Case No: 21-6179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES KNIGHT AND JASON MAYES,

Plaintiffs - Appellants,

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,

Defendants - Appellees.

Appeal from the United States District Court of
Tennessee, Middle District
No. 3:20-cv-00922, Hon. Aleta A. Trauger, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, AND REASON FOUNDATION IN SUPPORT OF APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 21-6179 Case Name: Knight v. Nashville

Name of counsel: Daniel T. Woislaw, Pacific Legal Foundation

Pursuant to 6th Cir. R. 26.1, Amici Curiae Pacific Legal Found., Cato Inst. and Reason Found.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on Feb. 22, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Daniel T. Woislaw
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a), Pacific Legal Foundation (PLF), the Cato Institute, and Reason Foundation submit this brief amicus curiae in support of Appellants James Knight and Jason Mayes.[1]

PLF was founded over 45 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). PLF has extensive experience with the questions at issue in this case. As lead counsel, PLF attorneys have represented property owners in the unconstitutional conditions cases of *Ballinger v. City of Oakland*, __ F.3d __, 2022 WL 289180 (9th Cir. Feb. 1, 2022), *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF submitted

[1] Rule 29(E) statement: All parties were timely notified of the filing of this brief. Appellants have consented to its filing and respondents indicated that they would not oppose the motion for leave to file the amicus brief. No part of this brief was authored by any party's counsel; no person or entity other than amici curiae funded its preparation or submission.

amicus briefs in support of the petitioner in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and the property owner in *McClung v. City of Sumner*, 548 F.3d 1219, 1227–28 (9th Cir. 2008), *abrogated by Koontz*, 570 U.S. at 603.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual Cato Supreme Court Review.

Reason Foundation is a national, nonpartisan, nonprofit think tank founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports.

In filing this brief in support of Appellants, amici urge this Court to hold that legislatively mandated exactions are subject to the "essential nexus" and "rough proportionality" tests established in *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374. Without meaningful judicial scrutiny of legislative exactions, municipalities have

engaged in widespread abuse of the land-use permitting process to exact money from applicants to fund a variety of unrelated public interests. Adopting the rule articulated by the district court below would undermine private property rights by allowing such abuse to continue unchecked.

ISSUE ADDRESSED BY AMICI CURIAE

Whether a generally applicable regulatory requirement that a property owner dedicate real and/or personal property as a condition of approval for a building permit is subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz*, 570 U.S. 595; *Dolan*, 512 U.S. 374; and *Nollan*, 483 U.S. 825.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises a critically important question concerning the limits that the doctrine of unconstitutional conditions places on a local government's authority to enact laws that use the land-use permit process to exact private property without compensation. At issue is a Nashville and Davidson County (collectively, Metro) sidewalk ordinance that directs permitting officials to condition issuance of residential building permits upon the owner dedicating real and personal property to the public, regardless of whether a sidewalk can or will be installed on the property. In *Nollan* and *Dolan*, however, the U.S. Supreme Court held that the doctrine of unconstitutional conditions, as specially applied to land-use permitting, requires that exactions be directly and proportionately related to the impact of the

proposed use of property. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 385, 391; *Koontz*, 570 U.S. at 604–05. A permit condition that does not satisfy the Court's two-part "essential nexus" and "rough proportionality" test is unconstitutional and invalid. *Id*.

The district court below correctly concluded that, if the doctrine applied to the challenged sidewalk conditions, Metro's exactions would likely fail the nexus and proportionality tests because the exactions are imposed automatically and without any consideration of project impacts and/or whether the properties could hold a sidewalk. *Knight v. Metropolitan Gov't of Nashville and Davidson Cty.*, No. 3:20-cv-00922, 2021 WL 5356616, at *11 (M.D. Tenn. Nov. 16, 2021). That conclusion is supported by several recent appellate decisions evaluating the constitutionality of similar permit conditions. *See Puce v. City of Burnsville*, __ N.W.2d __, 2022 WL 351119, at *8 (Minn. Ct. App. Feb. 7, 2022) (ruling that a park impact fee violated proportionality because the amount exacted was set by a generally applicable formula and did not, therefore, consider project impacts); *Church of Divine Earth v. City of Tacoma*, 194 Wash. 2d 132, 139 (2019) (holding that the city failed to meet burden of demonstrating its sidewalk right-of-way condition satisfied nexus and proportionality); *Mira Mar Dev. Corp. v. City of Coppell, Tex.*, 421 S.W.3d 74, 87 (Tex. App. 2013) (concluding the city must

compensate a developer for a legislatively mandated condition requiring it to dedicate property and install a sidewalk at an offsite location).

But instead of following the Supreme Court, which has never limited the doctrine's application to only certain kinds of conditions or government actions, *e.g.*, *Cedar Point*, 141 S. Ct. at 2079, the district court followed a now-repudiated Ninth Circuit rule that had categorically exempted exactions originating in the legislative branch from the heightened scrutiny demanded by the doctrine of unconstitutional conditions. *Knight*, 2021 WL 5356616, at *10–*11. (citing *McClung*, 548 F.3d at 1227–28, *abrogated by Koontz*, 570 U.S. at 603, *and disagreed with by Ballinger*, 2022 WL 289180, at *8–*9). By adopting the Ninth Circuit's repudiated rule, the decision below departs from the text of the Constitution and Supreme Court precedent and must be reversed.

ARGUMENT

I.

THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS LIMITS GOVERNMENT POWER IN LAND-USE PERMITTING WITHOUT LIMITATION TO ANY PARTICULAR CONTEXTS OR GOVERNMENT AGENCIES

The legislative origin of a property exaction provides a wholly inappropriate basis upon which to deny a person the fundamental protections guaranteed by the Just Compensation Clause, as specially enforced by *Nollan*, *Dolan*, and *Koontz*. Indeed, the Supreme Court has strongly cautioned courts against creating

categorical or contextual exceptions in property rights cases, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012), and has firmly rejected any suggestion that an individual's constitutional rights will wax and wane based on the particular branch of government that is taking one's property. *Cedar Point*, 141 S. Ct. at 2072 (The question "whether the government action at issue comes garbed as regulation" does not determine whether a taking has occurred); *Horne v. Dep't of Agriculture*, 576 U.S. 350, 369 (2015) (There is no "generally applicable exception to the usual compensation rule."); *see also Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (emphasizing that the Takings Clause is unconcerned with which "particular state actor is" burdening property rights); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (holding that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may" take money without compensation). Thus, there is no basis in the Fifth Amendment or Supreme Court precedents to support the lower court's decision.

A. *Nollan* and *Dolan* Established a General Test for Identifying Unconstitutional Conditions Imposed on the Exercise of a Property Right

The *Nollan/Dolan/Koontz* doctrine supplies a general test for evaluating conditions imposed on the use of property, not a test limited to particular contexts or government agencies. *See Cedar Point*, 141 S. Ct. at 2079 (observing that the

tests apply "[w]hen the government conditions the grant of a benefit such as a permit, license, or registration"). Specifically, the doctrine requires that a government-imposed condition demanding that the owner surrender an interest in real or personal property be directly and proportionately related to the impact of the desired property use. *Koontz*, 507 U.S. at 604–05; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right … to receive just compensation when property is taken for a public use in exchange for a discretionary benefit [that] has little or no relationship to the property."). This doctrine supplies a balanced method for gauging the constitutionality of conditions placed on the exercise of private property rights. While government may impose conditions to mitigate for the negative externalities of a proposed use, it may not use the permit process as an opportunity to force owners into surrendering real or personal property to some unrelated public use. *Koontz*, 570 U.S. at 604 (the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."); *see also Dolan*, 512 U.S. at 390 (explaining that the nexus and proportionality tests are designed to distinguish such "an appropriate exercise of the police power" from "an improper exercise of eminent domain.") (quoting *Simpson v. North Platte*, 206 Neb. 240, 245 (1980)).

Consistent with this understanding, the Supreme Court has repeatedly rejected attempts to limit the *Nollan* and *Dolan* tests to only certain kinds of conditions or government actions. In *Nollan*, for instance, the Court applied the doctrine to invalidate a generally applicable, regulatory public-access condition that had been placed on Mr. Nollan's coastal development permit. *Nollan*, 483 U.S. at 828–30 (noting that the condition was required by California Coastal Act and California Public Residential Code); *see also id*. at 859 (Brennan, J., dissenting) (discussing the regulatory condition's application to all new permits). In so doing, the Court rejected the dissent's insistence that the condition constituted a discretionary legislative act and should therefore be subject only to minimal rational basis scrutiny. *Id*. at 848 ("The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens."). The majority opinion explained that ordinary deference is inappropriate where the government makes "the actual conveyance of property … a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the [actual] purpose is avoidance of the compensation requirement, rather than the stated police-power objective." *Id*. at 841.

In *Dolan*, the Court applied the doctrine to invalidate generally applicable regulatory conditions placed on a permit to expand a hardware store. 512 U.S. at 377–78; *id*. at 378 (The city's development code "requires that new development

… dedicate[e] land for pedestrian pathways."); *id*. at 379 ("The City Planning Commission ... granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). In so doing, the Court rejected the dissent's claim that the commercial context of Ms. Dolan's proposal should immunize the permit conditions from the doctrine.[2] *Id*. at 392 ("[S]imply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights."). The Court also rejected the dissent's insistence on application of the doctrine to generally applicable regulatory conditions would interfere with the "necessary and traditional breadth of municipalities' power to regulate property development," *id*., 512 U.S. at 407 n.12 (Stevens, J., dissenting), explaining that the nexus and proportionality tests are designed to distinguish such "an appropriate exercise of the police power" from "an improper exercise of eminent domain."[3] *Dolan*, 512 U.S. at 390 (quoting *Simpson*, 206 Neb. at 245).

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[2] *See Dolan*, 512 U.S. at 402 (Stevens, J., dissenting).

[3] In its Supreme Court briefing, the City of Tigard argued that the legislative origin of Tigard's permit conditions shields the exactions from *Nollan* scrutiny. *See* Brief for Respondent, *Dolan v. City of Tigard*, 1994 WL 123754, at *24–*25 (U.S. Feb. 17, 1994); Brief for Petitioner, 1994 WL 249537, at *30–*35, (U.S. Jan. 13, 1994). The City insisted that legislative exactions of this sort should be given broad deference and presumed constitutional, subject only to rational basis review. *Id*. The Supreme Court rejected that argument, holding that the government bears the burden of showing that its permit condition satisfies the nexus and proportionality requirements. *Dolan*, 512 U.S. at 391. In an accompanying footnote, the Court explained that the legislature is not entitled to deference where its actions impinge

In *Koontz*, the Court held that a generally applicable regulatory condition requiring the property owner to pay a fee in lieu of a property dedication as a condition to clear and grade his land was subject to the nexus and proportionality tests. 570 U.S. at 612; *see also id*. at 600–01 (noting that the conditions were mandated by Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984). Again, in reaching this conclusion, the Court rejected an argument seeking to limit the doctrine's application to only certain species of property demands. *Id*. at 612 (noting the dissent's claim that money demands "can never provide the basis for takings claims."). The Court also rejected the government's attempt to place contextual limitations on the doctrine. *Id*. at 607 (reversing state court's conclusion that *Nollan* and *Dolan* apply only to conditions subsequent, not to conditions precedent).

And in *Cedar Point*, the Court once again turned away arguments seeking to limit application of the doctrine. 141 S. Ct. at 2086–87 (Breyer, J., dissenting) (claiming that, for the doctrine to apply, the permit condition should result in a total deprivation of the property interest). Consistent with its prior opinions, the Court held that *Nollan* and *Dolan* established a generally applicable test that controls

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on a fundamental right. *Id*. n.8 (citing *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977)). It is beyond question that the Just Compensation Clause codifies a fundamental right. *Knick*, 139 S. Ct. at 2170 (property rights are among the fundamental rights protected by the Bill of Rights).

"[w]hen the government conditions the grant of a benefit such as a permit, license, or registration." 141 S. Ct. at 2079. The Supreme Court's precedents do not support categorical exclusion for legislated exactions.

B. The Unconstitutional Conditions Doctrine Has Always Applied to Generally Applicable Regulatory Conditions That Compel the Surrender of Protected Rights

There is no basis, furthermore, in the Supreme Court's Just Compensation Clause jurisprudence for establishing categorical or contextual exceptions to its application. The doctrine finds its roots in a series of mid-nineteenth century Supreme Court cases responding to a wave of protectionist state laws placing conditions on foreign companies seeking permission to do business in the state.[4] *See*, *e.g.*, *Lafayette Ins. Co v. French*, 59 U.S. 404, 407 (1855) (invalidating a state statute conditioning business license for out-of-state companies on a waiver of the right to remove lawsuits to federal court). As originally expressed by the Court, the doctrine holds that "the power of the state"—a formulation that expressly includes

[4] The Supreme Court has not limited the doctrine to any single constitutional provision—instead, it has applied the doctrine whenever the government conditions an approval (or the provision of a benefit) on an individual's surrender of a constitutional right. *See*, *e.g.*, *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (Fourth Amendment); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (Freedom of the Press); *Memorial Hosp. v. Maricopa County,* 415 U.S. 250 (1974) (Interstate Travel); *Perry v. Sindermann*, 408 U.S. 593 (1972) (Free Speech); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Freedom of Religion); *Speiser v. Randall*, 357 U.S. 513 (1958) (Free Speech); *Hanover Ins. Co. v. Harding*, 272 U.S. 494 (1926) (Commerce Clause); *W. Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910) (Due Process).

the legislature—"is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. Railroad Comm'n of State of Cal.*, 271 U.S. 583, 594 (1926); *see also Martin v. Hunter's Lessee*, 14 U.S. 304, 340 (1816) (The U.S. Constitution is "the supreme law of the land, and … every state shall be bound thereby."); *see also Terral v. Burke Const. Co.*, 257 U.S. 529, 532–33 (1922) ("[T]he sovereign power of a state … is subject to the limitations of the supreme fundamental law.").

This formulation of the doctrine embraces the default rule of deferring to legislative judgment by preserving states' discretion to plan for their communities through legislation, providing that the legislation does not impose conditions forcing individuals to surrender liberties secured by the Bill of Rights. Indeed, the Court has repeatedly explained that although state legislatures enjoy broad authority to attach conditions to licenses, permits or other benefits, this authority ends when the government conditions the issuance of a benefit upon a requirement that a person waive or surrender a constitutional right.[5] *Ivanhoe Irr. Distr. v. McCracken*,

[5] *See also* Richard A. Epstein, *Bargaining with the State* 5 (1993) (Even if the government has absolute discretion to grant or deny a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421–22 (1989) ("Unconstitutional conditions problems arise when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.").

357 U.S. 275, 294–95 (1958); *see also Lafayette*, 59 U.S. at 407 ("This consent [to do business] may be accompanied by such condition [a state] may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States."); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so").

Consistent with this understanding, the Supreme Court has routinely invalidated legislation that imposed unconstitutional conditions on individuals under a variety of constitutional provisions. *See*, *e.g.*, *Rumsfeld v. Forum for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006) (invalidating provisions of a federal statute conditioning the receipt of funding on law schools allowing military recruiters onto campus); *Miami Herald*, 418 U.S. 241 (holding that a state statute requiring newspapers to provide political candidate with free space to reply to any adverse newspaper articles is subject to the doctrine); *Memorial Hosp.,* 415 U.S. 250 (invalidating state statue requiring a year's residence in county as a condition to receiving medical care); *Sherbert*, 374 U.S. 398 (invalidating provision of state unemployment statute conditioning benefits on waiving one's religious practice); *Speiser*, 357 U.S. 513 (invalidating provision of state constitution requiring

individuals to swear an oath not to advocate for the overthrow of government as a condition to tax exemption benefits); *Frost & Frost Trucking*, 271 U.S. 583 (invalidating state law requiring out-of-state trucking company to dedicate personal property to public uses as a condition of permission to use state highways); *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]"). Indeed, the Court in *Dolan* expressly relied on *Marshall*, 436 U.S. 307, as it refuted the dissenting opinion's insistence that exactions imposed through neutral regulations did not warrant heightened scrutiny. *Dolan*, 512 U.S. at 392. *Marshall* invalidated a warrantless search condition placed on commercial businesses by the Occupational Safety and Health Act. *Marshall*, 436 U.S. at 323.

Although the unique nature of land-use regulation compelled the Supreme Court to devise a "special application" of the doctrine, the rationale for that application remains identical to that animating the broader doctrine: it polices against demands that fall outside states' constitutional authority while at the same time preserving the government's discretion to impose *lawful* conditions. *Koontz*, 570 U.S. at 604–05; *see also Nollan*, 483 U.S. at 841. And that rationale applies to all branches of government. The ultimate question the nexus and proportionality test answers is whether the government has used its land use authority to extort an

owner into surrendering a protected interest in property. That question must be answered with respect to conditions imposed on development in the context of neutrally applicable regulations just as it is for discretionary permitting. The nexus and proportionality tests are the proper tool for this task whether it is a bureaucrat or legislature making that demand.

C. The Nexus and Proportionality Tests Enforce a Constitutional Provision That Applies to All Branches of Government

The Supreme Court has repeatedly explained that the nexus and proportionality tests are designed to ensure that the government does not "thwart the Fifth Amendment right to just compensation" by using its permitting authority to coerce a landowner into surrendering a valuable property interest, without compensation, in order to secure the approvals necessary to use their property. *See*, *e.g.*, *Koontz*, 570 U.S. at 606. That explanation further compels the conclusion that the *Nollan/Dolan/Koontz* doctrine applies to generally applicable regulatory conditions, because the Just Compensation Clause of the Fifth Amendment binds the legislative branch just as strongly as it binds an executive branch agency. *Cedar Point*, 141 S. Ct. at 2072 (The question "whether the government action at issue comes garbed as regulation" does not determine whether a taking has occurred); *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (holding that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may" take money without compensation); *see also Stop the Beach Renourishment*, 560 U.S. at 713–

14 ("The Takings Clause … is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor.… There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation."). Thus, since the rights secured by the Fifth Amendment do not turn on the identity of the government actor, there is no constitutional basis for a court-created rule exempting legislatively mandated exactions from *Nollan*, *Dolan*, and *Koontz*. The district court's ruling to the contrary must be reversed.

II.

THE CURRENT SPLIT OF AUTHORITY IS TRENDING AGAINST A CATEGORICAL RULE EXCEPTING LEGISLATIVE EXACTIONS FROM THE DOCTRINE'S APPLICATION; THE NINTH CIRCUIT HAS REPUDIATED ITS LEGISLATIVE EXACTIONS RULE

A. Recent Supreme Court Decisions Reject the Historic Reasons Why Courts Divided on the Legislative Exactions Question

There is no basis in the historic split of authority on the legislative exactions issue to adopt a rule that is contrary to the Supreme Court's understanding of the doctrine—particularly in light of the Court's decisions in *Koontz*, *Pakdel v. City & Cty. of San Francisco,* 141 S. Ct. 2226 (2021), and *Cedar Point*. Prior to *Koontz*, the state and federal courts were deeply confused over whether the nexus and proportionality tests constituted a regulatory takings theory, a due process theory,

or fell under some other theory, resulting in a longstanding split of authority on whether legislatively mandated exactions fall within the purview of those constitutional doctrines.[6] *See*, *e.g.*, *McClung*, 548 F.3d at 1225 (concluding that *Nollan/Dolan* established a regulatory takings test); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011) (concluding that "the *Nollan–Dolan* land-use exaction claims [is] a 'sub-category' of physical per se takings"); *Douglass Properties II, LLC v. City of Olympia*, 16 Wash. App. 2d 158, 162 (2021)

[6] Prior to *Koontz*, the courts were deeply split on the legislative exactions question. *See Parking Ass'n of Ga., Inc. v. City of Atlanta, Ga.*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting from denial of certiorari) (recognizing a nationwide split of authority); *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari) (division has been deepening for over twenty years); *see also F.P. Dev., LLC v. Charter Twp. of Canton, Michigan*, 16 F.4th 198, 206 (6th Cir. 2021) ("There is an interesting question whether [a city's] application of [a legislative exaction] falls into the category of government action covered by *Nollan*, *Dolan*, and *Koontz*. But the parties do not raise it. And we decline to do so on our own accord."). Numerous state and federal courts held legislative exactions subject to the doctrine. *See*, *e.g.*, *Town of Flower Mound v. Stafford Estates Ltd.*, 135 S.W.3d 620, 641 (Tex. 2004); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355–56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998); *City of Portsmouth, N.H. v. Schlesinger,* 57 F.3d 12, 16 (1st Cir. 1995); *Northern Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Dev. Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994). Others did not. *See*, *e.g.*, *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 41 P.3d 87, 102–04 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

(concluding that *Nollan/Dolan* is a due process doctrine); *see also* Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 Neb. L. Rev. 348, 370–73 (1999) (discussing the doctrinal confusion). But, as the Ninth Circuit recognized in *Ballinger*, *Koontz* settled the doctrinal confusion by confirming that *Nollan* and *Dolan* involved a "special application" of the doctrine of unconstitutional conditions. *Ballinger*, 2022 WL 289180, at *8. And *Cedar Point* confirmed that the doctrine applies to generally applicable regulatory conditions. *Ballinger*, 2022 WL 289180, at *9. Current Supreme Court caselaw compels a conclusion that legislated exactions are subject to *Nollan*, *Dolan*, and *Koontz*.

B. The Ninth Circuit Now Agrees That Legislative Conditions Are Subject to *Nollan/Dolan/Koontz*

The district court's opinion should also be reversed because it relied on *McClung*, a Ninth Circuit decision that has since been repudiated by that court. *Ballinger*, 2022 WL 289180, at *8–*9. By way of brief background, *McClung* involved a *Nollan/Dolan* claim challenging an ordinance that required owners to upgrade substandard storm water pipes when redeveloping property. 548 F.3d at 1222–23. The owner argued the cost of complying with the ordinance was a *de facto* "impact fee" and should be reviewed as an exaction.[7] The city responded that, because the ordinance did not require the owner to relinquish real property,

[7] *Tapps Brewing Inc. v. City of Sumner*, 482 F. Supp. 2d 1218, 1229 (W.D. Wash. 2007).

Nollan/Dolan were inapplicable. The Ninth Circuit agreed, broadly concluding that a legislative, generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction," is subject to *Nollan* and *Dolan*.[8] *McClung*, 548 F.3d at 1222, 1225 (emphasis added). Although *Koontz* abrogated that decision by holding monetary exactions subject to the doctrine, the Ninth Circuit continued to rely on *McClung* as having established a categorical exclusion for generally applicable regulated conditions. *See*, *e.g.*, *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1162 (9th Cir. 2020).

The Ninth Circuit, however, has since repudiated that rule based on the U.S. Supreme Court's summary reversal in *Pakdel,* 141 S. Ct. at 2229 n.1, in which the Court vacated the Ninth Circuit's decision and directed it to consider the merits of the claim that a regulatory condition requiring owners of a rental property to offer current tenants a lifetime lease as a condition of reoccupying their property violated

[8] In truth, *McClung* did not address the legislative exactions portion of that statement: "We are not confronted ... with a legislative development condition designed to advance a wholly unrelated interest [therefore we] do not address whether *Penn Central* or *Nollan/Dolan* would apply to such legislation." 548 F.3d at 1225 n.3. Properly read, *McClung* stands only for the well-settled rule that a condition that does not require a dedication of property does not constitute an exaction. *See Koontz*, 570 U.S. at 615. *McClung*, therefore, had no bearing here, where Metro permitting officials imposed a condition requiring that appellants dedicate real property and pay a fee in-lieu of sidewalk construction costs. *Nollan*, 483 U.S. at 837 (real property); *Koontz*, 570 U.S. at 612 (monetary exactions); *Horne*, 576 U.S. at 367 (fruits of one's labor).

Nollan/Dolan/Koontz consistent with *Cedar Point*. *See Ballinger*, 2022 WL 289180, at *8. Evaluating *Pakdel* and *Cedar Point*, the Ninth Circuit concluded that "any government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim." *Ballinger*, 2022 WL 289180, at *8. Thus, the Ninth Circuit repudiated its legislative exactions rule. *Id*. at *9 ("What matters for purposes of *Nollan* and *Dolan* is not who imposes an exaction, but what the exaction does, and the fact that the payment requirement comes from a city ordinance is irrelevant.") (cleaned up). The basis for the district court's ruling, therefore, has been rejected.

III.

THIS COURT'S RESOLUTION OF THE LEGISLATIVE EXACTIONS QUESTION WILL HAVE A PROFOUND IMPACT ON THE PUBLIC INTEREST

The district court justified its decision to adopt the Ninth Circuit's legislative exactions rule based on its belief that general legislation reduces the risk that individuals may be targeted to bear undue burdens.[9] But when the government

[9] This rationale fundamentally misunderstands the doctrine as discussed above. The legislatures-are-entitled-to-deference theory is premised on a legislature acting lawfully. But the heightened scrutiny demanded by *Nollan* and *Dolan* operates to police against governments acting outside their constitutional bounds. *Dolan*, 512 U.S. at 391 n.8 (the government is not entitled to deference where it impairs a constitutionally protected right); *Koontz*, 570 U.S. at 604–05.

places public costs on a small number of people through general laws, the democratic process often works as an endorsement for public extortion of minorities, not as a check against it. *See Town of Flower Mound*, 135 S.W.3d at 641 ("[W]e think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud[.]"); James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause … protects against this majoritarian tyranny … by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure.").

This political reality provides additional justification for holding generally applicable regulatory conditions subject to *Nollan/Dolan/Koontz*. The nexus and proportionality tests are designed to enforce the principles of fairness and justice—a central purpose of the Fifth Amendment's Takings Clause—in the land-use context. *Cedar Point*, 141 S. Ct. at 2080 ("[B]asic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection[.]") (quoting *Horne*, 576 U.S. at 366); *see also Nollan*, 483 U.S. at 836 n.4 (One of the principal reasons why the Supreme Court established the nexus and proportionality tests is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice,

should be borne by the public as a whole.") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). And from a property owner's perspective, there is no meaningful distinction between an exaction that is imposed individually or via a generalized demand. Both result in the exact same injury, for which the Constitution promises a remedy. Lisa Harms Hartzler, *The Stringent Takings Test for Impact Fees in Illinois: Its Origins and Implications for Home Rule Units and Legislation*, 39 N. Ill. U. L. Rev. 92, 131 (2018) ("[W]herever the power to command exactions from landowners arises—from legislation or adjudication—the U.S. Constitution provides a valuable and essential limitation on extortionate behavior.").

Moreover, the risk of oppressive burden shifting is heightened in the context of legislated exactions and impact fees. That is because legislation imposing such conditions affects only future development—thus, the burden of funding public projects is placed on individuals who often do not live in the community and cannot take part in the political process. Because there is very little opportunity for political resistance in that circumstance, municipalities are increasingly using exactions and impact fees to finance an expanding array of public projects. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 262 (2006) ("Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find impact fees an irresistible policy option."); *see also* Arthur C.

Nelson, et al., *A Guide to Impact Fees and Housing Affordability* 19 (2008) (The role of impact fees began as a limited, supplemental funding mechanism, but is now a primary strategy for raising funds.). This is particularly true in jurisdictions like California, where the courts have adopted per se rules shielding legislative exactions from meaningful scrutiny. *See*, *e.g.*, *Building Indus. Ass'n–Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1058 (2018) (dismissing *Nollan/Dolan* challenge to ordinance requiring developers to purchase and publicly display city-approved art or pay a fee in-lieu).

The impact of unchecked legislative authority to impose exactions on new development goes far beyond the constitutional injury suffered by individual land-use applicants. It is also harmful to the public's need for affordable housing. That is because impact fees, like other development costs, are typically added to the final purchase price of the home. *See* "$819 Increase in Fees Will Boost Home Cost by $1,000, Study Says," 35 No. CD-15 HDR Current Developments 10 (2007). And even a modest fee can have a dramatic effect on affordability. *Id*. (reporting that an increase of just $1,000 on a new home will price more than 217,000 potential buyers out of the housing market).

Most communities demand much more than $1,000 in impact fees on residential development, increasing housing costs "beyond the means of many teachers, firefighters, police officers, and other moderate-income workers." *Id*.

Indeed, a recent survey of impact fees concludes that, on average, each new single-family home built in Tennessee will be burdened with $6,226 in impact fees. *See* Duncan Associates, *National Impact Fees Survey: 2019*, at 4 (2019).[10] While that is nowhere near California's astronomical impact fees (averaging $37,471 per house), or Oregon's impact fees (averaging $21,911 per house) (*id*.), the comparatively modest impact fees charged throughout Tennessee still have a significant effect on the production of new affordable homes. Clancy Mullen, Duncan Associates, *National Impact Fees Survey: 2010*, at 6 (2010) (noting that between 2004 and 2008, the amount of money charged as an impact fee grew an average of 76 percent, with some jurisdictions increasing fees up to 225 percent in that four-year period). Without meaningful judicial scrutiny required by *Nollan/Dolan*, however, there is no way to enforce the Fifth Amendment's command that the government not force individuals "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong*, 364 U.S. at 49.

[10] *Available at* http://www.impactfees.com/publications%20pdf/2019survey.pdf.

CONCLUSION

For the foregoing reasons, amici request that the Court reverse the district court opinion and clarify that legislative exactions are subject to the doctrine of unconstitutional conditions.

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Respectfully submitted,

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