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COURT OF APPEALS  
STATE OF NEW YORK

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MATTER OF COALITION FOR FAIRNESS,

Respondent,

-against-

CITY OF NY,

NO. 112

Appellant.

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20 Eagle Street  
Albany, New York  
November 19, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Matter of Coalition for Fairness v. City of New York.

3 MR. SCHOEPP-WONG: Good afternoon, Your Honors.  
4 May it please the court. Jon Schoepp-Wong, on behalf of  
5 the appellant. I'd like to reserve three minutes for  
6 rebuttal, if I may.

7 CHIEF JUDGE WILSON: Yes.

8 MR. SCHOEPP-WONG: Thank you. So I'd like to  
9 begin with the predicate question in this case, and that's  
10 whether the government action here can be thought of as a  
11 taking. If it can't, that ends the analysis. And the  
12 First Department completely ignored that aspect of this.

13 And there's two reasons it's not a taking.  
14 Number one, the action challenges - - - the action  
15 challenged concerns a pre-existing undisputed restriction  
16 and refusing to allow petitioners to remove it and to add  
17 to their bundle of rights with regarding to their property  
18 does not take anything from them. And sec - - -

19 JUDGE GARCIA: But Counsel, they're offering a  
20 benefit here, right? So if someone came in and asked for  
21 this benefit, asked for a variance on a zoning, and you put  
22 a condition on that, why is that different under Sheetz  
23 than them - - - them - - - the government doing it this  
24 way?

25 MR. SCHOEPP-WONG: Well, here's the difference,



1 Your Honor. I think that what's important to remember is  
2 that there is this restriction that runs with the property.  
3 It's a specific-use restriction.

4 JUDGE GARCIA: And if you lift that restriction,  
5 which you can do right now, the property increases  
6 dramatically in value; I understand that. But that  
7 underlies all of these cases. I mean, if they weren't  
8 giving any value for the condition to be posed, then why  
9 would anyone do it? So you're always increasing the value  
10 of your property by getting some benefit from the  
11 government. Here, changing the status from artist-  
12 restricted to residential, let's call it.

13 MR. SCHOEPP-WONG: Respectfully, I - - - I  
14 disagree, Your Honor. I think that all of the cases that  
15 have preceded this one have all concerned - - - have - - -  
16 have - - - none of them have concerned this type - - - type  
17 of restriction that is running with the property, that is  
18 specific to the property. All of them have concerned  
19 overarching permitting schemes, where the government has a  
20 role in - - - in granting or denying permission to develop  
21 the property.

22 JUDGE GARCIA: Could you grant or deny a zoning  
23 variance? If something's zoned a certain way, can you  
24 grant or deny a zoning variance?

25 MR. SCHOEPP-WONG: I think - - - I think a zoning

1 variance would be in - - - in a similar vein of - - - of  
2 the permitting regimes of the Koontz, and Nollan and Dolan.

3 JUDGE GARCIA: And it seems like this is a Sheetz  
4 type zoning variance law.

5 MR. SCHOEPP-WONG: I - - - I - - - I disagree,  
6 Your Honor, because what we have is - - - is a restriction,  
7 a specific restriction - - -

8 JUDGE CANNATARO: So what is the difference  
9 between - - -

10 MR. SCHOEPP-WONG: - - - that attaches to the  
11 property itself.

12 JUDGE CANNATARO: What's the difference between a  
13 rezoning and a zoning variance, qualitatively?

14 MR. SCHOEPP-WONG: Qualitatively, I think what's  
15 important to remember here is that - - - so - - - so in the  
16 permitting realm, in the zoning variance realm, you have  
17 the government able to make a decision as to whether or not  
18 there's going to be, you know, a certain kind of  
19 development.

20 But what we have here is an existing restriction.  
21 The government's not doing anything to impose that  
22 restriction. So when - - - in the variance world and in  
23 the permitting world, the government - - - the action that  
24 is being taken actually imposes - - - diminishes the - - -  
25 the - - - the property, the right to the property.

1 JUDGE CANNATARO: So what I think I hear you  
2 saying is that in a rezoning, it's available to everyone  
3 who - - - you know, who holds that kind of property  
4 interest, the restricted property interest, and in a  
5 variance, it's a particular individual who's seeking the  
6 variance; is that right?

7 MR. SCHOEPP-WONG: I - - - I think that - - - no,  
8 I think that the way - - - the way that I would describe it  
9 is, so we have this permitting regime, we have a variance  
10 regime, where the government can take an action, can say,  
11 you can have this permit, you cannot have this permit, you  
12 can have this variance, you cannot have this variance. And  
13 what that does is it imposes an actual restriction on the  
14 property when the government says no. When the government  
15 says, no, you can't have this, or if there's a condition  
16 that's imposed on it, the government has then - - -

17 JUDGE GARCIA: So you could say - - -

18 MR. SCHOEPP-WONG: - - - burdened the property.

19 JUDGE GARCIA: - - - you can have this permit, if  
20 you pay us \$20,000, let's say. And anyone who pays it can  
21 have this permit. How is that different than this?

22 MR. SCHOEPP-WONG: And anyone who pays it can  
23 have this permit?

24 JUDGE GARCIA: Yeah.

25 MR. SCHOEPP-WONG: In - - - in the sense, well,



1 it depends on with this underlying - - -

2 JUDGE GARCIA: And then you're getting a benefit,  
3 right? You're granting a benefit, by statute, to everyone.  
4 There's no individual decision there; isn't that Sheetz?

5 MR. SCHOEPP-WONG: It depends on if - - - so  
6 Sheetz didn't - - - didn't address any of this at all.  
7 Sheetz - - -

8 JUDGE GARCIA: Well, Sheetz didn't address  
9 whether it's a taking, but Sheetz addressed whether you can  
10 do this by legislation, right?

11 MR. SCHOEPP-WONG: Sheetz addressed whether you  
12 can do it by legislation, but I submit that that's a  
13 different question from what I'm discussing here, which is  
14 whether the government action can be thought of as a taking  
15 in the predicate sense. So that is - - -

16 JUDGE GARCIA: But you seem to be saying one of  
17 the reasons it cannot be is because they did it this way  
18 rather than as an individual zoning variance. But I think  
19 Sheetz addresses that, doesn't it?

20 MR. SCHOEPP-WONG: No, Your Honor. So I think  
21 that the difference is in terms of what the underlying  
22 restriction on the property is. So I think that the - - -  
23 the question of whether it's being imposed as a legislative  
24 rule or not - - - and I think that that is an important  
25 factor in the rough proportionality analysis - - -

1 JUDGE HALLIGAN: Wait, wait, why is - - -

2 MR. SCHOEPP-WONG: - - - I think that is  
3 different - - -

4 JUDGE HALLIGAN: - - - why is that true under  
5 Sheetz? I thought Sheetz suggests that the fact that it's  
6 being imposed broadly does not take it outside the universe  
7 of what constitutes a taking.

8 MR. SCHOEPP-WONG: It doesn't take it outside of  
9 the universe of what constitutes a taking, but it is a  
10 factor that can - - - can and should be considered. And  
11 the concurrence in Sheetz - - -

12 JUDGE HALLIGAN: Under - - - under which of the  
13 Supreme Court's cases would you say that's true?

14 MR. SCHOEPP-WONG: So in - - - in - - - in - - -  
15 in Sheetz, what the - - - and in - - - and in Dolan - - - I  
16 would reference the court to Dolan, which referenced the  
17 legislative aspect of whether this was being imposed as an  
18 individual adjudication or a legislative scheme. So the  
19 difference here is that we're not asking for Nollan and  
20 Dolan not to apply because it's being - - - because this  
21 was imposed as a legislative act, where - - -

22 JUDGE HALLIGAN: That'd be hard to argue after  
23 Sheetz, I would think.

24 MR. SCHOEPP-WONG: Of - - - of course, but I  
25 think that what we need to keep in mind is the concurrence

1 in Sheetz, both of them, the - - -

2 JUDGE HALLIGAN: Uh-huh.

3 MR. SCHOEPP-WONG: - - - Justice Kavanaugh's  
4 concurrence as well as Justice Sotomayor's concurrence,  
5 which focused on how narrow that decision actually was - -  
6 -

7 JUDGE HALLIGAN: Well, perhaps one could read  
8 those concurrences as - - - as noting that those questions  
9 remain open. But - - - but I guess I'm - - - I'm still not  
10 quite tracking what the crux is as to your argument why  
11 this is not a taking.

12 MR. SCHOEPP-WONG: So - - -

13 JUDGE HALLIGAN: Maybe I'm just not tracking.

14 MR. SCHOEPP-WONG: So let's set aside, I think,  
15 the legislative aspect. I think that that is - - -

16 JUDGE HALLIGAN: Yes.

17 MR. SCHOEPP-WONG: - - - that - - - that - - -  
18 our argument on that is focused on the application of  
19 Nollan and Dolan, and not the predicate question as to  
20 whether there's a taking involved here that would trigger  
21 Nollan and Dolan. So I think that the difference here is  
22 the underlying restriction, what the government action is  
23 trying to do. So I think that Justice Barrett in Sheetz,  
24 for example dis - - -

25 JUDGE HALLIGAN: So wait, when you say the

1 "government action", do you mean the initial zoning  
2 restriction, or do you mean the opportunity now to procure  
3 a different use through payment of this fee, which of the  
4 two?

5 MR. SCHOEPP-WONG: I - - - I think the  
6 opportunity now to - - - so what is the government doing  
7 when its - - - when it says you have to pay a fee or you  
8 have to do this other thing to get a permit? So I think  
9 that - - - that is, what - - - what - - - what is the  
10 impact on - - - on the property from the government  
11 decision there, I think is - - - is the rub here. And I  
12 think that the difference between this case and  
13 Nollan/Dolan, Sheetz, and - - - and Koontz, is that here we  
14 have a specific-use restriction, undisputed, that predated  
15 - - - pre-existed this - - -

16 JUDGE GARCIA: Let's say it's the same situation  
17 here, they're single-family homes, though, same  
18 restriction. And as a condition of this legislation, that  
19 they're saying to you, you say, you can do this, you can  
20 change the status from artist to pure residential, but you  
21 have to give us an easement. Is that a taking?

22 MR. SCHOEPP-WONG: Well, I think that there are  
23 two - - - there - - - that - - - that goes to the two  
24 reasons that I think that there's not a taking here. But  
25 the first - - -

1 JUDGE GARCIA: No, but let's stick with your  
2 first reason.

3 MR. SCHOEPP-WONG: First one - - -

4 JUDGE GARCIA: That's the same benefit you're  
5 giving under the same legislation, but instead of saying  
6 you pay my arts fee, you know, you say I want an easement.  
7 But under your first reason, as I understand it, that would  
8 be okay.

9 MR. SCHOEPP-WONG: I think that that would be  
10 okay under this analysis because what is happening with the  
11 restriction is that it's - - - it's not changing based on  
12 what the government's doing.

13 JUDGE GARCIA: So - - -

14 JUDGE HALLIGAN: So you're saying that - - -

15 JUDGE GARCIA: - - - if you want to change it, I  
16 get an easement, the government gets an easement, to allow  
17 you to change it from artist residential to residential?

18 MR. SCHOEPP-WONG: That - - - that would be an  
19 extension of - - - of this - - - of - - - of the first  
20 prong of - - - of our argument.

21 JUDGE GARCIA: That, in your view, just so I'm  
22 clear, would not be - - - would not be a taking under  
23 Nollan/Dolan and Koontz?

24 MR. SCHOEPP-WONG: It - - - it would not be a  
25 taking because of the particular restriction that's being

1 applied here, but - - -

2 JUDGE HALLIGAN: I'm not - - - I'm not following  
3 that. If - - - if there's an easement that is required  
4 instead of a payment, why is it not a taking under - - -  
5 under the Supreme Court's case law?

6 MR. SCHOEPP-WONG: So there's - - - there's two  
7 issues here, I think, Your Honor. So that - - - there's  
8 the monetary obligation, which - - -

9 JUDGE HALLIGAN: Right, but hypothetically, I'm  
10 saying if - - - if it's an easement that is required - - -  
11 so let's assume that what the City says is you can convert,  
12 but you have to reserve your first floor for art gallery  
13 space, let's say, okay? I - - - I hear you saying I think  
14 that that's, nonetheless, not a taking - - - taking, even  
15 though it would be an easement, but I - - - I'm not clear  
16 why.

17 MR. SCHOEPP-WONG: It's because of what the  
18 government action is applying to - - - how - - - how the  
19 government action is applying to the property. So you  
20 know, Justice Barrett, in Sheetz, described the interaction  
21 between the police action and - - - and the - - - and the  
22 takings - - - and the takings realm as "in-laws and not  
23 soulmates", but - - -

24 JUDGE HALLIGAN: I - - - I appreciate that - - -  
25 that there's not an easement required here, and maybe

1 that's relevant to our determination whether there's an  
2 exaction, but I'm - - - I'm still not following - - - where  
3 under the more - - - you know, Nollan/Dolan, Koontz, Sheetz  
4 is there a clear suggestion that an easement is not a  
5 taking? It may be permissible if it satisfies the  
6 Nollan/Dolan scrutiny. But how - - - how do we get to the  
7 point that it's not a taking in any event?

8 MR. SCHOEPP-WONG: Well, I think that what we  
9 have to remember is that Nollan/Dolan and Koontz and Sheetz  
10 never addressed this particular scenario where there's - -  
11 -

12 JUDGE CANNATARO: So how is it not a taking here,  
13 on this particular regime?

14 MR. SCHOEPP-WONG: Because of the underlying  
15 restriction, Your Honor, because - - -

16 JUDGE CANNATARO: Because of the underlying - - -

17 MR. SCHOEPP-WONG: - - - because of the - - -  
18 because of the underlying restriction that already exists,  
19 that predates anything having to do with this case, and  
20 because the government action - - -

21 JUDGE GARCIA: But what if it was a permit?

22 MR. SCHOEPP-WONG: - - - doesn't actually change  
23 - - -

24 JUDGE GARCIA: I'm sorry.

25 MR. SCHOEPP-WONG: - - - anything with regards to

1 that.

2 JUDGE GARCIA: What if it was a permit, and you  
3 can't build two-story houses, and you need a permit to  
4 build above one story, and we pass a law that says anyone  
5 who pays us - - - anyone who gives us an easement can build  
6 two-story house? You get a permit. That would be okay or  
7 not okay? Because there's a pre-existing restriction on  
8 your home, you can't build a two-story house.

9 MR. SCHOEPP-WONG: If - - - if we're assuming  
10 there's a pre-existing restriction, then it would be more -  
11 - - more like the scenario that we have. But what we have  
12 in Koontz and all of the others is there is no pre-existing  
13 restriction. You have - - -

14 JUDGE GARCIA: But let's say my scenario, there  
15 is. You need a building permit to build above one floor.  
16 And instead of making you come in and get a building  
17 permit, we pass a law that says anyone who gives us an  
18 easement through their property can build two stories,  
19 violate taking or not taking?

20 MR. SCHOEPP-WONG: So I think that's - - - so  
21 we're assuming that there is some kind of restriction on  
22 this property that's specific to that property so - - -

23 JUDGE GARCIA: Whole development zoned, you  
24 cannot go above one story, you have to get a building  
25 permit to go above one floor. Pass a law that says, hey,

1 you know, that's our rule, but if you give us an easement  
2 through your property, then you can build two stories.

3 MR. SCHOEPP-WONG: Well, I think what's relevant  
4 is to whether that restriction is - - - whether it's a  
5 broad-based, you know, rule in terms of whether there's a  
6 permit that has to be sought or whether it's a specific  
7 restriction on the ownership rights of the - - - of the - -  
8 -

9 JUDGE CANNATARO: And how would that hypothetical  
10 be dissimilar from what's happening here because it does  
11 sound awfully close?

12 MR. SCHOEPP-WONG: So I think that there - - -  
13 the difference is whether there is a specific restriction  
14 on the property owner's rights. In this case - - - in this  
15 case, there is.

16 JUDGE CANNATARO: On the property owner's what?

17 MR. SCHOEPP-WONG: On the property owner's  
18 rights. In this case, there is.

19 JUDGE CANNATARO: Well, I mean - - -

20 MR. SCHOEPP-WONG: There is no - - -

21 JUDGE CANNATARO: - - - in this hypothetical, no  
22 one can build above one story.

23 MR. SCHOEPP-WONG: And there - - - but in the - -  
24 - in the - - - I think that - - - the hypothetical, as I  
25 understand it, is that there is a rule, a broad-based rule,



1 that requires the government to weigh in on whether they  
2 can build above one story or not. That's not a specific  
3 restriction that's attaching to the property itself. It's  
4 not a - - - it's not - - -

5 JUDGE CANNATARO: What does "weigh in" mean?

6 MR. SCHOEPP-WONG: In this case - - -

7 JUDGE CANNATARO: It's a zoning restriction.  
8 This area is zoned for one-story houses or buildings only.  
9 But if you want two stories, you just have to give us an  
10 easement, and we'll give it to you.

11 MR. SCHOEPP-WONG: I think the difference is that  
12 whether - - - whether it attaches to the specific property  
13 or not. So this is - - - that sounds like - - - to me,  
14 like a broad-based rule. And what we have here is a stick  
15 in the bundle of rights that the property owners never had,  
16 Your Honor. So I think that, you know - - -

17 JUDGE RIVERA: Your red light went on. Do you  
18 want to just take a moment to, assuming that it is taking  
19 an exaction, whether or not it would satisfy Dolan/Nollan  
20 standard?

21 MR. SCHOEPP-WONG: Sure. And I - - - and I do  
22 want to point out that there is an additional reason - - -

23 JUDGE RIVERA: You do have your red light on, so  
24 - - -

25 MR. SCHOEPP-WONG: - - - that there is not a

1 taking, which I can get to on rebuttal. But in terms of  
2 the essential nexus and the - - - and the rough  
3 proportionality, I think that what's important to remember  
4 here is that the nexus relationship that the petitioners  
5 are advocating for, that's not represented anywhere in the  
6 case law, what we need. And according to this court's case  
7 law in Consumers Union and Twin Lakes, and - - - and as it  
8 interprets Nollan and - - - and Dolan, you know, a  
9 consistent relationship between the stated purpose of the  
10 restriction and the condition, and the stated purpose is -  
11 - - that's from Sheetz.

12 This is not a strict standard. Dolan teaches us  
13 that it can be a theoretical standard as long as there's an  
14 articulable connection between the restriction and the  
15 condition. So what we have here is a denial - - - or  
16 denying conversion preserves an artistic amenity that has  
17 supported the creation of art in the City, and that's  
18 exactly what the Arts Fund fee does.

19 JUDGE GARCIA: Do you know how many artists - - -  
20 I think there are 1,636 units, and I saw something here  
21 that 1,600 of them are occupied by nonartists.

22 MR. SCHOEPP-WONG: That is an estimate that the  
23 legislators in this case put forward. I don't know whether  
24 that's an accurate estimate or not. But what's - - -

25 JUDGE GARCIA: Is there anything else in the

1 record to suggest it isn't?

2 MR. SCHOEPP-WONG: Well, what's important to  
3 remember, I think, is that there's no dispute that there  
4 are certified artists in these - - - in these units.

5 JUDGE GARCIA: So if there are 36 out of 1,636  
6 units, what are you preserving?

7 MR. SCHOEPP-WONG: So I think that what's  
8 important to remember here is that, obviously there have  
9 been a lot of changes with regard to the use in SoHo and  
10 NoHo. And I think that, you know, the amnesty has had a  
11 role in this as well in terms of suppressing the number of  
12 certified artists that have appeared in these - - - that -  
13 - - that occupy these spaces.

14 But I think that, you know, there's an assumption  
15 here by the petitioners that there is no certified artist  
16 market, that there cannot be another certified artist  
17 market once these amnesties have elapsed. And I think  
18 that's - - - you know, that's just not borne out in the  
19 record.

20 And I would point out that there is a presumption  
21 of constitutionality here, that it is the petitioner's  
22 burden to demonstrate that these are - - - that - - - that  
23 there is no market for them, that this is totally illusory,  
24 I think. But - - -

25 JUDGE GARCIA: It really seems to me, from



1 reading the record, that what the fee is trying to do is to  
2 do what this restriction hasn't done. It's failed to do.  
3 And that, I don't see as a nexus. Because by lifting this,  
4 you're essentially coming - - - accepting reality of - - -  
5 of the what's on the ground here. But you wanted it to do  
6 something different, originally, when it was done in 1971.  
7 And over time, it's become evident that it isn't doing  
8 that.

9 So the Loft Law came in, and a lot of them were  
10 transferred into lofts. Some weren't. Now most, if not  
11 nearly all, are occupied by nonartists. So facing reality,  
12 you're offering this change, but it isn't a harm from the  
13 change. It's a harm from the failure of the project.

14 MR. SCHOEPP-WONG: I disagree, Your Honor,  
15 because I think that that assumes that this never had a  
16 role in the way that SoHo and NoHo has developed. I think  
17 that the record shows that there have been thousands of  
18 certified artists over the years. There are still  
19 certified artists today being certified every year, through  
20 this process.

21 JUDGE GARCIA: Four, last year?

22 MR. SCHOEPP-WONG: Granted, there are not that  
23 many. A lot of that has to do with the skyrocketing  
24 property values in SoHo and NoHo, as well as the amnesties  
25 play a role.

1 JUDGE GARCIA: And that's under current market  
2 conditions. And as I understood it, the increase, the \$100  
3 per square foot, was based, I think, although this is  
4 unclear on the record, although I think you say it in your  
5 brief, on some idea that artists would now be priced out by  
6 the increase in property value. But if you're saying they  
7 were already priced out, what again is the harm you're  
8 addressing?

9 MR. SCHOEPP-WONG: There are - - - the point is  
10 that there are fewer artists that are qualifying for this,  
11 certainly, and I think that's - - - that's undisputable.  
12 But that doesn't mean that there are no artists, that there  
13 - - - there are still, to Your Honor's point, four, this  
14 year. I think there have been, roughly, twenty-three in  
15 the past five years that have been certified. There have  
16 been - - - you know, there have been less than ten, over  
17 the - - - over the preceding years, per year.

18 But that trend doesn't mean that - - - again,  
19 that there isn't a certified artist market or that the  
20 certified artist market cannot rebound with additional  
21 enforcement of this rule. So I think that that assumption  
22 that this has no role here just ignores the fact that these  
23 - - - the market study that Your Honor cites definitely  
24 shows that there is an ongoing impact with regard to this -  
25 - - with this - - - with this use restriction, this artist

1 restriction, so - - -

2 JUDGE GARCIA: Did you - - - where is that in the  
3 record, that this increase will price out artists? Where  
4 is - - - I know you say in your brief, I think, but is  
5 there anywhere in the record support for that - - -

6 MR. SCHOEPP-WONG: I don't think we're saying - -  
7 -

8 JUDGE GARCIA: - - - that the increase - - -

9 MR. SCHOEPP-WONG: - - - that it will price out  
10 all artists. I think that what we're saying is that these  
11 two things are flip sides of the same coin. And I think  
12 that's a commonsense assessment, that the increase in value  
13 for a - - - either to purchase or rent in - - - in - - - in  
14 - - - in one of these units has a direct impact. It's the  
15 flip side of the coin for the impact on artists who would  
16 want to occupy the space, to use the space for - - - for  
17 the making of art. So I think that that is, you know,  
18 evident from the record.

19 And I would point out that this - - - this - - -  
20 the study is not challenged in any way by the petitioners  
21 in this case. So I think that that is a fair inference to  
22 be drawn because that's just the way that the housing and  
23 real estate market works, Your Honor.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. SCHOEPP-WONG: Thank you, Your Honor.



1 MR. KIESER: Good afternoon, and may it please  
 2 the court. Chris Kieser for the respondents. The First  
 3 Department correctly held in this case that the Arts Fund  
 4 fee could not satisfy either Nollan's nexus or Dolan's  
 5 rough proportionality requirement. As far as nexus, the  
 6 record is clear that the Arts Fund is not intended to  
 7 replace the loss of space for - - -

8 JUDGE HALLIGAN: Can I - - - can I ask you,  
 9 suppose there was a \$250 fee that was charged for a permit,  
 10 would you argue that that was a taking?

11 MR. KIESER: Well, Your Honor, the - - - the - -  
 12 - the permit application fees typically are not - - - if -  
 13 - - if they are related - - -

14 JUDGE HALLIGAN: So what's - - -

15 MR. KIESER: - - - to administrative costs, for  
 16 instance, like certain - - -

17 JUDGE HALLIGAN: Okay. But - - -

18 MR. KIESER: - - - something like user fees.

19 JUDGE HALLIGAN: But it's related to a nexus  
 20 question or - - - and you know, is - - - is that about  
 21 applying Nollan/Dolan scrutiny or - - - or is that about  
 22 deciding whether it's an exaction? I'm not - - - I'm not  
 23 familiar with cases where courts have said a routine  
 24 permitting fee is an exaction and then applied the  
 25 Nollan/Dolan scrutiny. So how do we distinguish those

1 fees, if they're permissible, which I take it, you think  
2 they are?

3 MR. KIESER: First of all, Your Honor, this is  
4 not a routine permit application fee.

5 JUDGE HALLIGAN: I understand. I'm asking a  
6 hypothetical.

7 MR. KIESER: But second of all, Koontz here  
8 actually controls the - - - the predicate-taking analysis.  
9 As in Koontz, the court specifically held that the  
10 government's demand for property from a land-use permit - -  
11 -

12 JUDGE HALLIGAN: Wait, so your view is that any  
13 routine permitting fee - - - let's assume it's reasonable -  
14 - - is an exaction subject to Nollan/Dolan scrutiny?

15 MR. KIESER: That's not quite true, Your Honor,  
16 because I think that some of them could be considered user  
17 fees, such as, like, sort of a court filing fee, if they  
18 are for - - -

19 JUDGE HALLIGAN: Okay. So let's suppose I - - -

20 MR. KIESER: - - - to cover any initial cost.

21 JUDGE HALLIGAN: - - - want to, you know, build -  
22 - - build something, and I need a permit to do it under  
23 some longstanding law, and the municipality imposes a fee  
24 of \$250. I'm trying to understand whether your view is  
25 that that is an exaction, but it's permissible under

1 Nollan/Dolan scrutiny, or it's not an exaction at all?

2 MR. KIESER: I think that a normal permitting fee  
3 that's designed to cover administrative costs probably  
4 would not cover - - - or would not implicate Nollan and  
5 Dolan.

6 JUDGE RIVERA: So let's say it goes a hundred  
7 percent above the administrative costs.

8 MR. KIESER: I think once you - - -

9 JUDGE RIVERA: Is it an exaction?

10 MR. KIESER: Your Honor, once you get beyond the  
11 - - - the - - - the goal of covering administrative costs,  
12 then you're looking at Koontz, which talks about how  
13 monetary exactions are the - - - the - - - that is - - -  
14 that controls the predicate takings question.

15 JUDGE CANNATARO: But what makes it an exaction,  
16 I guess, is the question we're all struggling with. Is it  
17 just the fact that it's over and above what a nominal  
18 administrative fee would be?

19 MR. KIESER: I think that administrative fees,  
20 Your Honor, would be justified based on the administrative  
21 costs, like a typical user fee, where - - -

22 JUDGE CANNATARO: That's easy to understand. But  
23 what demarcates the transition between a user fee and an  
24 exaction?

25 MR. KIESER: Well, here, Your Honor, the - - -

1 the City is not saying that - - - that the Arts Fund fee  
2 has anything to do with the - - - the process of conversion  
3 at all. In fact, conversion, really, if you look at the  
4 record, is - - -

5 JUDGE CANNATARO: But - - - but it's a fee. And  
6 - - - and governments charge fees for things all the time.  
7 And they - - - they can. They - - - you know, we don't  
8 generally hold that governments are restricted from  
9 creating fees for certain activities.

10 MR. KIESER: That's true, Your Honor. But this  
11 is a fee that on average is about \$250,000.

12 JUDGE HALLIGAN: So if - - - if the concern is  
13 that proportionality question, right, why don't we think  
14 about this as Justice Kennedy suggested in Eastern  
15 Enterprises, where my recollection is he said something  
16 that - - - that may be, you know, disproportionate or  
17 extreme in terms of the amount is appropriately analyzed  
18 that way, and not as a - - - as a taking?

19 MR. KIESER: Your Honor, I actually think that  
20 Koontz is an application of Justice Kennedy's - - -

21 JUDGE HALLIGAN: But in Koontz, there is - - -  
22 there is I thought - - - correct me if I'm wrong - - -  
23 there's an alternative. It's either give me your easement  
24 or give me some money. Am I wrong about that?

25 MR. KIESER: Yes, you are wrong about that, Your

1 Honor. The Florida courts in Koontz actually were very  
2 clear about the fact that it was a monetary exaction and  
3 that it was not an in-lieu fee.

4 JUDGE HALLIGAN: I thought when it - - - I  
5 thought when it - - - when - - - when it - - - I might be  
6 misremembering the facts. But I thought that when it  
7 initially - - - during the initial interactions between the  
8 local government and the landowner, there was some  
9 suggestion that perhaps a larger easement would be  
10 appropriate or a monetary payment. Am I wrong about that?

11 MR. KIESER: There were some negotiations between  
12 Mr. Koontz and the water district about maybe the  
13 possibility of him being able to develop a smaller portion  
14 of his land in exchange for some other - - -

15 JUDGE HALLIGAN: So - - - so your view is that  
16 Koontz stands for the proposition that - - - that money  
17 alone, no suggestion of an easement, is a taking? I - - -  
18 I read, I guess, the - - - the - - - particularly the  
19 concurrences in - - - in Sheetz as suggesting that's an  
20 open question before the U.S. Supreme Court.

21 MR. KIESER: Koontz, in my view, decided that  
22 question. That's the reason that the court granted cert in  
23 Koontz, because the Florida Supreme Court had held that  
24 monetary exactions did not trigger Nollan/Dolan scrutiny.  
25 The court granted cert on the question of - - -

1 JUDGE HALLIGAN: So what do you make of the - - -  
2 of the concurrences in Sheetz then? What are they getting  
3 at, if - - - if not to suggest that that's an open  
4 question?

5 MR. KIESER: I think - - - I mean, Justice  
6 Kavanaugh's concurrence, as far as the - - - the class of  
7 properties question, I think that goes to the rough  
8 proportionality inquiry of to what extent do you have to  
9 defer to a legislative, like, fee schedule and - - - but -  
10 - - but the - - - the predicate question of whether Nollan  
11 and Dolan applies to - - -

12 JUDGE HALLIGAN: Well, I think Justice  
13 Sotomayor's concurrence, I think, says that the question  
14 presented here doesn't include the antecedent question  
15 whether the traffic impact fee would be a compensable  
16 taking if imposed outside the permitting context and could  
17 therefore trigger Nollan/Dolan scrutiny. Maybe you read  
18 that differently, but I read that as suggesting that  
19 question is open.

20 MR. KIESER: Perhaps that was her view. I think  
21 that Koontz is - - - is clear that the reason that the case  
22 was - - - was even taken in the first place in the Supreme  
23 Court was to - - -

24 JUDGE HALLIGAN: Well, it's hard to know - - -

25 MR. KIESER: - - - answer that question.

1 JUDGE HALLIGAN: It's hard to know why the court  
2 takes - - - takes a case, I assume. I'm not sure that can  
3 be dispositive of the scope of its ruling.

4 MR. KIESER: That was the question presented,  
5 Your Honor, because the Florida Supreme Court had held  
6 specifically that monetary exactions are not subject to  
7 Nollan/Dolan. And then when you read the majority opinion  
8 in Koontz, it's clear that it's an application of Justice  
9 Kennedy's concurrence from Eastern Enterprises. And the -  
10 - - the - - - the thing that makes the monetary obligation  
11 a taking in the exactions context is that it is connected  
12 to a discrete property interest. It burdens - - -

13 JUDGE HALLIGAN: Do you - - -

14 MR. KIESER: - - - that property interest.

15 JUDGE HALLIGAN: Do you think that you could have  
16 brought a due process claim challenging the amount of the  
17 fee as disproportionate to, you know, any - - - any  
18 reasonable metric?

19 MR. KIESER: I - - - I suppose that's possible.  
20 The standards for due process are different, but - - - and  
21 that's not how this case proceeded.

22 JUDGE HALLIGAN: Uh-huh.

23 MR. KIESER: But I suppose that that's possible.  
24 But I think in - - - Koontz applies that Eastern  
25 Enterprises standard from Justice Kennedy's concurrence,

1 which is controlling. And it's - - - that - - - that's the  
2 connection.

3 JUDGE CANNATARO: So let me ask you then, if it's  
4 - - - if it's about the burden on the property interest,  
5 what is the existing property interest that's burdened by  
6 this fee?

7 MR. KIESER: Well, first, I would point out that  
8 in Nollan/Dolan, Koontz, and Sheetz, and in - - - and in  
9 fact, in any other unconstitutional conditions case outside  
10 of the land-use context, the government always has the  
11 discretion - - - it's assumed that the government has the  
12 discretion - - - to deny the permit. And so whenever a  
13 permit is granted, it's an expansion of your - - - your  
14 rights. For instance, the - - - the property owner - - -

15 JUDGE CANNATARO: But there's no permit at issue  
16 in this case, is there?

17 MR. KIESER: Well, the - - - the JLWQA residents  
18 need a permit to convert - - - according to the City, they  
19 need a permit to convert their use from JLWQA artist  
20 housing into general residential.

21 JUDGE CANNATARO: Right. But this is not - - - I  
22 mean, I guess - - - maybe this is just a question of logic,  
23 but they're not telling anyone they have to do that.  
24 They're - - - they're just saying this is - - - this is how  
25 you convert the status of your property.

1 JUDGE RIVERA: It doesn't diminish the value.

2 MR. KIESER: In fact - - - well - - -

3 JUDGE RIVERA: Or do you think it diminishes the  
4 value?

5 MR. KIESER: No, I think that every permit - - -  
6 and I think Koontz says this - - - addresses this at - - -  
7 at page 605 of the opinion - - - every permit is extremely  
8 valuable to the permit applicant, and that's why the permit  
9 applicant would want the permit in the first place. The  
10 thing that creates the leverage for the government to  
11 actually impose an unconstitutional condition is that - - -  
12 is that the permit is so valuable that an applicant might  
13 be willing to pay something far beyond nexus and  
14 proportionality to receive it. And that's - - - that's why  
15 Nollan and Dolan exists as a safeguard to - - -

16 JUDGE CANNATARO: But I'm - - - I'm still  
17 struggling with it because you - - - you don't have to  
18 change the - - - the status of your property. You can  
19 continue to keep the property with the existing  
20 restrictions on it, and thereby, avoid the fee. No one has  
21 diminished the value of your property.

22 MR. KIESER: For one, Your Honor, that's true  
23 until you want to transfer or bequeath it. So some of  
24 these people, you know, when they die, that - - - that - -  
25 - and they want to bequeath it to someone, that's going to

1           happen - - -

2                   JUDGE CANNATARO: But that would be the same  
3           group of people - - - whoever you could bequeath it or  
4           transfer it to would be the same population that you  
5           could've before this entire regime was put in place.

6                   MR. KIESER: Because of the lack of certified  
7           artists, the - - - the chances of being able to transfer  
8           the property to a certified artist are fairly minimal, at  
9           this point. But I would just point out also - - -

10                   JUDGE CANNATARO: That's a - - - that's a  
11           statement about the economic conditions present in the  
12           City, but I don't understand - - - I don't quite understand  
13           how that informs this question.

14                   MR. KIESER: I think, when it comes down to it,  
15           it really doesn't matter whether it's mandatory or  
16           voluntary, because of course, the permit - - - the property  
17           owner in - - - in Nollan didn't have to build a single-  
18           family home. The property - - -

19                   JUDGE TROUTMAN: But if you took the property, in  
20           the first place, with a restriction, and you don't have to  
21           switch it, why is it different?

22                   MR. KIESER: Every single one of these cases,  
23           Your Honor, involves a permit application which could be  
24           denied, and that's the - - - that's the - - - that's the  
25           underlying fact about these cases.

1 JUDGE RIVERA: Well, but the difference here is  
2 that the individuals who would seek this permit and don't  
3 want to pay this fee, don't - - - excuse me - - - had an  
4 interest that did not include the tremendous increase in  
5 fair market value that they are looking for. That's the  
6 difference, right?

7 MR. KIESER: I - - - I - - - I don't think it  
8 really is because in - - - in any - - - in any of these  
9 land-use cases, they - - - the permit is required to do  
10 whatever the applicant wants to do. So when the applicant  
11 in Nollan wants to build his single-family home, he had to  
12 apply for that permit or else he was not going to be able  
13 to do it. And the Supreme Court assumed that the Coastal  
14 Commission - - -

15 JUDGE RIVERA: This is not changing it from - - -  
16 into a - - - from a single-family home to a two-family  
17 home. It's changing the essence of the actual interest.  
18 The interest is a very limited interest.

19 MR. KIESER: I think that any of these permits -  
20 - - I mean, and if you go even to the welfare cases and  
21 other unconstitutional conditions cases, the same thing is  
22 true that - - - that the interest is not something that one  
23 had before, and the permit could be denied.

24 JUDGE RIVERA: I got a fee, simple. I want to  
25 change it to a two-family house. They don't have that.

1 They have a - - - a very restricted residence.

2 MR. KIESER: And I would also point out, as a  
3 matter of fact, that - - -

4 JUDGE RIVERA: And they can still profit off of  
5 it.

6 MR. KIESER: - - - that the City - - -

7 JUDGE RIVERA: They just still have to maintain  
8 that restriction on it. What they are looking for is to  
9 remove a restriction, and so they say, all right, we'll - -  
10 - we'll - - - we've finally decided we're going to allow  
11 that. We're going to lift the restriction. But we - - -  
12 we need you to pay this fee to do that.

13 MR. KIESER: And this - - - this actually kind of  
14 leads into nexus and proportionality because - - -

15 JUDGE RIVERA: Okay.

16 MR. KIESER: - - - the - - - the fee that they're  
17 asking - - -

18 JUDGE RIVERA: Yes.

19 MR. KIESER: - - - the JLWQA residents to pay, it  
20 doesn't have any relationship to what - - -

21 JUDGE HALLIGAN: Can - - - can we go back to  
22 Koontz for just a minute, before - - -

23 MR. KIESER: Sure.

24 JUDGE HALLIGAN: - - - you turn to that? So - -  
25 - so Koontz says that the fulcrum of the case is the link

1           between - - - the direct link between the government's  
2           demand and a specific parcel of real property, right, and  
3           also says explicitly that it is beyond dispute that taxes  
4           and user fees are not takings.

5                        So what I'm trying to understand is why should we  
6           not think about what we have here as a user fee because  
7           it's not tied to a specific parcel of property, right? It  
8           - - - I - - - my understanding is it's true across the  
9           district. And if the concern is that it is completely out  
10          of whack with anything reasonable, and that may be a  
11          colorable argument, that - - - that - - - that can properly  
12          be vindicated as a due process concern.

13                      MR. KIESER: Your Honor, for each one of these  
14          properties, it is tied to a specific property. For each  
15          one of these 1,636, they each need a permit.

16                      JUDGE HALLIGAN: But not - - - not in the way - -  
17          - I don't think - - - Koontz is. That's what I - - - what  
18          I am - - - am struggling with. It seems to me that, in  
19          Koontz, we have - - - maybe I'm miss - - - I'm missing  
20          something, but in Koontz, I thought we have a specific  
21          parcel of property. And initially, the municipality - - -  
22          I forget what the exact entity is. You probably remember.  
23          But the municipality says, okay, maybe you could give us an  
24          easement. Maybe you could give us a lot of money. But - -  
25          - but it's clearly focused on that specific strip.

1           And I thought that what we have here, by  
2           comparison, is a broad requirement that a fee be paid, that  
3           is high, for a conversion across all properties that  
4           qualify in the district.

5           MR. KIESER: Your Honor, the question of whether  
6           it applies to one or all properties, that's the ad hoc  
7           administrative versus legislative exactions question that  
8           Sheetz answered. So it doesn't - - - but in each  
9           individual one - - -

10          JUDGE HALLIGAN: Sheetz leaves open, as I think  
11          you just - - - just said a few minutes ago, the question of  
12          what kind of scrutiny might apply and how to treat - - -  
13          you know, how - - - how to treat if - - -

14          MR. KIESER: That's true, but in this case, we  
15          don't need to get to that because, as the City's - - - the  
16          record demonstrates on its own, there's actually really no  
17          impact of these conversions that can be attributed to the  
18          JLWQA residents themselves. And in fact, the City wants  
19          the JLWQA designation to go away. That was the whole  
20          purpose of the rezoning. The only reason to keep it the  
21          way it is is so that they could require the JLWQA residents  
22          to then contribute to the Arts Fund fee in exchange for a  
23          conversion.

24          But the long-term purpose of the rezoning is to  
25          increase residential use in SoHo and NoHo, and getting rid

1 of the restriction furthers that goal. So the only reason  
2 to keep it in place, in the first place, would be to use it  
3 as a means to transfer the cost of this Arts Fund to pay  
4 into public art from the public as a whole to these 1,636  
5 residents. And that's why the Arts Fund fee violates  
6 Nollan and Dolan.

7 JUDGE RIVERA: Well, there is residential use. I  
8 mean, we're not talking about changing a commercial edifice  
9 to a residential edifice. It is residential use.

10 MR. KIESER: Well, I'd also note that to convert  
11 to commercial, there's no fee. And so that's - - - that's  
12 another aspect of this. But the - - - the whole - - - the  
13 - - -

14 JUDGE RIVERA: Well, your red light is on. Can  
15 you just quickly address the Dolan/Nollan perhaps more  
16 directly?

17 MR. KIESER: Sure. As far as nexus is concerned,  
18 there's - - - there's no, as the First Department correctly  
19 held, there's no relationship between what the - - - the  
20 Arts Fund exaction and artist housing. And in fact, the  
21 record even says the Arts Fund is not intended to replace  
22 the loss of space for art in SoHo and NoHo.

23 JUDGE RIVERA: But what - - - what if - - - what  
24 about their point that, yes, housing is part of what these  
25 restrictions were intended to achieve, housing for artists,

1 but it was intended to do more than that. The reason you  
2 wanted the housing for the artist is to create a - - - a  
3 nourishing environment where artists could flourish, where  
4 artwork and the culture would flourish. And there are  
5 other ways to also achieve that beyond creating artist  
6 housing. Why - - - why isn't that enough?

7 MR. KIESER: I think that's kind of the argument  
8 the Supreme Court was presented with in Nollan, when it  
9 came to access to the beach, because if you recall Nollan,  
10 the point of the - - - the Coastal Commission said it could  
11 deny the permit there because it would - - - the house  
12 would obstruct views. And then it said, well, you can have  
13 your permit if you give us an easement.

14 The easement didn't have anything to do with  
15 views. It had something to do with the broad concept of  
16 beach access, but it didn't have anything to do with the  
17 specific thing that the Coastal Commission actually wanted  
18 to deny the permit for. So here, the reason to deny a  
19 conversion permit, to the extent there is one, would be to  
20 preserve housing for artists. But the Arts Fund fee  
21 doesn't actually help to do that. And in fact, it's not  
22 going to be spent in SoHo and NoHo anyway.

23 And so when you - - - when you add that to the  
24 fact that as the First Department correctly held, there's  
25 no evidence of negative impacts on certified artists. And

1 there's no externalities here to mitigate because the City  
2 wants to get rid of J1WQA, and that's the whole purpose of  
3 the rezoning, to increase residential use and to sort of  
4 get rid of this outdated industrial use compromise from  
5 1971.

6 And so for those reasons, I ask that you affirm  
7 the judgment of the First Department. Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 JUDGE RIVERA: So why isn't he correct that it's  
10 all about just increasing residential use, not really about  
11 supporting artists?

12 MR. SCHOEPP-WONG: Well, I think that my friend  
13 on the other side misconstrues what the purpose of the  
14 artist restriction is in this case. He focuses on the  
15 housing piece, but that is clearly a secondary aspect of  
16 what the restriction was meant to do.

17 If we look at MDL 275 and we look at the City  
18 Planning Commission reports and all of the reports leading  
19 up to the determination of the fee, it was about preserving  
20 the public presence of the arts. It was about ensuring  
21 that art and artists could - - - could work in the City,  
22 could make art within the City. That was the primary  
23 purpose, according to the law, under MDL 275, for this  
24 restriction. So this is nothing like Nollan.

25 JUDGE RIVERA: So how does the fee achieve that

1 goal?

2 MR. SCHOEPP-WONG: So the fee achieves that goal  
3 because it can be used for grant - - - grant-making  
4 purposes, for artistic programming - - - programming. It  
5 can also be used for purchasing facilities, for purchasing  
6 artistic space and renovation for artistic space in - - -  
7 in the Lower Manhattan. So that directly advances the  
8 purpose of - - -

9 JUDGE RIVERA: City could have done that before  
10 without designating housing for artists.

11 MR. SCHOEPP-WONG: I think that what we have to  
12 remember, both in terms of the genesis of this restriction  
13 as well as what the City is trying to do here, was to  
14 balance competing concerns. That's - - - that's the  
15 hallmark of - - - of zoning - - - zoning law and what the  
16 City's purposes are here.

17 So when the artistic restriction was first  
18 conceived, it was to balance the manufacturing uses and the  
19 industrial uses and the - - - these vacant - - - these  
20 vacant spaces that artists were using to create their art.  
21 It was not to create a housing program. It was to ensure  
22 that the - - - that the - - - the community as it existed  
23 then advanced the City's needs and in terms of what the - -  
24 - what the actual community was there - - -

25 JUDGE RIVERA: So housing was secondary. You

1 just want to create an artist space, and they may live in  
2 that space also. Is that what you mean?

3 MR. SCHOEPP-WONG: That's right, Your Honor. So  
4 - - - and then when we look at the Arts - - - Arts Fund  
5 fee, again, we see this - - - a similar compromise here.  
6 We see that there are multiple competing interests. There  
7 are people that want to increase/expand artistic  
8 restrictions, artistic housing. There are people that want  
9 to remove it entirely.

10 And so what the City did here, and - - - and  
11 reasonably so, was to balance those interests by  
12 establishing this fee that provided a pathway to empower  
13 our property owners to decide whether they wanted to remove  
14 this restriction, but conditioning that on the mitigation  
15 of the impacts of doing so.

16 JUDGE CANNATARO: But you don't dispute that the  
17 Arts Fund fee doesn't create any artist housing, right?

18 MR. SCHOEPP-WONG: No, it doesn't - - - and it  
19 doesn't have to, Your Honor. What it has to do, it has to  
20 advance a consistent purpose. And I would point to this  
21 court's decisions in Consumers Union and Twin Lakes.

22 Consumers Union, there was a nonprofit insurer  
23 that was converting to a for-profit. And the question  
24 wasn't whether the funds there were going to be used for -  
25 - - to create another nonprofit insurer. They were going

1 to be used to advance the purposes of the original - - - of  
2 the original entity.

3 Twin Lakes, the same thing, you have a - - - you  
4 have a 50 to \$100 impact fee for various development lots  
5 that could be used for broad recreational purposes, even  
6 though the concern is part - - -

7 JUDGE GARCIA: Counsel, your red light is on.

8 Could we just get back to Koontz for one minute?  
9 And I think this discussion with your opposing counsel and  
10 Judge Halligan, I think there are things in Koontz that can  
11 support a reading of tying it to an easement, but as I read  
12 Koontz to the end, it seems that that holding is getting  
13 broader and broader.

14 And I think as you were going to say in the very  
15 beginning, way back of your presentation, one of the  
16 reasons this isn't a taking is because it's a monetary fee.  
17 It's the equivalent of a monetary fee. I don't want to put  
18 words in your mouth, but something to that - - - along the  
19 lines of Koontz is tied to an easement.

20 But the holding of Koontz, at the very end is,  
21 "We hold that the government's demand for property from a  
22 land-use permit applicant must satisfy the requirements of  
23 Nollan/Dolan when the government denies the permit and even  
24 when it demand - - - when its demand is for money", right,  
25 stop.

1           And then Justice Kagan, picking up on the  
2 possible implications, I think, of that holding, says, "The  
3 majority extends Nollan and Dolan to cases in which the  
4 government conditions a permit not on the transfer of real  
5 property, but instead on the payment or expenditure of  
6 money". So clearly, Justice Kagan, dissenting from that  
7 holding, which uses broad language and is not tied to an  
8 easement, seems to suggest that Koontz covers a monetary  
9 fee, to me.

10           MR. SCHOEPP-WONG: I'll acknowledge that there -  
11 - - there is some broad language in Koontz. But I think  
12 that what's important is that the majority opinion in that  
13 case walked back its determination by emphasizing that - -  
14 - that the - - - that the decision had nothing to do with  
15 user fees, taxes, and similar obligations. Those were  
16 still not takings, under the - - - the court's analysis.

17           So it was a response to Justice Kagan, a  
18 limitation on what the court was - - - was - - - was saying  
19 in this case, that it wasn't actually throwing out all  
20 monetary - - - monetary fees and saying that all of them,  
21 so long as a property owner had to pay - - -

22           JUDGE HALLIGAN: What's - - - what's the line  
23 that we're supposed - - - I'm sorry. I know your - - -  
24 your light is on. But what distinguishes one from the  
25 other? I think the majority's opinion in Koontz clearly

1 suggests that there are some monetary payments, which  
2 should be treated appropriately as a taking, and as you  
3 say, with the user fees, some that should not. How do we  
4 distinguish between them?

5 MR. SCHOEPP-WONG: So I think we just look at  
6 Koontz's reasoning, Your Honor. I think that Koontz was  
7 pretty clear on this point that what was motivating the  
8 decision there was this connection with the - - - with the  
9 easement that was being demanded, the dedication. So the  
10 in-lieu fee - - -

11 JUDGE HALLIGAN: But that's - - - that's not  
12 something, as I think Judge Garcia was suggesting, that is  
13 echoed in the concluding paragraph or so of the majority's  
14 opinion. So we should just read that - - - that into it or  
15 across the opinion; I take it?

16 MR. SCHOEPP-WONG: Well, I think that we have to  
17 read the opinion as a whole. There's that aspect that the  
18 concern, this anticircumvention concern, that the - - -  
19 that the government here was exacting a functional easement  
20 by tying it to this - - - tying the fee to this demand for  
21 a larger dedication of property. And I would just, you  
22 know, dispute this characterization of the Florida courts.  
23 The Florida courts may have said that this was just a  
24 monetary exaction. I think Koontz was very clear that it  
25 was not just a monetary - - -

1 JUDGE GARCIA: Sheetz is a monetary exaction, you  
2 would agree, right, the traffic impact fee not tied to a  
3 property interest?

4 MR. SCHOEPP-WONG: There's no indication that  
5 there's - - - tied to a property interest in the same way.

6 JUDGE GARCIA: And when that went back to  
7 California, the mid-level appeals court found that it was a  
8 taking.

9 MR. SCHOEPP-WONG: The mid-level appeals court  
10 upheld it, based on the, it satisfying Nollan and Dolan, so  
11 - - -

12 JUDGE GARCIA: So they had to get through the  
13 takings part of that first?

14 MR. SCHOEPP-WONG: They - - - they did.

15 JUDGE GARCIA: And I think they applied Koontz  
16 and said it was a taking.

17 MR. SCHOEPP-WONG: They did, Your Honor. And so  
18 you know, I think that there is a dispute on this,  
19 certainly, but I think that is a misreading of Koontz.

20 JUDGE HALLIGAN: And I believe that the  
21 California Supreme Court may have vacated that intermediate  
22 appellate court decision. I'm not sure. Maybe you know.

23 JUDGE GARCIA: I think they disappeared it. I  
24 think they said it - - -

25 MR. SCHOEPP-WONG: They - - -

1 JUDGE GARCIA: - - - had no precedential value.

2 MR. SCHOEPP-WONG: They - - - they unpublished  
3 it, I think. And under California - - -

4 JUDGE HALLIGAN: Whatever that means.

5 MR. SCHOEPP-WONG: - - - under California law, I  
6 think that means it cannot be cited, so. But I think  
7 that's - - -

8 JUDGE GARCIA: That applies to litigants only.

9 JUDGE HALLIGAN: But it suggests there's an open  
10 question that - - - that - - - that is before us.

11 MR. SCHOEPP-WONG: I - - - I think that's right  
12 to the - - - to the - - - to the extent that there is broad  
13 language in Koontz. But I think that Koontz's reasoning  
14 and the majority's response to the dissent's assertion that  
15 this removed all monetary fees from - - - from - - - or it  
16 applied Nollan and Dolan to all monetary fees, the court -  
17 - - the court pushed back on that characterization.

18 So I think the - - - that the dissent was wrong,  
19 ultimately, in that assessment because Koontz made very  
20 clear that there were pure monetary obligations and left  
21 for another day what that line was going to be. And I  
22 submit, based on the court's reasoning in that case, the  
23 line is whether it is - - - if there's a per se taking  
24 involved. That's - - - that's what - - - that's the  
25 determination here that was important here in terms of what

1 the fee was doing.

2 It was connected to this, you know, serious  
3 infringement of property rights in terms of, you know,  
4 dedicating a piece of land for public purposes to the  
5 government. So I think that that intrusion is what was  
6 really motivating the court there. And that's why the fee  
7 looked like something different than all of the other fees  
8 that courts have - - -

9 JUDGE RIVERA: And - - - and here there's no per  
10 se taking because it's just turning over money. And if you  
11 choose not to do that, it's your choice. You keep all the  
12 rights you had before the opportunity to convert, correct?

13 MR. SCHOEPP-WONG: That's - - - that's right.

14 JUDGE RIVERA: Is that - - - is that the way you  
15 see it?

16 MR. SCHOEPP-WONG: That - - - that - - - that's  
17 right, Your Honor. And I think that, you know, there's no  
18 takings claim in this case. They've - - - they've  
19 acknowledged that there is - - - or pardon me. There's no  
20 regulatory takings claim in this case. They've  
21 acknowledged that it doesn't apply here, but that - - -  
22 that framework still could be applied in an appropriate  
23 case. It's just the same as due process, same as equal  
24 protection. Just because the - - - the Nollan/Dolan  
25 analysis doesn't apply doesn't mean that there are just no

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- - - no - - - nothing constraining the government's role  
in this.

CHIEF JUDGE WILSON: Thank you.

MR. SCHOEPP-WONG: Thank you, Your Honor.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Joey Oliveros, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Coalition for Fairness v. City of NY, No. 112 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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