IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT
DAVIDSON COUNTY, TENNESSEE

MRB DEVELOPERS, APRIL KHOURY, HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE, OLD SOUTH CONSTRUCTION LLC, ASPEN CONSTRUCTION, and GREEN EGGS & HOMES,	)	
Plaintiffs,	)	**Case No. 19-534-I**
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

RESPONSE TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT

The Court should deny Plaintiffs' partial motion for summary judgment[1] and grant the Metropolitan Government's motion for summary judgment in full. Plaintiffs cannot prevail under any standard of review because the requirement of Metropolitan Ordinance No. BL2016-493 ("the Sidewalk Ordinance") to build sidewalks is a background restriction on property use that cannot be a taking as a matter of law in Tennessee.

Moreover, the sidewalk ordinance is a valid land use regulation that passes the United States Supreme Court's *Penn Central* test for Fifth Amendment regulatory takings. For decades, the Supreme Court and scores of lower courts have not applied the *Nollan/Dolan* test for administrative exactions to legislative land use regulations such as the Sidewalk Ordinance. Rather, under Supreme Court precedent, the *Penn Central* test applies to legislative land use regulations of general application such as the sidewalk

[1] Plaintiffs state that they reserve the right to file a dispositive motion on their claim for injunctive relief against the Sidewalk Ordinance's requirement to build curbs and gutters. (Mem. Law Supporting Pls.' Mot. Summ. J. at 4.) The Court should deny any such motion because this and all other claims for injunctive relief were dismissed more than two years ago. (Jan. 6, 2020 Mem. Op. at 3-6.)

ordinance. The Supreme Court's recent decision in *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2072 (2021), does not compel a different conclusion. Therefore, the *Penn Central* test for regulatory takings applies in this case, the Sidewalk Ordinance passes that test, and Plaintiffs' motion should be denied.

I. SIDEWALK DEDICATIONS ARE A LONGSTANDING BACKGROUND RESTRICTION ON PROPERTY USE THAT CANNOT SUPPORT A TAKINGS CLAIM.

The United States Supreme Court has long held that some background restrictions on property use arising from state law cannot serve as a basis for takings claims. For more than 175 years, Tennessee towns and cities have had the authority to require property owners to build sidewalks — even on vacant lots. Consequently, Plaintiffs may not bring a takings claim based on any requirement to build sidewalks.

"Many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021). Thus, a city does not take a property interest within the meaning of the Fifth Amendment by asserting "a pre-existing limitation upon the land owner's title." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992). "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1978).

For example, cities have long required landowners to abate nuisances. *See Cedar Point Nursery*, 141 S. Ct. at 2079 (collecting cases). Many early Supreme Court decisions held that "'harmful or noxious uses' of property may be proscribed by government regulation without the requirement of compensation." *Lucas*, 505 U.S. at 1022. Over time, this principle recognized that the government may also require landowners to affirmatively act or incur costs for the public good. *Id.* at 1022-28 ("The transition from our early focus on control of 'noxious' uses to our contemporary understanding of the broad realm within

which government may regulate without compensation was an easy one, since the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.").

Background limitations on property use are creatures of *state law*. *Cedar Point Nursery*, 141 S. Ct. at 2075-76 (emphasis added). Since 1845, Tennessee towns and cities have had the power to require property owners to build and maintain sidewalks along their street frontage. *City of S. Fulton v. Edwards*, 251 S.W. 892, 893 (Tenn. 1923) ("By a line of Tennessee cases beginning with *Mayor & Aldermen of Franklin v. Maberry*, on down to *O'Haver v. Montgomery*, it has been settled that the Legislature may delegate to municipal corporations the power to require the construction of pavements by property owners adjacent to their premises.") (citations omitted).

Maberry upheld an ordinance that required property owners in downtown Franklin to build and maintain sidewalks. 25 Tenn. 368, 372 (1845). The plaintiff attacked the ordinance as an unconstitutional tax.[2] *Id.* The Tennessee Supreme Court disagreed: "[T]his ordinance levies no sum of money to be paid by the citizens. It requires a duty to be performed for the well-being and comfort of the citizens of the town. *It is in the nature of a nuisance to be removed*." *Id.* (emphasis added). More than 50 years later, the court reaffirmed this conclusion in *O'Haver*:

> [A] city corporation may pass an ordinance requiring the owner of every lot fronting on a designated section of a public street to fix curbstones, and make a brick way or sidewalk in front of his lot. And it has been held in this state that the Legislature may grant to municipal corporations not only the power to compel abutting owners to construct sidewalks, but that after a reasonable time, and on failure of such owner, they may do the work through their own agencies, and thereby obtain a lien upon the property for reimbursement.

[2] The Plaintiff in *Maberry* owned a vacant lot, whereas some of his neighbors had improved their properties. 25 Tenn. at 373.

111 S.W. 449, 452 (1908), *overruled on other grounds*, *State v. Jackson*, 503 S.W.2d 185 (Tenn. 1973) (citations omitted).

Thus, in Tennessee, one background restriction or implied limitation on an urban landowner's property is that a city may require him or her to build a sidewalk. All Plaintiffs owned property in Nashville subject to this limitation. Consequently, they cannot state a takings claim under any standard of review based on the sidewalk ordinance's requirements. *Cedar Point Nursery*, 141 S. Ct. at 2075-76.

That includes a *Nollan/Dolan* unconstitutional conditions exaction, the very claim Plaintiffs bring here. "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." *Koontz v. St. Johns River Water Mgmt. Dist.,* 570 U.S. 595, 612 (2013). Under *Maberry* and its progeny, the Metropolitan Government could require Plaintiffs to build sidewalks outside of the permitting process. Therefore, Plaintiffs cannot satisfy the predicate to any *Nollan/Dolan* claim. The Court should deny their partial motion for summary judgment and grant the Metropolitan Government's motion.

II. WHETHER A LAND USE REGULATION IS LEGISLATIVE OR ADMINISTRATIVE IN NATURE DICTATES THE STANDARD OF REVIEW.

The Supreme Court has strongly suggested that the standard of review for a Fifth Amendment regulatory taking depends on whether the land use regulation is administrative or legislative in nature. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538, 546-47 (2005); *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994). Specifically, the nexus and rough proportionality test from *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan*, 512 U.S. 374 ("*Nollan/Dolan*"), the test Plaintiffs ask this Court to apply, is limited to "Fifth Amendment takings challenges to adjudicative land-use

exactions." *Lingle,* 544 U.S. at 546. All other regulatory takings, save for limited exceptions not relevant here, are subject to the test set forth in *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("*Penn Central*").[3] *Id.* at 538.

Last year, this Court concluded that the current version[4] of the Sidewalk Ordinance is a "generally applicable legislatively imposed condition to which the constitutional doctrine of an exaction/taking does not apply under current law." *Joni Elder d/b/a Dogtopia v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.,* No. 20-897-III, slip op. at *2 (May 27, 2021). In its analysis, the Court noted four features of legislative land use regulations: broad application, predetermined fees, requirements set in ordinances, and non-negotiability. *Id.* at *12. The Court contrasted these with three features of administrative exactions: *ad hoc* application, conditional bargaining, and administrative discretion. *Id.* at *12-13. The Court concluded that *Nollan/Dolan* did not apply to the Sidewalk Ordinance because it had all the features of a legislative land use regulation and none of an administrative exaction. *Id.* at *13-17.

Months later, the United States District Court for the Middle District of Tennessee agreed. *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:20-CV-00922, 2021 WL 5356616, at *9-13 (M.D. Tenn. Nov. 16, 2021). The District Court analyzed the same factors listed above and declined to apply *Nollan/Dolan* to a legislative land use regulation:

> Although the plaintiffs' concerns are certainly understandable, the legislatively imposed Sidewalk Ordinance and alternative in-lieu fee are more in the nature of a tax or user fee than the "individualized, property-specific" exactions at issue in *Nollan*, *Dolan*, and *Koontz*. For this reason, too, this court agrees with the numerous courts that have concluded that legislative "exactions" that apply generally, rather than only to specific

[3] The Tennessee Constitution covers regulatory takings to the same extent as the Fifth Amendment. *Phillips v. Montgomery Cty.*, 442 S.W.3d 233, 244 (Tenn. 2014).

[4] Metropolitan Code of Laws § 17.20.120 *et seq*. The Sidewalk Ordinance was amended to its current form in 2019 by Ordinance No. BL2019-1659.

> parcels of real property, should not be governed by the *Nollan/Dolan* standard of review.

Id. at *10.

The version of the Sidewalk Ordinance challenged here is identical to the current version in every material way for purposes of the Parties' cross motions: it is a legislative zoning ordinance that applies without administrative discretion. (BL2016-493, Exhibit 1 to Compl.) Its requirements are predetermined, and it does not apply conditionally. *Id.* While the Board of Zoning Appeals ("BZA") can vary the ordinance's requirements after it applies, sidewalk construction and/or in-lieu fees are not open to negotiation. *Id.*

Plaintiffs dismiss the administrative/legislative distinction as a matter of labels. (Mem. Law Supporting Pls.' Mot. Summ. J. at 8, 16.) But this distinction concerns the *nature* of the government action, not merely the government *actor*, as explained below and in the Metropolitan Government's motion for summary judgment, adopted and incorporated herein. Therefore, the *Penn Central* test is the right standard of review for legislative land use regulations such as the Sidewalk Ordinance, and the ordinance passes this test. (Mem. Law Supporting Def.'s Mot. Summ. J. at 5-14.)

A. *Penn Central* Applies to Legislative Land Use Regulations Because They Do Not Raise the Constitutional Risks of Administrative Exactions.

When a landowner challenges a property regulation under the Fifth Amendment, the standard of review depends on whether the regulation is administrative or legislative in nature. *See Dolan*, 512 U.S. at 385, 391 n.8. In the kind of *Nollan/Dolan* administrative exaction Plaintiffs allege, a government body (usually unelected) applies land use conditions *ad hoc* to a particular property, often in response to a permit application. *Koontz*, 570 U.S. at 614. In a legislative land use regulation, elected representatives set conditions in statutes or ordinances without considering a particular property; the conditions later apply automatically. *See Dolan*, 512 U.S. at 385; *San Remo Hotel L.P. v. City and Cty. of*

San Francisco, 41 P.3d 87, 104 (Cal. 2002). The Sidewalk Ordinance is just such a regulation, and it is subject to *Penn Central* review, not elevated *Nollan/Dolan* scrutiny. *Knight*, 2021 WL 5356616, at *10-12.

This distinction between *Nollan/Dolan* administrative exactions and *Penn Central* legislative regulations makes a constitutional difference because of how the government regulates (through elected officials or not)[5] and how the regulation can be changed (through the political process or not)[6]. In other words, it is not just *who* regulates property but *how* and *why* the regulation happens, and *where* the landowner can turn for a remedy. (Mem. Law Supporting Def.'s Mot. Summ. J. at 5-14.) These differences show why courts have long deferred to legislatures in matters of local land use policy, though the *Penn Central* test still provides an appropriate check on legislative government action. *See Lingle*, 544 U.S. at 545.

The Court should apply the *Penn Central* test in this case because the Sidewalk Ordinance is a classic example of "a public program adjusting the benefits and burdens of economic life to promote the common good" that applies broadly, without any administrative discretion. *Knight*, 2021 WL 5356616, at *12 (quoting *Penn Central*, 438 U.S. at 124). Further, because it is legislative and generally applicable, it is akin to "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners" that are not subject to *Nollan/Dolan* scrutiny. *Koontz*, 570 U.S. at 615.

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[5] *See Koontz*, 570 U.S. at 604-05; *Ehrlich v. City of Culver City*, 911 P.2d 429, 438-39 (Cal. 1996).

[6] *See San Remo Hotel, L.P. v. San Francisco City and Cty.*, 364 F.3d 1088, 1096 (9th Cir. 2004).

B. The Sidewalk Ordinance Passes the *Penn Central* Test.

The Sidewalk Ordinance passes the *Penn Central* test because: 1) its economic impact is minimal; 2) it did not interfere with Plaintiffs' investment-backed expectations; and 3) its character benefits property owners across the city. (Mem. Law Supporting Def.'s Mot. Summ. J. at 11-14.) Specifically, the ordinance's economic impact amounted to a small fraction of any Plaintiff's sale price or appraised value.[7] *Id*. It did not interfere with Plaintiffs' investment-backed expectations because they bought their properties after it was passed. *Id*. And because the ordinance passed after an extensive comment and feedback period that included developers and property owners, Plaintiffs could have helped shape it. (Sidewalk Ordinance Stakeholder Meeting Notes, Exhibit 2 to Def.'s Mot. Summ. J.) Finally, because the ordinance represents a good-faith effort to balance the benefits and burdens of development with the public good, it is not a *per se* "physical invasion by government," a situation where "a taking may more readily be found." *Penn Central*, 438 U.S. at 124.[8] Indeed, to the extent that the ordinance imposes costs on property owners, it also benefits them by providing sidewalks, which increase property values. *Maberry*, 25 Tenn. at 373.

C. *Nollan/Dolan* is a Special Application of the Unconstitutional Conditions Doctrine That Does Not Apply to Legislative Land Use Regulations.

Plaintiffs ask this Court to extend *Nollan/Dolan*, which is a "special application" of the unconstitutional conditions doctrine, into territory where relatively few courts have ventured. *See Lingle*, 544 U.S. at 530; *Koontz*, 570 U.S. at 604. For the reasons presented in the Metropolitan Government's motion for summary judgment, the Court should stand by

[7] Appraised value was used to show economic impact on Plaintiff April Khoury because she is the only Plaintiff who still owns any property at issue in this lawsuit. (Mem. Law Supporting Def.'s Mot. Summ. J. at 3-4.)

[8] The sidewalk ordinance cannot be a physical taking because it is a longstanding background limitation on property use, as discussed in Section I above.

Chancery Court, Part III's conclusion in *Elder* and keep company with the many courts that have refused to extend this test to legislative land use regulations. (Mem. Law Supporting Def.'s Mot. Summ. J. at 18-23.)

First, the unconstitutional conditions doctrine was developed to prevent the government from trampling constitutional rights that are especially vulnerable to chilling, such as free speech. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972). It is therefore poorly suited to property rights, especially building permit cases, which involve "mutually beneficial transaction[s]" between the government and property owners. *Dolan*, 512 U.S. at 407 (Stevens, J., dissenting).

Second, the Supreme Court has unanimously indicated that *Nollan/Dolan* only applies to administrative exactions. *Lingle,* 544 U.S. at 547. The high court has never applied the test outside this context. See *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379-80, 385; *Koontz,* 570 U.S. at 601-02, 614. Most state courts presented with the issue have followed suit, refusing to extend *Nollan/Dolan* beyond the limits set in those cases and *Koontz.* [9] The Maryland Supreme Court and the North Carolina Court of Appeals recently adopted this stance as well.[10]

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[9] *See St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007-08 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003); *Home Builders Ass'n of Cent. Ariz*, 930 P.2d at 999-1000; *Ehrlich*, 911 P.2d at 447 ("[I]t is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment[.]"); *Cal. Bldg. Indus. Assn. v. City of San Jose*, 351 P.3d 974, 979, 989-90 (Cal. 2015), *cert. denied*, 577 U.S. 1179 (2016); 10; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 695-87 (Colo. 2001) (en banc); *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Georgia*, 450 S.E.2d 200, 203 n.3 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995); *Harris v. City of Wichita, Sedgwick Cty., Kan.*, 862 F. Supp. 287, 293-94 (D. Kan. 1994), *aff'd,* 74 F.3d 1249 (10th Cir. 1996); *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 810 (Md. 2018); *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996); *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 14-15 (N.C. Ct. App. 2020); *Rogers Mach., Inc. v. Washington Cty.*, 45 P.3d 966, 983 (Or. App. 2002); *Knight*, 2021 WL 5356616, at *10; *City of Olympia v. Drebick*, 126 P.3d 802, 808 (Wash.

This Court's conclusion in *Elder* and the recent *Knight* decision continue a decades-long tradition of judicial restraint that applies *Nollan/Dolan* only to the administrative exactions that it was designed to keep in check. This Court should decline Plaintiffs' invitation to overextend it.

III. RECENT SUPREME COURT AND NINTH CIRCUIT DECISIONS DO NOT REQUIRE THIS COURT TO APPLY *NOLLAN/DOLAN*.

In their quest to extend *Nollan/Dolan,* Plaintiffs ask this Court to stretch dicta from *Cedar Point Nursery*, 141 S. Ct. at 2072, as well as dicta in *Ballinger v. City of Oakland*, 24 F.4th 1287, 1299 (9th Cir. 2022), to bolster their argument. This authority is not on point, and it is certainly not binding. Moreover, Plaintiffs have not alleged a physical taking at all, which is the only way in which *Cedar Point* would arguably be relevant.

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

Crucially, *Cedar Point Nursery* and *Ballinger* were not *Nollan/Dolan* administrative exaction cases. *Cedar Point Nursery* analyzed a California law that allowed a labor union to mount crack-of-dawn organizing drives on private agricultural property — an invasion squarely in the category of physical takings. 141 S. Ct. at 2069-70. The high court did not address the question of law on which this case turns; thus, the commentary that Plaintiffs

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2006) (en banc) ("[N]either the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances."); *Douglass Properties II, LLC v. City of Olympia*, 479 P.3d 1200, 1207 (Wash. App. 2d 2021); .

[10] *Dabbs*, 182 A.3d at 810; *Anderson Creek Partners*, 854 S.E.2d at14-15.

cite is not binding. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007).

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

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

141 S. Ct. at 2072.

This logic is well-tailored to an intrusive physical taking. If the government grants a right to intrude on private property without the owner's consent, it hardly matters which branch grants the right: the intruder is still there, unwanted, and there is little the landowner can do about it. But for the reasons presented above, strong constitutional and practical factors support judicial deference to legislative land use regulations.

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

Given that holding, the Ninth Circuit did not need to reach the question of whether *Nollan/Dolan* applies to legislative land use regulations. Nevertheless, the *Ballinger* court, citing *Cedar Point Nursery,* opined that the Supreme Court "suggested that any

government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim." *Id.* at 1299.

The Ninth Circuit seemed to venture into these waters because the Supreme Court had recently vacated one of its decisions in a regulatory takings case with instructions to reconsider any merit holdings in light of *Cedar Point Nursery*. *Id.* (citing *Pakdel v. City & Cty. of San Francisco*, 952 F.3d 1157, 1162 n.4 (9th Cir. 2020), *vacated*, 5 F.4th 1099 (9th Cir. 2021)). The Ninth Circuit thus distanced itself from (without expressly overruling) a prior decision that had confined *Nollan/Dolan* to administrative exactions. *Id.* at 1298 (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008)).

The Ninth Circuit's detour is remarkable, given that the Supreme Court's instructions in *Pakdel* came in a footnote with no sign that *Cedar Point Nursery* broadened the scope of *Nollan/Dolan*. *Pakdel*, 141 S. Ct. at 2229 n.1. *Cedar Point Nursery* was a physical takings case, so the plainest reading of the Supreme Court's *Pakdel* footnote is for the lower court to consider its analysis of any physical takings claims on remand in light of *Cedar Point Nursery*.

Nor did *Cedar Point Nursery* declare any such expansion of *Nollan/Dolan*. The decision merely summarized existing takings law and distinguished physical takings, regulatory takings, and unconstitutional exactions from one another. 141 S. Ct. at 2071-71. Moreover, the Supreme Court vacated and remanded *Pakdel* on ripeness grounds. *Pakdel*, 141 S. Ct. at 2228. Finally, the language the Ninth Circuit cited from *Cedar Point* to support its reassessment of *Nollan/Dolan*'s scope dealt with statutory grants of access to federal agencies for on-site inspections, not building permits or even land use regulations in general. *Cedar Point Nursery*, 141 S. Ct. at 2079. Simply put, it is irrelevant here.

In the end, Plaintiffs have not alleged a physical taking claim, which is the context that *Cedar Point Nursery* addressed. Therefore, dicta from that case about federal inspection authority and physical intrusions, footnoted in the Supreme Court's opinion vacating *Pakdel*, which prompted dicta in *Ballinger*, does not bind this Court.

IV. EVEN IF *NOLLAN/DOLAN* APPLIES, SUMMARY JUDGMENT FOR PLAINTIFFS IS NOT PROPER.

As noted in the Court's Order of February 17, 2022, if the Court applies *Nollan/Dolan*, the Parties need additional discovery to properly brief rough proportionality. The Metropolitan Government also reserves the right to satisfy a *Nollan/Dolan* analysis at trial, as neither the Fifth Amendment nor *Nollan/Dolan* imposes a procedural requirement to demonstrate rough proportionality at the time of an alleged taking. See *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 644 (Tex. 2004); *Hammer v. City of Eugene*, 202 Or. App. 189, 196, 121 P.3d 693, 697 (2005) (finding that a "trial court erred in concluding that the city may not attempt to demonstrate rough proportionality at trial"). Therefore, summary judgment for Plaintiffs is not warranted even if *Nollan/Dolan* applies.

CONCLUSION

The Court should deny Plaintiffs' motion and hold that the *Nollan/Dolan* standard does not apply to the Sidewalk Ordinance. Rather, the Court should enter summary judgment in favor of the Metropolitan Government because the ordinance is a valid land use regulation under the *Penn Central* test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by electronic mail and the Court's electronic filing system to:

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on this the 5th day of August, 2022.

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