No. 18-54

IN THE

Supreme Court of the United States

WILLIAM A. DABBS, JR.,

Petitioner,

v.

ANNE ARUNDEL COUNTY, MARYLAND

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are Anne Arundel County, Maryland's impact fees, which are legislatively imposed on a general basis to collect revenue to provide facilities for the general public and constitute taxes under state and federal law, required to satisfy the *Nollan/Dolan* rough proportionality test?

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE STATEMENT

Respondent is Anne Arundel County, Maryland, political subdivision, agency and instrumentality of the State of Maryland.

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INTRODUCTION

In its 1986 Session, the Maryland General Assembly enacted a public local law, 1986 Md. Laws, Ch. 350, § 1, which authorized Anne Arundel County, Maryland (the "County"), by ordinance "to fix, impose and collect development impact fees for financing, in whole or in part, the capital costs of additional or expended public works, improvements, and facilities required to accommodate new construction or development." Thereafter, the Anne Arundel County Council enacted Bill No. 50-87, an ordinance (the "Impact Fee Ordinance") that (1) imposed development impact fees on property owners who improve real property and thereby impact public facilities, and (2) established detailed rules and procedures for the calculation and imposition of the fees. The Impact Fee Ordinance has been amended from time to time and is now codified in Subtitle 2 of Title II of Article 17 of the Anne Arundel County Code (the "Code").[1]

Impact fees must be paid by any person who improves real property causing an impact on public facilities. Code §§ 17-11-203, 206. During the fiscal years (the "FYs") relevant to this case, the County imposed only transportation and school impact fees. The amount of

1. Unless otherwise indicated, all citations will be to the Anne Arundel County Code. The provisions of the Impact Fee Ordinance applicable to this case can be found in the County Code, as codified through December, 2006, and as amended by Bill No. 27-07. There is no codification of the provisions applicable to this case. (E.1295-1300) (All "E." cites are to the Record Extract before the Court of Appeals of Maryland.) The provisions in the 2006 Code and Bill No. 27-07 are contained in the Appendix to the County's Brief of Appellee before the Court of Appeals of Maryland.

fees is set annually on a county-wide basis by an ordinance enacted by the County Council, and different amounts of fees are imposed on different types of commercial and residential development. Code § 17-11-204. Section 17-11-202 of the Code provides that the purpose of the Impact Fee Ordinance is to require "all new development to pay its proportionate fair share of the costs for land, capital facilities and other expenditures necessary to accommodate development impacts in public school, transportation and public safety facilities."

Under Code § 17-11-209(a), impact fees must be used for eligible capital projects, that is, capital projects for the expansion of the capacity of roads and schools, and not for replacement, maintenance, or operations. On December 20, 2001, the County Council enacted Bill No. 96-01, which, effective February 3, 2002, authorized the County to use impact fees for temporary structures (classrooms), provided that the temporary structures expanded the capacity of the schools to serve new development. Finally, Code § 17-11-210(b) provides that, if the impact fees collected in a district are not expended or encumbered within six FYs following the FY of collection, the County Finance Office (the "FO") must give notice to current property owners that impact fees are available for refund.

In the mid-1980s, as the federal government curtailed grants for local government infrastructure, a number of other Maryland counties, in addition to Anne Arundel County, imposed development impact fees. In *Eastern Diversified Properties, Inc. v. Montgomery County*, 570 A.2d 850, 854-55 (Md. 1990), the Court of Appeals of Maryland (the "Court of Appeals") held that a transportation development impact fee

imposed by Montgomery County, which was analytically indistinguishable from the fees imposed by Anne Arundel County, was a tax, and as such was invalid due to lack of legislative authorization by the Maryland General Assembly. Notably, the Court of Appeals *refused* to sustain the development impact fee on grounds that the county had authority to impose impact fees as a regulatory fee under its general powers to regulate roads for the public health, safety, and welfare. *Id.* at 853-55. Subsequently, in *Waters Landing, Ltd. P'ship v. Montgomery Cty.*, 650 A.2d 712, 724 (Md. 1997), the Court of Appeals ruled that the *Nollan/Dolan* test for regulatory takings had no application to Montgomery County's development impact fee because it constituted a legislatively imposed tax of general application.

In the present case, Petitioners, William A. Dabbs, *et al.*, plaintiffs before the trial court (hereinafter, "Plaintiffs"), brought this class action seeking refunds of impact fees collected by Anne Arundel County in FYs 1997-2003. Pet'r App. at C-5. Plaintiffs are not the individuals who paid the fees and thus do not have standing to contend that the amounts of the fees imposed by the County violated the *Nollan/Dolan* rough proportionality test that this Court has established under the Takings Clause.[2] Rather, Plaintiffs are the current owners of

2. *Nollan v. Cal. Coastal Comm'n*, 438 U.S. 825, 831-32 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Only a fee payer has standing to challenge the amount of a fee. *See Latrobe Brewing Co. v. Comptroller of Treasury*, 192 A.2d 101, 104 (Md. 1963) ("[T]he modern general rule is that in the absence of a legislative intent to the contrary, the one required by law to do so, who paid the tax, is the one to claim and receive back on overpayment under a statute authorizing a refund.").

properties on which impact fees were paid in FYs 1997-2003, and in their complaint they claimed refunds of impact fees allegedly not expended or encumbered with six FYs as required by Code § 17-11-210(b). Pet'r App. at C-5. Section 17-11-210(b) of the Code provides for refunds of fees to current property owners, not feepayers, that are not expended or encumbered in a timely manner. In their complaint, Plaintiffs did not assert a claim that the County's Impact Fee Ordinance violated the *Nollan/Dolan* test under the Federal Constitution. Pet'r App. at C-3 to -5; E.62-80. The plaintiff class was certified as a class of current owners, not feepayers. Pet'r App. at C-5, C-25.

At trial, Plaintiffs presented no evidence that the amount of the impact fees violated the *Nollan/Dolan* test. Rather, they sought impact fee refunds under Code § 17-11-210(b) on grounds that the fees were not expended within the six FYs following the FY of collection. Nevertheless, Plaintiffs did argue that the *Nollan/Dolan* test should be applied, which the trial court rejected on grounds that (1) Plaintiffs had presented no meaningful argument or evidence to support their claim that, as the current owners of properties, they were entitled to refunds under the *Nollan/Dolan* test (Pet'r App. at C-12 to -13), and (2) the Court of Appeals had ruled that development impact fees constituted taxes to which the *Nollan/Dolan* test does not apply. The Court of Appeals affirmed, ruling that Plaintiffs had failed to explain their argument under *Nollan/Dolan* and, in any event, the County's impact fees were legislatively enacted for the primary purpose of collecting revenue and thus constituted taxes, which are not subject to the *Nollan/Dolan* test. Pet'r App. at A-26 to -29. The General Assembly has granted specific authority in 1986 Md. Laws, Ch. 350, § 1 to the County to impose the fees.

STATEMENT OF THE CASE

I. Factual Background.

A. Anne Arundel County's Impact Fee Ordinance.

(i.) Imposition of the Fees.

Code § 17-11-202(1) authorizes the County to impose impact fees for the purpose of requiring new development to pay its proportionate share of the costs for land and capital facilities necessary to accommodate development impacts on public facilities, including roads and schools. Impact fees must be paid by any person who improves real property causing an impact on public facilities. The amounts of school and transportation impact fees are set by an annual ordinance enacted by the County Council after a public hearing. The County Council has never set the fees in an amount sufficient to recover all the capital costs incurred for roads and schools to serve new development.

(ii.) Use of the Fees.

Under Code § 17-11-209(a), impact fees must be used for eligible capital projects, that is, capital projects for the expansion of the capacity of roads and schools, and not for replacement, maintenance, or operations. The County has been divided into impact fee districts for transportation (roads) and schools, and impact fees generally must be used for capital improvements within the district from which they are collected. Code § 17-11-209(d).

(iii.) Refunds to Current Owners of Fees Not Expended or Encumbered Within Six FYs Following the FY of Collection.

Section 17-11-210(b) provides that, if the impact fees collected in a district are not expended or encumbered within six FYs following the FY of collection, the County FO must give notice to current property owners that impact fees are available for refund. Under Code § 17-11-210(e), however, the Planning & Zoning Officer "may extend for up to three years the date at which the funds must be expended or encumbered under subsection (b) of this section." Such an extension may "be made only on a written finding that within a three-year period certain capital improvements are planned to be constructed that will be of direct benefit to the property against which the fees were charged." *Id.*

(iv.) Bill No. 96-01: The County Council Authorized Impact Fees to Be Expended on Temporary Classrooms That Expand the Capacity of Schools.

On December 20, 2001, the County Council enacted Bill No. 96-01, which, effective February 3, 2002, authorized the County to use impact fees for temporary structures (classrooms), provided that the temporary structures expanded the capacity of the schools to serve new development. (E.1285-94).

B. Plaintiffs' Claims for Refunds.

Plaintiffs are a class composed of the current owners of properties in the County on which impact fees were paid

in FYs 1997-2003. Pet'r App. at C-5. In Count I of their complaint, Plaintiffs sought a declaratory judgment that they were entitled to refunds in an unspecified amount because the County had failed to expend or encumber the fees within six FYs as required by Code § 17-11-210(b) and Articles 19 and 24 of the Maryland Declaration of Rights. In Count I, Plaintiffs also asserted that the County Council's decision in Bill No. 96-01 to authorize the County to expend impact fees on temporary classrooms was "improper" and requested a declaration that such expenditures could not be considered in determining whether impact fees had been expended or encumbered in a timely manner. Pet'r App. at C-3 to -4.

In Count II, Plaintiffs asserted a claim for "Assumpsit and Demand for a Refund of Impact Fees" and sought refunds in an unspecified amount for the County's use of impact fees to pay for temporary classrooms. *Id.* at C-4.

In Count III, Plaintiffs stated a claim for breach of contract, alleging that they were "special taxpayers" as opposed to "general taxpayers," and that they should receive refunds of impact fees that were not timely or legally expended or encumbered for the benefit of the property against which impact fees were "accessed [sic] by the end of the FY immediately following six (6) years from the date the transportation impact fee or school impact fee was paid." *Id.* at C-4 to -5. Plaintiffs also alleged a right to a refund under Articles 19 and 24 of the Maryland Declaration of Rights. *Id.* at C-4.

The Complaint did not allege a taking claim under the Fifth and Fourteenth Amendments to the United States Constitution, and none of the Plaintiffs was a feepayer with

standing to claim a refund of an impact fee on grounds that the fees were unconstitutionally imposed in violation of the *Nollan/Dolan* rule. Rather, as previously stated, the Plaintiffs were current owners of properties on which impact fees were paid who had standing to claim refunds under Code § 17-11-210(b) on grounds that the fees were not expended or encumbered in a timely manner. Pet'r App. at C-5.

II. The Trial Court Decision.

At trial, the court required the defendant, the County, to proceed first and present evidence demonstrating that, during the relevant FYs, impact fees were collected, expended, or encumbered in the manner required by law. The County introduced detailed financial records and summary charts showing the amount of collections, expenditures, encumbrances, and interest expenditures during all relevant FYs in all districts. The County demonstrated that all impact fees were collected, expended, and encumbered in a manner consistent with the Impact Fee Ordinance and were expended as encumbered for the purpose for which they were collected: the expansion of public facilities to accommodate new development. *Id.* at C-11 to -14, C-28 to -32.

Following the trial, the trial court issued a memorandum and declaratory judgment ruling that the testimony of the County's witness, Deputy Budget Officer Kurt Svendsen, "was credible, clear, convincing, and demonstrated a detailed knowledge not only of the impact fee legislation and its operation but a comprehensive understanding of how the County's budgeting and accounting systems work and mesh with impact fee calculations." *Id.* at C-12.

Further, the trial court found that the sole evidence presented by Plaintiffs was that of Kirk Sorenson, Ph.D., who "demonstrated only the flimsiest knowledge of the ordinance at issue in this case and how it operated in actual practice and was completely unhelpful in providing any useful testimony." *Id.* at C-12 to -13. Plaintiffs withdrew Dr. Sorenson's testimony after cross-examination and presented no meaningful evidence that the impact fees were not collected and used as required by County law. *Id.* at C-13.

In its memorandum and declaratory judgment, the trial court found that the County had collected, expended, and encumbered impact fees in compliance with the Impact Fee Ordinance. Further, it ruled that Plaintiffs had failed to mount a meaningful constitutional challenge under the "rational nexus" or "rough proportionality" test. *Id.* at C-31. First, the trial court found that Plaintiffs had made no argument that the amount of the fees imposed by the County was not roughly proportional to the capital costs incurred. Additionally, the trial court ruled that, although the Plaintiffs argued that the County violated the "rough proportionality" test by spending fees on temporary classrooms, Plaintiffs "do not articulate the analytical basis for their argument." *Id.* The trial court ruled that, "despite reams of papers being filed, it is still somewhat difficult to tease out precisely what Plaintiffs' specific contentions are except for the assertion that they should receive a refund of some unspecified amount." *Id.* at C-14. Finally, the trial court ruled that, in any event, the Court of Appeals had ruled in *Waters Landing Limited Partnership v. Montgomery County*, 650 A.2d 712, 723-24 (1994), that the rough proportionality test has no application to development impact fees, which are taxes

legislatively imposed on a general basis to raise revenue to benefit the general public. Pet'r App. at C-31.

III. The Decision of the Court of Appeals of Maryland

After the Court of Special Appeals of Maryland, Maryland's intermediate appellate court, affirmed the trial court, the Court of Appeals of Maryland issued a writ of certiorari to review the decision. After briefing and argument, the Court of Appeals affirmed the lower courts in all respects. As to Plaintiffs' allegation that the County's collection and expenditure of impact fees had violated the *Nollan/Dolan* "rough proportionality" test, the court agreed with the trial court that Plaintiffs were arguing "sweepingly" that the County's Impact Fee Ordinance violated *Nollan/Dolan* without any meaningful legal analysis as to why this was so. Further, the court agreed with the trial court that, in any event, the *Nollan/Dolan* rough proportionality test has no application to the County's impact fees, as the fees are taxes "imposed broadly on all properties, within defined geographical districts, that may be proposed for development. The legislation leaves no discretion on the fee imposition or calculation of the fee, *i.e.*, the Impact Fee Ordinance demonstrates how the fees are to be imposed, against whom, and how much." Pet'r App. at A-22 to -23.

The Court of Appeals analyzed this Court's decision in *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595 (2013) at length, stating that this Court carefully distinguished between a taking for which compensation is required under the Takings Clause, and taxation to which the Takings Clause has no application. Pet'r App. at A-17 to -22. The Court of Appeals explained that this

Court had ruled in *Koontz* that a taking for purposes of the Takings Clause involves the government's appropriation of a specific interest in physical or intellectual property, such that, if the government as a condition of a land use permit approval requires the dedication of an interest in property or the payment of money in lieu of the dedication of a property interest, the Takings Clause requires that the government demonstrate rough proportionality between the burdens created by the proposed development and the amount of property (or cash) demanded by the government. *Id. Koontz* made clear, however, that the Takings Clause does not apply to the government's exercise of its taxing authority. *Id.* at A-19 to -21 (discussing *Koontz*, 570 U.S. at 613-15). Accordingly, the Court of Appeals held that the County's legislative imposition of impact fees on a general basis in an amount established by law constituted taxation to which the *Nollan/Dolan* test does not apply. *Id.* at A-26 to -29.

ARGUMENT

I. Issuance of a Writ of Certiorari is Inappropriate Because the Court of Appeals of Maryland Correctly Analyzed this Court's Decision in *Koontz* in Concluding that the County's Impact Fees Were Taxes Not Subject to the *Nollan*/*Dolan* Rough Proportionality Requirement.

Plaintiffs' entire argument rests upon a false depiction of the decision below. They posit that the Court of Appeals' decision rests upon a false distinction between "legislative" and "adjudicative" exactions, when in fact the decision rested upon a diametrically different distinction: exactions that constitute taxes, which are

not subject to the *Nollan/Dolan* rough proportionality requirement because they are applicable on an area-wide basis, and exactions that do because they result from an individualized determination of "whether an actual permit will issue to a payor individual with a property interest." Pet'r App. at A-24. The Court of Appeals *never* mentioned the legislative adjudicative distinction cited by Plaintiffs, let alone applied it as the basis for its ruling that the *Nollan/Dolan* test does not apply.

In arguing that the Court of Appeals' holding distinguishes between the respective branches of government that imposed the exaction, Plaintiffs conflate the *nature* of the exaction with the *source* of the exaction. The Court of Appeals repeatedly pointed out that the fees at issue were legislatively imposed exactions of general application, as opposed to an assessment directed at a specific permit-seeker, an individualized determination. *See id.* at A-24 to -29. Remarkably, the Petition fails to address the actual holding of the Court of Appeals, let alone seek certiorari to review that holding. Even more remarkably, the Petition instead tags the decision below with a ruling that the Court of Appeals never made and certainly never intended. Even if, *arguendo*, the issue raised in the Petition were cert-worthy, this case fails to present the issue. On this basis alone, the Petition should be denied.

In any event, the Court of Appeals faithfully applied this Court's takings jurisprudence, including its analyses in *Nollan/Dolan* and *Koontz*. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court addressed the circumstances under which "adjudicative land-use

exactions–specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit " may constitute a compensable taking. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546-47 (2005).

In *Nollan*, this Court ruled that the forced dedication of an easement as a condition on a permit is constitutionally permissible only if the forced dedication would advance the same interest as the outright denial of the permit. Otherwise, the imposition of the condition would be tantamount to a "'plan of extortion'" of an interest in property from the owner. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assoc's. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). No law or regulation of general application ever was at issue.

In *Dolan*, this Court addressed the required relationship necessary for a government to demand a property interest as a condition of the granting of a permit needed to redevelop a specific site with enlarged and new facilities. *See* 512 U.S. at 384. The City of Tigard approved the permit on the condition that Dolan dedicate a greenway and a pedestrian/bicycle pathway. This Court held that the city had failed to demonstrate the existence of "rough proportionality" between the amount of the required dedication and the impact of the proposed development. *Id.* at 395-96.

In *Koontz*, this Court addressed when an alternative monetary exaction imposed as a part of regulatory action may constitute a compensable taking under the Takings Clause. The Court initially explained that the Takings Clause applies to the government's appropriation of

specific interests in real or intellectual property and does not apply to the government's imposition of property taxes, user fees, and other such taxes and regulations. *Koontz*, 570 U.S. at 613-15. Koontz had applied to the St. John's River Water Management District (the "District") for permits to develop the northern 3.7 acres of his 14.9-acre property. The District approved the permit subject to Koontz accepting one of two conditions:

(1) reduce the size of his development to one acre and dedicate a conservation easement to the District for the remaining 13.9 acres that would prevent development of the property in the future; or

(2) develop the 3.7 acres as proposed, dedicate a conservation easement for the remaining 11.2 acres of the property, and hire contractors to make improvements to District owned land several miles away by replacing culverts on a parcel or filling in ditches on another parcel.

Koontz challenged the conditions, arguing that the District had failed to establish its compliance with the *Nollan/Dolan* rough proportionality test. The Florida Supreme Court had ruled that Koontz's *Nollan/Dolan* claim failed because the second condition imposed by the District allowed him to pay money for offsite improvements in lieu of conveying an easement to the District and because it had also ruled that monetary exactions are not subject to the *Nollan/Dolan* test. This Court rejected the Florida Supreme Court's argument, explaining "that if we accepted this argument it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan* . . . . [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. Such so-called 'in lieu' fees are utterly commonplace." *Id.* at 612. Thus, this Court ruled, the monetary exactions imposed on Koontz "in lieu" of dedicating an easement over the 2.7 acre portion of his property must satisfy the *Nollan/Dolan* rough proportionality test.

This Court emphasized that the *Nollan/Dolan* test under the Takings Clause does not apply to taxation by a government: "It is beyond dispute that '[t]axes and user fees . . . are not takings.'" *Id.* at 615 (alterations in original) (quoting *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting)). Further, this Court stated that "[t]his case therefore does not affect the ability of governments to impose property taxes, user fees or similar laws and regulations that may impose financial burdens on property owners." *Id.* This is so, the Court explained, because the Takings Clause does not apply to government imposed financial obligations that "'d[o] not operate upon or alter an identified property interest.'" *Id.* at 613 (alteration in original) (quoting *E. Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J. concurring)). Rather, the Takings Clause applies to a government action that constitutes appropriation of, or is tantamount to an appropriation of, "'a specific interest in physical or intellectual property.'" *Id.* (quoting *E. Enters.*, 524 U.S. 498, 554-56) (Breyer, J. dissenting)).

In *Koontz,* the District had demanded the acquisition of an easement over 2.7 acres of Koontz's property unless Koontz agreed to pay for offsite mitigation. This demand for property or money by the government required application of the *Nollan/Dolan* test under the Takings

Clause because the government sought to acquire a specific easement in Koontz's property:

> In this case, moreover, petitioner does not ask us to hold that the government can commit a regulatory taking by directing someone to spend money. . . . . Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent.

Id. at 614.

This Court also noted in *Koontz* that the Florida legislature had not granted the power to the District to impose a tax for offsite mitigation, and a conclusion that the required payment of mitigation costs was a tax would have rendered the monetary exaction invalid under Florida law. Therefore, the District denied that the payment of mitigation costs was a tax and sought to defend the demand for money as a substitute for the required dedication of a conservation easement over the 2.7 acres in the land use regulation process. This Court stated:

> If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law. Far from making that concession, 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 land.

Id. at 617.

Finally, this Court emphasized in *Koontz* that it had long recognized that "'the power of taxation should not be confused with the power of eminent domain,' [and] we have had little trouble distinguishing between the two.'" *Id.*

The Court of Appeals of Maryland discussed at length this Court's analysis in *Koontz* that the Takings Clause (1) applies only to an action by the government that constitutes (or is tantamount to) an appropriation of a specific property interest, and (2) does not apply to taxation. The court then ruled that the County's impact fees constitute taxes. It explained that the impact fees are taxes because they are legislatively enacted charges of general application throughout the County, and the amount of the charge was set on a general basis for various classes of properties. Pet'r App. at A-26 to -29. The Court of Appeals' ruling that the County's impact fees were taxes was consistent with its earlier decision in *Eastern Diversified Properties, Inc. v. Montgomery County*, 570 A.2d 850 (Md. 1990). There, Eastern Diversified challenged a transportation impact fee imposed by Montgomery County on grounds that the fee was a tax that was not authorized by the Maryland General Assembly. The Montgomery County Impact fee was analytically indistinguishable from the impact fees imposed by the County in the present case. Montgomery County had imposed the impact fee to finance the construction of roads. The fee was collected from building permit applicants, and it was calculated to

be each applicant's proportional share of the cost of road facilities in their district of the County constructed to serve new development. The use of the fees was restricted to road construction in the district from which they were collected. *Id.* at 851-52.

The Maryland court ruled that Montgomery County's impact fee was a tax because its primary purpose was to raise revenue for a public purpose, the construction of roads. The Court initially explained:

> We have recognized a distinction between the imposition of fees as a necessary part of a regulatory measure and the imposition of a tax for revenue purposes…. In evaluation whether a development impact fee is a regulatory charge or a tax, "the purpose of the enactment governs rather than the legislative label."…. In *Theatrical Corp. v. Brennan, supra*, 24 A.2d 911[, 913-14 (1942)], we set forth the criteria for determining whether a governmental charge is a fee (regulatory measure) or a tax (revenue measure as follows:
>
> "[W]hether a particular Act is primarily a revenue measure or a regulatory measure is important, because different rules of construction apply. A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act. A revenue measure, on the other hand, may also provide for regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not reviewable by the courts…"

Id. at 854 (internal and parallel citations omitted). Further, the court explained:

> "The Supreme Court has defined a 'tax' as an enforced contribution to provide for the support of [the] government. *United States v. La Franca*, 282 U.S. 568, 572 (1931). Courts have generally defined taxes as 'taking money from the taxpayer for public purposes.' *Puglisi v. United States* 564 F.2d 403, 408 (Ct. Cl. 1977)."

Id. (alteration in original) (parallel cites omitted) (quoting *United States v. Maryland,* 471 F. Supp. 1030, 1036 (D. Md. 1979)). The Court of Appeals then ruled that the primary purpose of the Montgomery County impact fee was to raise revenue for public road projects:

> We think that the characteristics of the development impact fee scheme as set forth in ch. 49A are indicative of a tax rather that a regulatory fee. Indeed, the revenue raising objective of the development impact fee scheme is evident in § 49A-2(f) which states:
>
> "Imposing a development impact fee that requires new development in certain impact fee areas to pay their pro rata share of the costs of impact highway improvements necessitated by such new development in conjunction with other public funds is a reasonable method of raising the funds to build such improvements in a timely manner."

> Section 49A-2(g) states that funds collected from the imposition of development impact fees "will fund, in part, the improvements necessary to increase the transportation system capacity in the impact fee areas thereby allowing development to proceed.

Id. at 854-55; *accord Weaver v. Prince George's Cty.*, 379 A.2d 399, 404 (1977) ("[W]here a tax is levied by the Legislature without assessment and is measured by the extent to which a privilege is exercised by a taxpayer without regard to the nature or value of his assets, it is an excise.").

The Maryland court's conclusion that the County's impact fees constituted taxes was consistent with this Court's definition of taxation and with the decision of the lower federal courts. Plaintiffs do not dispute the Court of Appeals' determination that the fees are a tax, and for good reason. In *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974), this Court explained: "Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay based on property or income." *Id.* at 340-41 (internal footnote omitted). Taxation, therefore, may properly be levied on property in the form of assessments. The federal circuit courts of appeals have consistently affirmed fees that satisfy the definition of taxation as a measure enacted for the primary purpose of collecting revenue for government and public uses. In *Home Builders Ass'n of Mississippi v. City of Madison*, 143 F.3d 1006, 1011-12 (5th Cir. 1998), the Fifth Circuit ruled that an impact fee enacted by the

City of Madison, Mississippi, for the primary purpose of raising revenue was a tax, not a regulatory fee. *See also Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 134 (4th Cir. 2000) ("To determine whether a particular charge is a 'fee' or a 'tax,' the general inquiry is to assess whether the charge is for revenue raising purposes, making it a 'tax,' or for regulatory or punitive purposes, making it a 'fee.'" (citing *Collins Holding Corp. v. Jasper Cty.*, 123 F.3d 797, 800 (4th Cir. 1997))).

Plaintiffs argue in their Petition that the Court of Appeals created an unsupportable distinction between legislative and adjudicative exactions under which legislative exactions are not subject to the *Nollan/Dolan* test, but adjudicative exactions are. Plaintiffs misunderstand the Maryland court's opinion. The court did not draw a distinction between legislative and adjudicative exactions. Rather, it drew a distinction between (1) taxation by the government, as opposed to (2) government actions that are (or are tantamount to) an appropriation of a specific interest in real or intellectual property from a permit applicant. The Maryland court followed this Court's analysis in *Koontz* carefully and ruled that the County's impact fees did not affect an appropriation of a specific property interest as a condition for granting a permit. Rather, the impact fees constituted general monetary charges imposed throughout the County on persons seeking building permits in which the amount of the charges was uniform for various classes of residential and commercial property. In short, the Maryland court found that the County's impact fees are not subject to the *Nollan/Dolan* test because they are taxes. The Petition's failure to address this fact implicitly signals that the Court of Appeals' analysis faithfully adheres to and applies the teachings of *Nollan/Dolan* and *Koontz*.

The legislative/adjudicative distinction Plaintiffs seek to attribute to the Maryland court is not only based on an incorrect reading of the Maryland court's opinion and an erroneous application of this Court's analysis in *Koontz*, but it is also analytically flawed. Under the Court of Appeals' analysis, it is entirely conceivable that a legislative enactment could effect a taking when it deprives property owners of use and enjoyment of their property. If, for example, in the time of war, Congress enacted a law that required all owners of commercial piers able to accommodate certain Navy ships to relinquish the piers to the Navy, this legislative act would implicate the Takings Clause, and, indeed, would constitute an uncompensated taking of the piers. *Cf. United States v. Pewee Coal Co.*, 341 U.S. 114, 116-17 (1951) (ruling that an Executive Order directing the Secretary of the Interior to take possession of privately owned and operated coal mines constituted a taking and that the government was required to pay just compensation).

It is true, as this Court recognized in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546-47 (1960), that regulatory actions that require dedication of a specific property interests in the land use process as a permit condition are frequently adjudicative actions. An adjudicative action requiring the dedication must be analyzed under the Takings Clause. On the other hand, taxation is invariably imposed by the legislature by enacting laws requiring the payment of the money to the government by *all* affected property owners as a result of the ownership of, or a certain use of, physical or intellectual property. That taxation is imposed by the government by legislation does not mean that legislation actions can never effect a taking. If legislation authorizes the appropriation or confiscation

of a specific interest in real or intellectual property, it can constitute a taking.

Plaintiffs also incorrectly state that the Court of Appeals' decision in the present case was inconsistent with its prior decision in *Howard County v. JJM, Inc.*, 482 A.2d 908 (Md. 1984). *In JJM*, a county had enacted a subdivision regulation that required that, if a state highway was planned to cross the property of a subdivision applicant, the applicant must reserve the land required for the highway. Pursuant to this regulation, the county sought to compel JJM to reserve land for a state highway. *Id.* at 908-09. Anticipating this Court's decisions that established the *Nollan/Dolan* test, the Court of Appeals ruled that a property owner could not be compelled in the subdivision process to relinquish an interest in property unless it was shown to be reasonably related to the burden caused by the subdivision. Because the need for the highway was not reasonably related to the subdivision, the county could not compel the reservation or dedication of a right-of-way for the road without paying just compensation. *Id.* at 917-21.

Similarly, Plaintiffs greatly exaggerate the purported split among the federal circuit courts of appeals and state courts as to the actual issue at hand. Nearly all of Plaintiffs' cited cases applying the *Nollan/Dolan* test do *not* address the question. *See* Pet. at 30-32 (citing *City of Portsmouth v. Schlesinger,* 57 F.3d 12, 16 (1st Cir. 1995); *N. Ill. Home Builders Ass'n, Inc. v. Cty. of Du Page,* 649 N.E.2d 384, 397 (Ill. 1995); *Curtis v. Town of South Thomaston,* 708 A.2d 657, 660 (Me. 1998); *Manocherion v. Lenox Hill Hosp.,* 643 N.E.2d 479, 483 (N.Y. 1994); *Town of Flower Mound v. Stafford Estates Ltd. P'ship,* 135 S.W. 3d 620, 641 (Tex. 2004); *Trimen Dev. Co. v. King*

Cty., 877 P.2d 187, 194 (Wash. 1994)). Not one of the above cases holds that taxes are subject to the *Nollan/Dolan* test; many do not even address the question of whether the fees at issue were taxes. In its decision below, the Court of Appeals rejected Plaintiffs' argument that a "majority" of states support their position, concluding that only *one* jurisdiction, Ohio, has required taxes to satisfy the *Nollan/Dolan* test, which was "waver-thin support" for a supposedly majority rule. *See* Pet'r App. at A-16 to -29 (discussing *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek,* 729 N.E.2d 349, 355-56 (Ohio 2000) (applying the rough proportionality test to taxes based upon prior Ohio case law)).

In sum, this case is simply the wrong vehicle for this Court to decide whether a "legislative-adjudicative" distinction is proper under *Nollan* and *Dolan.*

Accordingly, issuance of a writ of certiorari in this case in inappropriate because the Maryland Court of Appeals correctly followed this Court's analysis in *Koontz* in finding that the *Nollan/Dolan* test does not apply to taxation. The Maryland court found that the County's fees constitute taxes, and the Maryland General Assembly specifically authorized the imposition of the taxes.

II. The Petitioners Failed to Create An Appropriate Record on Which This Court Should Consider the Federal Constitutional Claim They seek to Assert in This Case.

This Court also should decline to address the federal constitutional question raised by Plaintiffs because Plaintiffs have failed to develop an adequate factual basis

for review by this Court. Plaintiffs did not assert in their complaint that the County's Impact Fee Ordinance violated the Takings Clause of the United States Constitution. Further, Plaintiffs did not have standing to challenge the amount of impact fees imposed by the County and failed to articulate a meaningful argument that the amount of the fees was inconsistent with the *Nollan/Dolan* test. Rather, Plaintiffs are current owners of properties on which impact fees were paid in FYs 1997-2003, and they sought, pursuant to Code § 17-11-210(b), refunds of fees not expended or encumbered within six FYs after the FY of collection. In certifying the class, the trial court certified a class of the current owners of properties on which impact fees were paid in FYs 1997-2003 that had not been expended or encumbered in a timely manner. Plaintiffs contended that, under the *Nollan/Dolan* rough proportionality test, impact fees could not be expended on temporary classrooms, and therefore, could not be counted in determining whether impact fees were available for refund under Code § 17-11-201(b). As both the trial court and the Court of Appeals ruled, Plaintiffs failed to present an analytical basis for their argument that the *Nollan/Dolan* test prohibited fees from being expended on temporary classrooms. Further, the trial court found that, even if consideration of all expenditures of fees on temporary classrooms were excluded from the Code § 17-11-210(b) calculation, Plaintiffs still would not be entitled to refunds. Plaintiffs, therefore, request that this Court address the scope of the *Nollan/Dolan* test in a vacuum and as an advisory opinion. Plaintiffs did not create an adequate record before the state courts that would merit consideration by this Court of the federal constitutional issue that they seek to pose.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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