAYOR: I can see  
17 arguments on both sides, but I -- I -- I don't  
18 understand why the essence of Koontz isn't what  
19 the Chief observed, which is are -- is the state  
20 taking for its own personal use your property,  
21 an identified piece of property? Money has  
22 never been viewed as that way. A -- a --

23 MR. BEARD: Well, in Koontz, money was  
24 viewed as -- as a protectable interest when tied  
25 to the underlying land --

1 JUSTICE SOTOMAYOR: Well, but you had  
2 to --

3 MR. BEARD: -- on which it was  
4 operating.

5 JUSTICE SOTOMAYOR: -- it was either  
6 give me an easement or give me money, so it was  
7 tied to a property interest that the state --  
8 the government was going to take over.

9 MR. BEARD: That is not a reasonable  
10 reading of -- of Koontz. It wasn't the tie  
11 between the monetary demand and the in lieu  
12 request for a dedication of real property. It  
13 was the tie between the monetary demand  
14 operating on the property owner's land. It was  
15 burdening operating on his land because he was  
16 seeking a permit, a valuable permit --

17 JUSTICE SOTOMAYOR: That was going to  
18 give the government use of another piece of  
19 land.

20 JUSTICE JACKSON: Can I try it this  
21 way? My question is whether your argument is  
22 that all permit extractions should be -- are  
23 implicating the Takings Clause. Anytime the  
24 government asks for a fee related to real  
25 property, the Takings Clause is implicated?

1           MR. BEARD: I would frame it more  
2 narrowly, Justice Jackson. I would say that  
3 anytime the government, in the land use  
4 permitting context, appropriates money for the  
5 purpose of mitigating a land use, that is  
6 subject to Nollan, Dolan, and Koontz and -- and  
7 the requirement -- requirement for the  
8 government to show that it's -- what it's doing  
9 is mitigation --

10           JUSTICE JACKSON: Right. I understand  
11 your argument is that Nollan and Dolan applies  
12 in that situation. But what if I believe that  
13 Nollan and Dolan only applies when the Takings  
14 Clause is implicated?

15           Because what we're talking about here  
16 is the unconstitutional conditions doctrine, and  
17 so the condition has to be unconstitutional in  
18 order to even implicate the Nollan -- at least  
19 the way that I read the cases.

20           So what I'm trying to understand is,  
21 what is unconstitutional about a county saying,  
22 if you want to build in this way, because of the  
23 impacts on the traffic or environment or  
24 whatever, you have to pay a fee?

25           MR. BEARD: There is nothing as such

1 wrong with the government making that demand.

2 JUSTICE JACKSON: All right. So then  
3 we don't have an unconstitutional condition.

4 MR. BEARD: Well, we have an  
5 unconstitutional condition in the sense that if  
6 the government had knocked on Mr. Sheetz's door  
7 and said, we want this sum of money to pay for  
8 road improvements down the road, down the way,  
9 that in our view would have been an  
10 unconstitutional taking.

11 JUSTICE JACKSON: Would that --

12 JUSTICE BARRETT: I --

13 JUSTICE JACKSON: -- that would have  
14 been a taking?

15 MR. BEARD: That would have been a  
16 taking if he was being asked to give money to  
17 the government for a public improvement project  
18 as -- as his status as a landowner. That --

19 JUSTICE BARRETT: Mr. Beard, I'm  
20 pretty confused because I thought your argument  
21 was that this was in some sense an in lieu of  
22 because, as Justice Jackson's pointing out, this  
23 was an exaction, but it was kind of a trade for  
24 something. It was for either giving up some use  
25 of his property or, perhaps in the Lucas sense,

1 you know, all use of the property.

2 But now I think you're -- you're -- so  
3 that would be kind of the -- the taking part?  
4 I -- I guess I didn't understand it to be an  
5 argument that was solely about the taking of  
6 money that was unrelated.

7 MR. BEARD: What I was referring to in  
8 the -- in the example of the government  
9 unilaterally requesting or demanding that money  
10 be put to a particular use outside the  
11 permitting process, I was referring to the  
12 predicate for the unconstitutional conditions  
13 doctrine.

14 JUSTICE BARRETT: Okay.

15 MR. BEARD: And it's our view that --  
16 that if the government had -- had demanded money  
17 or actually taken money, as it has here, to put  
18 to a public use, because of his ownership of the  
19 land, that that would be a taking under the  
20 Koontz rationale, which is, when there is this  
21 demand linked to a particular piece of property,  
22 that can rise to the level of a protectable  
23 interest under the Takings Clause.

24 JUSTICE ALITO: Could your claim be  
25 conceptualized as one involving a -- a no -- a

1 no-build easement --

2 MR. BEARD: It certainly --

3 JUSTICE ALITO: -- a type of easement  
4 on the property that prohibits any building?

5 MR. BEARD: It certainly could be  
6 characterized that way because, if -- if he  
7 doesn't -- if he doesn't pay the ransom, he  
8 can't build. And so, in that sense, there is a  
9 complete annihilation of his use. As I put it  
10 in -- in my opening, it's -- it's this terrible  
11 choice between having to -- to pay \$23,000 or  
12 give up his right to build. So, in that sense,  
13 he is precluded from building if he doesn't pay.

14 JUSTICE BARRETT: And that is kind of  
15 more of an in lieu of. I mean, what Justice  
16 Alito is proposing to you is different, I think,  
17 than the way you were styling your argument  
18 before.

19 MR. BEARD: Well, in lieu has a kind  
20 of esoteric meaning, I think, in the exactions  
21 case, in exactions case law, meaning --

22 JUSTICE BARRETT: Okay. Well -- well,  
23 I'll -- I'll -- I'll retract that. Not in lieu  
24 of, but in that sense, you are demanding a  
25 property interest because you're demanding an

1 easement, like a no-build easement, which might  
2 be a variation of, say, a total conservation  
3 easement in exchange, or you can pay the money.  
4 Is that how your --

5 MR. BEARD: Yes, it can be  
6 characterized that way. We have been  
7 characterizing it in terms of Koontz because we  
8 think this case is on all fours with Koontz.

9 JUSTICE JACKSON: But can you  
10 characterize the -- can you characterize it in  
11 terms of what's actually happening in this case?

12 MR. BEARD: Yes.

13 JUSTICE JACKSON: I mean, I didn't  
14 understand the county to say anything about give  
15 up your land or don't build on your land or, you  
16 know, we want an easement, we're taking your  
17 land. I thought what was happening in Koontz,  
18 just as in Nollan and Dolan, is that the county  
19 actually was interested in possession of the  
20 land, a dedicated easement for some reason.

21 And in Nollan and Dolan, they, you  
22 know, said in order to -- you know, they set it  
23 up in a situation in which you -- the county  
24 could get that easement under those  
25 circumstances. And in Koontz, they said, okay,

1 fine, you don't have to give us the land, you  
2 can give us money in lieu of giving us the land.

3 But I didn't understand that dynamic  
4 to be what is happening here. This seems to me  
5 more like a property tax or a user fee that they  
6 say -- you know, a toll or something that --  
7 that if you build on your land in this way, it's  
8 going to cause certain impacts, and so, in order  
9 to permit you to do that building, you need to  
10 pay for the fee.

11 MR. BEARD: Right. And -- and -- and  
12 this is an impact -- impact mitigation  
13 requirement. The precedents teach us that when  
14 there is an impact mitigation requirement that,  
15 yes, the government does have the police power  
16 to mitigate for impacts, but it can't ask for  
17 something else or something beyond mitigation.

18 JUSTICE JACKSON: It can't ask for  
19 something unconstitutional. It can't ask for  
20 something it couldn't have asked for --

21 MR. BEARD: Correct.

22 JUSTICE JACKSON: -- consistent with  
23 the Constitution.

24 MR. BEARD: Yes.

25 JUSTICE JACKSON: So that's why I



1 asked you why is it unconstitutional for them to  
2 impose a fee, a user fee, a toll. What your --  
3 your argument is suggesting that every toll is  
4 -- is a taking, that every --

5 MR. BEARD: No.

6 JUSTICE JACKSON: -- property tax is a  
7 taking.

8 MR. BEARD: No. Taxes and user fees  
9 and other kinds of levies, they're entirely  
10 different on the basis of the -- the -- the  
11 power that's being invoked, the state or local  
12 procedures pursuant to which they're being  
13 invoked, the functional object of the thing  
14 that's being levied. So, for example, a tax  
15 generally is to raise revenues. It's not to  
16 mitigate impacts to land use.

17 A user fee is used to compensate the  
18 government or reimburse the government for a --

19 JUSTICE JACKSON: To mitigate impacts  
20 --

21 MR. BEARD: -- a service or product --

22 JUSTICE JACKSON: -- to mitigate  
23 impacts for -- for users.

24 MR. BEARD: But it's not, because a  
25 user fee -- in California, for example, the

1 Constitution defines a user fee as the provision  
2 of a good or service to the payer and to nobody  
3 else. That is not what is happening here.

4 Everyone use the roads, and Mr. Sheetz  
5 may not even use the roads that are being  
6 improved with his fee. So all of those other  
7 taxes, user fees, financial obligations examples  
8 are totally distinct. And as Koontz rec- --

9 JUSTICE KAGAN: But the Court has made  
10 clear that user fees generally don't have to be  
11 calibrated to individual people's uses, right?  
12 That --

13 MR. BEARD: True.

14 JUSTICE KAGAN: -- a legislature can  
15 make an overall judgment about the way in which  
16 categories of people use various services.

17 And I think what Justice Jackson is  
18 saying is, why shouldn't we understand what  
19 happened here in exactly that way? That,  
20 actually, this scheme is highly reticulated, but  
21 it's a judgment about how different categories  
22 of people, you know, some people who are  
23 building single residential homes and some  
24 business owners and some churches and, you know,  
25 many different categories of people, they've

1 made evaluations of how -- how much those people  
2 are going to use the roads, are going to  
3 increase the burden on the roads, and so how  
4 much they have to pay.

5           And that seems like a pretty classic  
6 -- I mean, I'm sure different counties and  
7 places have different terminologies for  
8 different sorts of fees, but the concept of that  
9 is a user fee. We're making a judgment that you  
10 and other people that fit within your category  
11 are going to use the roads X amount, and so you  
12 should have to pay Y amount.

13           MR. BEARD: That is to give a meaning  
14 to a user fee that -- that just doesn't exist  
15 in -- in any jurisdiction of which we're aware.

16           A user fee is very specifically  
17 defined. It has -- it has its own procedures.  
18 It has its own standard of review to determine  
19 whether it is a taking if it goes beyond what's  
20 reasonably allowed in terms of the cost.

21           No one has ever claimed in this case  
22 that this is anything but mitigation. No one  
23 ever claimed, including the county, the lower  
24 courts, that this was something like a user fee.  
25 And this goes to --

1 JUSTICE SOTOMAYOR: Excuse me.

2 MR. BEARD: Yes.

3 JUSTICE SOTOMAYOR: User fees in my  
4 mind, the essence of them is, I'm using  
5 something, I should pay for that use. You're  
6 using public roads that are going to have to be  
7 built because you build this kind of project,  
8 you're going to have to use public roads.

9 When I pay a toll, generally, I pay a  
10 toll, it's now in New York \$10, I can go a block  
11 or I can go one exit or I can go 10 exits, I'm  
12 paying the same \$10. No one's looking at my  
13 individual project -- trip and saying you're  
14 only using it for a fraction of a moment.

15 You're going to say that comes under  
16 the rough proportionality. But it doesn't.  
17 What's being judged is the project as a whole.  
18 And this is what the government's doing.

19 So I said to you this hasn't really  
20 been fleshed out below, but the concept that has  
21 to be addressed is what's the essence of a user  
22 fee. I personally don't see that as very  
23 different in impact.

24 And -- but the question is, when a  
25 court is reviewing that, is it reviewing it for

1     reasonableness, proportionality, or is it  
2     reviewing it for impact on an individual  
3     property? And I don't see how it can be that.  
4     So this may be a hybrid, and we may have to look  
5     at it someday, but it is not pure one side or  
6     the other.

7                     MR. BEARD: Justice Sotomayor, I -- I  
8     think your example just highlights the fact that  
9     user fees, like a toll, it's a -- it's a kind of  
10    user fee, there's no question about that, but it  
11    highlights the fact that, yes, user fees are  
12    subject to more lax review.

13                    What we're talking about entirely is  
14    the heartland of land use regulation where the  
15    government holds a permit over the property  
16    owner's head, a very valuable permit, and says  
17    we'll give you your right to build --

18                    JUSTICE KAGAN: Well, that's quite --

19                    MR. BEARD: -- so long as you pay us.

20                    JUSTICE KAGAN: -- that -- that's  
21    quite right, that in these kinds of cases we're  
22    concerned about the sort of leverage that a  
23    government official or a legislature has because  
24    of the permitting process.

25                    But -- but still you have to show that

1 outside the permitting process there would be a  
2 taking. I mean, that's when -- and I think  
3 you've agreed to that already. I don't think  
4 you disagree with that. That would -- so you  
5 need a taking outside the permitting process in  
6 order then to say, oh, gosh, in this permitting  
7 process, what the government is trying to do is  
8 leverage its power to force people to give up  
9 their right to just compensation.

10 But you need the right to just  
11 compensation to exist, and the question is,  
12 where do you get that right when it's only what  
13 seems to me a highly articulated user fee  
14 scheme?

15 MR. BEARD: We get the right from the  
16 fact that the government has required the owner  
17 of a particular piece of property to dedicate  
18 money to public use. And in this case, as we've  
19 seen in this case, the government can mitigate  
20 for land uses, but what it cannot do is -- is  
21 impose a burden that should be shared by the  
22 public as a whole on a select few. Who are the  
23 select few? The minority of land use applicants  
24 who happen at any given time to need to build or  
25 rebuild on their property.

1 JUSTICE BARRETT: Okay. So --

2 CHIEF JUSTICE ROBERTS: So that's --

3 JUSTICE BARRETT: -- what if it's not  
4 a permit? Oh, go ahead, Chief.

5 CHIEF JUSTICE ROBERTS: I was just  
6 going to say, so that is your key distinction,  
7 as however you want to characterize the  
8 assessment or whatever, is that it is applied to  
9 a particular use by a particular owner? In  
10 other words --

11 MR. BEARD: It -- it's always --

12 CHIEF JUSTICE ROBERTS: -- it's not --

13 MR. BEARD: Yeah.

14 CHIEF JUSTICE ROBERTS: -- it's --  
15 it's not a broadly applicable tax or -- or fee?  
16 But -- but I don't see how that's a significant  
17 distinction because it's like tolls. I mean,  
18 the tolls are only assessed on people who drive  
19 on that road. And yet, that doesn't suggest  
20 that the tolls are a taking.

21 MR. BEARD: Well, and that's because  
22 -- and they may be a taking, so we don't want to  
23 concede that point. But it's -- a user fee,  
24 again, is reimbursement for a product or service  
25 used.

1 JUSTICE KAGAN: I don't have to --

2 JUSTICE ALITO: Well --

3 JUSTICE KAGAN: -- buy those EZ passes  
4 anymore.

5 (Laughter.)

6 MR. BEARD: That's a matter of  
7 convenience, though, Your Honor.

8 JUSTICE ALITO: Mr. Beard, suppose we  
9 -- suppose one thinks that there has to be a  
10 very close connection to -- that your case  
11 involves what is allegedly a very close  
12 connection to real property and that that's the  
13 issue that would be presented in this case.

14 If you win on the precise -- on the  
15 question on which we granted cert, which is  
16 whether there is a total exemption for  
17 legislative enactment -- so let's assume for the  
18 sake of argument that the Court were to agree  
19 with you on that, and so there has to be an  
20 application of whatever the test is to  
21 legislative enactments.

22 And then there are legislative  
23 enactments and there are legislative enactments,  
24 and they -- some apply to a very broad category  
25 of -- of property, and some apply -- some could



1 apply to a very narrow category of property.

2           And -- and my question is whether you  
3 think that the test that applies to a  
4 legislative enactment that applies to a category  
5 of property should be the same as the one that  
6 applies in the permitting process, where there  
7 is an individualized determination.

8           So let me give you two examples. You  
9 have a law like this that imposes a fee, a -- a  
10 -- a particular fee, a set fee, on anybody who  
11 builds a tiny house, like 500 square feet. I  
12 don't know how many square feet a tiny house  
13 has, but a tiny house, okay? Everybody -- they  
14 do a study and they figure out that people on  
15 average who have these tiny houses have X number  
16 of cars and they calculate that. Or they have  
17 one, anybody who wants to build anything pays  
18 the same fee. So the person who wants to build  
19 a tiny house pays the same amount as somebody  
20 who wants to build a 20,000-foot house.

21           How would you apply it in those two  
22 situations?

23           MR. BEARD: Justice Alito, in both  
24 circumstances, is the fee being applied to  
25 mitigate the use of the land?

1 JUSTICE ALITO: Yeah. Mm-hmm.

2 MR. BEARD: There would be no  
3 difference that I can perceive in those two  
4 examples. In each case, the government would  
5 need to show -- if challenged, the government  
6 would need to show nexus and rough  
7 proportionality.

8 JUSTICE ALITO: On an individualized  
9 basis on -- for legislative categorical  
10 enactments, the same standard that you would  
11 apply to a permit?

12 MR. BEARD: Well, the "individualized  
13 determination" language comes from Dolan, as --  
14 as Your Honor knows, and it requires some sort  
15 of individualized determination. That is a  
16 substantive standard as we view it that just  
17 requires that the focus be on the individual  
18 parcel or property in question.

19 So the inquiry is never is there a --  
20 a connection between the fee and a broad class  
21 of -- of properties as different in nature and  
22 in impacts as they may be. That is not the  
23 inquiry under Dolan. What we would insist on is  
24 that the same standard --

25 JUSTICE KAGAN: But, under Dolan, of

1 course -- I mean, I'm very interested in this  
2 exact same question. Let's assume that there  
3 was a taking. Let's just put that aside, the  
4 questions that we've been talking about. And  
5 let's assume that you're right that there's some  
6 kind of unconstitutional conditions doctrine  
7 that does apply to generally applicable  
8 legislation, right?

9 And then I think what Justice Alito is  
10 saying is, why would it be the exact same kind  
11 of unconstitutional conditions requirement,  
12 test, evaluation, what have you, when we're not  
13 talking about an individual permitting decision,  
14 but we're talking about a generally applicable  
15 scheme? I mean, the legislature has decided to  
16 cut across a wide swath of individuals.

17 What would it mean to do parcel-based  
18 Nollan/Dolan in that context and why would we do  
19 parcel-based Nollan/Dolan in that context? Why  
20 wouldn't we ask more generally about the  
21 proportionality or reasonableness or whatever  
22 word you want to use of the general legislative  
23 scheme?

24 MR. BEARD: Because just because the  
25 government decides to, writ large,

1 undifferentiatedly appropriate property, whether  
2 it be an easement or some fee, just because it  
3 -- it happens to do it via legislation writ  
4 large doesn't mean it shouldn't be subject to  
5 the same standard, which is -- is to protect an  
6 individual property owner's right against an  
7 uncompensated taking. There is no --

8 JUSTICE KAGAN: So what would you  
9 evaluate? I mean, to me, that just makes it  
10 sound as though a county can't -- can't pass  
11 generally applicable laws anymore because, I  
12 mean, a -- a Nollan/Dolan analysis, I would -- I  
13 would think, you would have to look at the size  
14 of the individual property, you know, in a case  
15 like this, the distance from the highway, the  
16 number of residents, the -- the exact amount of  
17 use that they're going to do.

18 I mean, that's what Nollan/Dolan  
19 individualized inquiry looks like. I mean,  
20 that's just saying forget about generally  
21 applicable fees anymore. There aren't going to  
22 be any.

23 MR. BEARD: I don't think that is  
24 correct, Justice Kagan, because a well-crafted,  
25 granular, legislative impact fee schedule could

1 pass muster under Nollan and Dolan's heightened  
2 review. Why? Because, if -- if -- if it's  
3 based on, say, a group of development that is  
4 sufficiently granular, all of the members of  
5 that group, say single-family homes between 1200  
6 to 1500 square feet, produce the same kinds of  
7 impacts, and it's not this broad-brushed  
8 category of all development pays \$50,000.

9 That kind of a fee is sufficiently  
10 individualized, has a sufficient individualized  
11 justification for the fee in the range. And  
12 that -- that derives from the rough  
13 proportionality standard. What is rough  
14 proportionality? It means that any given  
15 project's impacts could have a range of fees so  
16 long as it's roughly proportionate to the impact  
17 of that project.

18 JUSTICE KAGAN: I think your red light  
19 is on. So sorry.

20 MR. BEARD: Excuse me.

21 JUSTICE KAGAN: We can -- I'm going to  
22 ask more questions about this --

23 MR. BEARD: Okay.

24 JUSTICE KAGAN: -- but I just want to  
25 --

1 MR. BEARD: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas?

5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: I have a case,  
7 Miramar. There, the -- the lower court examined  
8 20 different permitting conditions under  
9 Nollan/Dolan, from whether a drainage pipe  
10 really needed to be extended to a requirement  
11 that the developer use a concrete water line cap  
12 instead of compacted fill dirt.

13 It doesn't seem to me that when  
14 legislative schemes are being imposed, even  
15 including this one, there were 5,000 pages of  
16 statistics and calculations that the -- that the  
17 -- that the state involved itself with, that  
18 that's really what we want district courts to be  
19 doing.

20 Should I use compact dirt instead of a  
21 water cap? And that -- if you're going to  
22 require the sort of Nollan/Dolan test, that's  
23 what you're calling for. And if you're going to  
24 start saying, as you did, that you're reserving  
25 the right to say that a toll could be an

1 unconstitutional taking, I bet New York State is  
2 going to -- New York City is going to be sued  
3 very soon on that -- on that toll to come down  
4 into lower Manhattan.

5 I mean, at what point do we stop  
6 interfering?

7 MR. BEARD: Well, as to the toll issue  
8 and the user fee more -- more broadly, I'm not  
9 sure any monetary demand is totally exempt from  
10 the Takings Clause. The question is, what  
11 standard of review do you apply? And -- and the  
12 standard for users who pay taxes --

13 JUSTICE SOTOMAYOR: Oh, you're  
14 absolutely right. It -- it -- it's not.

15 MR. BEARD: -- are very deferential  
16 and -- and low because you don't have the same  
17 kind of coercive problem that you have in the  
18 land use permitting context, where government  
19 can just use individual property owners or even  
20 a class of individual property owners who need  
21 permits to raise funds because they don't want  
22 to raise funds via taxes.

23 That's unpopular. Let's use the --  
24 the alleged impacts from individual property  
25 owners to fund public improvement projects that

1 should be funded by the -- by the entire public.

2 All we're asking for is a test that  
3 ferrets out legitimate mitigation against a -- a  
4 confiscation or appropriation of property that  
5 doesn't mitigate for the project's impacts and  
6 is clearly just a way to raise money that can't  
7 be raised for political reasons through the  
8 taxing power.

9 JUSTICE SOTOMAYOR: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: I think what we were  
12 talking about is that what a -- a -- a  
13 legislature can decide to do is to do legitimate  
14 mitigation. And I agree that that's a question  
15 that our cases ask about. You know, are you  
16 doing legitimate mitigation or are you using  
17 your power to do something more?

18 But a -- a legislature can decide to  
19 do legitimate mitigation through broad rules and  
20 through categories and through averages. And I  
21 think that you just suggested no, you wouldn't  
22 really have to do it piece by piece by piece as  
23 long as you had the right categories.

24 But I think I'm going to suggest that  
25 -- that this scheme is highly reticulated. You



1 know, I'm just going to read you all the  
2 categories: singly -- single-family  
3 residential, multi-family residential, high trip  
4 commercial, general commercial, office,  
5 industrial, warehouse, church, gas station, golf  
6 course, campground, bed and breakfast.

7           Those are a lot of categories. And,  
8 you know, so what's wrong with a county doing  
9 exactly this? We're going to set up lots of  
10 different categories that reflect how much use  
11 we think different enterprises and activities  
12 use -- how much use they -- they -- they -- they  
13 put on the roads, and then we're going to charge  
14 them fees, and there's going to be some  
15 averages. Some people are going to pay a little  
16 bit more than they should. Some people are  
17 going to pay a little bit less.

18           But, you know, except if we're going  
19 to go house by house by house, that seems to be  
20 what a county would do.

21           MR. BEARD: So the problem with the  
22 fee that was imposed on Mr. Sheetz, yes, they  
23 have categories, and he falls into the  
24 single-family category, although they -- they  
25 group all single-family homes together, for

1 example. Any -- anything from, I don't know,  
2 four -- 400 to 500 square feet to 5,000, 6,000  
3 square feet, all of them have the same impacts.

4 But the fundamental problem is the  
5 burden-shifting. They -- they -- the county  
6 specifically and purposely shifted the burden of  
7 traffic impacts from non-residential, retail,  
8 office, other commercial, on to new residential.

9 And the reason they said they did it  
10 was because we -- we don't want to discourage  
11 new commercial from coming in to our -- our  
12 jurisdiction. We don't want to overburden them  
13 with impact fees. Let's just shift the burden  
14 over to residential. It's that kind of  
15 burden-shifting that reveals that the fee  
16 actually was not tailored to Mr. Sheetz's house.

17 JUSTICE KAGAN: Thank you, Mr. Beard.

18 MR. BEARD: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch?

21 JUSTICE GORSUCH: I just want to make  
22 sure I understand that last exchange and some  
23 others like it. We're dealing here with a  
24 legislative challenge, a challenge to a piece of  
25 legislation, but, of course, in Dolan, there was

1 legislation that executive actors were pursuing,  
2 and, in fact, executive actors usually pursue  
3 takings or any other action pursuant to  
4 legislation.

5           And so whether it's legislative or an  
6 executive action, we're dealing with a law, and  
7 the question is whether it's proportional. And  
8 one thing that might go to proportionality in a  
9 specific case, because you're not making a  
10 facial challenge, you're making an as-applied  
11 challenge, is how carefully reticulated it is to  
12 your circumstance.

13           Is -- is that a fair summary of the --  
14 of the question once we move past the QP?

15           MR. BEARD: Yes.

16           JUSTICE GORSUCH: Okay. And I -- I  
17 think a lot of what Justice Kagan and others  
18 have said might well go to proportionality and  
19 make this proportional.

20           Now I know you disagree with that, but  
21 would you at least agree that that's an  
22 available argument on remand?

23           MR. BEARD: On remand, the county  
24 could certainly argue that the fee that was  
25 imposed on Mr. Sheetz was roughly proportional

1 to his impacts.

2 JUSTICE GORSUCH: Because it's a  
3 carefully reticulated scheme and that it --

4 MR. BEARD: Correct.

5 JUSTICE GORSUCH: Okay.

6 MR. BEARD: Of course, we would  
7 disagree with that, but yes.

8 JUSTICE GORSUCH: I understand you  
9 disagree with that, but that would be the --

10 MR. BEARD: It certainly has that  
11 argument available.

12 JUSTICE GORSUCH: -- that would be the  
13 nature of the dispute on remand?

14 MR. BEARD: Yes.

15 JUSTICE GORSUCH: All right. Thank  
16 you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Kavanaugh?

19 JUSTICE KAVANAUGH: Can I just pick up  
20 on that? If you win on the idea that  
21 legislative exactions are subject to  
22 Nollan/Dolan and you win on impact fees are  
23 subject to Nollan/Dolan, then it comes down to  
24 how do you apply the nexus and rough  
25 proportionality test that Justice Kagan, Justice

1 Alito, Justice Gorsuch have been asking you  
2 about.

3 And I found your reply brief -- well,  
4 first of all, the amicus briefs of the states  
5 and of the American Planning Association, for  
6 example, say in essence, paraphrasing, it would  
7 be a total disaster to try to do that on a  
8 parcel-specific basis and would really destroy  
9 the concept of imposing impact fees for new  
10 development.

11 And in your reply brief, I thought you  
12 came back on page 16 and said: "While a fee  
13 based on classes of development can survive  
14 Nollan/Dolan, a fee schedule premised on a range  
15 of fees for different development classes will  
16 not necessarily run afoul of Nollan/Dolan." And  
17 that -- and I think you've repeated that today.

18 And then you have a sentence: "Of  
19 course, to guarantee the fee is constitutional,  
20 the government must make an individualized  
21 determination that the fee as applies to his  
22 project satisfies Nollan/Dolan."

23 So I view those two things as  
24 inconsistent in that paragraph, and I'm trying  
25 to kind of drill down on what exactly are you

1 saying needs to be shown by a county when it has  
2 a fee schedule or formula in order to show rough  
3 proportionality?

4 MR. BEARD: When challenged, it needs  
5 to show that the fee, once -- the fee from the  
6 schedule bears an essential nexus and rough  
7 proportionality to the impacts of the proposed  
8 development before it.

9 So getting to that last sentence that  
10 Your Honor read, the idea is that many  
11 jurisdictions, Texas is one of them, they have  
12 what I would call default. Illinois has it too.  
13 Default legislative impact fee schedules.

14 They have very well-crafted, detailed  
15 impact fee schedules. They don't do this weird  
16 burden-shifting for political reasons. And then  
17 an applicant has the opportunity to say: Well,  
18 hold on, I think that fee is excessive given the  
19 impacts of this project.

20 Now, if it's well-articulated and  
21 well-crafted, you're not going to see many  
22 challenges from developers, especially the --  
23 the mid- to -- to larger-sized developers. But  
24 you may have the occasional one.

25 And in that circumstance, certainly,

1 the government would need to show that its fee  
2 is roughly proportionate to the impacts, the fee  
3 that it drew from the legislative fee schedule.

4 JUSTICE KAVANAUGH: So is -- is it  
5 okay to classify all single-family homes  
6 together?

7 MR. BEARD: I mean, I think it  
8 depends. Where is it located? What are -- what  
9 are the sizes of these single-family homes? I  
10 mean, that's a traffic impact question. But,  
11 certainly, just class --

12 JUSTICE KAVANAUGH: That's a critical  
13 question for workability of what you're  
14 proposing, at least that's what the, I think,  
15 amicus briefs suggest and the county suggests,  
16 that, you know, the current way of -- or not the  
17 current way, but approaching it in a  
18 formula-based way would be more transparent,  
19 more predictable, and that your way is going to  
20 be more time-consuming and administratively  
21 burdensome.

22 So I just want to make sure you have a  
23 chance to respond --

24 MR. BEARD: Well, it --

25 JUSTICE KAVANAUGH: -- to that.

1                   MR. BEARD:  -- it very well may be,  
2                   but this is a constitutional standard --

3                   JUSTICE KAVANAUGH:  No, I understand  
4                   that.

5                   MR. BEARD:  -- and the Constitution  
6                   doesn't have to --

7                   JUSTICE KAVANAUGH:  But -- but then  
8                   where are the -- predictability, where are the  
9                   lines drawn?  You know, does -- do single-family  
10                  homes have to be divided into small, medium,  
11                  large?  How close you are to the highway?  If --  
12                  do you have bikers in the household who don't  
13                  use the roads?

14                  MR. BEARD:  Well, it -- it -- it -- it  
15                  doesn't -- the proportionality question -- the  
16                  nexus and proportionality questions don't rely  
17                  on what the individuals are doing.  It's a  
18                  project, right?  This is a single-family home of  
19                  X size.  This is what we expect, this is what we  
20                  anticipate the traffic impacts to be.

21                  But, to go to your point, the county  
22                  itself in 2019 realized that it could be better  
23                  crafted by creating single-family homes  
24                  categorized by square footage, and that makes  
25                  common sense, whereas before it said



1 administrative problems, too costly. Now we see  
2 that they're going in that direction.

3 And all applying Nollan and Dolan will  
4 do is keep governments honest and to make sure  
5 that they're actually doing the work of creating  
6 fees where an individual project will come  
7 before it and, yeah, that -- that fee from the  
8 schedule will be roughly proportional.

9 JUSTICE KAVANAUGH: And, again, I --  
10 I -- that's great, but I'm not sure how you  
11 answer that question, but I -- I think I'll let  
12 it go there. Okay.

13 MR. BEARD: Okay.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Barrett?

16 JUSTICE BARRETT: I have one question  
17 that's related to Justice Kavanaugh's question,  
18 which is it seems kind of like a nightmare to  
19 figure out where the lines should be drawn in  
20 these categories, and you're trying to -- you're  
21 trying to mitigate the potential consequences of  
22 that.

23 I mean, when you're deciding how  
24 reticulated it has to be, would the lines drawn  
25 between various categories be judged on a

1 rational basis level? Because it seems like  
2 you're saying, well, you look at whether the  
3 category is roughly proportional, but, as  
4 Justice Kavanaugh's pointing out, individual  
5 parcels within that category may have varying  
6 impacts on the traffic.

7 So how do you decide where the lines  
8 should be drawn?

9 MR. BEARD: Well, I think --

10 JUSTICE BARRETT: Is it  
11 proportionality? Is that your answer?

12 MR. BEARD: Proportionality as to the  
13 particular project and rough proportionality as  
14 to the particular project. So, as I said, there  
15 could be a fee within a category to which that  
16 project belongs that may be roughly  
17 proportionate. It doesn't have to be exact. It  
18 could be roughly proportionate.

19 JUSTICE BARRETT: Okay.

20 MR. BEARD: And as to the lines,  
21 categories and how do you judge --

22 JUSTICE BARRETT: Yeah.

23 MR. BEARD: -- those, that sounds to  
24 me like a -- like a facial challenge to the  
25 program, that the program hasn't been done

1 correctly because it's created categories that

2 --

3 JUSTICE BARRETT: Okay. Let's let  
4 that go.

5 The other question that I have is  
6 about how much your argument is tied to the fact  
7 this arises in a permitting context. So let's  
8 imagine that instead of tying this traffic  
9 impact exaction to granting the permit, let's  
10 say that your client builds the home and then,  
11 after that, so a permit's been granted and  
12 fallen out of the picture, the county comes back  
13 and says, we're going to have a special  
14 assessment applicable to everybody in this  
15 development of X amount of money, say it's the  
16 same 20 whatever thousand dollars that your  
17 client paid to cover traffic impacts.

18 Does that implicate Nollan/Dolan?

19 MR. BEARD: Since that occurs outside  
20 the land use permitting context, that would not  
21 implicate the Nollan/Dolan test, and -- and --

22 JUSTICE BARRETT: But do you think it  
23 might be a taking or implicate the Takings  
24 Clause?

25 MR. BEARD: Well, as I said earlier, I

1 don't know that any monetary appropriation is  
2 carte blanche exempt from the Takings Clause.  
3 The question really comes down to, has the  
4 government, in exercising its assessment power,  
5 its tax power, police power, has it exceeded  
6 what it's entitled to under that power? And --

7 JUSTICE BARRETT: So property taxes  
8 too?

9 MR. BEARD: Property taxes, one case  
10 that was cited in Koontz from 1960, Brushaber,  
11 said yeah, the progressive tax is  
12 constitutional. There's no taking. We could  
13 imagine a situation where it becomes so  
14 confiscatory that that portion of it may become  
15 a taking. So that's just to say that taxes  
16 generally are as a matter -- just as a matter of  
17 fact exempt. You're not going to mount a very  
18 strong takings challenge to a -- a take -- a  
19 tax.

20 JUSTICE BARRETT: Thank you.

21 MR. BEARD: Yeah.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Jackson?

24 JUSTICE JACKSON: So I guess I'm  
25 really, really confused now because I did not

1 understand the taking question constitutionally,  
2 the way that we analyze it and think about it,  
3 to be a matter of has the government overstepped  
4 its authority. I thought that takings were the  
5 dedication of private property to public use for  
6 which the government would have to pay just  
7 compensation.

8 MR. BEARD: Yes.

9 JUSTICE JACKSON: All right. So, if  
10 that's the case, then it seems to me we have to  
11 have that kernel of thing happening in whatever  
12 scenario that you say Nollan and Dolan applies.

13 And I don't understand why that's  
14 happening in a situation like the one that  
15 Justice Barrett articulated or any of the toll  
16 situations. So, for example, in this very case,  
17 instead of a fee schedule at the beginning for a  
18 -- a single-use person like your client, the  
19 county says, we will just set up a toll booth  
20 outside of the road in front of his house, and  
21 so, instead of charging him a certain amount for  
22 riding on the roads upfront via this fee  
23 schedule, we'll make him pay every time he comes  
24 home.

25 Taking in your perspective?

1                   MR. BEARD: That sounds to me like a  
2 user fee that is occurring outside the land use  
3 permitting context with a special --

4                   JUSTICE JACKSON: It's not outside the  
5 land use -- it's not outside land use because  
6 he's only doing this, as the Chief Justice  
7 posited, because he has to come there in order  
8 to get to his house.

9                   MR. BEARD: I don't conceive of that  
10 as -- as being within the heartland of land use  
11 permitting. Land use permitting is kind of a  
12 very defined world where you go for a permit to  
13 use your property, you need the government's  
14 permission to do so, and the government extorts  
15 something in return.

16                   JUSTICE JACKSON: But doesn't the  
17 something have to be a dedicated use of the  
18 property in order for the Takings Clause --

19                   MR. BEARD: Yes.

20                   JUSTICE JACKSON: -- to apply?

21                   MR. BEARD: Yes, and I --

22                   JUSTICE JACKSON: Right.

23                   MR. BEARD: Yes.

24                   JUSTICE JACKSON: So why is that  
25 happening in a situation in which the government

1 is just asking for a fee in connection with the  
2 -- getting the permit?

3 MR. BEARD: Because the government is  
4 appropriating, is directing the owner of  
5 property to make a monetary payment for -- for  
6 land use mitigation purposes. If it's --

7 JUSTICE JACKSON: So how -- how --

8 MR. BEARD: -- in that world --

9 JUSTICE JACKSON: Okay. So how does  
10 just compensation work? The Takings Clause says  
11 that the government can do that. They just have  
12 to pay just compensation. So, in your scenario  
13 where the government is extracting a fee in this  
14 way as a part of conditioning, what is the just  
15 compensation part of this?

16 MR. BEARD: Well, it's -- the just  
17 compensation part of it is that the government  
18 has appropriated a sum of money for which it  
19 owes compensation, a refund.

20 JUSTICE JACKSON: So, basically,  
21 you're saying, unlike our tax -- our -- our  
22 normal takings jurisprudence that would allow  
23 the government to do it, they just have to pay,  
24 here, the government effectively can't do it  
25 because it would be offset by the need to

1 provide a refund?

2 MR. BEARD: Well, if the government  
3 has committed an uncompensated taking, which we  
4 -- which we assert is the appropriation of this  
5 monetary exaction, connected and tied to a real  
6 property interest, if it's done an uncompenstate  
7 -- an uncompensated taking, as we allege, then  
8 the remedy is to compensate the government --  
9 the property owner --

10 JUSTICE JACKSON: All right.

11 MR. BEARD: -- which is why we seek a  
12 --

13 JUSTICE JACKSON: Let me -- one -- one  
14 last question because I -- I guess I -- I am  
15 sympathetic to your concerns about government  
16 overreach and the extent to which, you know,  
17 people who are landowners are being shaken down  
18 for fees. I get that.

19 What I guess I'm wondering is whether  
20 the awkwardness in terms of all of these  
21 doctrines that we're talking about with respect  
22 to this scenario is coming from the fact that  
23 it's really not a taking scenario in that you  
24 have other bases that you might be able to claim  
25 as the reason why the government shouldn't be



1 able to do this.

2           So, for example, the Due Process  
3 Clause. It sounds to me like you were making a  
4 procedural due process argument when you said  
5 the burden-shifting is the problem in response  
6 to Justice Kagan.

7           At one point, you said, you know, this  
8 is about keeping the government honest. There  
9 are other claims in the law that do that work,  
10 right? If you were unfairly singled out, you  
11 could bring an Equal Protection Clause claim.  
12 But I just don't know that takings is what is  
13 doing the work for you here in terms of  
14 challenging the government's program.

15           MR. BEARD: Well, we think the Takings  
16 Clause does apply because the Takings Clause --  
17 the animating principle is you don't select a  
18 few to bear public burdens that should be borne  
19 by the -- borne by the public as a whole. And  
20 that's what we think happened exactly to Mr.  
21 Sheetz --

22           JUSTICE JACKSON: Thank you.

23           MR. BEARD: -- that he -- thank you.

24           CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 MR. BEARD: Thank you.

2 CHIEF JUSTICE ROBERTS: Ms. McGrath.

3 ORAL ARGUMENT OF AILEEN M. McGRATH

4 ON BEHALF OF THE RESPONDENT

5 MS. McGRATH: Mr. Chief Justice, and  
6 may it please the Court:

7 Like countless local governments  
8 across the country, the County of El Dorado  
9 charges a fee to developers to address the  
10 impacts of new development using a predetermined  
11 schedule, as Justice Kagan has ident- -- has  
12 emphasized, reticulated by geographic zone and  
13 development type.

14 As the findings below make clear, the  
15 programmatic fee in this case does not pay for  
16 road improvements generally. It pays for only  
17 those improvements necessary to alleviate  
18 increased traffic from new development.

19 Neither precedent nor principle  
20 supports, much less compels, applying  
21 Nollan/Dolan's individualized test to those  
22 programmatic fees. In centuries' worth of  
23 precedent, this Court has reiterated that  
24 governments can charge fees to property owners,  
25 such as special assessments to fund public

1 improvements and user fees to fund government  
2 services.

3 This Court has always held that those  
4 fees, which are indistinguishable from the fee  
5 at issue, are not takings. Without that  
6 predicate for application of the  
7 unconstitutional conditions doctrine,  
8 Nollan/Dolan cannot apply.

9 More fundamentally, the county's  
10 impact fee shares all of the key features with  
11 the other property taxes, user fees, and similar  
12 property-based charges that this Court has  
13 cordoned off from Nollan/Dolan review. It is  
14 imposed by the legislature subject to an array  
15 of state law requirements and applies to all  
16 similar new development in the county based on  
17 the legislature's finding that new development  
18 creates the need for and will benefit from the  
19 road improvements the fee will fund. And,  
20 critically, it does not attempt to obtain any  
21 dedication of real property.

22 Petitioner would disregard those  
23 limiting features and expand Nollan/Dolan to  
24 commonplace impact fees. But doing so would  
25 have dire consequences for land use planning.

1 Forcing local governments to justify a  
2 programmatic fee on a parcel-by-parcel basis  
3 would disrupt, if not destroy, their ability to  
4 fund capital-intensive infrastructure necessary  
5 to serve new development, bringing such  
6 development to a grinding halt. The Takings  
7 Clause does not compel that sea change.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Do you think, again,  
10 not specifically this case, but do you think  
11 that legislative exactions can be subject to  
12 Nollan/Dolan scrutiny?

13 MS. McGRATH: I think that there are  
14 legislative exactions that could be subject to  
15 Nollan/Dolan scrutiny, yes, Justice Thomas. I  
16 think our position here, which is the position  
17 and the rule that the court of appeal applied  
18 below, is that certain kinds of legislative  
19 development impact fees do categorically fall  
20 outside of Nollan/Dolan. While it's possible to  
21 imagine or identify scenarios where the  
22 legislature might effect a taking on a  
23 programmatic basis, we would not bring those  
24 kinds of -- of, you know, unusual scenarios  
25 within our rule, but our position is that this

1 type of legislation does categorically fall  
2 outside Nollan/Dolan.

3 JUSTICE THOMAS: Well, it seems that  
4 much of your argument actually goes to the  
5 nature of the -- of the fee itself as opposed to  
6 its origins in legislation.

7 MS. McGRATH: I -- I -- I agree with  
8 that, that -- that our position is -- is not  
9 that the legislature categorically has some sort  
10 of insulation from what Nollan/Dolan requires.

11 Our position is that when the  
12 legislature acts in this case as the legislature  
13 has in a way that is functionally and  
14 constitutionally indistinguishable from the way  
15 that the legislature acts in instances where the  
16 Court has already said that Nollan/Dolan does  
17 not apply, that that is the reason that  
18 Nollan/Dolan does not apply in this context.

19 JUSTICE THOMAS: Well, that could -- I  
20 mean, that argument could have been -- the same  
21 argument could have been made in Nollan and  
22 Dolan. You -- you could have made the same  
23 argument that this type of tax in that case  
24 that -- from an ordinance or from a local  
25 regulation was exempt because of the nature of

1 the exaction.

2 MS. McGRATH: I don't think so,  
3 Justice Thomas. I think, in each of those  
4 cases, I think the primary distinction we would  
5 point to is that each of those cases, as already  
6 has been discussed today, purported to apply the  
7 unconstitutional conditions framework, which  
8 means that the question of each of -- of those  
9 cases is, is the permit condition effectuating a  
10 taking that the government would have to pay for  
11 if it effectuated outside the permit process.

12 That answer is not answered by looking  
13 at whether there is some sort of legislation --  
14 legislative authorization present somewhere at  
15 the -- in the scheme. It is looking at what  
16 that condition does, and I think that --

17 CHIEF JUSTICE ROBERTS: Well, based --  
18 based on your answer there, I think your answer  
19 to the question presented is, I think, the same  
20 as the Petitioner.

21 JUSTICE THOMAS: Yeah.

22 CHIEF JUSTICE ROBERTS: The question  
23 presented is whether a permit exaction is exempt  
24 from the unconstitutional conditions doctrine as  
25 applied in Nollan and Dolan simply because it is

1 authorized by legislation.

2           You said the answer to that is no,  
3 that the -- the fact that it's legislation does  
4 not give it an automatic exemption. Your  
5 friend's answer is no for the same reason.

6           MS. McGRATH: Well, I think today I  
7 heard my friend's answer to be more candid, just  
8 as it is in his brief, is that his position is  
9 that any permit condition that is imposed on a  
10 development permit is subject to Nollan/Dolan.

11           That is what he said on page 44 in the  
12 blue brief and the relief that he is asking from  
13 this Court. It's also the -- the relief that I  
14 heard him asking for this morning.

15           And so, in answering the question  
16 presented, I think what that highlights is that  
17 the question is not whether legislative -- some  
18 sort of legislative authorization somewhere in  
19 the scheme categorically exempts permit  
20 conditions from Nollan/Dolan.

21           The question is whether this kind of  
22 legislation, which is ubiquitous and commonly  
23 used, is subject to Nollan/Dolan. And, there, I  
24 would also refer back to what the question  
25 presented says about the unconstitutional

1 conditions doctrine.

2           The question is whether what the --  
3 which requires a determination that the  
4 condition that the government is imposing would  
5 be a taking if it were performed outside of the  
6 permitting context, and, here, you know, we  
7 think the answer is no.

8           But, as I said, more fundamentally,  
9 the Court has said before that certain kinds of  
10 legislation -- property taxes, special  
11 assessments, user fees -- are categorically  
12 outside of Nollan/Dolan, and our position --

13           CHIEF JUSTICE ROBERTS: Well --

14           MS. McGRATH: -- is that the fee --

15           JUSTICE GORSUCH: Counsel, I -- I --  
16 I -- I think you're right about all of that,  
17 that, you know, whether this is a tax is a  
18 really interesting question. Whether it's a  
19 user fee is a really interesting question.

20           But, as I read the court of appeals  
21 below, they said we're not even going to get  
22 into any of that because Nollan and Dolan simply  
23 doesn't apply to legislative enactments of any  
24 kind, whether it's a tax, whether it's a fee,  
25 whether it's something else.



1                   And I thought we had taken the case to  
2 address that question. And as the Chief Justice  
3 has pointed out, I think there's radical  
4 agreement on that question today.

5                   MS. McGRATH: I -- I think, if you  
6 read --

7                   JUSTICE GORSUCH: And so why wouldn't  
8 -- what would be wrong with allowing both sides  
9 to go back and make their arguments, recognizing  
10 that Nollan and Dolan does apply to some  
11 legislative enactments, and then we can -- you  
12 can go back to the courts below and talk about  
13 whether this is a tax, whether it's a user fee,  
14 or whether it isn't, but that there's just no  
15 categorical exemption from legislative  
16 enactments?

17                   What would be wrong with that holding  
18 today --

19                   MS. McGRATH: I think what would be --

20                   JUSTICE GORSUCH: -- which we might  
21 all be able to walk out of the courtroom  
22 agreeing on?

23                   MS. McGRATH: I -- I think that the  
24 two main problems with that, Justice Gorsuch, is  
25 that is not the rule that the court of appeal

1 applied below. And I think, on page A17 of the

2 --

3 JUSTICE GORSUCH: Well, let's say --  
4 let's say that's what I -- let's -- let's say  
5 that's the premise on which we -- I think we  
6 understood we took this case, me, myself and I.  
7 Then what?

8 MS. McGRATH: I think that then, if --  
9 if the question is whether we would welcome an  
10 opinion that simply says there is no legislative  
11 exemption from Nollan/Dolan, I think we would  
12 prevail under that standard because that is not  
13 the position or the rule that the court of  
14 appeal applied below.

15 The court of appeal applied a rule  
16 that said that legislatively mandated  
17 development --

18 JUSTICE GORSUCH: Well, I think -- I  
19 think you're -- you're fighting my -- my -- my  
20 condition. If -- if -- if that's how I  
21 understood the court of appeal below and --  
22 and -- and if that's how I understood the QP  
23 that we're being asked to decide and if we can  
24 all agree on that, would the government fight a  
25 world in which it's allowed to go back and make

1 all of the arguments you want to make here today  
2 before another court in the first instance  
3 rather than asking us, a court of review rather  
4 than first view, to -- to try and tackle them?

5 MS. McGRATH: I think my answer would  
6 be similar, is that I think it would be an odd  
7 opinion to write where it was not the rule that  
8 was applied below. But I'll take the  
9 hypothetical. And even there, I think what --  
10 what -- what is apparent from the briefing and  
11 what you hear from the arguments today is that  
12 the core of this disagreement is about whether  
13 all permit conditions are or are not subject to  
14 Nollan/Dolan. That's the very premise of the  
15 QP, is whether there's an exemption --

16 JUSTICE GORSUCH: No, no. The premise  
17 of the QP is what -- what we know in -- in  
18 Dolan, for example, administrative agents said  
19 you have to give me a 15-foot strip access to  
20 the beach. That -- that was subject to an  
21 unconstitutional conditions analysis.

22 And the only difference between that  
23 and this is that, there, you had an executive  
24 actor who was applying a legislative command,  
25 and, here, you have an executive actor applying

1 maybe a more specific or -- or -- or more  
2 obvious legislative command. But, in both  
3 instances, there are executive actors applying  
4 legislative commands, and we're being asked, I  
5 think, just to decide whether that makes a  
6 difference.

7 MS. McGRATH: I think that what  
8 happened in Nollan/Dolan and Koontz all looks  
9 fundamentally different from what the county is  
10 doing -- is doing here in a way that I think  
11 bears on what you are getting at, Justice  
12 Gorsuch, which is that what the -- what the  
13 governments were doing in Nollan/Dolan and  
14 Koontz looks fundamentally different from the  
15 county's scheme, which is indistinguishable from  
16 property taxes, user fees, and special  
17 assessments.

18 JUSTICE GORSUCH: Is this a tax? Is  
19 this a tax? I mean, if we're going to go down  
20 that road, do you think -- I -- I didn't see  
21 that word in your -- your brief. I might --  
22 might have missed it.

23 MS. McGRATH: Oh, I do -- I do think  
24 --

25 JUSTICE GORSUCH: Do you think this is

1 a tax under California law?

2 MS. McGRATH: Under California law, it  
3 is not a tax, but I think, for purposes of  
4 constitutional law, it is a tax. And the cases  
5 would be --

6 JUSTICE GORSUCH: So we have to decide  
7 that? We have -- we have to decide it's --  
8 constitutionally, it's a tax even though, under  
9 California law, it's not a tax in order to go  
10 down this road of resolving the parties'  
11 disputes beyond the QP?

12 MS. McGRATH: I think that our  
13 position is that the most straightforward way  
14 for the Court to resolve this case is to say  
15 that the fee that the county charged here is  
16 indistinguishable from property taxes, special  
17 assessments, and user fees as this Court has  
18 always defined them.

19 JUSTICE KAVANAUGH: Wouldn't --  
20 wouldn't --

21 JUSTICE ALITO: Counsel, I -- I -- I'm  
22 puzzled by your statements about what the court  
23 below held. It said over and over again that  
24 Nollan and Dolan do not apply to legislation.

25 "Only individualized development fees

1 as distinguished from legislatively mandated  
2 generally applicable development fees are  
3 subject to the Nollan/Dolan test." That's on  
4 page 407.

5 On 409, "While the Nollan/Dolan test  
6 applies to monetary land use" -- "land use  
7 exactions which are imposed ad hoc on an  
8 individual and discretionary basis, it does not  
9 apply to generally applicable development impact  
10 fees imposed through legislative action.

11 "As our Supreme Court has explained,  
12 legislatively prescribed monetary fees as  
13 distinguished from a monetary condition imposed  
14 on an individual permit application on an ad hoc  
15 basis that are imposed as a condition of  
16 development are not subject to the Nollan/Dolan  
17 test."

18 MS. McGRATH: I think, Justice Alito,  
19 that each of those descriptions of the court of  
20 appeals rule incorporates the additional nuances  
21 that we are emphasizing here, which is not the  
22 presence of legislation, it is a development  
23 impact fee that applies as here generally to a  
24 broad class of permit applicants, meaning it  
25 applies the way that legislature -- legislatures

1 typically make broad programmatic --

2 JUSTICE SOTOMAYOR: Counsel, you --

3 MS. McGRATH: -- descriptions

4 particularly --

5 JUSTICE SOTOMAYOR: -- you're fighting

6 -- you're fighting the words. And what's the

7 difference between that -- would that statement

8 apply to a legislature saying, you get a permit

9 only if you pay us 20 -- \$20,000 or dedicate

10 10 percent of your land to -- to conservation?

11 Now that would be a taking, wouldn't it?

12 MS. McGRATH: It would be a taking.

13 JUSTICE SOTOMAYOR: So you're fighting

14 -- they were saying, if it's part of a

15 generalized scheme, no matter how it's imposed,

16 as opposed to an individual assessment, it's out

17 of Nollan/Dolan. So it's not. It can be in

18 Nollan/Dolan. The question is, is this type of

19 fee subject to Nollan/Dolan?

20 I agree with you, but that's what

21 Justice Alito was saying. They started from

22 a -- from a broader sense of saying there can

23 never be a taking if it's generalized --

24 generalized imposition by a legislature. And

25 that's just not true.

1 MS. McGRATH: I -- I -- I don't take  
2 the court of appeal to have applied that rule.  
3 In California --

4 JUSTICE SOTOMAYOR: Well, you're  
5 fighting how others read this.

6 JUSTICE KAVANAUGH: If they applied  
7 that -- well, if they didn't apply that rule --  
8 well, let's start over.

9 Let's assume that legislative  
10 exactions are covered by Nollan/Dolan. And then  
11 you want to say, but impact fees, I think, are  
12 exempt from Nollan/Dolan. Right?

13 MS. McGRATH: That's correct.

14 JUSTICE KAVANAUGH: Okay. But  
15 wouldn't that allow a county or entity,  
16 government entity, to impose exorbitant impact  
17 fees that are obviously being used to fund  
18 improvements in the other part of the county  
19 that the county can't get the county council or  
20 whatever to pass tax increases for? And isn't  
21 that a core concern of our entire jurisprudence  
22 in this area?

23 MS. McGRATH: I -- I think that that  
24 would not enable counties to do what you're  
25 describing, Justice Kavanaugh. And I think that



1 those limits would flow directly from the -- the  
2 analogies that we're drawing to the special  
3 assessment context, where the legislature does  
4 have authority to decide which properties --

5 JUSTICE KAVANAUGH: Well --

6 MS. McGRATH: -- will be --

7 JUSTICE KAVANAUGH: -- can I just  
8 interrupt? I'm sorry. You said impact fees are  
9 not subject to scrutiny under Nollan/Dolan.

10 What then are the limits on impact  
11 fees being used to coerce more money out of the  
12 development to pay for other things going on in  
13 the other part of the county that they can't get  
14 the tax increases for? That's a --

15 MS. McGRATH: Well, I think, at a --  
16 at a minimum, here in California and in, I  
17 believe, the 37 other states that the states'  
18 brief identifies as setting limits on impact  
19 fees, those fees would unquestionably not  
20 satisfy the limits in those state laws which  
21 require --

22 JUSTICE KAVANAUGH: State laws. What  
23 federal constitutional --

24 MS. McGRATH: I think --

25 JUSTICE KAVANAUGH: -- limits are

1 there, if any? Maybe -- you know, if you're  
2 just going to say rational basis, I'm not sure  
3 that works, but -- but go ahead.

4 MS. McGRATH: I do think the Due  
5 Process Clause would provide a check there. And  
6 I also think that the Court could reason by  
7 analogy to the special assessment and the user  
8 fee cases, where the Court has made clear that  
9 despite the deference that legislatures receive  
10 in this area, they have to act reasonably. And  
11 those reasonable limits include, for instance,  
12 in -- in the user fee context, that if --

13 JUSTICE KAVANAUGH: Do you think it's  
14 reasonable to impose impact fees that are not  
15 designed to fund, say, the road that needs to be  
16 built because of the development but to fund  
17 improvements to schools on the other part --  
18 side of the county?

19 MS. McGRATH: Absolutely not, and I  
20 think that fee would unquestionably fail. That  
21 would fail state law and I think would pose  
22 serious questions under the Due Process Clause.

23 JUSTICE KAVANAUGH: Just serious  
24 questions?

25 MS. McGRATH: I -- I -- I do not see

1 -- if there is no reasonable basis, and I don't  
2 think a reasonable basis --

3 JUSTICE KAVANAUGH: Well, the  
4 reasonable basis is the county needs the money  
5 to fund the schools.

6 MS. McGRATH: I don't think that's a  
7 reasonable basis to impose that charge  
8 exclusively on new development. And here again,  
9 I would point to the special assessment cases  
10 that makes -- that make clear that, typically,  
11 when the government is charging fees to a  
12 specific group of property owners, that is based  
13 on its determination, subject to reasonableness,  
14 but notwithstanding that, a determination that  
15 those properties will specifically benefit from  
16 the public --

17 JUSTICE KAVANAUGH: What's the  
18 difference between reasonableness as you're  
19 describing it and rough proportionality and  
20 essential -- and nexus?

21 MS. McGRATH: I -- I think it -- and I  
22 think that actually touches on kind of the core  
23 of what our dispute is here, which I think your  
24 earlier questions were also touching on, Justice  
25 Kavanaugh, is that we do not dispute as a matter

1 of state law or federal law that there has to be  
2 a connection between new development and the  
3 fees that the county charges.

4 What we do dispute is that then, when  
5 the legislature has to justify how it imposed  
6 that -- those -- imposes those fees, that it has  
7 to do that on a parcel-by-parcel basis.

8 JUSTICE KAVANAUGH: Okay. So the  
9 whole dispute then, I think, does come down to  
10 -- we can use the adjectives, but you agree  
11 rough proportionality has to apply, I think, and  
12 -- and nexus. You say not Nollan/Dolan, but you  
13 say the same words as Nollan/Dolan apply.

14 But the key dispute then is do we do  
15 that by looking at the formula to see whether  
16 the formula is roughly proportional, as Justice  
17 Kagan was saying, or do we have to go to the  
18 individual house and say, well, what about the  
19 impacts of that house on the road?

20 MS. McGRATH: Right. I mean -- and  
21 just to be clear, as I think everyone  
22 understands, we dispute that there is any taking  
23 anywhere in the picture, and so we would dispute  
24 that any sort of constitutional principle in  
25 addition to due process reasonableness

1 protections applies.

2 But -- but accepting the hypothetical  
3 or -- or answering, I think, more directly the  
4 question, is, yes, the -- the core practical  
5 problem that this would create for counties is  
6 that it -- it would disable counties from acting  
7 on the predetermined bases that they routinely  
8 act in this context and that they need to be  
9 able to use to fund the kind of infrastructure  
10 improvements that we are talking about, schools,  
11 sewer systems, roads.

12 JUSTICE KAVANAUGH: Right.

13 MS. McGRATH: These are the kind of  
14 infrastructure that counties just --

15 JUSTICE KAVANAUGH: And I think the  
16 next question then is, how reticulated does the  
17 formula have to be? And --

18 JUSTICE JACKSON: But can I -- can I  
19 just --

20 JUSTICE KAVANAUGH: Can I just finish  
21 that?

22 JUSTICE JACKSON: Sorry.

23 JUSTICE KAVANAUGH: And, you know,  
24 what -- there's going to be litigation over  
25 that. What -- what -- what do you think? How

1     reticulated, because Justice Kagan said this  
2     one's very reticulated. I agree with that. How  
3     -- how reticulated does it have to be to satisfy  
4     constitutional scrutiny?

5             MS. McGRATH: Under -- under the  
6     constitutional test, again, putting aside the  
7     three dozen state laws that I think would  
8     require exactly the page -- the -- the  
9     connection that California -- that El Dorado  
10    drew in this case, that the 5,000-page  
11    administrative record supports, I think, as a  
12    matter of constitutional law, there would need  
13    to be a line that the legislature would need to  
14    draw between the properties on which the fee is  
15    imposed and the nature of the fee that I think  
16    would prevent -- and I would certainly take the  
17    position that it would prevent -- counties from  
18    -- from tagging new developers exclusively to  
19    pay for entirely unrelated public improvements.

20             JUSTICE KAVANAUGH: Sorry.

21             JUSTICE JACKSON: No, that's all  
22    right. Sorry.

23             So Justice Kavanaugh has been  
24    discussing the sort of core practical problem of  
25    how do we figure out when the county has

1 overstepped and gone too far and there must be a  
2 limit. And all of that is true, but I guess I'm  
3 concerned about the core legal problem that is  
4 the threshold question of which test should  
5 apply when given the claims that are being made  
6 by Mr. Sheetz in this case.

7           And so that takes me back to wondering  
8 whether the most straightforward way to win in  
9 this case from your perspective is not  
10 necessarily to prove that this is a tax or prove  
11 that this is, you know, a user fee but to say  
12 this is not a taking.

13           We have very clear, very  
14 well-established legal principles as to what  
15 qualifies as a taking. And whatever this is, I  
16 think we can say that since it isn't the kind of  
17 dedicated property appropriation that occurs in  
18 Nollan, Dolan, and Koontz, that it's not a  
19 taking, so this particular formula doesn't  
20 apply.

21           Isn't -- isn't that the most  
22 straightforward? Like, Justice Gorsuch was --  
23 was starting to investigate your position that  
24 this qualifies as a tax. And so then we have to  
25 sort of figure out, well, what does that mean

1 and is it a tax? Can't you win by just saying  
2 this is not a taking?

3 MS. McGRATH: Yes. Absolutely. We  
4 would welcome that opinion. That is our  
5 position. And the reason that we invoke the tax  
6 and the property tax and special assessment  
7 contexts is that the Court has categorically  
8 said those are not takings. But, absolutely, we  
9 agree. There -- put -- even putting all that to  
10 the side, there is no possible taking here.

11 I -- you know, the question was asked  
12 earlier about could a county go to a development  
13 and say, you have to pay the fees that result  
14 from the burdens on county -- county  
15 infrastructure that flow from this development.  
16 For instance, you need to pay for the sewer  
17 improvements that are going to be needed to the  
18 county's sewer system to account for the fact  
19 that we are expecting an additional 5,000  
20 residents to inhabit this new development.

21 Unquestionably, there is -- a county  
22 could do that outside the permitting context,  
23 and that's the answer to the question in this  
24 case.

25 CHIEF JUSTICE ROBERTS: Thank you,



1 counsel.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE ALITO: When you talk about  
5 due process, are you talking about substantive  
6 or procedural due process?

7 MS. McGRATH: I think procedural due  
8 process.

9 JUSTICE ALITO: So what procedure --  
10 the argument would be that certain procedures  
11 have to be applied on an individualized basis  
12 before this fee could be assessed against,  
13 collected against a particular landowner?

14 MS. McGRATH: I think we would invoke  
15 the same kind of due process principles that are  
16 identified in cases like Bi-Metallic, which said  
17 that due process -- procedural due process  
18 operates in this area, but it operates at a  
19 highly -- highly generalized level that requires  
20 counties to do things like enact legislation,  
21 provide opportunity for comment and feedback,  
22 but that -- that counties do not -- it has  
23 affirmatively rejected the idea that counties  
24 need to do that on an individualized basis.

25 But, beyond that, Justice Alito, I

1 also think if I can -- can return to answering  
2 the rest of the question --

3 JUSTICE ALITO: No. That was an  
4 answer. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Sotomayor?

7 JUSTICE SOTOMAYOR: No, thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: So, Ms. McGrath, I  
10 want to follow up on Justice Gorsuch's idea of  
11 radical agreement, and I -- I -- I want to give  
12 you -- suggest what it is that there is radical  
13 agreement on and what it is that there's not  
14 radical agreement on and see if you agree with  
15 me.

16 So what there is radical agreement on  
17 is that you don't get a pass from  
18 unconstitutional conditions analysis just  
19 because you've passed generally applicable  
20 legislation. And that's, of course, true in  
21 unconstitutional conditions analysis generally,  
22 and so too it's true of unconstitutional  
23 conditions analysis in the property area. If  
24 there has been a taking and that taking is being  
25 leveraged in the permitting process by generally

1 applicable legislation, there's no pass just  
2 because that's the mechanism that's being used.

3 So, first, let me ask you if you agree  
4 with that?

5 MS. McGRATH: I agree.

6 JUSTICE KAGAN: Okay. Here are two  
7 things it seems to me that the parties  
8 fundamentally disagree on, which is probably --  
9 one of these two things is going to answer this  
10 dispute in the end, but there are two things.  
11 Is -- number one, was -- is there a taking at  
12 all? Because if this is just something like a  
13 tax, unconstitutional conditions analysis never  
14 comes into play, and you say it never comes into  
15 play, and Mr. Beard says it absolutely comes  
16 into play. So that's one question that you're  
17 very much at odds on, is that correct?

18 MS. McGRATH: That's correct.

19 JUSTICE KAGAN: The second question  
20 that you're very much at odds on is, even if you  
21 assume that there has been some kind of taking  
22 here and that unconstitutional analysis does  
23 come into play -- and by that, I mean what we  
24 have in past cases called Nollan/Dolan analysis,  
25 right?

1                   Even if you assume that that  
2                   unconstitutional analysis comes into play, it  
3                   might look very different from what Nollan/Dolan  
4                   analysis looks like just because Nollan and  
5                   Dolan were focused on individual parcels,  
6                   individual property owners, and this is a  
7                   general scheme, and it would be very difficult  
8                   to apply Nollan and Dolan analysis literally to  
9                   a general scheme so that there might be ways in  
10                  which Nollan/Dolan analysis becomes something  
11                  that, you know, really looks different in  
12                  application. And I think Mr. Beard says no, not  
13                  really, and you say, yes, really. Is that  
14                  correct?

15                  MS. McGRATH: That's also correct.

16                  JUSTICE KAGAN: So that's the  
17                  agreement. Those are the two big disagreements?

18                  MS. McGRATH: I think that is correct,  
19                  Justice Kagan.

20                  JUSTICE KAGAN: Okay. I just wanted  
21                  to make that clear.

22                  CHIEF JUSTICE ROBERTS: Justice --  
23                  Justice Gorsuch?

24                  JUSTICE GORSUCH: That's super helpful  
25                  because, as I read it, and I may be the only

1 one, though I don't think so, the only QP was on  
2 the first question, whether Nollan/Dolan applies  
3 to legislative enactments. There -- there was a  
4 circuit split. That's -- that's why we took the  
5 case. And we could answer that and be done.

6 Now, if we went on, we have to decide  
7 whether it's a tax for the first one, and on the  
8 second one, we have to decide whether there's a  
9 difference between legislative enactments in  
10 gross and specific actions. On that, I guess, I  
11 had a question.

12 Couldn't one recharacterize what  
13 happened in Dolan as legislation in gross?  
14 There was a county code that said if thou wants  
15 to develop on a beach, thou will give 15-foot  
16 easements, and all they did was pretty much  
17 ministerially apply the legislative code.

18 So how are we supposed to draw a  
19 distinction if we're going to get -- if we're  
20 going to go down that road and try and decide  
21 that question, which I don't think is before us,  
22 but if we were to, how do we distinguish between  
23 Dolan and your case?

24 MS. McGRATH: So I think there are two  
25 bases of distinction. I think one relates to

1 what Dolan itself decided. And, there, I think  
2 that Dolan itself involved legislation that  
3 looks very different from the legislation here  
4 in two respects.

5           And, here, I would point the Court to  
6 page 380 of the Dolan decision, which emphasized  
7 two features of that ordinance. One was that it  
8 allowed for variances, significant variances  
9 from any sort of baseline mitigation floor that  
10 the legislation imposes, and, number two, it  
11 gave permitting officials discretion to identify  
12 the amount of open space that was required under  
13 that scheme when they --

14           JUSTICE GORSUCH: Yeah, but they  
15 didn't -- they didn't do either of those things.  
16 They just pretty much followed the rule, 15-foot  
17 easement, boom, you've to give us a 15-foot  
18 easement as I understood it.

19           MS. McGRATH: I think that's also, of  
20 course, putting to the side the fact that that  
21 case involved an easement and therefore  
22 didn't -- didn't raise these questions.

23           JUSTICE GORSUCH: I understand that.  
24 But that's all that -- that's the first can of  
25 worms, which we're not getting -- I mean, we

1 could say that this is a tax and that's a  
2 different -- but this is the second can of worms  
3 that -- that we're talking about now, which is  
4 legislation versus specific, and I guess I'm not  
5 sure where we draw that line.

6 MS. McGRATH: I think, there, the line  
7 that we draw, which gets to the second part of  
8 my answer to the first question, is on the  
9 non-discretionary and mandatory nature of the  
10 fees that were charged here.

11 Here, the fees are set by a  
12 predetermined schedule. That is exactly what  
13 the Petitioner is challenging.

14 JUSTICE GORSUCH: So, if there were a  
15 predetermined schedule, but a potential for  
16 variance existed, but they didn't vary, it would  
17 then be on the Dolan side of the line rather  
18 than your side of the line?

19 MS. McGRATH: I think, if it were a --  
20 I think it's on -- the condition in Dolan is on  
21 the Dolan side of the line primarily because  
22 there's a taking.

23 But, here, I think that in a case  
24 where there's significant discretion involved or  
25 variances allowed, I think that would be a

1 harder case and a different one. And, here,  
2 we're emphasizing the non-discretionary and  
3 mandatory nature, which we think, again, you  
4 know, relates primarily to the similarity to  
5 that.

6 JUSTICE GORSUCH: Thank you. Thank  
7 you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 JUSTICE KAVANAUGH: One question. On  
11 the "is it a taking" question that Justice Kagan  
12 raised and there's disagreement on that, and you  
13 say there's not a taking and you had answered  
14 Justice Jackson the same way, I think, though,  
15 then your due process review does, I think -- I  
16 just want to get back to this -- apply concepts  
17 like rough proportionality and essential nexus  
18 so long as that review is not applied at the  
19 parcel-specific level. Is that correct?

20 MS. McGRATH: I think we would use  
21 words like reasonableness or rationality rather  
22 than rough proportionality, but I think, Justice  
23 Kavanaugh, at the end of the day, I take your  
24 question to be suggesting there's not a  
25 significant difference in your mind between



1 those two scenarios, in which case that -- that  
2 is, I think, part of -- that is part of our --  
3 our position, is that if any sort of heightened  
4 review is necessary here, it needs to be  
5 performed at a programmatic basis that looks at  
6 the categories that the legislature itself has  
7 drawn.

8 JUSTICE KAVANAUGH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Barrett?

11 JUSTICE BARRETT: No.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14 JUSTICE JACKSON: So I just want to  
15 clarify. In your exchange with Justice Gorsuch,  
16 who very clearly isolated the question  
17 presented, as I read it, the question presented  
18 at least as the Petitioner put it forward is  
19 whether a permit exaction is exempt from the  
20 unconstitutional conditions doctrine simply  
21 because it's authorized by legislation.

22 So it seems to me that there is a  
23 threshold assumption that the permit exaction  
24 would otherwise trigger the unconstitutional  
25 conditions doctrine, and the question is, is it

1 exempt from that just because of legislation.

2           So, because there is disagreement  
3 about whether it would trigger it to begin with,  
4 I would think that to isolate the question  
5 presented as -- at a minimum, we would have to  
6 expressly preserve the assumption, right?

7           I mean, our -- our holding or our  
8 opinion would have to say assuming that a permit  
9 exaction of the nature of this one triggers the  
10 unconstitutional, that we couldn't not say that,  
11 right, in order to just isolate the question  
12 presented?

13           MS. McGRATH: I think that's exactly  
14 right, Justice Jackson. I think that's part of  
15 the reason that we think we are directly  
16 answering the question presented here, because  
17 of that assumption that all permit conditions  
18 are --

19           JUSTICE JACKSON: And -- and if it  
20 turns out that the assumption is easy based on  
21 our case law, let's say, the Court looks at this  
22 and very clearly says or thinks that, you know,  
23 if we don't have a dedicated appropriation of  
24 land kind of scenario, then there is no taking,  
25 would you encourage us to go ahead and say that

1 in this case?

2 MS. McGRATH: Yes.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Ms. Ross.

7 ORAL ARGUMENT OF ERICA L. ROSS  
8 FOR THE UNITED STATES, AS AMICUS CURIAE,  
9 SUPPORTING THE RESPONDENT

10 MS. ROSS: Thank you, Mr. Chief  
11 Justice, and may it please the Court:

12 I'd like to hit three main points  
13 which I think are responsive to a lot of the  
14 conversation that we've been having this  
15 morning.

16 First, on the question of how broadly  
17 the question presented sweeps, I certainly agree  
18 with you, Justice Jackson, that there is a  
19 logically antecedent question baked into the  
20 question presented, which is whether the  
21 unconstitutional conditions doctrine applies  
22 here at all. For reasons I'd like to talk about  
23 in a moment, we don't think it does.

24 But, if the Court doesn't want to  
25 reach that question, I think what's really

1 important if it's going to say that there is no  
2 sort of legislative exception from Nollan and  
3 Dolan is for the Court to make clear that these  
4 are still cases applying, as this Court said in  
5 Koontz, a special application of the  
6 unconstitutional conditions framework.

7 And so, when the parties go back  
8 and -- and parties across this country read this  
9 Court's decision, it remains clear that you have  
10 to identify a taking for a Nollan/Dolan claim to  
11 get off the ground.

12 Second, I think there was some  
13 conversation about what is the focus of the  
14 taking that Petitioner is suggesting here. I  
15 think it was clear in his introduction this  
16 morning and has been clear throughout the  
17 briefing if you look at pages 25 to 26 in  
18 particular of the blue brief that he's not  
19 making any sort of claim regarding a taking of  
20 his property, meaning the physical real  
21 property.

22 What he is claiming is that this  
23 \$23,000 fee is itself a taking. And we think  
24 that is not correct for all of the reasons that  
25 have already been discussed this morning and

1 that many of you have recognized.

2 I think this Court in Koontz talked  
3 about taxes, user fees, and similar laws and  
4 regulations, so I don't think that to prevail  
5 the county necessarily has to show that this is  
6 a tax or a user fee, but as Justice Barrett  
7 pointed out earlier, I think it is quite similar  
8 to the class of special assessments that this  
9 Court has held for a hundred-plus years in cases  
10 like Houck and Fallbrook and French are not  
11 subject to any sort of takings analysis or any  
12 heightened takings analysis. They are subject  
13 to normal constitutional constraints.

14 And I think this goes to the point  
15 that no court or this Court at least to my  
16 knowledge has never held that a widely  
17 applicable fee paid by large numbers of people  
18 to pay for government infrastructure is a  
19 taking, and I think doing so in this case would  
20 be -- would be very disruptive.

21 And I guess this gets me to the last  
22 and third point about the disruptiveness of the  
23 rule that I hear Petitioner to be asking. I  
24 think he is asking for, as he has said, a  
25 parcel-specific analysis.

1                   I think that has several problems.  
2     The workability ones certainly have already been  
3     discussed, but I also think there's an element  
4     of horizontal fairness here.  When you have a  
5     class and everyone within the class pays the  
6     same amount, that actually can be viewed as far  
7     more fair than having these one-off  
8     individualized determinations.

9                   I think, in -- in a -- in adopting a  
10    standard that's more like what the states have  
11    suggested in their amicus brief should the Court  
12    go down the Nollan/Dolan road -- and, again, I  
13    want to be clear we don't think there's any  
14    reason to do so -- but if the Court is inclined  
15    to do so, you know, I think it would be very  
16    important, one, again, to say that this has to  
17    operate at the class level, so the class at  
18    which the legislature is acting, and, two, that  
19    reasonable judgments, reasonable legislative  
20    judgments need to be able to be made regarding  
21    the class, how the -- how the county or the  
22    local government is going to allocate the  
23    burdens of taxation.

24                   CHIEF JUSTICE ROBERTS:  Counsel,  
25    you -- you said that there would be no takings

1 analysis with respect to a widely applicable  
2 provision that covers a large number of people.

3 MS. ROSS: I think when we're talking  
4 about money, when we're talking about a payment  
5 for government services, so I think that makes  
6 this case look a lot like a tax user fee.  
7 Similar laws and regulations, as this Court said  
8 in Koontz on page 615 of the opinion, are  
9 outside of the -- the takings context and  
10 outside of Nollan and Dolan.

11 CHIEF JUSTICE ROBERTS: So, if it's  
12 narrowly applicable and applies only to a  
13 relatively small number of people, then the  
14 takings analysis does apply?

15 MS. ROSS: No. I think the question  
16 is -- what I'm trying to get at is this idea of  
17 individualized ad hoc decision-making versus the  
18 broadly applicable legislative standard --

19 CHIEF JUSTICE ROBERTS: Yeah, but, I  
20 mean, obviously, that's a broad range. And I'm  
21 just trying to get a sense of exactly where you  
22 would have -- I mean, because this is a  
23 threshold determination, but if it depends on  
24 individualized analysis and you've got to figure  
25 out, well, where along that spectrum does it

1 apply, that's not a very helpful threshold.

2 MS. ROSS: So I think this is similar  
3 to analyses that the Court has conducted in  
4 other areas. I mean, I think there is -- we  
5 cited in our brief -- I apologize, the name of  
6 the case is escaping me at the moment -- but,  
7 basically, in the due process context, we do  
8 draw this distinction between whether you get an  
9 individualized hearing because we're really  
10 talking about sort of one-offs or we're talking  
11 about class-wide legislation.

12 I think what's really key here is that  
13 because this applies to a wide swath of  
14 landowners, it's done at the class level. As I  
15 said earlier, it -- it has horizontal fairness  
16 and it has, I think, a greater responsiveness in  
17 the political process than you would have --

18 CHIEF JUSTICE ROBERTS: So are you  
19 saying that if you have a provision that applies  
20 categorically in terms of its phraseology, but  
21 it turns out there are only, you know, three  
22 houses in the county that are going to be  
23 affected, that you would analyze that  
24 differently?

25 MS. ROSS: So I'm not sure it's a --



1 it becomes a takings problem, Mr. Chief Justice.  
2 And I apologize. I probably should have said  
3 that initially. I think that, you know, that  
4 may have sort of a -- an arbitrariness question  
5 under the Due Process Clause or an equal  
6 protection. Maybe it's not a class of one,  
7 maybe it's a class of three problem. But there  
8 would be a singling out analysis. I just don't  
9 think that's anything like what we have --

10 CHIEF JUSTICE ROBERTS: Thank you.

11 MS. ROSS: -- in this case.

12 JUSTICE GORSUCH: Ms. Ross, I -- I  
13 certainly understand your point that classes  
14 might be very informative when we're talking  
15 about a tax or a user fee and whether it meets  
16 rational basis test.

17 But, if this were a taking -- and I'm  
18 not saying it is, okay? I -- I -- I'm not sure  
19 we have to answer that question, as I've already  
20 indicated. But, if -- if it were a taking, why  
21 would that make a difference? If it actually --  
22 if -- if -- if the legislature said, we're going  
23 to take everybody's property, and there's no  
24 question they're taking your property, how on  
25 earth would that be better than an

1 individualized agency official saying, I'm  
2 taking Ms. Ross's property and no one else's?

3 MS. ROSS: So, Justice Gorsuch, I  
4 completely agree with you that this  
5 consideration is not dispositive.

6 JUSTICE GORSUCH: It's relevant when  
7 we get to taxes and user fees. I accept that.  
8 But you'd agree that it also doesn't cut much if  
9 we're actually talking about a true taking?

10 MS. ROSS: That's correct, Justice  
11 Gorsuch. And I think that just reflects that  
12 this Court has sort of always treated physical  
13 appropriations of real property as the  
14 quintessential taking, the classic taking, as  
15 this Court has said time and time again. It's  
16 what the -- the clause, the text of the clause  
17 itself, I think, is most focused --

18 JUSTICE GORSUCH: Yeah.

19 MS. ROSS: -- on, and so it makes  
20 sense that we have different rules in that  
21 context.

22 JUSTICE GORSUCH: Yeah. Thank you.

23 JUSTICE JACKSON: And so can you just  
24 clarify, say a little bit more about that? I  
25 mean, you seem fairly confident that this is not

1 a taking, so can you say exactly why that is?

2 MS. ROSS: Certainly, Justice Jackson.  
3 So I think it's not a taking because, as I think  
4 I said earlier, this Court has never found a  
5 taking in a situation in which the government is  
6 charging a -- if you want to call it a tax, a  
7 user fee, a other similar law or regulation, to  
8 pay for public benefits, public infrastructure,  
9 public services. It has never found a taking in  
10 that context.

11 I think there are a few reasons why  
12 that's so. First, of course, there is this sort  
13 of oft-repeated line that taxes are not takings.  
14 And I think that's -- that has meaning. And the  
15 reason it has meaning is because the Court has  
16 long recognized that governments need to be able  
17 to fund themselves and that when they do so,  
18 they are not engaging in, again, this sort of  
19 core taking physical appropriation of private  
20 property activity.

21 I think, if you wanted to put this in  
22 a box -- you know, the user fee has been talked  
23 about a lot this morning -- I think a special  
24 assessment is a really good way of thinking  
25 about this, as I think Justice Barrett noted

1 earlier. The -- the special assessment cases  
2 make clear that not only can government charge  
3 taxes at sort of a general level, it can also do  
4 it, it can define a particular district, as in  
5 Houck and Fallbrook and the other sort of  
6 irrigation district cases, or it can define a  
7 particular class of property owners --

8 JUSTICE JACKSON: And does it -- does  
9 it matter that it's doing that in connection  
10 with property? What I understood Mr. Sheetz's  
11 counsel to say is that when you do that in  
12 connection with property, then we're sort of  
13 getting into takings territory.

14 MS. ROSS: So I don't think a link to  
15 property can be enough or any link to property  
16 can be enough. And -- and if I could give two  
17 quick examples. I mean, I think a property tax  
18 obviously does that, and that has never been  
19 thought to be a taking. And, similarly, I think  
20 a transfer tax. I may really want to exercise  
21 my right as a property holder or property owner  
22 to sell my property, but nobody has ever thought  
23 that the government engages in a taking when it  
24 requires me to pay a certain percentage to  
25 Maryland or the District of Columbia or whatever

1 it is when I sell my property.

2 So I don't think just any link to  
3 property is enough. I think, to bring this back  
4 to Koontz, the link to property that was really  
5 at issue there was the in lieu nature of the  
6 fee. The choice on the table was pay me an --  
7 or give me over a real property interest, an  
8 easement that's going to destroy the right to  
9 exclude that this Court has recognized as sort  
10 of the core right in physical real property, or  
11 pay an equivalent amount of money.

12 And the concern, I think, as this  
13 Court made clear at page 612 of the opinion,  
14 when it was talking about the anti-circumvention  
15 rationale, is that if you allow the -- the  
16 county to do that -- that, give me one or give  
17 me the other, it's always going to be able to  
18 get the property that it wanted at the outset  
19 because it can just keep ratcheting up the fee.

20 JUSTICE ALITO: Did you -- do you --  
21 do you agree that the California court held that  
22 Nollan/Dolan does not apply to legislation?

23 MS. ROSS: So, Justice Alito, with all  
24 due respect to the California Court of Appeal, I  
25 think the -- the opinion is less than clear in

1 some places. I do think there are parts of the  
2 opinion -- I think my friend pointed to pages 16  
3 to 17 if I'm remembering correctly. There's a  
4 footnote that sort of analogizes this to a  
5 special assessment and, I think, refers to some  
6 of the cases that talk about the in lieu nature.  
7 And so, if you wanted to squint at the opinion  
8 and find a more nuanced rule, I think you could  
9 do that.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Alito, anything?

13 Justice Sotomayor?

14 Justice Kagan?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: One question. The  
17 concern on the other side, I think, is that  
18 property developers and owners will be charged  
19 impact fees to pay for costs of the county more  
20 generally, including on other sides of the  
21 county. You're -- you say the Takings Clause  
22 has nothing to say about that.

23 What constitutional limits, if any,  
24 are there, and how would you phrase the exact  
25 test?

1 MS. ROSS: Sure. So I think the --  
2 the Takings Clause, as some of Justice Jackson's  
3 questions went to earlier, doesn't really speak  
4 to this because, again, it's not talking about  
5 things that the government can't do. It's  
6 talking about things the government has to pay  
7 for when it does do. And so I don't think it's  
8 necessarily imposing a substantive limit.

9 But I think other -- certainly, state  
10 law has filled a lot of this area. Indeed,  
11 Dolan sort of drew its test from state law  
12 standards that have been well established for  
13 decades and I think have only gotten sort of  
14 more onerous since then.

15 But -- but federal constitutional  
16 provisions, I think there are due process  
17 checks. As I mentioned to the Chief Justice,  
18 there would be equal protection checks as well.

19 JUSTICE KAVANAUGH: And what -- what  
20 would be the phrasing of the due process check?

21 MS. ROSS: So I think the way that  
22 this Court has described it is essentially a --  
23 a reasonableness or an arbitrariness test. I  
24 acknowledge that courts have given the  
25 government significant discretion in this area

1 and the legislature significant discretion in  
2 this area, but I think that is often true when  
3 we're talking, again, about generally applicable  
4 legislation that isn't impeding on -- or isn't  
5 taking a private property interest itself.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

9 Justice Jackson?

10 Thank you, counsel. The case is  
11 submitted.

12 Oh, rebuttal. I'm sorry.

13 (Laughter.)

14 CHIEF JUSTICE ROBERTS: I was up late  
15 last night.

16 REBUTTAL ARGUMENT OF PAUL J. BEARD, II

17 ON BEHALF OF THE PETITIONER

18 MR. BEARD: Thank you, Mr. Chief  
19 Justice. Just a few points.

20 The other interesting thing about the  
21 court of appeal's decision is that it doesn't  
22 treat this exaction as a tax or a user fee or  
23 anything else other than a mitigation  
24 requirement.

25 So this case comes to the Court on the



1 premise this -- that this is a mitigation  
2 requirement and that the only reason the court  
3 of appeal thought that Nollan and Dolan don't  
4 apply is because of its legislative character.

5           In other words, the courts in  
6 California agree with us that at least in some  
7 cases, ad hoc impact fees, those are subject to  
8 Nollan and Dolan, which I think is an  
9 interesting concession from the California  
10 courts even that -- that go contrary -- that  
11 goes contrary to the county's and the United  
12 States Government's position.

13           On the issue of due process, rational  
14 -- equal protection, yes, those clauses could be  
15 available in a challenge like this, but the  
16 problem, of course, is that they provide very  
17 little protection to the property owner.  
18 Substantive due process, as I understand the  
19 cases, would require a showing of arbitrary and  
20 capricious on the part of the property owner  
21 challenging it. Equal protection would require  
22 rational basis.

23           It's Nollan and Dolan that provides --  
24 that provide the kind of robust protections for  
25 property owners that -- that this context

1 requires.

2           On administrability, we are not -- we  
3 are not asking for parcel-specific analyses or  
4 project-specific analyses. As such, it is true,  
5 as we state in our reply brief, that a  
6 project-specific analysis is the way to go if  
7 the government wants to guarantee for itself  
8 that its mitigation will pass constitutional  
9 muster, that the constitutional outcome required  
10 by Nollan and Dolan, nexus and rough  
11 proportionality are met. The only way to do  
12 that is on a project-specific basis.

13           Now the county here decided to impose  
14 its impact fee without any kind of  
15 administrative proceeding or hearing or anything  
16 like that. And we're not challenging that  
17 aspect, but it's curious, because, in Nollan and  
18 Dolan, you did have an administrative process  
19 attached to a conditional permit. And so,  
20 there, the government was able to make that  
21 individualized determination that its  
22 legislative mandate was or was not tailored to  
23 the particular impacts of the project.

24           Finally, everyone loves good roads and  
25 schools and public infrastructure, so the

1 government certainly has many tools at its  
2 disposal, including taxes, to pay for those.

3           What we're saying is that the  
4 government can't select a few. The one or two  
5 or -- or -- or a few property owners who happen  
6 to need a permit at any given time, to select  
7 them to bear the burdens of paying for that  
8 public infrastructure, and all Nollan and Dolan  
9 do is ensure that that's not happening, that  
10 what the government is doing is mitigation and  
11 nothing more.

12           Thank you, Your Honor.

13           CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15           The case is submitted.

16           (Whereupon, at 11:31 a.m., the case  
17 was submitted.)

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## Official - Subject to Final Review

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