No. 22-1074

In the Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,

Respondent.

On Writ of Certiorari to the Court of Appeal of California Third Appellate District

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a permit exaction exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests *amicus* because the right to just compensation when property is taken is fundamental to a just society and our constitutional order.

SUMMARY OF THE ARGUMENT

Some courts have wrongly held that exactions are exempt from *Nollan* and *Dolan* review merely because they are legislative in nature. According to these courts, the democratic process suffices to protect property owners such that no further constitutional scrutiny is required. That view has no footing in the text and history of the Constitution. Instead, it's based on unfounded optimism about the political process. This Court should reverse that error.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

In *Nollan v. California Coastal Commission*, this Court held that the government cannot impose a permit condition on development without compensation unless it has an "essential nexus" to a "valid governmental purpose."[2] Then, in *Dolan v. City of Tigard*, this Court explained that the proper standard of review is "rough proportionality"; the government has to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[3] Most recently, in *Koontz v. St. Johns River Water Management District*, this Court clarified that *Nollan/Dolan* review applies to "monetary exactions" within the land use permitting context.[4] *Nollan* and *Dolan* protect property owners against extortionate measures that "impermissibly burden the right not to have property taken without just compensation."[5]

As this Court held just two years ago, the constitutional safeguard against uncompensated takings does not depend on "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)."[6] But this rule has been disregarded by a number of courts—including the one below—that exempt monetary

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[2] 483 U.S. 825, 837 (1987).

[3] 512 U.S. 374, 391 (1994).

[4] 570 U.S. 595, 612 (2013).

[5] *Id.* at 607.

[6] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

exactions from *Nollan/Dolan* review if they are "legislative" in nature.[7]

This exception has no foundation in the relevant constitutional text and history (Part I), rests atop misreadings of this Court's opinions (Part II), and reflects a misunderstanding of the political dynamics surrounding takings (Part III).[8]

ARGUMENT

I. THE "LEGISLATIVE" EXCEPTION LACKS A CONSTITUTIONAL BASIS.

Nollan/Dolan review arises from restrictions on eminent domain provided by the Fifth and Fourteenth Amendments. Neither provision's text distinguishes between sources of government takings, and the history of both reveals legislative action as a primary constitutional concern.

The text of both amendments protects private property from extortion without reference to what branch of government commits it. *See* U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation."); *id.* amend. XIV (". . . nor shall any State deprive any

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[7] *See* Pet. at 11–19 (detailing the precedential split); *Sheetz v. County of El Dorado*, 84 Cal. App. 5th 394, 407, 411–12 (3d Dist. 2022).

[8] *See Knight v. Metro. Gov't of Nashville & Davidson County*, 67 F.4th 816, 818 (6th Cir. 2023) ("Nothing in the relevant constitutional text, history, or precedent supports [this] distinction . . . .").

person of . . . property, without due process of law . . . .").[9] Indeed, this Court recently emphasized that takings protections do not depend on whether the challenged government action "comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)."[10] This is true of other protections against unconstitutional conditions as well; this Court "typically applies" the same scrutiny "no matter the condition's source."[11] No reason exists to treat the Takings Clause differently. It is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and should not "be relegated to the

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[9] *Cf. Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272, 276 (1856) ("The [Fifth Amendment's Due Process Clause] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

[10] *Cedar Point Nursery*, 141 S. Ct. at 2072; *see also Ballinger v. City of Oakland*, 24 F.4th 1287, 1298–1300 (9th Cir. 2022) (recognizing that *Cedar Point Nursery* requires focus on the substance of a government taking and not what kind of government authority enacts it and citing, *inter alia*, *Pakdel v. City & County of San Francisco*, 141 S. Ct. 2226, 2229 (2021)).

[11] *See Knight*, 67 F.4th at 833 ("Take the free-speech context. There, the Court has relied on caselaw evaluating regulatory conditions when finding legislative conditions unconstitutional. And it has relied on caselaw concerning generally applicable legislative conditions when finding ad hoc executive personnel actions unconstitutional." (internal citation omitted)).

status of a poor relation in these comparable circumstances."[12]

In holding otherwise, the court below applied California precedent immunizing legislative exactions from *Nollan/Dolan* review because "the democratic political process" supposedly provides enough inherent protection against extortion.[13] Without citing any authority, the California Supreme Court imagined that a "city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election."[14]

Such sweeping trust in politicians was not shared by the Framers of the Fifth and Fourteenth Amendments. Thomas Jefferson called confidence in officials "the parent of despotism," saying constitutional protections are instead born of "jealousy."[15] As Justice Robert Jackson wrote for the Court in the landmark free-speech case *West Virginia State Board of Education v. Barnette*, "The very purpose of a Bill of Rights was to withdraw certain

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[12] *Dolan*, 512 U.S. at 392.

[13] *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 671 (2002).

[14] *Id.*

[15] THOMAS JEFFERSON, DRAFT KENTUCKY RESOLUTIONS 17:388 (1798), *quoted in* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 404 (2002).

subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[16] He noted that property is among those rights that "may not be submitted to vote" and "depend on the outcome of no elections."[17]

The counter-majoritarian nature of property rights in general always had particular cadence in the takings context. In a 1798 decision of this Court, Justice Samuel Chase condemned as "contrary to the great first principles of the social compact" any "law that takes property from A. and gives it to B."[18] In an 1810 decision, Chief Justice John Marshall recalled that in enacting state constitutional protections, the American people "manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed."[19] This Court similarly held in 1875 that a government which holds "the property of its citizens subject at all times to the absolute disposition and

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[16] 319 U.S. 624, 638 (1943).

[17] *Id.*

[18] *Calder v. Bull*, 3 U.S. 386, 388 (1798).

[19] *Fletcher v. Peck*, 10 U.S. 87, 138 (1810); *see also Santa Monica Beach, Ltd. v. Super. Ct. of L.A. County*, 19 Cal. 4th 952, 1032 (1999) (Brown, J., dissenting) ("The difficulty . . . is not, to borrow from Alexander Bickel, the 'counter-majoritarian difficulty,' it is the *majoritarian* difficulty itself. Along with other provisions of the national Constitution, the takings clause stands as a bulwark against confiscatory acts by a majority." (citation omitted)).

unlimited control of even the most democratic depository of power, is after all but a despotism."[20] William Blackstone wrote that proper use of eminent domain treated public officials not as the representatives of a majority lording over a minority, but as equals with landowners: "The public is now considered as an individual treating with an individual for an exchange. . . . and even this is an exertion of power which the Legislature indulges with caution."[21]

Blackstone's references to legislators reveal much. At common law, both in England and in its American colonies, it was the legislature that ordinarily exercised eminent domain and was restricted by limits on it.[22] The Justice Chase opinion quoted above also said it would be "against all reason and justice, for a people to entrust a Legislature" with the power to expropriate property.[23] Chief Justice Marshall strongly questioned whether legislative expropriation

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[20] *Loan Ass'n v. Topeka*, 87 U.S. 655, 662 (1875).

[21] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *135, *available at* https://avalon.law.yale.edu/18th_century/blackstone_bk1ch1.asp, *quoted in Gardner v. Trs. Of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. Ct. 1816) (per Kent, Ch.). *Gardner* uses a different pagination and has slight grammatical differences. *See* John V. Orth, *"Catch a Falling Star": The Bluebook and Citing Blackstone's* Commentaries, 2020 U. ILL. L. REV. ONLINE 125 (2020).

[22] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *135; *Knight*, 67 F.4th at 830–31.

[23] *Calder*, 3 U.S. at 388.

of property without compensation could ever comport with natural law and noted relevant federal constitutional limits on state legislatures.[24] As the Sixth Circuit recently observed, the Fifth Amendment's Framers understood it to protect property owners against legislative action in particular.[25]

The legislature's central role in effectuating takings continued through the enactment of the Fourteenth Amendment. In 1816, Chancellor Kent referred to federal and state takings clauses as "a necessary qualification accompanying the exercise of legislative power in taking private property."[26] In 1827, he wrote that federal and state constitutional restrictions on takings "imposed a great and valuable check upon the exercise of legislative power."[27] In 1833, Justice Joseph Story characterized eminent domain as legislative.[28] Other nineteenth-century

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[24] *Fletcher*, 10 U.S. at 135–38 (discussing bars on bills of attainder, ex post facto laws, and impairment of contracts).

[25] *See Knight*, 67 F.4th at 830–31.

[26] *Gardner*, 2 Johns. Ch. at 166.

[27] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 276 (1827), *quoted in Knight*, 67 F.4th at 831.

[28] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784, at 661 (1833), *quoted in Knight*, 67 F.4th at 831.

treatises and precedent did not distinguish between legislative takings and other kinds.[29]

All takings were equally subject to what one 1839 decision called "a settled principle of universal law": "the right to compensation."[30] Only four years after the Fourteenth Amendment's adoption, this Court reaffirmed that protections against uncompensated takings are "beyond the power of ordinary legislation to change or control" and warned against "pervert[ing]" constitutional references to eminent domain into "an authority for invasion of private right under the pretext of the public good."[31] Six years later, this Court in *Davidson v. New Orleans* condemned the idea that the Due Process Clause "has no application where the invasion of private rights is effected under the forms of State legislation"—citing the example of a forcible transfer of private property.[32]

Then, in 1897, this Court held that a judicial taking without compensation is unconstitutional "even if it be

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[29] *See Knight*, 67 F.4th at 831; *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893) ("The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character . . . ."); *Scott v. City of Toledo*, 36 F. 385, 394–95 (C.C.N.D. Ohio 1888) (quoting Thomas Cooley).

[30] *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (1839), *cited favorably by Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 238 (1897).

[31] *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177–78 (1872).

[32] 96 U.S. 97, 102 (1878).

authorized by statute."[33] That decision cited favorably a federal appellate case rejecting uncompensated takings "whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly . . . or indirectly through the forms of law."[34] Eighteenth- and nineteenth-century law did not recognize any legislative exception to the Takings Clause's normal protections.

Anticipating future Fourteenth Amendment jurisprudence in his *Davidson* concurrence, Justice Joseph Bradley called for takings to be constitutionally invalidated whenever they were "arbitrary, oppressive, and unjust."[35] That is the sort of review provided by *Nollan* and *Dolan*. To exempt legislative exactions from them is to impose distinctions alien to the text and history of the Fifth and Fourteenth Amendments.

Even worse, it would deny the Constitution's protections from being applied in their original context: legislative takings. Of course, it is only natural that these protections also reach other sorts of takings: as Justice Thomas has noted: "A city council can take property just as well as a planning

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[33] *Chi., Burlington & Quincy R.R.*, 166 U.S. at 240.

[34] *Scott*, 36 F. at 396, *cited approvingly by id.* at 238–39.

[35] *Davidson*, 96 U.S. at 107 (Bradley, J., concurring).

commission can."[36] But modern applications of the Takings Clause should never come at the expense of the protection it originally provided.[37] The legislative exception contradicts the original meaning of the Fifth and Fourteenth Amendments.

II. THE "LEGISLATIVE" EXCEPTION IS BASED ON MISREADINGS OF PRECEDENT.

This Court has warned readers not "to dissect the sentences of the United States Reports as though they were the United States Code."[38] But expansive misreadings of three passages have been used to support the legislative exception.

(1) In a footnote, this Court's *Dolan* opinion responded to criticism from a dissent by saying that "in evaluating most generally applicable zoning regulations," the party challenging a regulation bears the burden of persuasion, but not where the government makes "an adjudicative decision" to

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[36] *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of cert.); *see also Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1181 (2016) (Thomas, J., concurring in denial of cert.); *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 942 (1st Dist. 1995) ("[A] municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property.").

[37] *See United States v. Jones*, 565 U.S. 400, 411 (2012) (defending the application of original Fourth Amendment protections against trespass alongside later jurisprudence also safeguarding reasonable expectations of privacy).

[38] *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

impose conditions on "a building permit on an individual parcel."[39] The California Supreme Court cited this as authority for confining *Nollan/Dolan* review to discretionary, ad hoc fees.[40]

This reads too much into the footnote. As a federal district court recently observed while declining to adopt the legislative exception, the footnote mentions only generally applicable "*zoning*" regulations.[41] In likewise rejecting the legislative exemption, the North Carolina Supreme Court observed that the *Dolan* footnote concerned "zoning power and general land-use regulations rather than impact fees."[42] The *Dolan* footnote merely explained that the Court was not revolutionizing the law of police powers. It did not effect a sweeping limitation on *Nollan* and *Dolan*. After all, this Court does not "hide elephants in mouseholes."[43]

(2) *Dolan* also distinguished "essentially legislative determinations classifying entire areas of the city" from "an adjudicative decision to condition petitioner's application for a building permit on an individual

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[39] *Dolan*, 512 U.S. at 391 n.8.

[40] *San Remo Hotel L.P.*, 27 Cal. 4th at 666–70.

[41] *Heritage at Pompano Hous. Partners, L.P. v. City of Pompano Beach*, No. 20-61530-CIV, 2021 U.S. Dist. LEXIS 239647, at *16 (S.D. Fla. Dec. 15, 2021).

[42] *Anderson Creek Partners, L.P. v. County of Harnett*, 382 N.C. 1, 33 n.14 (2022).

[43] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (discussing statutory interpretation).

parcel."[44] This passage was recently cited by Nashville's municipal government in a takings case as support for the legislative exception.[45] In rejecting this argument, the Sixth Circuit noted that the landowners in the cases *Dolan* referred to "had not sought permits to develop their land; they had challenged zoning restrictions on the uses to which they and everyone else in the area could put their land."[46] Again, *Dolan's* point was to distinguish its holding from general zoning precedent, not set aside legislative exactions as a privileged class of takings.

Similarly, in *Koontz*, the Court identified the "fulcrum" triggering *Nollan/Dolan* review as "the direct link between the government's demand and a specific parcel of real property."[47] A North Carolina county cited this as authority for the legislative exception in a recent state supreme court case concerning water and sewer fees.[48] But as the court there observed, the fees *were* "linked to a specific piece of property, in each case the specific parcel of land that ha[d] been proposed for development."[49] The *Koontz* distinction was instead meant to address a different holding of this Court that rejected a takings challenge

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[44] *Dolan*, 512 U.S. at 385.

[45] *See Knight*, 67 F.4th at 834.

[46] *Id.*

[47] 570 U.S. at 614.

[48] *Anderson Creek Partners, L.P.*, 382 N.C. at 29.

[49] *Id.*

to a medical-benefits statute for retired miners.[50] *Koontz* was indicating merely that takings claims have to challenge burdens on the ownership of real property—such as a "monetary obligation" (like the one at issue here).[51]

(3) In her *Koontz* dissent, Justice Kagan supposed that the majority "might" accept the legislative exception based on its general desire not to

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[50] *See id.* (discussing *E. Enters. v. Apfel*, 524 U.S. 498 (1998)); *Levin v. City & County of San Francisco*, 71 F. Supp. 3d 1072, 1082 (N.D. Cal. 2014) (per Breyer, J.) (distinguishing *Koontz* from "an untethered financial obligation").

[51] *See Koontz*, 570 U.S. at 613.

At least three state appellate courts have noted that the application of rules to particular plots of land blurs the "legislative" category; this casts doubt on the workability of any legislative exception. *See Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 641 (Tex. 2004); *Highlands-in-the-Woods, L.L.C. v. Polk County*, 217 So. 3d 1175, 1178 n.3 (Fla. 2d Dist. Ct. App. 2017); *Amoco Oil Co.*, 277 Ill. App. 3d at 942 ("[T]he so-called 'ordinance' at issue here did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character."); *see also* Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 259 (2000) ("The more judgment or discretion available to the body applying the exaction, the more likely it is to be labeled an adjudicative determination. The two methods often go hand-in-hand because when a government body is making a functionally adjudicative decision by focusing on a particular party and applying preexisting policies, it is also likely to possess considerable discretion in how to apply the policies to the particular situation.").

fundamentally rework local land-use rules.[52] But as the North Carolina Supreme Court held, this inference was "advocated for in the dissenting opinion, rather than that of the majority."[53]

Neither *Nollan* nor *Dolan* distinguishes monetary exactions done by legislatures from those undertaken by other government actors. More than two decades ago, Justice Scalia noted scholarship finding that courts "either ignore or do not follow the 'essential nexus' standard" established by *Nollan* and *Dolan*.[54] Of particular concern was California courts' "seeking ways to evade their evident mandate, either procedurally or substantively."[55] This problem apparently persists. The legislative exception adopted by California and other jurisdictions lacks grounding in either the Constitution or this Court's precedents. The North Carolina Supreme Court even cited scholarship describing it as resting upon little more than "blind deference to legislative decisions."[56] It also reflects a misunderstanding of the political realities that surround takings.

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[52] 570 U.S. at 628 (Kagan, J., dissenting).

[53] *Anderson Creek Partners, L.P.*, 382 N.C. at 29.

[54] *Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1048–49 (2000) (Scalia, J., dissenting from denial of cert.) (citation omitted).

[55] *Id.* at 1049 (citation omitted).

[56] *Anderson Creek Partners, L.P.*, 382 N.C. at 34–35 (citation omitted).

III. THE "LEGISLATIVE" EXCEPTION MISUNDERSTANDS THE POLITICS OF TAKINGS.

The legislative exception is based on unfounded confidence that the democratic process is all the protection against extortionate exactions landowners need. Recall the California Supreme Court's (unsupported) musing: "A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election."[57] The Colorado Supreme Court has even called the risk of legislative extortion "virtually nonexistent" because "all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions."[58]

These just-so stories ignore political complexities noted by this Court and others. Far from voicing optimism, the *Nollan* Court was "inclined to be

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[57] *San Remo Hotel L.P.*, 27 Cal. 4th at 671; *see also Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996) (endorsing a legislative exception because—ipso facto—"the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present").

[58] *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *see also Home Bldrs. Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 486 (1997) (denying—without citing authority in support—that the risk of extortionate "leveraging" does not exist "when the exaction is embodied in a generally applicable legislative decision").

particularly careful . . . where [a taking] is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement."[59] This caution reflected the Takings Clause's role in stopping governments "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[60] As this Court has noted, "If . . . the uses of private property were subject to unbridled, uncompensated qualification . . . 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.'"[61]

There are reasons why takings are fraught with risk of abuse even when enacted legislatively. As Justice Scalia wrote of property regulation in general, extortionate fees happen "'off budget,' with relative invisibility and thus relative immunity from normal democratic processes."[62] They unfairly burden one

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[59] *Nollan*, 483 U.S. at 841. While this passage refers to physical takings, the point has equal force for monetary exactions.

[60] *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Monongahela Navigation Co.*, 148 U.S. at 325 ("[The Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government . . . .").

[61] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (*quoting Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

[62] *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part); *see also* Richard A.

citizen, "in some fashion other than taxes, to remedy a social problem that is none of his creation."[63] The Sixth Circuit observed that extortionate fees may arise because governments can leverage their "monopoly permit power to pay for unrelated public programs on the cheap."[64] As long as "the expected value of an owner's proposed project exceeds the condition's expected costs, the owner has an incentive to give in to this 'demand' even when the demand has no connection to the project's harmful social effects"—that is, even when it is a taking normally forbidden by the Constitution.[65] The equation does not necessarily change when the taking is done by legislators. In rejecting the legislative exception, the Texas Supreme Court found it "entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not

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Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 754 (1988) (observing that "there is nothing more commonplace than having democratic processes generate systems of 'off budget' financing"); James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 ENV'T. L. 143, 147 n.29 (1995) ("An important function of the takings clause is to force the majority to account for the costs of its actions. If the majority is permitted to impose costs on minorities, it has no incentive to account for those costs.").

[63] *Pennell*, 485 U.S. at 23 (Scalia, J., concurring in part and dissenting in part).

[64] *Knight*, 67 F.4th at 825.

[65] *Id.*

only tolerate but applaud, so long as the burdens they would otherwise bear were shifted to others."[66]

Pace the California Supreme Court, then, it is not true that "legislative and political processes" routinely protect landowners against "the vice of distributive injustice in the allocation of civic costs."[67] Precisely because legislatures are designed to be most responsive to majority demands, they "may be especially prone to extort disproportionate amounts of property from under-represented groups."[68] This is particularly true in the context of local politics, where monetary exactions commonly arise. In many areas, landowners are a minority especially susceptible to extortion by officials who are elected by a non-landowning majority.[69] What's more, for many land-

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[66] *Town of Flower Mound*, 135 S.W.3d at 641; *see also Knight*, 67 F.4th at 836 ("A majority of local taxpayers may well 'applaud' the lower taxes that their politically sensitive legislators can achieve through this type of cost shifting." (*citing id.*)).

[67] *Ehrlich*, 12 Cal. 4th at 876.

[68] Breemer, *supra*, at 403–04. For economically informed analyses of how different government actors can become agents of private gain rather than public good, see ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER (2d ed. 2016), and TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan et al. eds., 1980).

[69] *See* Breemer, *supra*, at 405 ("[I]n *San Remo* [*Hotel L.P.*], San Francisco's elected officials legislated the burden of ameliorating a city-wide housing shortage—and the associated homelessness—upon approximately 500 hotel owners."); Huffman, *supra*, at 146 ("Democracy will deter . . . wealth

use restrictions, only a small minority of people "happen to own property peculiarly affected."[70] At least in larger political jurisdictions, there exists some pressure to cobble together broad coalitional majorities, but local governments "come closer to a pure form of majoritarianism."[71] As James Madison warned, the risk of factionalism grows as the size of the government shrinks.[72] That makes the availability of judicial relief from illegal takings all the more important.[73]

Nollan recognized that developers are particularly vulnerable to takings.[74] One commentator described

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redistribution [by takings] only when large numbers of people are likely to bear the costs. The takings clause exists, along with the rest of the Bill of Rights, because the constitutional framers understood the inevitability of the tyranny of the majority in an unlimited democracy.").

[70] Huffman, *supra*, at 147.

[71] Reznik, *supra*, at 271.

[72] *Knight*, 67 F.4th at 836 (citing THE FEDERALIST No. 10 (James Madison)).

[73] *Contrast Home Bldrs. Ass'n of Dayton v. City of Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000) (rejecting legislation exception because *Nollan*/*Dolan* review "balances both the interests of local governments and real estate developers without unnecessary restrictions") *with McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008) (carving out legislative exception to limit judicial oversight of local government), *limited by Ballinger*, 24 F.4th at 1298–1300.

[74] *See Nollan*, 483 U.S. at 841 ("We are inclined to be particularly careful . . . where [a taking] is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the

developers as "precisely the kind of minority whose interests might actually be ignored" because most suburban voters "live in owner-occupied units," while developers are often outsiders who cannot cast local ballots.[75] Developers may even lack incentives to resist extortion, as they can pass on expenses to future buyers (who may also lack a local vote until after they move in).[76]

Concerns like these surface in judicial accounts of legislative monetary exactions. The Sixth Circuit recently applied *Nollan/Dolan* review to reject Nashville's attempt to make a house builder "pay for a sidewalk that he may well never use," as it was "2.5 miles away from his home."[77] In refusing to accept the legislative exception, the North Carolina Supreme

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compensation requirement, rather than the stated police-power objective.").

[75] Reznik, *supra*, at 271; *see also Anderson Creek Partners, L.P.*, 382 N.C. at 30, 37 (noting that residential developers are unpopular).

[76] *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 211 (2006) ("The few empirical studies undertaken seem to indicate that fees are largely passed on to the consumer of new housing and often in excess of the actual amount of the impact fee itself."); *Anderson Creek Partners, L.P.*, 382 N.C. at 37 (*quoting with a stylistic modification id.* at 262: "[W]ithout having to face the opposition of future residents who do not currently live or vote in the locality, local government officials find impact fees an irresistible policy option with continuing political support." (cleaned up)).

[77] *Knight*, 67 F.4th at 836.

Court noted cases where a county burdened developers with a school subsidy fee that increased by over 1600% in five years, and a town forced developers to either "submit to an illegal exaction" for water and sewer fees that would not result in any benefit to them or "discontinue [their] business."[78] In rejecting the legislative exception, the Texas Supreme Court warned that it would mean "a city could exact . . . money to provide a park" that was either "needed long before the developer subdivided his land" or "so far from the particular subdivision that the residents received no benefit."[79]

To be sure, state law can provide a valuable check on extortion, and legislators are not necessarily more abusive than any other government actors.[80] But legislative takings are not immune from abuse, and no procedural arrangement can substitute for the substantive protection promised by the Fifth and Fourteenth Amendments.

CONCLUSION

"From the point of view of the property owner" who counts on these provisions, "the consequence of a taking is the same whether done by the legislative, executive, or judicial branches."[81] The same is true

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[78] *See Anderson Creek Partners, L.P.*, 382 N.C. at 30–31 (citation omitted).

[79] *Town of Flower Mound*, 135 S.W.3d at 642–43 (citation omitted).

[80] *See Koontz*, 570 U.S. at 618.

[81] Huffman, *supra*, at 150.

from the perspectives of the Constitution and this Court's precedent, which do not authorize any legislative exception to *Nollan/Dolan* review. That exception reflects an unfounded optimism about the very majoritarian processes that the Takings Clause guards against. This Court should reverse the decision below.

Respectfully submitted,

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