No. 22-1074

In The
Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

BRIEF OF AMICI CURIAE SOUTHEASTERN LEGAL FOUNDATION AND BEACON CENTER OF TENNESSEE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Founded in 1976, Southeastern Legal Foundation (SLF) is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic. For nearly 50 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional governmental takings. SLF regularly represents property owners challenging overreaching government actions in violation of their property rights and frequently files amicus curiae briefs in support of property owners before the Supreme Court. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Beacon Center of Tennessee is a nonprofit that strives to protect individual rights and eliminate government barriers to opportunity. To this end, Beacon represents Tennesseans free-of-charge in public interest litigation seeking to vindicate their property rights or their right to earn a living.

This case is of particular concern to Amici because they recently and successfully challenged a legislative exaction before the United States Court of Appeals for

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[1] Rule 37 statement: The parties were notified that Amici intended to file this brief 10 days before its filing. *See* Sup. Ct. R. 37.2. No party's counsel authored any of this brief; Amici alone funded its preparation and submission. *See* Sup. Ct. R. 37.6.

the Sixth Circuit on behalf of two property owners. *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816 (6th Cir. 2023). The Sixth Circuit's approach, based on text and tradition, provides a roadmap for this Court to resolve this issue that has divided so many lower courts regarding the application of *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

SUMMARY OF ARGUMENT

For years now, legislatures have been getting away with extortion. Take the Metropolitan Government of Nashville and Davidson County (Nashville) for instance. Following decades of poor planning, Nashville lacked a convenient network of pedestrian walkways in the city. So it came up with a solution to fix the infrastructure problem it created: enact an ordinance requiring *private* property owners to install *public* sidewalks on their property or pay into a sidewalk fund before they could receive a permit to build their single- and two-family homes. Not only did property owners have to agree to construct a sidewalk or pay the sidewalk fee, but they also had to agree to dedicate a right-of-way or easement on their property to allow future installment of a public sidewalk.

When this requirement was challenged, the United States District Court for the Middle District of

Tennessee allowed Nashville to get away with this coercive scheme. The reason: the building permits were held hostage by legislative—rather than administrative—decree.

In reaching its ruling, the district court joined many lower courts that have been presented with similar issues following this Court's decisions in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). *See* Pet. at 11-19. Through *Nollan*, *Dolan*, and *Koontz*, this Court established a test to determine whether an exaction on property bears an "essential nexus" and "rough proportionality" to the property's alleged impact. *See* Pet. at 5-6.

The *Nollan/Dolan* test protects property owners because property rights are especially vulnerable to extortion during the permitting process, when landowners who value a building permit are more likely to accede to government conditions in exchange for a permit. The unconstitutional conditions doctrine stops the government from abusing the permitting process to accomplish indirectly what it cannot do outright.

But in the wake of *Nollan*, *Dolan*, and *Koontz*, some courts have held that legislative bodies are exempt from the *Nollan/Dolan* test. As a result, municipalities like Nashville evade judicial review by imposing permit conditions that violate the Fifth Amendment through legislation when they could not impose such conditions administratively. This approach undermines

the government's duty to uphold the Constitution. The question is not *who* from the government is violating the Constitution but *what* the government is doing.

The government has several means available to it to take property—whether by legislation, judicial decree, or adjudicative action. The *Nollan/Dolan* test provides an important check that prevents the government from exploiting its citizens. The test must be applied to legislative conditions "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Otherwise, the government will—through the legislative process—continue to force private individuals to bear the entire burden of paying for public benefits. This Court should not so easily allow local governments to sidestep the Constitution by imposing an unconstitutional condition through law. It should apply the *Nollan/Dolan* test to legislative and administrative exactions equally.

ARGUMENT

I. The *Nollan/Dolan* test protects against unconstitutional and extortionate permit conditions.

As this Court pointed out in *Koontz*, the "central concern of *Nollan* and *Dolan*" involved the risk of the government using its power to "pursue governmental

ends" through extortionate permit conditions. 570 U.S. at 597. "[L]and-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." *Koontz*, 570 U.S. at 605.

This Court warned that the permitting process is especially vulnerable to abuse because the government knows property owners will give in to a condition provided the condition is worth less than a permit. *Koontz*, 570 U.S. at 605. "[T]he government might try to leverage its monopoly permit power to pay for unrelated public programs on the cheap." *Knight v. Metro. Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 825 (6th Cir. 2023). Reasonable property owners who weigh the costs will almost always decide to accept a permit condition rather than forgo a valuable permit. *See id*. This kind of arrangement becomes a one-sided bargain with the state where the cost to the government is zero. Andre LeDuc, *Twilight of the Idols: Philosophy and the Constitutional Law of Takings*, 10 Ala. C.R. & C.L. L. Rev. 201, 267 (2019) (citing Richard Epstein, Bargaining with the State at 182-83 (1993)).

As easily as the government can do this through an administratively imposed condition, it can just as easily take property by operation of the law when it asks property owners to pay for "governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue." *Koontz*, 570 U.S. at 597.

II. Nashville's sidewalk scheme shows that legislative bodies are perfectly capable of making extortionate demands.

A. Nashville passed a law to fix its sidewalk problem.

Recently, the city of Nashville decided it had a problem: a lack of sidewalks. *See Strategic Plan for Sidewalks and Bikeways*, WalknBike Nashville, at 57 (2017) ("*WalknBike*")[2]; *see also Knight v. Metro Gov't of Nashville & Davidson Cnty.*, 67 F.4th 816, 819-20 (6th Cir. 2023) (discussing history of Nashville's sidewalk law before holding that it was an unconstitutional exaction).

But the city also had another problem: money. Sidewalks are not cheap, and Nashville has suffered years of financial mismanagement that leaves it strapped. It costs Nashville $1,000 per linear foot to build sidewalks. Addison Wright, *At Issue: Sidewalks*, Nashville Banner (July 10, 2023).[3] The city wanted 1,900 miles of them. *Knight*, 67 F.4th at 819. Even after increasing its sidewalk budget to $30 million, the city estimated it would take 20 years just to expand its sidewalks just 71 miles. *Id*. A 2020 special committee on sidewalks estimated that it would cost about $10 *billion* to fully realize Nashville's complete vision. Wright, *supra* note 3.

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[2] https://filetransfer.nashville.gov/portals/0/sitecontent/pw/docs/transportation/WalknBike/WalknBikeFinalPlan.pdf.

[3] https://nashvillebanner.com/2023/07/10/at-issue-sidewalks/.

Suffice it to say, Nashville did not have that kind of money lying around. In 2018, its *total* revenues were $2.2 billion. Metropolitan Government of Nashville & Davidson County, Operating Budget for Fiscal Year 2017-2018, A-11 (July 2017).[4] That same year, Nashville was scored as one of the worst-run cities, a ranking largely attributable to having the highest, long term outstanding debt per capita. Dustin Barnes, *Tennessee Cities Among the Worst Run U.S. Cities in 2018, Study Says*, The Tennessean (July 10, 2018).[5] In 2018 alone, Nashville had $1.7 billion in existing capital projects that were unfinanced. Joey Garrison, *Nashville Council Issues $775M in Bonds to Pay for Previously Approved Projects*, The Tennessean (Sept. 18, 2018).[6] Also in September 2018, Nashville approved $775 million in bonds just to cover its past underfunded debt for public works projects like sidewalks. *Id.* Future Mayor John Cooper called this "[v]ery bracing news." *Id*.

Instead of facing hard realities, Nashville reached for an easy solution—make someone else pay. As if to demonstrate this Court's point about the vulnerability of permit applicants to extortionate demands in *Koontz*, 570 U.S. at 605, Nashville decided that it could

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[4] https://filetransfer.nashville.gov/portals/0/sitecontent/Finance/docs/OMB/citizens_budget/budgetbook/FY2018%20Operating%20Budget%20Book.pdf.

[5] www.tennessean.com/story/money/2018/07/10/tennessee-worst-run-cities-united-states-chattanooga/771325002/.

[6] www.tennessean.com/story/news/2018/09/18/nashville-council-bonds-capital-projects/1347458002/.

leverage its power to approve building permits to fund its grand sidewalk ambitions by adding a sidewalk ordinance to its zoning code. *See Knight*, 67 F.4th at 819.

Any person who sought to build a new single- or two-family home or redevelop or build multifamily or nonresidential buildings in designated parts of the city first had to agree to install a public sidewalk or pay into a sidewalk fund before receiving a permit. *Id*.

Nashville also demanded that the person surrender a right-of-way or an easement across the property so the city would own the sidewalks. *Id*. at 819-20.

B. Nashville's sidewalk law was extortionate.

Nashville gave the Sixth Circuit good cause to rule that "an 'extortion' risk exists no matter the branch of government responsible for the condition." *Knight*, 67 F.4th at 835 (citing *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004)). The sidewalk law was premised on the desire of a legislature to extort payment out of a minority of voters, not "internalize the costs . . . that a development will impose on others." *Koontz*, 570 U.S. at 605. It is all too easy for local "legislators to single out a subset of individuals" to pay for public infrastructure to be enjoyed by the "majority of local taxpayers [who] may well 'applaud' the lower taxes that their politically sensitive legislators can achieve through this type of cost shifting." *Knight*, 67 F.4th at 836 (citing *Flower Mound*, 135 S.W.3d at 641).

The record surrounding the enactment of Nashville's sidewalk law showed that both lawmakers and voters perceived "developers" to be in the best position to install sidewalks. "Developers" needed to "do their part"[7] and "contribute to the betterment of their neighbors." Metro Nashville Council Final Report from the Special Committee on Sidewalks, 3 (Jan. 31, 2020).[8] This was not because "developers" were somehow causing the city's sidewalk shortage, but only because legislators saw them as a revenue source, even though the "developers" included individuals who just wanted to build a home for their family. Nashville's elected officials unsurprisingly found it cheap and easy to declare on behalf of their constituents that walking "is a fundamental civil right."

Nashville's own presentations show that it was well aware that purchasing the necessary rights-of-way (ROW) was a "challenge[]" if it was going to have sidewalks. Thus, one of the "[a]dvantages" of pushing that cost on "Private Development" was that they already "[o]wn [the] Property."

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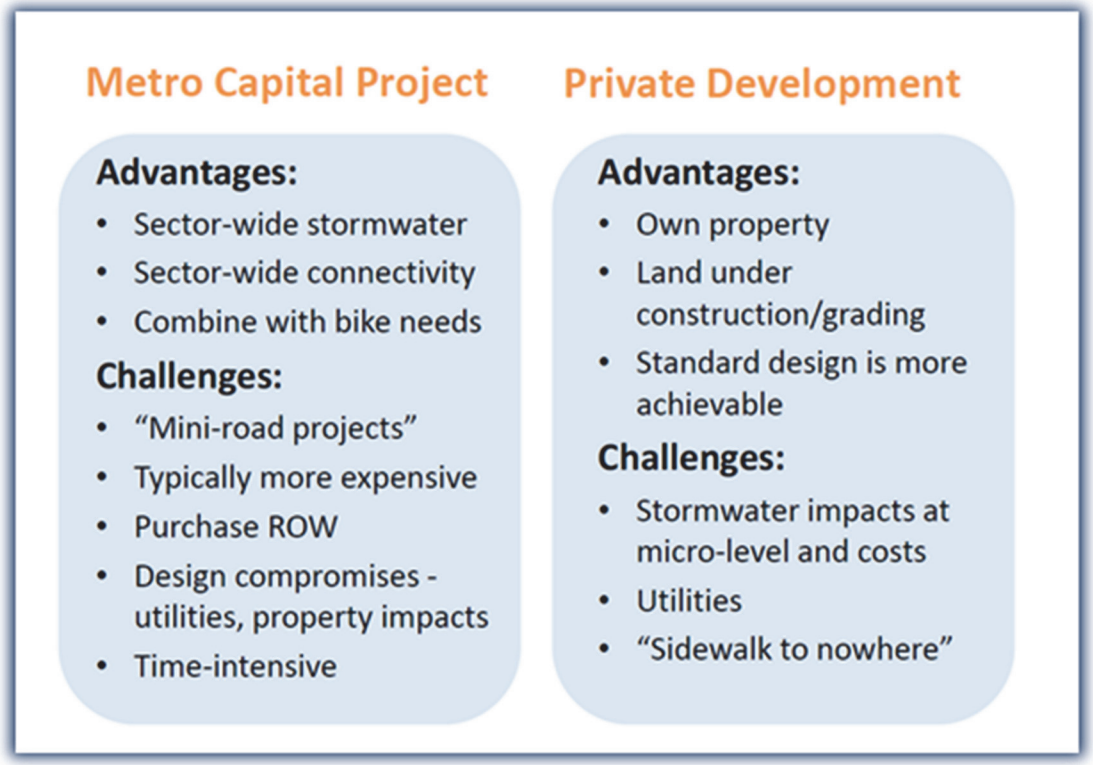
[7] This and the following quotes come from documents produced by Nashville to Amici during discovery over the course of the sidewalk litigation.

[8] https://filetransfer.nashville.gov/portals/0/sitecontent/Council/docs/reports/SidewalkCommitteeFinalReport.pdf.


Metro Capital Project
Advantages:
• Sector-wide stormwater
• Sector-wide connectivity
• Combine with bike needs
Challenges:
• "Mini-road projects"
• Typically more expensive
• Purchase ROW
• Design compromises - utilities, property impacts
• Time-intensive
Private Development
Advantages:
• Own property
• Land under construction/grading
• Standard design is more achievable
Challenges:
• Stormwater impacts at micro-level and costs
• Utilities
• "Sidewalk to nowhere"

Requiring property owners to surrender right-of-way and easements if they wanted permits "would eliminate the need for Nashville to purchase easements for future sidewalk improvement projects."

The experience of Jim Knight and Jason Mayes also mirrors the reality that legislators and their constituents are fully capable of making extortionate demands that individuals bear costs for benefits that the public will enjoy. Both men found out in 2019 when they wanted to build homes that the city would make them responsible for building city-owned sidewalks. *Knight*, 67 F.4th at 820-21. Neither property had an existing sidewalk nor connected to one. *Id*.

Both protested, with Mayes pointing out that it made no sense to build a "sidewalk to nowhere." *Id*. at 821. Knight pointed out that constructing a sidewalk would result in drainage problems and that a different city department told him not to build one. *Id*. at 820. The city demanded $7,600 from Knight if he wanted his permit. *Id*. Both men sought to be excused from the requirement. *Id*. at 820-21.

When Mr. Knight's case was before the Board of Zoning Appeals, neighbors opposed his request for a variance from the sidewalk law because it was a "dangerous street," obviously not Mr. Knight's fault.[9] But those same neighbors said they would also be satisfied

[9] This and the following quotes come from documents produced by Nashville to Amici during discovery over the course of the sidewalk litigation.

if Mr. Knight's *attorneys* before the BZA—who had even less to do with the absence of sidewalks on the street—would "pay into the sidewalk fund" because "that would be good for Nashville."

Why Mr. Knight's BZA attorneys should be forced to pay Nashvillians anything for handling the zoning appeal is anyone's guess. But it is hardly a reassuring signal that legislative bodies are free from improper influences.

Other neighbors thought Mr. Knight ought to be forced to pay for sidewalks, reasoning that if he could afford a new home, then he could "also afford to build the sidewalk and should be required to do so" because "[i]t's the neighborly thing to do."

Mr. Knight's appeal was predictably denied. *Knight*, 64 F.4th at 820. Nashville never issued him his permit because he was unwilling to give it the $7,600 it demanded. *Id*. at 821.

According to the BZA, the purpose of forcing Mr. Mayes to pay the in-lieu fee before he got his permit was that it would "supplement Nashville's annual sidewalk capital program by increasing sidewalk construction funds for areas surrounding his property."[10]

Mr. Mayes' request for a variance was likewise denied "because he could pay the in-lieu fee." *Knight*,

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[10] This quote comes from documents produced by Nashville to Amici during discovery over the course of the sidewalk litigation.

64 F.4th at 821. He only got his permit after he surrendered $8,883.21. *Id*. at 821. Still more, those funds were used not to build a sidewalk on *his* property, but on property over two miles away. *Id*. So he not only paid for a sidewalk he did not want; he paid for a *public* sidewalk that Nashville built miles away.

As the experience of Nashvillians well attests, "the Takings Clause (like the rest of the Bill of Rights) seeks to protect a minority from the popular will as much as from the bureaucratic one." *Knight*, 67 F.4th at 836 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

Thus, just as any other constitutional right, Fifth Amendment property rights can be violated by any government actor. It does not matter "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). A taking is a taking. As this Court has recently held, the Takings Clause deserves the same full-fledged status as other protections in the Bill of Rights. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019). What matters is that when a government actor takes property without just compensation, property owners may turn to the courts to impose checks on that abuse. This Court must affirm that *Nollan*, *Dolan*, and *Koontz* authorize the judicial branch to strike down legislation that unconstitutionally conditions a government benefit on the agreement to give up the right to just compensation.

In closing (and for what it is worth), Nashville's sidewalk scheme wasn't just extortionate. It also didn't work very well. By time that the Sixth Circuit ruled on Nashville's sidewalk law in 2023, the city had only built eight miles of sidewalks in twelve months. Wright, *supra* note 3. And in 2021, Nashville's debt burden was still so substantial that it ranked as a bottom five "sinkhole city." Jason Schaumburg, *Nashville's Financial Health Earns It 'Sinkhole City' Designation*, The Center Square (Feb. 13, 2021).[11]

What few sidewalks were built under Nashville's Rube Goldberg funding scheme resulted in the city's famous and much derided sidewalks-to-nowhere, zig-zagging sidewalks, and sidewalks-to-oblivion: Erica Francis, *Wonky Walkways: Is a Nashville Ordinance to Blame?* WKRN.com (Feb. 1, 2022).[12]

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[11] www.thecentersquare.com/tennessee/article_10fd33ea-6cb1-11eb-9986-13ef5a61c4e3.html.

[12] www.wkrn.com/special-reports/nashville-forward/wonky-walkways-is-a-nashville-ordinance-to-blame/.

These remain as fitting monuments both to what happens when legislatures take constitutional shortcuts and the absurdity of thinking legislative bodies cannot abuse the rights of political minorities. *See Knight*, 67 F.4th at 836 ("James Madison, after all, warned that the dangers of one 'faction' gaining a majority increased as the size of the government shrank.") (citation omitted). This Court should apply the *Nollan/Dolan* test to legislative exactions to prevent other legislatures from following suit.

CONCLUSION

For the reasons stated in the Writ of Certiorari and this amicus curiae brief, this Court should reverse the California Court of Appeal.

Respectfully submitted,

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