Case No. 21-6179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

James Knight and Jason Mayes,

Plaintiffs – Appellants,

v.

The Metropolitan Government of Nashville and Davidson County,

Defendant – Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee, No. 3:20-cv-00922 (Trauger, J.)

CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS JAMES KNIGHT AND JASON MAYES

Meggan S. DeWitt
BEACON CENTER OF TENNESSEE
1200 E. Clinton St., #205
Nashville, TN 37203
(615) 383-6431
meggan@beacontn.org

Kimberly S. Hermann
Braden H. Boucek
Celia Howard O'Leary
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org
bboucek@southeasternlegal.org
coleary@southeasternlegal.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case presents an unresolved question of constitutional law: whether local governments can constitutionally enact laws that impose permit conditions that would be unconstitutional if applied administratively. Indeed, just last October, this Court itself described this as "an interesting question" that it left to decide in another case. *See F.P. Dev., LLC v. Charter Twp. Of Canton*, 16 F.4th 198, 206 (6th Cir. 2021). This is that case. (Mem. Op., R. 40, Page ID # 639.) More fundamentally though, this case raises the question of whether the unconstitutional conditions doctrine applies to *all* branches of government under the Takings Clause of the Fifth Amendment, or just administrative actors.

While this Court has not conclusively taken a side, this question has produced a split among various courts. *See infra* at 13, n.4. And Justice Thomas has explained on more than one occasion: until courts resolve this issue, property owners "are left uncertain" about whether local governments can impose permit conditions legislatively that would be unconstitutional if demanded administratively. *See, e.g.*, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1181 (2016) (Thomas J., concurring in denial of certiorari).

This unresolved question of pure constitutional law is dispositive. The district court correctly recognized that if the unconstitutional conditions doctrine applied to the challenged sidewalk ordinance, "[P]laintiffs are likely correct" that the ordinance

is an unconstitutional condition, even while ruling that courts treat legislatively enacted takings differently under the unconstitutional conditions doctrine. (Mem. Op., R. 40, Page ID # 647.)

Given the importance of property rights and the legal issues involved, Plaintiffs-Appellants respectfully submit that the Court would benefit from oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction to hear Plaintiffs-Appellants' ("Plaintiffs") claims because they alleged that the Metropolitan Government of Nashville and Davidson County ("Metro") violated the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act of 1871. 28 U.S.C. §§ 1331; 1343; 1367. The district court entered a final judgment on November 16, 2021. (Order, R. 41, Page ID # 651.) Plaintiffs filed a timely notice of appeal on December 9, 2021. (Notice of Appeal, R. 43, Page ID # 653.) This Court has jurisdiction to hear Plaintiffs' claim under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Under Metro ordinance § 17.20.120 *et seq*., Metro will only issue permits to construct new homes in designated areas of the city if Plaintiffs and similarly situated property owners fund the installation of public sidewalks and dedicate easements and rights-of-way. The district court held that if the unconstitutional conditions doctrine applied to permit conditions enacted by the legislative branch when challenged under the Takings Clause of the Fifth Amendment, then Plaintiffs would "likely" prevail under the test set forth in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 372 (1994), and *Koontz v. St. John's River Water Mgmt. Dist.*, 570 U.S. 595 (2013). (Mem. Op., R. 40, Page

ID # 647.) Did the district court apply the wrong standard in finding that the test only applies to administrative actions?

STATEMENT OF THE CASE

I. Metro's Sidewalk Ordinance

Following decades of poor planning, Metro Nashville now lacks a convenient network of pedestrian walkways. *See Strategic Plan for Sidewalks and Bikeways*, WalknBike Nashville, at 57 (2017) ("*WalknBike*").[1] Faced with limited resources,[2] Metro came up with a solution to fix the infrastructure problem it created: enact an ordinance requiring *private* property owners seeking permits to build single- and two-family homes to install *public* sidewalks on their property or fund *public* sidewalks for another location within the city. (Mem. Op., R. 40, Page ID ## 626-27); *see also* BL2019-1659, codified at Metro. Code § 17.20.120 *et seq*. The ordinance applies to specific parcels based solely on their location. (Mem. Op., R. 40, Page ID # 627.) If a property owner wants to build a new single- or two-family

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

[2] In 2018, Metro had $1.7 billion in approved capital projects to include sidewalks that were unfinanced. Joey Garrison, *Nashville Council Issues $775M in Bonds to Pay for Previously Approved Projects*, The Tennessean (Sept. 18, 2018), https://www.tennessean.com/story/news/2018/09/18/nashville-council-bonds-capital-projects/1347458002/. *See* Fed. R. Evid. 902(6). And in September 2018, Nashville approved $775 million in bonds just to cover its past underfunded debt. Current Mayor John Cooper called this "[v]ery bracing news." *Id.* Nashville's finances cannot cover its ambitious sidewalk goals.

home on his or her property—which is allowed under Metro's current zoning laws—he or she must comply with the sidewalk ordinance. (Id.)

Before the property owner can receive a permit to build a single-family home, the property owner must dedicate property in two ways. First, he or she must agree to construct a city sidewalk across the entire frontage of his property. (Id., Page ID ## 627-28); *see also* Metro. Code § 17.20.120(C). Second, the property owner must dedicate a right-of way or an easement to allow present or future installment of a public sidewalk. (Id., Page ID #628, n.3 (quoting Metro. Code § 17.20.120(E)).) If a property owner refuses, Metro will deny the permit. (Id.)

In some cases, Metro allows the property owner to pay a fee to Metro's Pedestrian Benefit Zone Fund in lieu of building sidewalks on his or her property ("in-lieu fee"). (Id., Page ID # 627); *see also* Metro. Code § 17.20.120(D)(1). The cost of the in-lieu fee is set annually based on an average cost, by linear foot, of what Metro Public Works spent to build sidewalks over the preceding three years. (Mem. Op., R. 40, Page ID # 627); *see also* Metro. Code § 17.20.120(D)(1). For the year 2020–2021, that cost was $186 per linear foot. (Id.) The in-lieu fee "is capped at no more than three percent of the total construction value of the permit." (Mem. Op., R. 40, Page ID # 627); *see also* Metro. Code § 17.20.120(D)(1).

II. Plaintiff James Knight

James "Jim" Knight owns a vacant lot at 411 Acklen Park Drive. (Mem. Op., R. 40, Page ID # 630.) The lot is zoned for low-medium density residential; in 2018 Mr. Knight planned to build a single-family home on his property. (Id.) Metro's sidewalk database indicated that he must build a sidewalk on the property in exchange for a building permit, even though the lot does not connect to any sidewalks. (Id.; Decl. of James Knight, R. 20-1, Page ID # 125.) His project manager learned from Metro's Public Works Department that constructing a sidewalk would *create* stormwater runoff issues. (Mem. Op., R. 40, Page ID # 630.) Yet Metro demanded that he either build a sidewalk on the property or pay an in-lieu fee of $7,600. (Id.)

Mr. Knight appealed to the Board of Zoning Appeals ("BZA") as provided under the ordinance, but when the BZA refused to remove the sidewalk condition, Mr. Knight refused to comply with Metro's demand to build or pay for sidewalks. (Id., Page ID ## 630-31.) He has not built a home on the Acklen Park property. (Id., Page ID # 631.) To this day, no sidewalks connect to it. (Id., Page ID # 630.) He has not renewed his permit because he must satisfy the condition, but if it were removed, then he would proceed with plans to build a single-family home on his property. (Id., Page ID # 631.)

III. Plaintiff Jason Mayes

Jason Mayes owned a vacant lot at 167 McCall Street, where he intended to build a home for his family. (Id.) This lot did not connect to sidewalks either or have them anywhere near his property on that side of the street. (Id.) Yet Metro's sidewalk database showed that he must build sidewalks on his property before it would issue him a building permit. (Id.; Decl. of Jason Mayes, R. 20-2, Page ID # 129.) Mr. Mayes asked the Zoning Administrator to remove the condition, which he was authorized to do under the ordinance, but the Administrator would only allow Mr. Mayes to pay the in-lieu fee instead. (Id.; Decl. of Jason Mayes, R. 20-2, Page ID # 130-31.)

With carrying costs mounting, Mr. Mayes paid the fee of $8,883.21 and received a permit. (Mem. Op., R. 40, Page ID # 631.) When Mr. Mayes appealed to the BZA seeking the return of the fee, the BZA denied his request. (Id. at 632.) It affirmed the Planning Department's recommended denial on the basis that Mr. Mayes's in-lieu contribution "supplements Metro's annual sidewalk capital program by increasing sidewalk construction funds[.]" (Id.) Mr. Mayes completed construction of his home, but Metro has not returned his fee. (Id.) Metro used Mr. Mayes's in-lieu fee to fund the construction of a sidewalk nearly three miles away from his home. (Id.) His lot still does not have a sidewalk or connect to one. (Id.)

IV. Proceedings Below

In October 2020, Mr. Knight and Mr. Mayes sued Metro for unconstitutionally conditioning the issuance of building permits upon their agreement to build sidewalks or pay the city an in-lieu fee. (Compl., R. 1, Page ID # 21.) They sought a declaratory judgment and injunction for violating the Fifth Amendment Takings Clause, both facially and as applied. (Id., Page ID # 24.) They also brought a facial and as-applied unjust enrichment claim on behalf of Mr. Mayes and similarly situated property owners, and Mr. Mayes sought restitution of his in-lieu fee. (Id.)

Mr. Knight and Mr. Mayes asserted that Metro imposed an unconstitutional permit condition that failed to meet the *Nollan*/*Dolan* nexus and proportionality test because the sidewalk condition was unrelated to the impact of their land use and Metro did not conduct any individualized assessment of their properties before applying the sidewalk condition. (Id., Page ID ## 21-22.) The district court agreed that if the *Nollan*/*Dolan* test applied to Metro's ordinance, then Mr. Knight and Mr. Mayes would "likely" prevail. (Mem. Op., R. 40, Page ID # 647.) However, the court acknowledged a split among courts about whether the test applies to conditions imposed through legislative, rather than administrative, government actions. (Id., Page ID # 642); *see also infra* at 13, n.4.

The district court acknowledged that the Sixth Circuit had "recently applied" *Nollan*, *Dolan*, and *Koontz* to a city ordinance governing tree removal permits. (Mem. Op., R. 40, Page ID # 638.) While this Court applied the *Nollan*/*Dolan* test to the tree ordinance, it did not address the "interesting question" of whether the unconstitutional conditions doctrine applies to legislatively imposed permit conditions challenged under the Fifth Amendment because, unlike Plaintiffs here, the parties had not raised the issue. (Id.)

Faced with a split in authority and rejecting the approach of several federal courts, the district court adopted the approach of the Ninth Circuit Court of Appeals in distinguishing between conditions imposed by administrators and conditions imposed by legislatures. (Id., Page ID ## 641-46.) It then concluded that the *Nollan*/*Dolan* test only applies to administrative decisions.[3] (Id.) The court reasoned that zoning decisions must be "ad hoc" and "individualized" for *Nollan*/*Dolan* to apply. (Id., Page ID # 641.) It also reasoned that legislative conditions carry less risk of extortion, especially when an ordinance applies generally, the in-lieu fee is predetermined, and there is a cap on the fee. (Id., Page ID # 645.) Therefore, it applied the ad hoc factual test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and found that the sidewalk ordinance survived.

[3] Since the district court ruled, the Ninth Circuit has rejected its prior rulings to the contrary and found that legislative exactions are subject to the unconstitutional conditions test laid out in *Nollan*, *Dolan*, and *Koontz*. *See infra* Section I.C.

(Id., Page ID # 648.) As a result, the court declined to enjoin the ordinance and denied Mr. Mayes restitution. (Id., Page ID # 650.)

STANDARD OF REVIEW

Plaintiffs now appeal the district court's order granting Defendant's Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment on Plaintiffs' unconstitutional taking and unjust enrichment claims. Summary judgment is reviewed de novo. *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008). Summary judgment is proper where no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

SUMMARY OF ARGUMENT

For years now, Metro has been getting away with extortion. Through its sidewalk ordinance, the city forces a public burden—improving city-owned infrastructure—upon private landowners by holding building permits hostage in exchange for the agreement to install sidewalks or pay an in-lieu fee to build sidewalks on someone else's property and dedicate easements. The Supreme Court has made clear that the unconstitutional conditions doctrine prevents this very type of harm. Property rights are especially vulnerable during the permitting process, when landowners who value a building permit are more likely to accede to government conditions in exchange for a permit. The unconstitutional conditions

doctrine stops the government from abusing the permitting process to accomplish indirectly what it cannot do outright.

But some courts, including the district court below, have held that legislative bodies are exempt from this doctrine. As a result, municipalities like Metro evade judicial review by imposing permit conditions that violate the Fifth Amendment through legislation when they could not impose such conditions administratively. This approach undermines the government's duty to uphold the Constitution. The Supreme Court and this Court consistently hold all branches of government accountable under the unconstitutional conditions doctrine when it comes to constitutional rights and freedoms. *See infra* Section II. The question is not *who* from the government violates the Constitution but *what* the government is doing.

The government has several means available to it to take property—whether by legislation, judicial decree, or adjudicative action. The *Nollan*/*Dolan* test provides an important check that prevents the government from exploiting its citizens. The district court's refusal to apply the test to legislative conditions will do nothing "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). Instead, its decision will ultimately allow Metro and other municipalities to extort public remedies from private individuals through more legislation. This Court should not so easily allow

local governments to sidestep the Constitution by imposing an unconstitutional condition through law.

ARGUMENT

I. When the government demands the surrender of private property that would ordinarily require compensation as a permit condition, it has violated the Fifth Amendment regardless of who in government effects the taking.

Just as any other constitutional right, Fifth Amendment property rights can be violated by any government actor. It does not matter "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." *Cedar Point*, 141 S. Ct. 2072. A taking is a taking. What matters is that when a government actor takes property without just compensation, the judicial branch can impose checks on that abuse. Under *Nollan*, *Dolan*, and *Koontz*, this Court has authority to strike down legislation like Metro's sidewalk ordinance, which unconstitutionally conditions a government benefit on the agreement to give up the right to just compensation.

A. Under *Nollan*, *Dolan*, and *Koontz*, the government cannot hold a permit hostage in exchange for relinquishing property rights unless it demonstrates an essential nexus and rough proportionality.

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property without just compensation. U.S. Const. amend. V. It is also well settled that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."

Perry v. Sindermann, 408 U.S. 593, 597 (1972). This principle, known as the unconstitutional conditions doctrine, "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 570 U.S. at 604. It recognizes that while municipalities retain some authority to pass laws that promote citizen health, safety, and welfare, there are limits to that power, especially when a municipality threatens constitutional rights and liberties. *See Frost & Frost Trucking Co. v. R.R. Comm'n. of Cal.*, 271 U.S. 583, 594-95 (1926).

Over time, the Supreme Court has extended the unconstitutional conditions doctrine to Fifth Amendment takings claims. *See Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385; *Koontz*, 570 U.S. at 604-05. In *Nollan*, the government claimed that landowners' proposed use of their beachfront property would erect a "psychological barrier" between the public and the beach, and it refused to grant the owners a building permit unless they set aside a public easement granting beach access across their property. 483 U.S. at 828. The Supreme Court held that the government failed to show an essential nexus between the public easement condition and the proposed land use because it was unclear how an easement would lower a "psychological barrier" to the public beaches, "reduce[] any obstacles to viewing the beach," or "remedy any additional congestion." *Id*. at 838-39. Because there was no clear connection between the condition and any impact caused by the property owners'

request to build, the Court found that the scheme was "an out-and-out plan of extortion." *Id*. at 837.

The Court took this analysis a step further in *Dolan*, where the government conditioned approval of development permits on a property owner's agreement to improve a storm drainage system and grant an easement along her property for a public greenway and bike path. *Dolan*, 512 U.S. at 379-80. The government reasoned that paving a parking lot as the property owner intended would cause drainage issues and that adding a bike trail would alleviate increased traffic and congestion created by the planned building expansion. *Id.* at 379-80, 381-82.

Despite finding the requisite nexus, the Supreme Court struck down the conditions as unconstitutional. *Id*. at 396. Although the government could require property owners to offset the impact of their land use, the Court found that development conditions can become extortionate when not properly limited. *Id*. at 395, 383-84. The Court held that the government must make an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*. at 391. "No precise mathematical calculation is required," but the government "must make some effort to quantify its findings[.]" *Id*. at 395. It concluded that the government failed to show how improving a drainage system or dedicating a public trail were roughly proportional to the alleged impact of the owner's proposed development. *Id*.

The Court again relied on the unconstitutional conditions doctrine in *Koontz* when it rejected the government's demand for money in exchange for a development permit. 570 U.S. at 619. There, the government demanded that a property owner deed several acres of his property to the public or pay to improve a large plot of government-owned land in exchange for a permit. *Id*. at 601-02. The Court held that even though the landowner never actually submitted to the condition, and even though the condition was monetary, a taking occurred because the government burdened the property owner's right not to have property taken without just compensation. *Id*. at 606. As the Court explained, "the government may not deny a benefit to a person because he exercises a constitutional right." *Id*. at 604 (citing unconstitutional conditions cases).

B. The Supreme Court has said it does not matter which branch of government effects a taking, and the Ninth Circuit has followed.

In the years following *Nollan*, *Dolan*, and *Koontz*, a small faction of lower courts refuse to apply the nexus and proportionality test to permitting conditions imposed through legislation.[4] The district court below was one of them. It held that

[4] *Compare Dabbs v. Anne Arundel Cnty.*, 182 A.3d 798, 810–11 (Md. 2018) (finding absence of extortion where legislation applied broadly), *San Remo Hotel L.P. v. City of S.F.*, 41 P.3d 87, 104 (Cal. 2002) (noting difference between adjudicative and legislative conditions), *and Spinell Homes, Inc. v. Mun. of Anchorage*, 78 P.3d 692, 702 (Alaska 2003) (finding *Nollan*/*Dolan* only applies to adjudicative decisions), *with Heritage at Pompano Hous. Partners, L.P. v. City of Pompano Beach*, No. 20-61530-CIV, 2021 U.S. Dist. LEXIS 239647, at *16-19 (S.D. Fla. Dec. 15, 2021) (rejecting distinction between adjudicative and legislative conditions under

the *Nollan*/*Dolan* test only applies to ad hoc, administrative decisions. (Mem. Op., R. 40, Page ID # 644.) In finding a distinction between legislative and administrative conditions and concluding that *Nollan*, *Dolan*, and *Koontz* do not apply to Metro's sidewalk ordinance, the district court relied largely on Ninth Circuit precedent. (Id., Page ID ## 641-42, 646.) For several years, the Ninth Circuit has rejected *Nollan*/*Dolan* and instead applied the *Penn Central* test to legislative conditions. *See, e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1225, 1228 (9th Cir. 2008) (refusing to apply *Nollan*/*Dolan* when legislation required storm pipe installation as a condition of development), *abrogated in part by Koontz*, 570 U.S. 595.

Recent Supreme Court precedent demands a different approach. In 2021, the Court took up two Fifth Amendment takings cases, both of which were appealed from the Ninth Circuit. In *Cedar Point Nursery v. Hassid*, a California law permitted labor organizations to enter the private property of employers to solicit employees' support. 141 S. Ct. at 2069. Employers sued, claiming this was a per se physical taking of their property. *Id.* at 2070. Considering the statutory origin of the taking,

---

Nollan/*Dolan*), *Levin v. City and Cnty. of San Francisco*, 71 F. Supp. 3d 1072, 1089 (N.D. Cal. 2014) (applying *Nollan*/*Dolan* to local ordinance), *Cheatham v. City of Hartselle*, No. CV-14-J-397-NE, 2015 U.S. Dist. LEXIS 25360 at *8–13 (N.D. Ala. March 3, 2015) (finding state law failed to meet the rough proportionality standard); *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 641 (Tex. 2004) (relying on *Nollan*/*Dolan* to strike down a town ordinance), *and Delchester Devs., L.P. v. Zoning Hearing Bd.*, 161 A.3d 1081, 1099 (Commw. Ct. Pa. 2017) (applying *Nollan*/*Dolan* to a local law).

the Supreme Court found, "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id*. at 2072. Instead, "[t]he essential question" when analyzing a law challenged under the Fifth Amendment "is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property." *Id*. The Court also compared the California law to other government takings, including the permit condition in *Nollan*, before concluding that a per se physical taking had occurred. *Id*. In short, the Court rejected the *type* of governmental action—legislative or adjudicative—as irrelevant to whether a Fifth Amendment taking occurred.

Although *Cedar Point* was not an unconstitutional conditions case, the Supreme Court indicated that its reasoning applied broadly to its takings jurisprudence. Following its decision in *Cedar Point*, the Supreme Court issued a brief per curiam opinion in *Pakdel v. City and County of San Francisco*, 141 S. Ct. 2226 (2021). Although its analysis turned on the ripeness of the takings claim before it, the Court included a footnote inviting the Ninth Circuit to "give further consideration to" the Petitioners' alternative claims "in light of our recent decision

in *Cedar Point*[.]" *Id*. at 2229 n.1. One of those alternative claims was that the unconstitutional conditions doctrine applies to legislative conditions.

The Ninth Circuit accepted the Supreme Court's invitation in early February 2022, after the district court in the present case issued its opinion. *See Ballinger v. City of Oakland*, No 19-16550, 2022 U.S. App. LEXIS 2862 (9th Cir. Feb. 1, 2022). There, it considered a city ordinance that required landlords re-occupying their homes to pay vacating tenants a relocation fee. Landlords sued, claiming in part that this was an unconstitutional condition under the Fifth Amendment Takings Clause. Although the Ninth Circuit ultimately held that there was not a taking because "the relocation fee required by the Ordinance is a monetary obligation triggered by a property owner's actions with respect to the use of their property, not a burden on the property owner's interest in the property," *id.* at *16, it stated in no uncertain terms that while it "relied on *McClung*" in the past to reject applying the *Nollan*/*Dolan* test to legislative conditions, it was revisiting that analysis based on the Supreme Court's statements in *Pakdel* and *Cedar Point*. *Id*. at *19-20.

Rejecting the very distinction drawn by the district court in this case, the Ninth Circuit acknowledged that "the Supreme Court has suggested that any government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, can supply the basis for an exaction claim rather than a basic takings claim." *Id*. at *20. Following those two cases, "[w]hat matters for purposes of *Nollan*

and *Dolan* is not *who* imposes an exaction, but *what* the exaction does[.]" *Id*. at *21. The Ninth Circuit thus indicated that if it had it found a burden on a particular property interest among the landlords, it would have applied *Nollan*, *Dollan*, and *Koontz* to the local ordinance. To that end, the Ninth Circuit repudiated the portion of *McClung* relied upon by the district court (Mem. Op., R. 40, Page ID ## 641-42, 646), shrinking the number of lower courts that recognize a distinction between legislative and adjudicative conditions.

C. The unconstitutional conditions doctrine, as set forth in *Nollan*, *Dolan*, and *Koontz*, protects constituents from extortionate demands by the government.

The principle established in *Cedar Point* and *Ballinger*—that, for purposes of Fifth Amendment analysis, it makes no difference whether a lawmaking body or an administrator takes property—fully aligns with the Supreme Court's holdings in *Nollan*, *Dolan*, and *Koontz*. In those cases, the Court recognized that the unconstitutional conditions doctrine ensures that permit conditions have a legitimate purpose and that municipalities do not pressure their constituents into giving up constitutional rights. To that end, the Ninth Circuit's shift now leaves little precedent to support the standard applied by the district court below.

For example, when assessing the permit condition in *Nollan*, the Supreme Court compared it to a state *law* prohibiting citizens from shouting fire in a crowded theater. 483 U.S. at 837. Such a law would likely be a legitimate exercise of the

police power that is narrowly tailored to serve a compelling safety interest. But as the Court explained, a state law becomes unreasonable—and the exercise of police power illegitimate—the moment the ordinance grants an exception or imposes a condition that "utterly fails to further the end advanced as the justification" for the condition. *Id*. Therefore, a statutory ban on shouting fire is reasonable unless and until the government exempts anyone who pays $100 to the state. *Id*. At that point, "adding the unrelated condition alters the purpose" of the law because one could easily pay the fee, shout fire in a theater, and cause a mass disruption—undermining the purported safety goal. *Id*. Once the government attaches a condition that lacks an essential nexus to the problem it seeks to remedy, the government is no longer exercising legitimate authority. *Id*. This is true regardless of which branch imposes the condition.

And in *Dolan*, the Court contrasted demands attached to permits from laws regulating general zoning. It wrote that cases like *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), "involved essentially legislative determinations classifying entire areas of the city," but in cases like *Dolan*, "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." 512 U.S. at 384. In the present case, the district court understood this to mean that because *Nollan* and *Dolan* involved adjudicative decisions, *only* adjudicative decisions are subject to the *Nollan*/*Dolan* test. (Mem. Op., R. 40, Page ID # 641.)

But the Supreme Court's point in *Dolan* should not be read to exclude legislative conditions. The Court was merely describing the condition in that case. 512 U.S. at 384. The significant part of the Court's comparison was not *who* effected the taking, but rather *what* was being regulated: *Euclid* involved limitations on the use of property, whereas *Nollan* and *Dolan* involved conditions that forced property owners to hand over entire portions of their property to the government. *See Dolan*, 512 U.S. at 384. The Court's one adjective did not carve out an unprincipled exception to the whole point of the unconstitutional conditions doctrine.

As the Court pointed out in *Koontz*, the "central concern of *Nollan* and *Dolan*" involved the risk of the government using its power to "pursue governmental ends" through extortionate permit conditions. 570 U.S. at 597. "[L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 570 U.S. at 605. As the Ninth Circuit recognized in *Ballinger*, the risk of extortion is present any time a government entity has "broad discretion" to strong arm constituents. 2022 U.S. App. LEXIS 2862, at *18.

The Supreme Court warned in *Koontz* that the permitting process is especially vulnerable to abuse because the government knows property owners will give in to a condition provided the condition is worth less than a permit. *Koontz*, 570 U.S. at

605. Reasonable property owners who weigh the costs will almost always decide to accept a permit condition rather than forego a valuable permit. This kind of arrangement becomes a one-sided bargain with the state where the cost to the government is zero. Andre LeDuc, *Twilight of the Idols: Philosophy and the Constitutional Law of Takings*, 10 Ala. C.R. & C.L. L. Rev. 201, 267 (2019) (citing Richard Epstein, Bargaining with the State at 182-83 (1993)). As easily as the government can do this through an administratively imposed condition, it can just as easily take property by operation of the law when it asks property owners to pay for "governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed use of the property at issue." *Koontz*, 570 U.S. at 597.

The Court explained that the nexus and proportionality test still accommodated the government by allowing municipalities to impose legitimate ordinances regulating the use of property. But the test serves as an important check that prevents the government from taking property in indirect, illegitimate ways when it cannot do so outright. To preserve that check, the test must apply to both legislative and adjudicative conditions.

As explained more fully below, Metro's ordinance is exactly the type of action *Nollan*, *Dolan*, and *Koontz* are intended to prevent. The city cannot provide a legitimate reason for applying the ordinance to Plaintiffs or persons similarly situated because they are not responsible for the city's sidewalk shortage just by

building a new home. The ordinance goes beyond a mere land use regulation by requiring property owners to physically dedicate a portion of their property and pay money to the city. And by hiding behind the permitting process, Metro forces landowners to hand over their property without just compensation.

When read together, *Nollan*, *Dolan*, and *Koontz* show that it makes no difference which branch of government is violating the Takings Clause.[5] A taking is a taking. And no matter who with a .gov email address imposes a permit condition, *Nollan*, *Dolan*, and *Koontz* demand a showing of an essential nexus and rough proportionality. If not held to this standard, Metro will continue to get away with "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837.

II. The Supreme Court and this Court have never drawn distinctions between branches of government when considering unconstitutional conditions placed on other rights.

Just as a taking is a taking no matter who in government effects it, the broader unconstitutional conditions doctrine likewise applies to all government entities. The Supreme Court and this Court regularly apply the doctrine to legislative and executive bodies when they violate the rights of a citizen. The Fifth Amendment is

[5] *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713-714 (2009) ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor[.]"); *Cal. Bldg. Indus. Ass'n*, 577 U.S. at 1181 (Thomas J., concurring in denial of certiorari) ("I continue to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'")

no different from any other constitutional provision. Thus, the unconstitutional conditions doctrine also demands that the *Nollan*/*Dolan* test apply to ordinances like Metro's.

For nearly a century, our nation has required state and local ordinances to "find their justification in some aspect of the police power, asserted for the public welfare." *Euclid*, 272 U.S. at 387. The Supreme Court has explained that the police power gives the states "broad authority to enact legislation for the public good[.]" *Bond v. United States*, 572 U.S. 844, 854 (2014) (citing *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

But it is also settled that the police power "is not unlimited; and one of the limitations is that [a municipality] may not impose conditions which require relinquishment of constitutional rights." *Frost*, 271 U.S. at 594-95. In this way, the unconstitutional conditions doctrine is an important check on abuses of power by local government. Under the doctrine, municipalities must prove that their regulations are legitimate. *See, e.g.*, *Nollan*, 483 U.S. at 836-38.

The Supreme Court has applied the unconstitutional conditions doctrine to a myriad of government actions, including a state law banning insurance companies from conducting business within the state unless the companies waived their right to remove cases to federal court, *Ins. Co. v. Morse*, 87 U.S. 445, 458 (1874) (holding state law was "repugnant to the Constitution" and void); a state law conditioning the

right of private carriers to operate on public highways upon their agreement to be regulated as common carriers, *Frost*, 271 U.S. at 599 (striking down law as a violation of the Due Process Clause); a school board's decision to fire a teacher for publishing a letter critical of the board, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 574-75 (1968) (finding the government could not limit teachers' freedom of speech as a condition of their employment); a requirement that government employees support a certain political party, *Elrod v. Burns*, 427 U.S. 347, 359 (1976) (striking down the requirement because it "unquestionably" ran afoul of the First Amendment); and a state statute requiring indigents to reside for a year within a county before receiving free medical care, *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 261, 269 (1974) (holding law imposed an unconstitutional condition that penalized individuals for exercising their right to interstate travel in violation of the Equal Protection Clause).

These cases illustrate the Supreme Court's wariness toward government abuse of the police power. As a result, the government has a "heavy burden of justification" to show that "in pursuing its asserted objectives, [it] has chosen means that do not unnecessarily burden constitutionally protected interests." *Mem'l Hosp.*, 415 U.S. at 269. The same is true for property rights protected by the Fifth Amendment.

This Court recently applied the *Nollan*/*Dolan* test when reviewing a local ordinance requiring certain property owners to request permits before removing trees

from their property. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 201 (6th Cir. 2021). In exchange for a permit, a property owner had to replace the trees or pay an in-lieu fee to the city's tree fund. *Id*. The parcels subject to the ordinance were predetermined, as were the mitigation requirements. *Id*. F.P. Development sued, claiming that this was an unconstitutional taking both facially and as applied.

This Court began and ended its analysis with the unconstitutional conditions doctrine, acknowledging that there is a "special application" of the doctrine "'that protects the Fifth Amendment right to just compensation' when the government demands property in exchange for land-use permits." *Id*. at 205-06 (quoting *Koontz*, 570 U.S. at 604). It held that the city "fail[ed] to carry its burden to show that it made the required individualized determination" under the rough proportionality prong of the *Nollan*/*Dolan* test. *Id*. at 206.[6] It reasoned that the city "seems to assume that its mitigation requirements are enough." *Id*. But while the mitigation options "could offset" the impact of F.P. Development's tree removal, and although there may have been "some individualized assessment" involved, "*Dolan* requires more." *Id*. For example, the ordinance included pre-set mitigation requirements that disregarded the impact of each property owner's tree removal on the surrounding environment. *Id*. at 207. Because F.P. Development's tree removal automatically triggered the

[6] Unlike in this case, the parties did not dispute that an essential nexus existed between the condition and the goal of tree preservation. *F.P. Dev.*, 16 F.4th at 206.

ordinance's mitigation requirements, the ordinance could not satisfy *Dolan*'s individualized determination requirement. *Id*.

This Court alluded to "an interesting question whether Canton's application of the Tree Ordinance to F.P. falls into the category of government action covered by *Nollan*, *Dolan*, and *Koontz*," but it declined to take up the question because the parties did not raise it. *Id*. at 206. The district court here understood this Court to be referring to the emerging circuit split over *Nollan*/*Dolan*'s applicability to legislative conditions. (Mem. Op., R. 40, Page ID # 639.)

Although this Court has not squarely addressed the matter, it has applied the unconstitutional conditions doctrine to legislation on several other occasions. *See Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911-12 (6th Cir. 2019) (relying on *Koontz* to assess a legislative condition); *Sutton v. Parker*, No. 3:19-CV-00005, 2019 U.S. Dist. LEXIS 151382, at *62-66 (M.D. Tenn. Sept. 5, 2019), *aff'd*, 800 Fed. Appx. 397 (6th Cir. 2020) (applying *Planned Parenthood* and *Koontz* when reviewing an Eighth Amendment challenge to execution protocols established by state legislation); *West v. Parker*, No. 3:19-CV-00006, 2019 U.S. Dist. LEXIS 92494, at *61-65 (M.D. Tenn. June 3, 2019), *aff'd*, 783 Fed. Appx. 506 (6th Cir. 2019) (same); *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1190-91 (6th Cir. 1997), *rev'd on other grounds*, 523 U.S. 272 (1998) (finding a regulation

requiring inmates to admit guilt as a condition of clemency could threaten their Fifth Amendment right against self-incrimination).

When faced with unconstitutional conditions that affect First Amendment freedom of speech, Fourteenth Amendment due process and equal protection, Eighth Amendment protection against cruel and unusual punishment, and Fifth Amendment protection against self-incrimination, neither this Court nor the Supreme Court has paused to consider whether a condition was imposed administratively or legislatively. Instead, both Courts consistently bring legislation within the doctrine's ambit. *See, e.g.*, *Morse*, 87 U.S. at 458; *Frost*, 271 U.S. at 599; *Mem'l Hosp.*, 415 U.S. at 261; *Planned Parenthood of Greater Ohio*, 917 F.3d at 911-12. It has not mattered to either Court *who* from the government imposed the condition, but *what* the condition was. This makes sense, considering that the doctrine's purpose is to prevent the government from pressuring constituents into handing over constitutional rights. It also makes sense because the Constitution applies to all three branches of government.

The Fifth Amendment is not less important than other provisions of the Bill of Rights. The Supreme Court said as much in *Dolan*: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation[.]" 512 U.S. at 392. The Court specifically declined to compare the

conditions in *Dolan* to "a species of business regulation that . . . warrant[] a strong presumption of constitutional validity." *Id*. (listing cases in which the Court refused to defer to legislatures when statutes threatened constitutional rights).[7] It should not matter who from the government is abusing its power; constitutional safeguards cannot fluctuate based on the branch of government issuing the threat.

III. The sidewalk ordinance fails the *Nollan*/*Dolan* test.

If the Constitution applies to legislation, then Metro's sidewalk ordinance cannot survive the *Nollan*/*Dolan* nexus and proportionality test. As the Supreme Court made clear in *Nollan*, "To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831. That is exactly what Metro has done here. The sidewalk ordinance requires all property owners to pay fees or build sidewalks and to dedicate an easement or right-of-way for the

[7] And in other Fifth Amendment contexts, the Supreme Court has made no exceptions for takings carried out through legislation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421-23, 456 n.17 (1982) (finding per se physical taking when state law required landlords to let cable companies install cables on their property and that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"); *Horne v. Dep't of Agric.*, 576 U.S. 351, 361-62, 366-67 (2015) (state law requiring producers to set aside their crops amounted to a per se physical taking because it compelled producers to give up the right to sell some crops in exchange for participation in the market).

installation of sidewalks. Likewise, if Metro had simply entered Mr. Knight's and Mr. Mayes's properties to install sidewalks itself "rather than conditioning their permit to rebuild their house on their agreeing to do so," there can be "no doubt there would have been a taking." *Id*. The nexus and proportionality test prevents the government from hiding behind permitting conditions and in-lieu fees to take property that it cannot normally take without just compensation.

Metro's law imposes an unconstitutional condition because nothing about building new homes under existing zoning causes any of the public harms the sidewalk ordinance is intended to address. Nor does the cost of Metro's sidewalk demand relate in any way, let alone in a proportional manner, to any public harm caused by constructing new homes.

The district court acknowledged that Metro's sidewalk ordinance "likely" fails the *Nollan*/*Dolan* standard. (Mem. Op., R. 40, Page ID # 647.) Essential nexus and rough proportionality require a direct cause and effect link between the impact of a proposed land use and the imposed condition. A court "must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city." *Dolan*, 512 U.S. at 386 (quoting *Nollan*, 483 U.S. at 837). If an essential nexus exists, the court must then assess the condition's rough proportionality, or "the required degree of connection between the exactions and the projected impact of the proposed development." *Id*.

If a land use does not cause the need for the condition, the government cannot impose it. *See Dolan*, 512 U.S. at 930-31; *Nollan*, 438 U.S. at 838. The burden is on the government to prove that the condition solves the social problem, meaning that the perceived public problem must be attributable to the individual property owner. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 395 (finding government's belief that a condition "could" remedy a problem insufficient to satisfy its constitutional burden); *F.P. Dev.*, 16 F.4th at 207 (finding pre-set mitigation requirements did not get a legislative condition "over the bar set by *Nollan* and *Dolan*" because the requirements were automatically triggered "regardless of the specific impact caused by their removal").

A. Metro has not shown an essential nexus between demanding sidewalks and building new homes under existing zoning laws.

Metro failed to carry its burden, either facially or as applied, of establishing an essential nexus between the need for sidewalks and any negative impact resulting from building new homes under existing zoning laws. The purpose of Metro's sidewalk ordinance is to "reduce the number of people killed on Nashville's streets while walking," improve traffic flow and "reduce dependency on the automobile," improve air quality, "create greener, safer, and more accessible streets," and "increase . . . social connections[.]" Metro. Code § 17.20.120. But these problems have plagued the city for decades. *WalknBike* at 57. An essential nexus exists only (1) where the proposed, individual land use (developing a home) directly causes or

contributes to the public problem (safety and traffic flow), and (2) applying the permit condition (sidewalk ordinance) to the property owner will remedy that problem. *See Levin*, 71 F. Supp. 3d at 1088-89 (finding city ordinance requiring property owners to pay a lump sum to displaced tenants as a condition for withdrawing rent-controlled property from the rental market unconstitutional).

For this reason, preexisting public problems cannot be attributed to any individual landowner, nor can the resolution of those problems be borne by an individual landowner. *Id*. at 1084. It cannot be said that by building a home, Mr. Mayes caused or contributes to Nashville's seventy-year-old infrastructure problem. The same is true for Mr. Knight and any other similarly situated property owner who plans to build a home.

Just as building a home does not put pedestrians in more danger, cause more traffic congestion when the property is already zoned for a certain density, or make society more dependent on cars, the alternative of *denying* a home building permit does not alleviate those public problems. Denying a home permit will not make transportation safer or more convenient; denying a home permit will not make the public less dependent on automobiles; and denying a home permit will not increase homeowner and community health. *See Nollan*, 483 U.S. at 837 ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan

of extortion.") (internal quotation and citation omitted); *see also Koontz*, 570 U.S. at 606.

As applied, Plaintiffs have done nothing to create or exacerbate any of the problems sidewalks are meant to remedy. In Mr. Knight's case, building a compliant sidewalk will *cause* public problems in the form of stormwater runoff issues; that is why Metro officials required he pay a fee in lieu of building a sidewalk on his property. (Decl. of James Knight, R. 20-1, Page ID # 127.)

The sidewalk mandate lacks an essential nexus as applied for another reason: if either Plaintiff installed a sidewalk on his property, the sidewalk would lead to nowhere. (Mem. Op., R. 40, Page ID ## 630, 632.) Requiring Plaintiffs to install sidewalks in exchange for building permits would not improve Nashville's sidewalk dilemma when there are zero sidewalks for pedestrians to use which connect to either property.[8] Sidewalks that are useless to pedestrians do not advance any of Metro's stated goals and therefore lack an essential nexus. *See Nollan*, 483 U.S. at 836-37

[8] "Sidewalks to nowhere" and "zigzagging sidewalks" are now (in)famous throughout Nashville. Rebecca Cardenas, *City Ordinance Responsible for Sidewalks to Nowhere*, News4 Nashville (Mar. 4, 2019), https://www.wsmv.com/news/city-ordinance-responsible-for-sidewalks-to-nowhere/article_00835c22-3eed-11e9-a2a6-5fb78cc666c4.html. Dennis Ferrier, *Ferrier Files: Zigzagging Sidewalks More Common with Conflicting Metro Construction*, Fox17 WZTV Nashville (Aug. 1, 2019), https://fox17.com/news/ferrier-files/ferrier-files-zigzagging-sidewalks-more-common-with-conflicting-metro-construction.

("The evident constitutional propriety . . . disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification[.]").

Metro's stated purpose for the sidewalk ordinance does not address any burden property owners like Plaintiffs directly impose on the public, nor does it address the relief the public will have if permit requests are denied. In this way, the ordinance fails the nexus test on its face and as applied. Metro's sidewalk shortage is a classic example of a public problem that requires a public solution—not a solution to be borne by just a few individuals in certain parts of the city.

B. The district court correctly recognized that Metro has not shown a rough proportionality between the sidewalk ordinance and the impact of Plaintiffs' proposed land use.

Even if Metro somehow proves an essential nexus between improving citywide infrastructure and building a single-family home, it cannot establish rough proportionality, as the district court appeared to recognize. (Mem. Op., R. 40, Page ID # 647.) To survive the proportionality prong of the *Nollan*/*Dolan* test, Metro must show it has made "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *F.P. Dev.*, 16 F.4th at 206 (quoting *Dolan*, 512 U.S. at 389–91). The district court correctly found that Metro could not meet its burden. (Mem. Op., R. 40, Page ID # 647.) Like the tree ordinance in *F.P. Development*, Metro's sidewalk ordinance imposes a condition based on a pre-set factor—the location of the

property—that is expressly demanded in the law itself. (Id. Page ID ## 626-27); *F.P. Dev.*, 16 F.4th at 207. The condition is automatically triggered when a person who owns one of the predetermined parcels applies for a building permit, "regardless of the specific impact caused by" the building plans. *F.P. Dev.*, 16 F.4th at 207. In fact, Metro even admitted that "[n]o other characteristics of Plaintiffs' properties were considered in order for the ordinance to apply to them." (Def.'s Resp. to Pls.' Statement of Undisputed Material Facts, R. 27, Page ID ## 415-16.)

Moreover, as the district court noted, the basis for the BZA's decisions "included such findings as that the establishment of a 'connected pedestrian network via sidewalks and greenways' . . . was critical to planning goals" and that "Knight's property was near major thoroughfares and a newly built greenway." (Mem. Op., R. 40, Page ID ## 647-48.) "[S]uch generalized and conclusory findings," the court found, "were insufficient." (Id., Page ID # 648 (citing *Dolan*, 512 U.S. at 389–91; *F.P. Dev.*, 16 F.4th at 206).)

Nor was the in-lieu fee roughly proportional to any impact caused by building a new home under existing zoning. The cost of the in-lieu fee is predetermined every year and does not take the nature or impact of any homebuilding projects into account. Metro only considered Plaintiffs' ability to pay, and then otherwise followed the formula set forth by the ordinance that turns on what it costs Metro to build sidewalks and the length of the property frontage. *See* Metro. Code §

17.20.120(D)(1). While no "precise mathematical calculation" is required, "the city must make some effort to quantify its findings in support of the dedication." *Dolan*, 512 U.S. at 395-96. Here the city made none. It followed a pre-set formula unrelated to an evaluation of any harms Plaintiffs supposedly caused. The district court was correct: "In both *Dolan* and *F.P. Development*, such generalized and conclusory findings were insufficient." (Mem. Op., R. 40, Page ID # 648.)

Metro's claim that it conducted an individualized assessment when Mr. Knight and Mr. Mayes appealed the condition to the BZA was also correctly rejected by the district court. (Mem. Op., R. 40, Page ID ## 647-48.) The BZA's assessment was merely to determine whether Plaintiffs were exempted from the ordinance due to hardship. An individualized consideration of whether Plaintiffs had a *hardship* is different from an individualized assessment of whether the "required dedication is *related* both in nature and extent to the impact of the development." *Dolan,* 512 U.S. at 391 (emphasis added). Metro never determined the impact Plaintiffs' proposed land use would have on the community that would demand a need for sidewalks. The BZA simply found that Plaintiffs' properties were in the district where the ordinance applies and that they could afford to pay for sidewalks.

The real reason Metro imposes these conditions on property owners like Plaintiffs is simple: Metro does not want to pay for sidewalks. Plaintiffs do not deny that Nashville has an infrastructure problem that requires a solution. But the remedy

cannot come at the price of constitutional freedom. The purpose of Metro's sidewalk ordinance "then becomes, quite simply, the obtaining of an easement [and money] to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837; *accord Koontz*, 570 U.S. at 612. For this reason, the sidewalk ordinance is unconstitutional on its face and as applied.

IV. Metro has been unjustly enriched, and restitution and injunctive relief are the proper remedies.

Unjust enrichment claims are routine against municipalities under state law. Restitution and return of property are the appropriate remedies. The district court was right that this claim largely turns on whether Metro's law imposes an unconstitutional condition. (Mem. Op., R. 40, Page ID # 650.) Because the sidewalk ordinance imposes an unconstitutional condition for the reasons stated above, the unjust enrichment claim should prevail.

A. Under Tennessee law, unjust enrichment claims can be brought against local governments.

This Court, as well as other Tennessee state and federal courts, regularly recognize unjust enrichment claims against cities like Metro as a matter of Tennessee law. *See Halpern 2012, LLC v. City of Ctr. Line*, 806 Fed. Appx. 390 (6th Cir. 2020); *Noel v. Metro. Gov't of Nashville & Davidson Cnty.*, No. 3:11-cv-519, 2014 U.S. Dist. LEXIS 10252 (M.D. Tenn. January 28, 2014); *Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988); *Sircy v. Metro. Gov't of Nashville & Davidson Cnty.*, 182 S.W.3d

815 (Tenn. App. 2005). The elements of an unjust enrichment claim against a city are: (1) a plaintiff conferred a benefit on a city; (2) the city appreciated the benefit; and (3) it would be unjust for the city to retain the benefit. *See Noel*, 2014 U.S. Dist. LEXIS 10252 at *12.

Metro was unjustly enriched when it demanded an in-lieu fee from Mr. Mayes. Mr. Mayes conferred a benefit on Metro when he paid an in-lieu fee to the city in the amount of $8,883.21 in exchange for a permit to build a single-family home. (Mem. Op., R. 40, Page ID # 631.) Metro spent the in-lieu contribution on a sidewalk miles from Mr. Mayes's home. (Id., Page ID # 632.) It would be unjust for Metro to retain the cost of the in-lieu fee because the fee is an unconstitutional condition that required Mr. Mayes to forgo his Fifth Amendment right to just compensation in exchange for a building permit. Likewise, although Mr. Knight has not yielded to the unconstitutional sidewalk condition, he faces an imminent injury. If he were to pay the in-lieu fee, Metro would also be unjustly enriched by him. Metro cannot continue with this extortion.

B. The appropriate remedies are restitution of the in-lieu fee for Mr. Mayes and injunctive relief for Mr. Knight.

Mr. Mayes has already paid the in-lieu fee, so the appropriate remedy is restitution and return of his property. As the Supreme Court stated in *Koontz,* the question of remedies turns on "the cause of action—whether state or federal—on which the landowner relies." 570 U.S. at 609. Plaintiffs rely on a federal cause of

action: Section 1983. Courts in this Circuit recognize that restitution is an appropriate remedy under Section 1983. *Pund v. City of Bedford*, 339 F. Supp. 3d 701, 716 (N.D. Ohio 2018) (citing cases); *Yannoti v. City of Ann Arbor*, No. 19-11189, 2019 U.S. Dist. LEXIS 185773, at *10 (E.D. Mich. Oct. 28, 2019) (citing cases). Plaintiffs also rely on a state cause of action: unjust enrichment, for which restitution is also appropriate. *Chase Manhattan Bank, N.A. v. CVE, Inc.*, 206 F. Supp. 2d 900, 909 (M.D. Tenn. 2002) ("The remedy for unjust enrichment requires that the person who has been unjustly enriched at the expense of another make restitution to that person.") (citing *Browder v. Hite*, 602 S.W.2d 489, 491 (Tenn. Ct. App. 1980)). Metro should return the in-lieu fee to Mr. Mayes.

An injunction is the appropriate remedy for Mr. Knight. When government demands a discrete fund of money, but the transfer of money has not yet occurred, a suit for compensation is unavailable. Therefore, a request for an injunction is proper. *E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *see also Student Loan Marketing Ass'n. v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997). Metro will not give Mr. Knight a permit until he satisfies the sidewalk condition. (Mem. Op., R. 40, Page ID # 631.) That means Mr. Knight must pay the in-lieu fee just like Mr. Mayes, or else he cannot build on his own property. Because he will build once the condition is removed, the appropriate remedy for Mr. Knight is not restitution but injunctive relief.

CONCLUSION

This Court should apply *Nollan*, *Dolan*, and *Koontz*, reverse the district court's grant of Defendant-Appellee's Motion for Summary Judgment and enter summary judgment for Plaintiffs-Appellants.

February 15, 2022.

/s/ Braden H. Boucek

Meggan S. DeWitt
BEACON CENTER OF TENNESSEE
1200 E. Clinton St., #205
Nashville, TN 37203
(615) 383-6431
meggan@beacontn.org

Kimberly S. Hermann
Braden H. Boucek
Celia Howard O'Leary
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
khermann@southeasternlegal.org
bboucek@southeasternlegal.org
coleary@southeasternlegal.org

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Proc. 32(g)(1), this is to certify the foregoing complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9281 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). The foregoing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared on a computer using Times New Roman font (14 point).

February 15, 2022.

/s/ Braden H. Boucek
BRADEN H. BOUCEK

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2022, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile. Parties may access the filing through the Court's electronic filing system.

February 15, 2022.

/s/ Braden H. Boucek
BRADEN H. BOUCEK

Case No. 21-6179

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

James Knight and Jason Mayes,

Plaintiffs – Appellants,

v.

The Metropolitan Government of Nashville and Davidson County,

Defendant – Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee, No. 3:20-cv-00922 (Trauger, J.)

ADDENDUM
PLAINTIFFS-APPELLANTS' DESIGNATION OF THE RECORD ON APPEAL

Pursuant to 6 Cir. R. 30(b), Plaintiffs-Appellants James Knight and Jason Mayes hereby designate the following items in the district court's electronic record necessary to understand the issues and decide the appeal.

Document Description	Record Number	Page IDs
Complaint	1	1-25
Answer	10	56-70
Plaintiffs' Statement of Undisputed Material Facts	20	113-124
Declaration of James Knight	20-1	125-128
Declaration of Jason Mayes	20-2	129-132
Declaration of Braden Boucek with Exhibits	20-3; 20-4	133-175
Defendant's Statement of Undisputed Material Facts with Exhibits	23	240-393
Defendant's Response to Plaintiffs' Statement of Undisputed Material Facts	27	415-427
Declaration of Jeff Hammond	28	428-430
Plaintiffs' Response to Defendant's Statement of Undisputed Material Facts	30	453-458
Plaintiffs' Reply in Support of Statement of	32	462-496

Undisputed Material Facts		
Memorandum Opinion	40	626-650
Order	41	651
Notice of Appeal	43	653-654

February 15, 2022.

/s/ Braden H. Boucek
BRADEN H. BOUCEK