No. ____

In The
Supreme Court of the United States

WILLIAM A. DABBS, JR.,
Petitioner,

v.

ANNE ARUNDEL COUNTY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether legislatively proscribed monetary exactions on land use development are subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION... 1

CONSTITUTIONAL PROVISIONS AT ISSUE 2

INTRODUCTION 2

STATEMENT OF THE CASE................................... 3

A. Factual Background 3

1. Dr. Dabbs.. 3

2. The Challenged Impact Fee Ordinance.. 4

3. The County Illegally Held Fees For Decades.. 8

B. Procedural History of *Dabbs* 9

REASONS FOR GRANTING THE WRIT 12

I. THE MARYLAND COURT'S LEGISLATIVE EXACTIONS RULE CONFLICTS WITH DECISIONS OF THIS COURT....................... 12

A. The Maryland Rule Eliminates the Protections This Court Guaranteed to Land-Use Permit Applicants in *Nollan*, *Dolan*, and *Koontz*.................................... 13

B. The Doctrine of Unconstitutional Conditions Has Always Applied to Legislatively Mandated Conditions 20

C. There Is No Practical Reason for Exempting Impact Fees From *Nollan* and *Dolan* Scrutiny: Impacts to School, Transportation, and Public Safety Facilities Can Be Readily Identified and Quantified 23

D. Application of the Doctrine Must Turn on a Determination Whether a Permit Condition Affects a Constitutionally Protected Right, Not the Branch of Government Making the Demand 25

II. THE MARYLAND COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO LEGISLATIVE EXACTIONS UNDERMINES THE FUNDAMENTAL POLICY OF THE TAKINGS CLAUSE......... 28

III. THERE IS A SPLIT OF AUTHORITY AMONG STATE AND THE LOWER FEDERAL COURTS ABOUT THE *NOLLAN* AND *DOLAN* STANDARDS' APPLICATION TO EXACTIONS MANDATED BY LEGISLATION 30

CONCLUSION.. 32

Appendix

Decision of the Court of Appeals of Maryland, dated April 18, 2018 .... A-1 - A-46

Opinion of the Court of Special Appeals of Maryland, filed March 20, 2017 .... B-1 - B-34

Opinion of the Maryland Circuit Court, dated Dec. 30, 2015 .... C-1 - C-34

TABLE OF AUTHORITIES

Page

Cases

Alto Eldorado Partners v. City of Santa Fe,
634 F.3d 1170 (10th Cir. 2011) 31

Armstrong v. United States,
364 U.S. 40 (1960) 25, 28

Brown v. Legal Found. of Wash.,
538 U.S. 216 (2003) 25

California Bldg. Indus. Ass'n v.
City of San Jose, 136 S. Ct. 928 (2016)....... 3, 27, 30

City of Portsmouth v. Schlesinger,
57 F.3d 12 (1st Cir. 1995)...................................... 31

Commercial Builders of N. Cal. v. City of
Sacramento, 941 F.2d 872 (9th Cir. 1991) 32

Curtis v. Town of South Thomaston,
708 A.2d 657 (Maine 1998) 31

Dabbs v. Anne Arundel County, 232 Md. App. 314,
157 A.3d 381 (2017).. 1

Dabbs v. Anne Arundel County, 458 Md. 331,
182 A.3d 798 (2018).. 1

Dolan v. City of Tigard, 317 Or. 110,
854 P.2d 437 (1993).. 16

Dolan v. City of Tigard,
512 U.S. 374 (1994) 2, 13, 16-17, 29

Doyle v. Continental Ins. Co.,
94 U.S. 535 (1876) 21

Frost & Frost Trucking Co. v. Railroad Comm'n of
Cal., 271 U.S. 583 (1926) 19, 21

Garneau v. City of Seattle,
147 F.3d 802 (9th Cir. 1998) 32

Home Builders Ass'n of Cent. Arizona v. Scottsdale,
930 P.2d 993 (Ariz. 1997), *cert. denied*, 521 U.S.
1120 (1997) 31

Home Builders Ass'n of Dayton & Miami Valley v.
City of Beavercreek,
729 N.E.2d 349 (Ohio 2000) 24, 31

Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015) 25

Howard County v. JJM, Inc., 301 Md. 256,
482 A.2d 908 (1984) 10

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 2, 10, 13-14, 17-19, 25, 28

Lafayette Ins. Co v. French,
59 U.S. (18 How.) 404 (1855) 20

Levin v. City & Cty. of San Francisco,
71 F. Supp. 3d 1072 (N.D. Cal. 2014) 32

Louisville Joint Stock Land Bank v. Radford,
295 U.S. 555 (1935) 25

Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479
(N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1994).... 31

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 20

Mead v. City of Cotati, 389 Fed. App'x 637
(9th Cir. 2010) 32

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974) 20

N. Illinois Home Builders Ass'n, Inc. v. Cty. of Du
Page, 621 N.E.2d 1012 (Ill. App. Ct. 1993), *aff'd in*
part, rev'd in part, 649 N.E.2d 384 (Ill. 1995) 24

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 2, 13-15

Northern Illinois Home Builders Association, Inc. v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 31

Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.,
515 U.S. 1116 (1995) 26-27, 30

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 25

Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect,
176 N.E.2d 799 (Ill. 1961) 24

San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87 (Cal. 2002) 31

Sherbert v. Verner, 374 U.S. 398 (1963) 20

Southern Pacific Co. v. Denton,
146 U.S. 202 (1892) 19

Speiser v. Randall, 357 U.S. 513 (1958) 21

Spinell Homes, Inc. v. Municipality of Anchorage,
78 P.3d 692 (Alaska 2003) 31

St. Clair Cty. Home Builders Ass'n v. City of Pell City, 61 So. 3d 992 (Ala. 2010) 31

Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620 (Tex. 2004) 30, 31

Trimen Dev. v. King County,
877 P.2d 187 (Wash. 1994)............................. 23, 31

United States v. General Motors Corp.,
323 U.S. 373 (1945) 25

Waters Landing Ltd. P'ship v. Montgomery Cty.,
337 Md. 15, 650 A.2d 712 (1994) 10

Constitution

U.S. Const. amend. V 2

U.S. Const. amend. XIV, § 1 2

Other Authorities

Burling, James S., & Owen, Graham, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397 (2009) 22

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Epstein, Richard A., *Bargaining with the State* (1993) 21

Haskins, Steven A., *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487 (2006) 22

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PETITION FOR WRIT OF CERTIORARI

William A. Dabbs, Jr., as Trustee of the Estate of William A. Dabbs Jr. Living Trust, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at *Dabbs v. Anne Arundel County*, 458 Md. 331, 182 A.3d 798 (2018), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The decision of the Maryland Court of Special Appeals is reported at *Dabbs v. Anne Arundel County*, 232 Md. App. 314, 157 A.3d 381 (2017), and appears at Pet. App. B. The opinion of the Circuit Court for Anne Arundel County is attached here as Pet. App. C.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioner William A Dabbs, Jr., as Trustee of the Estate of William A. Dabbs Jr. Living Trust, filed a lawsuit challenging Anne Arundel County's collection of mandatory development impact fees as violating the unconstitutional conditions doctrine predicated on the Fifth and Fourteenth Amendments to the United States Constitution. The Maryland Court of Appeals dismissed the federal constitutional claim and upheld the impact fee ordinance in its April 10, 2018, decision. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. This guarantee is made applicable to the states by the Fourteenth Amendment, which provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This case raises an important and unresolved question concerning the limits the Fifth Amendment places on a local government's authority to use the land-use permit process to exact property for a public use without compensation. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court held that the doctrine of unconstitutional conditions requires the government to show that an exaction is necessary to mitigate impacts caused by the proposed development. Otherwise, the condition will be unconstitutional and invalid. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604-05 (2013). This Court has consistently applied the doctrine to exactions requiring that property owners dedicate land and/or money as a condition on the issuance of a permit, without regard to the particular branch of government making the demand. Over the years, however, state and lower federal courts have divided on the question whether a permit condition mandated by an act of generally applicable legislation (a so-called legislatively proscribed exaction) is subject to

the unconstitutional condition doctrine's "essential nexus" and "rough proportionality" requirements. *See, e.g., California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring in denial of certiorari).

In the decision below, the Maryland Court of Appeals held that "[i]mpact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny." Pet. App. A at 29 (emphasis in original). As a result, the Maryland court upheld Anne Arundel County's collection of millions of dollars in "development impact fees," without subjecting the exaction to meaningful scrutiny.

The question presented by this petition is particularly well suited for this Court's review because the Maryland court decided the legislative exactions issue as a matter of federal constitutional law. Thus, the case does not present any issues of fact or state law to distract from the important constitutional question. The Court should grant review of this case to finally decide whether the doctrine of unconstitutional conditions, as set forth by *Nollan*, *Dolan*, and *Koontz*, applies to exactions imposed by acts of legislation.

STATEMENT OF THE CASE

A. Factual Background

1. Dr. Dabbs

Dr. William A. Dabbs is a longtime homeowner in Anne Arundel County, Maryland. He is an established member of the community, running a family medicine practice in Annapolis and receiving awards for the

sports medicine services he provides at local high school competitions. Like many of his neighbors, Dr. Dabbs was required to pay a large "development impact fee" to the County as a condition of receiving a permit to build a new single-family home. Despite the County's claim that the fees are necessary to mitigate for the impacts that a new home may have on school, transportation, and public safety infrastructure, the County never explained how it calculated his or any of his neighbors' impact fees. Thus, after years of community frustration that the money was exacted without a sufficient nexus or proportionality to its alleged purpose, Dr. Dabbs agreed to act as a class representative in a lawsuit seeking an explanation for the fees and/or a refund of fees.

2. The Challenged Impact Fee Ordinance

In 1987, Anne Arundel County adopted an ordinance requiring property owners to pay a "development impact fee" as a mandatory condition on any improvement to private property.[1] Pet. App. A at 1-2; Pet. App. B at 3-4 (citing Anne Arundel County Code (AACC) §§ 17-11-203, 17-11-206). The amount of the fee is determined at the time a property owner applies for a development permit based on a legislatively determined fee schedule. Pet. App. C at 7 (citing AACC § 17-11-204). The ordinance requires that landowners pay all impact fees in full as a condition on the issuance of an approved building permit. Pet. App. B at 3-4 (citing AACC §§ 17-11-203, 17-11-206). Alternatively, the property owner may

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[1] The relevant regulatory provisions are reproduced in the intermediate appellate decision, attached as Appendix B to this petition.

satisfy the condition by dedicating land or buildings to the County in lieu of the fee. AACC § 17-11-207.

The stated purpose of the impact fee ordinance is to ensure that project proponents "pay [their] proportionate fair share of the costs for land, capital facilities, and other expenses necessary to accommodate development impacts on public schools, transportation, and public safety facilities" Pet. App. A at 2, n.1. Despite this nod toward the nexus and proportionality requirements of *Nollan* and *Dolan*,[2] the ordinance does not require the County to make any project-specific determination regarding actual impacts. Instead, "[t]he legislatively imposed development impact fee is predetermined, based on a specific monetary schedule, and applies to any person wishing to develop property in the district." Pet. App. A. at 24 (citing AACC §§ 17-11-101, 203, 206, 209(d)). The only limit placed on the County is a requirement that it use the fees to pay for "capital improvements within the development impact fee district from which they are collected, so as to reasonably benefit the property against which the fees were charged."[3] Pet. App. C at 8 (quoting AACC § 17-11-209(d)).

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[2] At the time the County adopted the impact fee ordinance, legal scholars believed that the fees would be subject to *Nollan*'s nexus test. Paul A. Tiburzi, *Impact Fees in Maryland*, 17 U. Balt. L. Rev. 502, 517-19 (1988).

[3] *See* Pet. App. A. at 11-12. Section 17-11-210(b) provides that, if the impact fees collected in a district are not expended or encumbered within six years following the collection of the fee, the County Office of Finance must give notice to current property owners that impact fees are available for refund. Section 17-11-210(e), however, allows the County to "extend for up to three years the date at which the funds must be expended or encumbered." Such an extension may be made "only on a written

Thus, the County's schedule for school impact fees, for example, has no apparent proportionality to project-specific development impacts.[4] Instead, the schedule subjects new homes to varying impact fees based on the size and type of structure proposed, not the number of children being introduced into the school system or any other relevant factor:

Type of Structure[5]	School Fee (2001)
Single-Family Detached	$3,161
Single-Family Attached	$1,997
2 Units (per unit)	$2,806
3 or 4 Units (per unit)	$1,433
5 or More Units (per unit)	$1,433
Mobile Home (per unit)	$2,570

Because the ordinance does not require the County to justify the impact fees based on a project's actual impact, there is no explanation why an individual developing a mobile home park should pay more in school impact fees per unit than a person developing an apartment complex or a duplex.

finding that within a three-year period certain capital improvements are planned to be constructed that will be of direct benefit to the property against which the fees were charged."

[4] The petition discusses on the school impact fees here because they are the most readily understandable. The same arguments regarding an apparent lack of nexus and proportionality apply to the traffic and public safety fees.

[5] Elizabeth Ridlington and Brad Heavner, *Accounting for Sprawl's Costs: How Development Impact Fees Can Discourage Low-Density Development* at 25, Table 5 (MaryPIRG Foundation, Sept. 2003) (*available at* http://www.impactfees.com/publications %20pdf/Maryland_ImpactFees03.pdf).

The current fee schedule confirms that the County determined the school impact fee based on the size of the structure, not the specific impact that a single-family dwelling will have on school capacity:

Residential Development[6]	School Fee (2017)
Under 500 sq. feet	$2,477
500-999 sq. feet	$4,559
1,000-1,499 sq. feet	$6,251
1,500-1,999 sq. feet	$7,364
2,000-2,499 sq. feet	$8,196
2,500-2,999 sq. feet	$8.861
3,000-3,499 sq. feet	$9,415
3,500-3,999 sq. feet	$9,889
4,000-4,499 sq. feet	$10,304
4,500-4,999 sq. feet	$10,671
5,000-5,499 sq. feet	$11,003
5,500-5,999 sq. feet	$11,304
6,000 sq. feet and over	$11,444

The ordinance provides no explanation of how a family's impact on school resources will vary based on the size of their home, let alone how those impacts will vary to the degree reflected by the increasing fee structure.

[6] http://www.aacounty.org/departments/inspections-and-permits/permit-center/utility-and-impact-fees/

3. The County Illegally Held Fees For Decades

To understand the constitutional questions raised by the *Dabbs* case, it is necessary to briefly discuss an earlier class action lawsuit that successfully challenged the County's collection of impact fees on state law grounds.

The County began exacting impact fees as a condition of development permits in 1988. Pet. App. B at 5. By 1996, the County had collected tens of millions of dollars in fees,[7] but had not expended or encumbered all of the money on eligible projects within the six-year timeframe required by the ordinance. Pet. App. A at 4-9. According to the ordinance, the County was required to notify each person who had paid a fee that they were eligible for a refund upon the expiration of the six-year period. Pet. App. A at 4-5, n.7. But instead of sending the refund notice, the County issued itself a series of interoffice memoranda, informally extending the period of time in which it was authorized to hold the money, none of which validly extended the deadline. *Id.* Nor did the memoranda contain written findings showing that any of its planned expenditures will directly benefit the district in which the burdened properties are located. Pet. App. B at 4.

Thus, in 2001, Halle Development, Inc., filed a class action lawsuit in the Maryland courts, seeking a refund of millions of dollars that the County had exacted under the impact fee ordinance between 1988

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[7] In 2003, the County estimated that it collected approximately $8 million in development impact fees per year. Ridlington, *supra*, at App. 25.

and 1996. Pet. App. A at 4. The *Halle Development* case focused on whether the County had violated the impact fee ordinance when it failed to notify landowners of their right to a refund when it did not expend or encumber certain fees within the time period required by law. *Id.* at 4-5. After more than a decade of litigation (and a dozen appellate decisions), the Maryland courts found in favor of the property owners and ordered the County to refund $1.3 million in fees. Pet. App. A at 8. Because that case was decided on state and local law, *Halle Development* did not address the applicability of *Nollan*, *Dolan*, and *Koontz* to the impact fees.

B. Procedural History of *Dabbs*

In 2011, Dr. Dabbs, acting as a class representative, filed a second class action lawsuit in the Maryland courts, asking the courts to order Anne Arundel County to return millions of dollars of fees unlawfully collected between 1997 and 2002. Pet. App. A at 10. The Dabbs class action proceeded on a very different cause of action because, while *Halle Development* was pending, the County amended the impact fee ordinance (1) to allow the County to expend fees on temporary (and relocatable) school structures that could be relocated to different districts, (2) to retroactively authorize itself to use a laxer method for expending and/or encumbering collected fees than had been previously required, and (3) to remove the refund provision. Pet. App. A at 10; Pet. App. B at 8; Pet. App. C at 15-16. Because of these changes, the Maryland courts foreclosed the type of refund proceeding that had been successfully litigated in *Halle Development*, concluding that, under the ordinance's recently amended (and retroactive) accounting provision, the

County was only required to show that it had expended money on eligible capital projects (including relocatable school structures) in an amount that roughly matched fees collected within the district. Pet. App. B at 16-18. Thus, the *Dabbs* case proceeded on the federal constitutional claim that the County's demand for impact fees, absent any showing of nexus and proportionality pursuant to the test established by *Nollan*, *Dolan*, and *Koontz*, violated the unconstitutional conditions doctrine. Pet. App. A at 16-19; Pet. App. B at 21-25; Pet. App. C at 31.

At the time, the Maryland courts were internally conflicted on the question whether a legislatively mandated exaction is subject to the doctrine of unconstitutional conditions. In a case decided prior to *Nollan*, the Maryland Court of Appeals invalidated an exaction of land mandated by a statute that sought to preserve property for future highway projects because the demand lacked a "reasonable nexus between the exaction and the proposed subdivision." *Howard County v. JJM, Inc.*, 301 Md. 256, 258, 281-82, 482 A.2d 908 (1984). But later in *Waters Landing Ltd. P'ship v. Montgomery Cty.*—a case decided on equal protection grounds—the Maryland Court of Appeals stated in dicta that a tax levied on all new development would not be subject to the nexus and proportionality tests because the tax was imposed pursuant to an act of legislation.[8] 337 Md. 15, 39, 650

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[8] *Waters Landing* also concluded that the nexus and proportionality tests apply only to permit conditions demanding a dedication of real property, not to conditions demanding money. 337 Md. at 39. *Koontz*, however, rejected that conclusion. 570 U.S. at 612. The lower courts accordingly do not discuss this aspect of the *Waters Landing* decision.

A.2d 712 (1994). In reaching that opinion, *Waters Landing* concluded that *Dolan* involved an exaction imposed as the result of an adjudicatory proceeding (in truth, *Dolan* involved two exactions that were legislatively mandated pursuant to the city's development code). *Id.*

The trial court and intermediate appellate court below opted to follow the dicta in *Waters Landing*, expanding upon the decision to broadly hold that the doctrine of unconstitutional conditions does not apply to legislatively mandated impact fees (as well as not applying to taxes). Pet. App. B at 21-25; Pet. App. C at 31. Thus, the lower courts dismissed Dr. Dabbs' constitutional claim as a matter of law, without addressing the merits. *Id.* Thereafter, the Maryland Court of Appeals granted review to determine whether "the lower courts erred in determining that '… the rough proportionality tests [or the rational nexus test] has no application to development impact fees … where monetary exactions are imposed …." Pet. App. A at 15. Maryland's high court upheld the lower courts' decisions, adopting a per se rule excluding all legislative exactions from heightened scrutiny under the doctrine of unconstitutional conditions. Pet. App. A at 29.

The court reached this conclusion by characterizing the exaction at issue in *Koontz* as a purely adjudicatory decision pertaining to only one parcel of land.[9] Pet. App. A at 21, 23. The court similarly characterized *Dolan* as having concluded "that impact fees imposed on a generally applicable

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[9] As discussed below on pages 17-18, the condition at issue in *Koontz* was mandated by a generally applicable state statute and a predetermined mitigation schedule.

basis are not subject to a rough proportionality or nexus analysis."[10] *Id.* at 24. The court then distinguished Anne Arundel County's impact fee ordinance from those at issue in *Koontz* and *Dolan* on the basis that the County's fees are predetermined, leaving permitting officials with no discretion in regard to the amount of money that must be paid as a condition on the issuance of a development permit. *Id.* at 23. Based on that distinction, the court held that, as a matter of federal constitutional law, "[i]mpact fees imposed by legislation applicable on an area-wide basis are *not* subject to *Nollan* and *Dolan* scrutiny."[11] *Id.* at 29.

Dr. Dabbs timely filed this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

THE MARYLAND COURT'S LEGISLATIVE EXACTIONS RULE CONFLICTS WITH DECISIONS OF THIS COURT

The Maryland court adopted an inflexible rule of federal constitutional law that excludes all impact fees required by acts of legislation from the protections guaranteed by the doctrine of unconstitutional conditions. The lower court therefore

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[10] Of course, *Dolan* did not concern impact fees and contained no such holding. Moreover, as discussed below on page 16, *Dolan* involved two exactions, both of which were mandated by the city's generally applicable development code.

[11] In reaching this conclusion, the Maryland court recognized that the legislative exactions question is subject to a split of authority among the state courts. Pet. App. A at 26-28, n.20 and 21.

refused to examine the fees collected by Anne Arundel County to determine whether they are sufficiently related to actual impacts of burdened development to satisfy the nexus and proportionality requirements of *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 29. The court's refusal to do so directly conflicts with this Court's case law and leaves property owners without any protection against legislative forms of extortion that the doctrine of unconstitutional conditions is supposed to curtail.

A. The Maryland Rule Eliminates the Protections This Court Guaranteed to Land-Use Permit Applicants in *Nollan*, *Dolan*, and *Koontz*

The nexus and rough proportionality tests are important safeguards of private property rights subject to land-use permitting. *Koontz*, 570 U.S. at 604-05, 612; *see also Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may require a landowner to dedicate property to a public use only where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz*, 570 U.S. at 604-05; *see also Dolan*, 512 U.S. at 385 ("[G]overnment

may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property.”).

The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners “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 604-05; *see also id*. at 607 (“Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.”). A close reading of *Nollan*, *Dolan*, and *Koontz* shows that the “broad discretion” to exact property as a permit condition is not limited to one branch of government, but has always included legislatively mandated conditions.

In *Nollan*, for example, the state of California enacted a law authorizing permit officials to require that coastal land owners dedicate a strip of beachfront property to the public as a condition on any new development permit. *Nollan*, 483 U.S. at 828-30 (citing California Coastal Act and California Public Residential Code); *see also id.* at 858 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of 1972, a deed restriction granting the public an easement for lateral beach access “had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach

Tract.”). Thus, the California Coastal Commission, acting pursuant to the requirements of a state law, required the Nollans to dedicate an easement over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home. 483 U.S. at 827-28. The Commission justified the condition on the grounds that “the new house would increase blockage of the view of the ocean, thus contributing to the development of ‘a “wall” of residential structures’ that would prevent the public ‘psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,’” and would “increase private use of the shorefront.” *Id.* at 828-29 (quoting Commission). The Nollans challenged the condition, arguing that it violated the Takings Clause because it bore no connection to the impact of their proposed development.

This Court agreed, holding that the easement condition was an unconstitutional condition because it lacked an “essential nexus” to the alleged public impacts that the Nollans’ project caused. *Id.* at 837. Because the Nollans’ home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id.* at 838-39. Without a constitutionally sufficient connection between a permit condition and a project’s alleged impact, the easement condition was “not a valid regulation of land use but an ‘out-and-out plan of extortion.’” *Id.* at 837 (citations omitted).

In *Dolan*, this Court defined how close a “fit” is required between a permit condition and the alleged impact of a proposed land use. There, the City’s

development code directed permit officials to exact bike path and greenway dedications as a mandatory condition on new development.[12] *See Dolan*, 512 U.S. at 377-78 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways."); *id.* at 379-80 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code]."). Thus, when Florence Dolan applied for a permit to expand her plumbing and electrical supply store, the City demanded that she dedicate some of her land for flood-control improvements and a bicycle path. 512 U.S. at 377.

Dolan refused to comply with the conditions and sued the city in state court, alleging that the development conditions violated the Takings Clause and should be enjoined. This Court held that the City had established a nexus between both conditions and Dolan's proposed expansion, but nevertheless held that the conditions were unconstitutional. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386.

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[12] Tigard's Community Development Code § 18.120.180.A.8 (1989) provided that "[w]here landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan. This area shall include portions at a suitable elevation for the construction of a pedestrian/bicycle pathway within the floodplain in accordance with the adopted pedestrian/bicycle plan." *See Dolan v. City of Tigard*, 317 Or. 110, 124-25, 854 P.2d 437 (1993) (quoting city code), *rev'd*, 512 U.S. 374 (1994).

There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The *Dolan* Court held that the City had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and invalidated the permit conditions. *Id.*

Notably, in its brief on the merits, the City of Tigard claimed the mandatory nature of Tigard's legislative permit conditions should shield its exactions from the heightened scrutiny required by *Nollan*. *See* Brief for Respondent, Dolan v. City of Tigard, at 24-25, *available at* 1994 WL 123754 (U.S.) (Feb. 17, 1994); Brief for Petitioner, at 30-35, *available at* 1994 WL 249537 (U.S.) (Jan. 13, 1994). The City argued that legislative actions should be given broad deference and presumed constitutional, subject only to rational basis review. *Id.* This Court rejected that argument, holding that the government bears the burden of showing that its permit condition satisfies the nexus and proportionality requirements. *See Dolan*, 512 U.S. at 391.

Koontz, too, involved a legislatively mandated exaction. *Koontz*, 570 U.S. at 600 (Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands). There, a government permitting agency conditioned the approval of Coy Koontz's application to develop 3.9 acres of his 14.9-acre commercial-zoned property. 570 U.S. at 601-02. Koontz offered to give the agency a conservation easement over the remaining 11 acres, but that was

not enough. *Id.* Acting pursuant to the mandates of state law, the agency demanded that Koontz either dedicate 13.9 acres of his land or pay a fee in lieu of the additional demanded property. *Id.* Koontz objected to the condition and the agency denied his application. *Id.* Koontz challenged the agency's decision under the doctrine of unconstitutional conditions. *Id.* The Florida Supreme Court denied Koontz's claim, upholding the impact fee condition as exempt from the doctrine of unconstitutional conditions. This Court, however, reversed the state court's decision, confirming that impact fees must also comply with the nexus and proportionality requirements.

Koontz, which also involved an impact fee, is directly on point. Like this case, the permitting authority in *Koontz* determined the amount of the fee pursuant to a generally applicable regulation setting a schedule of mitigation ratios.[13] *Id.* Florida's Department of Environmental Protection adopted the regulation nearly a decade before Koontz submitted his permit application. *Id.* The fact that the fee was legislatively required did not deter this Court from concluding that it was subject to the nexus and proportionality tests (*Koontz*, 570 U.S. at 612-17)—a fact that compelled Justice Kagan, writing in dissent, to question whether the majority had rejected the legislative-versus-adjudicative distinction. *Koontz*, 570 U.S. at 628 (Kagan, J., dissenting). Instead, the Court held that a monetary exaction will implicate the

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[13] *See also* Respondent's Brief in Opposition, *Koontz*, 2012 WL 3142655, at *5 n.4 (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

doctrine of unconstitutional conditions when it burdens a specific parcel of property. *Id.* at 613.

There is nothing in Anne Arundel County's ordinance to meaningfully distinguish its impact fees from the exactions at issue in *Dolan* and *Koontz*. All three conditions were mandated by acts of general legislation. And all three were imposed by the permitting authority as a mandatory condition on the issuance of the development permit. The fact that the County adopted the condition in advance of any particular permit application is of no significance because "unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent." *Koontz*, 570 U.S. at 607 (citing *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.,* 271 U.S. 583, 592-593 (1926); *Southern Pacific Co. v. Denton,* 146 U.S. 202, 207 (1892)).

Subjecting all permit conditions to heightened scrutiny—regardless of when in the process or by what agency they are imposed—is central to the unconstitutional conditions doctrine, which "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606. Thus, *Koontz* held that an inflexible rule holding only conditions precedent to approval subject to heightened scrutiny "would be especially untenable … because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent [or subsequent] to permit approval." *Koontz*, 570 U.S. at 606.

The Maryland decision warrants review because it conflicts with this Court's special application of the

doctrine of unconstitutional conditions in *Nollan*, *Dolan*, and *Koontz*.

B. The Doctrine of Unconstitutional Conditions Has Always Applied to Legislatively Mandated Conditions

There is no basis in the broader unconstitutional conditions doctrine for drawing any distinction between legislative and adjudicative exactions. Indeed, this Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals since the doctrine's origin in the mid-Nineteenth Century. *See, e.g.*, *Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts because "[t]his consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; … provided they are not repugnant to the constitution of laws of the United States."); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (provisions of unemployment compensation statute

held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

The doctrine's purpose—to enforce a constitutional limit on government authority—explains why it applies without regard to the type of government entity making the unconstitutional demand:

> [T]he power of the state […] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking, 271 U.S. at 593-94 (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).[14]

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[14] *See also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any

Legal scholars also find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999). Indeed, where a single government body writes the law and issues permits, as the County did here, it is difficult to distinguish one branch of the government from the other. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decision-making in the land-use context).

The irrelevance of the "legislative v. administrative" distinction comes as no surprise, because *Nollan* and *Dolan* are rooted in the unconstitutional conditions doctrine, which "does not distinguish, in theory or in practice, between conditions imposed by different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those

individual a privilege or benefit—such as a land-use permit—"it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights.").

justifications are concerned with questions of the exercise [of] government power and not the specific source of that power." *Id.* at 438. Indeed, from the property owner's perspective, he suffers the same constitutional injury—*i.e.*, the compelled waiver of the right to just compensation—whether a legislative or administrative body forces him to surrender his rights in exchange for a land-use permit.

C. There Is No Practical Reason for Exempting Impact Fees From *Nollan* and *Dolan* Scrutiny: Impacts to School, Transportation, and Public Safety Facilities Can Be Readily Identified and Quantified

There is no practical reason for the Maryland court's decision to adopt a categorical rule excluding the legislatively mandated impact fees from the scrutiny required by *Nollan*, *Dolan*, and *Koontz*. Indeed, case law from across the nation shows that cities and counties are readily equipped to quantify development impacts on amenities such as schools, roadways, and parks.

In *Trimen Dev. v. King County*, for example, the Washington Supreme Court upheld an impact fee ordinance against a *Nollan/Dolan* challenge. 877 P.2d 187, 194 (Wash. 1994). There, King County had determined that a spike in local development had resulted in a deficit of available parklands. To remedy that problem, the County enacted an ordinance requiring property owners to either dedicate land or pay a park impact fee as a mandatory condition on any new development. The County determined the size of the exaction based on a formula that considered the projected population growth attributable to the

development, alongside the general growth projection and the number of acres of parklands needed. On review, the Washington court concluded that the County's formula was sufficiently site-specific to satisfy the nexus and proportionality requirements. *Id.*

Similarly, the Illinois Supreme Court upheld Du Page County's method for calculating legislatively mandated traffic impact fees, which relied on a computer program that models projected travel based on new developments. *N. Illinois Home Builders Ass'n, Inc. v. Cty. of Du Page*, 621 N.E.2d 1012, 1020 (Ill. App. Ct. 1993), *aff'd in part, rev'd in part*, 649 N.E.2d 384 (Ill. 1995). The program analyzed the impacts of generic housing units on traffic in the area, using different mathematical traces of cars as they leave particular developments and enter the roads. *Id.* The court held that the data gathered and analyzed ensured that the impact fees imposed on developers were only for the improvements made necessary by new development. *Id.* As such, the court upheld the fees against a *Nollan/Dolan* challenge because they were sufficiently site-specific. *Id.*; *see also Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) ("[I]f the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden….").

The Ohio Supreme Court adopted a similar rule in *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 356 (Ohio 2000). There, the court held that cities and counties that wish to implement ordinances for traffic impact fees must be able to demonstrate a reasonable relationship

between the burden created by the development and the need for road improvements. The court found that the analyses do not need to take the form of a complicated study, but instead, would pass muster if they relied upon generally accepted traffic engineering practices. *Id.*

These cases demonstrate that there is no practical justification for a rule that shields legislative exactions from the nexus and proportionality tests.

D. Application of the Doctrine Must Turn on a Determination Whether a Permit Condition Affects a Constitutionally Protected Right, Not the Branch of Government Making the Demand

The Maryland rule conflicts with decisions of this Court by making the particular branch of government exacting a property interest determinative of an individual's rights under the doctrine of unconstitutional conditions. This Court, by contrast, has repeatedly held that the application of the doctrine turns on the question whether the condition "would transfer an interest in property from the landowner to the government."[15] *Koontz*, 570 U.S. at

[15] In other words, the demand must seek an interest in private property. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) ("property" is comprised of the rights to possess, use, exclude others, and dispose of the property); *see also Horne v. Dep't of Agric.*,135 S. Ct. 2419, 2426 (2015) (crops); *Koontz*, 570 U.S. at 615-16 (money and real property); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (interest on legal trust accounts); *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 159 (1998) (accrued interest); *Armstrong v. United States*, 364 U.S. 40, 44-49 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages). Thus, when the government demands that an owner hand over an

615. If the demand seeks an interest in property, then the condition constitutes an exaction and is subject to heightened scrutiny under the nexus and proportionality tests. *Id.*

Two Justices of this Court have expressed marked skepticism at the idea that the need for heightened scrutiny is obviated when a legislative body—as opposed to some other government entity—decides to exact a property interest from developers. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required the owners of parking lots to include landscaped areas equal to at least 10% of the paved area at an estimated cost of $12,500 per lot. 515 U.S. 1116, 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Despite an apparent lack of proportionality, Georgia's Supreme Court upheld the ordinance, concluding that legislatively imposed exactions are not subject to *Nollan* and *Dolan*. *Id.* at 1117. Dissenting from an order denying certiorari, Justice Thomas wrote that there appeared to be no meaningful distinction between legislatively imposed conditions and other exactions:

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interest in private property, its demand constitutes a taking for which just compensation is due. *See*, *e.g.*, *Horne*, 135 S. Ct. at 2428 (order demanding surrender of raisin crop as a condition of selling remaining raisins constituted a taking); *Koontz*, 570 U.S. at 614-15 (a condition demanding money in lieu of a land dedication is subject to the same constitutional protections as a demand for land); *Brown*, 538 U.S. at 235 (applying per se rule to a taking of interest from a legal trust account).

> It is not clear why the existence of a taking should turn on the type of government entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18 (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Justice Thomas further noted that the legislative exactions question warrants review because it raises a substantial question of federal constitutional law. *Id.* at 1118.

Justice Thomas reaffirmed that position in his concurring opinion in support of the Court's denial of certiorari in *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. at 928 (Thomas, J. concurring in denial of certiorari). There, he wrote that the "lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one" for at least two decades. *Id.* at 928. Once again, he expressed "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'" *Id.* (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117-18). Justice Thomas further noted that the Court should resolve this issue as soon as possible:

> Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Id.; *see also Koontz*, 570 U.S. at 628 (Kagan, J., dissenting) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.").

The Maryland court's decision to exempt legislatively mandated exactions from heightened scrutiny warrants review because it implicates all of the legal and policy concerns discussed by Justices O'Connor, Thomas, and Kagan.

II

THE MARYLAND COURT'S REFUSAL TO APPLY NOLLAN AND DOLAN SCRUTINY TO LEGISLATIVE EXACTIONS UNDERMINES THE FUNDAMENTAL POLICY OF THE TAKINGS CLAUSE

Review is also warranted because the Maryland rule threatens to undermine the principle that "public burdens ... should be borne by the public as a whole" and cannot be shifted onto individual property owners. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This fundamental principle of the Takings Clause can only be enforced if the lower courts faithfully apply the nexus and proportionality rules to

all exactions, whether they originate in the legislative branch or any other branch of the government.

Take this case for example. The stated purpose of the County's impact fee ordinance is to "shift" the costs of school, traffic, and public safety infrastructure from the general public onto new development. Pet. App. C. at 6 (citing Paul A. Tiburzi, *Impact Fees in Maryland*, 17 U. Balt. L. Rev. 502 (1988)). The County justified this burden shifting ordinance by concluding that new development strains existing facilities. *Id*. If that is true, then the County should be able to measure the impact of a new single-family home on capacity within the school district and limit its impact fee accordingly. *See Dolan*, 512 U.S. at 384 (quoting *Armstrong*, 364 U.S. at 49). As discussed above, this type of analysis is routinely performed in those jurisdictions that hold legislative exactions subject to *Nollan*, *Dolan*, and *Koontz*.

A rule that shields legislative exactions from the nexus and proportionality tests frustrates the Takings Clause's anti-burden-shifting principle. Typically, courts will defer to legislative decisions because the democratic process operates as a check on excessive regulation. But that justification does not apply here. When the government places public costs on a small number of people, the democratic process, which is majoritarian in nature, works as an endorsement, not a check, on decisions that improperly shift public burdens. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause … protects against this majoritarian tyranny … by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits

inure."). In that circumstance, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004). Thus, deferring to the democratic process will do nothing to ensure that legislation does not shift public burdens onto individuals via exactions.

When the government is not required to demonstrate a connection between an exaction and project impacts, and where there is no meaningful democratic check on its actions, there is no limit to the amount of money or property that the government can demand as a permit condition, and there is no end to the types of social problems that the government can burden an individual with. The Maryland court's decision operates as an exception that effectively swallows the rules and policy this Court set out in *Nollan*, *Dolan*, and *Koontz*. This Court should not allow such a troubling decision to stand unreviewed.

III

THERE IS A SPLIT OF AUTHORITY AMONG STATE AND THE LOWER FEDERAL COURTS ABOUT THE NOLLAN AND DOLAN STANDARDS' APPLICATION TO EXACTIONS MANDATED BY LEGISLATION

Courts across the country are split over the question of whether legislatively imposed permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (recognizing a nationwide split of authority);

California Bldg. Indus. Ass'n, 136 S. Ct. at 928 (division has been deepening for over twenty years). The Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *Town of Flower Mound*, 135 S.W.3d at 641; *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1994); *Trimen Development Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994).

On the other hand, the Supreme Courts of Alabama, Alaska, Arizona, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions. *See*, *e.g.*, *Alto Eldorado Partners v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 102-04 (Cal. 2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

Meanwhile, the Ninth Circuit is internally conflicted on this question. *See Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); *Garneau v. City of Seattle*, 147 F.3d 802, 813-15, 819-20 (9th Cir. 1998) (plurality opinion, the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions); *see also Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083, n.4 (N.D. Cal. 2014) (*Koontz* undermines the reasoning for holding legislative exactions exempt from scrutiny under *Nollan* and *Dolan*).

This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification. This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan*, *Dolan*, and *Koontz* because, it presents the issue as a pure question of law.

CONCLUSION

The petition for writ of certiorari should be granted.

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