No. 18-54

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM A. DABBS, JR.
Petitioner,

v.

ANNE ARUNDEL COUNTY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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

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This case interests *amici* because it presents an opportunity to clarify that the "nexus" and "rough proportionality" test from *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applies to legislated permit conditions. If the decision below stands, states and localities will continue using such conditions to circumvent the Takings Clause in precisely the manner the Court sought to stop in *Dolan*, *Nollan v. Calif. Coastal Comm'n*, 483 U.S. 825 (1987), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief; their consent letters have been lodged with the Clerk. No counsel for any party authored any part of this brief and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF THE ARGUMENT

The Court has repeatedly recognized that governments can misuse land-use permits to avoid their obligations under the Takings Clause. In response, the Court has limited governments from conditioning a land-use permit on the landowner surrendering a property right. Applying the unconstitutional-conditions doctrine in this setting, the Court has explained that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In other words, government cannot accomplish indirectly through land-use permits what it cannot do directly by taking the property.

The test for determining whether a condition violates the unconstitutional-conditions doctrine is straight forward. The reviewing court must first determine whether the condition itself would be a taking if imposed outside the permitting context. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013). If so, the court must then ask whether "there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Id.* at 2591. This test was formulated to ensure that governments do not circumvent the Takings Clause by extracting property interests at will, while also protecting their power to mitigate any harm a proposed development may cause.

As this case demonstrates, however, municipalities and counties have devised schemes to evade the prohibition on uncompensated takings. Here, the County imposed an "impact" fee tied to no specific impact. Pet. at 4. While waving vaguely at "public schools, transportation, and

public safety," Pet. at 5, (which are words that describe nearly everything local governments do), the fee itself bares no relationship to these ostensible interests. A single family living in a 1,000 square-foot home does not use on average twice the transportation resources of a single family living in a 6,000 square-foot home, yet the ordinance assesses them for twice the impact on the public fisc.[2] Pet. at 7. The schedule laid out by the County demonstrates that the target is not "the effects of the proposed land use," *Koontz*, 133 S. Ct. at 2591, but to raise general revenue on the backs of landowners who are "especially vulnerable to the type of coercion" at issue here, because they would lose far more by forgoing the project than by paying the impact fee. *Id.* at 2594. These general obligations of government should be funded by taxes generally imposed, such that all citizens, not simply those vulnerable or disfavored, provide for these common goods.

There is no basis in this Court's jurisprudence—or in logic—for exempting legislatively imposed conditions in this context. This Court has never distinguished between legislatively imposed conditions and *ad hoc* conditions; it has instead invalidated both under the unconstitutional-conditions doctrine. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972). It would make little sense to treat the two types of conditions differently, as "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117–18 (1995) (Thomas, J., dissenting from denial of

[2] Indeed, one would expect larger homes to be occupied by families of higher socioeconomic status, who are more likely to use private schools and personal cars, rather than public schools and transportation.

cert.). "A city council can take property just as well as a planning commission can." *Id.* at 1118.

A common response is that *ad hoc* conditions are more prone to abuse than their legislative counterparts because they are typically insulated from democratic processes. *See, e.g.*, *San Remo Hotel L.P. v. City & Cty. of San Francisco*, 27 Cal. 4th 643, 671 (Cal. 2002). But this view is myopic. Legislators are just as prone as bureaucrats to impose uncompensated conditions. They can score political points by targeting disfavored groups (such as developers) via legislation that a majority of their constituents will support. And while *ad hoc* permitting conditions apply only to a single landowner, legislated conditions apply to broad categories of landowners. For that reason, legislated conditions pose an even greater threat to individual property rights than *ad hoc* ones. Put simply, the need for rigorous application of the unconstitutional-conditions doctrine to legislative conditions is more acute than with *ad hoc* permitting conditions.

Finally, there is an acknowledged split of authority on this issue. *See, e.g.*, *Parking Ass'n of Georgia*, 515 U.S. at 1117 (Thomas, J., dissenting from denial of cert.); *CBIA v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of cert.). That split has deepened over the decades, with the majority of courts incorrectly exempting legislative conditions from the unconstitutional-conditions doctrine. Without this Court's intervention, lower courts are likely to continue trending in the wrong direction, allowing more states and localities to circumvent their constitutional obligations under the Takings Clause.

ARGUMENT

I. GOVERNMENTS EVADE THEIR "JUST COMPENSATION" OBLIGATIONS WHEN COURTS EXEMPT LEGISLATED CONDITIONS FROM THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. Legislatively Imposed "Impact Fees" Like Anne Arundel County's Are the Latest "Innovation" Allowing Local Governments to Violate This Court's Protection of Property Rights in *Nollan*, *Dolan*, and *Koontz*

Ordinances such as Anne Arundel County's dodge this Court's Takings Clause jurisprudence. Once *Nollan* and *Dolan* limited *ad hoc* conditions, states and localities like Anne Arundel County embed those fees in an ordinance to exempt them from scrutiny, thus returning to the *status quo ante*. This Court should grant certiorari to block the County's unabashed attempt to evade the Takings Clause.

The Fifth Amendment's Takings Clause states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power'" to pay "just compensation" for the taken property interests. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted).

This Court has long recognized that states often try to circumvent the "just compensation" requirement through the land-use permitting process. In *Nollan*, for example, the California Coastal Commission conditioned a building permit on the landowners granting a public easement across their property to access a beach. *Nollan v. Cal.*

Coastal Comm'n, 483 U.S. 825, 827 (1987). The Court explained that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831.

The Court explained that conditioning a permit upon the grant of that same easement, which had no relationship to the permit request itself, is "an out-and-out plan of extortion." *Id.* at 837. Compliance with the Takings Clause, the Court emphasized, is "more than an exercise in cleverness and imagination." *Id.* at 841. To ensure compliance with the "just compensation" requirement, the Court thus extended the doctrine of "unconstitutional conditions" to attempts by states and localities to impose onerous conditions in the permitting process. *See also Dolan*, 512 U.S. at 385.

There are important reasons why this Court chose to restrict states' and local governments' permitting power in this manner. In particular, "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 more than property it would like to take." *Koontz*, 133 S. Ct. at 2594. The government can therefore force a landowner to sacrifice property in exchange for a valuable land-use permit. *Id.* "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation." *Id.* at 2595.

To prevent this "gimmickry," courts should apply heightened scrutiny to conditions placed in land-use permits. *Dolan*, 512 U.S. at 387. When reviewing a permit, courts must first decide whether the proposed condition

would be a taking if the government imposed it directly on the landowner outside the permitting process. *Koontz*, 133 S. Ct. at 2598 ("A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing."); *see also Lingle*, 544 U.S. at 537–40 (explaining the test for finding a taking). If the condition would be a taking, then the state cannot impose it as a condition *unless* there is a "nexus" and "rough proportionality" between "the property that the government demands and the social costs of the [landowner's] proposal." *Koontz*, 133 S. Ct. at 2595.

This test protects both the landowner's property rights and the government's regulatory interests. It balances (1) the reality that state and local governments often try to coerce landowners into giving up property interests and (2) the possibility that "proposed land uses threaten to impose costs on the public that dedications of property can offset." *Koontz*, 133 S. Ct. at 2594–95. The Court's "precedents thus enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out . . . extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* at 2595 (quoting *Dolan*, 512 U.S. at 387). For example, if a landowner's "proposed development . . . somehow encroache[s] on existing greenway space in the city," then it would be permissible "to require the [landowner] to provide some alternative greenway space for the public either on her property or elsewhere" as a condition of obtaining the permit. *Dolan*, 512 U.S. at 394.

The Court's guidance unfortunately has not deterred states and localities from still trying to avoid their compensation obligations. Just as states and localities attempted to use land-use permits to avoid those

obligations altogether, they increasingly accomplish that same end by gaming the Court's "nexus" and "rough proportionality" test. *Koontz* is the perfect example of this "gimmickry." There, a Florida water management district conditioned the landowner's requested permit on the landowner paying for improvements on unrelated government-owned property. 133 S. Ct. at 2593. The government argued that the landowner's claim failed at the first step because "the exaction at issue here was the money rather than a more tangible interest in real property." *Id.* at 2599. But this Court recognized that "if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Id.* "[A] permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.*

By rejecting the government's argument in *Koontz*, the Court prevented an end-run of the just-compensation requirement. Yet governments can be quite adept at finding other ways to fill their coffers with ill-gotten gains from property owners, and ordinances like this one are just the latest example.

B. There Is No Doctrinal or Reasoned Basis for Exempting Legislated Conditions from Heightened Scrutiny

"One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan*, 512 U.S. at 384 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). A common justification for distinguishing between legislatively imposed conditions and *ad hoc* permitting conditions is that the latter are more likely to be abused.

"*Ad hoc* [conditions] deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape . . . political controls." *San Remo*, 27 Cal. 4th at 671. According to some courts, "[t]he risk of [extortionate] leveraging does not exist when the exaction is embodied in a generally applicable legislative decision." *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *see also San Remo*, 27 Cal. 4th at 668 (explaining that "the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present" for legislative conditions).

This reasoning is flawed. The notion that *ad hoc* conditions are more prone to abuse is overly simplistic. Indeed, the risk of abuse is *greater* for legislatively imposed conditions. The Texas Supreme Court has recognized that legislatures can "'gang up' on particular groups to force exactions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004). Legislatively or ordinance-based land-use decisions "reflect classic majoritarian oppression." Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 271 (2000). As Anne Arundel County's ordinance demonstrates, "developers, whose interests judicial rules like *Dolan* aim to protect, are precisely the kind of minority whose interests might actually be ignored." *Id.* That is because the "single issue that characterizes the legislative process of many suburban communities in the United States is the antidevelopment issue." *Id.* As a result, "discrimination against a prodevelopment minority is quite likely given that they are so outnumbered." *Id.*

The potential for abuse is amplified by the fact that legislative conditions have sweeping application. Instead of an administrative body extracting unconstitutional concessions from developers one by one, the County has accomplished that feat in one fell swoop. Other municipalities—in Maryland and other states where courts immunize legislatively imposed conditions—are currently free to impose similar exactions in broadly applicable legislative enactments.

Perhaps this result would be acceptable if there were some other doctrinal basis for exempting legislatively imposed conditions, but there isn't one. Treating these conditions differently is an act of hollow formalism rather than a logical conclusion. As two justices of this Court recognized more than 20 years ago, "[i]t is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking." *Parking Ass'n of Georgia*, 515 U.S. at 1117–18 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.). "A city council can take property just as well as a planning commission can." *Id.* at 1118. Focusing on the governmental entity in this manner leads to absurd results. According to the court below, a municipality's ordinance is subject to heightened scrutiny if it conditions *one homeowner's* permit on surrendering a property right. But the same municipality can freely "*seize[] several hundred homes*" if that condition originates from legislation. *Id.* (emphasis added). There is simply no logical basis for this result, which is why "[t]he distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.*

Those courts that have exempted these conditions may be driven by the mistaken belief that the unconstitutional-

conditions doctrine cannot be applied to a legislatively mandated impact fee because such a challenge is akin to a facial challenge. Because the "nexus" and "rough proportionality" test requires an examination of how the permit's condition fits with a *particular* piece of property, the argument goes, courts cannot make that determination on a facial basis.

But the same is true for other unconstitutional conditions imposed by statute. Like the "nexus" and "rough proportionality" test, all unconstitutional-conditions cases require some form of weighing the importance of the governmental interest against the nature of the condition. This Court has repeatedly sustained facial challenges to legislative acts imposing unconstitutional conditions. For example, in *Memorial Hospital v. Maricopa County*, the Court invalidated a statute that conditioned the receipt of state-sponsored healthcare on living in that state for a year, 415 U.S. 250, 251, 269–70 (1974); *see also Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (applying unconstitutional conditions doctrine to a federal statute without regard to its legislative origin); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 59–60 (2006) (same). Lower courts have shown that the same can be true in the property context. *See, e.g.*, *N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page*, 649 N.E.2d 384, 388–90 (Ill. 1995) (invalidating a legislatively imposed condition under *Nollan* and *Dolan*). Of note, the Court in *Koontz* relied on the Court's analysis of the facial challenges in *Memorial Hospital*, *Regan*, and *Rumsfeld* when it applied the unconstitutional conditions doctrine to land-use permits. 133 S. Ct. at 2594. It is no answer, then, to say that legislatively imposed conditions on real property are somehow unique in the unconstitutional-conditions universe.

The court of appeals' decision also creates significant line-drawing problems. There is often little to distinguish between a condition that is legislatively imposed and one that is the result of an *ad hoc* permitting decision. While the county's ordinance is clearly a legislatively imposed mandate, "the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction." Reznik, *supra*, at 266. This has led some to conclude that "a workable distinction can[not] always be drawn between actions denominated adjudicative and legislative." *Town of Flower Mound*, 135 S.W.3d at 641.

Many courts thus refuse to apply the unconstitutional-conditions doctrine to legislatively imposed conditions not because there is any logical distinction, but simply because of their belief that this Court has never applied the doctrine outside the *ad hoc* process. In *Krupp v. Breckenridge Sanitation District*, for example, the Colorado Supreme Court concluded that *Nollan* and *Dolan* arose only in the context of an *ad hoc* permit application. 19 P.3d 687, 695–96 (Colo. 2001). But that distinction is a shallow gloss on this Court's decisions. The conditions in *Nollan*, *Dolan*, and *Koontz* each arose from an overarching legislative regime and were thus arguably legislative conditions, underscoring the difficulty of distinguishing between legislative and *ad hoc* conditions. *Town of Flower Mound*, 135 S.W.3d at 641 (explaining how the exactions in *Nollan* and *Dolan* were imposed pursuant to a legislative scheme). The absence of a bright line between legislative conditions and adjudicative conditions is an additional reason why the former should be subject to the same scrutiny as the latter.

II. THE DEEPENING SPLIT AMONG STATES AND CIRCUITS IS TRENDING IN THE WRONG DIRECTION

For more than 20 years, there has been an acknowledged split among states and circuits on whether legislatively imposed conditions are subject to the unconstitutional-conditions doctrine. *See Parking Ass'n of Georgia,* 515 U.S. at 1117 (Thomas, J., joined by O'Connor, J., dissenting from denial of cert.) ("The lower courts are in conflict over whether *Dolan*'s test for property regulation should be applied in cases where the alleged taking occurs through an Act of the legislature."). Unfortunately, this Court has revisited its jurisprudence in this context only once since 1995, *Koontz*, 133 S. Ct. at 2586, but it did not then address the split presesnted here. In fact, the *Koontz* dissent lamented the lack of guidance on whether heightened scrutiny applies to legislatively imposed exactions. *Id.* at 2608 (Kagan, J., dissenting, joined by Ginsburg, Breyer, and Sotomayor, JJ.) ("Maybe today's majority accepts that distinction [between *ad hoc* and legislative conditions]; or then again, maybe not. At the least, the majority's refusal 'to say more' about the scope of its new rule now casts a cloud on every decision by every local government to require a person seeking a permit."). A majority of the Court's current justices thus have acknowledged the confusion sown by lack of clarity here.

Perhaps the split of authority was not ripe for this Court's review in 1995. Other than the case that was on appeal, the dissent from denial of certiorari in *Parking Association of Georgia* highlighted only a single district court case that exempted legislative enactments 515 U.S. at 1117 (citing *Harris v. Wichita*, 862 F. Supp. 287 (D. Kan. 1994)). But the same cannot be said today; the split has deepened significantly since then. *See* Pet. 30–32.

Justice Thomas was correct to note recently that the split of authority "shows no signs of abating." *CBIA*, 136 S. Ct. at 928 (Thomas, J., concurring in denial of cert.). And the majority of courts during this time period have followed the wrong path, choosing to exempt legislatively imposed conditions from heightened scrutiny. *See, e.g.*, *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinnell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702–03 (Alaska 2003), *abrogated on other grounds by Hageland Aviation Servs. Inc. v. Harms*, 210 P.3d 444, 450 n.21 (Alaska 2009); *San Remo*, 27 Cal. 4th at 670–71; *Krupp*, 19 P.3d at 696; *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 999–1000; *see also* Pet. at 17–19.

Additionally, this Court's review is necessary to resolve a conflict within the country's most populous circuit. States in the Ninth Circuit conflict with that court's view on whether legislatively imposed conditions are subject to heightened scrutiny. California, Washington, Alaska, and Arizona have held they are not; *San Remo*, 27 Cal. 4th at 670-71; *Spinnell Homes*, 78 P.3d at 702; *Home Builders Ass'n of Cent. Ariz.*, 930 P.2d at 996, while the Ninth Circuit has held that they are, *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991) (applying the unconstitutional conditions doctrine to a legislatively imposed condition); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (holding that, under circuit precedent, legislatively imposed conditions are subject to the unconstitutional conditions doctrine). As a result, the validity of a legislative condition in these states depends on the court in which that condition is challenged.

If this Court does not clarify this area of the law, then "property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can impose exactions that would not pass muster if done administratively." *CBIA*, 136 S. Ct. at 929 (Thomas, J., concurring in denial of cert.). At best, landowners' Fifth Amendment rights will continue to depend entirely on the state in which they live. At worst, those rights depend on whether their cases arise in a state or federal court.

This Court has "grant[ed] certiorari in takings cases without the existence of a conflict." *Parking Ass'n of Georgia*, 515 U.S. at 1118 (Thomas, J., dissenting from denial of cert.). "Where, as here, there *is* a conflict, the reasons for granting certiorari are all the more compelling." *Id.* (emphasis added).

CONCLUSION

For the above reasons, and those stated by the petitioners, the Court should grant the petition.

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