No. 22-1074

In The
Supreme Court of the United States

GEORGE SHEETZ,

Petitioner,

v.

COUNTY OF EL DORADO,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

AMICUS CURIAE BRIEF OF TEXAS PUBLIC POLICY FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., MANHATTAN INSTITUTE, SOUTHEASTERN LEGAL FOUNDATION, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHANCE WELDON
**Counsel of Record*
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
cweldon@texaspolicy.com

[Additional Counsel Listed On Signature Page]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Is a permit exaction exempt from the unconstitutional conditions doctrine as applied in *Nollan* and *Dolan* simply because it is authorized by legislation?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. The Plain Text of the Takings Clause Prohibits Certain Restrictions on Property, Regardless of Which Branch of Government is Involved	7
II. This Court's Exaction Jurisprudence Flows From the Unique Nature of Property Rights, Not Special Concerns About Coercion in the Adjudicative Process	9
III. The Experience in Texas Courts Over the Last Forty Years Shows that there is No Ill Effect from Providing Judicial Review of Legislative Exactions	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES:

Army Corps v. Eng'rs v. Hawkes Co.,
136 S. Ct. 1807 (2016) 3

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673 (1930) 8

Cal. Bldg. Indus. Ass'n v. City of San Jose,
577 U.S. 1179, 136 S. Ct. 928 (2016).....18

Cedar Point Nursery v. Hassid,
141 S. Ct. 2063 (2021) 3

Center for Biological Diversity v. Haaland,
58 F.4th 412 (9th Cir. 2023) 4

City of Carrollton v. RIHR Inc.,
308 S.W.3d 444 (Tex. App. Dallas 2010) 16

City of Dallas v. 6101 Mockingbird, LLC,
No. 05-18-00328-CV, 2019 Tex. App.
LEXIS 6270 (Tex. App. Dallas 2019) 16

Coll. Station v. Turtle Rock Corp.,
680 S.W.2d 802 (Tex. 1984) 7, 14–16

Consol. Towne E. Holdings, LLC v. City of Laredo,
No. 04-22-00130-CV, 2023 Tex. App.
LEXIS 3499 (Tex. App. May 24, 2023).....16

District of Columbia v. Heller,
554 U.S. 570 (2008) 7

Dolan v. City of Tigard,
512 U.S. 374, 114 S. Ct. 2309,
129 L. Ed. 2d (1994)..... 3, 5–7, 9, 10, 12–16

TABLE OF AUTHORITIES—Continued

Page

Ex parte Virginia,
100 U.S. 339 (1880) 9

F.P. Dev., LLC v. Charter Twp. of Canton,
16 F.4th 198 (6th Cir. 2021) 1, 13

Hearts Bluff Game Ranch v. State,
381 S.W.3d 468 (Tex. 2012) 16

Hutcheson v. Storrie,
92 Tex. 685, 51 S.W. 848 (1899).....5

Knight v. Metro. Gov't of Nashville & Davidson Cty.,
No. 21-6179, 2023 U.S. App. LEXIS 11453
(6th Cir. May 10, 2023).....6

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595, 133 S. Ct. 2586 (2013).....5, 6, 9–12,
.....14, 16

Lambert v. City & Cty. of S.F.,
529 U.S. 1045, 120 S. Ct. 1549 (2000).....12

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528, 125 S. Ct. 2074 (2005).....9

Loretto v. Teleprompter Manhattan Catv Corp.,
458 U.S. 419, 102 S. Ct. 3164 (1982).....10

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992).....3, 10

McMillan v. Northwest Harris County Mun. Util. Dist. No. 24,
988 S.W.2d 337 (Tex. App. Houston 1999).....16

Mira Mar Dev. Corp. v. City of Coppell,
421 S.W.3d 74 (Tex. App. Dallas 2013) 16

TABLE OF AUTHORITIES—Continued

Page

Nollan v. California Coastal Comm'n,
483 U.S. 825, 107 S. Ct. 3141,
97 L. Ed. 2d 677 (1987) 5–7, 9, 10, 12–16

Norwood v. Baker,
172 U.S. 269, 19 S. Ct. 187 (1898) 4–6, 13

Parking Ass'n v. City of Atlanta,
515 U.S. 1116, 115 S. Ct. 2268 (1995) 13

Polecat Hill, LLC v. City of Longview,
648 S.W.3d 315 (Tex. App. Texarkana 2021) 16

Rischon Dev. Corp. v. City of Keller,
242 S.W.3d 161 (Tex. App. Fort Worth 2007) 16

Sefzik v. City of McKinney,
198 S.W.3d 884 (Tex. App. Dallas 2006) 16

Sheffield Dev. Co. v. City of Glenn Heights,
140 S.W.3d 660 (Tex. 2004) 16

Shelley v. Kraemer,
334 U.S. 1 (1948) 9

Solenex v. Haaland,
No. 13-00993, 2022 WL 4119776
(D.D.C. Sep. 9, 2022) 4

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,
560 U.S. 702 (2010) 8, 9

Stupack-Thrall v. Glickman,
226 F.3d 467 (6th Cir. 2000) 4

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 3

TABLE OF AUTHORITIES—Continued

Page

Town of Flower Mound v. Rembert Enters.,
369 S.W.3d 465 (Tex. App. Fort Worth 2012).....16

Town of Flower Mound v. Stafford Estates Ltd. P'ship,
135 S.W.3d 620 (Tex. 2004).....6, 7, 15–17

Tyler v. Hennepin Cty.,
598 U.S. ___ (2023).....11

United States v. Stanley,
109 U.S. 3 (1883).....9

Virginia v. Rives,
100 U.S. 313 (1880).....9

Yates v. Milwaukee,
77 U.S. (10 Wall.) 497 (1870).....11

UNITED STATES CONSTITUTION:

U.S. Const. amend. V.....7, 8

U.S. Const. amend. XIV, § 1.....8, 9

OTHER AUTHORITIES:

1 ANNALS OF CONG. 457
(Joseph Gales ed., 1790).....18

U.S. Census Bureau,
2020 Apportionment Results (2021);
https://tinyurl.com/585wadkv.....17

INTEREST OF *AMICI CURIAE*[1]

Texas Public Policy Foundation

The Texas Public Policy Foundation ("TPPF") is a nonprofit, nonpartisan research foundation dedicated to promoting and defending liberty, personal responsibility, and free enterprise throughout Texas and the nation. For decades, TPPF has worked to advance these goals through research, policy advocacy, and impact litigation.

In pursuit of its broad mission, TPPF has represented property owners subject to unconstitutional permit requirements across the country. For instance, TPPF recently successfully represented F.P. Development in the Sixth Circuit in *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198 (6th Cir. 2021)—a case that struck down a legislative exaction as unconstitutional. Furthermore, TPPF is familiar with the legal and political landscape in Texas, which has allowed state courts to review legislative exactions for at least four decades.

---

[1] The parties were timely notified of the intention to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

National Federation of Independent Business Small Business Legal Center, Inc.

The National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

NFIB Legal Center takes interest in this case to continue its tradition of promoting the protection of property rights for small businesses and individuals.

Manhattan Institute

The Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship and filed briefs supporting economic freedom and property rights against government overreach.

Southeastern Legal Foundation

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national nonprofit, public-interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court.

For 40 years, SLF has advocated for the protection of private property interests from unconstitutional governmental takings. SLF regularly represents property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs in support of property owners before the Supreme Court. *See*, *e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Mountain States Legal Foundation

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and

limited and ethical government. Since its creation in 1977, MSLF attorneys have been active litigating on behalf of individuals and small businesses whose property rights have been violated by the government. *See*, *e.g.*, *Center for Biological Diversity v. Haaland*, 58 F.4th 412 (9th Cir. 2023) (counsel for plaintiff); *Solenex v. Haaland*, No. 13-00993, 2022 WL 4119776 (D.D.C. Sep. 9, 2022) (counsel for plaintiff); *Colorado v. McCracken*, No. 07CA977 (Colo. Sup. Ct. 2005) (counsel for defendants); *Stupak-Thrall v. Glickman*, 226 F.3d 467 (6th Cir. 2000) (counsel for plaintiff). MSLF has long represented the rights of property owners faced with onerous and arbitrary government regulation and brings that experience to this *amicus curiae* Brief in support of Appellant.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1898, this Court heard a challenge to a legislatively adopted road impact fee similar to the law at issue here. *Norwood v. Baker*, 172 U.S. 269, 279, 19 S. Ct. 187, 191 (1898). Under the challenged law, property owners abutting a road were required to pay assessments to offset the cost of expanding the road further. The property owners sued, claiming that these legislatively mandated impact fees were wholly unconnected to their actual benefit from the road and therefore amounted to little more than an attempt to exact a public benefit at private expense. In striking down this legislative scheme, this Court noted that an "exaction

from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking . . . " *Id*. A year later, the Texas Supreme Court followed suit, striking down a similar municipal ordinance. *Hutcheson v. Storrie*, 92 Tex. 685, 692, 51 S.W. 848, 850 (1899).

Over the next century, both Texas and federal courts would apply a similar principle to local demands for mitigation in exchange for permits to develop private property. Looking in part to Texas precedent involving legislatively imposed mitigation requirements, this Court eventually developed what has become known as the *Nollan/Dolan* test—named for this Court's cases from which it is derived. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599, 133 S. Ct. 2586, 2591 (2013) (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)). That test (discussed more below) has a simple purpose—to determine whether the mitigation demanded for a land-use purpose is actually mitigation for externalities created by the proposed property use, or merely an attempt to use the permitting process to exact public benefits from property owners that the government would otherwise have to pay for. *See*, *id*.

Unfortunately, because *Nollan* and *Dolan* arguably involved administratively imposed exactions, and because this Court has sometimes included *dicta* in its opinions about the coercive nature of the administrative

process, a split has developed between state and federal courts as to whether the *Nollan/Dolan* test (which, ironically, was derived from legislative exaction cases) can be applied to legislative exactions. *Knight v. Metro. Gov't of Nashville & Davidson Cty.*, No. 21-6179, 2023 U.S. App. LEXIS 11453, at *27–28 (6th Cir. May 10, 2023) (collecting cases).

But, as explained below, neither the text of the Takings Clause, nor the structure and purpose of the *Nollan/Dolan* test, support this proposed distinction between legislative and administrative exactions. Instead, the distinction rests entirely on policy concerns. Some members of this Court have expressed concerns that applying *Nollan/Dolan* review to legislatively imposed exactions could lead to a flood of challenges, denying "the flexibility of state and local governments to take the most routine actions to enhance their communities." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 626, 133 S. Ct. 2586, 2607 (2013) (Kagan, J., dissenting).

But as was true when this Court decided *Nollan* and *Dolan*, the experience of Texas courts on this issue can be instructive. *See*, *id.* at 607 (citing *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 642 (Tex. 2004)). Drawing a straight line from this Court's decision in *Norwood*, Texas courts have never distinguished between legislative and administrative exactions. *Flower Mound*, 135 S.W.3d at 642 (tracing the history of Texas legislative exactions cases to *Norwood*). And since at least 1984, Texas courts have made

this approach explicit. *See*, *id*. (quoting *Coll. Station v. Turtle Rock Corp*., 680 S.W.2d 802, 803 (Tex. 1984)).

If the concerns raised by jurists about the application of the *Nollan/Dolan* test to legislative exactions were valid, we would certainly see evidence of those ill effects in Texas. But Texas courts have not seen a flood of challenges to run-of-the-mill fees. Nor have Texas cities lost the ability to function. To the contrary, Texas cities are some of the fastest growing and most desirable locations in the nation. By contrast, California—which does not provide *Nollan/Dolan* review for administrative exactions—has seen skyrocketing housing costs and a decline in the quality of life of its cities.

This Court should therefore take this opportunity to finally clarify that the *Nollan/Dolan* test for unconstitutional conditions equally applies to legislatively authorized exactions.

ARGUMENT

I. THE PLAIN TEXT OF THE TAKINGS CLAUSE PROHIBITS CERTAIN RESTRICTIONS ON PROPERTY, REGARDLESS OF WHICH BRANCH OF GOVERNMENT IS INVOLVED.

In applying constitutional provisions in a given case, courts begin with the text. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation." U.S.

Const. amend. V. This Court has been clear that "[t]he Takings Clause (unlike, for instance, the Ex Post Facto Clauses, *see* Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713–14 (2010) (plurality opinion of Scalia, J.). Indeed "[t]here is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle." *Id*. at 714.

The text of the Fourteenth Amendment, which incorporated the Takings Clause against the states, likewise provides no basis for distinguishing between which branch commits a taking. It provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, § 1. As this Court made clear, "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930). This is in accord with the "earliest cases involving the construction of the terms of the Fourteenth Amendment" which made clear that its prohibitions applied equally to actions taken by

legislative or executive authorities. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (quoting the *United States v. Stanley*, 109 U.S. 3, 11, 17 (1883); *Ex parte Virginia*, 100 U.S. 339, 347 (1880); *Virginia v. Rives*, 100 U.S. 313, 318 (1880)).

Put simply, the Takings Clause, as applied to the states via the Fourteenth Amendment, "bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking." *Stop the Beach Renourishment, Inc.*, 560 U.S. at 715 (plurality opinion of Scalia, J.). Is there any textual predicate for the government's alleged distinction between takings conducted by the executive branch, and those enacted legislatively? No.

II. THIS COURT'S EXACTION JURISPRUDENCE FLOWS FROM THE UNIQUE NATURE OF PROPERTY RIGHTS, NOT SPECIAL CONCERNS ABOUT COERCION IN THE ADJUDICATIVE PROCESS.

The common response to this plain text approach is that the *Nollan/Dolan* test is something unique. As this Court has described it, the *Nollan/Dolan* test is a "special application" of the unconstitutional conditions test as applied to the Takings Clause. *Koontz*, 570 U.S. at 604 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547, 125 S. Ct. 2074, 2087 (2005)).

But this Court's use of the term "special application" was an attempt to explain why the test applied in *Nollan* and *Dolan* looks somewhat different than other

unconstitutional conditions cases—namely, the nature of property rights—not an attempt to create some new form of unconstitutional conditions test that would apply solely in the administrative context. *See Koontz*, 570 U.S. at 605–06 (explaining the origin of the *Nollan/Dolan* test)

The unconstitutional conditions test is based on the principle that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz*, 570 U.S. 595, 604. So, the first question in the analysis will be whether the thing you are being asked to surrender is a right. For example, in the free speech context, the first question will be whether the thing you are being asked to refrain from is actually "speech" protected by the First Amendment.

The *Nollan/Dolan* test takes its contours from the nature of the right at issue—*i.e.*, property. The ownership of property traditionally includes the right to "to possess, use and dispose of it." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 435, 102 S. Ct. 3164, 3176 (1982). However, not every *use* of property is a property *right* and therefore not every condition on property use is an exaction. For example, it is well established that property owners do not have the right to use their property in ways that cause a nuisance for their neighbors. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992). As such, governments can require that property owners mitigate for harms or "negative externalities" created by the owners' use of their property. *Koontz*, 570 U.S. at 605. For example, if paving a parking lot on your property causes an adjacent

property to flood, the local government can condition the grant of a parking lot permit on you building drainage culverts to abate this flooding concern. *See*, *id*. This sort of mitigation requirement does not impair property rights, or implicate the Takings Clause, because the right to own property does not include the right to use it in ways that cause a nuisance for your neighbors.

At the same time, a traditional use of property cannot be converted into a nuisance just because the government says so.

Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 505 (1870); *see also Tyler v. Hennepin Cty.*, 598 U.S. at *5 (May 25, 2023). And history teaches that governments can abuse permitting requirements by demanding substantially more in mitigation for a permit than what is necessary to mitigate for the externalities created by the proposed property use. *Koontz*, 570 U.S. at 604–05. To stick with the earlier example, a city could not require a property owner to build drainage culverts for the entire city as "mitigation" for paving a single square foot. In those circumstances, the government is no longer demanding mitigation at all, but instead attempting to exact a public benefit from the property owner without compensation by holding the right to use his property hostage. *See*, *id*. If allowed to go forward, such demands would circumvent the Takings Clause by allowing governments to use the permitting process to extort public benefits from private property owners that it would otherwise have to pay for.

The *Nollan/Dolan* test is designed to address these "two realties" by ensuring that when a city demands mitigation for a use of property that what is demanded is *actually* mitigation and not just a demand for a public benefit at private expense. *Koontz*, 570 U.S. at 604–06.

It does so in three steps. First, the mitigation demanded must have an "essential nexus" to the harm the government seeks to mitigate. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Lambert v. City & Cty. of S.F.*, 529 U.S. 1045, 1046, 120 S. Ct. 1549, 1550 (2000) (Scalia, J., dissenting from denial of *certiorari*) ("[A] burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit, and must be roughly proportional to what is needed to eliminate that harm.") This ensures that the government is seeking to mitigate harm created by a use of property, and not simply using permitting requirements as pretext to discourage development or acquire something it would otherwise have to pay for. *Nollan*, 483 U.S. at 837.

Second, the mitigation must be "roughly proportional" to what is needed to eliminate the harm or externality which justifies the mitigation. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). This is because when the "city demand[s] more" than what is required, that excess demand is not really mitigation at all, but a demand for a public benefit at private expense. *See*, *id*. at 393.

Finally, the assessment of rough proportionality must be based on a site-specific "individualized determination" that the mitigation is related "both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. This site-specific approach ensures that governments cannot circumvent the requirements of *Dolan* with "conclusory statement[s]" about the public interest. *Id*. at 395. Instead, the government must "make some effort to quantify its findings." *Id*.

In practice, the test is not particularly onerous. It does not require mathematical precision, and the government will often win. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 207 (6th Cir. 2021) (noting that in most cases, "the government generally satisfies the nexus and rough proportionality test with ease"). But it does require that the government show its work. *Id*. at 206 (the government bears the burden of production). Otherwise, governments would have free rein to extort property owners under the guise of mitigation—something this Court has rejected for more than a century. *See Norwood*, 172 U.S. at 279.

When the *Nollan/Dolan* test is properly viewed as a test to ensure that alleged mitigation demands are *actual* mitigation demands, arguments that it should not apply to legislatively imposed exactions make little sense. A demand for a public benefit at private expense is a taking, regardless of the branch of government that makes the demand. *See Parking Ass'n v. City of Atlanta*, 515 U.S. 1116, 1117–18, 115 S. Ct. 2268 (1995) (Thomas, J., dissenting from denial of *certiorari*).

III. THE EXPERIENCE IN TEXAS COURTS OVER THE LAST FORTY YEARS SHOWS THAT THERE IS NO ILL EFFECT FROM PROVIDING JUDICIAL REVIEW OF LEGISLATIVE EXACTIONS.

Faced with these arguments, advocates for excluding legislative exactions from *Nollan/Dolan* often appeal to pragmatism. They have voiced concerns that if legislative exactions are subject to meaningful review, we may see a flood of challenges preventing cities from engaging in basic land use regulations. *See*, *e.g.*, *Koontz*, 570 U.S. at 626 (Kagan, J., dissenting). But the experience in Texas should put these fears to bed.

Texas courts began dealing with exaction issues before this Court decided *Nollan*. In *College Station v. Turtle Rock Corp.*, the Texas Supreme Court examined the constitutionality of a local ordinance that required developers to dedicate property for parks, or pay cash in lieu of dedication, as a condition precedent to subdivision plat approval. 680 S.W.2d at 804. In questioning the constitutionality of that ordinance, the court did not discuss the coercive risks of the administrative or adjudicative process. Instead, the court expressed concern that there was nothing in the ordinance to ensure that such dedications were connected to any externalities created by the proposed development. The court explained that it must consider

> whether there is a reasonable connection between the increased population arising from the subdivision development and the increased

> park and recreation needs in this neighborhood. . . . Both need and benefit must be considered. Without a determination of need, a city could exact land or money to provide a park that was needed long before the developer subdivided his land. Similarly, unless the court considers the benefit, a city could, with monetary exactions, place a park so far from the particular subdivision that the residents received no benefit.

Id. at 806–07. In other words, the primary concern in *Turtle Rock* was not the body demanding the exaction, but whether the exaction was, in fact, mitigation.

In 2004, the Texas Supreme Court once again previewed issues that had not yet come to this Court. In *Flower Mound*, 135 S.W.3d at 622, the court considered whether the *Nollan/Dolan* test applied to a local ordinance requiring that developers pay to improve abutting roads as a condition precedent to the grant of a development permit. The City argued that the nexus and proportionality analysis of cases like *Nollan* and *Dolan* should not apply because the ordinance at issue: (1) involved a legislative exaction as opposed to an *ad hoc* adjudicative process; and (2) the demand was for money as opposed to the dedication of a formal easement. Pointing to more than a century of precedent on the topic, the court rejected both arguments. *Id*. at 640 (*Nollan/Dolan* not limited to dedicatory exactions); 641–42 (*Nollan/Dolan* equally applies to legislative exactions).

As noted above, both cases have been cited approvingly by this Court when developing its exaction jurisprudence. *Koontz*, 570 U.S. at 603 (citing *Flower Mound*); *Dolan*, 512 U.S. at 390–91, 399 (citing *Turtle Rock*); *Nollan*, 483 U.S. at 839–40 (same). But these cases are relevant for another, equally important reason. The timing of these decisions undermines any sky-is-falling concerns about applying *Nollan/Dolan* to legislative exactions. If critiques of applying meaningful review to legislative exactions were well-founded, then we would see evidence to that effect in Texas, where legislative exactions have been subject to meaningful review for decades. But in the four decades since the Texas Supreme Court's 1984 decision in *Turtle Rock Corp.*, only a dozen exaction cases have been adjudicated in Texas courts of appeals.[2] That is hardly a flood of litigation making it impossible for cities to engage in traditional land use regulation.

---

[2] *Hearts Bluff Game Ranch v. State*, 381 S.W.3d 468 (Tex. 2012); *Sheffield Dev. Co. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004); *Consol. Towne E. Holdings, LLC v. City of Laredo*, No. 04-22-00130-CV, 2023 Tex. App. LEXIS 3499, at *1 (Tex. App. May 24, 2023); *Polecat Hill, LLC v. City of Longview*, 648 S.W.3d 315 (Tex. App. Texarkana 2021); *City of Dallas v. 6101 Mockingbird, LLC*, No. 05-18-00328-CV, 2019 Tex. App. LEXIS 6270 (Tex. App. Dallas 2019); *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74 (Tex. App. Dallas 2013); *Town of Flower Mound v. Rembert Enters.*, 369 S.W.3d 465 (Tex. App. Fort Worth 2012); *City of Carrollton v. RIHR Inc.*, 308 S.W.3d 444 (Tex. App. Dallas 2010); *Rischon Dev. Corp v. City of Keller*, 242 S.W.3d 161 (Tex. App. Fort Worth 2007); *Sefzik v. City of McKinney*, 198 S.W.3d 884 (Tex. App. Dallas 2006); *McMillan v. Northwest Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337 (Tex. App. Houston 1999).

Nor have Texas cities turned into unregulated Mad Max wastelands. According to the United States Census Bureau, six of the fifteen fastest growing cities in the country are found in Texas. Press Release No. CB23-79, U.S. Census Bureau, Large Southern Cities Lead Nation in Population Growth (May 18, 2023), https://tinyurl.com/5t2svzbb. Texas has significantly lower housing costs than California, which does not allow meaningful review of legislative exactions. https://meric.mo.gov/data/cost-living-data-series. And Texas was the only state to add two electoral votes after 2020 census. *See U.S., Census Bureau*, 2020 Apportionment Results (2021), available at: https://tinyurl.com/585wadkv. As it turns out, cities are fully capable of keeping the lights on without extorting public benefits at private expense. Or, as the Texas Supreme Court put it, "we are unable to see any reason why limiting a government exaction from a developer to something roughly proportional to the impact of the development—in other words, prohibiting 'an out-and-out plan of extortion'—will bring down the government." *Flower Mound*, 135 S.W.3d at 639.

CONCLUSION

When James Madison introduced the Bill of Rights in Congress, he noted the importance of judicial review as a fundamental check on the other branches. According to Madison, "independent tribunals of justice" are to be "an impenetrable bulwark against every assumption of power in the legislative *or* executive."

1 ANNALS OF CONG. 457 (Joseph Gales ed., 1790) (emphasis added). He did not argue that the legislative branch should get a free pass when it comes to the Bill of Rights.

For decades now, lower courts have split on whether this longstanding approach applies to the Takings Clause in the context of exactions. *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 577 U.S. 1179, 1180, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring). But as explained above, there is no textual, structural, or pragmatic basis for drawing this arbitrary distinction. This Court should therefore grant certiorari to finally resolve this split.

Respectfully submitted,

ROBERT HENNEKE
rhenneke@texaspolicy.com
CHANCE WELDON
cweldon@texaspolicy.com
CHRISTIAN TOWNSEND
(*Of Counsel*)
ctownsend@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
901 Congress Avenue
Austin, Texas 78701
Telephone:(512) 472-2700
Facsimile:(512) 472-2728

Counsel for Texas Public Policy Foundation

ELIZABETH MILITO
ROB SMITH
NFIB SMALL BUSINESS LEGAL
CENTER, INC.
555 12th Street, NW Suite 1001
Washington, DC 20004
elizabeth.milito@nfib.org
rob.smith@nfib.org

Counsel for NFIB Small Business Legal Center, Inc.

ILYA SHAPIRO
MANHATTAN INSTITUTE
42 Vanderbilt Avenue
New York, NY 10017
(202) 599-7000
ishapiro@manhattan.institute

Counsel for Manhattan Institute

BRADEN H. BOUCEK
KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Road
Suite 104
Roswell, GA 30075
(770) 977-2131
bboucek@southeasternlegal.org
khermann@southeasternlegal.org

Counsel for Southeastern Legal Foundation

IVAN LONDON
DAVID MCDONALD
MOUNTAIN STATES LEGAL FOUNDATION
2596 S. Lewis Way
Lakewood, CO 80227
(720) 640-8713
ilondon@mslegal.org
dmcdonald@mslegal.org

Counsel for Mountain States Legal Foundation