

IN THE
Supreme Court of the United States

No. 11-299

WEST LINN CORPORATE PARK L.L.C.,
Petitioner,

v.

CITY OF WEST LINN, BORIS PIATSKI AND DOE
DEFENDANTS 1 THROUGH 10,
Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF FOR NATIONAL ASSOCIATION OF
HOME BUILDERS, 24 STATE HBA CHAPTERS
AND OIA LEGAL CENTER AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

INTEREST OF *AMICI CURIAE*¹

The NAHB represents over 160,000 builder and associate members throughout the United States. Its members include people and firms that construct and

¹ Pursuant to Rule 37.6, *Amici Curiae* state that counsel for the parties did not author this brief in whole or in part, neither party nor party counsel made a contribution intended to fund the preparation or submission of the brief, and no person or entity other than an amicus made any monetary contribution to the preparation or submission of this brief.

supply single family homes as well as apartment, condominium, commercial, and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with the Ninth Circuit's decision that terminates heightened judicial review from disproportionate monetary exactions.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" in a number of cases involving the rights and remedies of its members who have been adversely affected by governmental actions. Cases in which NAHB has appeared as an *amicus curiae* or "of counsel" before this Court include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of*

Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006); *Rapanos v. United States*, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Env'tl. Prot. Agency*, 129 S. Ct. 1498 (2009); and *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *United States v. Tohono O'odham Nation*, 559 F.3d 1284 (Fed. Cir. 2009), *cert. granted*, 130 S. Ct. 2097 (2010) (No. 09-846); and *Am. Elec. Power Co., Inc. v. Connecticut*, 582 F.3d 309 (2d Cir. 2009), *cert. granted*, 131 S. Ct. 813 (2010) (No. 10-174).

In addition to NAHB, the state HBAs, on behalf of their members, have expressly requested to join NAHB as *amici* in petitioning this Court to grant a writ of certiorari. The members of these state chapters regularly suffer monetary exactions when developing property in their respective states. The state chapters joining this brief are: Oregon Home Builders Association representing 3,211 members; Home Builders Association of Mississippi representing 2,300 members; North Dakota Association of Builders representing 1,900 members; Home Builders Association of Tennessee representing 3,300 members; Home Builders Association of South Carolina representing 3,400 members; North Carolina Home Builders Asso-

ciation representing 12,936 members;² Home Builders Association of Kentucky representing 6,100 members; Florida Home Builders Association representing 6,905 members; Building Industry Association of Washington representing 8,900 members; Home Builders Association of Delaware representing 340 members; Home Builders Association of Michigan representing 4,700 members; Home Builders Association of New York representing 2,900 members; Home Builders Association of Connecticut representing 950 members; Home Builders Association of Colorado representing 2,100 members; Ohio Home Builders Association representing 4,500 members; Oklahoma State Home Builders Association representing 2,500 members; Home Builders Association of Pennsylvania representing 6,500 members; Wisconsin Builders Association representing 5,400 members; Home Builders Association of Alabama representing 8,203 members; Montana Building Industry Association representing 1,700 members; California Building Industry Association representing 3,217 members; Home Builders Association of Illinois representing 1,780 members; South Dakota Home Builders Association representing 1,685 members; and Texas Association of Builders representing over 10,000 members.³

² North Carolina Home Builders Association appeared as amicus curiae in *Amward Homes, Inc. v. Town of Cary*, 698 S.E.2d 404 (N.C.App.,2010), *rev. allowed* 709 S.E.2d 597 (N.C. 2011) (plaintiff's challenging imposition of approximately \$600,000 in development fees).

³ Founded in 1946, the Texas Association of Builders represents over 315,000 jobs and more than \$21 billion in the Texas economy. The state and local associations play a crucial role in providing housing for Texans. The Texas Association of Builders is dedicated to creating a positive business environment for

OIA is a non-partisan, non-profit public interest law center focused on litigation to protect the constitutional rights of landowners from excessive and increasingly burdensome federal, state and local regulations. OIA successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. City of Tigard*, and has filed other petitions for certiorari and has appeared as *amicus curiae* in many significant takings clause decisions in state and federal courts in the last two decades.

OIA believes its experience with takings jurisprudence arising in Oregon can be helpful to this Court in formulating its decision.

ARGUMENT

I. Monetary Exactions Are a Substantial Economic Concern Throughout the United States.

In a 2010 survey of published impact fees representing 27 states, state and local governments charged on average \$11,796 in total impact fees per single-family detached dwelling unit constructed. Clancy Mullen, *National Impact Fee Survey: 2010* (2010) available at http://www.impactfees.com/publications%20pdf/2010_survey.pdf. As of August 2011, local governments authorized a seasonally adjusted annual rate of 417,000 single-family dwellings. Erica Filipek or Stephen Cooper, U.S. Census Bureau and U.S. Department of Housing and Urban Development, *New Residential Construction in August 2011* (September 20, 2011) available at http://www.esa.doc.gov/sites/default/files/ei/documents/2011/September/new_r

the housing industry by addressing the housing issues of the people of Texas.

esidential_construction_august_2011.pdf. Even in a recession the large cost of impact fees coupled with the enormous number of building permits issued in the United States makes the issue of monetary exactions a substantial economic concern.

The estimated impact fee cost above is in addition to ad hoc exactions requiring real property dedications, additional monetary payments or capital improvements. As demonstrated by the broad representation of *amici* from 24 states, the practice of requiring monetary exactions is pervasive throughout the United States and is also a substantial economic concern. The Ninth Circuit denied property owners who are victims of disproportionate monetary exactions the constitutional protections created in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). This Court should grant the petition for writ of certiorari to address these issues of national economic concern.

II. The Ninth Circuit's Decision Allows Governments to Easily Circumvent the Constitutional Protections of *Nollan* and *Dolan* While Still Imposing Disproportionate Exactions.

The questions presented in the Petition for a Writ of Certiorari call into question the importance and scope of this Court's decisions in *Nollan* and *Dolan*. Petr. Br. i. A reexamination of the facts, ruling, and impact of *Dolan* along with the limiting effect the Ninth Circuit's decision will have on *Dolan* demonstrates why this Court must grant certiorari to address what protections, if any, *Dolan* provides to property owners forced to accept disproportionate monetary exactions.

Petitioner Florence Dolan owned a plumbing and electric supply store located in the Tigard, Oregon. *Dolan*, 512 U.S. at 379. The property consisted of a 1.67-acre parcel. *Id.* A creek flows through the southwestern corner of the parcel and along its western boundary. *Id.* The property was originally developed with a store approximately 9,700 square feet in size and 39-space gravel parking lot located on the eastern side of the parcel. *Id.* The petitioner submitted a site development review application with the City requesting permission to expand her store to 17,600 square feet and pave the existing 39-space gravel parking lot, which expressly included requests for variances from certain provisions of the Tigard Community Development Code (CDC), including 18.120.180.A.8 and 18.86.040.A.1.b. *Id.* at 380

CDC 18.120.180.A.8 proscribed the following standard for site development review approval:

Where landfill and/or development is allowed within and adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan. *Id.* at 378-79.

CDC 18.86.040.A.1 also provided in relevant part:

The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

- b. The development shall facilitate pedestrian/bicycle circulation if the site is located adjacent

to a designated greenway/open space/park. Specific items to be addressed are as follows:

- (i) Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bikepaths identified in the comprehensive plan. *If direct connections cannot be made, require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths. Id. at 378, n.1 (emphasis added).*

The city's decision contained the following relevant conditions:

The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100-year floodplain [of Fanno Creek] (i.e. all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area. *Id. at 379, n.2.*

The area subject to the dedication required by this condition comprised approximately 7,000 square feet, or 10% of the subject parcel. *Id. at 380.*

This Court explained the method of analyzing the above exaction as a two part test. The first part was determining whether an "essential nexus" exists between the "legitimate state interest" and the exaction. *Dolan*, 512 U.S., at 386, *quoting Nollan*, 483 U.S., at 837. This Court easily determined the exaction, requiring a dedication of land for greenway and bicycle pathway, had an essential nexus with the

legitimate interests of flood prevention and traffic reduction. *Dolan*, 512 U.S., at 387-88. The second part was “to determine whether the degree of the exactions demanded by the city’s permit conditions bears the required relationship to the projected impact of petitioner’s proposed development.” *Id.* at 388. After reviewing relevant state court decisions, this Court restated the standard of judicial review as requiring a “roughly proportionate” relationship to the impact of the proposed development. *Id.* at 39. This Court also held “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.” *Id.*

Under these standards, the Court held the city’s findings were insufficient. *Id.* at 393. The city failed to explain why the petitioners needed to dedicate their property to the city for public use as opposed to merely preserving it as private open space, which the CDC already required. *Id.* Additionally, the conclusory finding that a non-vehicular pathway *could* offset traffic demands on nearby streets did not satisfy the city’s burden. The city was required to “make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.”

While the city chose to exact real property at a cost to the taxpayers of \$1.5 million⁴, the CDC gave

⁴ After this Court remanded the City of Tigard’s decision, the city applied substantially the same exaction demanding a dedication for the recreation easement. City of Tigard, Oregon Resolution 95-61 (1995). However, the petitioner again sued the city, and the parties ultimately entered into a stipulated judgment whereby the city agreed to compensate the petitioner for

the city another option. CDC § 18.86.040 A.1.b.i expressly allowed the city to “require that funds in the amount of the construction cost be deposited into an account for the purpose of constructing paths” if the path could not be directly connected. Thus, instead of paying the petitioner for her exacted real property, the city could have located the pathway on another property and billed the petitioner for the construction costs. Nothing in this Court’s decision suggests that such an exaction, without determining it satisfied the requirements of the essential nexus and rough proportionality tests, would have been consistent with this Court’s decision. However, the Ninth Circuit’s holding provides such an exaction would be beyond the protections of *Nollan* and *Dolan*.

After the City of Tigard settled with the petitioner, it adopted the following code provisions:

CDC 18.810.110 Bikeways and Pedestrian Pathways

A. Bikeway extension.

2. Developments adjoining proposed bike-ways identified on the City’s adopted pedestrian/bikeway plan shall include provisions for the future extension of such bikeways through the dedication of easements or rights-of-way, *provided such dedication is directly related to and roughly proportional to the impact of the development.*

the value of the land acquired for the pedestrian pathway and other costs incurred in the amount of \$1.5 million. *See City of Tigard Will Pay Dolans \$1.5 Million in Bikepath “Takings” Case, Bus. Wire, Nov. 21, 1997, available in Lexis, News Library, BWIRE file.*

* * *

B. Cost of construction. Development permits issued for planned unit developments, conditional use permits, subdivisions and other developments which will principally benefit from such bikeways *shall be conditioned to include the cost or construction of bikeway improvements in an amount roughly proportional to the impact of the development* (emphasis added).

These revisions to the CDC expressly require both real property and monetary exactions be roughly proportionate to the impacts of the proposed developments.⁵ However, if this Court refuses to accept the petition for certification of review, then the city will have the freedom to strike these protections in the CDC and again demand disproportionate monetary exactions without being challenged as unconstitutional takings.

This Court's decision in *Dolan* provided property owners clear protections from disproportionate government exactions. Justice Stevens unequivocally stated *Dolan* is an "important case." *Dolan*, 512 U.S. at 396 (J. Stevens Dissent). However, the Ninth

⁵ Several other provisions of the CDC have incorporated the standards of *Nollan* and *Dolan*. See CDC § 18.810.020 (A) expressly limits the city's ability to require dedications of real property and construction of public improvements as conditions of approval "only when the required exaction is directly related to and roughly proportional to the impact of the development; § 18.810.080 (A) requires exactions obtaining parks dedications to be directly related to and roughly proportionate to the impact; § 18.390.040 (B)(e) requires applicants to supply impact studies quantifying the effects of the proposed development on public facilities and services along with proposed findings regarding the proportionality of dedications required by the CDC.

Circuit's decision eviscerates the importance of *Dolan* by mistakenly holding the standards of review required by *Nollan* and *Dolan* do not apply to monetary exactions. Without this Court's clarification that the protections of *Nollan* and *Dolan* apply equally to property owners suffering monetary exactions as to those owners suffering real property exactions, lower courts will continue to misapply *Nollan* and *Dolan*. Moreover, governments that desire to take advantage of property owners will have a clear path for imposing disproportionate monetary exactions.

III. The Reliance on *Lingle* by the Ninth Circuit and Oregon Supreme Court is Misplaced and Ignores the Reasons for Applying the Standard of Judicial Review Applied in *Nollan* and *Dolan* to Monetary Exceptions

The Ninth Circuit and Oregon Supreme Court decisions below refused to hold that monetary exactions must be roughly proportionate to impacts of the development, and their reasoning almost exclusively relies on this Court's decision in *Lingle v. Chevron USA Inc. West Linn Corporate Park, L.L.C. v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *West Linn Corporate Park L.L.C. v. City of West Linn*, 2011 U.S. App. LEXIS 7911 (9th Cir. Apr. 18, 2011) (Petr. Br. App., at 121a) *citing Lingle v. Chevron USA Inc.*, 544 U.S. 528, 547 (2005). *Lingle* was a facial challenge under the Takings Clause of the Fifth Amendment. 544 U.S. at 532. The lower court's reliance on this Court's decision of federal law to answer a certified question of Oregon law defies all reason, and two Oregon Supreme Court Justices dissented in part for this reason. *West Linn Corporate Park, L.L.C. v. City*

of *West Linn*, 240 P.3d 29, 45 (Or. 2010) (Kistler, J., dissenting). In addition to failing to adequately explain the basis for their reliance on *Lingle*, the decisions below also failed to address the only instance when this Court has granted certiorari to a case involving monetary exactions. *Ehrlich v. City of Culver City*, 512 U.S. 1231, (1994) (vacating and remanding *Ehrlich v. City of Culver City*, 15 Cal.App. 4th 1737, 19 Cal.Rptr.2d 468 (1993) for further consideration in light of *Dolan*).

While this Court's decision in *Ehrlich* is not binding precedent, the analysis provided by the California Supreme Court upon remand provides a cogent statement of why all ad hoc exactions should be subject to the judicial review standards announced in *Nollan* and *Dolan*.

In *Ehrlich*, a developer applied for a zone change from recreation zone to multi-family residential zone with the intent of replacing his private sports facility with condominiums. *Ehrlich v. City of Culver City*, 911 P.2d 429, 438-39, *cert. denied* 519 U.S. 929 (1996). The city approved the zone change, but imposed a condition requiring the developer to make a \$280,000 payment in lieu of construction of four public tennis courts. *Id.* 12 Cal.4th 854, 911 P.2d at 434-35. After *Dolan*, the California Supreme Court held the monetary exaction was a taking and characterized the context as one which the protections of *Dolan* “quintessentially” applied. *Ehrlich*, 12 Cal.4th 854, 911 P.2d at 438. Although the court splintered on various issues, it was unanimous on the application of *Dolan*.⁶

⁶ *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 858, 911 P.2d 429 (plurality op. by Arabian, J., joined by Lucas, C.J., and George, J.); *id.* at 887. (Mosk, J., concurring) (*Dolan* “is generally

In the court’s reasoning, the Supreme Court of California focused on the policy of the Fifth Amendment furthered by *Nollan/Dolan* and the analytical framework used by this Court to guide its decision. The court stated:

One of the central promises of the takings clause is that truly public burdens will be publicly borne. Where the regulatory land use power of local government is deployed against individual property owners through the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use. The essential nexus test is, in short, a “means-ends” equation, intended to limit the government’s bargaining mobility in imposing permit conditions on individual property owners-whether they consist of possessory dedications or the exaction of cash payments-that, because they appear to lack any evident connection to the public impact of the proposed

not applicable to development fees; the present case is thus more the exception than the rule”); *id.* at 903 (Kennard, J., concurring and dissenting, joined by Baxter, J., in concurring), (“I agree with the majority that *Nollan-Dolan*’s ‘essential nexus’ and ‘rough proportionality’ requirements apply to monetary exactions that, like the mitigation fee involved here, are imposed on a specific parcel of property as a condition of obtaining a development permit”); *id.* At 912 (Werdegar, J., concurring and dissenting); see *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 666, 41 P.3d 87 (2002) (“Though the members of this court disagreed on various parts of the analysis [in *Ehrlich*], we unanimously held that this ad hoc monetary exaction was subject to *Nollan/Dolan* scrutiny.”).

land use, *may* conceal an illegitimate demand—may, in other words, amount to “out-and-out ... extortion.”

Under this view of the constitutional role of the consolidated “essential nexus” and “rough proportionality” tests, it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction. In a context in which the constraints imposed by legislative and political processes are absent or substantially reduced, the risk of too elastic or diluted a takings standard—the vice of distributive injustice in the allocation of civic costs—is heightened in either case. Support for this view of the scope of the test can be drawn from a close reading of the text of Justice Scalia’s opinion in *Nollan* and from the Chief Justice’s opinion in *Dolan. Ehrlich v. City of Culver City*, 12 Cal.4th 854, 876, 911 P.2d 429 (Cal. 1996).

Thus, the Takings Clause of the Fifth Amendment furthers two policies. The first is to ensure that public benefits should not be borne unfairly by private individuals. The second is to prohibit extortionate governmental activity. Neither of these policies are served by removing the protections of *Nollan* and *Dolan*.

The court in *Ehrlich* properly reasoned that the distinction between real and personal property exactions is not significant under *Nollan/Dolan* because the citizen applying for a permit is equally vulnerable to unjust taking by the government regardless of type of property interest being taken. Such an arbitrary distinction flies in the face of the United States Supreme Court’s warning that the

“Fifth Amendment’s Property Clause [is] to be more than a pleading requirement, and compliance with it [is] to be more than an exercise in cleverness and imagination.” *Nollan*, 483 U.S. at 841.

The City of West Linn will likely argue, as Justice Stevens stated in his dissenting opinion in *Dolan*, if this Court holds governments imposition of ad hoc monetary exactions are subject to the level of judicial scrutiny required in *Nollan* and *Dolan*, it will invite a return to the “superlegislative power the Court exercised during the *Lochner* era.” *Dolan*, 512 U.S. at 409 (J. Stevens Dissent); *citing Lochner v. New York*, 198 U.S. 45 (1905). Time has proven Justice Stevens’ concerns unfounded, and this Court clarified in *Lingle* that the Takings Clause of the Fifth Amendment does not provide a basis to facially challenge regulations that purportedly fail the “substantially advances” formula. 544 U.S. at 544.

However, without disturbing the holding in *Lingle*, this Court can follow the lead of the California Supreme Court, City of Tigard and other jurisdictions requiring,⁷ or self-regulating as the case may be, ad

⁷ The New York Court of Appeals has applied *Nollan/Dolan* to fees in lieu of dedications, and cited *Nollan/Dolan* in a decision holding that rent control statutes were unconstitutional. *Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105, 801 N.E.2d 821 (2003), *cert. denied*, 541 U.S. 974 (2004); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12, 822 N.E.2d 1214 (2004) (*Dolan* scrutiny applies to dedications of land and to fees-in-lieu of land dedications); *but see Manocherian v. Lenox Hill Hosp.*, 618 N.Y.S.2d 857, 862, 643 N.E.2d 479, 84 N.Y.2d 385 (1994) (relying on *Nollan/Dolan* in part and holding a rent control law did not have a sufficient nexus to a legitimate state interest and was not roughly proportionate). The Washington Supreme Court has applied heightened scrutiny to monetary exactions for off-site improvements when the requirements were the product

hoc monetary exactions be directly related to and roughly proportional to the impact of the proposed development. These cases are distinct from other challenges to legislatively imposed and generally applicable regulations and taxes. If state and local governments use their monopolistic power of granting permits for the use and development of private real property to exact ad hoc off-site improvements, fees in lieu, or dedications of real property, such exactions must comply with the procedural and judicial review requirements of *Nollan* and *Dolan*.

of quasi-judicial decisions. *Benchmark Land Co. v. City of Battle Ground*, 103 Wash. App. 721, 14 P.3d 172 (2000) (applying *Nollan/Dolan* to exactions requiring off-site street improvements and equating monetary exactions to real property exactions). In rejecting a facial challenge to a local ordinance, the Arizona Supreme Court interpreted Arizona Revised Statute § 9-463.05, the state authorizing statute, already incorporated the standard rough proportionality. *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (1997). Moreover, the Texas, Illinois, and Ohio Supreme Courts have applied heightened scrutiny to monetary exactions even when the sources of the exactions are generally applicable fees imposed by statute or ordinance. *Town of Flowers Mound v. Stafford Estates LP*, 135 S.W.3d 620 (Tex. 2004) (applying *Nollan/Dolan* to exactions because monetary exactions are more like real property exactions than use restrictions); *Northern Ill. Home Builders Ass'n v. County of Du Page*, 165 Ill.2d 25, 649 N.E.2d 384 (1995) (citing *Nollan/Dolan* and applying a heightened level of scrutiny to an ordinance requiring transportation impact fees on new developments); *Home Builders Ass'n v. City of Beavercreek*, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000).

CONCLUSION

The issues of monetary exactions are important economic and constitutional issues worthy of this Court's consideration. The lower court decisions have eroded the protections announced in *Nollan* and *Dolan* such that state and local governments can extort money from property owners without adequate judicial review. Therefore, *Amici* urge this Court to grant the petition for writ of certiorari.

Dated this 11th day of October, 2011.

Respectfully submitted,

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