No. 22-1074

IN THE

Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO, CALIFORNIA,

Respondent.

On Writ of Certiorari to the California Court of Appeal, Third Appellate District

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
NINA HENRY
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

December 20, 2023

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

Constitutional Provisions and Legislative Materials

Books, Articles, and Other Authorities

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES -- cont'd

Page(s)

TABLE OF AUTHORITIES -- cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has an interest in ensuring that the Takings Clause of the Fifth Amendment is interpreted in accordance with its text and history and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2006, El Dorado County in California established a Traffic Impact Mitigation fee program ("the Program") to finance the construction and widening of roads in the County. Under the Program, as refined through changes adopted in 2012, the builders of new developments are required to help pay for the cost of building and widening roads. As relevant here, the Program imposes a flat fee for certain residential developments and a variable fee based on square footage for others. Pet. App. D-14-15. The amount of the fee does not depend on the new development's specific impact on the roads.

In 2016, Petitioner applied for a permit to construct a single-family home on his plot of land, and the County agreed to issue the building permit on the

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

condition that he pay the Program fee of $23,420 for improvements to the state highway and local roads. The following year, Petitioner challenged the Program arguing, among other things, that it was unconstitutional under the Constitution's Takings Clause. The California state courts rejected this challenge, Pet. App. A-1, C-1, and this Court should affirm.

The Program at issue here does not violate the Takings Clause for the simple reason that the County is neither taking Petitioner's property nor, in an effort to evade the Takings Clause's just compensation requirement, requiring him to make a monetary payment. All the County is doing is requiring Petitioner to pay a fee to help improve roads that might be negatively affected by his development. The Takings Clause does not prohibit—and this Court has never understood it to prohibit—governments from charging those sorts of fees. This Court should reject Petitioner's invitation to expand the scope of the Clause in a manner that would be inconsistent with its text and history, as well as this Court's precedent.

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. const. amend. V. Consistent with its text, the Clause was originally understood to apply only to the direct appropriation of private property. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 782 (1995) ("[T]he Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value.").

At the time of the Founding, colonial and state constitutions prohibited only the direct appropriation

of property, and governmental regulations that affected the value of property were commonplace. Indeed, James Madison, the drafter of the Takings Clause, introduced legislation prohibiting landowners from building a mill or dam unless a court inquest first concluded that potential negative consequences to the region could be prevented, mitigated, or repaid in damages. A Bill Concerning Mill Dams and Other Obstructions of Water Courses, *reprinted in* 2 *The Papers of Thomas Jefferson, 1777–18 June 1779*, at 464, 466 (Julian P. Boyd ed., 1950). Under Madison's proposal, colonial landowners were required to pay fees before developing their properties—much like the fees Petitioner paid to the County—even when doing so effectively destroyed the value of a mill site. *See* John Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 Md. L. Rev. 287, 313 (2004) (describing "fish-passage laws contemporary with the adoption of the Takings Clause [that] prohibited obstruction of migratory fish by mill dams").

For decades, the Clause was applied consistently with this understanding. *See Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2071 (2021) ("Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property."). And even as this Court has expanded somewhat the scope of the Takings Clause, it has been careful to limit the Clause's application to governmental actions that could reasonably be considered equivalent to direct appropriations that were within the scope of the Clause's original meaning, or that were efforts to evade the Clause's application to such appropriations. *See, e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (explaining that categories of takings

"share a common touchstone," as "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

In the permitting context, for example, this Court has made clear that governments may not impose conditions that are designed to evade the Takings Clause's requirements. As this Court explained in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a permit condition is impermissible if "[t]he purpose . . . [is] the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837; *see also Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (permit condition impermissible where, had easement been directly requested, "a taking would have occurred"). And in *Koontz v. St. Johns River Water Management District,* 570 U.S. 595 (2013), this Court made clear that the *Nollan-Dolan* rule applies not only when governments seek to obtain an easement through a permit condition, but also when they seek to use a permit condition to obtain a monetary exaction in lieu of an easement. *See id.* at 612 (expressing concern that "a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value"); *id.* at 613 ("this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien").

This Court has never suggested—let alone held—that the Takings Clause extends as broadly as Petitioner suggests, and this Court should reject the invitation to so expand it now. Doing so would be at

odds with both this Court's precedents and the text and history of the Clause.

ARGUMENT

I. As Originally Understood, the Takings Clause Applied Only to the Direct Appropriation of Property.

1. The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. By its terms, the Clause's scope is quite narrow: it applies only when the government takes private property. And rather than preventing such takings, it only requires the government to provide just compensation when those takings occur. *See First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987). While the Constitution does not define the term, a "taking" most naturally means an expropriation of property, such as when the government exercises its eminent domain power to physically acquire private property to build a road, military base, or park. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envt'l Aff. L. Rev. 509, 515 (1998).

The Clause's focus on actual appropriations of private property makes sense in light of the historical circumstances that preceded the adoption of the Clause. Prior to the ratification of the Fifth Amendment, "there was no [federal] rule requiring compensation when the government physically took property or regulated it. The decision to provide compensation was left entirely to the political process." Treanor, *supra*, at 783; *see id.* ("[T]he framers did not favor absolute protection of property rights."). Thus, during the Revolutionary War, the military regularly

seized private goods without providing compensation. *See* 1 William Blackstone, *Commentaries with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-06 (St. George Tucker ed., 1803) (statement by Tucker regarding the "arbitrary and oppressive mode of obtaining supplies for public uses . . . as was too frequently practised during the revolutionary war, without any compensation whatsoever"); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (upholding uncompensated seizure of provisions from private citizens during the war).

Indeed, only two foundational documents from the colonial era included even limited recognition of a right to compensation for the taking of private property, and both covered only physical appropriations of property. Treanor, *supra*, at 785. First, the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement that applied only to the seizure of personal property: "No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Mass. Body of Liberties § 8 (1641), *reprinted in Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 149 (Richard L. Perry & John C. Cooper eds., 1959) [hereinafter *Sources of Our Liberties*]; *see* Treanor, *supra,* at 785 n.12 ("This provision of the Body of Liberties appears to have been modelled on Article 28 of Magna Carta, which barred crown officials from 'tak[ing] anyone's grain or other chattels, without immediately paying for them in money.'"

(quoting Magna Carta art. 28 (1215), *reprinted in Sources of Our Liberties* 16)).

Likewise, the 1669 Fundamental Constitutions of Carolina, which were drafted by John Locke and never fully implemented, would have mandated compensation only for the direct seizure of real property. Treanor, *supra,* at 785-86. Locke sought to authorize public construction of buildings and highways, so long as "[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint." *Id.* at 786 (quoting Fundamental Constitutions of Carolina art. 44 (1669), *reprinted in* 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 115 (1971)).

2. Because the Founders were concerned about the physical appropriation of property, regulations affecting the value of property were viewed as unproblematic. For example, colonial governments commonly regulated land use and business operations, *see id.* at 789 (collecting examples), yet no colonial charter required compensation for property owners affected by those regulations—not even when the regulations affected a property's value. And, significantly, colonial property regulations frequently caused landowners to incur expenses related to the community's welfare and interests. *Id.* at 788-89; *see* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099, 1103 (2000) ("Legislation contemporary with the Takings Clause provides especially persuasive evidence that for those who framed and ratified it the words 'property . . . taken for public use' meant appropriation and not regulation.").

In fact, James Madison successfully introduced a law in the Virginia Assembly requiring landowners to pay the costs necessary to address the local impact of new construction and to drain unimproved tidal lands. A Bill Concerning Mill Dams and Other Obstructions of Water Courses, 18 June 1779, *in* 2 *The Papers of Thomas Jefferson, 1777–18 June 1779*, at 464-67 (Julian P. Boyd ed., 1950). Under Madison's legislation, mill developers seeking to dam a river had to prove that their actions would not harm the community by, for example, obstructing the flow of fish or river navigation. A committee of twelve local freeholders would review the proposed building site "to examine the lands above and below, of the property of others, which may probably be overflowed, and say to what damage it will be of to the several proprietors." *Id.* The committee would also "enquire whether and in what degree fish of passage and ordinary navigation will be obstructed, whether by any and by what means such obstruction may be prevented; and whether, in their opinion, the health of the neighbours will be annoyed by the stagnation of the waters." *Id.* Permission to build could be subject to "such conditions for preventing the obstruction, if any there will be, of fish of passage, and ordinary navigation as to them shall seem right." *Id.* Even after permission was granted, the mill owner still had to pay for any upstream and downstream damages likely attributable to the construction before he began to build, and the builder could also be held liable for other damages that were not "actually foreseen and estimated" by the committee. *Id.*

Those laws were consistent with a long tradition of land use regulation. Local laws required landowners to drain swampland, build gristmills, open and operate mines, and develop idle land, often under penalty of

forfeiture of the underlying parcel. Hart, *Land Use Law*, *supra*, at 1117-29. For example, the 1789 law that incorporated Hartford, Connecticut stated that a town committee had to approve the plans of "any Dwelling House, Shop, or Building" to ensure the building "shall best correspond with the Line or the Street" and "be most regularly proportioned to the Situation of the adjacent Buildings," and landowners would be fined if they built a noncompliant building. *Id.* at 1110 (citing By-Law of Nov. 4, 1789, *reprinted in* By-Laws of the City of Hartford 37-38 (Hudson & Goodwin 1797)). Similar laws existed in colonial New York, Georgia, Virginia, South Carolina, North Carolina, and Pennsylvania. *Id.* at 1109-15.

3. After the American Revolution, "[n]one of the state constitutions adopted in 1776 had just compensation requirements" for physical takings or for regulations that affected property rights. Treanor, *supra,* at 789. As state constitutions later began to provide compensation for the taking of property, those protections covered only physical appropriations of property. *See id.* at 791. The Vermont Constitution, for example, provided that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. of 1777, ch. I, art. II, *reprinted in* 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3740 (Francis N. Thorpe ed., 1909) [hereinafter *The Federal and State Constitutions*]. Similarly, the Massachusetts Constitution of 1780 stated that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of

1780, part I, art. X, *reprinted in* 3 *The Federal and State Constitutions, supra,* at 1891. Further, the Northwest Ordinance of 1787 stated that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." Northwest Ordinance of 1787, art. 2, *reprinted in Sources of Our Liberties*, *supra*, at 395. Significantly, "[i]n each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way." Treanor, *supra,* at 791.

Ultimately, when the Framers adopted the federal Takings Clause, they also protected against the physical appropriation of property. As one scholar has explained it, "the right against physical seizure received special protection . . . because of the framers' concern with failures in the political process." *Id.* at 784. For various reasons, the Framers feared that the ordinary political process would not adequately protect physical possession of property. *Id*. at 782 ("the limited scope of the [T]akings [C]lause[] reflected the fact that, for a variety of reasons, members of the framing generation believed that physical possession of property was particularly vulnerable to process failure"); *see, e.g.*, *id.* at 829-30 (explaining how Vermont's Takings Clause and other state analogues were "designed to provide security against the type of process failure to which majoritarian decisionmaking processes were peculiarly prone"—namely "real property interests").

For example, the statements of James Madison, the drafter of the Clause and its chief proponent, "uniformly indicate that the clause only mandated compensation when the government physically took

property." Treanor, *supra*, at 791; *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1057 n.23 (1992) (Blackmun, J., dissenting) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government."); *accord* Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 Okla. L. Rev. 417, 420 (1994). Madison believed that physical property needed special protection in the form of a compensation requirement "because its owners were peculiarly vulnerable to majoritarian decisionmaking." Treanor, *supra*, at 847. Madison wrote, for instance, of the need for a means to protect physical property ownership separate from the political process because, "[a]s the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter." James Madison, *Note to His Speech on the Right to Suffrage* (1821), *in* 3 *The Records of the Federal Convention of 1787*, at 450-51 (Max Farrand ed., 1911). He described "[t]he necessity of . . . guarding the rights of property," a matter that he observed "was for obvious reasons unattended to in the commencement of the Revolution." James Madison, *Observations on the "Draught of a Constitution for Virginia" (ca. Oct. 15, 1788)*, *in* 11 *The Papers of James Madison* 287 (Robert A. Rutland et al. eds., 1977). Thus, Madison was concerned that the political process would be insufficient to preserve physical property rights, and he drafted the Takings Clause to protect against political-process failures. *See* Treanor, *supra*, at 854.

The drafting history of the Takings Clause confirms its limited scope. As originally drafted, the Clause read, "No person shall be . . . obliged to

relinquish his property, where it may be necessary for public use, without a just compensation." *Lucas,* 505 U.S. at 1028 n.15 (quoting Speech Proposing Bill of Rights (June 8, 1789), *in* 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson et al. eds., 1979)).

Because no one besides Madison advocated for the inclusion of a Takings Clause in the Bill of Rights, and there is no record of anyone advocating to expand the scope of Madison's original draft, there is no reason to think the final draft was meant to be more robust than the original. *See* Treanor, *supra,* at 834 ("Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government." (footnote omitted)). Thus, although no legislative history exists that explains why a select committee, of which Madison was a member, altered the wording before the Amendment's adoption, "[i]t is . . . most unlikely that the change in language was intended to change the meaning of Madison's draft Takings Clause." Schwartz, *supra,* at 420.

As one scholar has argued, "[t]he substitution of 'taken' for Madison's original 'relinquish' did not mean that something less than acquisition of property would bring the clause into play," Schwartz, *supra,* at 420*,* because Samuel Johnson's *Dictionary*—a prominent Founding-era dictionary—defined "to take" in 1789 as, among other things, "[t]o seize what is not given"; "[t]o snatch; to seize"; "[t]o get; to have; to appropriate"; "[t]o get; to procure"; and "[t]o fasten on; to seize," *id.* at 420-21 (quoting 1-2 Samuel Johnson, *A Dictionary of the English Language (1755-56)*).

4. Accounts from shortly after the adoption of the Takings Clause confirm that it was understood to apply only to physical appropriations. "[A]lthough 'contemporaneous commentary upon the meaning of

the compensation clause is in very short supply,'" *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) (quoting Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 58 (1964)), an 1803 treatise recognized that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war." 1 William Blackstone, *Commentaries*, *supra*, at 305-06. Another treatise writer observed in 1857 that "[i]t seems to be settled that, to entitle the owner to protection under [the Takings] [C]lause, the property must be actually taken in the physical sense of the word." Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* 519 (1857).

Moreover, the few Supreme Court decisions prior to 1870 interpreting the Takings Clause held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held *not* to be a taking within the meaning of the constitutional provision." *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 642 (1878) (emphasis added). In fact, until the last few decades of the nineteenth century, the Supreme Court steadfastly refused to extend the Clause beyond actual appropriations. In 1870, the Court affirmed that the Takings Clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 551 (1870); *see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302, 321 (2002) ("The text of the Fifth Amendment itself provides a

basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations . . . .").

In subsequent years, the Court somewhat expanded the scope of the Clause. But, as the next Section discusses, even in those cases it applied the Clause only to governmental actions that were the functional equivalent of physical appropriations of property and those that were designed to evade the Clause's restrictions on such appropriations.

II. This Court's Cases Have Applied the Takings Clause to Physical Appropriations of Property, the Functional Equivalent of Such Appropriations, and Governmental Efforts to Evade the Clause's Protections.

The notion that the Takings Clause may apply to government actions beyond the physical expropriation of property emerged gradually over the next century as the Court considered cases in which government action very closely resembled expropriations of property. The first of these cases, *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1871), involved a state-authorized dam that flooded the petitioner's property. *Id.* at 167. The Court noted that "[i]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it . . . can inflict irreparable and permanent injury to any extent," or "in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that

word, it is not *taken* for the public use." *Id.* at 177-78. To avoid such a result, the Court held that, "where real estate is *actually invaded* by superinduced additions of water, earth, sand, or other material, . . . so as to *effectually destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution." *Id.* at 181 (emphases added). The Court made clear, however, that "[b]eyond this we do not go, and this case calls us to go no further." *Id.*

Nearly fifty years later, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court again narrowly expanded the reach of the Takings Clause. This time the Clause was expanded to encompass regulations that the Court viewed as particularly oppressive. Yet even in expanding the scope of the Clause to reach government regulations, the Court was once again careful to limit its reach to instances in which the effect of a regulation was tantamount to the direct appropriation of property contemplated by the text of the Fifth Amendment. *See Lingle*, 544 U.S. at 539 (noting that to bring a successful regulatory takings claim, a plaintiff must "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

Mahon involved a challenge to the Kohler Act, a Pennsylvania law that prevented coal companies from mining coal that formed the support for surface-level land. 260 U.S. at 416-17. Pennsylvania law recognized the right to this support property as a distinct property interest, and this Court stated that the Act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate." *Id.* at 414. The Court declared that the Pennsylvania law had "very nearly the same effect for constitutional purposes as appropriating or destroying

[the estate]," *id.*, and, again relying on this analogy to an expropriation of property, declared that a regulation can be considered a taking when it "goes too far," *id.* at 415. In that case, the Court concluded that "[b]ecause the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the *complete destruction of rights* claimant had reserved from the owners of the surface land, . . . the statute was invalid as effecting a 'taking' without just compensation." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127-28 (1978) (emphasis added) (discussing *Mahon*).

While governmental action becomes a taking if it completely destroys the value of property, governmental action does not become a taking simply because it may reduce to some degree the value of property. Indeed, this Court has repeatedly recognized "that government may execute laws or programs that adversely affect recognized economic values." *Id.* at 124-25; *Mahon*, 260 U.S. at 393 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."'). And it is for this reason that "the authority of state and local governments to engage in land use planning has been sustained" by this Court "against constitutional challenge as long ago as" 1926. *Dolan*, 512 U.S. at 384 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

To be sure, this Court has held that the Takings Clause imposes some limitations in the permitting context, but in doing so, it has consistently emphasized the Clause's focus on the direct appropriation of property. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the government refused to let a landowner rebuild a beach house on his property

unless he agreed to grant an easement allowing the public to pass through the property. *Id.* at 842. As the Court explained, "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt there would have been a taking." *Id.* at 831; *see id.* at 832 (a "permanent physical occupation" amounting to an unconstitutional taking occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises").

Because taking the easement without paying just compensation would have run afoul of the Clause, the Court concluded that "requiring it to be conveyed as a condition for issuing a land-use permit" also ran afoul of the Clause unless there was a sufficient nexus between the condition and a legitimate exercise of the state's police power. *Id.* at 834. In the absence of such a nexus, "[t]he purpose . . . becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Id.* at 837. Or, as this Court put it more colorfully, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.*

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court again emphasized that the permitting process cannot be used to evade the requirements of the Takings Clause, and it resolved a question left open by *Nollan*—that is, "the required degree of connection between the exactions imposed by the [government] and the projected impacts of the proposed development." *Id.* at 377. Dolan sought to expand her business's parking lot, and the City conditioned

approval of her permit on her agreement to dedicate two portions of her property to uses specified by the City. *Id.* at 380. The Court held that the City had not shown a strong enough connection between the proposed conditions and the City's goals to justify the serious intrusion on Dolan's right to exclude the public from her property. *Id*. at 395-96.

As in *Nollan*, the Court underscored that the easement requirement was a taking due to the infringement on her property rights: "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, . . . a taking would have occurred." *Id.* at 384; *see id.* ("access would deprive petitioner of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property" (internal citations omitted)). And as in *Nollan*, the Court emphasized that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for 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." *Id.* at 385.

Most recently, in *Koontz v. St. Johns River Water Management District,* 570 U.S. 595 (2013), this Court again made clear that *Nollan* and *Dolan* "provide important protection against the misuse of the power of land-use regulation." *Id.* at 599; *see id.* at 604 ("*Nollan* and *Dolan* . . . protect[] the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits."). There, Coy Koontz sought permits to develop the 3.7-acre northern section of his property, and the government agreed to approve the construction only if he agreed to one of two

concessions: he could either reduce the size of his planned development and deed the remainder of his property to the District as a conservation easement, or he could proceed with the development as proposed but pay to fund offsite mitigation work on District-owned land several miles away. *Id.* at 601-02. The Florida Supreme Court held that *Nollan* and *Dolan* did not apply because the government was not demanding an easement, but rather that Koontz spend money to improve his land. *Id.* at 611-12.

This Court reversed, recognizing that "if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Id.* at 612. As this Court explained, "[b]ecause the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value." *Id.* The Court further explained that because the "monetary obligation burdened petitioner's ownership of a specific parcel of land," "this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien—a right to receive money that is secured by a particular piece of property." *Id.* at 613. The Court thus emphasized that "[t]he fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property." *Id.* at 614; *see also id.* at 617 ("respondent has maintained throughout this litigation that it considered petitioner's money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land").

"Because of that direct link," this Court added, "this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property." *Id.* at 614. Conversely, where a fine or fee does not raise that central concern, it raises no Takings Clause issue under this Court's precedents. As this Court emphasized in *Koontz*, "[t]his case . . . does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id.* at 615.

In sum, this Court's Takings Clause cases make clear that the Clause is implicated by the direct physical appropriation of property, the functional equivalent of such appropriations, and other governmental actions designed to evade the Clause's limits. Fees of the type at issue here do not raise those concerns, as the next Section discusses.

III. The Traffic Impact Mitigation Program Is Not an Unconstitutional Taking.

The Traffic Impact Mitigation fee at issue here does not raise the "central concern" of *Nollan* and *Dolan* and thus does not implicate the Takings Clause.

In 2004, recognizing that greater development of land could have adverse impacts on the roads and traffic conditions in the County, the County adopted a new general plan that, among other things, required individuals seeking to build new developments to help pay for the road improvements that would be necessary to address the traffic impacts from such

development. Two years later, the County adopted the Program at issue here in order to help raise funds to construct new roads and widen existing roads. As part of that Program, the County provided that payment of the Traffic Imposition Fee would be imposed as a condition to the approval of a building permit. The TIM fee is thus a blanket fee that applies to all builders in the County. While the amount of the fee can vary based on the type of property or the square footage, it is not individually set for any particular parcel of land, and it does not identify particular land that must be given to the government or a particular pool of funds from which the fee must come.

Given that, this fee raises none of the concerns that motivated this Court's decisions in *Nollan*, *Dolan*, and *Koontz*. In *Nollan* and *Dolan*, this Court was plainly concerned that the government was seeking to accomplish through a condition what it knew it could not accomplish directly: taking an easement without providing just compensation. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384; *see also Garneau v. City of Seattle,* 147 F.3d 802, 811 (9th Cir. 1998) (describing "the Court's concern [in *Dolan*] that where the government *demands individual parcels of land* through adjudicative, rather than legislative, decision making, there is a heightened risk of extortionate behavior by the government"). Similarly, in *Koontz*, this Court was concerned that the monetary exaction was in lieu of an easement—as the Court said, "this case bears resemblance to our cases holding that the government must pay just compensation when it takes a lien." *Koontz*, 570 U.S. at 613.

By contrast, the fee here is not in lieu of an easement, but is simply a blanket fee designed to raise funds for necessary road improvements. It is thus no more a taking than any monetary payment that could

be linked to land use or ownership. And, as this Court has repeatedly recognized, such fees raise no concerns under the Takings Clause. *See id.* at 615 ("[i]t is beyond dispute that [t]axes and user fees . . . are not 'takings'" (internal quotations omitted)); *see also Dolan*, 512 U.S. at 385 ("essentially legislative determinations classifying entire areas of the city" were permissible, as were conditions that were "simply a limitation on the use petitioner might make of her own parcel" as opposed to "a requirement that she deed portions of the property to the city").

Notably, Petitioner is not without recourse if he wishes to challenge the Program. Petitioner is already challenging the Program under a California law passed to address government overreach in this context. Pet'r Br. 5. And precisely because this is a general fee applicable to anyone who wishes to develop land in the County, Petitioner can always seek change through the political process. As the court below noted, "generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election." Pet. App. A-14 (citing *San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 671 (Cal. 2002)); *cf. Village of Euclid*, 272 U.S. at 393 ("We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfying to a majority of the citizens, their recourse is to the ballot—not the courts." (quoting *State ex rel. Civello v. City of New Orleans*, 154 La. 271, 283 (1923)) *cf.* Treanor, *supra*, at 847 (discussing Madison's belief that owners of physical property were "peculiarly vulnerable to majoritarian decisionmaking").

In short, Petitioner may not like the County's decision to charge this fee, but that does not make it unconstitutional. Petitioner's argument that the Program violates the Takings Clause is at odds with both this Court's precedent and the text and history of the Clause. This Court should reject it.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
NINA HENRY
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

December 20, 2023 * Counsel of Record