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.)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS JAMES KNIGHT AND JASON MAYES

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Plaintiffs-Appellants James Knight and Jason Mayes ("Plaintiffs") file the following brief in reply to Metropolitan Government of Nashville and Davidson County ("Metro"). Metro's sidewalk ordinance is not a generally applicable land use regulation governed by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), but an unconstitutional condition governed by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 372 (1994), and *Koontz v. St. John's River Water Management District*, 570 U.S. 595 (2013). For purposes of applying *Nollan*, *Dolan*, and *Koontz*, Supreme Court and Sixth Circuit precedent shows that it does not matter which branch of government has effected a taking. Finally, restitution is the appropriate remedy when the government takes money in exchange for a development permit. But when nothing has been physically taken due to a property owner's refusal to pay, injunctive relief is appropriate.

I. Metro's sidewalk ordinance is not a land use regulation but an unconstitutional permit condition.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. These twelve words are "indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). Indeed, the preservation of property rights through the Takings Clause is essential because it

"empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Id*. (quoting *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017)). The Takings Clause serves as an important check on governmental abuse of power by ensuring that the government cannot seize private property for public use unless it pays a landowner just compensation.

An unconstitutional taking can occur in three ways. First, it occurs when the government physically takes possession of property, known as a *per se* physical taking. *Id*.; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Second, it occurs when the government imposes regulations that go "too far" to "restrict an owner's ability to use his own property." *Cedar Point*, 141 S. Ct. at 2071, 2078; *accord Lingle*, 544 U.S. at 537-38. Third, it occurs when the government "require[s] property owners to cede a right of access as a condition of receiving certain benefits[.]" *Cedar Point*, 141 S. Ct. at 2079; *accord Lingle*, 544 U.S. at 538. Typically, under this third category, the government withholds a development permit until a property owner dedicates a portion of his or her property for public use. *See Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999).

Metro's position confuses the difference between regulatory takings and the "special context" of permit conditions. *See Lingle*, 544 U.S. at 538. Not every ordinance is a land use regulation subject to *Penn Central*. *See Cedar Point*, 141 S. Ct. at 2072 (finding that labeling every legislative land use restriction a regulatory

taking "can mislead" because when the government relies on a regulation to physically take property, for example, the *per se* physical taking standard applies and "*Penn Central* has no place"). Land use regulations govern *how* landowners use their property by limiting features like density, height, width, and other characteristics that may create a nuisance or jeopardize citizen health and safety. *See id*. at 2079 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992)). Such regulations derive directly from the traditional police power granted to municipalities. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

On the other hand, permit conditions—also called exactions—are specifically defined as "land-use decisions conditioning approval of development on the dedication of property to public use." *Del Monte Dunes*, 526 U.S. at 702. Permit conditions do not merely regulate how a landowner *uses* his or her property; they deprive a landowner of his or her property outright. They are "so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 547; *see also Koontz*, 570 U.S. at 614 ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent.") (quoting

Brown v. Legal Found. of Wash., 538 U.S. 216, 235 (2003)).[1] In this way, unconstitutional permit conditions are a total perversion of the traditional police power.

The Supreme Court made the distinction between regulatory takings and permit conditions clear in *Nollan* when it dispelled the dissent's contention that requiring an easement along a strip of private property in exchange for a building permit was a "mere restriction on its use." 483 U.S. at 831. To call the permit condition a mere land use restriction, rather than a taking, "is to use words in a manner that deprives them of all their ordinary meaning." *Id*. As the Court clarified in *Nollan*, then in *Dolan* and *Koontz*, when the government requires landowners to dedicate land for public use, it deprives the owner of his or her constitutional rights in at least two ways. First, it deprives the owner of the right to exclude others from his or her property, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id*. at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)); *Dolan*, 512 U.S. at 384. Second, it burdens property ownership by forcing a property owner to "transfer an interest in property . . . to the government." *Koontz*, 570 U.S. at 613. Metro does both through

[1] The Supreme Court recently even described the permit condition in *Nollan*—an easement—as a type of physical taking. *See Cedar Point*, 141 S. Ct. at 2073 ("We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*.").

its sidewalk ordinance, which requires property owners to convey real property or money to the government and to set aside easements for public use.

"A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Id*. at 612. If Metro were to knock on Plaintiffs' doors tomorrow to notify Plaintiffs it was installing sidewalks on their properties, or to demand that Plaintiffs hand over money to install sidewalks down the street, Metro would no doubt be engaged in a *per se* physical taking. *See id*.; *Nollan*, 483 U.S. at 831. Merely working the sidewalk installation and dedication requirements into the permitting process does not change the injury; Metro is still appropriating Plaintiffs' property for public use without just compensation. In this way, unconstitutional conditions are more like *per se* physical takings than regulatory takings. Simply codifying the permit condition into a law does not automatically render it a land use restriction subject to *Penn Central*. *Cedar Point*, 141 S. Ct. at 2072.[2]

[2] In a footnote, Metro also tries to resurrect its argument that this Court should apply the "reasonable relationship" test. (Br. of Def.-Appellee, Doc. 43, Page ID # 39 n.8.) That test has never had any solid footing in federal takings jurisprudence. (*See* Mem. Op., R. 40, Page ID # 646.) While Metro has made its disagreements with the Supreme Court known (*see id*., Page ID # 42 (calling the unconstitutional conditions doctrine "an unwieldy tool for takings cases"); *see also* Def.'s Mem., R. 22, Page ID # 187 n.4 (calling *Koontz* "not consistent with Supreme Court precedent" and citing authority for it being "The Very Worst Takings Decision Ever")), the district court was correct to reject this test. (Mem. Op., R. 40, Page ID ## 646-47.)

II. The unconstitutional conditions doctrine, set forth in *Nollan*, *Dolan*, and *Koontz*, applies to legislative conditions.

Whether Metro imposes the sidewalk condition through administrative action or legislative ordinance, the constitutional injury is all the same to Plaintiffs. (*See* Br. for Pacific Legal Foundation, et al., as Amici Curiae Supporting Pls.-Appellants, Doc. 34, Page ID # 29.) The purpose of the unconstitutional conditions doctrine is to curb abuses of the police power, no matter what branch of government initiates the abuse. *See Koontz*, 570 U.S. at 604.

A. The unconstitutional conditions doctrine prevents the government from accomplishing indirectly what it cannot do outright.

Plaintiffs do not seek to rehash the long and settled history of the unconstitutional conditions doctrine. (*See* Br. of Pls.-Appellants, Doc. 21, Page ID ## 30-36; Br. for The Buckeye Institute as Amicus Curiae Supporting Pls.-Appellants, Doc. 32, Page ID ## 7-17.) It simply bears repeating that this Court and the Supreme Court have applied the doctrine to adjudicate claims against legislative and executive branches of government when those branches condition a benefit upon the agreement to give up a constitutional right. *See, e.g.*, *Frost & Frost Trucking Co. v. R.R. Comm'n. of Cal.*, 271 U.S. 583 (1926) (Fourteenth Amendment Due Process); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (First Amendment); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250 (1974) (Fourteenth Amendment Equal Protection); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (Fourth Amendment);

Planned Parenthood of Greater Ohio v. Hodges, 917 F.3d 908 (6th Cir. 2019) (Fourteenth Amendment Due Process); *Sutton v. Parker*, No. 3:19-CV-00005, 2019 U.S. Dist. LEXIS 151382 (M.D. Tenn. Sept. 5, 2019), *aff'd*, 800 Fed. Appx. 397 (6th Cir. 2020) (Eighth Amendment).

As the Supreme Court has consistently found, Fifth Amendment property rights are no different from other constitutional rights. *See Dolan*, 512 U.S. at 392 (rejecting dissent's comparison of a permit condition to a business regulation because the Takings Clause is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and applying the unconstitutional conditions doctrine to find a taking); *Koontz*, 570 U.S. at 604 ("*Nollan* and *Dolan* 'involve a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits.") (quoting *Lingle*, 544 U.S. at 547).

Likewise, this Court has already applied *Nollan*, *Dolan*, and *Koontz* to a legislative permit condition. *F.P. Dev., LLC v. Charter Twp. Of Canton*, 16 F.4th 198 (6th Cir. 2021). Although this Court left the "interesting question" about the artificial adjudicative/legislative distinction for another day, *id*. at 206, it had no trouble applying *Nollan*/*Dolan* to invalidate a legislative condition that automatically applied to certain parcels within the city, in a manner almost identical to Metro's sidewalk ordinance. *Id*. at 207.

Metro is doing everything in its power to take Plaintiffs' property without regard for the Constitution and its demand for just compensation. Through the sidewalk ordinance, Metro strong arms Plaintiffs and similarly situated property owners into dedicating easements and installing sidewalks or handing money to the government in exchange for a permit to build single-family homes on their own land. This is not a restriction on how they are using their properties, especially because their land is already zoned for the kinds of homes they have built or want to build. This is an "out-and-out plan of extortion." *Nollan*, 483 U.S. at 837.

B. Supreme Court cases establish that the unconstitutional conditions doctrine applies to legislatively imposed permit conditions.

Metro fails to support its conclusory statement that "[t]he Supreme Court's choice of the unconstitutional conditions doctrine to support *Nollan*/*Dolan* suggests that the test should only apply to administrative exactions." (*See* Br. of Def.-Appellee, Doc. 43, Page ID ## 42-43.) It offers no reason why the unconstitutional conditions doctrine does not include takings effected through legislation.[3] And it mischaracterizes the Supreme Court's statements about the *Nollan*/*Dolan* test in *Lingle*. There, the Court found, "Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions[.]" *Lingle*, 544 U.S. at 546.

[3] In fact, the conditions in *Nollan*, *Dolan*, and *Koontz* were each considered generally applicable regulations; that did not stop the Supreme Court from striking them down. (*See* Br. for Pacific Legal Foundation, et al., as Amici Curiae Supporting Pls.-Appellants, Doc. 34, Page ID ## 13-18.)

Although Metro concludes that this means *Nollan* and *Dolan* can *only* apply to administratively imposed conditions, the Supreme Court was merely describing the types of conditions at issue in those cases.

Metro reaches the same conclusion about *Dolan*, claiming that the Supreme Court "mapped out a fork in the road" for litigants by explaining that the standard of review for an unconstitutional permit condition "depends on whether the regulation is administrative or legislative." (Br. of Def.-Appellee, Doc. 43, Page ID # 28.) But like in *Lingle*, the Court in *Dolan* did no such thing; it was merely describing the type of condition at issue in that case. *See Dolan*, 512 U.S. at 384. It never mentioned a difference between legislative and adjudicative decisions. More importantly, it repudiated Metro's basis for claiming the regulatory takings test applies when it distinctly contrasted permit conditions—which require landowners to hand property over to the government, like Metro's sidewalk ordinance does here—from land use restrictions, like zoning ordinances, that only limit how one uses property. *Id*.

When it comes to takings effected through legislation, the Supreme Court has expressed that it is not about "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." *Cedar Point*, 141 S. Ct. at 2072 (emphasis added); *accord Stop the Beach*

Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715 (2010) ("Condemnation by eminent domain . . . is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant.") (emphasis in original).[4]

The Supreme Court's reasoning in *Cedar Point* should be dispositive. When assessing a challenge to a regulation that allowed members of the public to enter private property, the Court emphasized the statutory origin of the regulation before finding, "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." 141 S. Ct. at 2072. And although *Cedar Point* involved a *per se* physical taking rather than a permit condition, the Court explicitly compared permit conditions—like the easement requirement in *Nollan*—to *per se* physical takings. *Id*. at 2073 ("We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan v. California Coastal Commission*.").

The Court's comparison in *Cedar Point* fully aligns with its past comparisons. *See Lingle*, 544 U.S. at 547 ("*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per*

[4] Metro omits language from the plurality opinion in *Stop the Beach Renourishment* to suggest the exact opposite of what the Court said. (*Compare* Br. of Def.-Appellee, Doc. 43, Page ID # 45 n.10, *with Stop the Beach Renourishment*, 560 U.S. at 715.)

se physical takings."); *Nollan*, 483 U.S. at 831-32 ("We think a 'permanent physical occupation' has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."); *Koontz*, 570 U.S. at 614 ("[W]hen the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis under the Court's precedent.") (quoting *Brown*, 538 U.S. at 235). Thus, the Supreme Court often compares land use conditions that require dedications of property and easements to physical takings, *not* to regulatory takings.[5] Because Metro's sidewalk ordinance requires Plaintiffs to set aside portions of their property and either install sidewalks or pay Metro an in-lieu fee, the ordinance is similar to a *per se* physical taking, not a regulatory taking.

And because of the Supreme Court's decision in *Cedar Point*, the Ninth Circuit repudiated its prior position that the *Nollan*/*Dolan* test only applied to

[5] Metro contends that because *Cedar Point* "did not address the question of law on which this case turns"—namely, whether legislatively imposed conditions are subject to *Nollan*, *Dolan*, and *Koontz*—the case is not binding. (Br. of Def.-Appellee, Doc. 43, Page ID # 47.) But Metro never explains what is wrong with the Court's reasoning, or why it does not resolve the question. Furthermore, Metro cites nothing from the Supreme Court—binding or otherwise—suggesting that the existence of a taking turns on which branch of government is doing the taking.

administrative conditions. *See Ballinger v. City of Oakland*, No. 19-16550, 2022 U.S. App. LEXIS 2862, at *19-21 (9th Cir. Feb. 1, 2022). By way of background, in 2020, landowners challenged a San Francisco ordinance requiring certain property owners to offer lifetime leases to tenants. *Pakdel v. City & Cnty. of San Francisco*, 952 F.3d 1157, 1160 (9th Cir. 2020). The property owners claimed that the ordinance was a regulatory taking, but in the alternative, they argued that the lease requirement was an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*. *Id.* at 1162 n.4. The Ninth Circuit rejected the unconstitutional conditions claim, finding that the legislation was a generally applicable land use ordinance. *Id*. (citing *McClung v. City of Sumner*, 548 F.3d 1219, 1227-29 (9th Cir. 2008) (refusing to apply *Nollan*/*Dolan* to a legislative permit condition)).

When the Supreme Court took up *Pakdel*, it remanded and invited the Ninth Circuit to consider whether the city ordinance imposed an unconstitutional condition. *Pakdel v. City & Cnty. of San Francisco*, 141 S. Ct. 2226, 2229 n.1 (2021). It explicitly invited the Ninth Circuit to reconsider its analysis "in light of" *Cedar Point*. *Id*. When the Ninth Circuit did so, it found that *Cedar Point* demanded the conclusion that there is no difference between unconstitutional conditions imposed administratively or legislatively. *Ballinger*, 2022 U.S. App. LEXIS 2862, at *21.[6] In

[6] Metro asserts that "the question of whether *Nollan*/*Dolan* applies to legislative land use regulations was not presented" in *Ballinger*. (Br. of Def.-Appellee, Doc. 43, Page ID # 48.) But the opposite is true: as the property owners stated on appeal, "The City

doing so, the Ninth Circuit repudiated *McClung*, which the district court relied on heavily in proceedings below. (Mem. Op., R. 40, Page ID ## 639, 642 n.8, 646.) And while Metro repeatedly cited Ninth Circuit precedent below, (Def.'s Mem., R. 22, Page ID ## 189, 201), it has noticeably stopped, leaving it with only *state* precedents to cite on a matter of *federal* law. (Br. of Def.-Appellee, Doc. 43, Page ID # 51 n.11.)[7]

C. Metro's sidewalk ordinance fails under *Nollan*, *Dolan*, and *Koontz*.

Applying *Nollan*, *Dolan*, and *Koontz* to legislatively imposed conditions is imminently practical considering the "two realities of the permitting process." *Koontz*, 570 U.S. at 604-05. Indeed, this Court has already applied it to a local

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will argue, and the district court held, that the *Nollan* and *Dolan* tests do not apply to a monetary exaction that emanates from legislation. . . . But that question has not been resolved in this Circuit. The Court should hold here that the *Nollan* and *Dolan* tests apply to any condition on property use that qualifies as an 'exaction,' regardless of whether it derives from legislation or executive agency action." Br. of Appellant, *Ballinger v. City of Oakland*, No. 19-16550, Doc. 7, Page ID # 11496154, (9th Cir. Nov. 12, 2019).

[7] In its most recent brief, Metro still cites *San Remo Hotel, L.P. v. San Francisco City and County*, a case predating *McClung* in which the Ninth Circuit found that *Nollan*/*Dolan* only applied to administrative conditions. (Br. of Def.-Appellee, Doc. 43, Page ID # 33 (citing *San Remo Hotel, L.P. v. San Francisco City & Cnty.* 364 F.3d 1088, 1097-98 (9th Cir. 2004).) In *Ballinger*, the Ninth Circuit cited *San Remo Hotel* alongside *McClung* when it acknowledged that "we have applied an exactions analysis only to generally applicable administrative, not legislative, action." *Ballinger*, 2022 U.S. App. LEXIS 2862, at *19. Then, the Ninth Circuit expressly repudiated its holding in *McClung*. *Id.* at *21. By repudiating *McClung*, the Ninth Circuit thus repudiated *San Remo Hotel*.

ordinance without any trouble. *See F.P. Dev.*, 16 F.4th at 207. The *Nollan*/*Dolan* test lessens the risk that the government will abuse the permitting process by pressuring private citizens 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); *Koontz*, 570 U.S. at 604-05. This reality fully embraces the history and purpose of the unconstitutional conditions doctrine; courts consistently apply the doctrine to protect individuals from being forced to give up their rights in exchange for government benefits. *See Koontz*, 570 U.S. at 604. At the same time, applying the *Nollan*/*Dolan* test to legislative conditions still accommodates the government's interest in land use regulation. *Id*. at 605. The nexus and proportionality test allows the government to offset the impact of a landowner's proposed land use to cut down on nuisance and protect citizen health, safety, and welfare. *Id*.

Metro, however, does not even try to prove nexus and proportionality.[8] It appears to concede that under *Nollan*/*Dolan*, it loses. The sidewalk ordinance is exactly the type of harm the unconstitutional conditions doctrine prevents: through

[8] Metro refers in passing to the sidewalk ordinance's role in mitigating "man-made burdens that Appellants would place on public infrastructure," without any evidence, or even any examples, of what those burdens are. (*See* Br. of Def.-Appellee, Doc. 43, Page ID # 36.) This is a far cry from the cause-and-effect relationship and individualized assessment required by the nexus and proportionality tests, respectively. (*See* Br. of Pls.-Appellants, Doc. 21, Page ID ## 36-44.) Metro has conceded that it cannot show that its permit conditions are designed to make Plaintiffs "bear the full costs of their proposal." *Koontz*, 570 U.S. at 606.

the ordinance, Metro withholds a government benefit (a development permit) in exchange for Plaintiffs' agreement to set aside easements and either install sidewalks themselves or pay in-lieu fees. Metro cannot show that this condition serves an essential nexus or is roughly proportional to the impact of Plaintiffs' proposed land uses because it has not shown any cause-and-effect link between the proposed uses and the sidewalk requirement. The *only* support Metro offered in the district court was in the recital clause to the ordinance, which includes general statements about improving traffic flow and reducing the number of pedestrians killed on Nashville's streets. *See* Metro. Code § 17.20.120. These problems all predate Plaintiffs' permit applications. Metro conducted no individualized assessment of how Plaintiffs' new homes would impact traffic, safety, welfare, the environment, or any other remotely related factor. (Mem. Op., R. 40, Page ID # 647.) It is clear that Metro is simply trying to remedy a longstanding infrastructure problem that it cannot afford to fix. (*See* Br. for Home Builders Association of Middle Tennessee as Amicus Curiae Supporting Pls.-Appellants, Doc. 23-1, Page ID ## 2-5.) Thus, as Metro seems to accept, the sidewalk ordinance is an unconstitutional condition that fails *Nollan*, *Dolan*, and *Koontz*.[9]

[9] Rather than address the merits of Plaintiffs' nexus and proportionality claims, Metro broadly writes off its unconstitutional legislation by citing the democratic process. But the Bill of Rights and the judicial branch deter the very harm present here; when government actors violate constitutional rights, it is the role and duty of courts to check that abuse. Metro cannot merely shrug its shoulders and suggest that

III. Plaintiffs have sufficiently shown that both restitution and injunctive relief are needed to stop Metro's unconstitutional permit scheme.

Plaintiffs preserved restitution on appeal as a remedy, despite Metro's unsupported argument to the contrary. First, the district court did not rule against restitution as a remedy. Rather, it held that *Nollan*/*Dolan* was not the appropriate standard to apply to Plaintiffs' facial and as-applied takings claims. As a result, the district court did not reach Mr. Mayes's claim for restitution. (Mem. Op., R. 40, Page ID # 650 ("This claim is premised upon the assertion that, through the enforcement of the Sidewalk Ordinance, Metro acquired funds from Mayes through an unconstitutional exaction. . . . Because the court has found that Metro is entitled to summary judgment on the plaintiffs' takings claims, Mayes' unjust enrichment claim also fails, and Metro is entitled to summary judgment on this claim as well.").) Claims are preserved for appeal when they are "subsumed" by other claims. *See, e.g.*, *Rose v. State Farm Fire & Cas. Co.*, 766 F.3d 532, 540 (6th Cir. 2014) (finding that appellants preserved their bad faith claim on appeal because that claim depended

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Plaintiffs simply vote the government officials who violated their rights out of office next time. Moreover, even duly elected legislatures can abuse their authority through permit conditions. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004) ("[W]e think it 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."). And other courts have applied *Nollan*/*Dolan* to legislative conditions for decades without adversely impacting the proper role and function of legislatures. (Br. for Texas Public Policy Foundation as Amicus Curiae Supporting Pls.-Appellants, Doc. 22, Page ID ## 15-16.)

on whether a valid contract existed, and the district court's order that there was no valid contract "subsumed" the bad faith claim).

Second, even if the court below held that restitution was not a lawful remedy, Plaintiffs sufficiently preserved this claim on appeal. They devoted an entire section of their argument to explain why restitution and injunctive relief are appropriate remedies. (Br. of Pls.-Appellants, Doc. 21, Page ID ## 44-46); *accord United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006) (finding issue was not preserved when it was limited to one footnote and the argument was not presented either in the statement of issues or in the argument headings). Plaintiffs clearly spent "some effort to develop an argument." *Williamson v. Recovery Ltd. P'ship*, 731 F.3d 608, 621 (6th Cir. 2013). Moreover, even if Plaintiffs should have included an issue statement that the district court should have ruled differently on the appropriate remedy—which would have been impossible, considering the district court was essentially silent on the matter—this Court "retain[s] discretion not to waive arguments a party does not specifically include in its 'statement of issues.'" *Rose*, 766 F.3d at 540. Metro cannot claim it was prejudiced when the issue was fully briefed, both here and below.

It is also patently incorrect to say that "just compensation under the Fifth Amendment is for real property, not money." (Br. of Def.-Appellee, Doc. 43, Page ID # 44.) Metro cites the *dissent* in *Koontz* to support this proposition. (Id.) The

holding in *Koontz* made clear that the Fifth Amendment Takings Clause—including the Just Compensation Clause—applies equally to the seizure of real property and money. *Koontz*, 570 U.S. at 604. There, the Supreme Court found that "*Nollan* and *Dolan* 'involve a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment *right to just compensation* for property the government takes when owners apply for land-use permits." *Id*. It added later, "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*[,]" before extending the *Nollan*/*Dollan* test to monetary exactions. *Id*. at 60.

When the government takes property by a permit condition—whether physically or through in-lieu fees—the injury arises the minute the unconstitutional condition is imposed. *See id*. ("As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury."). *Nollan*, *Dolan*, and *Koontz* prevent the government from holding a permit hostage in exchange for a constitutional right. Despite Metro's focus on property values, this line of cases is unconcerned with whether a property's value increases or decreases; the demand for property itself is unconstitutional. This is particularly true when, as here, landowners bring a facial challenge. It is impossible—and

irrelevant—to calculate whether and to what extent an ordinance like Metro's adds value to properties throughout the city when the entire ordinance is unconstitutional on its face.

Nollan, *Dolan*, and *Koontz* also do not distinguish between the agreement to comply with an unconstitutional condition or the refusal to do so. *See Koontz*, 570 U.S. at 620 ("[W]hen the government denies a permit because an owner has refused to accede to that same demand, nothing has actually been taken. The owner is entitled to have the improper condition removed; and he may be entitled to a monetary remedy created by state law for imposing such a condition; but he cannot be entitled to constitutional compensation for a taking of property.").

Plaintiffs' injuries thus arose the minute Metro enacted the sidewalk ordinance and imposed it against them. The remedy stems from the injury, not from any benefits to the property owner. The only remedy that can apply when the government unconstitutionally takes money in exchange for a permit, like Metro did to Mr. Mayes, is restitution of the fees it took. (Br. of Pls.-Appellants, Doc. 21, Page ID ## 44-46.) Metro was unjustly enriched when it took Mr. Mayes's money without a constitutional basis to do so. Courts in this Circuit recognize unjust enrichment claims as a matter of state law, as well as restitution as a matter of federal law. (Id.) Metro is incorrect that Plaintiffs presented no federal or state authority to support Mr. Mayes's claim for restitution. (*See* id., Page ID # 46 (citing *Pund v. City of*

Bedford, 339 F. Supp. 3d 701, 716 (N.D. Ohio 2018); *Yannoti v. City of Ann Arbor*, No. 19-11189, 2019 U.S. Dist. LEXIS 185773, at *10 (E.D. Mich. Oct. 28, 2019); *Chase Manhattan Bank, N.A. v. CVE, Inc.*, 206 F. Supp. 2d 900, 909 (M.D. Tenn. 2002); *Browder v. Hite*, 602 S.W.2d 489, 491 (Tenn. Ct. App. 1980).) And as explained above, it does not matter whether Mr. Mayes's property value changed.[10]

Finally, the only remedy that can apply when the government holds a permit hostage until a property owner agrees to the government's extortionate demand, like Metro is doing to Mr. Knight, is injunctive relief against the unconstitutional condition. (Id.) Again, Metro is incorrect to assert that an injunction is not the proper remedy to an unconstitutional condition. (*See* id. (citing *E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998); *Student Loan Marketing Ass'n. v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997).) Metro has forced Mr. Knight to forgo building his new home until the city rescinds the unconstitutional condition. As a result, Mr. Knight faces an imminent injury. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) (finding plaintiffs must demonstrate a future harm that is "certainly impending"). It does not matter whether Mr. Knight has actually paid the fee: "The owner is entitled to have the improper condition removed." *Koontz*, 570 U.S. at 620.

[10] Even if Mr. Mayes's property value increased, he is still missing the $8,883.21 he paid to Metro. (Br. of Pls.-Appellants, Doc. 21, Page ID # 45.) Whatever his current property is worth, it is worth that amount *plus* $8,883.21. That is because sidewalks are a public infrastructure cost that must be borne by the public as a whole, not by any one individual.

CONCLUSION

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

April 29, 2022.

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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 5348 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).

April 29, 2022.

/s/ Celia H. O'Leary
Celia Howard O'Leary

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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.

April 29, 2022.

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