No. _____

In The
Supreme Court of the United States

JOHN PIETSCH; ARLAN IRWIN, AS TRUSTEE FOR THE ALBERT AND GRACE IRWIN TRUST; WARD COUNTY FARM BUREAU, A NORTH DAKOTA NON-PROFIT CORPORATION; WARD COUNTY FARMERS UNION, A NORTH DAKOTA NON-PROFIT CORPORATION,

Petitioners,

v.

WARD COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NORTH DAKOTA; THE BOARD OF COUNTY COMMISSIONERS FOR WARD COUNTY, NORTH DAKOTA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES L.L.C.
P.O. Box 346
300 East 18th Street
Cheyenne, Wyoming 82003
Karen@buddfalen.com
307-632-5105
Fax 307-637-3891

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Does the violation of the "unconstitutional conditions doctrine" for an extortionate exaction under *Nollan v. California Coastal Commission*, 483 U.S. 837 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), create a stand-alone cause of action?

2. If the violation of the "unconstitutional conditions doctrine" for an extortionate exaction prior to a Fifth Amendment takings is a stand-alone cause of action, what is the appropriate remedy?

PARTIES TO THE PROCEEDINGS

Petitioners, John Pietsch and Arlan Irwin as Trustee for the Albert and Grace Irwin Trust, are private property owners and were the Plaintiffs and Appellants in the proceedings below. Petitioners also include the Ward County Farm Bureau and the Ward County Farmers Union as non-profit corporations representing similarly situated landowners within Ward County, North Dakota. The Respondents are Ward County, a political subdivision of the State of North Dakota, and the Board of County Commissioners, the elected officials for Ward County, North Dakota. Respondents were the Defendants in the proceeding below and Appellees before the Eighth Circuit Court of Appeals.

CORPORATE DISCLOSURES

Pursuant to Supreme Court Rule 29.6, counsel for the Petitioners state the following:

Petitioner Ward County Farm Bureau is a North Dakota Non-Profit Corporation comprised of and governed by farmers; there are no parent corporations, and no publicly held corporation owns ten-percent or more of its stock.

Petitioner Ward County Farmers Union is a branch of the North Dakota Farmers Union which is a trade name adopted by Farmers Educational and Cooperative Union of America North Dakota Division, a mutual aid corporation; no publicly held corporation owns ten-percent or more of its stock.

RELATED CASES

- *Pietsch v. Ward Cty., North Dakota*, 446 F.Supp.2d 513 (D.N.D. 2020).
- *Pietsch v. Ward Cty., North Dakota*, 991 F.3d 907 (8th Cir. 2021).

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

John Pietsch, Arlan Irwin as Trustee for the Albert and Grace Irwin Trust, Ward County Farm Bureau, a North Dakota Non-Profit Corporation, and the Ward County Farmers Union, a North Dakota Non-Profit Corporation, petition for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported as *Pietsch v. Ward Cty., North Dakota*, 991 F.3d 907 (8th Cir. 2021) and is reproduced at App. 1-6. The opinion of the Federal District Court for North Dakota is reported as *Pietsch v. Ward Cty., North Dakota*, 446 F.Supp.2d 513 (D.N.D. 2020) and is reproduced at App. 7-58.

JURISDICTION

The Eighth Circuit Court of Appeals entered judgment on March 16, 2021. App. 1. Pursuant to Supreme Court Rule 13, a petition for writ of certiorari must be filed within 90 days of the entry of judgment. On March 19, 2020, the Supreme Court entered a rule extending the deadline to file a petition for writ of certiorari to 150 days from the date of the lower court's judgment. Based upon the date of the judgment of the Eighth Circuit Court of Appeals, this writ is timely

filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the legal application of the "unconstitutional conditions doctrine" as applied to the states through the Fourteenth Amendment, and the appropriate remedy for the violation of the "unconstitutional conditions doctrine" which prohibits the government from conditioning the receipt of a discretionary benefit on a waiver of a constitutionally guaranteed right. The constitutionally guaranteed right in this case is the Fifth and Fourteenth Amendments' right to not have one's property taken without just compensation.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for

> public use, without just compensation. U.S. Const. amend. V.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

Ward Cty. Zoning Ordinance, Chapter 3, Article 24, Section 4(A)(12). App. 59-67.

Ward Cty. Zoning Ordinance, Chapter 3, Article 24, Section 8(A)(1). App. 68-70.

INTRODUCTION AND STATEMENT OF THE CASE

The issue presented in this case involves a question never before answered by the Supreme Court involving whether the "unconstitutional conditions doctrine" can be pled as a stand-alone cause of action to challenge an extortionate exaction condition, and if so, what is the remedy for the unlawful application of an "unconstitutional condition." The U.S. Supreme

Court has clearly held that the government's demand for property as a condition of the approval of a land-use permit must satisfy the *Nollan/Dolan* requirements. "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Koontz v. St. Johns Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013). And, while the U.S. Supreme Court has clearly stated that the remedy for the actual taking of private property is just compensation as required by the Fifth Amendment to the U.S. Constitution,[1] the Supreme Court has not squarely answered whether cases challenging the application of an unconstitutional condition where the property is not actually taken, have their own cause of action and what the appropriate remedy is in cases involving the application of an unconstitutional condition when money damages are not available.

Although the North Dakota Federal District Court and the Eighth Circuit Court of Appeals both held that the case at bar had to be pled as a "takings case," the courts failed to recognize that the Ward County Dedication Ordinance at issue does not result in a taking of private property which can be compensated by money damages unless the condition is accepted by the landowner seeking a permit. Rather, the Ward County Dedication Ordinance mandates that a landowner

[1] The Fifth Amendment remedy is applied to the states and local jurisdictions such as the one in this case through the Fourteenth Amendment to the U.S. Constitution.

must dedicate to the public a 40-foot right of way on either side of the center line along section lines, township roads, frontage roads, or subdivision roads as a condition prior to the approval of a subdivision or outlot plat. (Referred to herein as the "Dedication Ordinance.") App. 65. The required right of way is extended to 75 feet on either side of the center line along county roads, again as a condition that must be met prior to the approval of an outlot or subdivision plat. *Id*. Although the Ward County Dedication Ordinance states that its purpose is to provide for the proper arrangement of streets in relationship to other existing and planned streets, App. 11-12, 60, there is no individualized determination of whether such a condition is necessary based on the facts of the individual zoning or outlot application. App. 13, 68. "Because of this uniform approach, Ward County has essentially stripped itself of any discretion to approve a subdivision or outlot plat that does not comply with the dedication requirement." App. 12-13.

There is a way for a landowner to avoid the right of way dedication and that is through completion of an application for a variance. App. 2, 13, 68. However, variances can only be granted if the landowner has met the burden of showing a hardship. App. 2-3, 13. Additionally, a variance can only be granted based on the physical characteristics of the property. *Id.* Thus, in neither the application for the approval of a subdivision plat nor the application for a variance does the Ward County Commission consider whether there is an essential nexus or rough proportionality to an

increase of traffic from the granting of the proposed land use permit for an outlot or subdivision plat. App. 12-13.

Petitioner John Pietsch's request for approval of a 5.3-acre outlot from his existing 143.21-acre parcel is an example of the application of the Dedication Ordinance. App. 14-15. Pietsch's intended use for the outlot was to construct a farm shop to store his farm machinery. *Id.* Pietsch never intended to sell his farm equipment shed or the property upon which it was to sit. However, because the outlot bordered County Road 18, the Dedication Ordinance mandated an uncompensated 75-foot right of way prior to approval of the outlot plat.[2] App. 15. Rather than complying, Pietsch requested a variance from the right of way dedication requirement. *Id.* On May 17, 2017, the County Commission denied the variance because the physical characteristics of Pietsch's property fell outside the geophysical requirements for a hardship. *Id.* The County Commission did not ever consider the transportation-related impacts of the proposed outlot. *Id.* In turn, Pietsch's outlot application was denied. *Id.* Without approval of the outlot plat, Pietsch was not able to construct his farm machinery shed. *Id.*

The facts for Petitioner Irwin are much the same. Irwin, as trustee for the Albert and Grace Irwin Trust, proposed to create two outlots from the Trust's 150.52

---

[2] Ward County had previously offered to purchase the right of way from Pietsch for a planned reconstruction of the County road, but Pietsch declined the County's offer. App. 15.

acre property. App. 16. One of the outlots abutted 191st Avenue Southwest, a township road that traversed less than 1.6 miles and dead ended at two private driveways. *Id.* Based on the Dedication Ordinance, Irwin would have been required to dedicate a 40-foot right of way to the County prior to approval of his plat. Rather than giving up his private property without just compensation, he applied for a variance which the County Planning Commission recommended for approval because the township road was an "extremely low traffic" gravel road not prone to future development concerns. App. 17. Disregarding this recommendation, the County Commission denied the requested variance because it did not meet the right of way requirements of the Dedication Ordinance. *Id*. The County did not consider the transportation-related requirements of the variance request. *Id.* In turn, Irwin's outlot plat application was denied. *Id*.

The remaining Petitioners are organizations that advocate for farmers' rights and interests in Ward County. Ward County has enforced the Dedication Ordinance against members of both the Ward County Farm Bureau and the Ward County Farmers Union. App. 18-19.

Based upon these facts and the language of the Dedication Ordinance, this is a case of an extortionate demand for private property, for which the requirements of *Nollan/Dolan* can never be satisfied, and for the Petitioners who refused to accede to the unconstitutional condition, no remedy is available. Although admittedly there is a "hearing process" before the

County Commission when a variance is requested, that hearing is only to consider whether the geophysical characteristics of the property prohibit the dedication of a right of way. App. 12-13. If the physical characteristics of the property allow for the right of way, the request for variance "shall" be denied. *Id.* The County Commission never makes an individualized determination of whether the right of way has a nexus and is roughly proportional to the transportation related impacts of the individual plat application because the Ordinance applies as a matter of course to all subdivision and outlot plats. App. 12.

As stated by Justice Thomas in his concurring opinion in *Knick v. Twp. of Scott, Pennsylvania*, injunctive relief is not available as a remedy when an adequate remedy at law exists (*citing Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156 (2010)). *Knick v. Twp. of Scott, Pennsylvania*, 139 S.Ct. 2162, 2180 (2019). However, this case is different because there is no means by which just compensation will be made available to the Petitioners because they refused to give up their property as a condition for approval of a plat.

Under these facts, although the landowners receive notice and have the right to be heard, the Dedication Ordinance itself prohibits the County from considering the very "essential nexus" and "rough proportionality" requirements mandated by the Supreme Court in *Nollan* and *Dolan*. Rather, the landowner seeking the land use permit either agrees to the uncompensated takings, requests a hearing where the

only factor that can be considered is hardship to the landowner based on the geophysical characteristics of the property, or has his permit denied. The burden is on the landowner to prove a physical hardship to the land. App. 13. Furthermore, there is no consideration by the County of the transportation-related impacts that an individual outlot or subdivision application may have on the transportation network. *Id.*

Jurisdiction was proper in the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1291 because it was an appeal of a final order of the United States District Court for the District of North Dakota which maintained subject matter jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1343 (civil rights) as this controversy arose under 42 U.S.C. § 1983. The final judgment by the District Court disposed of all claims and causes of action by and between the Plaintiffs and the Defendants and was timely appealed to the Eighth Circuit Court by the Petitioners.

REASONS FOR GRANTING THE PETITION

In this case, the Eighth Circuit Court of Appeals incorrectly dismissed the Petitioners' claim that Ward County's Dedication Ordinance was an extortionate exaction creating an unconstitutional condition before reviewing the merits of the Petitioners' unconstitutional condition claim. The Eighth Circuit's reasoning was that the Petitioners failed to bring a traditional takings claim when challenging the Dedication Ordinance. App. 4 (stating that "Plaintiffs' due process and unconstitutional conditions claims are an impermissible attempt to recast a Takings claim . . . Plaintiffs thus have a remedy for unconstitutional exactions under the Takings clause."). The Petitioners, however, did validly bring an unconstitutional condition claim before the court. *Id.* As a result, the Eighth Circuit's ruling stands for the inaccurate notion that the only way to challenge an extortionate exaction of private property as an unconstitutional condition is by bringing a traditional takings claim even if a taking of property never actually occurs.

I. The Eighth Circuit's Decision Reflects Widespread Confusion Among the Courts and Scholars as to the Correct Legal Theory Exactions Should Reside Under.

The Eighth Circuit's decision to dismiss the present case without touching upon the merits reflects a general confusion by both courts and scholars as to the correct legal theory exactions should reside in. *See, e.g.*, Alan Romero, *Two Constitutional Theories for*

Invalidating Extortionate Exactions, 78 NEB. L. REV. 348, 370-373 (1999). While a takings clearly occurs in the context of *Nollan* or *Dolan* when a party chooses to forfeit property to the government in exchange for a discretionary benefit (often a development or zoning permit), it is less clear as to what should be the correct legal theory in a case similar to *Koontz* in which a permit is denied because the party refuses the unconstitutional condition. However, under the Eighth Circuit's ruling at bar, a claim of an illegal exaction is only properly pled as a violation of the Fifth and Fourteenth Amendments as a taking of private property without just compensation. App. 4. This ruling came despite the fact that an unconstitutional conditions claim was properly pled and acknowledged by the Eighth Circuit. *Id.*

Under the Eighth Circuit's formulation, in order to challenge an unconstitutional condition created by an exaction, a property owner would have to file a cause of action for a "takings," even if a taking of property never actually occurred. Thus, even if a court were to acknowledge that an unconstitutional condition occurred due to a proposed exaction, the court could also find in favor of the government because the property owner did not plead that there was a theoretical taking of property without just compensation. This quandary created by the Eighth Circuit is not uncommon and reflects the general confusion held by many courts and scholars. This confusion has evolved into courts unevenly applying *Nollan, Dolan*, and *Koontz* and scholars

debating as to what the correct legal theory for an exaction of private property should be.

A. Existing case law inconsistently and unclearly applies different legal theories when ruling on exaction cases.

The conundrum the lower courts have faced when reviewing exaction cases was created because there is a lack of clarity as to where a claim against an illegal exaction should reside. As discussed below, in one ruling, the Court has suggested that an extortionate exaction is unconstitutional because it is a taking of property without just compensation. *See Nollan*, 483 U.S. at 834-837. Conversely, the Court has also ruled that an exaction is actually an unconstitutional condition because the constitutional violation of an extortionate exaction is created upon the presentation of impossible options for the property owner (having to decide whether to lose the proposed permit or lose part of their property) rather than the actual physical taking of the property. *Koontz*, 570 U.S. at 607. The cause of action under *Koontz* then naturally accrues upon the creation of the unconstitutional condition itself before a taking of property is ever executed. *Id*.

In *Nollan*, this Court suggested that extortionate exactions should fail under the Fifth and Fourteenth Amendments as a taking of property without just compensation because the land use restriction imposed for the purpose of extortion does not "substantially advance legitimate state interests." *See Nollan*, 483 U.S.

at 834-837. So originally, it appeared as though cases involving illegal exactions fell under the purview of a takings claim. Although *Nollan* suggested that extortionate exactions are illegal because they allow the government to take property without just compensation, the Court never explicitly stated that the California Coastal Commission violated the Takings clause with its extortionate demand of Nollan. Instead, the Court stated that since the demand would have a been a taking if directly imposed, the California Coastal Commission should have to pay for the easement if it wanted it. *Id*. at 834.

Conversely, in *Dolan*, the Court suggested that extortionate exactions create an unconstitutional condition because the exaction forces a person to give up the right to just compensation in exchange for a government benefit. *Dolan*, 512 U.S. at 385 (referring to the "well-settled doctrine of 'unconstitutional conditions'" as the driving legal theory to invalidate an extortionate exaction).[3] Thus, instead of falling under the theory of a taking, extortionate exactions were found to be

[3] It has been theorized that the reason this Court took *Dolan* was because *Nollan's* ruling caused much confusion for many courts which often avoided making a substantive ruling based off of *Nollan* by narrowly interpreting the findings of *Nollan*, so *Dolan* was an attempt to clarify the Court's position regarding the constitutional theory behind invalidating illegal exactions. *See, e.g.*, Richard A. Epstein, *Introduction: The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. U. L. REV. 477, 492 (1995); Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 354-355 (1999).

illegal because they impose an unconstitutional condition. *Id.*

In *Lingle* this Court stated that *Nollan* and *Dolan* were a "special application of the 'doctrine of 'unconstitutional conditions'"[4] because *Nollan* and *Dolan* involved cases in which the government attempted to require a person to give up a constitutional right in exchange for a discretionary benefit. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547-548 (2005). In that case, the Court reiterated that the correct legal theory to challenge an exaction was through the unconstitutional conditions doctrine rather than a taking of property without just compensation. However, additional confusion arose because *Lingle* framed its interpretation of *Nollan* and *Dolan* as if it simultaneously applied takings jurisprudence and the unconstitutional conditions doctrine because as part of the Court's reasoning it stated that the "substantially advances" formula is not a valid takings test and is more properly posited as a due process action. *See id.* at 546-548. In turn, other courts have interpreted *Lingle* to suggest that an extortionate exaction is a taking. *See, e.g.*, *Action Apartment Ass'n v. City of Santa Monica*, 166 Cal.App.4th 456, 459-460 (2008) (citing to *Lingle* while also stating "This is principally a takings case" when reviewing a challenge under *Nollan* and *Dolan*). *Id.*

---

[4] Interestingly, the Eighth Circuit cited to *Knick* as justification for dismissing the present case for failing to plead a violation of the Takings clause. App. 4.

Koontz further reinforced that extortionate exactions are illegal through the unconstitutional conditions doctrine. *See Koontz*, 570 U.S. 595. In *Koontz* the Court stated that "[e]xtortionate demands of this sort frustrate the Fifth Amendment's right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Id.* at 605. Further, the Court ruled that the principles behind the *Nollan* and *Dolan* decisions remain intact whether the government approves a permit upon acceptance of the condition by the property owner or the government conversely denies the permit because the property owner refuses the government's request to relinquish property. *Id*. at 606. The Court emphasized that an unconstitutional condition could occur before a violation of a person's constitutional rights (in the case of exactions, a taking of property without just compensation) ever occurs. *Id*. at 607.

Ultimately, while this Court has stated repeatedly that extortionate exactions create unconstitutional conditions, other statements and methods of analysis used by the Court have made this issue murky. This Court has outlined that the proper cause of action to challenge an extortionate exaction is via unconstitutional conditions. *Dolan*, 512 U.S. at 385; *Lingle*, 544 U.S. at 547-548; *Koontz*, 570 U.S. at 604. However, this Court has then intermixed takings jurisprudence with unconstitutional conditions when making its decision. *See Lingle*, 554 U.S. at 546-548; *Nollan*, 483 U.S. at 834-837. This confusion has been further perpetuated by the fact that the parties in *Nollan*, *Dolan*, and *Koontz* all brought takings claims challenging the

condition as a taking of private property without just compensation. *Koontz*, 570 U.S. at 602; *Nollan*, 483 U.S. at 829; *Dolan*, 512 U.S. at 382. As a result, this Court has never taken an exactions case in which the exaction was challenged as an unconstitutional condition exclusive from a takings challenge.

B. There is a split between the courts and scholars as to which legal theory an extortionate exaction should be challenged under.

There appear to be three prominent theories as to the proper legal theory to challenge an exaction. The first theory is that *Nollan* and *Dolan* are actually a form of takings. Several state and circuit courts have called challenges under *Nollan* and *Dolan* a takings claim. *See, e.g.*, *Action Apartment Ass'n*, 166 Cal.App.4th at 459-460 (stating "This is principally a takings case" when reviewing a challenge under *Nollan* and *Dolan*); *Iowa Assur. Corp. v. City of Indianola, Iowa*, 650 F.3d 1094, 1097-1098 (8th Cir. 2011) (claiming that a "governmental requirement that, without sufficient justification, requires an owner to 'dedicate' a portion of his property in exchange for a building permit" is a form of regulatory takings); *Alto Eldorado P'ship v. Cty. of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011) (stating that "*Nollan* and *Dolan* do not authorize challenges to permitting decisions as alleged unconstitutional takings without first seeking compensation if the state has provided the means to seek compensation."). Thus, under these courts' rationale, a challenge to an exaction

under *Nollan* and *Dolan* is actually a takings claim and must be pled as one, even if property is never actually taken. *See also* Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 904-908 (1995) (arguing that *Dolan* did not actually rely on unconstitutional conditions theory); L.K.S. Rath, Note, *Dolan v. Tigard. A Further Step Toward Full Recognition of Property Owner Rights*, 8 TUL. ENVTL. L.J. 337, 349 (1994) ("*Dolan* takes this trend further, holding that even where the land use regulation serves a legitimate public purpose and meets the essential nexus test of *Nollan*, it may still be a taking if the required exactions are not proportional to the impact of the proposed development.").

In contrast, other courts have cited to *Dolan, Koontz*, and *Lingle* to suggest that the proper legal theory to challenge an exaction is the unconstitutional conditions doctrine. *See, e.g.*, *Alpine Homes, Inc. v. City of West Jordan*, 424 P.3d 95, 104 (Utah 2017) ("Thus, it is the constitutionality of the government-imposed condition that is at issue under a *Nollan/Dolan* claim, not a consummated taking of private property. . . ."); *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1138 (9th Cir. 2014), *rev'd sub nom. Horne v. Dep't of Agric.*, 576 U.S. 350 (2015) (reversed on other grounds) (stating that "If the Secretary works a constitutional taking by accepting (through the RAC) reserved raisins, then, under the unconstitutional conditions doctrine, the Secretary cannot lawfully impose a penalty

for non-compliance. But if the receipt of reserved raisins does not violate the Constitution, neither does imposition of the penalty.").[5] Under this theory, a party should be able to challenge the constitutionality of the condition being imposed itself rather than having to undergo a takings claim when challenging an extortionate exaction.

Still other constitutional and property law scholars believe that exactions should fall under a substantive due process claim. *See* Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 370-373 (1999). Professor Romero's reasoning is that, in the context of an exaction, because the government is willing to waive a permit requirement in order to gain a property interest, a court may examine the regulation itself with closer scrutiny because it can be argued that the government is pursuing an illegitimate interest. *Id*. at 372. Under his reasoning, when the regulation is conditionally waived in order to get some property interest from the owner, the court should look for a nexus and rough proportionality to determine whether the illegitimate reason suggested by the exaction is truly the government's reason for its action. *Id*.

---

[5] Note that while both courts acknowledge that *Nollan, Dolan*, and *Koontz* were unconstitutional condition cases, the courts also stated that the exaction was an illegal taking.

C. This Court's previous rulings suggest that the most correct legal theory to challenge an extortionate exaction is as an unconstitutional condition.

This Court's previous rulings support that the doctrine of unconstitutional conditions is a stand-alone cause of action and should be the correct legal theory for violations of *Nollan* and *Dolan*. For example, in *Koontz*, the Court clarified that an extortionate exaction may be challenged even if the property owner chooses not to accept the condition and their permit is subsequently denied. *Koontz*, 570 U.S. at 606. *Koontz* stands for the concept that extortionate exactions run afoul of the Takings Clause not because there is a taking of property, but instead the violation occurs when the government impermissibly burdens the right not to have property taken without just compensation. *Id*. at 607. Because a taking never occurs, for a *Nollan*/*Dolan* claim, logically, the unconstitutional conditions doctrine should be the proper cause of action because a physical taking never occurs in a *Koontz* scenario.

In addition to the necessity that a *Nollan*/*Dolan* claim be viewed as an unconstitutional condition, rather than a taking to be logically consistent with *Koontz*, this Court's words explicitly state that the proper claim is under the unconstitutional conditions doctrine. In *Dolan*, the Court cited the "[w]ell settled doctrine of 'unconstitutional conditions' " as the driving legal theory to invalidate an extortionate exaction. *Dolan*, 512 U.S. at 385. In *Lingle*, this Court favorably looked upon the unconstitutional conditions doctrine

as the proper legal theory to challenge an extortionate exaction when the Court stated that *Nollan* and *Dolan* were a "special application of the 'doctrine of "unconstitutional conditions . . ."'" because *Nollan* and *Dolan* involved cases in which the government attempted to require a person to give up a constitutional right in exchange for a discretionary benefit. *Lingle*, 544 U.S. at 547-548. *Koontz* states repeatedly that extortionate exactions create an unconstitutional condition. *Koontz*, 570 U.S. at 604-609.

Finally, the doctrine of unconstitutional conditions has been treated as a separate cause of action to the underlying constitutional challenges in other unconstitutional conditions cases outside of the *Nollan/Dolan* context. For example, in *Rust v. Sullivan*, this Court considered both a First Amendment challenge and an unconstitutional conditions challenge restricting the First Amendment challenge to Title X regulations prohibiting recipients of those funds from using those funds to engage in abortion advocacy or counseling. *See Rust v. Sullivan*, 500 U.S. 173, 192, 196 (1991). In another case in 2013, the Court considered a challenge to funding given under the Leadership Act that was brought solely as an unconstitutional condition against the First Amendment because the funding was explicitly not available to any organization that did not explicitly oppose prostitution and sex trafficking. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 211 (2013). Thus, this Court has already reviewed challenges of unconstitutional conditions as standalone causes of action that can operate independently

of other causes of actions. In turn, this Court should view unconstitutional condition challenges to extortionate exactions as a stand-alone cause of action that does not require a claim for takings.

D. Requiring *all* challenges under *Nollan*, *Dolan*, and *Koontz* to be brought as takings claims results in constitutional violations with no adequate remedy.

Requiring all challenges under *Nollan, Dolan*, and *Koontz* to be takings claims creates a remedy issue as well. By pigeonholing the Petitioners' cause of action predicated upon a *Nollan/Dolan* unconstitutional condition violation as a takings, the Eighth Circuit has highlighted the inherent flaw in such an approach: it provides no remedy for the Petitioners who were harmed by the unconstitutional condition but are not entitled to just compensation because the takings were never consummated. There is no question that the mandated remedy when the government takes private property is just compensation. *Koontz*, 570 U.S. at 608-609. *See also First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 315 (1987) (The Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") (emphasis in original). However, when, as in the case at bar, there is no taking because a property owner does not acquiesce to the government's extortionate demand for the dedication of property in

contravention to the standards established in *Nollan* and *Dolan*, just compensation is not available.

Despite grazing the issue, the Supreme Court has not yet determined what the adequate remedy is for an unconstitutional condition that is required as a condition of a land-use permitting decision but prior to a Fifth Amendment takings. *See Koontz* 570 U.S. at 608-609. The *Koontz* majority opinion unequivocally held that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Koontz*, 570 U.S. at 619. However, it expressly declined to discuss the appropriate remedy when there is no taking despite a *Nollan/Dolan* unconstitutional conditions violation. *Id*. at 609. ("Because petitioner brought his claim pursuant to a state law cause of action, the Court has no occasion to discuss what remedies might be available for a *Nollan/Dolan* unconstitutional conditions violation either here or in other cases."). The solution to the juxtaposition of these two positions, at least when the unconstitutional condition is the relinquishment of real property, is injunctive relief as suggested by Justice Kagan's dissent in *Koontz*. *Id*. at 620 (Kagan, J., dissenting) ("[W]hen the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed. . . .")

However, such a remedy is precluded if the Petitioners are required to bring a takings claim because

the Supreme Court has rejected requests for injunctive relief to block alleged takings. *Knick*, 139 S.Ct. at 2176 ("Today, because the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable. As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin a government's action effecting a taking"); *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (*citing Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n. 18 (1949) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."). As argued below, the appropriate remedy for a violation of the unconstitutional conditions doctrine is invalidation of the condition, i.e., injunctive relief. Thus, by definitively finding that violations of *Nollan* and *Dolan* can be properly pled as violations of the unconstitutional conditions doctrine, this Court can ensure that the constitutional violations at issue here have an adequate remedy.

The confluence of the confusion of lower courts and the inadequate remedy available for the Petitioners is seen in the Eighth Circuit's reliance on *Knick*. In contrast to the unconstitutional condition being challenged by the Petitioners, *Knick* was squarely an alleged regulatory taking wherein the plaintiff claimed a taking due to an ordinance which made all cemeteries, including the one on the plaintiff's private

property, open to the general public. *Id.* at 2168. In overruling *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Court stated that "so long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities." *Id.* at 2168. *Knick's* caveat for protecting local government ordinances works well in the takings context in which there is an opportunity to receive just compensation. However, that opportunity never exists for a property owner facing an extortionate exaction. Despite the clear difference between *Knick* and the case at bar, *Knick* was cited favorably by the Eighth Circuit in support of the District Court ruling in this matter. App. 4 ("Plaintiffs' due process and unconstitutional conditions claim are an impermissible attempt to recast a Takings claim. 'As long as an adequate provision for obtaining just compensation exists, there is no basis to enjoin government action effecting a taking.' ") (citation omitted).

This case is similar to *Knick* in that Petitioners find themselves in a Catch-22. There, under the now overturned precedent of *Williamson Cty.*, a plaintiff "[could] not go to federal court without going to state court first; but if he [went] to state court and los[t], his claim will be barred in federal court. The federal claim dies aborning." *Knick*, 139 S.Ct. at 2167. Here, the Petitioners' ability to receive relief from the unconstitutional condition that resulted in the denial of their requests to subdivide their lots is similarly hamstrung by the decision of the Eighth Circuit limiting their

cause of action to only a takings claim. This is inappropriate because no taking has ever occurred and the sole remedy for a takings, just compensation, cannot adequately readdress their injuries. The Eighth Circuit's reliance on *Knick* emphasizes the importance of the Court finding that the Petitioners' cause of action is a stand-alone cause of action for a violation of the unconstitutional conditions doctrine.

E. The Eighth Circuit incorrectly viewed *Nollan*, *Dolan*, and *Koontz* as takings cases, thereby improperly ignoring Petitioners' claim of an unconstitutional condition created by the Dedication Ordinance.

In the present case, the Eighth Circuit committed a reversible error by incorrectly viewing *Nollan*, *Dolan*, and *Koontz* as operating solely under the Takings clause and ignoring the Petitioners' claim that the proposed Ward County Dedication Ordinance created an unconstitutional condition. App. 4. A taking never occurred for the Petitioners because they refused the dedication condition and were denied the permit. App. 16, 18. The Petitioners subsequently and clearly raised, among other things, that the Dedication Ordinance created an unconstitutional condition. App. 4. While the Eighth Circuit acknowledged that the Petitioners raised both a due process claim and an unconstitutional conditions claim, the Court then chose not to review the merits of that claim. *Id*. The Eighth Circuit justified this by citing to *Lingle* because it stood for the

concept "that a substantive due process inquiry has 'no proper place' in Takings doctrine. . . ." *Id. citing Lingle*, 544 U.S. at 540, 546-548. Ironically, in the same sentence, the Eighth Circuit also quoted *Lingle's* statement that *Nollan* and *Dolan* are special applications of unconstitutional conditions doctrine for takings. App. 4. In turn, the Eighth Circuit dismissed the Petitioners' claim that the Dedication Ordinance created an unconstitutional condition because the Petitioners failed to raise a takings claim in their pleadings. App. 5 (stating "Plaintiffs thus have a remedy for unconstitutional exactions under the Takings clause," and reasoning that therefore a claim challenging an unconstitutional exaction under any other legal theory is improper.).

While the Eighth Circuit's ruling is understandable given the widespread misconception that *Nollan*, *Dolan*, and *Koontz* were takings cases rather than unconstitutional conditions cases, as explained above, this is a plain error because this Court has stated that illegal exactions create an unconstitutional condition rather than initiating a claim for a taking without just compensation. *Dolan*, 512 U.S. at 385; *Lingle*, 544 U.S. at 547-548; *Koontz*, 570 U.S. at 604. Further, this Court's ruling in *Koontz* stating that an illegal exaction can be challenged before property is ever taken shows that an unconstitutional conditions claim rather than a takings claim is the proper challenge because a physical taking never actually occurs. *See Koontz*, 570 U.S. at 606.

II. The adequate remedy for a *Nollan/Dolan* unconstitutional conditions violation should be injunctive relief as is generally acknowledged to be the appropriate remedy for unconstitutional conditions violations.

The Supreme Court has not yet determined the adequate remedy for an unconstitutional condition that is required as a condition of a land-use permitting decision but prior to a Fifth Amendment takings. *Koontz*, 570 U.S. at 609. The Court should resolve this gap and find the proper remedy, at least when the unconstitutional condition is the relinquishment of real property, to be injunctive relief as suggested by Justice Kagan's dissent in *Koontz*. *Id*. at 620 (Kagan, J., dissenting) ("[W]hen the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed. . . .") As in *Koontz*, the issue of remedies was not directly addressed by the *Nollan* or *Dolan* Courts, however, Justice Kagan's dissent is consistent with the remedy for unconstitutional conditions which these cases seem to imply.[6] As noted above, just compensation is the appropriate remedy *only* when the government actions resulting in a taking are proper or legitimate. *See First English Evangelical Lutheran*

---

[6] Scholars have pointed to treatises and Supreme Court cases as support for the adoption of injunctive relief invalidating the condition as the remedy for *Nollan/Dolan* unconstitutional conditions violations. *See* Scott Woodward, *The Remedy for a "Nollan/Dolan Unconstitutional Conditions Violation*," 38 VT. L. REV. 701, 709 n. 55, 710 n. 56 (2014).

Church of Glendale, 482 U.S. at 315; *Larson*, 337 U.S. at 697 n. 18. However, a *Nollan/Dolan* unconstitutional condition is *per se* an illegitimate exercise of the government's power which makes equitable relief in the form of an injunction appropriate.

The constitutional harm that occurs when a permit is denied because of a *Nollan/Dolan* unconstitutional condition cannot be remedied through just compensation when no taking has occurred. The invalidation of the condition is the appropriate remedy here as supported by *Nollan* where the Court acknowledged that if the Commission wanted to pursue a comprehensive program for access to the beach, the proper avenue was through use of eminent domain and not the attempted unconstitutional condition placed on permit applications. *See Nollan*, 483 U.S. at 841-842. The *Dolan* Court went further by expressly invoking the unconstitutional conditions doctrine with no caveat that just compensation would make the condition permissible. *Dolan*, 512 U.S. at 385 ("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 a public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.") (*citing Perry v. Sindermann*, 408 U.S. 593 (1972), *overruled in part on other grounds by Rust v. Sullivan*, 500 U.S. 173 (1991); *Pickering v. Board of Educ. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568 (1968)).

As the Supreme Court has anchored the constitutional violation at issue in *Nollan*, *Dolan*, and *Koontz*, to the unconstitutional conditions doctrine, the appropriate remedy for a *Nollan/Dolan* unconstitutional violation should be commensurate to the remedy for other unconstitutional condition cases. This approach was advocated for in the dissent to the 2009 *Koontz* appellate opinion:

> In [*Perry* and *Pickering*], the litigation simply invalidated the condition. To say that an agency's imposition of a condition on the discretionary grant of a permit to develop real property necessarily "takes" the property until the condition is removed is illogical. If an agency imposes an unconstitutional condition on public employment that deprives a person of his right of free association or free speech, the invalidation of the condition does not require that the government employ, or continue in employment, anyone who was burdened by the condition. The unconstitutional condition is simply removed and the individual may or may not be hired or continued in employment based on constitutional criteria. By imposing an unconstitutional condition, the agency did not "take" the job.

St. Johns River Water Mgmt. Dist. v. Koontz, 5 So.3d 8, 18 (Fla. Dist. Ct. App., 2009) (Griffin, J., dissenting).

In *Perry*, relied upon by both the *Dolan* and *Koontz* Courts when defining the unconstitutional condition at issue in the land-use context, Sindermann was a teacher under a one-year contract who became

involved in a public dispute with the college's Board of Regents. *Perry*, 408 U.S. at 594-595. When the one-year contract expired, the Board of Regents voted not to offer the teacher a new contract, and while they issued a public statement alleging insubordination, the teacher was not provided an official statement of reasons or hearing to challenge the decision. *Id*. at 595. The *Perry* Court endorsed the Court's previous, clear direction that the government "may not deny a benefit to a person on a basis that infringes on his constitutionally protected interests . . . [because] his exercise of those freedoms would in effect be penalized and inhibited . . . [and] such interference with constitutional rights is impermissible." *Id.* at 597. The Court reaffirmed that nonrenewal of a nontenured teaching contract "*may not* be predicated on his exercise of First and Fourteenth Amendment rights." *Id.* at 598 (emphasis added).

The *Perry* Court could not determine if the teaching contract had in fact been terminated on impermissible grounds because the District Court granted summary judgment which precluded full consideration of the issue. *Id.* at 598. However, it found that summary judgement without full exploration of the issue was improper because "there is a genuine dispute as to 'whether the college refused to renew the teaching contract on an impermissible basis – as a reprisal for the exercise of constitutionally protected rights.'" *Id.* at 598. Accordingly, the *Perry* Court remanded the case for a full hearing on this issue. *Id.* at 603. The *Perry* Court did not state what would occur if on remand it was determined that the nonrenewal of the contract

was predicated on the unconstitutional condition, however, the subsequent case of *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle* made clear that Sindermann could be reinstated if the "decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-284 (1977). In *Mount Healthy City Sch. Dist. Bd. of Educ.*, the Court found that once it is determined that the unconstitutional condition was the basis of the decision, consideration of the unconstitutional condition is prohibited and the decision can only stand if supported by entirely constitutional bases. *See id*. at 287. Stated another way, unconstitutional conditions must be invalidated, and government actions can only stand if supported purely by constitutional bases.

Indeed, governmental attempts to impose unconstitutional conditions have been invalidated to protect a broad array of constitutional rights. *See* Scott Woodward, *The Remedy for a "Nollan/Dolan Unconstitutional Conditions Violation*," 38 VT. L. REV. 701, 717 n. 92 (2014).[7] The Court has further found that

---

[7] *See*, *e.g.*, *Fed. Commc'n Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (invalidating § 399 of the Public Broadcasting Act because it imposed the condition to refrain from "editorializing" on non-commercial educational broadcasters in exchange for public grants); *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-718, 720 (1981) (invalidating a denial of unemployment benefits conditioned on foregoing religious exercise); *Sherbert v. Verner*, 374 U.S. 398, 404-406 (1963) (invalidating a denial of unemployment benefits conditioned on forgoing religious exercise) [(Abrogated by *Holt v. Hobbs*, 135 S.Ct. 853 (2015))]; *Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973)

invalidating an unconstitutional condition is an appropriate remedy even if the threatened unconstitutional condition has not yet happened. *See Agency for Int'l Dev.*, 570 U.S. 205. Thus, affirmatively holding that invalidation of an unconstitutional condition in the context of a *Nollan/Dolan* unconstitutional condition violation is the appropriate remedy is supported by the lineage of the unconstitutional conditions doctrine cases and is further well within the authority of this Court.

It has long been established that federal courts have broad powers to grant equitable relief for constitutional violations. *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting). Equitable relief has been found appropriate when there is a continuing violation of constitutional rights. *See Johnson v. Wells*

(invalidating a New York law conditioning continuance and renewal of state contracts on requirement to surrender right to refuse self-incrimination in proceedings related to state contracts); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (invalidating one year residency condition imposed on welfare recipients before being able to apply for benefits) [(Partially overruled on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974))]; *Gomillion v. Lightfoot*, 364 U.S. 339, 347-348 (1960) (invalidating under the Fifteenth Amendment state redistricting that effectively made it a condition to be white in order to vote within the boundaries of Tuskegee); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (invalidating an Oklahoma law requiring state employees to take an oath that the employee was not or had not been a member of the Communist Party on condition of state employment); *Bailey v. Alabama*, 219 U.S. 219, 244-245 (1911) (invalidating an Alabama statute imposing what amounted to indentured servitude in violation of the Thirteenth Amendment where a debtor failed to pay a debt on a labor contract).

Fargo & Co., 239 U.S. 234, 244 (1915) ("Such continuing violation of constitutional rights might afford a ground for equitable relief.") (citations omitted); *see also Swann v. Charlotte-Mcklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."). As described above, the Court's recent decision in *Knick* has made it more important than ever for this Court to clearly distinguish a *Nollan/Dolan* unconstitutional conditions violation from a takings claim because of the clearly disparate remedies available. *See supra* pp. 23-25 of this Petition.

Unlike in *Knick* or in a true takings case, injunctive relief is the appropriate remedy here because there is no "adequate provision" for the Petitioners to obtain just compensation. The Dedication Ordinance uniformly applies to all requests for subdivisions and outlots. App. 11. The Ward County Dedication Ordinance does not provide for, and in fact explicitly prohibits, the consideration of any individualized determination of the nexus or rough proportionately between the required dedications and the impacts to the public. App. 11-13. This is a textbook example of an unconstitutional condition where the Petitioners' subdivision requests were denied *only* because they refused to agree to dedicating their private property as the Respondents did not and could not show the required dedications were in conformance with the *Nollan* and *Dolan* standards. Accordingly, there were

no takings in the case at bar and therefore no avenue for the Petitioners to receive just compensation. However, there was a violation of the unconstitutional conditions doctrine for which invalidation of the condition, either through injunctive relief prohibiting the enforcement of the Dedication Ordinance, injunctive relief prohibiting denial of Petitioner Pietsch's and Irwin's subdivision requests based on the Dedication Ordinance, or both, is the adequate and properly tailored remedy.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

KAREN BUDD-FALEN
BUDD-FALEN LAW OFFICES L.L.C.
P.O. Box 346
300 East 18th Street
Cheyenne, Wyoming 82003
Karen@buddfalen.com
307-632-5105
Fax 307-637-3891