CASE NOS. 20-1447, 20-1466

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

F.P. DEVELOPMENT, LLC,
Plaintiff-Appellee/Cross-Appellant,
v.
CHARTER TOWNSHIP OF CANTON, MICHIGAN,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 18-13690
(Hon. George Caram Steeh)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

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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, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests *amicus* because Canton's tree-removal ordinance is but one of many municipal laws from around the country that appear to be unassuming land-use regulations but in fact deprive landowners of fundamental property rights protected under the Takings Clause of the Fifth Amendment.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Canton, Michigan demands that plaintiff F.P. Development pay a substantial fine or replant trees according to a set formula to account for the unpermitted removal of trees on its property. F.P. removed the trees in order to clear mature and overgrown woods and to access a drainage ditch, all to prepare that portion of land for sale. Canton's demand constitutes a *per se* taking of a fundamental attribute of

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

ownership, equivalent to those the Supreme Court found to trigger the Fifth Amendment's Takings Clause in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

While the Court in *Loretto* limited its ruling to physical invasions and in *Lucas* to regulations resulting in a total loss of a property's value, both cases suggest that the Court is willing to endorse a broader *per se* taking test—one that prohibits all interferences with any of the fundamental attributes of ownership. Reading between the lines, they both presume that each fundamental attribute of ownership, given their common-law provenance, deserves a heightened level of protection. Several earlier Supreme Court cases further suggest that, for the purposes of takings analysis, each fundamental attribute can be "segmented" from one another. That is, each is its own "bundle of rights" that can be unconstitutionally interfered with regardless of the fractional impact the interference may have on the "parcel as a whole."

There are two "caveats" to the protection from uncompensated takings that the common law affords the fundamental attributes of ownership. Neither is truly a caveat, however, but instead an *explanation* for why what appears as a governmental interference is not really that. The first is that noxious uses of one's land interferes with a superseding public right against internalizing privately created costs. This understanding merely restates the traditional contours of common-law ownership. The common law generally prohibits noxious uses, so nuisance law merely contours

private property rights within their proper common-law boundaries. The second caveat is that, especially in the modern regulatory state, many governmental interferences (*e.g.*, fire-prevention measures) are indeed compensated—not through direct payment, but through the reciprocal advantages that a burdened landowner accrues from the imposition of similar regulations on the broader community.

Alternatively, if this Court disfavors the idea that the *per se* takings test be expanded to *all* fundamental attributes of ownership, as the Supreme Court has implied it should, the Court should find Canton's tree-removal ordinance to be instead an exaction: a condition imposed on a landowner in exchange for a permit to undertake a specific land use for which the cost to the landowner is not "roughly proportional" to the externalized costs of that use. The Supreme Court held in *Dolan v. Tigard*, 512 U.S. 374 (1994), that the onus is on the government to show that the conditions they have proposed are indeed roughly proportional to the cost an individual owner's proposed land use would place upon the public.

Because Canton's tree-removal ordinance does not allow for site-specific analysis, its application will at least sometimes "overcharge" a landowner for a proposed use, levying fines or mitigation requirements in excess of the costs that use will externalize. That is the textbook definition of an unconstitutional condition. If Canton's ordinance did allow for site-specific analyses, it would have found that the plaintiff's actions, if not net-beneficial to Canton, at least furthered one of the

ordinance's express purposes. Accordingly, the "rough proportionality" threshold has not been met here and Canton's tree-removal ordinance, on its face and as applied, effects an exaction in violation of the Takings Clause.

ARGUMENT

I. CANTON'S TREE-REMOVAL ORDINANCE CONSTITUTES A *PER SE* TAKING OF THE SEGMENTED PROPERTY RIGHT IN TREES

A. The Supreme Court's Rulings in *Loretto* and *Lucas* Prohibit *All* Interferences with Fundamental Attributes of Ownership

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Supreme Court held that a physical invasion of private property, no matter how slight, constitutes a *per se* taking. In *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), the Court further held that a regulation resulting in a total value loss was also a *per se* taking. An important caveat, however, was that any interference, no matter how severe, is not a taking if it does no more than prevent or cease a use that is noxious under the "background principles of the State's law of property and nuisance." *Id.* at 1029. But such regulations are not so much interferences as they are limitations that "inhere in the title itself." *Id.* That is, they prevent or restrain land uses that are *ultra vires* to the rights and interests a holder's title affords. The subtext of the Court's holdings in *Loretto* and *Lucas* was that *all* interferences with the fundamental attributes of ownership—in *Loretto*, the right to exclude; in *Lucas*, the right to gainful use—are unconstitutional regardless of the regulatory purpose.

These fundamental attributes of ownership predate the Constitution and are rooted in the common law. John Locke, whose political philosophy inspired the Founding generation, explained the proper relationship between public and private rights under the common-law tradition, writing that "the power of the [s]ociety . . . can never be suppose[d] to extend farther than the common good, but is obliged to secure every ones Property." John Locke, Second Treatise, *in Two Treatises of Government* §131 (1689). *See also* Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 Mo. L. Rev. 525, 526–27 (2007) ("Madison, the chief architect of the Takings Clause, was deeply influenced by Locke.").

Property implies *sovereignty* over all its dimensions—physical, temporal, and conceptual. Indeed, it demands it. Blackstone defined the "right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." William Blackstone, *Commentaries on the Laws of England* *2 (1768). "[I]f as soon as [a man] walked out of his tent or pulled off his garment, the next stranger who came by would have a right to inhabit the one and to wear the other," he would have no incentive to produce or maintain either. *Id.* at *3.

James Madison and his contemporaries defined property rights broadly—enough to bring direct *and* indirect violations within the ambit of what would eventually become the Takings Clause:

> If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and sooth their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 James Madison, *The Papers of James Madison* 201 (Hobson et al. eds., 1979) (emphasis original). Madison further argued that property, "[i]n its larger and juster meaning . . . embraces every thing to which a man may attach a value and have right." *Id.*

Roscoe Pound described the "attributes of ownership" as similarly all-encompassing, including "*jus utendi*, the liberty of using the object according to one's will"; "*jus fruendi*, the liberty of enjoying the fruits and avails of the object owned"; and "*jus abutendi*, the liberty of changing its form or even destroying it." Roscoe Pound, *Jurisprudence* 128 (1959). Pound noted, however, that "restrictions of exercise of them do not mean doing away with them." *Id.* Of course this is true, though the line must be drawn somewhere. By Pound's own calculus, it should be drawn at a point where such attributes "still correspond to economic utilizing of objects in civilized society." *Id.*

Strong property rules create economic utility, a fact that is fundamental to the well-settled common-law rules of ownership expounded by Blackstone, Madison,

Pound, and contemporary legal scholars like Richard Epstein. To be sure, there has always been a purely equitable dimension to property rights, but more important from a communitarian standpoint is what rules will provide incentives for the highest-valued uses of property.

Here, the best law-and-economics argument for Canton's tree-removal ordinance working a *per se* taking of the plaintiff's property is that the conditions it imposes disincentivize the highest-valued use that could be made of the land. As Justice Scalia put it, referring specifically to the fundamental right to exclude, "the right that we all possess to use the public lands is not the 'property' of anyone—hence the sardonic maxim, explaining what economists call the 'tragedy of the commons,' *res republica*, *res nullius*." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

Avoiding the tragedy of the commons and creating a healthier relationship between the public and private realms depend in no small measure on drawing the line as far in favor of private property as the needs—not merely the wants—of the broader public allow. In the modern context, this means restricting regulations to those necessary to protect public rights from private predation. The common law does not place upon private ownership the burden of proving its worth to the public.

To preserve the common-law notion of private ownership, its fundamental attributes are each comprised of strands in a "bundle of rights" particular to that

fundamental attribute. The Supreme Court has long endorsed this pro-segmentation view of the bundle of rights, which holds that "every regulation of any portion of an owner's 'bundle of sticks' is a taking of that particular portion considered separately." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988). *See*, *e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1871) (articulating that for a regulation to effect a taking "it is not necessary that the land should be absolutely taken"); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 593, 601-02 (1935) (finding that state law effected a taking when it extinguished mortgagor's remaining debt, even though the mortgagee retained a right to "reasonable rent"); *Chippewa Indians of Minn. v. United States*, 305 U.S. 479, 481-82 (1939) (holding that Congress violated the Takings Clause when it converted tribal lands into a national forest, although the lands were to be held in trust and the tribe was to receive the proceeds from the sale of timber); *United States v. Dickinson*, 331 U.S. 745, 749 (1947) (finding a taking when gradual flooding "stabilized," even when the land, as a *whole*, was not condemned); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951) (holding that the government effected a taking when it "required mine officials to agree to conduct operations"—retaining the right to manage—"as agents for the Government"); *Dugan v. Rank*, 372 U.S. 609, 625 (1963) (suggesting that a requisition of a *portion* of owner's water rights merits compensation under the

Tucker Act). The Court's pro-segmentation cases "ha[ve] not been consistent in deciding when segmentation occurs or how it should affect its decisions," Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9, 18 (1997), but *Loretto* and *Lucas* make clear that, at least under takings analysis, the fundamental rights in ownership should be segmented from the parcel as a whole.

Although the plaintiff in *Lucas* reserved the right to exclude—that was the only real element of ownership he preserved—and the invaded property in *Loretto* still held value—though on remand the lower court awarded only nominal damages—the regulations in both cases still constituted takings because they deprived the plaintiff of just one strand of one fundamental attribute's bundle of rights. If the plaintiff here had an interest only in the trees on the land, and not in the land itself, there would be no question that Canton's blanket per-tree mitigation requirement is a *Lucas*-style taking *of that interest*. It should not matter that the plaintiff happens to hold a fee simple interest in the land on which the trees sit.

Moreover, in *Horne v. Dep't of Agriculture*, the Supreme Court clarified that "[t]he different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike." 135 S. Ct. 2419, 2427–28 (2015). The Court limited its analysis to the facts of the case, which involved a *physical* appropriation of

personal property, but nothing in its reasoning rejects its application of *per se* takings to *non-physical* appropriations of personal property.

The district court was thus wrong in holding that, because there is no *physical* trespass onto land or confiscation of chattel, the Canton ordinance's per-tree fee or mitigation requirement is immune to *per se* takings analysis. *See F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F. Supp. 3d 879, 889 (E.D. Mich. Apr. 23, 2020). Physical intrusion or appropriation is not the *sine qua non* of *Loretto*, *Lucas*, and *Horne*. Instead, the reasoning of those cases, and those of other pro-segmentation rulings, suggests that *any* governmental interference with a fundamental attribute of ownership is a *per se* taking unless it addresses a real or potential nuisance or is otherwise compensated through reciprocal advantages. The fundamental attributes protected in pro-segmentation cases are simply too varied to suggest otherwise. If the district court had not so limited *Loretto*'s reach, it would have endorsed the plaintiff's *per se* takings claim. *Id.* (making no other doctrinal distinction between this case and *Loretto* and *Horne* beyond the fact that "the government regulation at stake does not physically take [plaintiff's] trees for public use").

This Court should simply take the next commonsense step and extend the *Loretto*/*Lucas* doctrine to its logical end, prohibiting uncompensated regulations that interfere with *any* fundamental attribute of ownership, instead of reserving common-law protection to the rights to exclude and to gainful use.

B. Common Law Affords Two Categorical "Exceptions" to the Absolute Protection of the Fundamental Attributes of Ownership

Two "exceptions" exempt certain interferences from a direct-compensation requirement because either the interference: (a) *properly* restricts the use of property within its common-law contours, prohibiting nuisance uses, or (b) the owner is indirectly compensated through the benefit, or "reciprocal advantage," he derives from the government's imposing the same restrictions on all who are similarly situated. *See* Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. Rev. 531, 548 (1995) ("If a particular use of property was considered tortious under the common law, a statute prohibiting that use cannot credibly said to have 'taken' anything from the property owner, since the right never was in his bundle of property rights to begin with."); *id*. at 576 ("[I]in the case where there is no diminution in value, or only a de minimis diminution in value, or a diminution in value completely offset by an average reciprocity of advantage, there is no taking, and further analysis is not needed."). Thus, these are not so much exceptions as they are explanations for why such regulations are not uncompensated takings. *See* Richard A. Epstein, *Simple Rules for a Complex World* 134–37 (1995). *See also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("The exercise of [the police power without just compensation] has been held warranted in some cases by what we may call the average reciprocity of advantage.").

In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Supreme Court first held that the state could under certain circumstances exercise its police powers to limit the use of private property without a requirement to provide just compensation to the burdened landowners. But this was not a radical departure from the common law. It merely incorporated the ancient concept of *sic utere tuo ut alienum non laedas* into American constitutional jurisprudence, clarifying that the Takings Clause did not prevent the state from prohibiting harmful land uses. As the Court put it:

> The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, *by a noxious use of their property*, to inflict injury upon the community.

Id. at 669 (emphasis added).

The law of nuisance and the "reciprocity of advantage"—though the courts did not yet call it that—figured prominently in 19th-century case law, drawing the line between private and public rights. See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1585–1604 (2003) (surveying 19th-century eminent domain case law). The default view among jurists of the time was that property conferred absolute use and dominion up to the border of a superseding public right. *Id.* at 1597 ("If the people vest their equal property rights

in a commons . . . a neighboring private owner becomes subject to a duty not to use his own in a manner that interferes with the purposes of the public domain.").

Recent precedent continues to reflect, in words if not action, the absolutist view of property's elementals, even if some courts over-broaden the scope and power of the average reciprocity of advantage. The Supreme Court in *Hodel v. Irving* wrote that the right to devise, "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." 481 U.S. 704, 716 (1987). The right to use one's property as one wishes—provided it does not interfere with the superseding public right against nuisance uses—derives from the same Anglo-American tradition and deserves a similar treatment.

The Framers for the most part read this tradition as according rights in private property absolute protection except when necessary for the common good. *See* Ilya Somin, *The Grasping Hand:* Kelo v. City of New London *and the Limits of Eminent Domain* 36–39 (2015) (discussing early post-ratification cases, including *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795), in which Justice William Patterson held that the state's eminent domain power can be used only "in urgent cases, or cases of the first necessity"). The Framers' primary innovation—to require the government to make just compensation even when operating under common-good necessity—provided the fortress of ownership with another layer of protection, one that did not exist under common law at the time. *See* William M.

Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995) ("Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment.").

Note that the *Mugler* Court restricted its analysis to "noxious" uses of property. The Court did not tread further—and would not revise this doctrine until in *Pennsylvania Coal Co. v. Mahon* it clarified that a regulation like the one in *Mugler*, among others, "goes too far" if it does not prevent a noxious use *or* underpays a landowner for a burden that the Court would later require "in all fairness and justice, should be borne by the public as a whole." 260 U.S. 393 (1922); *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Penn Central* and *Lucas* demonstrate that, by the end of the 20th century, both the nuisance and reciprocity-of-advantage "exceptions" incorporated through *Mugler* and its progeny were firmly baked into the Court's takings jurisprudence.

C. The Plaintiff's Use of Its Trees Does Not Subject It to the Nuisance Exception to the Fundamental Attribute Rule

F.P. Development's use of its property is not a nuisance because the removal is good forestry practice and part of the removal was intended to access a drainage ditch that the county had failed to maintain. This is according to its retained expert arborist, who found that aside from Canton's expert's surveying errors (including misidentifying several trees), "the thinning of trees [maintains] a healthy

development of wood as maturing trees compete for nutrients, water, and light," and "the replanting of trees in the woodland of trees . . . is ill advised as [the grown trees required to be planted] are unlikely to survive and instead the better practice is to replenish with seedlings." *F.P. Dev.*, 464 F. Supp. at 884. But one need not be an arborist to see that the plaintiff's tree removal conforms to the ordinance's purpose of "promot[ing] an increased quality of life through the regulation, maintenance and protection of trees, forests, and other natural resources." *Id.* at 891.

And even if the plaintiff had removed trees for no good reason, the ordinance makes no distinction between nuisance and non-nuisance uses, imposing fees or mitigation orders on all removals. Canton "admits that it engaged in no site-specific evaluation . . . to determine the *impact* of tree removal." *Id.* at 894 (emphasis added). All Canton's expert did was provide notice to the plaintiff that the removal violated the ordinance and calculated the number of regulated trees that had been removed.

Under these circumstances, it is difficult to disagree with plaintiff's expert's findings. This court should do the same, not simply as a matter of good evidentiary practice, but because the ordinance's inflexibility means that Canton's expert testimony includes no mention of whether the removal was a nuisance or not.

D. The Penalty Imposed Here Does Not Subject Plaintiff to the Reciprocity-of-Advantage Exception Either

In *Penn Central Transp. Co. v. New York City*, the Supreme Court held that, undertaking "essentially ad hoc, factual inquiries," a court could find a regulation

effected a partial taking if it was confiscatory in view of "[t]he economic impact of the regulation . . . particularly, the extent to which the regulation has interfered with [a claimant's] distinct investment-backed expectations" and "the character of the governmental action." 438 U.S. 104, 124 (1978). The district court, using that test, held that the ordinance worked a partial regulatory taking of the plaintiff's interest in the trees on its land, and thus was not compensable. *F.P. Dev.*, 456 F. Supp. at 891. Regardless of the continuing merit of the *Penn Central* test, however, *Loretto* and *Lucas* counsel that this confusing and open-ended test can and should be bypassed here by simply holding the Canton ordinance to be a *per se* taking.

Whether a *per se* or *Penn Central* taking, a court considering either claim must determine whether, in lieu of direct compensation, a claimant has been compensated "in kind." Per Richard Epstein, "regulations [that] sweep more broadly . . . may promise 'the average reciprocity of advantage' insofar as *all persons are benefited and burdened in equal proportions*." Epstein, *Simple Rules*, *supra* at 134 (emphasis original). "If so, then the benefits that each party receives when like restraints are imposed on others constitutes compensation for the losses sustained." *Id.*

The character and amount of sufficient reciprocal advantage always depends on the facts of a case and could involve difficult calculations, but a regulation can certainly be so exacting or so targeted that it will not even pass a cursory cost-benefit analysis. Canton's tree-removal ordinance is a prime example of the latter.

There is no reciprocal advantage here because there are exempt landowners who, because their land uses confer other community benefits, would be given a disincentive for providing those benefits if they were required to replant removed trees. *See* Canton Charter Township, Code of Ordinances, Article 5A.05(B) ("All agricultural/farming operations, commercial nursery/tree farm operations and occupied lots of less than two acres . . . shall be exempt from all permit requirements of this article."). These exemptions suggest that, in enacting their ordinance, Canton officials conducted at least a basic, maybe unthinking, cost-benefit analysis of the ordinance's utility in particular land-use contexts. And "rules with selective burdens or explicit facial discrimination are always suspect." Epstein, *Simple Rules*, 135.

For the plaintiff to still obtain a reciprocal advantage despite this disparate treatment, the "heavy burdens" must be counteracted with "greater benefits in exchange." *Id.* But the benefits to the plaintiff for the charges the tree-removal ordinance imposes are no greater than those that fall on the entire community.

If an agricultural owner converted its land to non-agricultural commercial use, no doubt the ordinance would apply in equal measure. Thus one might argue that, because all are free to engage in commercial land use—notwithstanding separate regulatory and zoning obstacles—everyone is *officially* subject to charges under the tree-removal ordinance. But this formal equality is not enough to satisfy *Penn*

Central, for example, because it "conceals the enormous implicit wealth transfer that takes place between" commercial users and those engaging in exempted uses. *Id.*

In sum, when a cost is "borne by the public as a whole," each landowner is either directly compensated if he or she bears a disproportionate share of the burden, or otherwise receives the "reciprocal advantage" of having the same burdens imposed on their neighbors. But when both direct and indirect compensation are lacking, then the regulation effects a taking if the targeted use is not noxious. And even if the targeted use *is* a nuisance, a regulation can still overcharge a landowner for the use and thus constitute a taking. *See* D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. Miami L. Rev. 471, 503 (2004) ("[J]ust because a use is prohibited by an exercise of the police power does not mean that the use is so noxious as to provide a moral justification for the denial of compensation regardless of the impact of the prohibition of that use on the property owner."). This is the notion underlying *Dolan v. Tigard*, in which the Supreme Court termed such overcharges "exactions." 512 U.S. 374, 377 (1994).

II. ALTERNATIVELY, CANTON'S TREE-REMOVAL ORDINANCE FAILS *DOLAN*'S "ROUGH PROPORTIONALITY" TEST AND IS THUS AN EXACTION

A. *Dolan* Prohibits Conditions on Land Use That Are Not Roughly Proportional to the Costs the Use Would Impose on the Community

If a regulation is not held to be a *per se* taking or a *Penn Central* regulatory taking, it might still be considered an *exaction*, which to remediate requires greater

precision in holding a landowner to account for the negative externalities flowing from the uses of its land. This is because an exaction is more or less an overcharging of the landowner for the harm its land use will cause. An exaction thus *miscalculates* the extent to which a landowner oversteps the limits of their property rights, and pushes back too far past the boundary stone either by forcing the owner to pay for something unrelated to the harm caused, or simply by demanding too much. *See* Timothy M. Mulvaney, *The Remnants of Exaction Takings*, 33 Environs: Envtl. L. & Pol'y J. 189, 218 (2010) ("From an efficiency perspective, conditions on new development need only require internalization of the dollar-equivalent of the social cost."). When a court invalidates an exaction, it ensures that the government compels landowners to reabsorb the negative externalities of their land use and thus does not "go too far" in violation of *Pennsylvania Coal* and *Armstrong*.

In *Nollan v. Cal. Coastal Comm'n* and *Dolan v. Tigard*, the Supreme Court defined an exaction, respectively, as a condition that does not have an "essential nexus" to the proposed land use and one that is also so demanding that it bears more than a "rough proportionality" to the cost that prospective use would impose on the surrounding area. *Nollan*, 483 U.S. 825, 837 (1987); *Dolan*, 512 U.S. 374, 391.

According to the *Dolan* Court, "[n]o precise mathematical calculation is required" to determine rough proportionality. 512 U.S. at 391. Instead, a local government "must make some sort of individualized determination that the required

dedication is related both in nature and extent to the impact of the proposed development." *Id.* In idiomatic terms, the question is whether the punishment fits the crime, and it is on the government to prove that it does. While there is no need for a "precise mathematical calculation," some cases could require a more exacting analysis than others. This is not such a case because the lack of rough proportionality is obvious. The ordinance imposes the fee or replanting condition, full stop. No matter the impact of the removal—that is, the "crime"—the punishment is the same.

For a permitting condition to pass muster under *Dolan*, it cannot do more than balance the costs and benefits of the targeted use. If the targeted use *confers* benefits on the community, then the chances that a condition is an exaction become that much greater. If the targeted use is *net*-beneficial, or furthers a purported purpose of the relevant ordinance, than *any* conditions imposed necessarily constitute an exaction. The former because any fine or mitigation requirement is disproportionate if it punishes a *net*-beneficial land use. This would be tantamount to fining someone for donating to charity. The latter because if a court is to draw a line anywhere with respect to a particular ordinance, what better authority then the ordinance itself?

While the Supreme Court has not ruled specifically on *legislative* monetary exactions like the ordinance here, it moved the *Nollan*/*Dolan* test in that direction in *Koontz v. St. Johns River Water Mgmt. Dist.*, in which it held that an *administrative* demand for money must satisfy the *Nollan*/*Dolan* test. 570 U.S. 595, 619 (2013).

The *Koontz* Court noted that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Id.* at 604–05. On the flipside, the Court acknowledged that "many proposed land uses threaten to impose costs on the public that dedications of property can offset." *Id.* at 605. In view of these countervailing points, the Court concluded that the *Nollan*/*Dolan* test "enable[s] permitting authorities to insist that applicants bear the full costs of their proposals while still prohibiting the government from engaging in 'out-and-out . . . extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* at 606.

The robust stance the Court took in *Koontz* against the sheer audacity of the administrative exactions suggests that its reasoning applies with equal measure to legislation that demands money or costly mitigation in exchange for a permit. This is especially likely where the ordinance does not distinguish between positive and negative externalities flowing from an applicant's undertaking the permitted action.

B. Because the Ordinance Imposes Costs Without Site-Specific Cost-Benefit Analyses, It Very Likely Exacts Unconstitutional Conditions

A regulation is almost certainly an exaction when it does not account for positive externalities at all. Canton's tree-removal ordinance, which doesn't even account for the *possibility* of positive externalities, belongs in that category. It imposes the same conditions for each tree removed no matter the site-specific

circumstances. And while the ordinance does include some site-specific questions, the district court noted that these "only concern whether a permit may be granted in the first instance . . . but d[o] not play any part in determining mitigation." *F.P. Dev.*, 456 F. Supp. at 894.

The Supreme Court in *Dolan* observed:

> Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.

512 U.S. at 385–86. The same could be written here. Since the Canton ordinance does not provide for any site-specific analysis to determine whether to require mitigation in the first place, and since Canton's expert did not make any assessment beyond the number and type of trees felled, the municipality "has not identified any 'special quantifiable burdens' created by" plaintiff's tree removal. *Id.* at 386.

The fact that the ordinance does not allow for a site-specific analysis makes it more difficult to determine the costs (if any) that plaintiff's tree removal has imposed on the surrounding area, a figure essential to rendering an accurate accounting of the outstanding balance between the removal's positive and negative externalities. Since Canton would not have undertaken a site-specific analysis even if plaintiff had

applied for a permit (and so plaintiff does not therefore have "unclean hands," as Canton alleges), the district court rightly noted that a permit application would have had no effect on measuring whether a condition should even be imposed. It would only measure the site-specific mitigation cost. *F.P. Dev.*, 456 F. Supp. at 893, 894.

Especially because the ordinance does not account for site-specific mitigating factors—such as thinning trees as good forestry practice—the burden falls on Canton to prove a cost-benefit imbalance justifying conditions in exchange for a removal permit. This would be true under *Nollan*/*Dolan* even if the ordinance accounted for site-specific factors. *See* Timothy M. Mulvaney, *State of Exactions*, 61 Wm. & Mary L. Rev. 169, 177 (2019) ("Under this new constitutional takings framework unique to exaction disputes, it is the government—as the defendant—who has the burden of proving that a challenged exaction" satisfies the *Nollan*/*Dolan* test.).

On paper, the sole purpose of the law here is to "promote an increased quality of life through the regulation, maintenance and protection of trees, forests, and other natural resources." Add to this Canton officials' assertions "that the tree replacement requirement is designed to beautify its community, avoid becoming the 'next concrete jungle,' and to address the problem of a shortage of trees in Canton." *F.P. Dev.*, 456 F. Supp. at 893. These purposes are no doubt sound, even noble, policy goals, and are without question part of local government's police powers. But without allowing for site-specific analysis to adjust the size and scope of the

conditions it imposes, Canton's tree-removal ordinance is a model *prima facie* exaction, the sort against which *Nollan* and *Dolan* aggressively cautioned. Even if this court disagrees with plaintiff's *per se* taking and *Penn Central* taking claims, it should extend the *Nollan*/*Dolan* test to Canton's tree-removal ordinance for its failure to exempt constructive removals from its exacting regime.

CONCLUSION

For the reasons stated above, and those offered by plaintiff-appellee, the court should affirm the lower court's ruling with respect to plaintiff-appellee's exaction claim and reverse it with respect to plaintiff-appellee's *per se* taking claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 6,029 words, excluding the parts exempted by Fed. R. App. P. 32(f).
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/s/ *Ilya Shapiro*
December 11, 2020

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I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
December 11, 2020