No. 22-1074

In The
# Supreme Court of the United States

GEORGE SHEETZ,
*Petitioner,*

v.

COUNTY OF EL DORADO, CALIFORNIA,
*Respondent.*

**On Writ of Certiorari to the California Court of Appeal, Third Appellate District**

## BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC. IN SUPPORT OF PETITIONER


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## INTERESTS OF THE *AMICI CURIAE*

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach.

The Buckeye Institute has taken the lead in Ohio and across the country in advocating for the roll-back of government regulations that burden citizens' ability to exercise their constitutional rights to make free use of their property.

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm

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[1] Pursuant to Rule 37.6, amici state that no counsel for any party has authored this brief in whole or in part and no person other than the amici have made any monetary contribution to this brief's preparation or submission.

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 often participates in important property rights cases to protect the rights of small business property owners. See, *e.g., Sackett* v. *Envtl. Prot. Agency*, 598 U.S. 651 (2023); *Tyler* v. *Hennepin Cnty.*, 598 U.S. 631 (2023); *Wilkins* v. *United States*, 598 U.S. 152 (2023); *Cedar Point Nursery* v. *Hassid*, 141 S.Ct. 2063 (2021).

## SUMMARY OF ARGUMENT

The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 595–96 (2013). Reduced to its simplest iteration, it means that constitutional rights are not chits to be bargained away for government services. Yet the legislation at issue here does just that. By requiring Mr. Sheetz to pay a $23,420 exaction for the permission to place his manufactured home on his property, the County of El Dorado is demanding that he trade his Fifth Amendment right to be free from uncompensated takings for a permit to use his own property. The exaction for road funding is unrelated to Mr. Sheetz's

activity and extremely disproportionate to any costs that the County of El Dorado might incur as a result of it.

El Dorado County and the California Court of Appeals, however, assert that the unconstitutional conditions doctrine does not apply to legislative takings. This view is at odds with the Takings Clauses' plain language, its history, and the holdings of this Court and numerous circuit courts. In those cases, courts correctly looked to the substance of the government-imposed condition rather than whether the condition arose by statute or from an administrative decision. This broad application of the doctrine to any government action—executive, legislative, or judicial—that coerces citizens to trade their constitutional rights for some government benefit is consistent with the text of the Fifth Amendment's prohibition against uncompensated takings and that protection's historical underpinnings.

Thus, the principles articulated by this Court in *Nollan* v. *California Coastal Com'n,* 483 U.S. 825 (1987), *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), and *Koontz* apply to legislative acts relating to building permits. The Sixth Circuit's recent opinion in *Knight* v. *Metropolitan Government of Nashville and Davidson County Tennessee*, 67 F.4th 816 (6th Cir. 2023), provides a substantial legal and historical analysis of the unconstitutional conditions doctrine and held no reason to draw a distinction between unconstitutional land use conditions imposed legislatively and those imposed by local government officials. The Court should engage in the same

analysis here and clarify that in the context of Fifth Amendment takings, the unconstitutional conditions doctrine protects citizens from *all* uncompensated takings through extortionate government demands, regardless of which branch of government makes them.

## ARGUMENT

### I. The Unconstitutional Conditions Doctrine and the Increasing Need for Its Protections

The U.S. Constitution does not contain an "all-encompassing 'Unconstitutional Conditions Clause.'" *Knight*, 67 F.4th at 824; *Planned Parenthood of Greater Ohio* v. *Hodges*, 917 F.3d 908, 911 (6th Cir. 2019). Nevertheless, this Court has long recognized that "[t]he government may not deny an individual a benefit, even one an individual has no entitlement to, on a basis that infringes his constitutional rights." *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). The unconstitutional conditions doctrine thus "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Koontz*, 570 U.S. at 606.

The unconstitutional conditions doctrine is "not anchored to any single clause of the Constitution," but rather serves as a "constitutional 'glue,' filling in the interstitial space left between the enumerated individual rights and structural limitations on government power." Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. Pa. J. Const. L. 1167, 1170–71 (2019) (citing Richard

Epstein, *Unconstitutional Conditions, State Power and the Limits of Consent*, 102 Harv. L. Rev. 4, 10 (1988)).

As government at all levels has become increasingly involved in citizens' day-to-day lives and decisions, this "interstitial glue" has more and more become a vital constitutional protection. As the "modern regulatory and welfare state" has expanded, and governments have come to provide "more goods, services, and exemptions," governments' opportunities to condition such benefits on the "sacrifice of constitutional rights" have likewise increased. Adam B. Cox and Adam M. Samantha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. Legal Analysis 61, 69 (2013). And governments have taken advantage of these opportunities—and in some cases they have conditioned government benefits on funding unrelated to governmental expenditures when it has been politically untenable to do so via general tax increases.

Without the structural support provided by the "interstitial glue" of the unconstitutional conditions doctrine, the constraints our Constitution places on government power, embodied by the combination of individual rights and structural limits, would collapse. Simply put, the doctrine prevents the government from simply "contracting" its way around the Constitution. Fischer, *supra*, at 117 (quoting Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 V. L. Rev. 479, 491 (2012)).

As Professor Epstein explains, "The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted." Epstein, *supra*, at 10. Rather than citizens consenting to be governed in exchange for the *protection* of their inalienable rights, citizens trade those rights for the "privilege" of being governed. This inversion of the constitutional order is particularly apparent in land use cases like this one where the local government holds a monopoly on the permitting process and can thus name its price. *Id*. at 17–18. Just as a landowner has no economic leverage in the transaction, political remedies also fall short. The conditions extracted typically fall on a diverse and scattered minority of citizens—in this case, individuals seeking to build homes. At the same time, the benefit realized by the public at large—better roads—is widespread. Thus, individual landowners have little recourse at the ballot box. As Professor Epstein observes, "Left unregulated by constitutional limitations, a majority could use a system of taxation and transfers to secure systematic expropriation of property." *Id.* at 23. Or as George Bernard Shaw pithily expressed it, "[a] government which robs Peter to pay Paul can always depend on the support of Paul." George Bernard Shaw, *Everybody's Political What's What?* 256 (1944).

Shaw's observation is manifest here, where the County of El Dorado—by ordinance—has sought to fund its commitment to maintain and improve roads—not through across-the-board taxes—but by extracting payments from individual property owners for conduct

unconnected to either those roads or any cost incurred from the permitted activity. Government officials provide improved roads to the entire county at no cost to the vast majority of voters who will enjoy the improvements, by dunning the relatively few and politically discrete individuals who seek building permits.

The notion of a social contract where the People cede a portion of their natural sovereignty to the government in exchange for protection of their rights and that a government's legitimacy arises from and depends upon the consent of the governed is hardly new. But the social contract theory that supported the Declaration of Independence was not Rousseau's inescapable pact where the individual pledges himself wholly, inexorably, and forever to the general will, but rather a social contract in which the people reserved certain individual rights to themselves. Thomas Jefferson, for example, recognized the necessity of the People to preserving certain rights in the social contract:

> "[T]he purposes of society do not require a surrender of all our rights to our ordinary governors: that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right . . . ."

6 Thomas Jefferson, *The Works of Thomas Jefferson* 201 (1905). Jefferson understood that these rights were just as vulnerable to legislative majorities as to singular despots. Madison likewise understood the potential tyranny of the majority and made no distinction between legislative and other takings in the Fifth Amendment.

## II. The Fifth Amendment's Takings Clause Does Not Distinguish Between Administrative and Legislative Takings.

As this Court held in *Cedar Point Nursery*, 141 S. Ct. at 2072, an uncompensated taking is unconstitutional regardless of "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." This makes sense because the Takings Clause's just compensation requirement is categorical and unconditional. Its simple and unadorned language provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. It makes no distinction between administrative adjudicatory takings and legislative takings. Nor does the history of the amendment or the scholarship devoted to it endorse such a distinction.

The Framers' purpose in drafting the Fifth Amendment was to protect citizens against *all* uncompensated takings. Indeed, history shows that those takings most familiar to the Framers were *legislative* takings. As this Court has previously identified, the roots of the Takings Clause extend "back at least 800 years to Magna Carta, which specifically protected agricultural crops from

uncompensated takings." *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015). Magna Carta's taking provisions focused on restraining the Crown and his minions. Specifically, Clause 28 of Magna Carta forbade any "constable or other bailiff" from taking "corn or other provisions from any one [sic] without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller." *Id.* (internal citations omitted). Chapter 31 of Magna Carta placed an outright prohibition on "the king or his officers taking timber" from land without the owner's consent. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 564 (1972). Lord Coke interpreted this limitation to imply that while the king could take certain "inheritances" from land, he could not take the land itself. *Id.* Blackstone later asserted Magna Carta's protections of property meant that "only the legislature could condemn land." *Id.*; see also *Knight*, 67 F.4th at 830 ("[T]he taking of property was too 'dangerous' an activity to be left to just any public tribunal,' and so 'nothing but the legislature [could] perform' this activity." (quoting 1 William Blackstone, *Commentaries on the Laws of Engla*nd 135 (1765)).

By contrast, for purposes of the legislative/administrative distinction at issue here, "eminent domain"—the physical taking of land—arose in Anglo-American jurisprudence as a function of Parliament," rather than as a prerogative of the Crown. *Id.* The Sixth Circuit's decision in *Knight* delves extensively into this history, explaining that "[b]efore the Fifth Amendment's enactment . . . only legislatively backed takings could take place in

England because only Parliament could authorize them." *Id.* (citing William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1756 (2013); Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L.J. 1738, 1756 (2002)). Thus, from its beginning, the Fifth Amendment protection against uncompensated takings has applied to legislative acts.

Consistent with the Framers' understanding of the Takings Clause, Justice Thomas Cooley, in his 1871 *Treatise on Constitutional Limits*, noted that the government is never justified in taking more than it needs—and by implication—more than it is owed:

> The taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made. When a part only of a man's premises is needed by the public, the necessity for the appropriation of that part will not justify the taking of the whole, even though compensation be made therefor. The moment the appropriation goes beyond the necessity of the case, it ceases to be justified on the principles which underlie the right of eminent domain.

Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 1147 (1871).

While Cooley was discussing physical takings of land, his "necessity of the case" rule prefigures the *Nollan/Dolan* nexus and proportionality test. And notably, Cooley was writing about the limits of *legislative* power. Just as the Fifth Amendment does not allow a legislature to take more land than it needs, the *Nollan/Dolan* test prohibits the legislature—or any state actor—from imposing a condition on building that strays beyond the impact of the permitted activity.

## III. *Knight* v. *Nashville Metropolitan Government of Nashville & Davidson County, Tennessee* Provides a Clear View of the Universal Application of the Unconstitutional Conditions Doctrine.

In *Knight*, the most recent circuit case to address whether there is any distinction between an administrative or legislative taking, a unanimous panel, relying on the Fifth Amendment's text and history, held that there was none. *Knight*, 67 F.4th at 835.

*Knight* arose out of a challenge to a local ordinance that required property owners, as a condition of receiving a building permit, to either install a sidewalk on their property or pay into a fund to pay for sidewalks elsewhere in the city.

To reach its conclusion, the *Knight* court first looked to the Fifth Amendment's text and history. The court began by observing that the text of the Takings Clause—"nor shall private property be taken for public use, without just compensation"—is phrased in the passive voice and prohibits the *act* of an

uncompensated taking, rather than enjoining a particular actor. The Takings Clause "does not make significant *who* commits the 'act'; it makes significant *what* type of act is committed." *Id.* at 830.

This approach was consistent with the Sixth Circuit's longstanding jurisprudence, which treated the unconstitutional conditions doctrine as a check on "the government" generally—rather than a specific limitation on the adjudicatory power of executive agencies. For example, the Sixth Circuit had never drawn a distinction between incursions on constitutional rights imposed through legislatively enacted conditions and conditions imposed through administrative adjudications in non-Fifth Amendment contexts. See, *e.g., G & V Lounge, Inc.* v. *Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994) (noting a "well established Supreme Court precedent to the effect that *a state actor* cannot constitutionally condition the receipt of a benefit, such as a liquor license or an establishment permit, or an agreement to refrain from exercising one's constitutional rights, especially one's right to free expression." (emphasis added)); *Toledo Area AFL–CIO Council* v. *Pizza*, 154 F.3d 307, 321 (6th Cir. 1998) ("This is not to say that *the government* can place conditions on the receipt of state-created benefits that have the effect of dissuading people from exercising a constitutional right, even if *the government* has absolute discretion as to whether it will provide the benefit in the first instance." (emphasis added)); see also *Country Mill Farms, LLC* v. *City of E. Lansing,* 280 F.Supp.3d 1029, 1052 (W.D. Mich. 2017) ("Generally, the 'overarching principle' of the

unconstitutional conditions doctrine 'vindicates the Constitution's enumerated rights by preventing *the government* from coercing people into giving them up.' The doctrine applies whether *the government* approves a benefit that comes with a condition or whether *the government* denies a benefit because the applicant refuses to meet the condition." (emphasis added) (internal citations omitted)).

The view that the Fifth Amendment protects against "the government" generally and not a specific branch or official appears in this Court's unconstitutional conditions decisions as well. For example, the *Koontz* majority began its discussion with the proposition that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz*, 570 U.S. at 604 (quoting *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)). In applying the *Nollan/Dolan* nexus and rough proportionality rubric, the *Koontz* majority again evaluated the relationship between "the government's" demands and the "social costs of the applicant's proposal." *Id.* at 606. The *Koontz* majority explained that "a contrary rule 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 to permit approval." *Id.* at 606–07 (emphasis added). In other words, if the Court draws a distinction between government branches in enforcing the Takings Clause, governments will take note and abuse the distinction.

The *Knight* court next looked to the historical record to see if the distinction urged by the city could

find any support there. As noted above, while the historical excavation did unearth some distinction between legislative and administrative takings, the record demonstrated that legislative takings were likely foremost in the Framers minds and were the most common type of taking when the Constitution was ratified. The *Knight* court noted that it was "the colonial legislatures (not the other branches) that typically passed provisions authorizing the taking of property for projects like public buildings or public roads. *Knight*, 67 F.4th at 830 (citing James Ely, Jr. "*That Due Satisfaction May be Made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. Legal Hist. 1, 5–11 (1992)). This conclusion is consistent with that of other legal historians and commentators. See, *e.g.,* Cooley, *supra*, at 1157. "If anything," the court noted, "the framers designed the Takings Clause precisely to protect against legislative action . . . ." *Knight*, 67 F.4th at 830.

Since the Fifth Amendment did not originally apply to the states, the *Knight* court also examined the contemporary views of the law leading up to the ratification of the Fourteenth Amendment. It found that "many sources identified the Takings Clause as a limit on legislative power" and "no hint that the discretionary act of an executive officer might amount to a taking even if the identical act would not qualify as one when legislatively compelled." *Id.* at 831.

The *Knight* court next looked to this Court's precedent for any evidence of a distinction between legislative and other takings. The Sixth Circuit noted that this Court has routinely applied the

unconstitutional conditions doctrine to legislative requirements. For example, in *Agency for Int'l Dev.*, 570 U.S. 205, this Court held that Congress could not attach conditions that limited speech to federal AIDS funding. The Sixth Circuit also pointed to this Court's recent decision in *Cedar Point Nursery*, 141 S.Ct. 2063, to note that a Fifth Amendment taking has been accomplished by a generally applicable regulation rather than an ad hoc administrative decision. Again, in practice, there is no difference between a rule promulgated by an administrative agency (which had presumably been given the legislative authority to promulgate it) and a legislative act.

Finally, the *Knight* court addressed the argument that the legislative process and potential legislative remedies exempts legislative actions from the Fifth Amendment, pointing out that "[n]obody would argue that we should allow a city official to commit an uncompensated appropriation of a majority of its residents' homes because the injured resident could 'still petition their councilmembers, elect new councilmembers, or even run for office to' change the law." *Knight*, 67 F.4th at 835. A taking is prohibited regardless of "whether or not one would describe it as 'extorting' a minority of residents." *Id.* Regardless, *Knight* concludes with the commonsense observation that "an 'extortion' risk exists no matter the branch of the government responsible for the condition." *Id.*

This case mirrors the facts in *Knight*. A local government is seeking—legislatively—to shore up its finances by extorting a payment from Mr. Sheetz to allow him to use his property. There is no meaningful distinction between a $23,000 exaction to an

individual imposed by a local bureaucrat and one imposed by a legislature. Justice Cooley recognized over a century ago that "governing powers will be no less disposed to be aggressive when chosen by majorities than when selected by the accident of birth, or at the will of the privileged classes." Cooley, *supra*, at 258. Surveying the fundamental principles upon which the unconstitutional conditions doctrine rests, this Court's application of that doctrine in other statutory contexts, and the plain language and historical understanding of the constitutional right at issue here, whether the condition is imposed by ordinance or administrative decision is a distinction without a difference. Accordingly, the Court should apply the *Nollan/Dolan* test in this case and remand for further proceedings.

## IV. The Court Should Remind Legislatures and Executives Alike That They Must Respect Private Property.

This Court long ago explained that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Local governments have been slow to get the message and have tried to narrowly cabin this concept and pretend they can take property by utilizing permitting fees or conditions. This Court recently clarified the reach of the Takings Clause, explaining in the context of governmental home equity theft that a "taxpayer must render unto Caesar what is Caesar's, but no more." *Tyler*, 598 U.S. at 647. By applying the Nation's early history and recent decisions like *Knight*

and *Tyler,* the Court should make clear that the right to be free from uncompensated takings is truly inalienable, and not contingent on which branch of government is doing the taking.

## CONCLUSION

For reasons stated in the foregoing brief, amici curiae The Buckeye Institute and National Federation of Independent Business Small Business Legal Center, Inc., urge the Court to reverse the California Court of Appeals' decision.

Respectfully submitted,

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