Case No. 21-6179

In the 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.)

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE

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[1] Pursuant to Rule 29(E), no party authored this brief in whole or in part, and no party, party's counsel, or other person other than the amicus curiae and its members contributed any funds towards the preparation of this brief.

SUMMARY OF THE ARGUMENT

Federal courts have long recognized that "a government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether." *MS Rentals, LLC v. City of Detroit*, 362 F.Supp.3d 404, 413 (E.D. Mich. 2019) (citing *Amelkin v. McClure*, 330 F.3d 822, 827-28 (6th Cir. 2003)). Yet the ordinance at issue here codified at Metro. Code § 17.20.120, et seq. ("the Sidewalk Ordinance")—does just that by requiring property owners seeking to build homes to either install public sidewalks on their own property or fund public sidewalks elsewhere in the city. In similar cases involving land-use permits conditioned on some other act by the landowner, to pass constitutional muster, the U.S. Supreme Court has required the government to show a nexus between the permitted activity and the condition, as well as proportionality between the burden imposed by the condition and the permitted activity's impact on the public. *See Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374(19 94); *Koontz v. St. Johns River Water Mgt. Dist.*, 570 U.S. 595 (2013).

As the district court noted, however, the Sixth Circuit has not spoken directly on whether *Nollan/Dolan* analytical framework should apply to conditions—like the

Sidewalk Ordinance at issue here—that have been imposed legislatively. Still, this Court and district courts within the Circuit have enforced the prohibition against unconstitutional conditions in numerous other contexts. And in those cases, Courts have looked to the substance of the government-imposed condition rather than whether the condition arose by statute or from an administrative decision.

In other words, while the Sixth Circuit has not definitively held that the principles articulated by the Supreme Court in *Nollan*, *Dolan*, and *Koontz* apply to legislative acts relating to building permits, it has interpreted the unconstitutional conditions doctrine to broadly apply to any type government action that coerces citizens to trade their constitutional rights for some government benefit. This broad application of unconstitutional conditions is, of course, consistent with the text of the Fifth Amendment's prohibition against uncompensated takings and the historical underpinnings of that protection, which is the basis for the Appellants' complaint.

ARGUMENT

I. A Robust Unconstitutional Conditions Doctrine Is Vital In an Increasingly Regulatory State

The U.S. Constitution does not contain an "Unconstitutional Conditions Clause." *Planned Parenthood of Greater Ohio v. Hodges*, 917 F.3d 908, 911 (6th Cir. 2019). But federal courts, including this Circuit, have 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." *Id*. (citing *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013)). Simply put, the unconstitutional conditions doctrine "forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them." *Id*. (quoting *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013)).

Commentators have observed that the unconstitutional conditions doctrine is amorphous and "not anchored to any single clause of the Constitution." 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)). Rather, the doctrine serves as a "constitutional 'glue,' filling in the interstitial space left between the enumerated individual rights and structural limitations on government power." *Id.*

But as government at all levels has become increasingly involved in citizens' day-to-day lives and decisions, this "interstitial glue" has more and more come to serve as a vital constitutional protection:

> As the "modern regulatory and welfare state" has expanded and the federal government has come to provide "more goods, services, and exemptions," the government's opportunities to condition such benefits on the "sacrifice of constitutional rights" have likewise increased. In this context, 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; the government could simply choose to "contract" its way around the Constitution.

Id. (internal citations omitted).

"The problem of unconstitutional conditions," Professor Epstein explains, "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 (emphasis in original). The problem inherent in this type of bargain is that the 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—more sidewalks—is widespread. Thus, individual landowners have little recourse at the ballot box. As Epstein observes, "[l]eft unregulated by constitutional limitations, a majority could use a system of taxation and transfers to secure systematic expropriation of property." *Id.* at 23.

Epstein's concern is manifest in the instant case, where the City of Nashville—by ordinance—has sought to fund its commitment to build and repair sidewalks not through across the board taxes, but by extracting payments from property owners for conduct disconnected from sidewalk funding.

II. The Sixth Circuit's Application of the Unconstitutional Conditions Doctrine.

The Sixth Circuit's jurisprudence on the unconstitutional conditions doctrine is both extenstive and broad in its application. Significant to this case, in all of the varied contexts that this Circuit has applied the unconstitutional conditions doctrine, the Court has treated the doctrine as a check on "the government" generally— rather than a specific limitation on the adjudicatory power of executive agencies. By doing so, this Court has drawn no distinction between incursions on constitutional rights imposed through legislatively enacted conditions and conditions imposed through administrative adjudications. *See, e.g., 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 removed); *see also 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).

While the U.S. Supreme Court's unconstitutional conditions jurisprudence reaches back into the 19th Century, this Circuit first invoked the doctrine by name in a majority opinion in *Bradley v. Milliken*, 433 F. 2d 897 (6th Cir. 1970). That case involved a Michigan enactment designed to thwart desegregation of the Detroit Public School System. *Id.* at 898. The Michigan act, which applied only to the Detroit School System, preempted the Detroit School System's desegregation plan by creating an open enrollment program that gave preference to students residing closest to the schools. In dicta, the Court pointed to the unconstitutional conditions doctrine to support the general proposition that "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result." *Id.* at 904 (internal citations omitted). Of particular note to the instant case, *Bradley* involved legislation, not an administrative determination. What mattered to the Court was not

the type of government act at issue, but whether the government had used its legitimate power to coerce an illegitimate end.

Through the 1980s and 1990s, this Court frequently addressed the unconstitutional conditions doctrine in the context of the government's ability to condition some benefit, usually employment, on a citizen's abdication of some enumerated right. For example, public employees challenged police and fire department rules that required employees to submit to urinalysis as a condition of employment, arguing that they were being forced to abandon their Fourth Amendment rights to be free of unreasonable searches. *See Lovvorn v. City of Chattanooga, Tenn.*, 846 F.2d 1539 (6th Cir. 1988); *Penny v. Kennedy*, 846 F. 2d 1563 (6th Cir. 1988). In those cases, which were later consolidated for hearing *en banc*, the Court relied on the U.S. Supreme Court's decisions in *National Treasury Employees Union v. Von Raab*, 469 U.S. 656 (1989), and *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989) to hold that the tests implicated the employees' Fourth Amendment rights, that the respective cities' compelling interest in ensuring that public safety workers were not impaired by illicit drugs was a compelling one, and remanded the cases for further fact finding. *Penny v. Kennedy*, 915 F. 2d 1065 (6th Cir. 1990) (on remand).

While the final outcome in *Penny* did not draw any bright lines regarding unconstitutional conditions, there is an important lesson to be gleaned from it. The

employment policies in *Lovvorn* and *Penny*, while not statutory, were—like a statute—uniform in their operation. Indeed, that was why the employee plaintiff employees complained: They were being subjected to a search with no individualized finding of reasonable suspicion. The district court's rationale for declining to apply the *Nollan*/*Dolan* framework to a legislative action—that the ordinance was "generally applicable" and did not involve an "individual, adjudicative decision"—is thus inconsistent with this Court's employment cases, where the Court applied an unconstitutional conditions analysis to generally applicable police and fire department employment policies.

The Court has also applied the unconstitutional conditions doctrine to protected First Amendment activities by holding, for example, that a government entity cannot condition the receipt of a liquor permit on the proprietor's agreement not to offer adult entertainment on the premises. *G & V Lounge* 23 F.3d at 1077. Likewise, in *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005), this Court held that the unconstitutional conditions doctrine prohibited a city government from rescinding a microbrewery's liquor permit if it did not agree to limits its hours of operation. In discussing the doctrine, the Court noted its wide application:

> [W]hile the unconstitutional conditions doctrine has been most consistently applied to protect First Amendment rights, it has also been applied by the Supreme Court to other constitutional provisions, including the Takings

> Clause. The doctrine should equally apply to prohibit the government from conditioning benefits on a citizen's agreement to surrender due process rights.

Id. at 434 (internal citations omitted). Again, while the condition at issue in *R.S.W.W.* was administratively imposed, the Court's says nothing to indicate that the unconstitutional conditions doctrine applies *only* to administrative actions.

Notably, some of the speech and association cases this Court has heard addressed unconstitutional conditions imposed by statute. While the Court has sometimes dismissed plaintiffs' claims for a lack of a protected First Amendment right, it has nonetheless performed an unconstitutional conditions analysis. *See, e.g.*, *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (discussing unconstitutional conditions doctrine at length in case challenging legislative ban on union check-off for political contributions); *Libertarian Party of Ohio v. Wilhelm*, 988 F. 3d 274, 279 (6th Cir. 2021) (applying unconstitutional conditions analysis where minor political party challenged statute rendering its members unable to serve on the Ohio Elections Commission). While the plaintiffs in those cases were unsuccessful, the Court never hinted that the statutes at issue were immune from unconstitutional conditions challenges merely because the conditions were imposed by statutes. If a distinction existed between conditions imposed by statute and those imposed by administrative action, one would expect that the Court would have mentioned it—particularly in cases where that distinction would have been dispositive. Indeed, the Courts could

have saved significant time and judicial resources if such claims were impermissible, and could be disposed of quickly on that basis.

In the recent case of *F.P. Development, LLC. v. Charter Township of Canton, Michigan*, 16 F.4th 198 (6th Cir. 2021), the township ordinance at issue required a landowner to plant between one or three trees (depending on the size and type of tree removed) or pay into a "tree fund" to finance tree-planting in order to obtain a permit to remove a tree on one's property. *Id.* at 201. Like the instant case, *F.P. Development* examined a permit condition that required the applicant to provide some uncompensated benefit to the government.

This Court noted the "interesting question" as to whether Canton's application of the ordinance to the Appellant "falls into the category of government action covered by *Nollan, Dolan,* and *Koontz*." *Id.* at 206. But the parties failed to raise the issue, and stipulated that the case was governed by the unconstitutional conditions doctrine and subject to *Nollan/Dolan*. Accordingly, the Court declined to reach the question of whether there was a distinction between a taking effected through an adjudicatory administrative determination and one effected by a legislative act. *Id.*

The parties in that case agreed that there was an "essential nexus" between the permit conditions and the township government's "legitimate interest in forest and natural resource preservation." *Id.* Thus, under *Nollan* and *Dolan*, the township government had only to demonstrate that the exactions demanded by the permit

conditions were "roughly proportional" to impact of the plaintiff's tree removal. *Id.* (citing *Dolan*, 512 U.S. at 388). The Court held, however, that the township failed to demonstrate how the statutorily required mitigation was proportional to the permitted activity, and therefore failed to meet its burden. *Id*. at 207.

Setting aside the *F.P. Development* Court's decision to eschew deciding whether legislative takings required a different analytical framework than administrative takings when the parties had not raised that issue, the very fact that the Court applied the *Nollan/Dolan* test to the application of a legislative act shows that it is not incompatible with legislative takings. Indeed, the *F.P. Development* Court addressed the very issue posed by Appellants here: Is the condition imposed proportional to the impact of the permitted activity, or is it an attempt to extort money to be used for other city purposes?

In summary, while the district court was correct in stating that this Court has not directly addressed whether the *Nollan/Dolan* test applies to legislative actions, it has had numerous opportunities in which it could have made that distinction. The fact that it did not indicates that this Court analyzes unconstitutional conditions claims based on the strength of the constitutional claim and the merits of the case, not on the type of government actor enforcing the condition.

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

As the U.S. Supreme Court recently held in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021), 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.)" The trial court below declined to apply the *Nollan/Dolan* test to the Sidewalk Ordinance at issue, finding that while "it share[d] some feature of the 'adjudicative' actions in *Nollan* and *Dolan* . . . the Sidewalk Ordinance [was] essentially legislative . . . and did not require individualized adjudicatory decision making." (Mem. Op. R. 40, Page ID 644). But 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. The U.S. Supreme Court has identified that the roots of the Takings Clause extend "back at least 800 years to Magna, which specifically protected agricultural crops from uncompensated takings." *Horne v. Dep't of Agric., 576 U.S. 350*, 358 (2015). 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 the 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*.

Notably, 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*. 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* (1871), p. 1147.

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/*Dollan test should prohibit the legislative – or any state actor –from imposing a condition on building that strays beyond an essential nexus of the permitted activity.

CONCLUSION

This Circuit has not explicitly applied the *Nollan/Dolan* analytical framework to a legislative land use condition. But 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.

Respectfully submitted,

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February 22, 2022.

CERTIFICATE OF COMPLIANCE

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February 22, 2022.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Amicus Brief was served on all counsel of record via the Court's electronic filing system this 22nd day of February, 2022.

/s/ Jay R. Carson