No. 21-6179

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES KNIGHT; JASON MAYES

Plaintiffs – Appellants,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TN,

Defendant - Appellee

BRIEF OF APPELLEE THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1(a), the Metropolitan Government of Nashville and Davidson County, Tennessee is a governmental entity and is not required to submit a corporate disclosure statement.

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March 28, 2022

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STATEMENT REGARDING ORAL ARGUMENT

The Metropolitan Government submits that oral argument will aid the Court's decision in this case, which involves an unsettled question of law that has divided state and federal courts for decades. This Court has never considered whether the Supreme Court's test for administrative exactions developed in the *Nollan/Dolan* line of cases applies to legislative land use regulations. The Court lately observed that it is an "interesting question" in an case where the parties had stipulated to the *Nollan/Dolan* standard of review. *F.P. Dev., LLC v. Charter Twp. Of Canton*, 16 F.4th 198, 206 (6th Cir. 2021). The parties now raise the issue for the Court's review, and oral argument will help the Court weigh the many legal and practical considerations that the issue presents.

STATEMENT OF ISSUES PRESENTED

I. Whether the District Court erred in applying the *Penn Central* regulatory takings test to the Metropolitan Government's Sidewalk Ordinance, rather than the *Nollan/Dolan* test for administrative exactions.

II. Whether the District Court erred in concluding that the Metropolitan Government's Sidewalk Ordinance is not an unconstitutional taking under the Fifth Amendment.

STATEMENT OF FACTS

I. The Sidewalk Ordinance's History and Purposes

The material facts of this case are undisputed. (Mem. Op., RE 40, PageID# 626, 633.) In 2017, the Metropolitan Council of Nashville and Davidson County passed an ordinance that required property owners who built new single-family homes in urban areas of the city to install sidewalks or pay a fee in lieu of sidewalk construction. (Ordinance No. BL2016-493, RE 22-1, PageID# 209-16.) In 2019, the Council amended this ordinance, namely Metropolitan Code of Laws §§ 17.20.120, *et seq.*, to its current form, which Appellants challenge in this action. (Ordinance No. BL2019-1659, Metro. Code § 17.20.120 ("the Sidewalk Ordinance," RE 1-2, PageID# 28-34.) The 2019 legislation that amended the Sidewalk Ordinance stated several policy goals:

- "A wider variety of safe transportation options in a rapidly growing Nashville";
- Walking and biking infrastructure aligned with Nashville's General Plan, Strategic Transit Plan, and Strategic Plan for Sidewalks and Bikeways;
- "Providing a safe and designated path for connecting to schools, parks, libraries, businesses, and transit," thereby increasing property values;

- A sidewalk network that meets the General Plan's safety and design standards;
- Building this sidewalk network quickly and efficiently; and
- Reducing pedestrian deaths on Nashville's streets.

(*Id.* at PageID# 28-29)

The text of the Sidewalk Ordinance also states several purposes, including:

- Offering safe and convenient walkways for Nashvillians;
- Reducing dependency on cars, thus reducing traffic congestion and protecting air quality;
- Increasing homeowner and community health and social connections; and
- Improving pedestrian safety.

(*Id*. at PageID# 29.)

II. The Sidewalk Ordinance's Requirements and Variance Process

Relevant to Appellants' claims, the Sidewalk Ordinance applies to new single-family home construction in densely developed areas of Nashville. (Metro. Code § 17.20.120(A)(2), RE 1-2, PageID# 30.) When a property owner applies for a permit to build a new home in these areas, the Sidewalk Ordinance requires sidewalks to be built along the property's public street frontage. (Metro. Code § 17.20.120(C)(1) and (2), RE 1-2, PageID# 31-32.) If a property owner cannot build a sidewalk, the

ordinance grants the Metropolitan Government's Zoning Administrator the authority to allow an in-lieu fee for all or part of a property's street frontage. (Metro. Code § 17.20.120(A)(3)(b), RE 1-2, PageID# 30.) The in-lieu fee is preset according to "the average linear foot sidewalk project cost, including new and repair projects, determined by July 1 of each year by the Department of Public Works' review of sidewalk projects contracted for or constructed by the Metropolitan Government." (Metro. Code § 17.20.120(D)(1), RE 1-2, PageID# 32.) The cost is posted on the Metropolitan Government's website; for 2021, it was $186 per linear foot.[1] This is lower than the $837 per-linear-foot average that the Metropolitan Government actually pays to build sidewalks because the Department of Public Works removes especially expensive projects from the average calculation and reduces the cost-per-linear-foot figure even further. (Declaration of Jeff Hammond, RE 28, PageID# 428-29.) The ordinance caps the total amount of any given in-lieu fee at three percent of a permit's total construction value. (Metro. Code § 17.20.120(D)(1), RE 1-2, PageID# 32.)

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[1] *See* https://www.nashville.gov/departments/planning/long-range-planning/transportation-planning/sidewalks.

If a property owner pays an in-lieu fee, the city must spend the money within 10 years on sidewalk or bikeway projects within the same "pedestrian benefit zone" as the property that generated the in-lieu fee. (Metro. Code § 17.20.120(D)(2), RE 1-2, PageID# 32.) These zones are defined in the Metropolitan Government's zoning code. (Metropolitan Code of Laws § 17.04.060, RE 22-2, PageID# 218-21.)

If a property owner disagrees with how the Sidewalk Ordinance applies, he or she has two paths for relief. First, the Zoning Administrator may approve an alternate sidewalk design or waive the ordinance altogether for a hardship such as "utilities, a ditch or drainage ditch, historic wall(s) or stone wall(s), tree(s), [or] steep topography." (Metro. Code § 17.20.120(A)(3)(a), RE 1-2, PageID# 30.) Second, a property owner can appeal to the Board of Zoning Appeals ("BZA"), which can grant a variance in the form of a fee in lieu of sidewalk construction, an alternate design, or "other appropriate mitigation." (Metro. Code § 17.20.125, RE 1-2, PageID# 31.)

III. The Sidewalk Ordinance's Application to Appellants

Plaintiff-Appellant James Knight bought property at 411 Acklen Park Drive in Nashville in 2017. (Compl. ¶¶ 27-28, RE 1, PageID# 7.) He tore down the 790-square foot home on the lot in 2018. (Mem. Op., RE 40, PageID# 630.) Knight then applied for a permit to build a 2,651 square-foot, single-family home with a 323

square-foot garage and porches totaling 468 square feet. (*Id.*) In October 2019, Knight asked the Zoning Administrator for a variance from the Sidewalk Ordinance's requirements. (*Id.*) The Zoning Administrator denied Knight's request in January 2020 on the Planning Department's recommendation. (*Id.* at PageID# 630-31.) Knight appealed to the Board of Zoning Appeals, which heard his case on May 21, 2020. (*Id.* at PageID# 631.) The BZA denied Knight's request. (*Id.*) To date, Knight has not paid an in-lieu fee, built a sidewalk, or granted an easement for a sidewalk at 411 Acklen Park Drive. (*Id.*)

Plaintiff Jason Mayes acquired the vacant lot at 167 McCall Street in Nashville in 2018. (Appellee's Statement of Undisputed Material Facts ("SUMF") ¶ 10, RE 23, PageID# 242.) In November 2019, Mayes applied for a permit to build a new single-family home with 2,375 square feet of living space and a 640 square-foot, two-car garage. (Appellee's SUMF ¶ 11, RE 23, PageID# 243.) That same month, Mayes asked for a waiver from the Sidewalk Ordinance's requirements. (Compl. ¶ 86, RE 1, PageID# 14.) In December 2019, the Planning Department recommended denying Mayes's waiver request. (Appellee's SUMF ¶ 12, RE 23, PageID# 243.) Mayes paid an in-lieu fee of $8,883.21 on January 21, 2020. (Compl. ¶ 94, RE 1, PageID# 15.) Meanwhile, Mayes appealed the Planning Department's decision to the Board of Zoning Appeals, which heard his case on March 5, 2020.

(Mem. Op., RE 40, PageID# 632.) The BZA denied Mayes's request for a variance because he could pay an in-lieu fee. (Appellee's SUMF ¶ 14, RE 23, PageID# 243.) Mayes's in-lieu fee went toward a sidewalk project in the same pedestrian benefit zone in 2020. (*Id.* ¶¶ 15-16, PageID# 244.) To date, Mayes has not built a sidewalk or dedicated an easement for a sidewalk at 167 McCall Street. (*Id.* ¶ 17, PageID# 244.)

SUMMARY OF THE ARGUMENT

The Supreme Court has stated that the *Penn Central* balancing test for regulatory takings is the default standard of review for challenges to land use regulations under the Fifth Amendment. The text and history of the Fifth Amendment's takings clause support the District Court's application of the *Penn Central* test to conclude that Nashville's Sidewalk Ordinance is a valid land use regulation.

The Supreme Court has applied the heightened standard of review developed in the *Nollan/Dolan* line of cases only to administrative exactions involving *ad hoc*, adjudicative decisions affecting property rights. The Supreme Court has never held that *Nollan/Dolan* applies to legislative land use regulations such as Nashville's Sidewalk Ordinance. Reversing the District Court and overextending *Nollan/Dolan* would improperly inject the federal judiciary into local land use policy with no coherent constitutional basis.

This Court should affirm the District Court's decision applying *Penn Central* rather than *Nollan/Dolan* and, in so doing, clarify this hazy body of law.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004); *Herman Miller, Inc. v. Palazetti Imports & Exports, Inc*., 270 F.3d 298, 307-08 (6th Cir. 2001).

ARGUMENT

I. THE SUPREME COURT'S REGULATORY TAKINGS JURISPRUDENCE, SPECIFICALLY THE *PENN CENTRAL* TEST, IS THE PROPER STANDARD OF REVIEW FOR LEGISLATIVE LAND USE REGULATIONS SUCH AS THE SIDEWALK ORDINANCE.

For generations, the Supreme Court has held that government land use regulations that go "too far" can take property in violation of the Fifth Amendment. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court has unanimously stated that its regulatory takings jurisprudence, specifically the balancing test from *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) ("*Penn Central*"), is the default framework to apply when property owners challenge land use regulations under the Fifth Amendment. *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005).

Appellants ask this Court to extend the heightened standard of scrutiny for administrative exactions developed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), ("*Nollan/Dolan*") to Nashville's Sidewalk Ordinance, a valid legislative land use

regulation. (Appellants' Br. at 34-38.[2]) But the Supreme Court has stated that the *Nollan/Dolan* test is a "special application" of the unconstitutional conditions doctrine that applies to case-by-case, administrative exactions affecting property rights. *Lingle*, 544 U.S. at 530; *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 604 (2013). For the following reasons, the Court should decline to extend *Nollan/Dolan* and affirm the District Court's application of *Penn Central* to the Sidewalk Ordinance.

A. The Text and Original Intent Behind the Fifth Amendment Show That *Penn Central*, Not *Nollan/Dolan*, Is the Right Standard of Review for Legislative Land Use Regulations.

Appellants argue that *Nollan/Dolan*'s nexus and rough proportionality test should extend to legislative land use regulations, based solely on the relatively recent history and application of the unconstitutional conditions doctrine.[3] (Appellants' Br. at 19-22, 26-36.) But this argument ignores the text and original understanding of the Fifth Amendment's takings clause, which support the District Court's decision that the Sidewalk Ordinance is a valid land use regulation under *Penn Central*. This

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[2] All page references to Appellants' brief are to the electronic page numbers, not Appellants' manual pagination.

[3] The *Nollan/Dolan* test is a poor fit for legislative land use regulations for the reasons outlined in Section II to follow.

Court should adhere to a faithful interpretation of the text and history of the takings clause and reject Appellants' request to improperly extend the unconstitutional conditions doctrine, by way of *Nollan/Dolan*, to legislative land use regulations.

The winding path of this body of law starts simply enough: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. These dozen words describe takings, not regulations or exactions. Thus, as the Supreme Court has recognized, "[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 321 (2002). This textual distinction between physical takings and regulatory takings lays a foundation for the doctrinal distinction between administrative exactions and regulatory takings that many courts have recognized, as outlined in Section II.C below.

Moreover, a constitutionally sound reading of the takings clause must account for how the Framers understood it. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) ("[I]t would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment . . ."). To this end, it

is relevant to ask how governments took private property for public use in the late 18th century. In England, the crown certainly had a longstanding taste for taking personal property. *See* Magna Carta, ch. 28 (1215). In the years before the revolution, American colonial judges and contemporary English courts generally did not award just compensation when the government took land. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 788-89 (1995). However, colonial juries and legislatures often compensated landowners when the government took their land to build roads. *Id*. at 787.

Perhaps because of this tradition wherein majoritarian bodies compensated landowners for takings, no state suggested a just compensation clause in the Bill of Rights. That job fell to James Madison, who introduced the takings clause in a speech to Congress in 1789. William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 709-11 (1985). In Madison's mind, the takings clause was a shield for a small fraction of property owners who were likely to suffer unfair treatment in majoritarian political processes. Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. at 847-55, 872 (arguing that the takings clause was originally understood to "defend[] those most likely to be the victims of process failure.").

Madison and the Framers understood that property rights included more than mere physical possession. *See* James Madison, *Property*, Papers 14:266-68 (Mar. 29, 1792) (defining property as including "a man's land, or merchandi[s]e, or money" as well as "every thing to which a man may attach a value and have a right"); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* 18 (U.P. Kansas 1985) ("[T]he framers of the Constitution . . . understood that the word property had more meaning than one."). The Framers also understood that the government could regulate in ways that reduced the value of property without taking land outright. *See, e.g.*, Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1381 (1997) ("The Framers . . . understood that the value of property may be reduced just as its title may be taken; they had plenty of regulations that reduced the value of property, just as they had a history that included many examples of regulation that took the title to property."). For example, Boston had zoning regulations that governed the locations of various types of businesses. Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. at 789.

And yet Madison's writings and other contemporary sources suggest that the takings clause only concerned direct physical takings, not regulatory takings. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057-58 n.23 (1992) (Blackmun,

J., dissenting); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1292 (1996) ("The reason the Framers did not address land use regulation in the Takings Clause is that they did not regard it as a taking.").[4] Thus, the takings clause originally covered only physical takings, and this understanding endured for many decades, as the Supreme Court observed in *Lucas*, 505 U.S. at 1014 (citing *Legal Tender Cases*, 79 U.S. 457, 551 (1870)).

Justice Holmes revised this notion in 1922, when he created the concept of regulatory takings in his famous "too far" formula. *Mahon*, 260 U.S. at 415. "The rub, of course, has been—and remains—how to discern how far is 'too far.'" *Lingle*, 544 U.S. at 538 (quoting *Mahon*, 260 U.S. at 415). In *Lingle*, a unanimous Supreme Court described the balancing test from *Penn Central* as the default test for deciding how far is "too far" when a landowner challenges a government land use regulation.[5]

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[4] Some scholars and jurists believe that the takings clause originally covered both physical and regulatory takings. *See, e.g.*, *Lucas*, 505 U.S. at 1028 n.15. If this view is correct, it does not mean that the Supreme Court's regulatory takings jurisprudence is not the proper framework for legislative land use conditions. If anything, an original understanding of the takings clause that included regulatory takings reinforces this conclusion by providing an originalist rationale for *Mahon*, which has been criticized as a radical departure from 18th and 19th century takings jurisprudence. *See, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37, 40-42 (1964).

[5] That is, outside of two narrow categories of *per se* regulatory takings: permanent

544 U.S. at 538. Under this test, courts examine factors including a regulation's economic impact on the landowner, its effect on his or her investment-backed expectations, and the character of the government's action. *Penn Central*, 438 U.S. at 124. Unless a landowner can show that "the interference with [his] property is of such a magnitude that there must be an exercise of eminent domain and compensation to sustain it," *id.* at 136, there is no taking.

Tracing the text and original understanding of the takings clause through the Supreme Court's development of the regulatory takings framework, the *Penn Central* test remains a constitutionally sound way to evaluate government land use regulations. The District Court correctly found that the Sidewalk Ordinance is a generally applicable legislative land use regulation for the reasons presented in Section I.D below. And while *Mahon* and its progeny reasonably expanded the original, limited application of the takings clause to regulatory takings, Appellants would have this Court expand the takings clause significantly further, well beyond

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physical invasions and regulations that annihilate all economically beneficial use. *Lingle*, 544 U.S. at 538. Last year, in *Cedar Point Nursery*, the Supreme Court revised the first category, holding that an intermittent physical taking is no less actionable than a permanent one. 141 S. Ct. 2063, 2075 (2021).

its original intent. This Court should decline this invitation to overreach and affirm the District Court below.

B. *Penn Central* Applies to Legislative Land Use Regulations Because They Do Not Implicate the Practical Issues Present In Administrative Exactions.

Appellants' argument that "a taking is a taking . . . no matter who with a .gov email address imposes a permit condition" ignores the constitutionally significant differences between administrative exactions and legislative land use regulations. (Appellants' Br. at 21.) In fact, when a landowner challenges a land use regulation under the Fifth Amendment, the Supreme Court has mapped out a fork in the road as to the standard of review. The landowner's litigation path depends on whether the regulation is administrative or legislative. See *Dolan*, 512 U.S. at 385, 391 n.8. In a *Nollan/Dolan* administrative exaction, a government body (usually unelected) applies land use conditions *ad hoc* to a particular property, usually in response to a permit application. *Koontz*, 570 U.S. at 614. In a *Penn Central* legislative land use regulation, elected representatives set conditions in statutes or ordinances without considering a particular property; the conditions later apply automatically. *See Dolan*, 512 U.S. at 385; *San Remo Hotel L.P. v. City and Cty. of San Francisco*, 41 P.3d 87, 104 (Cal. 2002).

Nearly 30 years ago, Justices Thomas and O'Connor wondered "why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia*, *Parking Ass'n of Georgia*, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of cert.). This distinction between *Nollan/Dolan* administrative exactions and *Penn Central* legislative regulations makes a constitutional difference because it matters which branch of government regulates property, namely how the government regulates (through elected officials or not) and how the regulation can be changed (through the political process or not). In other words, it is not just *who* regulates property but *how* and *why* the regulation happens, and *where* the landowner can turn for a remedy.

These factors bear directly on the risk for extortion in land use permitting, the central concern that goaded the Supreme Court into developing *Nollan/Dolan*. *See Dolan*, 512 U.S. at 387. In an administrative exaction, an unelected body can impose conditions on a landowner so fanciful and capricious as to amount to "gimmickry." *Id*. A stringent test is therefore appropriate to restrain the administrative arms of government.

But a legislative land use regulation such as Nashville's Sidewalk Ordinance poses a low risk of extortion, and is thus properly considered under *Penn Central*, for several reasons. First, legislative regulations are crafted by elected

representatives whose deliberations are open to the public. Such regulations are akin to the kind of majoritarian takings that did not worry the Framers:

> The bulk of the evidence concerning the predecessor clauses to the Fifth Amendment's Takings Clause suggests that these clauses were not written out of a belief that legislatures could not be trusted to protect property rights. Rather, the evidence . . . reflects a belief that constitutionalization of the compensation issue was seen as necessary to address those isolated instances in which the political process would not adequately protect property rights.

Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. at 834.

Second, state legislatures further restrain local governments' authority to regulate property. At least one state legislature has codified the *Nollan/Dolan* standard for local dedications, exactions, and impact fees, thus forcing cities and towns to show a nexus and rough proportionality for such regulations, regardless of whether they are legislative or administrative. *See* Minn. Stat. Ann. § 462.358; *see also Puce v. City of Burnsville*, No. A21-0895, 2022 WL 351119, at *1 (Minn. Ct. App. Feb. 7, 2022) (applying *Nollan/Dolan* scrutiny to a legislative land use condition as required by the statute). Florida, for its part, has a statute that provides relief in situations where the government burdens property rights without effecting a taking. Fla. Stat. Ann. § 70.001. Utah and Wyoming have "property protection" statutes that require land use regulations to substantially advance government

interests. Utah Code Ann. § 63L-3-202; Wyo. Stat. Ann. § 9-5-303. Confining *Nollan/Dolan* to its proper scope, discussed further in Section II below, will provide room for state legislatures to enact such measures, while showing a degree of deference to legislative property regulations that prevailed when the Bill of Rights was ratified. *See* Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. at 859-60 ([T]he underlying idea was not that all majoritarian decisions should be reviewed . . . [r]ather, heightened constitutional protection was provided only for the limited category of decisions in which unfairness was most likely.").

Third, legislative regulations bind the administrative discretion that can so easily lead to extortion. *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 28 (1988) Regulations like the Sidewalk Ordinance apply blindly and evenly to broad categories of properties. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) (en banc); *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997). Thus, there is little risk that the government will extract concessions from property owners because the fees and conditions have already been imposed by the legislation. *San Remo Hotel*, 41 P.3d at 104 ("[N]o meaningful government discretion enters into either the imposition or the calculation of the in-lieu fee.").

Because legislative land use regulations remove administrative discretion, they also pose a low risk of extortion because they do not involve the type of "direct link between the government's demand and a specific parcel of real property" that justified *Nollan/Dolan* scrutiny in *Koontz*. 570 U.S. at 614. Conditions without that direct link do not implicate the "central concern" of *Nollan* and *Dolan*: "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Id.*

The North Carolina Court of Appeals, for example, noted several factors common to legislative land use regulations and contrasted them with an administrative exaction scenario: "[t]he Fees are predetermined, set out in the Ordinance, and non-negotiable; the Fees are not assessed on an ad hoc basis or dependent upon the landowner's particular project [. . .] but, unlike the conditions imposed in *Koontz*, the County does not view a landowner's proposed project and then make a demand based upon that specific parcel of real property." *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 14-15 (N.C. Ct. App. 2020) (citing *Koontz*, 570 U.S. at 613). Such clearly defined legislative schemes are very different from a situation where a government agency can dangle a carrot or brandish

a stick before imposing fees or conditions, easily abusing power through gimmickry or pretext. *See Koontz*, 570 U.S. at 604-05; *Ehrlich v. City of Culver City*, 911 P.2d 429, 438-39 (Cal. 1996).

Finally, legislative land use regulations offer a remedy that administrative exactions lack "because the group affected can use the elective processes to petition for change in the law." *San Remo Hotel, L.P. v. San Francisco City and Cty*, 364 F.3d 1088, 1096 (9th Cir. 2004). Appellants are right that it stings when regulation hits a landowner's bank account, no matter who demands the money. But courts need not intervene when a landowner can participate in the political process and lobby for more lenient regulations, or vote for representatives who will roll back property regulations that go "too far." When the only remedy is to shake one's fist at an unelected panel of bureaucrats, judicial oversight is appropriate. *See, e.g.*, Cal. Pub. Res. Code § 30301 (outlining makeup of appointed regional commissioners under the California Coastal Commission).

Relatedly, legislative land use regulations are often crafted with input from landowners and developers. Appellants could have shaped the Metropolitan Council's revision of the Sidewalk Ordinance. They may still petition their councilmembers, elect new councilmembers, or even run for office to change the effects of the Sidewalk Ordinance. But asking this or any court for relief upends

what should be a local, citizen-driven process and asks the judiciary to act as a zoning review board, "a task for which courts are not well suited." *Lingle*, 544 U.S. at 544; *see also Schenck v. City of Hudson*, 114 F.3d 590, 594 (6th Cir. 1997) (noting, in a substantive due process context, that "it is not the province of a federal court to act as a super-zoning board.").

Of course, the political process itself may be abused, but the Sidewalk Ordinance does not single out Appellants or even homeowners generally. *See Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 641 (Tex. 2004). The ordinance does not target one, 10, or even 100 parcels of land; it covers wide areas of the city. Thus, it does not unfairly place public burdens on a minority too small to effectively use the political process. *See Lucas*, 505 U.S. at 1073 (Stevens, J., dissenting) ("In analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy."). Indeed, homebuilders' organizations such as *amicus curiae* Home Builders' Association of Middle Tennessee wield significant political power and are not vulnerable to the kind of legislative process failure that concerned the Framers. *See* Treanor, *The Original Understanding of the*

Takings Clause, 95 COLUM. L. REV. at 850-51. So too with homeowners generally; U.S. Census data shows that two-thirds of people in the South own their homes.[6]

C. The *Penn Central* Test is Also Doctrinally and Practically Suitable for Legislative Land Use Regulations Such as the Sidewalk Ordinance.

Penn Central is also the appropriate standard in this case because the Sidewalk Ordinance is a classic example of "adjusting the benefits and burdens of economic life to promote the common good." *Koontz*, 570 U.S. at 621 (citing *Penn Central*, 438 U.S. at 124).) As presented above, the Sidewalk Ordinance is designed to balance the impacts of development in denser areas of Nashville with a public need for safe transportation options as well as landowners' economic and possessory interests. Relevant to this balancing act, the Sidewalk Ordinance only affects property rights that touch a city street, which the Metropolitan Government builds and maintains. (Metro. Code §17.20.120(A), RE 22-1 at 1, PageID# 209-10.) Contrast *Nollan*, *Dolan*, and *Koontz*, where the government intervened to protect natural, God-given features: the Pacific coastline of Ventura County, California; a small creek running through the outskirts of Portland, Oregon; and central Florida

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[6] *See* https://www.census.gov/housing/hvs/data/q421ind.html; https://www.census.gov/quickfacts/TN. The Court may take judicial notice of these facts from self-authenticating sources pursuant to Federal Rules of Evidence 201 & 902(5).

wetlands. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 378; *Koontz*, 570 U.S. at 599-600. Because the Metropolitan Government created the road and sidewalk network that the ordinance advances, it has a strong interest in balancing landowners' development activities with the public interest in a safe transportation network that benefits all Nashvillians. Moreover, as the District Court noted, the Metropolitan Government already has a setback interest in the strip of land next to city streets; Appellants have never been free to use the land subject to sidewalk easements as they pleased. (Mem. Op., RE 40, PageID# 632, 649-50 (citing Metropolitan Code of Laws §§ 17.04.060, 17.12.030).)

Put another way, the government's interests in *Nollan*, *Dolan*, and *Koontz* were largely environmental: in each case, the government stepped in to mitigate an uncertain human impact on the natural world; civic implications were secondary. Here, Nashville's city council is trying to balance man-made burdens that Appellants would place on public infrastructure.

These factors also bear on fairness, another fundamental theme in takings cases. *See, e.g.*, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1172 (1967) (distilling the test for takings cases to the question, "is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby

inflicted?"). For the reasons presented above, the Sidewalk Ordinance is a fair regulation. Indisputably, it imposes costs on homeowners. But in return, it gives the city a more complete sidewalk network, which means higher property values, less traffic, better air quality, and safer streets for the homeowner. Accordingly, the *Penn Central* test is the best doctrinal and practical framework for this type of regulation.

D. The District Court Correctly Applied the *Penn Central* Test to Find That the Sidewalk Ordinance Is a Valid Legislative Land Use Regulation.

The District Court properly concluded that the Sidewalk Ordinance was subject to *Penn Central* and not *Nollan/Dolan* because "its application does not require individualized, adjudicatory decision-making." (Mem. Op. RE 40, PageID# 644.) As such, it does not open the door to extortion by unelected bureaucrats. *Id*. The court noted that the amount of an in-lieu fee for any given property is predetermined according to the formula written into the ordinance, and the total amount of an in-lieu fee is capped at three percent of the total construction value of a given building permit. *Id*.

In the same vein, the District Court properly observed that the Sidewalk Ordinance does not implicate the "two realities of the permitting process" that concerned the Supreme Court in *Koontz:* 1) the "special vulnerability of land use permit applicants to extortionate demands for money"; and 2) the fact that "many

proposed land uses threaten to impose costs on the public that dedications of property can offset." (Mem Op., RE 40, PageID# 644-45 (quoting *Koontz*, 570 U.S. at 604-05, 619); *see also* Glen Hansen, *Let's Be Reasonable: Why Neither* Nollan/Dolan *Nor* Penn Central *Should Govern Generally-Applied Legislative Exactions After* Koontz, 34 PACE ENVTL. L. REV. 237, 257-64 (2017)). The court found that the ordinance's general application, predefined procedures, and limited impact do not give rise to an extortionate demand for property or money. (Mem. Op. at 19-20, RE 40, PageID# 644-45.) As for the costs of proposed land uses, the court found that the legislative nature of the ordinance and the predetermined calculation of the in-lieu fee are "more in the nature of a tax or user fee than the 'individualized, property-specific' exactions at issue in *Nollan*, *Dolan*, and *Koontz*." (*Id*. (quoting *Koontz*, 570 U.S. at 615).)

Having properly applied the *Penn Central* test to the Sidewalk Ordinance, the District Court also had ample evidence to uphold it. First, the economic impact on Plaintiff-Appellant Jason Mayes (the only party who paid an in-lieu fee) was not onerous: 1.6% of his new home's $550,000 appraised value. (Mem. Op., RE 40, PageID# 648.) Next, the court found that the Sidewalk Ordinance did not interfere with Appellants' investment-backed expectations because sidewalks improve property values (as courts have recognized in Tennessee for more than 175 years),

and the ordinance did not diminish the value of their property.[7] (*Id.* at PageID# 648-49) (citing *Mayor v. Maberry*, 25 Tenn. 368, 373 (Tenn. 1845)). Moreover, the Sidewalk Ordinance existed before either Appellant bought property. (*Id*. at PageID# 649.) Finally, the court found that the Sidewalk Ordinance "falls within the category of a public program adjusting the benefits and burdens of economic life to promote the common good" because its goals "benefit the city of Nashville, its residents, and individual property owners and enhance[] the value, desirability, and safety of the plaintiffs' properties and neighborhoods." (*Id*. (quotation marks omitted).) Thus, the Court correctly found that the Sidewalk Ordinance does not effect a taking that violates the Fifth Amendment.[8]

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[7] The Court can take judicial notice of the current appraised value of Mayes's property as $637,000 according to the Davidson County Property Assessor: https://www.padctn.org/prc/property/150044/card/1. Fed. R. Evid. 201. In a housing market like Nashville's, Appellants would thus be hard-pressed to argue that the Sidewalk Ordinance has stifled property values or housing demand.

[8] If the Court finds the *Penn Central* standard inapt, it should apply the "reasonable relationship" test adopted by state courts in California, Colorado, Ohio, and Tennessee. This test asks two questions. First, is there a reasonable relationship between the regulation and the development activity as well as the public need in question? *San Remo Hotel*, 41 P.3d at 105-06; *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 354 (Ohio 2000). Second, is there a reasonable relationship between the cost of the regulation and the cost of the public need? *San Remo Hotel*, 41 P.3d at 105-06; *Krupp*, 19 P.3d at 693-94.

The test satisfies the two elements that the Supreme Court requires for any

II. THE *NOLLAN/DOLAN* TEST IS A SPECIAL APPLICATION OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE THAT SHOULD NOT BE EXTENDED TO LEGISLATIVE LAND USE REGULATIONS.

As noted above, *Nollan/Dolan* is a "special application" of the unconstitutional conditions doctrine that bars the government from twisting a landowner's arm into surrendering constitutional rights in exchange for discretionary benefits. *Lingle*, 544 U.S. at 530; *Koontz*, 570 U.S. at 604. Under this standard, the government "may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 570 U.S. at 599 (quoting *Nollan*, 483 U.S. at 107;

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takings standard of review. First, it considers the magnitude and character of the regulation's burden on property rights. *Lingle*, 544 U.S. at 542. Second, it considers how regulatory burdens are distributed among property owners. *Id.*; see also Hansen, *Let's Be Reasonable*, 34 PACE ENVTL. L. REV. at 289-90. Thus, it protects landowners against extortionate land-use exactions while preventing the kind of judicial interference that troubled the dissenting justices in *Koontz*. 570 U.S. at 626 (Kagan, J., dissenting). The Sidewalk Ordinance passes the "reasonable relationship" test for the reasons outlined in the Metropolitan Government's motion for summary judgment. (Mem. Law Supporting Def.'s Mot. Summ. J., RE 22, PageID# 197-201.)

Dolan, 512 U.S. at 374). This special application covers dedications of property as well as monetary payments. *Koontz*, 570 U.S. at 619.[9]

But *Nollan/Dolan* is doctrinally unfit for evaluating legislative land use conditions, which helps explain why the Supreme Court has never applied the standard in that context. Numerous lower courts have followed suit, finding that *Nollan/Dolan* does not apply outside of an administrative exaction scenario.

A. The Unconstitutional Conditions Doctrine as Applied in *Nollan/Dolan* Is Inappropriate for Analyzing Legislative Land Use Regulations.

The unconstitutional conditions doctrine has traditionally protected rights that the government can chill with ease, especially free speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Scholars have criticized this body of law as a "doctrinal

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[9] To highlight one aspect of the confused state of modern takings law, *Koontz*'s extension of *Nollan/Dolan* scrutiny to a permit denial is hard to square with the doctrine of *stare decisis*. Specifically, the five-justice majority in *Koontz* did not cite, let alone engage with, the high court's unanimous statement that *Nollan/Dolan* "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development." ." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999). Accordingly, *Koontz*'s basis for extending *Nollan/Dolan* to permit denials has been questioned. *See Echeverria,* Koontz, 22 N.Y.U. Envtl. L.J. at 19-35. Further, *Koontz*'s extension of *Nollan/Dolan* to money payments is inconsistent with the statements of the majority and dissenting justices in *E. Enters. v. Apfel*, 524 U.S. 498, 540, 554 (1998), who agreed that money payments did not fall within the ambit of a takings claim.

swamp" that is in "disarray." Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 914 (2006); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1417 (1989). Thus, it is an unwieldy tool for takings cases, especially building permit cases, which implicate "mutually beneficial transaction[s]" that lack the same coercive power dynamics as free speech cases. *Dolan*, 512 U.S. at 407 n.12, 407-08 (Stevens, J., dissenting); *see also* Daniel L. Siegel, *Exactions After* Lingle*: How Basing* Nollan *and* Dolan *on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STAN. ENVTL. L.J. 577, 609-12 (2009); Epstein, *Unconstitutional Conditions*, 102 HARV. L. REV. at 27 (1988) ("This hierarchy of legal rights makes the doctrine of unconstitutional conditions especially difficult to apply to complex modern statutory schemes that implement explicit or implicit transfers of wealth for purposes now regarded as unquestionably legitimate—for example, to regulate land use . . . ."). Just as it is wrong to apply physical takings standards to regulatory takings cases, and vice versa, *Tahoe-Sierra*, 535 U.S. at 323-24, it would be wrong to apply the *Nollan/Dolan* test for administrative exactions to legislative land use regulations.

The Supreme Court's choice of the unconstitutional conditions doctrine to support *Nollan/Dolan* suggests that the test should only apply to administrative

exactions. A unanimous high court seemed to agree on this much in *Lingle*, branding *Nollan* and *Dolan* as "Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle*, 544 U.S. at 546. Notably, the court made this categorical statement after discarding the "substantially advances" test from *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980), which *Nollan* and *Dolan* had both applied. *Nolan*, 483 U.S. at 835, 836 n.3; *Dolan*, 512 U.S. at 387. The Court declared the "substantially advances" test doctrinally unfit for takings cases, as well as practically unwise because of how it invited judicial policymaking:

> The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Lingle, 544 U.S. at 544.

At the end of this analysis, the high court noted that "the reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established." *Id*. at 545. The court's very next move, contrasting *Nollan* and *Dolan* as administrative exaction cases, "signals that *Nollan*

and *Dolan* do not extend beyond requirements imposed on a case-by-case basis to cover conditions that are imposed legislatively." Siegel, 28 STAN. ENVTL. L.J. at 608-09. The *Lingle* court's subsequent citation aimed at administrative exactions supports this argument: "see also *Del Monte Dunes*, supra, at 702, 119 S.Ct. 1624 (emphasizing that we have not extended this standard 'beyond the special context of [such] exactions')". *Lingle*, 544 U.S. at 547 (quoting *City of Del Monte*, 526 U.S. at 702). This Court should heed these signals from a unanimous Supreme Court and decline to extend *Nollan/Dolan* to the Sidewalk Ordinance, which is a legislative regulation subject to the *Penn Central* balancing test.

B. The Supreme Court Has Never Applied *Nollan/Dolan* to Legislative Land Use Regulations.

The Supreme Court has applied the *Nollan/Dolan* intermediate level of scrutiny to administrative exactions because they can be easily abused as "out-and-out plan[s] of extortion." *Dolan*, 512 U.S. at 387 (quoting *Nollan*, 483 U.S. at 837). *Nollan*, *Dolan*, and *Koontz*, the leading cases in this area, each concerned *ad hoc*, adjudicatory conditions on specific properties. *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-80, 385; *Koontz*, 570 U.S. at 601-02, 614.

As noted above, legislative land use regulations pose no constitutional threat because they do not implicate "the central concern of *Nollan* and *Dolan*," which

depends on a "direct link between the government's demand and a specific parcel of real property." *Koontz*, 570 U.S. at 614.

Unsurprisingly, then, the Supreme Court has never held that *Nollan/Dolan* applies to legislative land use regulations. *See Del Monte Dunes*, 526 U.S. at 702; *Lingle*, 544 U.S. at 546 (describing *Nollan* and *Dolan* as "Fifth Amendment takings challenges to adjudicative land-use exactions"); *Koontz*, 570 U.S. at 604, 614.[10] Many lower courts refuse to cross this line, declining to extend *Nollan/Dolan* outside of administrative exactions. *See, e.g.*, *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 810 (Md. 2018) ("The exactions concept protects citizens against abuses of power by land-use officials concerning proposed quasi-judicial or administrative action for permit or other development approvals relative to an individual parcel of land."); *Action Apartment Assn. v. City of Santa Monica*, 82 Cal. Rptr. 3d 722, 731-32 (Cal.

[10] Appellants insist that the takings clause "is not addressed to the action of a specific branch or branches" of government. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010). But this language comes from a non-controlling section of a plurality opinion in a judicial takings case. Even if this case was on point, the plurality hinted at the fitness of *Penn Central* for legislative land use regulations by observing that "the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, *depending on its nature and extent*." *Id*. at 714 (emphasis added).

App. 2d Dist. 2008) ("Both the United States and California Supreme Courts have explained the two part *Nollan/Dolan* test developed for use in land exaction takings litigation applies only in the case of individual adjudicative permit approval decisions; not to generally applicable legislative general zoning decisions."); *see also* Hansen, *Let's Be Reasonable*, 34 PACE ENVTL. L. REV. at 239-40, 255-64; John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 53-55 (2014).

C. Recent Supreme Court and Ninth Circuit Decisions Do Not Require This Court to Extend *Nollan/Dolan*.

Appellants ask this Court to stretch dicta from *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), filtered through dicta in *Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022), to apply *Nollan/Dolan* to legislative land use regulations such as Nashville's Sidewalk Ordinance. The Court should decline this invitation, which is not as straightforward as Appellants suggest.

Usually, Supreme Court dicta constitutes "considerable persuasive authority." *Grutter v. Bollinger*, 288 F.3d 732, 746 n.9 (6th Cir. 2002). But the high court has addressed *Nollan/Dolan*'s scope more fully in other cases, especially *Lingle*, 544 U.S. at 546. Therefore, the Court should ignore Appellants' cherry-picked dicta from *Cedar Point Nursery* and instead consider the Supreme Court's full treatment of this

topic.

Neither *Cedar Point Nursery* nor *Ballinger* involved a *Nollan/Dolan* administrative exaction. *Cedar Point Nursery* analyzed a California law that allowed a labor union to mount aggressive, crack-of-dawn organizing drives on private agricultural property — an invasion squarely in the category of physical takings. 141 S. Ct. at 2069-70. The Court did not address the question of law on which this case turns; thus, the commentary that Appellants cite is not binding. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007).

Rather, the high court asked whether a physical taking claim depended on which government entity allowed the invasion and for how long, not whether *Nollan/Dolan* should apply to legislative land use regulations:

> Government action that physically appropriates property is no less a physical taking because it arises from a regulation . . . The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. Whenever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place.

Id. at 2072.

This logic is well-tailored to a physical intrusion style of taking. If the government grants a right to intrude on private property without the owner's consent,

it hardly matters which branch grants the right: the intruder is still there, unwanted, and there is little the landowner can do about it. But for the reasons presented below, strong constitutional and practical factors support judicial deference to legislative land use regulations.

Ballinger involved a situation even more remote from the question of law before this Court. There, the Ninth Circuit considered a city ordinance in California that effectively forced a landlord who wanted to reoccupy her property to pay displaced tenants a "relocation payment." *Ballinger*, 24 F.4th at 1291. The court found the ordinance to be a "wealth-transfer provision" that regulated the landlord-tenant relationship, not an unconstitutional taking. *Id*. at 1290, 1292, 1298.

Again, the question of whether *Nollan/Dolan* applies to legislative land use regulations was not presented. Nevertheless, the Ninth Circuit, citing *Cedar Point Nursery*, opined that the Supreme Court "suggested 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." *Id*. at 1299.

The *Ballinger* court seemed to venture into these waters because the Supreme Court had recently vacated one of its decisions in a regulatory takings case with instructions to reconsider any merit holdings in light of *Cedar Point Nursery*. *Id*.

(citing *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1162 n.4 (9th Cir. 2020), *vacated*, 5 F.4th 1099 (9th Cir. 2021)). The Ninth Circuit thus distanced itself from (without expressly overruling) a prior decision that had confined *Nollan/Dolan* to administrative exactions. *Id*. at 1298 (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008)).

The Ninth Circuit's detour is remarkable, given that the Supreme Court's instructions in *Pakdel* came in a footnote with no sign that *Cedar Point Nursery* broadened the scope of *Nollan/Dolan*. *Pakdel*. 141 S. Ct. at 2229 n.1. Nor did *Cedar Point Nursery* declare any such expansion; the decision merely summarized existing takings law and distinguished physical takings, regulatory takings, and unconstitutional exactions from one another. 141 S. Ct. at 2071-71. Moreover, the Supreme Court vacated and remanded *Pakdel* on ripeness grounds. *Pakdel*, 141 S. Ct. at 2228. Finally, the language the Ninth Circuit cited from *Cedar Point* to support its reevaluation of *Nollan/Dolan*'s scope dealt with statutory grants of access to federal agencies for on-site inspections, not building permits or even land use regulations in general. *Cedar Point Nursery*, 141 S. Ct. at 2079. Simply put, it is irrelevant here.

In the end, Appellants' argument that dicta from *Cedar Point Nursery* about federal inspection authority and physical intrusions, footnoted in the Supreme

Court's opinion vacating *Pakdel*, which prompted dicta in *Ballinger*, somehow "demands a different approach" from this Court as to how to apply *Nollan/Dolan* (Appellants' Br. at 23-26) is highly speculative, unsupported by the text of the cases, and does not bind this Court. *See Nixon v. Kent Cty*., 76 F.3d 1381, 1388 (6th Cir. 1996) ("Although we do not take lightly disagreement with the views of our sister circuits, we are not constrained to follow them if, in our opinion, they are based upon an incomplete or incorrect analysis.").

C. Most Courts Presented With the Question Have Not Extended *Nollan/Dolan* to Legislative Land Use Regulations.

As the example above shows, it is no surprise that lower courts disagree on whether *Nollan/Dolan* applies to legislative land use regulations. The Supreme Court has noted the schism: "For at least two decades . . . lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. That division shows no signs of abating." *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179 (2016) (Thomas, J., concurring in denial of cert.) (citations omitted). Justice Kagan has also reflected on the possibility of siding with courts who limit the rule to adjudicative exactions:

> The majority might, for example, approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are

> imposed ad hoc, and not to fees that are generally applicable. *Dolan* itself suggested that limitation by underscoring that there "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination [ ] classifying entire areas of the city."

Koontz, 570 U.S. at 628 (Kagan, J., dissenting) (quoting *Dolan*, 512 U.S. at 385) (internal citations omitted) (alterations in original).

The great weight of authority supports the District Court's decision here. State and federal courts in Alabama, Alaska, Arizona, California, Colorado, Georgia, Kansas, Maryland, Minnesota, North Carolina, Oregon, Tennessee, and Washington, and even the Ninth Circuit, have recognized a doctrinal difference between administrative exactions and legislative land use regulations.[11] Courts in

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[11] *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007-08 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003); *Home Builders Ass'n of Cent. Ariz*, 930 P.2d at 999-1000; *Ehrlich*, 911 P.2d at 447 ("[I]t is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment[.]"); *Cal. Bldg. Indus. Assn. v. City of San Jose*, 351 P.3d 974, 979, 989-90 (Cal. 2015), *cert. denied*, 577 U.S. 1179 (2016); *Krupp*, 19 P.3d at 695-97; *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Georgia*, 450 S.E.2d 200, 203 n.3 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995); *Harris v. City of Wichita, Sedgwick Cty., Kan.*, 862 F. Supp. 287, 293-94 (D. Kan. 1994), *aff'd,* 74 F.3d 1249 (10th Cir. 1996); *Dabbs*, 182 A.3d at 810; *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); *Anderson Creek Partners*, 854 S.E.2d at 14; *Rogers Mach., Inc. v. Washington Cty.*, 45 P.3d 966, 983 (Or. App. 2002); *Knight v. Metro. Gov't of*

Illinois, South Dakota, Texas, and Virginia have applied *Nollan/Dolan* scrutiny to legislative land use regulations.[12] This Court has not decided the issue.[13]

Recent cases from state courts in Maryland and North Carolina continue a quarter-century trend of reserving *Nollan/Dolan* scrutiny for administrative exactions. *See Dabbs*, 182 A.3d 798, 813 n.21 (collecting cases). In *Dabbs*, the Maryland Supreme Court held that *Nollan/Dolan* did not apply to a local ordinance that imposed development fees on broad classes of properties. *Id*. at 812-13. The

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Nashville & Davidson Cty., No. 3:20-CV-00922, 2021 WL 5356616, at *10 (M.D. Tenn. Nov. 16, 2021); *City of Olympia v. Drebick*, 126 P.3d 802, 808 (Wash. 2006) (en banc) ("[N]either the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances."); *Douglass Properties II, LLC v. City of Olympia*, 479 P.3d 1200, 1207 (Wash. App. 2d 2021); *McClung*, 548 F.3d at 1227.

[12] *See Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. Ct. 1995); *Dakota, Minn. & E. R.R. Corp. v. S. Dakota*, 236 F. Supp. 2d 989, 1026 (D.S.D. 2002), *aff'd in part, vacated in part, remanded sub nom.*, 362 F.3d 512 (8th Cir. 2004); *Town of Flower Mound*, 135 S.W.3d at 642-43; *National Ass'n of Home Builders v. Chesterfield Cty.*, 907 F. Supp. 166, 168 (E.D. Va. 1995).

[13] This Court recognizes a difference between legislative and administrative functions in the context of substantive due process challenges to zoning ordinances. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1220-21 (6th Cir. 1992). The court should recognize a similar difference in takings claims, given the overlapping considerations in both areas of the law. *See Lingle*, 544 U.S. at 540-41.

court reviewed the *Nollan/Dolan/Koontz* framework, analyzed the legislative nature of the ordinance, and concluded:

> There is no analogy to the *Koontz* scenario present here. The [] Ordinance is imposed broadly on all properties, within defined geographical districts, that may be proposed for development. The legislation leaves no discretion in the imposition or the calculation of the fee, i.e., the [] Ordinance demonstrates how the fees are to be imposed, against whom, and how much.

Id. at 810-11.

In 2020, the North Carolina Court of Appeals reviewed a legislative development fee and adopted the *Dabbs* court's reasoning:

> We hold that impact and user fees which are imposed by a municipality to mitigate the impact of a developer's use of property, which are generally imposed upon all developers of real property located within that municipality's geographic jurisdiction, and which are consistently imposed in a uniform, predetermined amount without regard to the actual impact of the developers' project do not invoke scrutiny as an unconstitutional condition under *Nollan/Dolan* nor under North Carolina precedent.

Anderson Creek Partners, 854 S.E.2d at 443; *id.* at 442-43 (recapping the *Dabbs* holding).

The District Court correctly relied on the reasoning from these opinions as well as authority from the Supreme Court and other courts. (Mem. Op. at 16-19, RE 40, PageID# 641-44.) Considering the sound constitutional arguments in the cases above as well as the District Court's opinion, this Court should not extend

Nollan/Dolan beyond administrative exactions. Rather, this Court should affirm the District Court's decision to join the "numerous courts that have concluded that legislative 'exactions' that apply generally, rather than only to specific parcels of real property, should not be governed by the *Nollan/Dolan* standard of review." (Mem. Op. at 20-21, RE 40, PageID# 645-46.)

III. APPELLANTS ARE NOT ENTITLED TO RESTITUTION OR INJUNCTIVE RELIEF.

On pages 44-46 of their brief, Appellants argue that they would be entitled to restitution in this case if the District Court had adopted their position at summary judgment that the *Nollan/Dolan* standard applied to the Sidewalk Ordinance. But Appellants do not discuss the proper remedy for a *Nollan/Dolan* violation in their statement of the issues — either in their brief (at pages 10-11) or in their formal "Civil Appeal Statement of Parties and Issues" (Doc. No. 12). Thus, Appellants have not properly raised this issue.

Moreover, neither Appellant is entitled to any remedy because the Sidewalk Ordinance did not take their property unconstitutionally. In any event, the remedy for a takings claim is just compensation. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176 (2019). Just compensation is a legal remedy, not an equitable one. *Del Monte Dunes*, 526 U.S. at 710-11 ("[I]n determining just compensation, 'the question is

what has the owner lost, not what has the taker gained.'") (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)). Restitution is an equitable remedy in this context because Appellants assert a takings claim, and the remedial question is what they lost, not what the Metropolitan Government gained. *See Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002).

Plaintiff-Appellant Mayes has presented no federal or state authority to establish a right to restitution on these facts. *See Koontz*, 570 U.S. at 608-10. In any event, just compensation under the Fifth Amendment is for real property, not money. U.S. Const. amend. V; *see also Koontz*, 570 U.S. at 622-24 (Kagan, J., dissenting). Thus, Mayes is not entitled to restitution of his in-lieu fee. Nor may he recover his in-lieu fee under a theory of unjust enrichment because, for the reasons stated above, the fee was lawfully collected and spent to improve sidewalks in Mayes's neighborhood. As such, Mayes and his neighbors, not the Metropolitan Government, benefited from the fee. *See Halpern 2012, LLC v. City of Ctr. Line, Michigan*, 806 F. App'x 390, 398 (6th Cir. 2020) (rejecting an unjust enrichment claim to recover fees paid to a city, finding "no indication that the fees were excessive, used for anything other than their stated purpose, or obtained unfairly").

The case of *Cline v. Red Bank Util. Dist.*, 250 S.W.2d 362 (Tenn. 1952), is instructive on this point. In *Cline*, a landowner sued a municipal utility district to

recover money she paid to extend the district's sewer line to seven houses she built. *Id.* at 362-63. The landowner claimed that the district converted her property when it took over her sewer extension and started collecting fees from other sewer users. *Id*. The Tennessee Supreme Court rejected the idea that the utility district had been enriched because there was no evidence that it profited from taking over the sewer extension. *Id*. at 364. The Court also noted that "[i]f Mrs. Cline's property increased in value, due to this desirable improvement, her right to reimbursement for it is wholly without reason." *Id*.

Here, as in *Cline*, Appellants' properties likely increased in value because of the benefits of the sidewalk network. As the District Court noted, sidewalks enhance property values, not just on the properties they touch, but across neighborhoods and cities. *See Maberry*, 25 Tenn. at 373. Accordingly, Appellant Mayes is not entitled to restitution of easements, rights-of-way, or in-lieu fees. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 373 (2015) (Breyer, J., concurring in part and dissenting in part) (noting that the Supreme Court has consistently offset the "value of the portion that was taken" from "the value of any benefits conferred upon the remaining portion of the property" when calculating just compensation).

Plaintiff-Appellant Knight has not built a sidewalk or paid an in-lieu fee. He therefore asks for injunctive relief. *See Knick*, 139 S. Ct. at 2179 ("As long as just

compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed."); *Cedar Point Nursery*, 141 S. Ct. at 2089 (Breyer, J. dissenting). However, Knight is not entitled to injunctive relief because he has suffered no injury. He does not have an active building permit, and any injunctive relief would be speculative:

> Plaintiff assumes that even if it pays the fee the sidewalk will never be built [], but this conclusion rests on speculation . . . In any event, plaintiff . . . has not paid fees in lieu[.] The record shows that . . . the City negotiated with plaintiff for construction of the required sidewalks. The fact that these negotiations have so far proved unsuccessful does not equate to pretext or extortion.

2701 Mountain Glen CT, LLC v. City of Woodland Park, Colo., No. 20-1040, 2021 WL 1187407, at *4 (10th Cir. Mar. 30, 2021).

Just compensation is no less available to Knight than it is to Mayes; Knight may resume his development proposal and ask for the usual remedy in a takings case. This Court should therefore decline to find that he is entitled to injunctive relief.

CONCLUSION

The text and original understanding of the Fifth Amendment's takings clause place this challenge to the Metropolitan Government's Sidewalk Ordinance squarely within the Supreme Court's regulatory takings jurisprudence. Applying regulatory taking principles to the ordinance, it easily passes the test. Accordingly, the Court

should affirm the District Court's decision to apply the *Penn Central* standard and affirm its conclusion that the Sidewalk Ordinance did not take Appellants' property within the meaning of the Fifth Amendment.

Respectfully submitted,

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I certify that the foregoing document complies with the word limit of Fed. R. App. P. 32(a)(7)(B), excluding the parts of the document exempted by Fed. R. App. P. 32(f), because it contains 10,142 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Times New Roman 14-point type in Microsoft Word for Office 365.

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March 28, 2022

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ADDENDUM
DESIGNATION OF CITED DISTRICT COURT DOCUMENTS IN THE ELECTRONIC RECORD

RE No.	Title	PageID# Range
1	Complaint	1-25
1-2	Metropolitan Code of Laws § 17.20.120	28-35
22-1	Ordinance No. BL2016-493	209-17
22-2	Metropolitan Code of Laws § 17.04.060	218-22
23	Metropolitan Government's Statement of Undisputed Material Facts	240-45
26	Defendant's Response to Plaintiffs' Motion for Summary Judgment	397-41
28	Declaration of Jeff Hammond	428-30
40	District Court Memorandum Opinion	626-50

Kiren Mathews

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