

# 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 99  
Place: Washington, D.C.  
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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 -- we think it's --  
14 it's very consistent with the Takings Clause  
15 and, in particular, with the Court's decision in  
16 Koontz, where -- where the Court held  
17 explicitly, if the money demand has a direct  
18 link to an identifiable property interest, which  
19 in that case and in this case was the land that  
20 was proposed for use, that direct link is  
21 sufficient to render the mone- -- monetary  
22 demand a monetary exaction subject to Nollan and  
23 Dolan.

24 CHIEF JUSTICE ROBERTS: Well, it  
25 involves land, but they're not taking any

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

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

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

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



1 JUSTICE SOTOMAYOR: Taxes --

2 JUSTICE GORSUCH: Could your --

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

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

16 MR. BEARD: Justice Sotomayor --

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

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

1 to the underlying land --

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

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

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

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

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

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

1 property, the Takings Clause is implicated?

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

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

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

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

1           MR. BEARD: There is nothing as such  
2 wrong with the government making that demand.

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

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

12           JUSTICE JACKSON: Would that --

13           JUSTICE BARRETT: I --

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

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

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

1 of his property or, perhaps in the Lucas sense,  
2 you know, all use of the property.

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

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

15 JUSTICE BARRETT: Okay.

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

25 JUSTICE ALITO: Could your claim be

1 conceptualized as one involving a -- a no- -- a  
2 no-build easement --

3 MR. BEARD: It -- it certainly --

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

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

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

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

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

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

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

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

13 MR. BEARD: Yes.

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

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

1 circumstances. And in Koontz, they said, okay,  
2 fine, you don't have to give us the land, you  
3 can give us money in lieu of giving us the land.

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

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

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

22 MR. BEARD: Correct.

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

25 MR. BEARD: Yes.



1 JUSTICE JACKSON: So that's why I  
2 asked you why is it unconstitutional for them to  
3 impose a fee, a user fee, a toll. What your --  
4 your argument is suggesting that every toll is  
5 -- is a taking, that every --

6 MR. BEARD: No.

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

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

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

20 JUSTICE JACKSON: To mitigate impacts  
21 --

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

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

25 MR. BEARD: But it's not, because a

1 user fee -- in California, for example, the  
2 Constitution defines a user fee as the provision  
3 of a good or service to the payer and to nobody  
4 else. That is not what is happening here.

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

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

14 MR. BEARD: True.

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

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

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

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

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

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

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

1 Then this goes to --

2 JUSTICE SOTOMAYOR: Excuse me.

3 MR. BEARD: Yes.

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

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

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

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

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

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

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

20                  JUSTICE KAGAN: So, that's quite --

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

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

1 of the permitting process.

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

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

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

1 applicant -- applicants who happen at any given  
2 time to need to build or rebuild on their  
3 property.

4 JUSTICE BARRETT: Okay. So --

5 CHIEF JUSTICE ROBERTS: So that's --

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

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

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

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

16 MR. BEARD: Yeah.

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

24 MR. BEARD: Well, and that's because  
25 -- and -- and they may be a taking, so we don't

1 want to concede that point. But it's -- a user  
2 fee, again, is reimbursement for a product or  
3 service used.

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

5 JUSTICE ALITO: Well --

6 JUSTICE KAGAN: -- buy those E-Z  
7 passes anymore?

8 (Laughter.)

9 MR. BEARD: That's a matter of  
10 convenience, though, Your Honor.

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

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

25 And then there are legislative



1 enactments and there are legislative enactments,  
2 and they -- some apply to a very broad category  
3 of -- of property, and some apply -- some could  
4 apply to a very narrow category of property.

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

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

24           How would you apply it in those two  
25 situations?

1           MR. BEARD: Justice Alito, in both  
2           circumstances, is the fee being applied to  
3           mitigate the use of the land?

4           JUSTICE ALITO: Yeah. Mm-hmm.

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

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

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

23          So the -- the inquiry is never is  
24          there a -- a -- a connection between the fee and  
25          a broad class of -- of properties as different

1 in nature and in impacts as they may be. That  
2 is not the inquiry under Dolan. What we would  
3 insist on is that the same standard --

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

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

21 What would it mean to do parcel-based  
22 Nollan/Dolan in that context and why would we do  
23 parcel-based Nollan/Dolan in that context? Why  
24 wouldn't we ask more generally about the  
25 proportionality or reasonableness or whatever

1 word you want to use of the general legislative  
2 scheme?

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

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

22 I mean, that's what Nollan/Dolan  
23 individualized inquiry looks like. I mean,  
24 that's just saying forget about generally  
25 applicable fees anymore. There aren't going to

1 be any.

2 MR. BEARD: I -- I don't think that is  
3 correct, Justice Kagan, because a well-crafted,  
4 granular, legislative impact fee schedule could  
5 pass muster under Nollan and Dolan's heightened  
6 review. Why? Because, if -- if -- if it's  
7 based on, say, a group of development that is  
8 sufficiently granular, all of the members of  
9 that group, say single-family homes between 1200  
10 to 1500 square feet, produce the same kinds of  
11 impacts, and it's not this broad-brushed  
12 category of all development pays \$50,000.

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

22 JUSTICE KAGAN: I think your red light  
23 is on. So sorry.

24 MR. BEARD: Excuse me.

25 JUSTICE KAGAN: We can -- I'm going to

1 ask more questions about this --

2 MR. BEARD: Okay.

3 JUSTICE KAGAN: -- but I just want to

4 --

5 MR. BEARD: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,

7 counsel.

8 Justice Thomas?

9 Justice Sotomayor?

10 JUSTICE SOTOMAYOR: I have a case,

11 Mira Mar. There, the -- the court -- lower

12 court examined 20 different permitting

13 conditions under Nollan/Dolan, from whether a

14 drainage pipe really needed to be extended to a

15 requirement that the -- the developer use a

16 concrete water line cap instead of compacted

17 fill dirt.

18 It doesn't seem to me that when

19 legislative schemes are being imposed, even

20 including this one, there were 5,000 pages of

21 statistics and calculations that the -- that the

22 -- that the state involved itself with, that

23 that's really what we want district courts to be

24 doing.

25 Should I use compact dirt instead of a

1 water cap? And that -- if you're going to  
2 require the sort of Nollan/Dolan test, that's  
3 what you're calling for. And if you're going to  
4 start saying, as you did, that you're reserving  
5 the right to say that a toll could be an  
6 unconstitutional taking, I bet New York State is  
7 going to -- New York City is going to be sued  
8 very soon on that -- on that toll to come down  
9 into lower Manhattan.

10 I mean, at what point do we stop  
11 interfering?

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

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

20 MR. BEARD: -- are very deferential  
21 and -- and low because you don't have the same  
22 kind of coercive problem that you have in the  
23 land use permitting context, where government  
24 can just use individual property owners or even  
25 a class of individual property owners who need

1 permits to raise funds because they don't want  
2 to raise funds via taxes.

3 That's unpopular. Let's use the --  
4 the alleged impacts from individual property  
5 owners to fund public improvement projects that  
6 should be funded by the -- by the entire public.

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

14 JUSTICE SOTOMAYOR: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

23 But a -- a legislature can decide to  
24 do legitimate mitigation through broad rules and  
25 through categories and through averages. And I



1 think that you just suggested no, you wouldn't  
2 really have to do it piece by piece by piece as  
3 long as you had the right categories.

4 But I think I'm going to suggest that  
5 -- that this scheme is highly reticulated. You  
6 know, I'm just going to read you all the  
7 categories: singly -- single-family  
8 residential, multi-family residential, high trip  
9 commercial, general commercial, office,  
10 industrial, warehouse, church, gas station, golf  
11 course, campground, bed and breakfast.

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

23 But, you know, except if we're going  
24 to go house by house by house, that seems to be  
25 what a county would do.

1           MR. BEARD: So the problem with the  
2 fee that was imposed on Mr. Sheetz, yes, they  
3 have categories, and he falls into the  
4 single-family category, although they -- they  
5 group all single-family homes together, for  
6 example. Any -- anything from, I don't know,  
7 four -- 400 to 500 square feet to 5,000, 6,000  
8 square feet, all of them have the same impacts.

9           But the fundamental problem is the  
10 burden-shifting. The -- they -- they -- the  
11 county specifically and purposely shifted the  
12 burden of traffic impacts from non-residential,  
13 retail, office, other commercial, on to new  
14 residential.

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

23           JUSTICE KAGAN: Thank you, Mr. Beard.

24           MR. BEARD: Thank you.

25           CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: I just want to make  
3 sure I understand that last exchange and some  
4 others like it. We're dealing here with a  
5 legislative challenge, a challenge to a piece of  
6 legislation, but, of course, in Dolan, there was  
7 legislation that executive actors were pursuing,  
8 and, in fact, executive actors usually pursue  
9 takings or any other action pursuant to  
10 legislation.

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

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

21 MR. BEARD: Yes.

22 JUSTICE GORSUCH: Okay. And I -- I  
23 think a lot of what Justice Kagan and others  
24 have said might well go to proportionality and  
25 make this proportional.

1                   Now I know you disagree with that, but  
2 would you at least agree that that's an  
3 available argument on remand?

4                   MR. BEARD: On remand, the county  
5 could certainly argue that the fee that was  
6 imposed on Mr. Sheetz was roughly proportional  
7 to his impacts.

8                   JUSTICE GORSUCH: Because it's a  
9 carefully reticulated scheme and that it --

10                  MR. BEARD: Correct.

11                  JUSTICE GORSUCH: Okay.

12                  MR. BEARD: Of course, we would  
13 disagree with that, but yes.

14                  JUSTICE GORSUCH: I understand you  
15 disagree with that, but that would be the --

16                  MR. BEARD: It certainly has that  
17 argument available.

18                  JUSTICE GORSUCH: -- that would be the  
19 nature of the dispute on remand?

20                  MR. BEARD: Yes.

21                  JUSTICE GORSUCH: All right. Thank  
22 you.

23                  CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25                  JUSTICE KAVANAUGH: Can I just pick up

1 on that? If you win on the idea that  
2 legislative exactions are subject to  
3 Nollan/Dolan and you win on impact fees are  
4 subject to Nollan/Dolan, then it comes down to  
5 how do you apply the nexus and rough  
6 proportionality test that Justice Kagan, Justice  
7 Alito, Justice Gorsuch have been asking you  
8 about.

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

17           And in your reply brief, I thought you  
18 came back on page 16 and said: while "a fee  
19 based on classes of development can survive  
20 Nollan/Dolan, a fee schedule premised on a range  
21 of fees for different development classes will  
22 not necessarily run afoul of Nollan/Dolan." And  
23 that -- and I think you've repeated that today.

24           And then you have a sentence: "Of  
25 course, to guarantee the fee is constitutional,

1 the government must make an individualized  
2 determination that the fee as applies to his  
3 project satisfies Nollan/Dolan."

4 So I view those two things as  
5 inconsistent in that paragraph, and I'm trying  
6 to kind of drill down on what exactly are you  
7 saying needs to be shown by a county when it has  
8 a fee schedule or formula in order to show rough  
9 proportionality?

10 MR. BEARD: When challenged, it needs  
11 to show that the fee, once -- the fee from the  
12 schedule bears an essential nexus and rough  
13 proportionality to the impacts of the proposed  
14 development before it.

15 So getting to that last sentence that  
16 Your Honor read, the idea is that many  
17 jurisdictions, Texas is one of them, they had  
18 what I would call default. Illinois has it too.  
19 Default legislative impact fee schedules.

20 They have very well-crafted, detailed  
21 impact fee schedules. They don't do this weird  
22 burden-shifting for political reasons. And then  
23 an applicant has the opportunity to say: Well,  
24 hold on, I think that fee is excessive given the  
25 impacts of this project.

1                   Now, if it's well-articulated and  
2 well-crafted, you're not going to see many  
3 challenges from developers, especially the --  
4 the mid- to -- to larger-sized developers. But  
5 you may have the occasional one.

6                   And in that circumstance, certainly,  
7 the government would need to show that its fee  
8 is roughly proportionate to the impacts, the fee  
9 that it drew from the legislative fee schedule.

10                  JUSTICE KAVANAUGH: So is -- is it  
11 okay to classify all single-family homes  
12 together?

13                  MR. BEARD: I mean, I think it  
14 depends. Where is it located? What are -- what  
15 are the sizes of these single-family homes? I  
16 mean, that's a traffic impact question. But,  
17 certainly, just class --

18                  JUSTICE KAVANAUGH: That's a critical  
19 question for workability of what you're  
20 proposing, at least that's what the, I think,  
21 amicus briefs suggest and the county suggests,  
22 that, you know, the current way of -- or not the  
23 current way, but approaching it in a  
24 formula-based way would be more transparent,  
25 more predictable, and that your way is going to

1 be more time-consuming and administratively  
2 burdensome.

3 So I just want to make sure you have a  
4 chance to respond --

5 MR. BEARD: Well, it --

6 JUSTICE KAVANAUGH: -- to that.

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

9 JUSTICE KAVANAUGH: No, I understand  
10 that.

11 MR. BEARD: -- and the Constitution  
12 doesn't have to --

13 JUSTICE KAVANAUGH: But -- but then  
14 where are the -- predictability, where are the  
15 lines drawn? You know, does -- does  
16 single-family homes have to be divided into  
17 small, medium, large? How close you are to the  
18 highway? If -- do you have bikers in the  
19 household who don't use the roads?

20 MR. BEARD: Well, it -- it -- it -- it  
21 doesn't -- the -- the proportionality question  
22 -- the nexus and proportionality questions don't  
23 rely on what the individuals are doing. It's a  
24 project, right? This is a single-family home of  
25 X size. This is what we expect, this is what we



1 anticipate the traffic impacts to be.

2 But, to go to your point, the county  
3 itself in 2019 realized that it could be better  
4 crafted by creating single-family homes  
5 categorized by square footage, and that makes  
6 common sense, whereas before it said  
7 administrative problems, too costly. Now we see  
8 that they're going in that direction.

9 And all applying Nollan and Dolan will  
10 do is keep governments honest and to make sure  
11 that they're actually doing the work of creating  
12 fees where an individual project will come  
13 before it and, yeah, that -- that fee from the  
14 schedule will be roughly proportional.

15 JUSTICE KAVANAUGH: And, again, I --  
16 I -- that's great, but I'm not sure how you  
17 answer that question, but I'll -- I think I'll  
18 let it go there. Okay.

19 MR. BEARD: Okay.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 JUSTICE BARRETT: I have one question  
23 that's related to Justice Kavanaugh's question,  
24 which is -- I mean -- it seems kind of like a  
25 nightmare to figure out where the lines should

1 be drawn in these categories, and you're trying  
2 to -- you're trying to mitigate the potential  
3 consequences of that.

4 I mean, when you're deciding how  
5 reticulated it has to be, would the lines drawn  
6 between various categories be judged on a  
7 rational basis level? Because it seems like  
8 you're saying, well, you look at whether the  
9 category is roughly proportional, but, as  
10 Justice Kavanaugh's pointing out, individual  
11 parcels within that category may have varying  
12 impacts on the traffic.

13 So how do you decide where the lines  
14 should be drawn?

15 MR. BEARD: Well, I think --

16 JUSTICE BARRETT: Is it  
17 proportionality? Is that your answer?

18 MR. BEARD: Proportionality as to the  
19 particular project and rough proportionality as  
20 to the particular project. So, as I said, there  
21 could be a fee within a category to which that  
22 project belongs that may be roughly  
23 proportionate. It doesn't have to be exact. It  
24 could be roughly proportionate.

25 JUSTICE BARRETT: Okay.

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

3 JUSTICE BARRETT: Yeah.

4 MR. BEARD: -- those, that sounds to  
5 me like a -- like a facial challenge to the  
6 program, that the program hasn't been done  
7 correctly because it's created categories that  
8 --

9 JUSTICE BARRETT: Okay. Let's let  
10 that go.

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

24 Does that implicate Nollan/Dolan?

25 MR. BEARD: Since that occurs outside

1 the land use permitting context, that would not  
2 implicate the Nollan/Dolan tests, and -- and --

3 JUSTICE BARRETT: But do you think it  
4 might be a taking or implicate the Takings  
5 Clause?

6 MR. BEARD: Well, as I said earlier, I  
7 don't know that any monetary appropriation is  
8 carte blanche exempt from the Takings Clause.  
9 The question really comes down to, has the  
10 government, in exercising its assessment power,  
11 its tax power, police power, has it exceeded  
12 what it's entitled to under that power? And --

13 JUSTICE BARRETT: So property taxes  
14 too?

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

1 JUSTICE BARRETT: Thank you.

2 MR. BEARD: Yeah.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: So I guess I'm  
6 really, really confused now because I did not  
7 understand the taking question constitutionally,  
8 the way that we analyze it and think about it,  
9 to be a matter of has the government overstepped  
10 its authority. I -- I thought that takings were  
11 the dedication of private property to public use  
12 for which the government would have to pay just  
13 compensation.

14 MR. BEARD: Yes.

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

19 And I don't understand why that's  
20 happening in a situation like the one that  
21 Justice Barrett articulated or any of the toll  
22 situations. So, for example, in this very case,  
23 instead of a fee schedule at the beginning for a  
24 -- a single-use person like your client, the  
25 county says, we will just set up a toll booth

1 outside of the road in front of his house, and  
2 so, instead of charging him a certain amount for  
3 riding on the roads upfront via this fee  
4 schedule, we'll make him pay every time he comes  
5 home.

6 Taking, in your perspective?

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

10 JUSTICE JACKSON: It's not outside the  
11 land use -- it's not outside land use because  
12 he's only doing this, as the Chief Justice  
13 posited, because he has to come there in order  
14 to get to his house.

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

22 JUSTICE JACKSON: But doesn't the  
23 something have to be a dedicated use of the  
24 property in order for the Takings Clause --

25 MR. BEARD: Yes.

1 JUSTICE JACKSON: -- to apply?

2 MR. BEARD: Yes, and I --

3 JUSTICE JACKSON: Right.

4 MR. BEARD: Yes.

5 JUSTICE JACKSON: So why is that  
6 happening in a situation in which the government  
7 is just asking for a fee in connection with the  
8 -- getting the permit?

9 MR. BEARD: Because the government is  
10 appropriating, is directing the owner of  
11 property to make a monetary payment for -- for  
12 -- land use mitigation purposes. If it's --

13 JUSTICE JACKSON: So how -- how --

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

15 JUSTICE JACKSON: Okay. So how does  
16 just compensation work? The Takings Clause says  
17 that the government can do that. They just have  
18 to pay just compensation. So, in your scenario  
19 where the government is extracting a fee in this  
20 way as a part of conditioning, what -- what is  
21 the just compensation part of this?

22 MR. BEARD: Well, it's -- the just  
23 compensation part of it is that the government  
24 has appropriated a sum of money for which it  
25 owes compensation, a refund.

1 JUSTICE JACKSON: So, basically,  
2 you're saying, unlike our tax -- our -- our  
3 normal takings jurisprudence that would allow  
4 the government to do it, they just have to pay,  
5 here, the government effectively can't do it  
6 because it would be offset by the need to  
7 provide a refund?

8 MR. BEARD: Well, if the government  
9 has committed an uncompensated taking, which we  
10 -- which we assert is the appropriation of this  
11 monetary exaction, connected and tied to a -- a  
12 real property interest, if it's done an  
13 uncompensate -- an uncompensated taking, as we  
14 allege, then the remedy is to compensate the  
15 government -- the property owner --

16 JUSTICE JACKSON: All right.

17 MR. BEARD: -- which is why we seek a  
18 --

19 JUSTICE JACKSON: Let me -- one -- one  
20 last question because I -- I guess I -- I am  
21 sympathetic to your concerns about government  
22 overreach and the extent to which, you know,  
23 people who are landowners are being shaken down  
24 for fees. I get that.

25 What I guess I'm wondering is whether



1 the awkwardness in terms of all of these  
2 doctrines that we're talking about with respect  
3 to this scenario is coming from the fact that  
4 it's really not a taking scenario in that you  
5 have other bases that you might be able to claim  
6 as the reason why the government shouldn't be  
7 able to do this.

8           So, for example, the Due Process  
9 Clause. It sounds to me like you were making a  
10 procedural due process argument when you said  
11 the burden-shifting is the problem in response  
12 to Justice Kagan.

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

21           MR. BEARD: Well, we think the Takings  
22 Clause does apply because the Takings Clause --  
23 the animating principle is you don't select a  
24 few to bear public burdens that should be borne  
25 by the -- borne by the public as a whole. And

1 that's what we think happened exactly to Mr.  
2 Sheetz --

3 JUSTICE JACKSON: Thank you.

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

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 MR. BEARD: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. McGrath.

9 ORAL ARGUMENT OF AILEEN M. McGRATH  
10 ON BEHALF OF THE RESPONDENT

11 MS. McGRATH: Mr. Chief Justice, and  
12 may it please the Court:

13 Like countless local governments  
14 across the country, the County of El Dorado  
15 charges a fee to developers to address the  
16 impacts of new development using a predetermined  
17 schedule, as Justice Kagan has -- has  
18 emphasized, reticulated by geographic zone and  
19 development type.

20 As the findings below make clear, the  
21 programmatic fee in this case does not pay for  
22 road improvements generally. It pays for only  
23 those improvements necessary to alleviate  
24 increased traffic from new development.

25 Neither precedent nor principle

1 supports, much less compels, applying  
2 Nollan/Dolan's individualized test to those  
3 programmatic fees. In centuries' worth of  
4 precedent, this Court has reiterated that  
5 governments can charge fees to property owners,  
6 such as special assessments to fund public  
7 improvements and user fees to fund government  
8 services.

9           This Court has always held that those  
10 fees, which are indistinguishable from the fee  
11 at issue, are not takings. Without that  
12 predicate for application of the  
13 unconstitutional conditions doctrine,  
14 Nollan/Dolan cannot apply.

15           More fundamentally, the county's  
16 impact fee shares all of the key features with  
17 the other property taxes, user fees, and similar  
18 property-based charges that this Court has  
19 cordoned off from Nollan/Dolan review. It is  
20 imposed by the legislature subject to an array  
21 of state law requirements and applies to all  
22 similar new development in the county based on  
23 the legislature's finding that new development  
24 creates the need for and will benefit from the  
25 road improvements the fee will fund. And,

1 critically, it does not attempt to obtain any  
2 dedication of real property.

3           Petitioner would disregard those  
4 limiting features and expand Nollan/Dolan to  
5 commonplace impact fees. But doing so would  
6 have dire consequences for land use planning.  
7 Forcing local governments to justify a  
8 programmatic fee on a parcel-by-parcel basis  
9 would disrupt, if not destroy, their ability to  
10 fund capital-intensive infrastructure necessary  
11 to serve new development, bringing such  
12 development to a grinding halt. The Takings  
13 Clause does not compel that sea change.

14           I welcome the Court's questions.

15           JUSTICE THOMAS: Do you think, again,  
16 not specifically this case, but do you think  
17 that legislative exactions can be subject to  
18 Nollan/Dolan scrutiny?

19           MS. McGRATH: I think that there are  
20 legislative exactions that could be subject to  
21 Nollan/Dolan scrutiny, yes, Justice Thomas. I  
22 think our position here, which is the position  
23 and the rule that the court of appeal applied  
24 below, is that certain kinds of legislative  
25 development impact fees do categorically fall

1 outside of Nollan/Dolan. While it's possible to  
2 imagine or identify scenarios where the  
3 legislature might effect a taking on a  
4 programmatic basis, we would not bring those  
5 kinds of -- of, you know, unusual scenarios  
6 within our rule, but our position is that this  
7 type of legislation does categorically fall  
8 outside Nollan/Dolan.

9 JUSTICE THOMAS: Well -- well, it  
10 seems that much of your argument actually goes  
11 to the nature of the -- of the fee itself as  
12 opposed to its origins in legislation.

13 MS. McGRATH: I -- I -- I agree with  
14 that, that -- that our position is -- is not  
15 that the legislature categorically has some sort  
16 of insulation from what Nollan/Dolan requires.

17 Our position is that when the  
18 legislature acts in this case as the legislature  
19 has in a way that is functionally and  
20 constitutionally indistinguishable from the way  
21 that the legislature acts in instances where the  
22 Court has already said that Nollan/Dolan does  
23 not apply, that that is the reason that  
24 Nollan/Dolan does not apply in this context.

25 JUSTICE THOMAS: Well, that could -- I

1 mean, that argument could have been -- the same  
2 argument could have been made in Nollan and  
3 Dolan. You -- you could have made the same  
4 argument that this type of tax in that case  
5 that -- from an ordinance or from a local  
6 regulation was exempt because of the nature of  
7 the exaction.

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

18 That answer is not answered by looking  
19 at whether there is some sort of legislation --  
20 legislative authorization present somewhere at  
21 the -- in the scheme. It is looking at what  
22 that condition does, and I think that --

23 CHIEF JUSTICE ROBERTS: Well, based --  
24 based on your answer there, I think your answer  
25 to the question presented is, I think, the same

1 as the Petitioner.

2 JUSTICE THOMAS: Yeah.

3 CHIEF JUSTICE ROBERTS: The question  
4 presented is whether a permit exaction is exempt  
5 from the unconstitutional conditions doctrine as  
6 applied in Nollan and Dolan simply because it is  
7 authorized by legislation.

8 You said the answer to that is no,  
9 that the -- the fact that it's legislation does  
10 not give it an automatic exemption. Your  
11 friend's answer is no for the same reason.

12 MS. McGRATH: Well, I think today I  
13 heard my friend's answer to be more candid, just  
14 as it is in his brief, is that his position is  
15 that any permit condition that is imposed on a  
16 development permit is subject to Nollan/Dolan.

17 That is what he said on page 44 in the  
18 blue brief and the relief that he is asking from  
19 this Court. It's also the -- the relief that I  
20 heard him asking for this morning.

21 And so, in answering the question  
22 presented, I think what that highlights is that  
23 the question is not whether legislative -- some  
24 sort of legislative authorization somewhere in  
25 the scheme categorically exempts permit

1 conditions from Nollan/Dolan.

2 The question is whether this kind of  
3 legislation, which is ubiquitous and commonly  
4 used, is subject to Nollan/Dolan. And, there, I  
5 would also refer back to what the question  
6 presented says about the unconstitutional  
7 conditions doctrine.

8 The question is whether what the --  
9 which requires a determination that the  
10 condition that the government is imposing would  
11 be a taking if it were performed outside of the  
12 permitting context, and, here, you know, we  
13 think the answer is no.

14 But, as I said, more fundamentally,  
15 the Court has said before that certain kinds of  
16 legislation -- property taxes, special  
17 assessments, user fees -- are categorically  
18 outside of Nollan/Dolan, and our position --

19 JUSTICE GORSUCH: Counsel --

20 CHIEF JUSTICE ROBERTS: Well --

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

22 JUSTICE GORSUCH: Counsel, I -- I --

23 I -- I think you're right about all of that,  
24 that, you know, whether this is a tax is a  
25 really interesting question. Whether it's a



1 user fee is a really interesting question.

2 But, as I read the court of appeals  
3 below, they said we're not even going to get  
4 into any of that because Nollan and Dolan simply  
5 doesn't apply to legislative enactments of any  
6 kind, whether it's a tax, whether it's a fee,  
7 whether it's something else.

8 And I thought we had taken the case to  
9 address that question. And as the Chief Justice  
10 has pointed out, I think there's radical  
11 agreement on that question today.

12 MS. McGRATH: I -- I think, if you  
13 read --

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

24 What would be wrong with that holding  
25 today --

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

2 JUSTICE GORSUCH: -- which we might  
3 all be able to walk out of the courtroom  
4 agreeing on?

5 MS. McGRATH: I -- I think that the  
6 two main problems with that, Justice Gorsuch, is  
7 that is not the rule that the court of appeal  
8 applied below. And I think, on page A17 of the  
9 --

10 JUSTICE GORSUCH: Well, let's say --  
11 let's say that's what I -- let's -- let's say  
12 that's the premise on which we -- I think we  
13 understood we took this case, me, myself and I.  
14 Then what?

15 MS. McGRATH: I think that then, if --  
16 if the question is whether we would welcome an  
17 opinion that simply says there is no legislative  
18 exemption from Nollan/Dolan, I think we would  
19 prevail under that standard because that is not  
20 the position or the rule that the court of  
21 appeal applied below.

22 The court of appeal applied a rule  
23 that said that legislatively mandated  
24 development --

25 JUSTICE GORSUCH: Well, I think -- I

1 think you're -- you're fighting my -- my -- my  
2 condition. If -- if -- if that's how I  
3 understood the court of appeal below and --  
4 and -- and if I -- that's how I understood the  
5 QP that we're being asked to decide and if we  
6 can all agree on that, would the government  
7 fight a world in which it's allowed to go back  
8 and make all of the arguments you want to make  
9 here today before another court in the first  
10 instance rather than asking us, a court of  
11 review rather than first view, to -- to try and  
12 tackle them?

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

24 JUSTICE GORSUCH: No, no. The premise  
25 of the QP is what -- what we know in -- in

1 Dolan, for example, administrative agents said  
2 you have to give me a 15-foot strip to -- access  
3 to the beach. That -- that was subject to an  
4 unconstitutional conditions analysis.

5           And the only difference between that  
6 and this is that, there, you had an executive  
7 actor who was applying a legislative command,  
8 and, here, you have an executive actor applying  
9 maybe a more specific or -- or -- or more  
10 obvious legislative command. But, in both  
11 instances, there are executive actors applying  
12 legislative commands, and we're being asked, I  
13 think, just to decide whether that makes a  
14 difference.

15           MS. McGRATH: I think that what  
16 happened in Nollan/Dolan and Koontz all looks  
17 fundamentally different from what the county is  
18 doing in -- is doing here in a way that I think  
19 bears on what you are getting at, Justice  
20 Gorsuch, which is that what the -- what the  
21 governments were doing in Nollan/Dolan and  
22 Koontz looks fundamentally different from the  
23 county's scheme, which is indistinguishable from  
24 property taxes, user fees, and special  
25 assessments.

1 JUSTICE GORSUCH: Is this a tax? Is  
2 this a tax? I mean, if we're going to go down  
3 that road, do you think -- I -- I didn't see  
4 that word in your -- your brief. I might --  
5 might have missed it.

6 MS. McGRATH: Oh, I do -- I do think  
7 --

8 JUSTICE GORSUCH: Do you think this is  
9 a tax under California law?

10 MS. McGRATH: Under California law, it  
11 is not a tax, but I think, for purposes of  
12 constitutional law, it is a tax. And the cases  
13 would be --

14 JUSTICE GORSUCH: So we have to decide  
15 that? We have -- we have to decide it's -- it's  
16 -- constitutionally, it's a tax even though,  
17 under California law, it's not a tax in order to  
18 go down this road of resolving the parties'  
19 disputes beyond the QP?

20 MS. McGRATH: I think that our  
21 position is that this -- most straightforward  
22 way for the Court to resolve this case is to say  
23 that the fee that the county charged here is  
24 indistinguishable from property taxes, special  
25 assessments, and user fees as this Court has

1 always defined them.

2 JUSTICE KAVANAUGH: Wouldn't that --  
3 wouldn't --

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

8 "Only individualized development fees  
9 as distinguished from legislatively mandated  
10 generally applicable development fees are  
11 subject to the Nollan/Dolan test." That's on  
12 page 407.

13 On 409, "While the Nollan/Dolan test  
14 applies to monetary land use" -- "land use  
15 exactions which are imposed ad hoc on an  
16 individual and discretionary basis, it does not  
17 apply to generally applicable development impact  
18 fees imposed through legislative action.

19 "As our Supreme Court has explained,  
20 legislatively prescribed monetary fees as  
21 distinguished from a monetary condition imposed  
22 on an individual permit application on an ad hoc  
23 basis that are imposed as a condition of  
24 development are not subject to the Nollan/Dolan  
25 test."

1                   MS. McGRATH: I think, Justice Alito,  
2                   that each of those descriptions of the court of  
3                   appeals rule incorporates the additional nuances  
4                   that we are emphasizing here, which is not the  
5                   presence of legislation, it is a development  
6                   impact fee that applies as here generally to a  
7                   broad class of permit applicants, meaning it  
8                   applies the way that legislature -- legislatures  
9                   typically make broad programmatic --

10                   JUSTICE SOTOMAYOR: Counsel, you --

11                   MS. McGRATH: -- decisions  
12                   particularly --

13                   JUSTICE SOTOMAYOR: -- you're fighting  
14                   -- you're fighting the words. And what's the  
15                   difference between that -- would that statement  
16                   apply to a legislature saying, you get a permit  
17                   only if you pay us 20 -- \$20,000 or dedicate  
18                   10 percent of your land to -- to conservation?  
19                   Now that would be a taking, wouldn't it?

20                   MS. McGRATH: It would be a taking.

21                   JUSTICE SOTOMAYOR: So you're fighting  
22                   -- they were saying, if it's part of a  
23                   generalized scheme, no matter how it's imposed,  
24                   as opposed to an individual assessment, it's out  
25                   of Nollan/Dolan. So it's not. It can be in

1 Nollan/Dolan. The question is, is this type of  
2 fee subject to Nollan/Dolan?

3 I agree with you, but that's what  
4 Justice Alito was saying. They started from  
5 a -- from a broader sense of saying there can  
6 never be a taking if it's generalized --  
7 generalized imposition by a legislature. And  
8 that's just not true.

9 MS. McGRATH: I -- I -- I don't take  
10 the court of appeal to have applied that rule.  
11 In California --

12 JUSTICE SOTOMAYOR: Well, you --  
13 you're -- you're fighting how others read this.

14 JUSTICE KAVANAUGH: If they applied  
15 that -- well, if they didn't apply that rule --  
16 well, let's start over.

17 Let's assume that legislative  
18 exactions are covered by Nollan/Dolan. And then  
19 you want to say, but impact fees, I think, are  
20 exempt from Nollan/Dolan. Right?

21 MS. McGRATH: That's correct.

22 JUSTICE KAVANAUGH: Okay. But  
23 wouldn't that allow a county or entity,  
24 government entity, to impose exorbitant impact  
25 fees that are obviously being used to fund



1 improvements in the other part of the county  
2 that the county can't get the county council or  
3 whatever to pass tax increases for? And isn't  
4 that a core concern of our entire jurisprudence  
5 in this area?

6 MS. McGRATH: I -- I think that that  
7 would not enable counties to do what you're  
8 describing, Justice Kavanaugh. And I think that  
9 those limits would flow directly from the -- the  
10 analogies that we're drawing to the special  
11 assessment context, where the legislature does  
12 have authority to decide which properties --

13 JUSTICE KAVANAUGH: Well --

14 MS. McGRATH: -- will be --

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

18 What then are the limits on impact  
19 fees being used to coerce more money out of the  
20 development to pay for other things going on in  
21 the other part of the county that they can't get  
22 the tax increases for? That's a --

23 MS. McGRATH: Well, I think, at a --  
24 at a minimum, here in California and in, I  
25 believe, the 37 other states that the states'

1 brief identifies as setting limits on impact  
2 fees, those fees would unquestionably not  
3 satisfy the limits in those state laws which  
4 require --

5 JUSTICE KAVANAUGH: State laws. What  
6 federal constitutional --

7 MS. McGRATH: I think --

8 JUSTICE KAVANAUGH: -- limits are  
9 there, if any? Maybe -- you know, if you're  
10 just going to say rational basis, I'm not sure  
11 that works, but -- but go ahead.

12 MS. McGRATH: I do think the Due  
13 Process Clause would provide a check there. And  
14 I also think that the Court could reason by  
15 analogy to the special assessment and the user  
16 fee cases, where the Court has made clear that  
17 despite the deference that legislatures receive  
18 in this area, they have to act reasonably. And  
19 those reasonable limits include, for instance,  
20 in -- in the user fee context, that if you --

21 JUSTICE KAVANAUGH: Do you think it's  
22 reasonable to impose impact fees that are not  
23 designed to fund, say, the road that needs to be  
24 built because of the development but to fund  
25 improvements to schools on the other part --

1 side of the county?

2 MS. McGRATH: Absolutely not, and I  
3 think that fee would unquestionably fail. Not  
4 -- that would fail state law and I think would  
5 pose serious questions under the Due Process  
6 Clause.

7 JUSTICE KAVANAUGH: Just serious  
8 questions?

9 MS. McGRATH: I -- I -- I do not see  
10 -- if there is no reasonable basis, and I don't  
11 think a reasonable basis in fact --

12 JUSTICE KAVANAUGH: Well, the  
13 reasonable basis is the county needs the money  
14 to fund the schools.

15 MS. McGRATH: I don't think that's a  
16 reasonable basis to impose that charge  
17 exclusively on new development. And here again,  
18 I would point to the special assessment cases  
19 that makes -- that make clear that, typically,  
20 when the government is charging fees to a  
21 specific group of property owners, that is based  
22 on its determination, subject to reasonableness,  
23 but notwithstanding that, a determination that  
24 those properties will specifically benefit from  
25 the public improvements --

1 JUSTICE KAVANAUGH: What's the  
2 difference between reasonableness as you're  
3 describing it and rough proportionality and  
4 essential -- and nexus?

5 MS. McGRATH: I -- I think it -- I --  
6 and I think that actually touches on kind of the  
7 core of what our dispute is here, which I think  
8 your earlier questions were also touching on,  
9 Justice Kavanaugh, is that we do not dispute as  
10 a matter of state law or federal law that there  
11 has to be a connection between new development  
12 and the fees that the county charges.

13 What we do dispute is that then, when  
14 the legislature has to justify how it imposed  
15 that -- those -- imposes those fees, that it has  
16 to do that on a parcel-by-parcel basis.

17 JUSTICE KAVANAUGH: Okay. So the  
18 whole dispute then, I think, does come down to  
19 -- we can use the adjectives, but you agree  
20 rough proportionality has to apply, I think, and  
21 -- and nexus. You say not Nollan/Dolan, but you  
22 say the same words as Nollan/Dolan apply.

23 But the key dispute then is do we do  
24 that by looking at the formula to see whether  
25 the formula is roughly proportional, as Justice

1 Kagan was saying, or do we have to go to the  
2 individual house and say, well, what about the  
3 impacts of that house on the road?

4 MS. McGRATH: Right. I mean -- and  
5 just to be clear, as I think everyone  
6 understands, we dispute that there is any taking  
7 anywhere in the picture, and so we would dispute  
8 that any sort of constitutional principle in  
9 addition to due process reasonableness  
10 protections applies.

11 But it -- but accepting the  
12 hypothetical or -- or answering, I think, more  
13 directly the question, is, yes, the -- the core  
14 practical problem that this would create for  
15 counties is that it -- it would disable counties  
16 from acting on the predetermined bases that they  
17 routinely act in this context and that they need  
18 to be able to use to fund the kind of  
19 infrastructure improvements that we are talking  
20 about, schools, sewer systems, roads.

21 JUSTICE KAVANAUGH: Right.

22 MS. McGRATH: These are the kind of  
23 infrastructure that counties --

24 JUSTICE KAVANAUGH: And I think the  
25 next question then is, how reticulated does the

1 formula have to be? And --

2 JUSTICE JACKSON: But can I -- can I  
3 just --

4 JUSTICE KAVANAUGH: Can I just finish  
5 that?

6 JUSTICE JACKSON: Sorry.

7 JUSTICE KAVANAUGH: And, you know,  
8 what -- there's going to be litigation over  
9 that. What -- what -- what do you think? How  
10 reticulated, because Justice Kagan said this  
11 one's very reticulated. I agree with that. How  
12 -- how reticulated does it have to be to satisfy  
13 constitutional scrutiny?

14 MS. McGRATH: Under -- under the  
15 constitutional test, again, putting aside the  
16 three dozen state laws that I think would  
17 require exactly the page -- the -- the  
18 connection that California -- that El Dorado  
19 drew in this case, that the 5,000-page  
20 administrative record supports, I think, as a  
21 matter of constitutional law, there would need  
22 to be a line that the legislature would need to  
23 draw between the properties on which the fee is  
24 imposed and the nature of the fee that I think  
25 would prevent -- and I would certainly take the

1 position that it would prevent -- counties from  
2 -- from tagging new developers exclusively to  
3 pay for entirely unrelated public improvements.

4 JUSTICE KAVANAUGH: Sorry.

5 JUSTICE JACKSON: No, that's all  
6 right. Sorry.

7 So Justice Kavanaugh has been  
8 discussing the sort of core practical problem of  
9 how do we figure out when the county has  
10 overstepped and gone too far and there must be a  
11 limit. And all of that is true, but I guess I'm  
12 concerned about the core legal problem that is  
13 the threshold question of which test should  
14 apply when given the claims that are being made  
15 by Mr. Sheetz in this case.

16 And so that takes me back to wondering  
17 whether the most straightforward way to win in  
18 this case from your perspective is not  
19 necessarily to prove that this is a tax or prove  
20 that this is, you know, a user fee but to say  
21 this is not a taking.

22 We have very clear, very  
23 well-established legal principles as to what  
24 qualifies as a taking. And whatever this is, I  
25 think we can say that since it isn't the kind of

1 dedicated property appropriation that occurs in  
2 Nollan, Dolan, and Koontz, that it's not a  
3 taking, so this particular formula doesn't  
4 apply.

5           It -- isn't that the most  
6 straightforward? Like, Justice Gorsuch was --  
7 was starting to investigate your position that  
8 this qualifies as a tax. And so then we have to  
9 sort of figure out, well, what does that mean  
10 and is it a tax? Can't you win by just saying  
11 this is not a taking?

12           MS. McGRATH: Yes. Absolutely. We  
13 would welcome that opinion. That is our  
14 position. And the reason that we invoke the tax  
15 and the property tax and special assessment  
16 contexts is that the Court has categorically  
17 said those are not takings. But, absolutely, we  
18 agree. There -- put -- even putting all that to  
19 the side, there is no possible taking here.

20           I -- I -- I -- you know, the question  
21 was asked earlier about could a county go to a  
22 development and say, you have to pay the fees  
23 that result from the burdens on county -- county  
24 infrastructure that flow from this development.  
25 For instance, you need to pay for the sewer



1 improvements that are going to be needed to the  
2 county's sewer system to account for the fact  
3 that we are expecting an additional 5,000  
4 residents to inhabit this new development.

5 Unquestionably, there isn't -- a  
6 county could do that outside the permitting  
7 context, and that's the answer to the question  
8 in this case.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: When you talk about  
14 due process, are you talking about substantive  
15 or procedural due process?

16 MS. McGRATH: I think procedural due  
17 process.

18 JUSTICE ALITO: So what procedure --  
19 you -- you're -- the argument would be that  
20 certain procedures have to be applied on an  
21 individualized basis before this fee could be  
22 assessed against, collected against a particular  
23 landowner?

24 MS. McGRATH: I think we would invoke  
25 the same kind of due process principles that are

1 identified in cases like Bi-Metallic, which said  
2 that due process -- procedural due process  
3 operates in this area, but it operates at a  
4 highly -- highly generalized level that requires  
5 counties to do things like enact legislation,  
6 provide opportunity for comment and feedback,  
7 but that -- that counties do not -- it has  
8 affirmatively rejected the idea that counties  
9 need to do that on an individualized basis.

10 But, beyond that, Justice Alito, I --  
11 I also think if -- if I can -- can return to  
12 answering the rest of the question --

13 JUSTICE ALITO: No. That -- that was  
14 an answer. Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Sotomayor?

17 JUSTICE SOTOMAYOR: No, thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

19 JUSTICE KAGAN: So, Ms. McGrath, I  
20 want to follow up on Justice Gorsuch's idea of  
21 radical agreement, and I -- I -- I want to give  
22 you -- suggest what it is that there is radical  
23 agreement on and what it is that there's not  
24 radical agreement on and see if you agree with  
25 me.

1                   So what there is radical agreement on  
2   is that you don't get a pass from  
3   unconstitutional conditions analysis just  
4   because you've passed generally applicable  
5   legislation. And that's, of course, true in  
6   unconstitutional conditions analysis generally,  
7   and so too it's true of unconstitutional  
8   conditions analysis in the property area. If  
9   there has been a taking and that taking is being  
10  leveraged in the permitting process by generally  
11  applicable legislation, there's no pass just  
12  because that's the mechanism that's being used.

13                   So, first, let me ask you if you agree  
14  with that?

15                   MS. McGRATH: I agree.

16                   JUSTICE KAGAN: Okay. Here are two  
17  things it seems to me that the parties  
18  fundamentally disagree on, which is probably --  
19  one of these two things is going to answer this  
20  dispute in the end, but there are two things.  
21  Is -- number one, was -- is there a taking at  
22  all? Because if this is just something like a  
23  tax, unconstitutional conditions analysis never  
24  comes into play, and you say it never comes into  
25  play, and Mr. Beard says it absolutely comes

1 into play. So that's one question that you're  
2 very much at odds on, is that correct?

3 MS. McGRATH: That's correct.

4 JUSTICE KAGAN: The second question  
5 that you're very much at odds on is, even if you  
6 assume that there has been some kind of taking  
7 here and that unconstitutional analysis does  
8 come into play -- and by that, I mean what we  
9 have in past cases called Nollan/Dolan analysis,  
10 right?

11 Even if you assume that that  
12 unconstitutional analysis comes into play, it  
13 might look very different from what Nollan/Dolan  
14 analysis looks like just because Nollan and  
15 Dolan were focused on individual parcels,  
16 individual property owners, and this is a  
17 general scheme, and it would be very difficult  
18 to apply Nollan and Dolan analysis literally to  
19 a general scheme so that there might be ways in  
20 which Nollan/Dolan analysis becomes something  
21 that, you know, really looks different in  
22 application. And I think Mr. Beard says no, not  
23 really, and you say, yes, really. Is that  
24 correct?

25 MS. McGRATH: That's also correct.

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

3 MS. McGRATH: I think that is correct,  
4 Justice Kagan.

5 JUSTICE KAGAN: Okay. I just wanted  
6 to make that clear.

7 CHIEF JUSTICE ROBERTS: Justice --  
8 Justice Gorsuch?

9 JUSTICE GORSUCH: That's super helpful  
10 because, as I read it, and I may be the only  
11 one, though I don't think so, the only QP was on  
12 the first question, whether Nollan/Dolan applies  
13 to legislative enactments. There -- there was a  
14 circuit split. That's -- that we -- that's why  
15 we took the case. And we could answer that and  
16 be done.

17 Now, if we went on, we have to decide  
18 whether it's a tax for the first one, and on the  
19 second one, we have to decide whether there's a  
20 difference between legislative enactments in  
21 gross and specific actions. On that, I guess, I  
22 had a question.

23 Couldn't one recharacterize what  
24 happened in Dolan as legislation in gross?  
25 There was a county code that said if thou wants

1 to develop on a beach, thou will give 15-foot  
2 easements, and all they did was pretty much  
3 ministerially apply the legislative code.

4 So how are we supposed to draw a  
5 distinction if we're going to get -- if we're  
6 going to go down that road and try and decide  
7 that question, which I don't think is before us,  
8 but if we were to, how do we distinguish between  
9 Dolan and your case?

10 MS. McGRATH: So I think there are two  
11 bases of distinction. I think one relates to  
12 what Dolan itself decided. And, there, I think  
13 that Dolan itself involved legislation that  
14 looks very different from the -- legislation  
15 here in two respects.

16 And, here, I would point the Court to  
17 page 380 of the Dolan decision, which emphasized  
18 two features of that ordinance. One was that it  
19 allowed for variances, significant variances  
20 from any sort of baseline mitigation floor that  
21 the legislation imposes, and, number two, it  
22 gave permitting officials discretion to identify  
23 the amount of open space that was required under  
24 that scheme when they think --

25 JUSTICE GORSUCH: Yeah, but they

1 didn't -- they didn't do either of those things.  
2 They just pretty much followed the rule, 15-foot  
3 easement, boom, you've to give us a 15-foot  
4 easement as I understood it.

5 MS. McGRATH: I think that's also, of  
6 course, putting to the side the fact that that  
7 case involved an easement and therefore  
8 didn't -- didn't raise these questions.

9 JUSTICE GORSUCH: I understand that.  
10 But that's all that -- that's the first can of  
11 worms, which we're not getting -- I mean, we  
12 could say that this is a tax and that's a  
13 different -- but this is the second can of worms  
14 that -- that we're talking about now, which is  
15 legislation versus specific, and I guess I'm not  
16 sure where we draw that line.

17 MS. McGRATH: I think, there, the line  
18 that we draw, which gets to the second part of  
19 my answer to the first question, is on the  
20 non-discretionary and mandatory nature of the  
21 fees that were charged here.

22 Here, the fees are set by a  
23 predetermined schedule. That is exactly what  
24 the Petitioner is challenging.

25 JUSTICE GORSUCH: So, if there were a

1 predetermined schedule, but a potential for  
2 variance existed, but they didn't vary, it would  
3 then be on the Dolan side of the line rather  
4 than your side of the line?

5 MS. McGRATH: I think, if it were a --  
6 I -- I think it's on -- the condition in Dolan  
7 is on the Dolan side of the line primarily  
8 because there's a taking.

9 But, here, I think that in a case  
10 where there's significant discretion involved or  
11 variances allowed, I think that would be a  
12 harder case and a different one. And, here,  
13 we're emphasizing the non-discretionary and  
14 mandatory nature, which we think, again, you  
15 know, relates primarily to the similarity to  
16 that.

17 JUSTICE GORSUCH: Thank you. Thank  
18 you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Kavanaugh?

21 JUSTICE KAVANAUGH: One question. On  
22 the "is it a taking" question that Justice Kagan  
23 raised and there's disagreement on that, and you  
24 say there's not a taking and you had answered  
25 Justice Jackson the same way, I think, though,



1 then your due process review does, I think -- I  
2 just want to get back to this -- apply concepts  
3 like rough proportionality and essential nexus  
4 so long as that review is not applied at the  
5 parcel-specific level. Is that correct?

6 MS. McGRATH: I think we would use  
7 words like reasonableness or rationality rather  
8 than rough proportionality, but I think, Justice  
9 Kavanaugh, at the end of the day, I -- I take  
10 your question to be suggesting there's not a  
11 significant difference in your mind between  
12 those two scenarios, in which case that -- that  
13 is, I think, part of -- that is part of our --  
14 our position, is that if any sort of heightened  
15 review is necessary here, it needs to be  
16 performed at a programmatic basis that looks at  
17 the categories that the legislature itself has  
18 drawn.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Barrett?

22 JUSTICE BARRETT: No.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Jackson?

25 JUSTICE JACKSON: So I just want to

1 clarify. In your exchange with Justice Gorsuch,  
2 who very clearly isolated the question  
3 presented, as I read it, the question presented  
4 at least as the Petitioner put it forward is  
5 whether a permit exaction is exempt from the  
6 unconstitutional conditions doctrine simply  
7 because it's authorized by legislation.

8           So it seems to me that there is a  
9 threshold assumption that the permit exaction  
10 would otherwise trigger the unconstitutional  
11 conditions doctrine, and the question is, would  
12 -- is it exempt from that just because of  
13 legislation.

14           So, because there is disagreement  
15 about whether it would trigger it to begin with,  
16 I would think that to isolate the question  
17 presented as -- at a minimum, we would have to  
18 expressly preserve the assumption, right?

19           I mean, our -- our holding or our  
20 opinion would have to say assuming that a permit  
21 exaction of the nature of this one triggers the  
22 unconstitutional, that we couldn't not say that,  
23 right, in order to just isolate the question  
24 presented?

25           MS. McGRATH: I think that's exactly

1 right, Justice Jackson. I think that's part of  
2 the reason that we think we are directly  
3 answering the question presented here, because  
4 of that assumption that all permit conditions  
5 are --

6 JUSTICE JACKSON: And -- and if it  
7 turns out that the assumption is easy based on  
8 our case law, let's say, the Court looks at this  
9 and very clearly says or thinks that, you know,  
10 if we don't have a dedicated appropriation of  
11 land kind of scenario, then there is no taking,  
12 would you encourage us to go ahead and say that  
13 in this case?

14 MS. McGRATH: Yes.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Ms. Ross.

19 ORAL ARGUMENT OF ERICA L. ROSS  
20 FOR THE UNITED STATES, AS AMICUS CURIAE,  
21 SUPPORTING THE RESPONDENT

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

24 I'd like to hit three main points  
25 which I think are responsive to a lot of the

1 conversation that we've been having this  
2 morning.

3 First, on the question of how broadly  
4 the question presented sweeps, I certainly agree  
5 with you, Justice Jackson, that there is a  
6 logically antecedent question baked into the  
7 question presented, which is whether the  
8 unconstitutional conditions doctrine applies  
9 here at all. For reasons I'd like to talk about  
10 in a moment, we don't think it does.

11 But, if the Court doesn't want to  
12 reach that question, I think what's really  
13 important if it's going to say that there is no  
14 sort of legislative exception from Nollan and  
15 Dolan is for the Court to make clear that these  
16 are still cases applying, as this Court said in  
17 Koontz, a special application of the  
18 unconstitutional conditions framework.

19 And so, when the parties go back  
20 and -- and parties across this country read this  
21 Court's decision, it remains clear that you have  
22 to identify a taking for a Nollan/Dolan claim to  
23 get off the ground.

24 Second, I think there was some  
25 conversation about what is the focus of the

1 taking that Petitioner is suggesting here. I  
2 think it was clear in his introduction this  
3 morning and has been clear throughout the  
4 briefing if you look at pages 25 to 26 in  
5 particular of the blue brief that he's not  
6 making any sort of claim regarding a taking of  
7 his property, meaning the physical real  
8 property.

9           What he is claiming is that this  
10 \$23,000 fee is itself a taking. And we think  
11 that is not correct for all of the reasons that  
12 have already been discussed this morning and  
13 that many of you have recognized.

14           I think this Court in Koontz talked  
15 about taxes, user fees, and similar laws and  
16 regulations, so I don't think that to prevail  
17 the county necessarily has to show that this is  
18 a tax or a user fee, but as Justice Barrett  
19 pointed out earlier, I think it is quite similar  
20 to the class of special assessments that this  
21 Court has held for a hundred-plus years in cases  
22 like Houck and Fallbrook and French are not  
23 subject to any sort of takings analysis or any  
24 heightened takings analysis. They are subject  
25 to normal constitutional constraints.

1                   And I think this goes to the point  
2                   that no court or this Court at least to my  
3                   knowledge has never held that a widely  
4                   applicable fee paid by large numbers of people  
5                   to pay for government infrastructure is a  
6                   taking, and I think doing so in this case would  
7                   be -- would be very disruptive.

8                   And I guess this gets me to the last  
9                   and third point about the disruptiveness of the  
10                  rule that I hear Petitioner to be asking. I  
11                  think he is asking for, as he has said, a  
12                  parcel-specific analysis.

13                  I think that has several problems.  
14                  The workability ones certainly have already been  
15                  discussed, but I also think there's an element  
16                  of horizontal fairness here. When you have a  
17                  class and everyone within the class pays the  
18                  same amount, that actually can be viewed as far  
19                  more fair than having these one-off  
20                  individualized determinations.

21                  I think, in -- in a -- in adopting a  
22                  standard that's more like what the states have  
23                  suggested in their amicus brief should the Court  
24                  go down the Nollan/Dolan road -- and, again, I  
25                  want to be clear we don't think there's any

1 reason to do so -- but if the Court is inclined  
2 to do so, you know, I think it would be very  
3 important, one, again, to say that this has to  
4 operate at the class level, so the class at  
5 which the legislature is acting, and, two, that  
6 reasonable judgments, reasonable legislative  
7 judgments need to be able to be made regarding  
8 the class, how the -- how the county or the  
9 local government is going to allocate the  
10 burdens of taxation.

11 CHIEF JUSTICE ROBERTS: Counsel,  
12 you -- you said that there would be no takings  
13 analysis with respect to a widely applicable  
14 provision that covers a large number of people.

15 MS. ROSS: I think when we're talking  
16 about money, when we're talking about a payment  
17 for government services, so I think that makes  
18 this case look a lot like a tax user fee.  
19 Similar laws and regulations, as this Court said  
20 in Koontz on page 615 of the opinion, are  
21 outside of the -- the takings context and  
22 outside of Nollan and Dolan.

23 CHIEF JUSTICE ROBERTS: So, if it's  
24 narrowly applicable and applies only to a  
25 relatively small number of people, then the

1 takings analysis does apply?

2 MS. ROSS: No. I think the question  
3 is -- what I'm trying to get at is this idea of  
4 individualized ad hoc decision-making versus the  
5 broadly applicable legislative standard --

6 CHIEF JUSTICE ROBERTS: Yeah, but, I  
7 mean, obviously, that's a broad range. And I'm  
8 just trying to get a sense of exactly where you  
9 would have -- I mean, because this is a  
10 threshold determination, but if it depends on  
11 individualized analysis and you've got to figure  
12 out, well, where along that spectrum does it  
13 apply, that's not a very helpful threshold.

14 MS. ROSS: So I think this is similar  
15 to analyses that the Court has conducted in  
16 other areas. I mean, I think there is -- we  
17 cited in our brief -- I apologize, the name of  
18 the case is escaping me at the moment -- but,  
19 basically, in the due process context, we do  
20 draw this distinction between whether you get an  
21 individualized hearing because we're really  
22 talking about sort of one-offs or we're talking  
23 about class-wide legislation.

24 I think what's really key here is that  
25 because this applies to a wide swath of



1 landowners, it's done at the class level. As I  
2 said earlier, it -- it has horizontal fairness  
3 and it has, I think, a greater responsiveness in  
4 the political process than you would have --

5 CHIEF JUSTICE ROBERTS: So are you  
6 saying that if you have a provision that applies  
7 categorically in terms of its phraseology, but  
8 it turns out there are only, you know, three  
9 houses in the county that are going to be  
10 affected, that you would analyze that  
11 differently?

12 MS. ROSS: So I'm not sure it's a --  
13 it becomes a takings problem, Mr. Chief Justice.  
14 And I apologize. I probably should have said  
15 that initially. I think that, you know, that  
16 may have sort of a -- an arbitrariness question  
17 under the Due Process Clause or an equal  
18 protection. Maybe it's not a class of one,  
19 maybe it's a class of three problem. But there  
20 would be a singling out analysis. I just don't  
21 think that's anything like what we have --

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MS. ROSS: -- in this case.

24 JUSTICE GORSUCH: Ms. Ross, I -- I --  
25 I certainly understand your point that classes

1 might be very informative when we're talking  
2 about a tax or a user fee and whether it meets  
3 rational basis test.

4           But, if this were a taking -- and I'm  
5 not saying it is, okay? I -- I -- I'm not sure  
6 we have to answer that question, as I've already  
7 indicated. But, if -- if it were a taking, why  
8 would that make a difference? If it actually --  
9 if -- if -- if the legislature said, we're going  
10 to take everybody's property, and there's no  
11 question they're taking your property, how on  
12 earth would that be better than an  
13 individualized agency official saying, I'm  
14 taking Ms. Ross's property and no one else's?

15           MS. ROSS: So, Justice Gorsuch, I  
16 completely agree with you that this  
17 consideration is not dispositive.

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

22           MS. ROSS: That's correct, Justice  
23 Gorsuch. And I think that just reflects that  
24 this Court has sort of always treated physical  
25 appropriations of real property as the

1 quintessential taking, the classic taking, as  
2 this Court has said time and time again. It's  
3 what the -- the clause, the text of the clause  
4 itself, I think, is most focused --

5 JUSTICE GORSUCH: Yeah. Thank you.

6 MS. ROSS: -- on, and so it makes  
7 sense that we have different rules in that  
8 context.

9 JUSTICE GORSUCH: Yeah. Thank you.

10 JUSTICE JACKSON: And so can you just  
11 clarify, say a little bit more about that? I  
12 mean, you seem fairly confident that this is not  
13 a taking, so can you say exactly why that is?

14 MS. ROSS: Certainly, Justice Jackson.  
15 So I think it's not a taking because, as I think  
16 I said earlier, this Court has never found a  
17 taking in a situation in which the government is  
18 charging a -- if you want to call it a tax, a  
19 user fee, a -- other similar law or regulation,  
20 to pay for public benefits, public  
21 infrastructure, public services. It has never  
22 found a taking in that context.

23 I think there are a few reasons why  
24 that's so. First, of course, there is this sort  
25 of oft-repeated line that taxes are not takings.

1 And I think that's -- that -- that has meaning.  
2 And the reason it has meaning is because the  
3 Court has long recognized that governments need  
4 to be able to fund themselves and that when they  
5 do so, they are not engaging in, again, this  
6 sort of core taking physical appropriation of  
7 private property activity.

8 I think, if you wanted to put this in  
9 a box -- you know, the user fee has been talked  
10 about a lot this morning -- I think a special  
11 assessment is a really good way of thinking  
12 about this, as I think Justice Barrett noted  
13 earlier. The -- the special assessment cases  
14 make clear that not only can government charge  
15 taxes at sort of a general level, it can also do  
16 it, it can define a particular district, as in  
17 Houck and Fallbrook and the other sort of  
18 irrigation district cases, or it can define a  
19 particular class of property owners --

20 JUSTICE JACKSON: And does it -- does  
21 it matter that it's doing that in connection  
22 with property? What I understood Mr. Sheetz --  
23 Sheetz's counsel to say is that when you do that  
24 in connection with property, then we're sort of  
25 getting into takings territory.

1           MS. ROSS: So I don't think a link to  
2 property can be enough or any link to property  
3 can be enough. And I -- and if I could give two  
4 quick examples. I mean, I think a property tax  
5 obviously does that, and that has never been  
6 thought to be a taking. And, similarly, I think  
7 a transfer tax. I may really want to exercise  
8 my right as a property holder or property owner  
9 to sell my property, but nobody has ever thought  
10 that the government engages in a taking when it  
11 requires me to pay a certain percentage to  
12 Maryland or the District of Columbia or whatever  
13 it is when I sell my property.

14           So I don't think just any link to  
15 property is enough. I think, to bring this back  
16 to Koontz, the link to property that was really  
17 at issue there was the in lieu nature of the  
18 fee. The choice on the table was pay me an --  
19 or give me over a real property interest, an  
20 easement that's going to destroy the right to  
21 exclude that this Court has recognized as sort  
22 of the core right in physical real property, or  
23 pay an equivalent amount of money.

24           And the concern, I think, as this  
25 Court made clear at page 612 of the opinion,

1 when it was talking about the anti-circumvention  
2 rationale, is that if you allow the -- the  
3 county to do that -- that, give me one or give  
4 me the other, it's always going to be able to  
5 get the property that it wanted at the outset  
6 because it can just keep ratcheting up the fee.

7 JUSTICE ALITO: Did you -- do you --  
8 do you agree that the California court held that  
9 Nollan/Dolan does not apply to legislation?

10 MS. ROSS: So, Justice Alito, with all  
11 due respect to the California Court of Appeal, I  
12 think the -- the opinion is less than clear in  
13 some places. I do think there are parts of the  
14 opinion -- I think my friend pointed to pages 16  
15 to 17 if I'm remembering correctly. There's a  
16 footnote that sort of analogizes this to a  
17 special assessment and, I think, refers to some  
18 of the cases that talk about the in lieu nature.  
19 And so, if you wanted to squint at the opinion  
20 and find a more nuanced rule, I think you could  
21 do that.

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Alito, anything?

25 Justice Sotomayor?

1 Justice Kagan?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: One question. The  
4 concern on the other side, I think, is that  
5 property developers and owners will be charged  
6 impact fees to pay for costs of the county more  
7 generally, including on other sides of the  
8 county. You're -- you say the Takings Clause  
9 has nothing to say about that.

10 What constitutional limits, if any,  
11 are there, and how would you phrase the exact  
12 test?

13 MS. ROSS: Sure. So I think the --  
14 the Takings Clause, as some of Justice Jackson's  
15 questions went to earlier, doesn't really speak  
16 to this because, again, it's not talking about  
17 things that the government can't do. It's  
18 talking about things the government has to pay  
19 for when it does do. And so I don't think it's  
20 necessarily imposing a substantive limit.

21 But I think other -- certainly, state  
22 law has filled a lot of this area. Indeed, and  
23 Dolan sort of drew its test from state law  
24 standards that have been well established for  
25 decades and I think have only gotten sort of

1 more onerous since then.

2 But -- but federal constitutional  
3 provisions, I think there are due process  
4 checks. As I mentioned to the Chief Justice,  
5 there would be equal protection checks as well.

6 JUSTICE KAVANAUGH: And what -- what  
7 would be the phrasing of the due process check?

8 MS. ROSS: So I think the way that  
9 this Court has described it is essentially a --  
10 a reasonableness or an arbitrariness test. I  
11 acknowledge that courts have given the -- the  
12 government significant discretion in this area  
13 and the legislature significant discretion in  
14 this area, but I think that is often true when  
15 we're talking, again, about generally applicable  
16 legislation that isn't impeding on -- or isn't  
17 taking a private property interest itself.

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Barrett?

21 Justice Jackson?

22 Thank you, counsel. The case is  
23 submitted.

24 Oh, rebuttal. I'm sorry.

25 (Laughter.)



1 CHIEF JUSTICE ROBERTS: I was up late  
2 last night.

3 REBUTTAL ARGUMENT OF PAUL J. BEARD, II  
4 ON BEHALF OF THE PETITIONER

5 MR. BEARD: Thank you, Mr. Chief  
6 Justice. Just a few points.

7 The other interesting thing about the  
8 court of appeal's decision is that it doesn't  
9 treat this exaction as a tax or a user fee or  
10 anything else other than a mitigation  
11 requirement.

12 So this case comes to the Court on the  
13 premise this -- that this is a mitigation  
14 requirement and that the only reason the court  
15 of appeal thought that Nollan and Dolan don't  
16 apply is because of its legislative character.

17 In other words, the courts in  
18 California agree with us that at least in some  
19 cases, ad hoc impact fees, those are subject to  
20 Nollan and Dolan, which I think is an  
21 interesting concession from the California  
22 courts even that -- that go contrary -- that  
23 goes contrary to the county's and the United  
24 States Government's position.

25 On the issue of due process, rational

1 -- equal protection, yes, those clauses could be  
2 available in a challenge like this, but the  
3 problem, of course, is that they provide very  
4 little protection to the property owner.  
5 Substantive due process, as I understand the  
6 cases, would require a showing of arbitrary and  
7 capricious on the part of the property owner  
8 challenging it. Equal protection would require  
9 rational basis.

10           It's Nollan and Dolan that provides --  
11 that provide the kind of robust protections for  
12 property owners that -- that this context  
13 requires.

14           On administrability, we are not -- we  
15 are not asking for parcel-specific analyses or  
16 project-specific analyses. As such, it is true,  
17 as we state in our reply brief, that a  
18 project-specific analysis is the way to go if  
19 the government wants to guarantee for itself  
20 that its mitigation will pass constitutional  
21 muster, that the constitutional outcome required  
22 by Nollan and Dolan, nexus and rough  
23 proportionality are met. The only way to do  
24 that is on a project-specific basis.

25           Now the county here decided to impose

1 its impact fee without any kind of  
2 administrative proceeding or hearing or anything  
3 like that. And we're not challenging that  
4 aspect, but it's curious, because, in Nollan and  
5 Dolan, you did have an administrative process  
6 attached to a conditional permit. And so,  
7 there, the government was able to make that  
8 individualized determination that its  
9 legislative mandate was or was not tailored to  
10 the particular impacts of the project.

11 Finally, everyone loves good roads and  
12 schools and public infrastructure, so the  
13 government certainly has many tools at its  
14 disposal, including taxes, to pay for those.

15 What we're saying is that the  
16 government can't select a few. The one or two  
17 or -- or -- or a few property owners who happen  
18 to need a permit at any given time, to select  
19 them to bear the burdens of paying for that  
20 public infrastructure, and all Nollan and Dolan  
21 do is ensure that that's not happening, that  
22 what the government is doing is mitigation and  
23 nothing more.

24 Thank you, Your Honor.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel, counsel.

2 The case is submitted.

3 (Whereupon, at 11:31 a.m., the case  
4 was submitted.)

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## Official

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