

No. 25-1187

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IN THE  
**Supreme Court of the United States**

THE COALITION FOR FAIRNESS IN  
SOHO AND NOHO, INC., ET AL.,

*Petitioners,*

*v.*

CITY OF NEW YORK, NEW YORK, ET AL.,

*Respondents.*

—————  
*On Petition for a Writ of Certiorari to the  
New York Court of Appeals*

—————  
**BRIEF FOR THE CATO INSTITUTE AS  
AMICUS CURIAE IN SUPPORT OF  
PETITIONERS**

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**QUESTION PRESENTED**

Does the protection the Takings Clause provides to land-use permit applicants encompass monetary demands beyond those imposed in lieu of a dedication of real property?

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files *amicus* briefs.

Cato Institute scholars have published extensive research on the importance of property rights to the freedoms guaranteed by the Constitution. This case interests Cato because it concerns the proper interpretation of the Takings Clause and its application to land-use permits.

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<sup>1</sup> Pursuant to Supreme Court Rule 37, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund its preparation or submission. All parties were timely notified of the filing of this brief.

**STATEMENT AND  
SUMMARY OF ARGUMENT**

America faces a housing crisis. Ezra Klein, *America's Housing Crisis, in One Chart*, N.Y. TIMES (Nov. 23, 2025).<sup>2</sup> This crisis has become particularly acute in New York City. The City's rate of overcrowding is more than double the national rate. Sean Campion, *A Building Crisis: The Quality-of-Life, Population, and Economic Effects of Housing Underproduction*, CITIZENS BUDGET COMM'N, at 2 (2024).<sup>3</sup> Its homelessness rate is the highest in the country. *Id.* at 3. By 2030, the City will need 560,000 more housing units than it currently has. *Id.* at 2. As a result, the average rent has skyrocketed. Paulina Cachero et al., *Even New York City's Wealthy Renters Can't Avoid the Housing Crisis*, BLOOMBERG (Sept. 12, 2025).<sup>4</sup> In neighborhoods like SoHo, for example, the monthly median rent is an eyebrow-raising \$4,895. *Id.*

This crisis is the backdrop to the skyrocketing housing costs that Petitioners now endure. Petitioners have challenged the fee required to convert Joint Living-Work Quarters for Artists (JLWQA) to unrestricted residential use. Cert. Br. 10. They argued that this condition violates the Fifth Amendment because it results in a taking of property without just compensation. App. 2a. The lower court disagreed, holding that “the City has neither coerced JLWQA property owners to cede an interest in their property for which the City would otherwise have to compensate them nor

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<sup>2</sup> Available at <https://tinyurl.com/5xabv9r9>.

<sup>3</sup> Available at <https://tinyurl.com/yaf57fxp>.

<sup>4</sup> Available at <https://tinyurl.com/pzkkvta4>.

imposed a fee in lieu of requiring the transfer of a property interest.” App. 26a.

The lower court erred. It failed to protect the Petitioners’ property rights—rights which hark back to England’s pre-colonial common-law right to property. That vision of property rights encouraged the Framers to craft the robust property rights found in the Takings Clause. The Takings Clause is meant to protect those like Petitioners who are subject to the government’s overreach.

In particular, the Takings Clause prevents the government from subjecting a land-use permit applicant to an unlawful monetary demand—that is, a demand that fails the requirements set out by this Court in *Nollan* and *Dolan*. *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987). The *Nollan/Dolan* standard requires the government’s demand to have both an essential nexus and a rough proportionality with the land use. The demand the City has imposed on Petitioners lacks both, but the court below has read the law in a manner that improperly limits the protections that *Nollan* and *Dolan* offer property owners. This Court should grant the Petition in order to clarify the protections that the Takings Clause provides.

“[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). In this case, the government has chosen *Mahon*’s forbidden shortcut by extorting money that it intends never to return. That shortcut evades both the requirements of the Takings Clause and the legacy of the Framers.

## ARGUMENT

### I. THE TAKINGS CLAUSE REFLECTS THE FRAMERS' BROAD VISION OF PROPERTY RIGHTS AND PROHIBITS UNLAWFUL CONDITIONS FOR A LAND-USE PERMIT.

“Property must be secured, or liberty cannot exist.” 6 JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 280 (Charles Francis Adams ed. 1851). Before the American Revolution, English common law had long protected property. The Framers drew upon these protections when they crafted the Takings Clause.

#### A. Pre-colonial law advanced property rights.

The Anglo-American perspective on rights comes from medieval England. Gordon S. Wood, *The Origins of the Bill of Rights*, *AM. ANTIQUARIAN SOC'Y* 255, 258 (1992); *Horne v. Dep't of Agric.*, 576 U.S. 351, 358 (2015) (“The principle reflected in the [Takings] Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings.”). “Long before the era of the revolutionary controversy, the centrality of property to the definition of liberty, to the rule of law, and to constitutionalism had become established British legal dogma.” JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 29 (1986).

This theory of property rights evolved as the English people repeatedly defended their property from royal predation. *See generally* Wood, *supra*, at 260–61. The barons who forced King John to sign Magna Carta in 1215 thereby acquired a guarantee that no one could be “stripped of his rights or possessions” except by “lawful judgment.” Magna Carta art. 39 (1215). In

1628, in response to the King's forced loans, the English countered with the Petition of Right, which ensured that no one could "be disseized of his freehold or liberties" except "by the lawful judgment of his peers, or by the law of the land." The Petition of Right, 3 Car. 1, c.1 (1627). After the Glorious Revolution, William III also signed the Declaration of Rights, which prohibited levying money "without Grant of Parlyament." The Bill of Rights (1688), 1 Will. & Mary, sess.2, c.2.

Limits on royal power ensured that Englishmen's property would be protected. As Blackstone explained, property was the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 1 WILLIAM BLACKSTONE, COMMENTARIES \*393. William Penn also called "Ownership, and Undisturbed Possession" a "Birth-Right of Englishmen." WILLIAM PENN, *England's Present Interest Considered, with Honour to the Prince, and Safety to the People*, in THE POLITICAL WRITINGS OF WILLIAM PENN 22, 26 (Andrew R. Murphy ed., 2002) (1675). Judges who did not respect this right were often impeached. Reid, *supra*, at 29 n.3. Indeed, "In the eighteenth-century pantheon of British liberty there was no right more changeless and timeless than the right to property." *Id.* at 27.

This idea—the centrality of property rights to law and liberty—would influence the Founders. *Horne*, 576 U.S. at 358 ("The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property."). The Founders, as Justice Story explained, brought the "general principles" of English law to America. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829). They built upon them there.

## **B. The Founders fought to protect property rights.**

The American Revolution was “begun as a dispute over the security of property, and it was a common assumption that government existed for the protection of property.” EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-89* 94 (Daniel J. Boorstin ed., 3d ed. 1956). England endangered the property rights of the colonists, and the American Revolution was the response. Paul J. Larkin Jr., *The Original Understanding of “Property” in the Constitution*, 100 *MARQ. L. REV.* 1, 31–32 (2016).

The Founders’ revolution was animated by the vision of property rights at the heart of their English heritage. Wood, *supra*, at 262. *The Federalist* laid out their perspective: “Government is instituted no less for protection of the property, than of the persons.” *THE FEDERALIST* No. 54 (James Madison or Alexander Hamilton). As Alexander Hamilton declared during the Constitutional Convention, “One great [object] of [Government] is personal protection and the security of Property.” 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 302 (Max Farrand ed., 1911); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far,”* 49 *AM. UNIV. L. REV.* 181, 195 (1999).

After the Revolution, the Founders enshrined these rights in the Fifth Amendment’s Takings Clause. *See* Gerald S. Dickinson, *Takings Doctrinalization*, 81 *WASH. & LEE L. REV.* 2095, 2105–06 (2025). As James Madison—the author of the Takings Clause—explained when he proposed the draft Bill of Rights: “No person shall . . . be obliged to relinquish his property, where it may be necessary for public use, without a

just compensation.” Gold, *supra*, at 192–93. Madison’s preamble, which reads “Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property,” was never enacted. *Id.* at 194–95; 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834). Nonetheless, that preamble illuminates Madison’s view of property rights as central and fundamental to the Constitution.

Madison viewed property broadly. He defined the “larger and juster meaning” of property as “every thing to which a man may attach a value and have a right.” 6 James Madison, *Property*, in THE WRITINGS OF JAMES MADISON 101, 101 (Gaillard Hunt ed. 1906) (1792). Property thus included “man’s land, or merchandize, or money.” *Id.* Property was, Madison thought, not secure “where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations.” *Id.* at 102.

Early cases, like *Gardner v. Trustees of the Village of Newburgh*, cemented the importance of property rights to liberty and law in the new Nation. When a stream was diverted from Gardner’s land to supply water to a nearby village, he asked the court for a remedy. *Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162, 163–64 (N.Y. Ch. 1816). The court granted an injunction, acknowledging “the necessity of a preventive remedy when great and immediate mischief or material injury would arise to the *comfort and useful enjoyment* of property.” *Id.* at 165, 168 (emphasis added).

An 1807 case from the Supreme Judicial Court of Massachusetts also underscores the centrality of proper measurement of—and proper compensation

for—intrusions on property rights. See *Commonwealth v. Coombs*, 2 Mass. (2 Tyng) 489 (1807). That court ultimately decided to quash the creation of a road, essentially because a committee appointed by a lower court, the Court of Sessions, had failed to do its job. In that era, when citizens required a road, they applied to the Court of Sessions, which could then appoint a committee to determine whether the road was needed, provide notice, identify the property owners affected, and determine damages. *Id.* at 490–91.

In this case, because the lower court’s committee failed to accomplish most of these tasks, the Supreme Judicial Court quashed the creation of the road. *Id.* at 493. The Court’s opinion demonstrated that the protection of property rights rests on the proper estimation of damages, and that estimation requires an accounting of the interests of the property owner:

In estimating the damages, the committee are not confined to the value of the land covered by the road, and the expense of fencing the ground. The owner may suffer much greater damage by the road depriving him of water, or by otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm, and that he may suffer very little or no injury by the location. The estimation ought, therefore, to be according to the damage which the owner will, in fact, sustain in his property by the opening of the road.

*Id.* at 492.

Cases like these illustrate the broad protections for property that prevailed during the Founding era. The Nation’s history demonstrates that such protection of property rights is integral to the Constitution.

**C. The requirements of *Nollan* and *Dolan* protect the people from abusive government practices.**

“The Government has broad powers, but the means it uses to achieve its ends must be ‘consist[ent] with the letter and spirit of the constitution.’” *Horne*, 576 U.S. at 362 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). The Constitution guarantees, among other things, the use and enjoyment of one’s property without unlawful government intervention.

The Fifth Amendment provides: “[N]or shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. This Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

There is “no dispute” that this clause applies to real property. *Horne*, 576 U.S. at 357–58. But this Court has also applied the Takings Clause to personal property, *id.* at 358, and “property the government takes when owners apply for land-use permits.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Unconstitutional conditions on land-use permits are unlawful whether imposed by an agency or legislature. *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 279 (2024).

Land-use permit applicants are particularly “vulnerable . . . because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.” *Koontz*, 570 U.S. at 604–05. Therefore, “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.” *Id.* at 619. Under *Nollan* and *Dolan*, the government may not “condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Id.* at 599. Neither that essential nexus nor that rough proportionality can be found here.

The protections of the Takings Clause may not be sidestepped by ingenious designers of ground-breaking permit models. In *Koontz*, this Court recognized that the government may not “evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval.” 570 U.S. at 606. Likewise, the government cannot evade the Constitution’s protections simply by requiring monetary fees for permits rather than dedications of land. The text of the Takings Clause provides no foundation for distinguishing between a demand for a property interest and a demand for money: The Takings Clause “protects ‘private property’ without any distinction between different types.” *Horne*, 576 U.S. at 358.

It is uncontroversial that the broad protections of the Takings Clause require heightened scrutiny when the government demands an easement as a condition of a permit. That heightened scrutiny is a consequence

of the Constitution’s protection of property rights, and there is no reason this protection should vanish when the government exacts payment in dollars for its permits instead. The nature of the unconstitutional condition is the same: in both cases, a property owner who needs a permit is forced to choose between surrendering something of value and forgoing the right to the property’s use.

Of course, there is no argument here that the Takings Clause makes property taxes or user fees unconstitutional generally; indeed, *Koontz* shows how to distinguish “impermissible land-use exactions from property taxes.” 570 U.S. at 615–17. In contrast, the lower court asserted that *Koontz* “applies only to monetary conditions which are offered as an alternative to, or ‘in lieu of’, a condition that would be a *per se* taking if imposed directly,” App. 21a, adding that any broader reading of *Koontz* “gives rise to an intractable line-drawing problem.” App. 23a. But this argument for a cramped interpretation of *Koontz* misfires: Indeed, as *Koontz* notes, those who take that position “exaggerate . . . the practical difficulty of distinguishing between the power to tax and the power to take by eminent domain.” 570 U.S. at 615. This Court’s decisions “show that teasing out the difference between taxes and takings is more difficult in theory than in practice.” *Id.* at 616.

In any event, the case at hand shows why the extension of *Nollan/Dolan* scrutiny to permits tied to monetary demands is especially appropriate—namely, the fungible nature of money. As compared to real property, the exaction of money is more difficult for courts to trace and police without a clear doctrinal rule. Indeed, because the possession and transfer of money is inherently less legible than the possession

and transfer of property, it is reasonable to suggest that financial transactions properly require more scrutiny, not less.

In any event, the lower court's refusal to require parallel scrutiny for permits that demand payment in dollars threatens to create a roadmap for municipalities to circumvent the Takings Clause. In this case, upholding the lower court's decision would encourage municipalities to evade constitutional protections of property rights by converting every land dedication into a hefty fee—a scenario in which “it would be very easy for land-use permitting officials to evade the protections of *Nollan* and *Dolan*” that *Koontz* warned against. *Koontz*, 570 U.S. at 612. In this case, the application of *Nollan* and *Dolan* reveals the taking that the City has engineered.

**1. The government's demand and the effects of the land use lack an essential nexus.**

Under *Nollan* and *Dolan*, there must be a clear connection between the condition that the government demands and the interest that the government possesses. *Dolan*, 512 U.S. at 386 (1994) (quoting *Nollan*, 483 U.S. at 837). Does an “essential nexus” exist[] between the ‘legitimate state interest’ and the permit condition exacted by the city”? *Id.* If not, the object becomes simply taking property “without payment of compensation”—and that does “not pass constitutional muster.” *Nollan*, 483 U.S. at 837.

In other words, the rule of *Nollan* and *Dolan* imposes a means-end requirement: The government's use of the permit is the means, and the advancement of some government interest with an essential nexus to

that permit is the end. *See id.* “In short, unless the permit condition serves the same governmental purpose” as the policy that purportedly animates it, the permit condition “is not a valid regulation of land use but ‘an out-and-out plan of extortion.’” *See id.* (quoting *J. E. D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584 (1981)).

The facts of *Nollan* illuminate its holding’s application. The Nollans had asked the California Coastal Commission for permission to replace their house, and the Commission required the Nollans to grant the public an easement on their property in exchange. *Nollan*, 483 U.S. at 828. The Supreme Court determined that even though a legitimate state interest was in play—namely, ensuring the visibility of the ocean—that interest had no nexus to the permit condition of the public easement. *Id.* at 835–837. Because the Court thus understood the government’s condition as a taking, therefore “it must pay for it.” *Id.* at 841–42.

In the case at hand, there is likewise no nexus between the condition and the City’s interest. The condition is a fee of at least “\$100.00 per square foot of floor area” to convert a unit to residential use. NY City Zoning Resolution § 143-13. This fee goes to the SoHo-NoHo Arts Fund, which “support[s] arts programming, projects, organizations, and facilities that . . . extend the cultural legacy of SoHo and NoHo.” NY City Zoning Resolution §§ 143-02, 143-13. The City’s interest, purportedly, is to support artist housing. App. 5a (“artists of limited means have been able to lawfully reside and pursue their creative work in these spaces as a result of the JLWQA use designation”). Perhaps helping artists to live in SoHo and NoHo is a legitimate interest, but it is nonetheless unconnected to the City’s permitting condition: the promotion of arts programming. The provision of housing is significantly distinct from

the creation of art, and so “the lack of nexus between the condition and the original purpose . . . converts that purpose to something other than what it was.” *Nollan*, 483 U.S. at 837. Because there is no nexus, it follows that there is a taking. *See Koontz*, 570 U.S. at 604.

**2. The government’s demand and the effects of the land use are not roughly proportional.**

*Dolan* requires a judicial comparison between the magnitude of the government’s condition and the impact it would have on land use—a comparison that asks whether the two are in proportion to each other. *Dolan*, 512 U.S. at 374. The label of “‘rough proportionality’ best encapsulates . . . the requirement of the Fifth Amendment.” *Id.* At bottom, the two must be reasonably commensurate: “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.*

In *Dolan*, the Court considered the proportionality of a building permit that was conditioned upon requiring the owner to allow flood control and traffic improvements, *id.* at 377, 395–96, by examining each condition in turn. First, the Court determined that a floodplain easement lacked a reasonable relationship to the construction of a new building. *Id.* at 377, 394–95. Next, the Court determined that “the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.” *Id.* at 377, 395. That insufficient

proportionality led the Court to conclude that the conditions constituted a taking. *Id.* at 394–96.

In the case at hand, the relation between the City’s requirements and the impact of the land use is similarly disproportionate. First, the public benefit of the JLWQA scheme is minimal. By 2022, “an estimated 1,600 out of 1,636 JLWQA-designated units were occupied by non-conforming households,” and very few artists were being certified. App. 7a. Therefore, the benefit that artists receive from the JLWQA units, as well as any impact if those units were altered, is very low. In contrast, the cost of this condition is very high. The cost of a conversion of a typical home is at least \$250,000. Cert. Br. 1. This cost is widespread and continually additive—JLWQA units comprise 32% of existing housing stock in SoHo/NoHo. *SoHo/NoHo Neighborhood Plan: Housing Info Session*, NYC DEPT OF HOUS. PRES. & DEV., at 35 (2021). The extraordinary mismatch between the cost of the condition and any beneficial impact fails any test of rough proportionality—and therefore requires the conclusion that the condition constitutes a taking. *See Koontz*, 570 U.S. at 604.

Notably, the City’s scheme also fails to satisfy *Dolan*’s requirement of an *individualized* assessment of proportionality. *Dolan*, 512 U.S. at 391. The JLWQA condition is merely a square-foot calculation of a fee that is assessed indiscriminately on every transitioning loft in the neighborhoods of SoHo and NoHo. There is no individualized assessment here, just an assembly line of exactions.

In short, the *Nollan/Dolan* requirements—an essential nexus and a rough proportionality—subject the JLWQA scheme to a lethal one-two punch. The City’s

permit scheme cannot withstand application of the *Nollan* and *Dolan* standard, and that scheme therefore constitutes an unlawful taking of the Petitioners' property. That makes this case a good vehicle to review the question presented, because it was outcome-determinative: Had the court below applied *Nollan/Dolan* scrutiny, the exaction would have failed it. The court below has limited *Koontz's* protections in a manner that is unsupported by *Koontz's* text, and this Court should grant certiorari to, *inter alia*, clarify that decision's scope. Ultimately, the ruling below is improper and should be struck down, and this Court should grant certiorari.

### CONCLUSION

During the American Revolution, the colonists cried out for "Liberty and Property." JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 25 (3d. ed. 2008). Today, the Petitioners echo the colonists' call. They ask this Court to reinforce the property rights the Founders believed they had won. Here, the fundamental misalignment between property owners' rights and the government's purposes is demonstrated by two glaring absences: The government's condition lacks an essential nexus with its own interest, and the government's condition lacks the required proportionality with its ultimate impact. These dual failures to protect property rights signify a taking, and the nature of a taking is that the government must pay for it. The lower court erred when it found that there was no taking: It rested its decision on an erroneous reading of *Koontz's* nature and scope, and that error needs correction. Broadly, this case is an appropriate vehicle to clarify *Koontz's* general application; narrowly, this case allows the Court to protect Petitioners from the

unconstitutional conditions that Respondents have imposed. The Court should grant certiorari to these ends.

Respectfully submitted,

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