IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C093682

GEORGE SHEETZ,
Plaintiff and Appellant,

v.

COUNTY OF EL DORADO,
Defendant and Respondent.

On Appeal from the Superior Court of El Dorado
(Case No. PC20170255, Honorable Dylan Sullivan, Judge)

BRIEF OF *AMICUS CURIAE* CITIZEN ACTION DEFENSE FUND, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, MANHATTAN INSTITUTE, WALLACE PROPERTIES, WASHINGTON BUSINESS PROPERTIES ASSOCIATION, AND SOUNDBUILT HOMES LLC IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF INTEREST

Citizen Action Defense Fund ("CADF") is an independent, nonprofit organization based in Washington State that supports and pursues strategic, high-impact litigation in cases to advance free markets, restrain government overreach, or defend constitutional rights. As a government watchdog, CADF files lawsuits, represents affected parties, intervenes in cases, and files amicus briefs when the state enacts laws that violate the state or federal constitutions, including when government imposes conditions on the issuance of land-use permits that demand permit-seekers surrender their fundamental rights in exchange.

The **Building Industry Association of Washington** ("BIAW") is a Washington state-based trade association representing nearly 8,000 member home builders, remodelers, suppliers, and other professionals supporting the home building industry. The Association is made up of fourteen affiliated local associations. BIAW is one of the largest home-building associations in America, championing the rights of its members and fighting for affordable home ownership at all levels of government. BIAW is a committed advocate in Washington State, and the Ninth Circuit, frequently participating as a party litigant and amicus curiae to safeguard the rights and interests of its members, and all others interested in the availability and affordability of housing nationwide.

Manhattan Institute ("MI") The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting economic freedom and property rights against government overreach.

Wallace Properties, Inc. is a commercial real estate company headquartered in Bellevue, representing various entities that pursue multifamily housing and other commercial development projects which are often required to pay impact fees as a condition to receiving a building permit.

Washington Business Properties Association ("WBPA") is a member-based non-profit organization advocating for property owners against burdensome taxation and encroaching regulation of property. It is a broad coalition of businesses and professional associations focused on commercial, residential, and retail real estate, and property rights in Washington state. WBPA represents the interests of business owners to state and local legislative bodies, news media, and the general public. It is actively involved in the Legislature and local governments on any legislation affecting property rights and property taxation.

Soundbuilt Homes LLC ("Soundbuilt") is a builder and developer that pays in excess of 2 million dollars per year to various jurisdictions for impact fees. It is important that jurisdictions are held accountable to accurate impact fee calculations that represent the proportional impacts of new development. Soundbuilt has a vested interest in providing financially attainable housing and cannot do so when fee exactions continue to mount without proper checks and balances in place.

Amici have a strong interest in the outcome of this case as they are committed to the protection of property rights in Washington State and throughout the United States. Specifically, *amici* fear that if the lower court's opinion in this case stands, it will incentivize other state and local governments to further erode the fundamental protections constitutionally afforded to private property.

INTRODUCTION & SUMMARY OF ARGUMENT

Impact fees are integral to the development process. It is imperative upon land-use agencies to ensure that developers cover the downstream effects of development—*e.g.*, increased traffic and expansion of public services. The U.S. Supreme Court has long been clear on the constitutional parameters of these so-called "exactions," although some lower courts have been slow to fully adopt the high court's framework. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up.").

Thus the Court has found itself clarifying rules long thought settled. To wit, last term, in *Sheetz v. El Dorado County*, 601 U.S. 267 (2024), a unanimous Supreme Court did not so much find as it *reconfirmed* that exactions are subject to a due process/takings analysis—called the "unconstitutional conditions" doctrine—whether imposed via legislation, and not limited to case-by-case levies.

Given the essential role exactions play in mitigating the negative impacts of development, it is no surprise that judges often fret over other courts' overreading strikes against particular exactions and proscribing far more impact fees than the Constitution demands. *Amici* suspect that *Sheetz* has not magically exorcised such trepidations, and so write this Court with two crucial points. First, invalidating *this* exaction will not negatively impact the capacity of other jurisdictions to impose *constitutional* mitigation fees. Second, failure to invalidate exactions of such undue scale will continue to worsen a nationwide housing crisis that excessive impact fees have played an integral role in perpetuating.

ARGUMENT

I. INVALIDATING THIS EXACTION WILL NOT NEGATIVELY IMPACT THE CAPACITY OF OTHER JURISDICTIONS TO IMPOSE CONSTITUTIONAL MITIGATION FEES

El Dorado County's ("County") impact-fee schedule stands alone in magnitude and is closer than most to the inessential end of the "nexus" continuum. It runs afoul of both the "proportionality" and "essential nexus" elements of the Supreme Court's exactions test. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury."). *See also Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

Striking the fee at issue in this case will have no negative effects on the vast majority of existing (and future) fee schedules, since few (though in light of *Sheetz*, evidently some) land-use officials after *Nollan* and *Dolan* have dared to levy fees that so obviously flout these precedents. Some of the worst offenders—a collection of California cities—have not gone nearly as far as El Dorado County. *See It All Adds Up: The Cost of Housing Development Fees in Seven California Cities*, Terner Ctr. Rprt. (2018) (*except* Fremont, where average traffic impact

fees exceed $40,000 per single-family home). For decades, local government operated under the terms of a now-repudiated rule that exempted legislative exactions from *Nollan*/*Dolan* review. This former rule naturally resulted in some local governments expanding their fees beyond the boundaries imposed by the essential nexus and rough proportionality tests. Under the relevant schedule in place in 2015, the average fee on single-family residences ("SFRs") in the County across all districts was $22,404—the highest in California by a significant margin. At that time, the average traffic impact fee in California was $6,272, and the national average was $3,256. For example, Sacramento (which shares many of the same roads as El Dorado County) required only $7,013. Duncan Assocs., *National Impact Fee Survey*, at 1, 7 (2019). The County's impact fee levied against Mr. Sheetz is beyond the pale. It is neither reasonable on its face nor, upon examination, even remotely proportional to the *de minimis* impact Mr. Sheetz's proposed single-family home would have on traffic in the area.

Striking this particular fee on the grounds set forth in Plaintiff-Appellant's briefing will not metastasize into a broader overcorrection against impact fees that are even only arguably within the constitutional ambit. Beyond its pure violation of the *Nollan*/*Dolan* test, the County's traffic-impact fee on Mr. Sheetz's development request suffers several fatal flaws that set it apart from most others and reveal the drawbacks of blanket legislative exactions in place of more searching case-by-case levies. As Plaintiff-Appellant emphasizes, "Mr. Sheetz must pay the same traffic impact fee despite generating 97% [to] 98% fewer daily trips than" comparable developments. App. Op. Br. at 50. The County's fee schedule turns on a property's categorical traits instead of via individualized analyses, producing odd results—*e.g.*, "the County chose to "reallocate costs from non-residential to residential so

that 84% of the fees are absorbed by residential and 16% are absorbed by non-residential. *Id* at 18.

This is not the norm, and thus striking such an outlier will not have a negative cascading effect on even roughly tailored statutory fees of fairly ambiguous constitutional imprimatur. This is especially so given that the impact fee in this case is categorically distinguishable from traffic-related fees in other jurisdictions because "it was not designed to collect money in an amount commensurate with a project's traffic impacts" but was instead meant "to raise funds needed to pay the total unfunded cost of road improvement projects identified as far back as 2005. *Id.* at 51.

Often, causal links between exactions and external costs of development are achieved via so-called "nexus studies" and similar data-driven inquiries. While not perfect, they make eminent sense as a baseline—a litmus, even—without which the challenged government simply cannot prove up their proffered justifications. *See generally*, *Improving Impact Fees in California: Rethinking the Nexus Study Requirement*, Terner Ctr. Rprt. (2020) (critiquing elements of standard nexus studies in California, without questioning their essential purpose).

Compelling developers to internalize costs that would otherwise fall upon the broader public is the whole (and sole) constitutional purpose for impact fees. But land-use officials must first *demonstrate* correlations between externalities and the impact fees ostensibly designed to compensate the public for privately imposed costs. In a sort of "reverse *Armstrong*," exactions are constitutional when in fairness and justice *individual* owners bear the burdens of their own land uses instead of the public writ-large. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). And, at the same time, reminding land-use officials to tread with caution. *See* Tappendorf & DiCanni, *The Big Chill?: The*

Likely Impact of Koontz *on the Local Government/Developer Relationship*, 30 Touro L. Rev. 455, 473–76 (2014) (critiquing the various ways in which *Koontz* would "chill" official conduct that is, in *Amici*'s estimation, exactly the sort of behavior the unconstitutional conditions doctrine is meant to preempt).

To reiterate, the County's levy against Mr. Sheetz is so outside the norm—and beyond even the broadest constitutional canopy—that striking it cannot feasibly impede other courts from undertaking independent analyses of other impact fees as they come before their dockets. Upholding it, on the other hand, broadcasts to other courts—at this early post-*Sheetz* stage—that they should continue over-deferring to legislative pronouncements of proportionality and nexus. If a fee nearly four times the average suffices—the thinking may go—then certainly fees two or three times the average is also constitutionally acceptable.

II. UNDUE EXACTIONS GREATLY EXACERBATE AMERICA'S EVER-WORSENING HOUSING CRISIS

Exactions unrelated to a cognizable harm of a specific development (or class of developments, in the case of legislative exactions) or disproportionate considering the predicted harm—though rarer after *Nollan* and *Dolan*—continue to impose costs that artificially delay or prevent housing growth in many of the metropolitan areas that need it most. As early as 2005—a couple years' prior to the greatest collapse of the American housing market since the Great Depression—Professor Vicki Been, a prominent scholar of land-use law, listed several possible adverse outcomes of undue exactions. These ranged from the price of housing (and construction) to an informal "fiscal zoning" that could end up reversing much progress towards housing desegregation. *See generally*, Vicki Been, *Impact Fees and Housing Affordability*, 8 Cityscape 139 (2005).

While Been could not have known the specifics, in broad strokes much of what she predicted has come to fruition. Not everywhere, of course—and this is a crucial point, as Argument I, *supra*, rest on the well-demonstrated premise that the County's fee against Mr. Sheetz and those of similar magnitude can fall to constitutional scrutiny without risking *reasonable* (proportionate and nexus) exactions.

Courts may defer to legislative or bureaucratic justifications for the price and purpose of specific exactions but should at least make the ultimate call themselves—that is, an independent analysis of a legislature's or agency's stated intentions. And as they do, it is helpful to remind these courts that they do not risk "opening the floodgates" every time they fail to hew so close to official explanations that plaintiffs almost never win. There is a happy middle ground—which in no way will be lost when this court rules in Plaintiff-Appellant's favor.

Exercising judicial independence to strike undue exactions while protecting those that even remotely fall within the constitutional ambit will help to remove one of the greatest impediments to housing growth in the United States—with NIMBYs ("not in my backyard" advocates) using them as cudgels to preemptively shield their neighborhoods from changes they fear will reduce the value of their investments. *See* David Foster & Joseph Warren, *The NIMBY Problem*, 34 J. Theoretical Pols. 1, 33 (2021) ("Mechanisms for local residents to express their preferences over development approval tend to coincide empirically with manifold opportunities for delay and thus high transaction costs for development."). Never mind that preserving a property's value at the expense of would-be newcomers is not a fundamental (or even ancillary) right of ownership.

Halting undue exactions—a natural byproduct of courts' more often exercising their proper independent judgment—will go far to alleviate (or prevent the imposition of) those procedural costs that today

greatly stifle development where it is needed most. Cities with great need for more housing but whose labyrinthine land-use regulatory processes are a substantial impediment—and often impose private costs that outstrip the public costs of development. *See* Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. Econ. Perspectives 3, 27 (2018) ("Empirical investigations of the local costs and benefits of restricting building generally conclude that the negative externalities are not nearly large enough to justify the costs of regulation.").

Subjecting impact fees to heightened scrutiny—or at least displaying a healthy incredulity to those that are more than *double* the national average—will not magically solve America's chronic housing shortage. But it would certainly ease some of the worst restrictions. And after *Nollan*, *Dolan*, and now *Sheetz*, courts doubtless have the doctrinal muscle and *flexibility* to cabin impact fees within constitutional bounds without overburdening the public with the private costs of development.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiff-Appellant's briefing, this Court should strike the County's unconstitutional imposition of impact fees that are both disproportionate and bear no nexus to Mr. Sheetz's desired use.

DATED: October 15, 2024.

Respectfully submitted,

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DECLARATION OF SERVICE

On October 15, 2024, a true copy of **BRIEF *AMICUS CURIAE* OF CITIZEN ACTION DEFENSE FUND, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, MANHATTAN INSTITUTE, WALLACE PROPERTIES, WASHINGTON BUSINESS PROPERTIES ASSOCIATION, AND SOUNDBUILT HOMES LLC IN SUPPORT OF PLAINTIFF-APPELLANT** was electronically filed with the Court through the Third District E-Filing system. Notice of this filing will be sent to those who are registered with the Court's e-filing system.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed this 15th day of October, 2024, at La Mesa, California.

/s/ Timothy Snowball
TIMOTHY SNOWBALL
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