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ARTICLE

Let's Be Reasonable: Why Neither *Nollan/Dolan* nor *Penn Central* Should Govern Generally-Applied Legislative Exactions After *Koontz*

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I. INTRODUCTION

For nearly twenty years, Fifth Amendment takings challenges to adjudicative land-use exactions and permit conditions have been governed by the dual United States Supreme Court cases of *Nollan v. California Coastal Commission*[1] and *Dolan v. City of Tigard*.[2] In *Nollan*, the Court held that a government could, without paying compensation, demand an easement as a condition for granting a development permit the government was entitled to deny as an exaction of private property, *provided* that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit.[3] In *Dolan*, the Court followed up with the related requirement that the dedication of private property must be "'roughly proportional[]' . . . both in nature and extent to the impact of the proposed development."[4] In its 2013 decision, *Koontz v. St. Johns River Water Management District,* a deeply divided Court held that the two-part *Nollan/Dolan* test applies to a government's demand for a monetary exaction imposed on a land-use permit applicant on an *ad hoc*, adjudicative basis.[5] But the majority in *Koontz* did not address

1. 483 U.S. 825 (1987).
2. 512 U.S. 374 (1994).
3. 483 U.S. at 834, 836–37.
4. 512 U.S. at 391.
5. 133 S. Ct. 2586, 2589 (2013).

the question of whether legislatively imposed monetary exactions are also governed by the heightened scrutiny of the *Nollan*/*Dolan* test.[6] As the California Supreme Court recently observed: "The *Koontz* decision does not purport to decide whether the *Nollan*/*Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments."[7]

After *Koontz*, there is significant uncertainty as to whether the U.S. Supreme Court will accept the distinction between adjudicative and legislative exactions made by many lower courts.[8] At least one post-*Koontz* federal decision (currently on appeal to the Court of Appeals for the Ninth Circuit) applied *Nollan*/*Dolan* to a legislative exaction, but for the wrong reasons.[9] Supreme Court Justice Clarence Thomas aptly noted in early 2016: "For at least two decades, however, lower courts have divided over whether the *Nollan*/*Dolan* test applies in cases where the alleged taking arises from a legislatively imposed

6. In *Lingle v. Chevron U.S.A. Inc.*, the Court made it clear that the *Nollan* and *Dolan* cases were decided in the context of *ad hoc*, adjudicatively imposed conditions:

> Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. See *Dolan,* 512 U.S. at 379–80 (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path); *Nollan,* 483 U.S. at 828 (permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line).

544 U.S. 528, 546 (2005) (citations modified).

7. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974, 990 n.11 (Cal. 2015).

8. *See, e.g.*, San Remo Hotel v. City of San Francisco, 41 P.3d 87, 105 (Cal. 2002); Ehrlich v. Culver City, 911 P.2d 429, 443-44 (Cal. 1996); Rogers Mach., Inc. v. Washington Cty., 45 P.3d 966, 977 (Or. Ct. App. 2002) ("With near uniformity, lower courts applying *Dolan* to monetary exactions have done so *only* when the exaction has been imposed through an adjudicatory process; they have expressly declined to use *Dolan*'s heightened scrutiny in testing development or impact fees imposed on broad classes of property pursuant to legislatively adopted fee schemes.").

9. See the discussion of Levin v. City of San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014), *infra* Part III.F.

condition rather than an administrative one. That division shows no signs of abating."[10]

Resolving that constitutional uncertainty is of paramount importance. Justice Thomas recently warned: "Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively."[11] Indeed, Justice Kagan anticipated that uncertainty in her dissent in *Koontz* when she stated: "[T]he majority's refusal 'to say more' about the scope of its new rule [of applying *Nollan/Dolan* to monetary exactions] now casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money."[12] Due to the widespread concern of that lingering constitutional uncertainty,[13] Justice Thomas believes that there

10. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of cert.) (citations omitted).

11. *Id.* at 928–29.

12. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting).

13. *See, e.g.*, William R. Devine & Kathryn D. Horning, *US Supreme Court Limits Governmental Power to Impose Conditions on New Development,* ALLEN MATKINS LEGAL ALERT (June 26, 2013), http://www.allenmatkins.com/en/Publications/Legal-Alerts/2013/06/26_06_2013-Koontz-Alert.aspx [https://perma.cc/UUG9-SGQB] ("The decision in *Koontz* now places in question the continued applicability of both *Ehrlich* and *San Remo*"); Christopher W. Garrett et al., *Koontz Decision Extends Property Owners' Constitutional Protections*, PUB. SERVANT (Oct. 30, 2013), https://www.lw.com/thoughtLeadership/koontz-decision-extends-property-owners-constitutional-protections [https://perma.cc/Z9V7-YLUE] ("It is not apparent, however, that the Court will accept the distinction drawn by the California Supreme Court in *Ehrlich*, and it could apply the *Koontz* protections broadly"; the majority opinion in *Koontz* "leaves open the level of scrutiny to which legislatively imposed fess [sic] with [sic] now be subject"); Mitchell B. Menzer & Karen Michail Shah, Koontz v. St. Johns River Water Management District: *The United States Supreme Court Expands Fifth Amendment Takings Protections To Limit Monetary Exactions in Land Use Matters*, PAUL HASTINGS BLOG (July 16, 2013), https://www.paulhastings.com/publications-items/details/?id=9e09de69-2334-6428-811c-ff00004cbde [https://perma.cc/QSA3-3SRN] ("The major question left unanswered by *Koontz* is whether *Nollan/Dolan* apply to fees and exactions imposed through legislation of general application. . . . It remains to be seen whether the *Nollan* and *Dolan* restrictions are eventually extended to legislatively adopted, generally applicable exactions."); Jack J. Kubiszyn et al., *Supreme Court Rules In Favor of Landowner Seeking to Develop Property*, BRADLEY ARANT BOULT CUMMINGS LLP, REAL EST. NEWSL. (July 12, 2013), http://www.babc.com/supreme-court-rules-in-favor-of-landowner-seeking-to-develop-property-07-12-2013/

are "compelling reasons for resolving this conflict *at the earliest practicable opportunity*."[14]

This article explains why the *Nollan/Dolan* test should *not* apply to legislatively imposed exactions, *provided* that such exactions satisfy two key criteria: (1) the exaction is generally-applied; and (2) the exaction is applied based on a set legislative formula without any meaningful administrative discretion in that application. Legislative exactions that fail to meet those two criteria should be governed by the *Nollan/Dolan* standard of review in the same manner as the *ad hoc* adjudicative exaction in *Koontz*. Furthermore, legislative exactions that satisfy those two criteria also should *not* be governed by the factored analysis in *Penn Central Transportation Co. v. New York City*.[15] Instead, a "reasonable relationship" test should be applied to legislative exactions that satisfy those two criteria.

Part II of this Article discusses the constitutional rationales that guided the Court in reaching its decision in *Koontz* regarding adjudicative monetary exactions. Part III examines how those rationales, as well as the arguments raised by the *Koontz* dissent, demonstrate that *Nollan/Dolan* should not govern legislative exactions that are generally-applied and provide no meaningful discretion to administrators. Part IV explains why the *Penn Central* factored analysis also should not govern legislative exactions that meet those two criteria. Part V demonstrates why a reasonable relationship test that has been employed in various forms by state courts should govern legislative exactions that satisfy those two criteria. Applying that reasonable relationship test to qualifying legislative exactions lessens judicial interference with local land use decisions, reinforces the constitutional rationale in *Koontz* that development projects should pay for the external costs they create, and addresses the concern of property owners that some generally-applied legislative exactions may "go too far."

[https://perma.cc/7YDA-TC4V] (*Koontz* "creates potential confusion as any legitimate monetary payment required by a governmental entity—such as a payment for costs relating to sewer, water, traffic or wetlands—now also falls under the same balancing test.").

14. *Cal. Bldg. Indus. Ass'n*, 136 S. Ct. at 929 (emphasis added).

15. 438 U.S. 104 (1978).

II. KOONTZ EXTENDED THE HEIGHTENED SCRUTINY OF NOLLAN/DOLAN TO AD HOC, ADJUDICATIVE MONETARY EXACTIONS, BUT DID NOT ADDRESS WHETHER NOLLAN/DOLAN ALSO APPLIES TO LEGISLATIVE EXACTIONS

A. The Heightened Scrutiny in *Nollan/Dolan* Is Designed to Protect Land-Use Applicants from a Specific Type of Regulatory Taking

The Takings Clause in the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation."[16] It does not prohibit the taking of private property, "but instead places a condition on the exercise of that power."[17] The Takings Clause is designed "to secure compensation in the event of otherwise proper interference amounting to a taking."[18]

The "paradigmatic" taking that requires just compensation is a "direct government appropriation or physical invasion of private property."[19] When the government physically takes possession of an interest in property for some public purpose, "it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."[20] That category of "physical takings" cases "requires courts to apply a clear rule."[21]

However, beginning with the 1922 case of *Pennsylvania Coal Co. v. Mahon,*[22] the U.S. Supreme Court recognized that "[g]overnment regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may

16. U.S. CONST. amend. V. The Takings Clause is made applicable to the States through the Fourteenth Amendment. Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

17. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987).

18. *Id.* at 315.

19. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005).

20. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (internal citation omitted).

21. *Id.* at 323 (quoting Yee v. Escondido, 503 U.S. 519, 523 (1992)).

22. 260 U.S. 393 (1922).

be compensable under the Fifth Amendment."[23] A "regulatory takings" case "'necessarily entails complex factual assessments of the purposes and economic effects of government actions.'"[24] So far, the Court has recognized four (4) different theories under which a government regulation may be challenged under the Takings Clause. Two of those theories are deemed *per se* takings, and two of those theories are not. The two categories of regulatory action that are deemed *per se* takings are "where government requires an owner to suffer a permanent physical invasion of her property,"[25] and where regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property."[26] For regulatory actions that do not involve *per se* takings, the Supreme Court has historically applied either the factored analysis in *Penn Central* or the heightened standard of review in *Nollan/Dolan*.

Under *Penn Central*, the Court applied a three-factor regulatory takings analysis that examines the economic impact of the regulation, the extent to which it interferes with investment-

23. *Lingle*, 544 U.S. at 537–38 ("In Justice Holmes' storied but cryptic formulation, 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" (citing *Pa. Coal Co.* 260 U.S. at 415)).

24. *Tahoe-Sierra*, 535 U.S. at 323 (quoting *Yee*, 503 U.S. at 523). In *Tahoe-Sierra*, the Court explained the rationale as to why judicial review is different in physical takings cases and regulatory takings cases:

> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. . . . Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.

Id. at 323–24.

25. *Lingle*, 544 U.S. at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

26. *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)) (emphasis in original).

backed expectations, and the character of the governmental action.[27]

Under the two-part inquiry of *Nollan/Dolan,* "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."[28] In *Koontz*, the majority of the Justices held that this two-part test applies when the government demands a monetary exaction in order to obtain an adjudicative land use permit.[29]

B. The Majority in *Koontz* Applied *Nollan/Dolan* to *Ad Hoc*, Adjudicative Monetary Exactions

The petitioner in *Koontz* (and his father before him) sought to develop a portion of his 14.9-acre property, the southern portion of which included wetlands.[30] His development plans called for the development of the 3.7-acre northern section of his property.[31] Under Florida state law, a landowner wishing to undertake construction on that particular type of property had to obtain a management and storage of surface water permit (which could

27. *See* Penn Cent. Transp. Co. (*Penn Central*) v. City of New York, 438 U.S. 104, 124 (1978); *see also* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349 (1986); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224–25 (1986); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). In *Lingle*, the Court explained the *Penn Central* analysis as follows:

> The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." Primary among those factors are "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." In addition, the "character of the governmental action"-for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good" may be relevant in discerning whether a taking has occurred.

544 U.S. at 538–39 (internal citations omitted).

28. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2591 (2013).

29. *Id.* at 2603.

30. *Id.* at 2591-92.

31. *Id.* at 2592.

impose "such reasonable conditions" on the permit as are "necessary to assure" that construction will "not be harmful to the water resources of the district") and a wetlands resource management permit.[32] Petitioner sought such a permit from the St. Johns River Water Management District ("District").[33] To mitigate the environmental effects of his proposal, petitioner offered to foreclose any possible future development of the approximately 11-acre southern section of his land by deeding to the District a conservation easement on that portion of his property.[34] The District considered the proposed easement to be inadequate, and informed petitioner that the District would approve construction only if he agreed to one of two concessions: (a) Petitioner reduce the size of his development to 1 acre and deed a conservation easement to the District on the remaining 13.9 acres; *or* (b) proceed with the development on the terms proposed by petitioner *and* hire contractors to make improvements to District-owned land several miles away.[35] The District also said that it "would also favorably consider" alternatives to its suggested offsite mitigation projects if petitioner proposed something "equivalent."[36]

Petitioner filed suit in a Florida state court under a state law that provides money damages for agency action that are "an unreasonable exercise of the state's police power constituting a taking without just compensation."[37] The Florida trial court found that the District's demands failed to comply with *Nollan/Dolan*.[38] The Florida District Court of Appeal affirmed.[39] The Florida Supreme Court reversed on two grounds: (1) unlike the conditional approvals in *Nollan* or *Dolan*, the District here *denied* Petitioner's permit application; and (2) a monetary exaction cannot give rise to a takings claim under

32. *Koontz*, 133 S. Ct. at 2592.
33. *Id.*
34. *Id.* at 2592-93.
35. *Id.* at 2593.
36. *Id.*
37. *Id.* (quoting FLA. STAT. § 373.617(2) (2016)).
38. *Id.*
39. *Id.*

Nollan/*Dolan*.[40] The U.S. Supreme Court reversed and held that the Florida Supreme Court erred on both grounds.[41]

First, the Court unanimously agreed the *Nollan*/*Dolan* standard may apply to the government's denial of a permit. Writing for the majority, Justice Alito stated that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit . . . ."[42] The dissent agreed: "The *Nollan-Dolan* standard applies not only when the government approves a development permit conditioned on the owner's conveyance of a property interest (*i.e.*, imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (*i.e.*, imposes a condition precedent)."[43]

Second, by a 5-4 margin, the Court held that "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*."[44] The majority concluded that a government's "demand for property" from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan*, "even when its demand is for money."[45] Thus, the majority in *Koontz* applied the heightened scrutiny of *Nollan* and *Dolan* to monetary exactions in an *ad hoc*, individualized context. The analysis below examines the constitutional rationales adopted by the majority in reaching that conclusion.

C. The Majority in *Koontz* Focused on Extortionate Governmental Demands and Monetary Targeting of Specific Properties

Writing for the majority, Justice Alito explained that the constitutional basis for the heightened scrutiny in *Nollan*/*Dolan* is the "unconstitutional conditions" doctrine. The Court explained that, because "the government may not deny a benefit to a person

40. *Koontz*, 133 S. Ct. at 2593-94.
41. *Id.* at 2603.
42. *Id.*
43. *Id.* (Kagan, J., dissenting).
44. *Id.* at 2599.
45. *Id.* at 2603.

because he exercises a constitutional right,"[46] the unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[47] The premise of 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."[48] Justice Alito noted 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."[49]

The majority opinion discussed the "two realities of the permitting process" that warrant the "special application" of the unconstitutional conditions doctrine under *Nollan/Dolan*.[50] The first reality is "that land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take."[51] Justice Alito explains the "extortionate" nature of that relationship between permit applicants and local governments:

> By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation. So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable. Extortionate demands of this sort frustrate

46. *Koontz*, 133 S. Ct. at 2594 (citing Regan v. Taxation With Representation of Wash., 461 U.S. 540, 545 (1983).

47. *Id.*

48. *Id.* at 2598.

49. *Id.* at 2594 (citing Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547 (2005)).

50. *Id.*

51. *Id.*

> the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.[52]

Justice Alito continues:

> 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. 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.[53]

Thus, the potential for extortionate demands by the government warrants application of the heightened scrutiny of *Nollan/Dolan* in the land use context.[54]

The second reality of the permitting process, according to the majority, is that "many proposed land uses threaten to impose costs on the public that dedications of property can offset."[55] Justice Alito recognized that requiring landowners to internalize the negative externalities of their conduct "is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack."[56]

The heightened scrutiny in *Nollan*/*Dolan* accommodates those two realities "by allowing the government to condition approval of a permit on the dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the

52. *Koontz*, 133 S. Ct. at 2594-95 (internal citations omitted).

53. *Id.* at 2596 (emphasis added).

54. Because of that threat of extortionate demands in the adjudicative exactions context, the majority in *Koontz* explained that heightened scrutiny was needed, despite the potential applicability of other constitutional doctrines: the court has "repeatedly rejected the dissent's contention that other constitutional doctrines leave no room for the nexus and rough proportionality requirements of *Nollan* and *Dolan*. Mindful of the special vulnerability of land use permit applicants to extortionate demands for money, we do so again today." *Id.* at 2602–03.

55. *Id.* at 2595.

56. *Id.*

applicant's proposal."[57] Thus, the Court's precedents combine those two realities by allowing the government "to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in '*out-and-out . . . extortion'* that would thwart the Fifth Amendment right to just compensation.[58] Those rationales must be addressed in any analysis of judicial scrutiny of legislative exactions.

Furthermore, the majority in *Koontz* essentially made four arguments in support of applying *Nollan*/*Dolan* to the *ad hoc* monetary exactions in that case. First, Justice Alito argued that it would be "very easy" for land-use permitting officials to evade the limitations of *Nollan*/*Dolan* if monetary exactions were not brought under that heightened scrutiny.[59] For example, "[b]ecause the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement's value."[60] Those "in lieu of" fees are "functionally equivalent to other types of land use exactions."[61]

Second, the *Koontz* majority distinguished the monetary exaction imposed on the particular real property in that case from general taxes that were addressed in *Eastern Enterprises v. Apfel*.[62] In *Eastern Enterprises*, the United States retroactively imposed on a former mining company an obligation to pay for the medical benefits of retired miners and their families.[63] A four-Justice plurality in *Eastern Enterprises* concluded that the statute's imposition of retroactive financial liability was so arbitrary that it violated the Takings Clause.[64] However, Justice Kennedy joined four other Justices in dissent in *Eastern Enterprises* in arguing that the Takings Clause does not apply to

57. *Koontz*, 133 S. Ct. at 2595 (citing Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).

58. *Id.* (emphasis added) (citing *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837).

59. *Id.* at 2599.

60. *Id.*

61. *Id.*

62. *Id.* (citing E. Enters. v. Apfel, 524 U.S. 498 (1998)).

63. *E. Enters*, 524 U.S. at 513-14, 517.

64. *Id.* at 538.

government-imposed financial obligations that "d[o] not operate upon or alter an identified property interest."[65] The majority in *Koontz* distinguishes Justice Kennedy's opinion in *Eastern Enterprises* by focusing on the property-specific nature of the exaction at issue in *Koontz*. Justice Alito wrote that, unlike *Eastern Enterprises*, the demand for money in *Koontz* "'operate[d] upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment," and "burdened petitioner's ownership of a specific parcel of land."[66] The *Koontz* case therefore bore a resemblance to cases holding that the government must pay just compensation "when it takes a lien–a right to receive money that is secured by a particular piece of property."[67] Justice Alito explained:

> The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of Nollan and Dolan: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.[68]

Justice Alito added:

> [The petitioner] does not ask us to hold that the government can commit a *regulatory* taking by directing someone to spend money. As a result, we need not apply *Penn Central*'s "essentially ad hoc, factual inquir[y]," at all, much less extend that "already difficult and uncertain rule" to the "vast category of cases" in which someone believes that a regulation is too costly. *Eastern Enterprises*, 524 U. S. at 542, (opinion of Kennedy, J.). Instead, petitioner's claim rests on the more limited proposition that when the government commands the relinquishment of funds linked to a *specific, identifiable property interest* such as a bank account or par-

65. *E. Enters*, 524 U.S. at 540 (Kennedy, J., opinion concurring in judgment and dissenting in part).

66. *Koontz,* 133 S. Ct. at 2599.

67. *Id.*

68. *Id.* at 2600 (emphasis added).

> cel of real property, a "*per se* [takings] approach" is the proper mode of analysis under the Court's precedent.[69]

Thus, the majority in *Koontz* emphasized the individualized, property-specific nature of the exaction that falls within *Nollan/Dolan*.

Third, Justice Alito rejected the argument that, if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes. He wrote that "[i]t is beyond dispute that '[t]axes and user fees . . . are not "takings,"'" and therefore the Court's holding in *Koontz* "does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[70] Also, he explained, the Court has had "little trouble distinguishing" between the power of taxation and the power of eminent domain.[71]

D. The Dissent in *Koontz* Decried Judicial Intrusion into Local Land Use Decisions

Writing for the dissent, Justice Kagan refused to apply *Nollan*/*Dolan* to monetary exactions in the land use context. She explained that "[c]laims that government regulations violate the Takings Clause by unduly restricting the use of property are generally 'governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U. S. 104, (1978).'"[72] While the *Penn Central* test "balances the government's manifest need to pass laws and regulations 'adversely affect[ing] . . . economic values,' with our longstanding recognition that some regulation 'goes too far,'" the *Nollan* and *Dolan* decisions are different because "[t]hey provide an independent layer of protection in 'the special context of land-use exactions.'"[73] She added: "*Nollan* and *Dolan* thus serve not to address excessive regulatory burdens on

69. *Koontz,* 133 S. Ct. at 2600 (alteration in original) (emphasis added at "specific, identifiable property interest") (citations omitted).

70. *Id.* at 2600-01 (citing Brown v. Legal Foundation of Washington, 538 U.S. 216, 243 n.2 (2003) (Scalia, J., dissenting).

71. *Id.* at 2602.

72. *Id.* at 2604 (Kagan, J., dissenting) (citations omitted).

73. *Id.* (citations omitted).

land use (the function of *Penn Central*), but instead to stop the government from imposing an 'unconstitutional condition'—a requirement that a person give up his constitutional right to receive just compensation 'in exchange for a discretionary benefit' 8having 'little or no relationship' to the property taken."[74] The dissent concluded that the unconstitutional conditions doctrine cannot apply to challenges to monetary exactions at all in the land use context.[75] Justice Kagan explained: "[A] court can use the *Penn Central* framework, the Due Process Clause, and (in many places) state law to protect against monetary demands, whether or not imposed to evade *Nollan* and *Dolan*, that simply "go[] too far."[76]

The dissent also highlighted the ambiguity regarding the scope of the majority's opinion. Specifically, Justice Kagan was concerned that, by extending *Nollan* and *Dolan*'s heightened scrutiny to a simple payment demand, "the majority threatens the heartland of local land-use regulation and service delivery, at a bare minimum depriving state and local governments of 'necessary predictability.'"[77] She lamented that, "[b]y applying *Nollan* and *Dolan* to permit conditions requiring monetary payments–with no express limitation except as to taxes–the majority extends the Takings Clause, with its notoriously 'difficult' and 'perplexing' standards, into the very heart of local land-use regulation and service delivery."[78] Justice Kagan was concerned that "the flexibility of state and local governments to take the most routine actions to enhance their communities will diminish accordingly."[79] The dissent questioned the majority's position that the decision will have only limited impact on localities' land-use authority, because "the majority's refusal 'to say more' about the scope of its new rule now casts a cloud on

74. *Koontz*, 133 S. Ct. at 2604-05 (Kagan, J., dissenting) (citations omitted).

75. *Id.* at 2606-07, -09 n.3 (Kagan, J., dissenting).

76. *Id.* at 2609 (Kagan, J., dissenting) (alteration in original) (citation omitted)

77. *Id.* (Kagan, J., dissenting) (quoting E. Enters. v. Apfel, 524 U.S. 498, 542 (1998) (Kennedy, J., opinion concurring in judgment and dissenting in part)).

78. *Id.* at 2607 (Kagan, J., dissenting) (citations omitted).

79. *Id.* (Kagan, J., dissenting).

every decision by every local government to require a person seeking a permit to pay or spend money."[80]

E. *Koontz* Left Open the Question of Whether *Nollan/Dolan* Applies to Legislative Exactions

The majority in *Koontz* did not address the issue of whether legislatively applied exactions are also governed by *Nollan/Dolan*. Professor John Echeverria notes: "The majority opinion in *Koontz* is pointedly silent as to whether the ruling applies only to *ad hoc* fees or applies to fees imposed through general rules as well."[81] Professor Echeverria aptly predicts: "With respect to monetary fees, one issue that will preoccupy the lower courts in the years ahead is whether the *Koontz* ruling that monetary fees are subject to *Nollan*/*Dolan* applies to fees calculated and imposed, not in *ad hoc* proceedings, but through general legislation."[82] As discussed above, that ambiguity has led Justice Thomas to recently point out the "compelling reasons for resolving this conflict at the earliest practicable opportunity."[83]

For the reasons discussed below, this author recommends that the Court should follow Justice Kagan's suggestion in *Koontz* that the Court "approve the rule, adopted in several States, that *Nollan* and *Dolan* apply only to permitting fees that are imposed *ad hoc*, and not to fees that are generally applicable."[84]

80. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

81. John D. Echeverria, Koontz*: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 54-55 (2014).

82. *Id.* at 54.

83. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 929 (2016).

84. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (citing as an example Ehrlich v. Culver City, 911 P.2d 429 (Cal. 1996)).

III. *NOLLAN/DOLAN* GENERALLY SHOULD NOT APPLY TO LEGISLATIVE EXACTIONS IN LIGHT OF THE CONSTITUTIONAL RATIONALES DISCUSSED IN *KOONTZ*

A. The Language in *Dolan*, Itself, Draws a Distinction Between Adjudicative and Legislative Exactions

The Court has never directly addressed the issue of whether *Nollan/Dolan* test applies to legislative exactions. Citing his dissent to a denial of a petition for a writ of certiorari in the 1995 case of *Parking Association of Georgia, Inc. v. City of Atlanta*,[85] Justice Thomas came the closest to addressing that issue when he recently opined that he "continue[s] to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'"[86] In *Parking Association*, Justice Thomas earlier explained:

> It is hardly surprising that some courts have applied [*Dolan*'s] rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[87]

Since Justice Thomas articulated those comments in *Parking Association*, however, courts have recognized several

85. Parking Ass'n of Ga., Inc. v. City of Atlanta , 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

86. *Cal. Bldg. Indus. Ass'n*,136 S. Ct. at 928 (quoting *Parking Ass'n of Ga.,* 515 U.S. at 1116).

87. *Parking Ass'n of Ga.,* 515 U.S. at 1117-18; *see* Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. John River Management District, 27 GEO. INT'L ENVTL. L. REV. 539, 571 (2015) ("If the *sine qua non* of an unconstitutional conditions violation is [the] government's imposed choice between giving up a constitutional right to attain something wanted and foregoing the wanted item, it does not matter whether the choice arrives by legislative enactment or through the discretion of permitting authorities.").

constitutional grounds to distinguish between legislative and adjudicative exactions in the application of *Nollan/Dolan*.

In her dissent in *Koontz,* Justice Kagan found such a distinction within the language in *Dolan*. She explained that "*Dolan* itself suggested that limitation by underscoring that there 'the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel,' instead of imposing an 'essentially legislative determination[ ] classifying entire areas of the city.'"[88] Other courts have found that comparative language in *Dolan* to be constitutionally significant. For example, in *Krupp v. Breckenridge Sanitation District,* the Colorado Supreme Court noted that the language in *Dolan* "distinguished typical land use regulations from the type of pointed exaction demanded in *Dolan,*"[89] and reinforced the fact that *Nollan* and *Dolan* "concerned discretionary adjudicative determinations specific to one landowner and one parcel of land, and involved a demand for the dedication of a portion of the land for public use."[90] The Arizona Supreme Court similarly recognized in *Home Builders Association of Central Arizona v. City of Scottsdale*[91] that "the Chief Justice [in *Dolan*] was careful to point out that the case involved a city's *adjudicative* decision to impose a condition tailored to the particular circumstances of an individual case," whereas the development fee at issue in the Arizona case "involves a generally applicable *legislative* decision by the city."[92]

88. *Koontz,* 133 S. Ct. at 2608 (Kagan, J., dissenting) (alteration in original) (quoting Dolan v. City of Tigard, 512 U.S. 374, 385 (1994)).

89. 19 P.3d 687, 696 (2001).

90. *Id*. at 695. In *Lingle,* the U.S. Supreme Court similarly stated: "Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to *adjudicative* land-use exactions"; and "[t]he Court further refined this requirement in *Dolan*, holding that an *adjudicative* exaction requiring dedication of private property must also be '"roughly proportional" . . . both in nature and extent to the impact of the proposed development.'" 544 U.S. 528, 546-47 (2005) (emphasis added).

91. 930 P.2d 993 (Ariz. 1997).

92. *Id*. at 1000 (emphasis in original); *see also* Se. Cass Water Res. Dist. v. Burlington N. R.R. Co., 527 N.W.2d 884, 896 (N.W. 1995) (whereas *Dolan* made a distinction between the city's "adjudicative decision to condition petitioner's application for a building permit on an individual parcel," and other decisions that involved "essentially legislative determinations classifying entire areas of the city," a North Dakota state statute that required railroads to modify bridges and culverts at their own expense did not constitute a compensable taking because the railroad's duty arose "not from a municipal 'adjudicative decision to

Like the dissent in *Koontz* and such other lower courts, the U.S. Supreme Court will likely recognize that the language of *Dolan*, itself, draws a constitutionally significant difference between legislative and adjudicative exactions.

B. The "Extortionate Demands" Prong of the Unconstitutional Conditions Doctrine Demonstrates that *Nollan/Dolan* Should Not Apply to Legislative Exactions that Contain No Meaningful Administrative Discretion

As it did in *Koontz*, the Court will likely begin its analysis of the applicability of *Nollan/Dolan* to legislative exactions by considering the "two realities of the permitting process" that underlie the application of the unconstitutional conditions. The first "reality" of the permitting process is the potential for an "extortionate" relationship between land use applicants and permitting agencies, and the "special vulnerability of land use permit applicants to extortionate demands for money."[93] However, that concern is greatly diminished in the context of legislative exactions because such exactions are less prone to

condition,' but rather from an express and general legislated duty under a constitutional reservation of police power over a corporation"); Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692, 702 (Alaska 2003) ("A *Nollan*/*Dolan* taking may arise when the government makes 'an adjudicative decision to condition [the landowner's] application for a building permit on an individual parcel,' as opposed to a legislative determination of general application. . . . But [plaintiff] Spinell has not demonstrated that the municipality specially required Spinell to dedicate any property for public easements or to construct new street. The municipality simply required that predetermined municipal requirements be satisfied before it would issue permits or certificates. These requirements were city-wide conditions . . . There is no indication Spinell was required to do anything other developers were not required to do to satisfy the plat notes for their subdivisions" (quoting *Dolan*, 512 U.S. at 385)); Waters Landing Ltd. P'ship v. Montgomery Cty., 650 A.2d 712, 724 (1994) (The U.S. Supreme Court in *Dolan*, "in reaching its holding, specifically relied on two distinguishing characteristics that are absent in the instant case. First, the Court mentioned that instead of making 'legislative determinations classifying entire areas of the city,' the City of Tigard 'made an adjudicative decision to condition [the landowner's] application for a building permit on an individual parcel.' . . . In contrast, Montgomery County imposed the development impact tax by legislative enactment, not by adjudication . . .." (Citation omitted.))

93. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2603 (2013).

"leveraging" (i.e., extortionate demands). That is the conclusion of a number of lower courts that have considered that issue.

The California Supreme Court in *Erlich v. Culver City*[94] applied the *Nollan*/*Dolan* test to *ad-hoc*, adjudicative exactions, but not to exactions that are imposed legislatively.[95] In *Ehrlich*, a developer requested that a city amend its general plan, change the zoning of his property and amend the specific plan in order to allow him to build a 39-unit residential condominium complex on his property, which property had previously been used as a private tennis club and recreational facility.[96] Eventually, the city council approved the application "conditioned upon the payment of certain monetary conditions"[97] which included fees to be used for partial replacement of the lost recreational facilities occasioned by the specific plan amendment; and a fee under the city's "art in public places" program.[98] The developer filed a petition for writ of mandate to set aside both fees as unconstitutional takings.[99]

The California Supreme Court decided the case not only by reference to the constitutional takings clause, but also under California's Mitigation Fee Act ("Act").[100] Section 66001 of the Act sets forth a two-part standard for assessing the reasonableness of a monetary exaction by local governments. Subdivision (b) of section 66001applies to "adjudicatory, case-by-case actions" involving application of a fee ordinance to a particular development project.[101] For such adjudicatory *ad hoc* fees, subdivision (b), provides:

> In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall deter-

94. The California Supreme Court's decision in *Ehrlich* followed a remand from the U.S. Supreme Court to reconsider that case in light of *Dolan.* Ehrlich v. City of Culver City, 512 U.S. 1231 (1994).

95. Ehrlich v. Culver City, 911 P.2d 429, 433 (Cal. 1996) (Arabian, J., plurality opinion).

96. *Id.* at 434 (Arabian, J., plurality opinion).

97. *Id.*

98. *Id.* at 435 (Arabian, J., plurality opinion).

99. *Id.*

100. *Id.* at 433 (Arabian, J., plurality opinion).

101. Garrick Dev. Co. v. Hayward Unified Sch. Dist., 4 Cal. Rptr. 2d 897, 907 (1992).

> mine how there is a *reasonable relationship* between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.[102]

The *Ehrlich* court construed the "reasonable relationship" language in subdivision (b) that applies to *ad hoc* determinations "as imposing a requirement consistent with the *Nollan*/*Dolan* standard, we serve the legislative purpose of protecting developers from disproportionate and excessive fees."[103] The *Ehrlich* court therefore viewed the *ad hoc* land use permit context in the same way as the majority of the Justices on the U.S. Supreme Court recently did in *Koontz*. However, the *Ehrlich* court took a very different approach to legislatively-imposed monetary exactions. Subdivision (a) of section 66001 applies to the adoption of legislative exactions,[104] and requires that a local agency to determine "how there is a reasonable relationship"

102. CAL. GOV'T. CODE § 66001(b) (West 2007) (emphasis added).

103. *Ehrlich*, 911 P.2d at 438 (Arabian, J., plurality opinion). The *Ehrlich* court explained the regulatory "leveraging" of permit power in the context of adjudicatory land use permits:

> In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators in land use 'bargains' between property owners and regulatory bodies—those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which purportedly offset the impact of the proposed development. It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies.

Id. The court added:

> It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the *sine qua non* for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

Id. at 439 (Arabian, J., plurality opinion). In his concurring opinion in *Ehrlich*, Justice Mosk similarly explained: "[W]hen a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives." *Id.* at 460 (Mosk, J., concurring opinion).

104. *Garrick*, 4 Cal. Rptr. 2d at 907.

between the proposed use of a given exaction and both "the type of development project" and "the need for the public facility and the type of development project on which the fee is imposed."[105] In a concurring opinion in *Ehrlich*, Justice Mosk explained that "general governmental fees" are "judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*."[106] He added, "Courts will, for federal constitutional purposes, defer to the legislative capacity of the states and their subdivisions to calculate and charge fees designated for legitimate government objectives, unless the fees are plainly arbitrary or confiscatory."[107]

Other state supreme courts have adopted *Ehrlich*'s approach to legislative exactions. For example, the Supreme Court for the State of Washington repeated the observation in *Ehrlich* that "it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment – cases in which the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.'"[108] The Colorado Supreme Court similarly explained:

> One critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development.[109]

105. *Erlich*, 911 P.2d at 436-37 (Arabian, J., plurality opinion) (quoting CAL. GOV'T. CODE § 66001(a)(3)-(4)).

106. *Id.* at 457 (Mosk, J., concurring).

107. *Id.* at 458.

108. City of Olympia v. Drebick, 126 P.3d 802, 808 n.4 (Wash. 2006) (alteration in original) (quoting *Ehrlich*, 911 P.2d at 447).

109. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001).

Likewise, the Arizona Supreme Court observed that "the *Dolan* analysis applied to cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land," but the risk of that sort of leveraging "does not exist when the exaction is embodied in a generally applicable legislative decision."[110]

The California Supreme Court revisited the distinction drawn in *Ehrlich* between generally applicable development fees and "special, discretionary permit conditions" in *San Remo Hotel v. City and County of San Francisco*.[111] In that case, plaintiff owners of a hotel sought approval from the City and County of San Francisco to rent all rooms in the hotel to tourists or other daily renters, rather than to longer term residents. The city granted that approval subject to plaintiffs' compliance with the City's Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), which required replacement of the residential units the City claimed would be lost by the conversion, or paying an in-lieu fee into a governmental fund for the construction of low and moderate-income housing.[112] In response to plaintiffs' takings challenge to the conversion fee, the California Supreme Court refused to apply *Nollan*/*Dolan* and instead applied the deferential test for legislatively imposed fees under the Mitigation Fee Act that was discussed in *Ehrlich*.[113] The court explained:

> While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. *Ad hoc* individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading system-

110. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997).

111. San Remo Hotel v. City of San Francisco, 41 P.3d 87, 103 (Cal. 2002); *see also* Ocean Harbor House Homeowners Ass'n. v. Cal. Coastal Comm'n, 77 Cal. Rptr. 3d 432, 444 (Cal. Ct. App. 2008) (*Nollan*/*Dolan* test applies to "*ad hoc* mitigation fees").

112. *San Remo Hotel*, 41 P.3d at 91.

113. *Id.* at 105.

> atic assessment, they are more likely to escape such political controls.[114]

Similar to that rationale in *San Remo Hotel*, some commentators suggest that a key constitutional concern in the *ad hoc* context is the lack of transparency in the imposition of permitting exactions, which is generally not a concern in the legislative context.[115]

Other state supreme courts have adopted the "political process" rationale behind the legislative/adjudicative distinction described in *Ehrlich* and *San Remo Hotel.* For example, the Oregon Supreme Court held in *Rogers Machinery, Inc. v. Washington County*[116] that a traffic impact fee assessed against property developers under a county ordinance to fund improvements to city streets was not governed by the *Nollan*/*Dolan* test.[117] In support of that conclusion, the Oregon court stated that, "as *Ehrlich* and *San Remo Hotel* accurately observe, the two-pronged heightened scrutiny that the Court adopted in *Dolan* was animated by the Court's particular concern with the sort of governmental leveraging that can arise in case-by-case adjudicatory imposition of development conditions."[118] The Oregon court adopted the reasoning of *San Remo Hotel* that

114. *Id.; see* McClung v. City of Sumner, 548 F.3d 1219, 1228 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009) ("As noted by *San Remo Hotel*, 41 P.3d at 105, any concerns of improper legislative development fees are better kept in check by 'ordinary restraints of the democratic political process.'").

115. *See* Echeverria, *supra* note 81, at 54 ("[L]egislative enactments are generally the product of more carefully considered, transparent decision making by senior government officers than permitting decisions arrived at in *ad hoc* administrative proceedings. *Nollan* and *Dolan* are arguably rooted in the Court's particular suspicions about the negotiations that occur in the court of *ad hoc* proceedings. Thus a majority of the Court may be willing not to extend *Nollan* and *Dolan* to legislative fees."); *see also* Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW 1, 24 (2014) (citing Town of Leesburgh v. Giordano, 701 S.E.2d 783 (2010)) ("Justice Alito's majority opinion in Koontz does not reflect disdain for development exactions, but may express irritation with the lack of transparency in the process by which developers are led to accede to informal demands for possibly unreasonable exactions. In the case of incentive fees or applicant-created infrastructure expenses of a routine nature, transparency could be furthered by legislatively-enacted fee schedules. Those are upheld unless clearly unreasonable.").

116. 45 P.3d 966 (Or. Ct. App. 2002).

117. *Id.* at 981-82.

118. *Id.* at 982.

"'[w]hile legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process.'"[119]

A few courts, such as the Texas Supreme Court, appear to be more concerned about the danger of improper leveraging in the legislative context, even with the inherent transparency of the political process.[120] However, that theoretical danger is present with any generally-applicable tax or user fee, including property taxes, which *Koontz* explicitly held is not governed by *Nollan/Dolan*.[121] Moreover, the concern over improper leveraging in the legislative context is significantly reduced where, as in *San Remo Hotel* (1) the legislation that includes the exaction is "generally applicable legislation in that it applies, without discretion or discrimination, to every residential hotel in the city"; and (2) "no meaningful government discretion enters into either the imposition or the calculation of the in lieu fee."[122] Also, "extortionate demands" in the legislative context would likely be eliminated by the application of a "reasonable relationship" test

119. *Id.* at 982 (quoting *San Remo Hotel*, 41 P.3d at 105-06).

120. *See* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) ("While we recognize that an *ad hoc* decision is more likely to constitute a taking than general legislation, we 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."); *see also* Wake & Bona, *supra* note 74, at 571 n.206. ("One conceived basis for this distinction [between legislative and adjudicative exactions] is that legislative bodies are—*hypothetically*—less likely to treat the permitting process as an opportunity to force valuable concessions from landowners. The assumption is that legislative bodies are more accountable to the people; however, this discounts the fact that legislative bodies are often spurred by the utilitarian impulse, which would sacrifice the interest of a few individuals for the benefit of the community on the whole. In any event, this rationale offers no doctrinal basis for concluding that the same extortionate condition should be reviewed under a different standard when a legislative body imposes the very same constitutional injury.").

121. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600-01 (2013).

122. *San Remo Hotel*, 41 P.3d at 104 (the court noted that the housing replacement fee assessed under the HCO stood in sharp contrast to the recreational facilities replacement fee in *Ehrlich*. In the latter, the city "relied on no specific legislative mandate to impose the fee condition and no legislatively set formula to calculate its size. The condition was imposed *ad hoc*, entirely at the discretion of the city council and staff").

to legislative exactions, such as the California Supreme Court did in *San Remo Hotel* with the following explanation:

> Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development . . . While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for *ad hoc* fees subject to *Ehrlich* [i.e., *Nollan/Dolan*], the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster."[123]

Thus, the concern over potential "leveraging" in the legislative context is not a sufficient ground to apply *Nollan/Dolan* to legislative exactions where such exactions are generally applicable and are not applied with any administrative discretion in either the imposition or the calculation of the exaction.

C. Uniformly-Applied Legislative Exactions Are More Like the "Financial Burdens on Property Owners" that the Majority in *Koontz* Distinguished from Monetary Exactions Relating to a "Specific Parcel of Real Property"

The majority in *Koontz* distinguished between two different types of financial burdens that government can impose on property owners. One type, which is governed by *Nollan/Dolan*, "'operate[s] upon or alters an *identified* property interest' by directing the owner of a *particular* piece of property to make a monetary payment."[124] This type of payment demand "burden[s] the ownership of a *specific* parcel of land."[125] A "*per se* takings" approach is proper when "the government commands the relinquishment of funds linked to a *specific, identifiable* property

123. *Id.* at 105-106 (citations omitted).

124. *Koontz*, 133 S. Ct. at 2599 (quoting E. Enter. v. Apfel, 524 U.S. 498, 542 (1998) (Kennedy, J.)) (emphasis added).

125. *Id.* at 2590 (emphasis added).

interest."[126] Indeed, the "fulcrum" of the *Koontz* decision was "the *direct* link between the government's demand and a *specific* parcel of real property."[127] The other type of financial burden imposed by government on property owners, which is not governed by *Nollan/Dolan,* involves "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[128] Justice Alito juxtaposed these two types of financial when he noted that "the power of taxation should not be confused with the power of eminent domain,"[129] and when he commented that the Court has "little trouble" distinguishing between such powers of "eminent domain" and "taxation."[130] That comparison highlights the Court's clear distinction between financial obligations that explicitly target a specific property (i.e., eminent domain), from financial obligations that address parcels of land generally (i.e., taxation).

Legislative exactions that do not target an "identified," "particular," or "specific parcel of real property," but apply generally to parcels of land, are akin to "property taxes, user fees, and similar laws and regulations." Since *Nollan/Dolan* does not apply to such generally-applied fees and taxes, legislative exactions that apply generally, and do not target "particular," or "specific parcel of real property," should not be governed by the *Nollan/Dolan* standard of review. Numerous lower courts have adopted that conclusion. For example, the concurring Justice in *Ehrlich* stated:

> [I]f a municipality can constitutionally impose a development tax as long as it is rationally based, why is a higher level of constitutional scrutiny required when, as in the case of generally applicable development fees, the "tax" is earmarked for use in alleviating specific development impacts rather than for the general fund?[131]

126. *Koontz*, 133 S. Ct. at 2600 (emphasis added).

127. *Id.* at 2590 (emphasis added).

128. *Id.* at 2601.

129. *Id.* at 2602 (quoting Houck v. Litter River Drainage Dist., 239 U.S. 254, 264 (1915)).

130. *Id*. at 2602.

131. Ehrlich v. Culver City, 911 P.2d 429, 455 (Cal. 1996) (Mosk, J., concurring).

The Oregon Supreme Court agreed with that concurrence:

> There is no principled basis on which to distinguish generally applicable development fees that fund the infrastructure expansion needed to support new development from other legislatively imposed and generally applicable taxes, assessments, and user fees. We therefore join the several courts in other jurisdictions that have held that *Dolan* does not apply to such legislatively imposed and calculated development fees.[132]

Thus, the rationales that led the U.S. Supreme Court in *Koontz* to apply *Nollan/Dolan* to *ad hoc* monetary exactions and to distinguish such exactions from general taxes, are the same rationales that have led lower courts to make a distinction between adjudicative exactions and legislative exactions in the application of *Nollan/Dolan*.

D. The Individualized Determination Required Under *Dolan* Does Not Fit the Context of Generally-Applied Legislative Exactions

The "individualized determination" component of the roughly proportional test in *Dolan* is inconsistent with legislatively imposed development fees. Under *Dolan*, "the city must make some sort of *individualized determination* that the required dedication is related both in nature and extent to the impact of *the proposed development*."[133] Requiring such an "individualized determination" for every proposed development that could conceivably be impacted by a generally applied fee would be impractical in a judicial review of such a fee.[134]

The case of *Home Builders Assn. of Dayton and Miami Valley v. City of Beavercreek* ("*Dayton*")[135] illustrates the doctrinal

132. Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 982 (Or. Ct. App. 2002) (citing *Ehrlich,* 911 P.2d at 455 (Mosk, J., concurring)).

133. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (emphasis added).

134. *See e.g.*, City of Olympia v. Drebick, 126 P.3d 802, 803 (Wash. 2006) (refusing to apply *Nollan/Dolan* and holding that a state impact fee statute did not require local governments to calculate a transportation impact fee by making individualized assessments of a new commercial development's direct impact on each improvement planned in a service area).

135. *See generally*, Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek, 729 N.E.2d 349 (Ohio 2000).

inconsistency between legislative exactions and the individualized assessment that is required under *Dolan*. In *Dayton*, the Ohio Supreme Court purported to extend "dual rational nexus test . . . based on the *Nollan* and *Dolan* cases" to a generally applicable and legislatively imposed "system of impact fees payable by developers of real estate to aid in the cost of new roadway projects."[136] The court opined that the *Dolan* test was applicable because "the appropriate test is one that balances the interests of the city and developers of real estate without unduly restricting local government."[137] The court explained that, under this "dual rational nexus" test, the city must first demonstrate that there is a "reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new developments," and if such a reasonable relationship exists, "it must then be demonstrated that there is a reasonable relationship between the impact fee imposed on a developer and the benefits accruing to the developer from the construction of new roadways."[138] However, in that purported effort to apply *Nollan/Dolan* to the legislative exaction, the Ohio court omitted the individualized determination that *Dolan* requires. The Oregon Supreme Court later observed that the Ohio Supreme Court's actual application of the *Nollan/Dolan* test in *Dayton* is "questionable"[139] because the Ohio court "did not seem to adhere to that test in its analysis."[140] That is because the analysis in *Dayton*, according to the Oregon court, "is difficult to square with *Dolan* and, in fact, mirrors the more deferential test traditionally used for user fees and other purely monetary assessments."[141] Specifically, the Oregon court noted that the *Dayton* decision "made no individualized assessment of proportionality at all but instead reviewed the legislation from a facial perspective as it applied to developers generally."[142] Thus, even courts that purport to apply *Nollan/Dolan* to legislative

136. *Id.* at 353, 356.

137. *Id.* at 355.

138. *Id.* at 350.

139. Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 978 (Or. Ct. App. 2002).

140. *Id.* at 978 n.13.

141. *Id.*

142. *Id.*

exactions (like the Ohio court in *Dayton*) have struggled to comply with the individualized assessment analysis in *Dolan* in the context of legislative exactions.

E. Avoiding Undue Judicial Interference with Local Land Use Authority Is Stronger in the Legislative Context than it Is in the Administrative Context

The U.S. Supreme Court has recognized the need to avoid judicial interference in local legislative governance. "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established."[143] In *Lingle*, the Court rejected the "substantially advances" formula in *Agins v. City of Tiburon*[144] for regulatory takings under the Fifth Amendment because that formula "would require courts to scrutinize the efficacy of a vast array of state and federal regulations - a task for which courts are not well suited," and "would empower - and might often require - courts to substitute their predictive judgments for those of elected legislatures and expert agencies."[145] The Court added that "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established."[146] That deference to legislative decision making is another constitutional reason to avoid the application of *Nollan/Dolan* to generally applied legislative exactions. Indeed, the California Supreme Court considered that the deference the U.S. Supreme Court grants to legislative bodies and concluded: "Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development would open to searching judicial scrutiny the wisdom of myriad government economic

143. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545 (2005). Earlier as a Judge of the Court of Appeals for the Third Circuit, Justice Alito similarly stated that a higher judicial standard of review in the context of a substantive due process challenge "prevents us from being cast in the role of a 'zoning board of appeals.'" United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA, 316 F.3d 392, 402 (3d Cir. 2002).

144. 447 U.S. 255, 255 (1980).

145. *Lingle*, 544 U.S. at 544.

146. *Id.* at 545.

regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause."[147]

F. After *Koontz*, One U.S. District Court Applied *Nollan/Dolan* to a Legislative Exaction, but for the Wrong Reasons

The U.S. District Court for the Northern District of California applied *Nollan/Dolan* to a legislative exaction in the post-*Koontz* case of *Levin v. City & County of San Francisco.*[148] While the ultimate application of *Nollan/Dolan* to the exaction was correct, the rationales adopted by the District Court in reaching that decision were not; and the court's opinion suggests an application of *Nollan/Dolan* to legislative exactions that is overbroad.

In *Levin*, the District Court reviewed an ordinance that was enacted in 2014 by the City and County of San Francisco that required property owners wishing to withdraw their rent-controlled property from the rental market under California's Ellis Act to pay a lump sum to displaced tenants.[149] That 2014

147. San Remo Hotel v. City of San Francisco, 41 P.3d 87, 106 (Cal. 2002) (citing Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Penn Central v. City of New York, 438 U.S. 104, 133 (1978); Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 19 (1976)). The Court of Appeals for the Ninth Circuit similarly declined to apply *Nollan* and *Dolan* to a city's general storm pipe requirement, and made a distinction between an "adjudicative determination" that is applicable solely to individual developers and "general requirement[s] imposed through legislation," in part, because "[t]o extend the *Nollan*/*Dolan* analysis here would subject any regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers." McClung v. City of Sumner, 548 F.3d 1219, 1227-28 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009).

148. *See generally* Levin v. City of San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014). The District Court's decision was appealed to the Court of Appeals for the Ninth Circuit, as case no. 14-17283. That appeal is pending. On appeal, the City and County of San Francisco explicitly raises the issue of whether "legislatively imposed conditions are not subject *to Nollan/Dolan* means-end scrutiny." Opening Brief of Appellant City and County of San Francisco at 24-28, Levin v. City of San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014) (No. 14-17283). The City argues: "[G]enerally applicable conditions are not subject to *Nollan/Dolan* exactions analysis, but instead to the less stringent *Penn Central* inquiry . . .." *Id.* at 26.

149. CAL. GOV'T CODE §§ 7060-7060.7 (West 2016). Under California's Ellis Act of 1985, government entities are restricted from "compel[ling] the owner of any residential real property to offer, or to continue to offer, accommodations in

Ordinance required property owners to pay the greater of a relocation payment due under a 2005 ordinance or twenty-four times the difference between the units' current monthly rate and an amount that purports to be the fair market value of a comparable unit in San Francisco.[150]Although the 2014 Ordinance was generally applied, a landlord could petition the City for a payment reduction on the grounds that the payment would constitute an "undue financial hardship."[151]Under the specific facts in the *Levin* case, the plaintiff landlords were required to pay their tenant $117,958.89 on the day the tenant vacates the unit, under the payment formula in the 2014 Ordinance.[152] Plaintiffs filed a constitutional takings claim in the Northern District of California.

The District Court applied *Nollan/Dolan* to the takings claim and found that the ordinance failed both the essential nexus and rough proportionality tests.[153] The court explained its rationale for applying *Nollan/Dolan* as follows:

> The *Nollan/Dolan* rule governs the land use restriction challenged in the instant case, in which a property owner wishing to make a different use of a property – withdraw it from the rental market for sale or personal use – must apply to the City for a permit to do so. As a condition of granting the necessary Ellis Act permit, the Ordinance requires a monetary exaction—a substantial payment, without which the property owner's proposed new land use is denied and the tenant continues to occupy the unit.

the property for rent or lease, except for guestrooms or efficiency units within a residential hotel . . . ." *Id.* § 7060(a). But section 7060.1 provides that "[n]otwithstanding Section 7060, nothing in this chapter" . . . "(c) [d]iminishes or enhances any power in any public entity to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations." *Id.* § 7060.1(c). The San Francisco Administrative Code implements this power by requiring that, if the property owner "wishes to withdraw from rent or lease all rental units within any detached physical structure," the owner must (1) serve a Notice of Termination of Tenancy on all tenants in possession of the unit; (2) file a Notice of Intent to Withdraw Rental Units with the San Francisco Rent Board; (3) withdraw their unit from the rental market unless the Rent Board grants permission of rescission on the grounds that no tenant vacated or agreed to vacate the property or that extraordinary circumstances exist. S.F. ADMIN. CODE § 37.9(a)(13) (2016).

150. *Levin*, 71 F. Supp. at 1074.

151. *Id.* at 1077.

152. *Id.* at 1078.

153. *Id.* at 1079–89.

> As in *Koontz*, where the monetary exaction was subject to a *Nollan/Dolan* analysis because the City commanded a monetary payment "linked to a specific, identifiable property interest such as a . . . parcel of real property," here the Ordinance's requirement of a monetary payment is directly linked to a property owner's desire to change the use of a specific, identifiable unit of property. "Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*" as acutely and in the same way as the traditional land-use permitting context: the risk that San Francisco has used its substantial power under the Ellis Act to pursue policy goals that lack an essential nexus and rough proportionality to the effects of a property owner withdrawing a unit from the rental market.[154]

Then, in response to the City's argument that *Nollan/Dolan* "categorically" did not apply to legislatively imposed exactions[155] in light of the Ninth Circuit case of *McClung v. City of Sumner,*[156] the District Court stated: "*Koontz* abrogated *McClung*'s holding that *Nollan/Dolan* does not apply to monetary exactions, which is intertwined with and underlies *McClung*'s assumptions about legislative conditions."[157] In addition, the District Court stated that the post-*Koontz* decision by the Ninth Circuit in *Horne v. United States Dept. of Agriculture*[158] "reinforces the applicability of the *Nollan/Dolan* framework to facial reviews of legislative exactions."[159]

154. *Id.* at 1082–83 (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013)).

155. *Id.* at 1083 n.4.

156. McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009).

157. *Levin*, 71 F. Supp. 3d at 1083 n.4.

158. 750 F.3d 1128 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

159. *Levin*, 71 F. Supp. 3d at 1083 n.4. The District Court reasoned:

> In *Horne*, the Ninth Circuit reviewed and rejected a takings challenge to a Marketing Order that required raisin producers to hold back a certain amount of their crop from the market. There, the Ninth Circuit reviewed whether the Order satisfied the *Nollan/Dolan* essential nexus and rough proportionality tests. In so doing, the court explained that *Dolan's* individualized review of a particular land-permit condition made sense there, because "in the land use context . . . the development of each parcel is considered on a case-by-case basis. But here, the [raisin] use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool.". The court went

In *Levin*, the District Court's application of *Nollan/Dolan* to the plaintiffs' takings challenge is ultimately correct, but not for the reasons stated in that opinion. The *Nollan/Dolan* test should apply in that case because of the substantial discretion that is afforded the City's administration in subjectively exempting particular landlords from the payment requirements of the 2014 Ordinance based on the specific financial condition of those landlords. That variance-like procedure does not appear to have been considered by the court in its determination of whether to apply *Nollan/Dolan* to the 2014 Ordinance. However, the rationales expressed by the District Court in suggesting a broad "applicability of the *Nollan/Dolan* framework to facial reviews of legislative exactions" is flawed for the following three (3) reasons.

First, the *Levin* court's application of *Koontz* to legislative exactions is too broad. The District Court equated the description in *Koontz* about government commands for the relinquishment of funds that are "linked to a specific, identifiable property interest such as a bank account or parcel of real property"[160] with the 2014 Ordinance's requirement of a monetary payment that is "directly linked to a property owner's desire to change the use of a specific, identifiable unit of property."[161] In a similar manner, the District Court equated the language in *Koontz* about "the effects of the proposed new use of the specific property at issue"[162] with "the effects of a property owner withdrawing a unit from the rental market" in light of the 2014 Ordinance.[163] Unlike the Supreme Court in *Koontz* (relying on *Eastern Enterprises*), the District Court in *Levin* did not focus on whether the exaction targeted an "identified," "particular," or "specific parcel of real property."[164] Instead, *Levin* focused on the effect of the exaction on the "choices" of the property owners that seek to use the properties that were impacted by the generally-applied legislative

> on to conclude that the Marketing Order was tailored to the government interests under *Nollan/Dolan* because it varied the reserve requirement annually in accordance with market conditions.

Id. (quoting *Horne*, 750 F.3d at 1143-44).

160. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013).

161. *Levin*, 71 F. Supp. 3d at 1083.

162. *Koontz*, 133 S. Ct. at 2600.

163. *Levin*, 71 F. Supp. 3d at 1083.

164. *Koontz*, 133 S. Ct. at 2599–600.

exaction.[165] That "choices" rationale is flawed because it would necessarily sweep into the *Nollan/Dolan* analysis all "property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners."[166] Such generally-applied financial burdens on property owners will necessarily have an effect on the "choices" of those property owners as to how they will use their property. Thus, the District Court erred in its application of *Nollan/Dolan* to the 2014 Ordinance when it looked to the property owners' "choices" that are impacted by the legislative exaction, instead of looking to whether the exaction explicitly targeted an "identified," "particular," or "specific parcel of real property."[167]

Second, the *Levin* court's reliance on the Ninth Circuit's decision in *Horne* is misplaced. In *Horne,* the court considered a takings challenge to a marketing order imposed by the U.S. Department of Agriculture on California producers of certain raisins. That marketing order required that the producers divert a percentage of their annual crop to a reserve, and allowed the Secretary to impose a penalty on producers who failed to comply with that diversion program.[168] The Ninth Circuit refused to apply a *per se* takings analysis to a legal challenge by raisin growers, and instead applied the *Nollan*/*Dolan* standard of review.[169] The court reasoned that the Takings Clause affords less protection to personal than to real property, and that the

165. The *Levin* court explained:

> As in *Nollan*, *Dolan*, and *Horne*, the challenged Ordinance requires a conditional exaction: the loss of substantial funds or physical control over the landlord's unit. All conditionally grant a government benefit in exchange for the exaction, which here takes the form of the Ellis Act permit that the landlord must have in order to withdraw property from the rental market. "And, critically, all" of these cases "involve choice": the Nollans could have continued to lease their property with the existing structure, Ms. Dolan could have left her store and parking lot unchanged, the Hornes could have avoided the Marketing Order by planting different crops, and the Levins and Park Lane can avoid paying the exaction by subjecting their property to continued occupation by an unwanted tenant.

Levin, 71 F. Supp. 3d at 1083 (citations omitted).

166. *Koontz*, 133 S. Ct. at 2601.

167. *Id.* at 2599–600.

168. Horne v. United States Dep't of Agric., 750 F.3d 1128, 1132 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015).

169. *Id.* at 1139–41.

reserve requirement "is a use restriction applying to the [plaintiffs] insofar as they voluntarily choose to send their raisins into the stream of interstate commerce."[170] The court explained that *Nollan*, *Dolan* and this case all involved "conditional exaction" and "choice."[171] However, contrary to the suggestion by the U.S. District Court in *Levin*, the Ninth Circuit's decision in *Horne* is not authority on the legislative exaction issue. The case did not involve a legislative exaction, but rather involved a marketing order that was made by a "Raisin Administrative Committee" that was comprised of "forty-seven industry-nominated representatives" appointed by the Secretary of the Department of Agriculture,[172] which is different both in structure and in function from elected legislative bodies. Also, the Ninth Circuit did not consider whether the *Koontz* analysis applies to legislative exactions, and did not discuss the distinctions between legislative and adjudicative exactions that numerous other courts have made. In addition, the U.S. Supreme Court reversed the Ninth Circuit's decision in *Horne* on several grounds, *inter alia*, that the marketing regulation constituted a "clear physical taking" that applies to personal property.[173] In other words, *Horne* is a physical takings case and not a regulatory takings case that is subject to *Nollan/Dolan* review. Thus, contrary to the District Court's analysis in *Levin*, the *Horne* decision by the Ninth Circuit does not provide any authority for the proposition that *Nollan/Dolan* applies to legislative exactions.

Third, the *Levin* court's cursory dismissal of the Ninth Circuit's discussion of legislative exactions in *McClung* is incorrect. While *Levin* accurately noted that *Koontz* abrogated the holding in *McClung* that monetary exactions do not fall within *Nollan/Dolan,*[174] the District Court incorrectly concluded that such holding in *McClung* is "intertwined with and underlies *McClung*'s assumptions about legislative conditions."[175] That is

170. *Horne*, 750 F.3d at 1142.

171. *Id.* at 1143.

172. *Id.* at 1133 n.3.

173. *Id.* at 2425–431.

174. Levin v. City of San Francisco, 71 F. Supp. 3d 1072, 1083 n.4 (N.D. Cal. 2014) (citing Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013)).

175. *Id.*

because the Ninth Circuit in *McClung* discussed the legislative/adjudicative distinction apart from the "monetary" nature of the particular exactions in that case.[176] *Levin* overlooked that discussion. *Levin* also avoids those cases that have made a distinction between legislative and adjudicative exactions in determining whether to apply *Nollan/Dolan* to legislative exactions, which cases (such as *San Remo Hotel*) were cited in *McClung*.[177]

In short, while the District Court's decision in *Levin* to apply *Nollan/Dolan* to the 2014 Ordinance is correct due to the administrative variance-type procedure that is contained within that ordinance, the court erred in suggesting that *Koontz* warrants a broad "applicability of the *Nollan/Dolan* framework to facial reviews of legislative exactions."

G. Thus, to Avoid *Nollan/Dolan*, a Legislative Exaction Must Be Generally Applied, and Must Establish a Set Formula that is Applied Without Any Meaningful Administrative Discretion

The *Nollan/Dolan* test should apply to exactions that are *ad hoc* adjudicatory monetary demands on land use permittees, even if such demands are enacted by legislative bodies.However, *Nollan/Dolan* should not govern exactions that (1) are generally applied, and (2) are based on a set legislative formula that is applied to specific development projects without any meaningful administrative discretion. Those two criteria are discussed below.

176. For example, the *McClung* decision included the following discussion:

> Next, the McClungs attempt to recast the facts as involving an individualized, discretionary exaction as opposed to a general requirement imposed through legislation. The McClungs make this argument in recognition of the fact that at least some courts have drawn a distinction between adjudicatory exactions and legislative fees, which have less chance of abuse due to their general application. The facts do not support the McClungs falling within the former category. All new developments must have at least 12-inch storm pipe; there is no evidence on the record that the McClungs were singled out.

McClung v. City of Sumner, 548 F.3d 1219, 1228–29 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009) (citations omitted).

177. *Id.* at 1228.

First, in order to avoid *Nollan/Dolan*, a legislative exaction must be generally applied. A number of lower courts have recognized that the political process inherent in the adoption of legislative exactions operates as protection against extortionate demands on land-use applicants.[178] However, the strength of that "political process" rationale diminishes as the legislative exaction becomes more narrowly applied. Even those courts that decline to apply *Nollan/Dolan* to legislative exactions recognize that such exactions are not "generally applicable" if they target specific properties or developers.[179] Indeed, the Court has emphasized the Takings Clause's role "in 'barring 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.'"[180] Justice Stevens explained in his dissent in *Lucas* that "one of the central concerns of our takings jurisprudence is 'prevent[ing] the public from loading upon one individual more than his just share of the burdens of government,'" and "[w]e have, therefore, in our takings law frequently looked to the *generality* of a regulation of property."[181] Accordingly, Justice Stevens noted that "[i]n analyzing takings claims, courts have long recognized the difference between a regulation that targets one or two parcels of land and a regulation that enforces a statewide policy."[182] Professor Echeverria summarizes Justice Stevens' view this way: "so long as regulation applies broadly across a community, there should be a strong presumption that the regulation represents a

178. *See infra* Part III.B.

179. For example, in *McClung,* the Ninth Circuit Court of Appeals refused to apply the *Nollan*/*Dolan* standard to a city ordinance's "across-the-board" requirement that all new developments include a minimum of 12-inch storm pipes. 548 F.3d at 1228. When the plaintiffs attempted to recast the facts as involving "an individualized, discretionary exaction as opposed to a general requirement imposed through legislation," the court explained: "The facts do not support the [plaintiffs] falling within the former category. All new developments must have at least 12-inch storm pipe; there is no evidence on the record that the [plaintiffs] were singled out." *Id.* at 1228–29.

180. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537 (2005) (citations omitted) (emphasis added).

181. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1071–72 (1992) (Stevens, J., dissenting) (alteration in original); *see also id.* at 1072 n.7 (Stevens, J., dissenting) ("This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the 'mischiefs of faction.'").

182. *Id.* at 1073 (Stevens, J., dissenting).

legitimate outcome of the political process rather than the high jacking of the process by some special interest."[183] That view is consistent with the California Supreme Court in *San Remo Hotel* and the Oregon Supreme Court in *Rogers Machinery*, discussed above. Thus, in order for a legislative exaction to not be an "extortionate demand" like the *ad hoc* administrative exaction in *Koontz* that required the application of *Nollan/Dolan*, the legislative exaction must be generally applicable and must not single out a few projects or properties (i.e., "some people").[184]

Second, in order to prevent a legislative exaction from becoming an "extortionate demand" that is subject to *Nollan/Dolan*, there must not be any meaningful discretion in the application of the exaction to specific projects or properties.[185] The Court's concern regarding administrative discretion is evident in Justice Alito's explanation in *Koontz* that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad *discretion* to deny a permit that is worth far more than property it would like to take."[186] The relevance of administrative discretion is also apparent in the exchange during oral argument between Petitioner's counsel and Justice Sotomayor. The Justice asked: "So what happens in just – when the legislature passes a development fee? Are you, now,

183. John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. OF ENVTL. L. & POL'Y 171, 193 (2005). Professor Eagle similarly notes that "fine-grained ordinances setting out requisites for development" may lack judicial deference because they would constitute "spot zoning." Eagle, *supra* note 115, at 24.

184. In most cases the difference between the two should be apparent. Professor Ilya Somin describes the distinction between "broad-based property taxes or user fees that apply to all property owners, or to all users of a particular public service, and narrowly targeted exactions that single out individual landowners or small groups" as follows: "[a]lthough the precise line between the two may be elusive, most real-world cases are likely to fall clearly on one side or the other of this continuum." Ilya Somin, *Two Steps Forward for the "Poor Relation" of Constitutional Law:* Koontz*,* Arkansas Game & Fish*, and the Future of the Takings Clause*, CATO SUPREME CT. REV. 215, 239 (2013).

185. *See, e.g.*, Krupp v. Breckenridge Sanitation Dist.*,* 19 P.3d 687, 694 (Colo. 2001) (". . .the District Manager [of a sanitation district] validly calculated [developers'] specific assessment according to a publicly promulgated conversion framework.").

186. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594 (2013) (emphasis added).

saying that's subject to *Nollan* and *Dolan*, too?"[187] Petitioner's counsel responded: "If the legislation requires an agency who processes the permit to impose a fee in exchange for a permit – again, within the land-use context, we are not talking about taxes, homeowners' fees, we are talking within the *discretionary* land-use process – that is imposed there, then the risk of coercion, undue influence, and the like arise, and *Nollan* and *Dolan* should apply."[188] Thus, even Petitioner's counsel in *Koontz* recognized a connection between "the risk of coercion, undue influence, and the like" and the "discretionary" land-use process. That is because the existence of administrative discretion in the application of a legislative exaction raises the same potential for coercion and "extortionate demands" as an adjudicative exaction.

For example, the Texas Supreme Court applied *Nollan/Dolan* to a legislative exaction, *inter alia*, because of the administrative discretion that was allowed in the application of that exaction to specific projects. In *Town Of Flower Mound v. Stafford Estates Ltd Partnership*, the Texas court found no meaningful distinction between the conditions imposed in *Nollan* and *Dolan* (which involved "general authority taking into account individual circumstances") and the requirement in a town ordinance that conditioned the approval of a subdivision development on the general requirement that all developers construct concrete streets.[189] However, the ordinance contained an exception to that development requirement if the Town's Council found and determined "that such standards work a hardship" due to the "costs" and "other related factors" resulting from the imposition of that requirement in individual cases.[190] The Town denied the request by the plaintiff developer for an exception to that requirement, even though the Town "had exercised its discretion to grant exceptions to other developers on a project-by-project basis."[191] The Texas court explained the

187. Transcript of Petitioner Oral Argument at 58, Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013) (No. 11-1447).

188. *Id.* (emphasis added).

189. Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

190. *Id.* at 624 (quoting FLOWER MOUND, TEX., CODE, ch.12 § 4.04(a) (1994) (now codified at CODE § 90-301 (2002)).

191. *Id.* at 624.

relevance of that discretionary element in the application of the *Nollan/Dolan* test:

> The Town was authorized to grant, and did grant, exceptions to the general requirement that roads abutting subdivisions be improved to specified standards. Stafford applied for an exception and was refused, but the Town nevertheless considered whether an exception was appropriate. [¶] The Town argues that if the government is to be held to the stricter *Dolan* standard because it tries to tailor general requirements to individual circumstances - that is, because it sometimes grants variances - it will be less inclined to do so, thereby inflicting one-size-fits-all shoes onto very different feet. But it is precisely for this reason that we decline to adopt a bright-line adjudicative/legislative distinction.[192]

The application of *Nollan/Dolan* in *Town of Flower Mound* therefore depended, in part, on the fact that the Town's administrative staff had the discretion to decide who should have to follow the otherwise generally-applied legislative exaction.[193] That application of *Nollan/Dolan* to a legislative exaction is consistent with the rationale in *San Remo Hotel*, where the California Supreme Court declined to apply *Nollan/Dolan* to a legislative in lieu fee

192. *Id.* at 641–42 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987)).

193. In *Twin Lakes Development Corporation v. Town of Monroe*, the Court of Appeals of New York similarly applied *Nollan/Dolan* to a legislative exaction that had a built-in discretionary administrative component. There, the New York court affirmed summary judgment against a developer that brought a takings challenge against a town code requirement that an applicant for a subdivision permit pay a per-lot in lieu fee where the town's planning board determines that parkland dedication is not appropriate. Twin Lakes Dev Corp v. Town of Monroe, 801 N.E.2d 821, 822 (N.Y. 2003). Without any discussion as to whether *Nollan/Dolan* should even apply in that legislative context, the court simply adjudicated the case under that standard. *Id.* The Plaintiff developer argued that the fee constituted an unconstitutional taking, in part, because the amount of the fee was not based on an individualized consideration under *Dolan* of the recreational needs generated by its subdivision plan and thus is not roughly proportional to those needs. *Id.* at 824. The court rejected that argument because the planning board made a finding that led to the imposition of the in-lieu fee rather than a parkland dedication, and such findings "reflect the individualized consideration of the project's impact contemplated by *Dolan*." *Id.* at 825.

as there "is no meaningful government discretion [that] enters into either the imposition or the calculation of the in lieu fee."[194]

Thus, the general consensus appears to be that the *Nollan/Dolan* test should apply to a legislative exaction where a project applicant/property owner is treated uniquely either in the imposition of the exaction, or in the exception from the exaction. Both situations involve administrative discretion that carry the threat of "extortionate demands,"[195] even though the exaction is initially created in the legislative process. However, legislative exactions that do not include any meaningful discretion in their administration (either in their application or in an exception to their application) should not be governed by *Nollan/Dolan*.

IV. THE DEFAULT *PENN CENTRAL* ANALYSIS SHOULD NOT GOVERN GENERALLY APPLIED AND DISCRETIONLESS LEGISLATIVE EXACTIONS

A. *Penn Central* is the Default Standard of Review for Takings Cases

In various cases, the Court has made general statements to the effect that the multi-factored analysis in *Penn Central* is the "default" test that determines whether a regulatory action constitutes a "taking" under the Fifth Amendment. For example, in *Palazzolo v. Rhode Island*,[196] Justice O'Connor explained in a concurring opinion: "Our polestar instead remains the principles

194. San Remo Hotel v. City of San Francisco, 41 P.3d 87, 104 (Cal. 2002); *see, e.g.,* Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 696 (Colo. 2001) (*Nollan/Dolan* does not apply to Colorado state's sanitation plant investment fee where "[t]he General Assembly authorized the fee and the District assessed it under the terms of a publicly promulgated conversion schedule"; and "[n]either the promulgation of the conversion schedule, nor the calculation of the [individual property owner's] [fee] assessment by the assigned administrative official, constituted a discretionary adjudicative activity.").

195. It could be argued that a "legislative exaction" that involves administrative discretion is not really a "legislative exaction" at all. However, it is important to interpret legislative exactions in light of the degree of administrative discretion that is built into the legislation in order to address the concern of some courts that there may not be a clear "adjudicative/legislative distinction" for purposes of determining the proper standard of judicial review. *See, e.g., Town of Flower Mound*, 133 S.W.3d at 642.

196. 533 U.S. 606 (2001).

set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."[197] The dissent in *Koontz* similarly recognized that "[c]laims that government regulations violate the Takings Clause by unduly restricting the use of property are generally 'governed by the standards set forth in *Penn Central Transp. Co. v. New York City*,'"[198] and that the "function of *Penn Central*" is to "address excessive regulatory burdens on land use."[199] The *Lingle* Court more specifically explained that, outside the "two relatively narrow categories" of a physical invasion of property and of a deprivation of all economically beneficial use of property under *Lucas*, and other than the "special context of land-use exactions" in *Nollan/Dolan*, "regulatory takings challenges are governed by the standards set forth in *Penn Central* . . . ."[200] In light of such statements, it is not surprising that the Court of Appeals for the Ninth Circuit held in an unreported decision in 2010 that "the proper framework" for analyzing whether a "generally applicable development fee" was a taking is "the fact-specific inquiry developed by the Supreme Court in *Penn Central* . . . ."[201]

197. *Id.* at 633 (O'Connor, J., concurring).

198. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2604 (2013) (Kagan, J., dissenting) (citations omitted) (quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005)).

199. *Id.* at 2604 (Kagan, J., dissenting) (citations omitted).

200. *Lingle*, at 538; *see id.* at 539 (the *Penn Central* factors "have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules"); *id.* at 548 ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."); *see also* Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012) ("[W]e have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking. So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land. But aside from the cases attended by rules of this order, most takings claims turn on situation-specific factual inquiries." (citing, *inter alia*, Penn Central v. City of New York, 438 U.S. 104, 125 (1978)); *Palazzolo*, 533 U.S. at 617 (citing *Penn Central* for the proposition that "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors . . . .").

201. Mead v. City of Cotati, No. 09-15005, 2010 U.S. App. LEXIS 15201, at *4–5 (9th Cir. July 22, 2010) (citing McClung v. City of Sumner, 548 F.3d 1219, 1225 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009)).

B. However, the *Penn Central* Analysis Should Not Govern Generally-Applied Legislative Exactions

Despite those general statements by the Court, legislative exactions should *not* be governed by the *Penn Central* analysis for the following three (3) reasons.

First, because the *Penn Central* analysis is "situation-specific"[202] and "essentially *ad hoc*,"[203] it is not designed to address generally-applied legislative exactions. For example, *Lingle* explained that the "primary" *Penn Central* factor is "[t]he economic impact of the regulation on *the claimant* and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations."[204] Thus, just as the "individualized determination" under *Nollan/Dolan* renders that standard inapplicable to generally-applied legislative exactions for the reasons discussed above,[205] so too the "situation-specific" analysis under *Penn Central* makes the latter ill-suited for judicial review of legislative exactions of general applicability.

Second, the *Penn Central* analysis is too inherently uncertain and gives rise to too many "vexing subsidiary questions"[206] to be practical in the context of legislative exactions. Professor Eagle notes that the *Penn Central* doctrine "remains under-theorized, subjective, with its factors mutually referential, and unable to provide a reliable guide to courts or litigants," and that the doctrine "has become a compilation of moving parts that are neither individually coherent nor collectively compatible."[207] For example, in *Koontz,* Justice Alito expressed relief that the Court

202. *Ark. Game & Fish*, 133 S. Ct. at 518.

203. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

204. *Lingle*, 544 U.S. at 538–39 (emphasis added); *see also Palazzolo*, 533 U.S. at 633–34 (O'Connor, J., concurring) ("[T]he regulatory regime in place at the time the *claimant* acquires the property at issue" is relevant to the "degree of interference with investment-backed expectations" element of the *Penn Central* analysis. Also, "[e]valuation of the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to *particular property* 'goes too far.'") (emphasis added).

205. *See infra* Part III.D.

206. *Lingle*, 544 U.S. at 538–39 (citing *Palazzolo*, 533 U.S. at 617-18, 632-34 (O'Connor, J., concurring)).

207. Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601, 601-02 (2014).

"need not apply *Penn Central*'s 'essentially ad hoc, factual inquir[y],' at all, much less extend that '*already difficult and uncertain rule*' to the 'vast category of cases' in which someone believes that a regulation is too costly."[208] Justice Alito's comment suggests that the Court would be reluctant to apply the "difficult and uncertain rule" in *Penn Central* to legislative exactions. That makes sense because judicial standards of review should be applied in a manner that affords clarity to legislatures in how to enact land use exactions that are constitutionally valid. Just as legislation must have sufficient clarity so as to give fair warning to the public as to what activities are prohibited in order to pass constitutional muster,[209] so too should judicial standards of review give clarity to legislatures where the constitutional lines are drawn for legislative exactions. Just like the Court purposefully "construe[s] [ambiguous] statutes [as necessary] to avoid constitutional questions,"[210] so too the Court should apply non-ambiguous standards of review to legislative exactions so as to allow legislatures to avoid unconstitutional takings. Thus, the Court should provide a non-ambiguous standard of review to determine whether generally applied and discretionless exactions constitute takings under the Fifth Amendment. The *Penn Central* analysis does not provide such a standard.

Third, the prevalence of legislative exactions is so widespread that the Court should avoid its usual predisposition to "generally eschew[] any " 'set formula' " for determining how far is too

208. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2600 (2013) (quoting E. Enters. v. Apfel, 524 U.S. 498, 542 (1998) (opinion of Kennedy, J.)) (emphasis added).

209. *See generally* United States v. Lanier, 520 U.S. 259, 266–67 (1997).

210. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 328 (2010); *see* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 628–29 (1993) ("It is a hoary one that in a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' 'Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."" (citations omitted)); *see also* Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 134 (1974) ("[W]hen a statute is ambiguous, 'construction should go in the direction of constitutional policy.'") (citation omitted)).

far."[211] Generally, the Court "resist[s] the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula."[212] *Penn Central*, itself, is based on the Court's decision to eschew "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[213] However, that judicial policy of avoiding formulaic takings rules should not govern legislative exactions. As the dissent in *Koontz* pointed out, the constitutional standard of review applied to land use exactions impacts "every decision by every local government to require a person seeking a permit to pay or spend money."[214] What is at stake, according to the *Koontz* dissent, is the potential that the Court could end up diminishing "the flexibility of state and local governments to take the most routine actions to enhance their communities . . . ."[215] The widespread impact of the constitutional standard of review in the legislative takings context, coupled with Justice Kennedy's observation that "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law,"[216] collectively means that widespread constitutional litigation can be expected in the legislative exactions context if the *Penn Central* analysis is applied. Thus, the appropriate standard of judicial review for generally-applied and discretionless legislative exactions should not be *Penn Central*, but should be a "set formula."

Accordingly, the *Penn Central* "factors" analysis is inappropriate in the legislative exaction context. Instead, a set formula for legislative exactions is warranted. Indeed, Professor

211. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

212. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002).

213. *Penn Cent.*, 438 U.S. at 124 (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

214. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting).

215. *Id.* at 2607 (Kagan, J., dissenting).

216. E. Enters. v. Apfel, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

Echeverria points out that *per se* rules in takings cases assist local agencies in drafting legislation: "Even from a perspective of defenders of government regulatory authority, this approach had the potential benefit of identifying actions that would be safely immune from takings liability – assuming these *per se* tests came to define not only the grounds, but also the outer limits, of takings liability."[217] The Court should design a 'set formula' standard of review that constitutes both the "grounds" and "outer limits" of constitutional takings in the legislative exactions context. As discussed below, the reasonable relationship test that has been adopted by several states constitutes such a standard of review.

V. A REASONABLE RELATIONSHIP TEST SHOULD GOVERN GENERALLY-APPLIED AND DISCRETIONLESS LEGISLATIVE EXACTIONS

Since neither the *Nollan/Dolan* heightened scrutiny test, nor the "default" *Penn Central* analysis, should govern generally-applied and discretionless legislative exactions, as explained above, the Court should therefore fashion a "takings" standard of review that is tailored to such legislative exactions. Such a standard must satisfy the two fundamental "takings" criteria explained in *Lingle*. Prior to *Lingle*, the Court had declared in *Agins v. Tiburon*[218] that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ."[219] However, the Court reversed course in *Lingle*, concluding that "the 'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[220] According to *Lingle*, the formula in *Agins* "prescribes an inquiry in the nature of a due process, not a takings, test,"[221] examines the validity of a

217. Echeverria, *supra* note 171, at 173.

218. 447 U.S. 255 (1980).

219. *Id.* at 260.

220. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 532, 536–45 (2005).

221. *Id.* at 540. *See also id.* (*Agins* formula "was derived from due process, not takings, precedents"); *id.* at 542 ("The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose. An inquiry of

regulation in a manner that "is logically prior to and distinct from the question whether a regulation effects a taking"[222], and does not involve the key examination of whether the governmental regulation forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[223] In rejecting the *Agins* formula, the Court in *Lingle* outlined the two key elements that must be included in any "takings" standard of review: "[T]he 'substantially advances' inquiry [in *Agins*] reveals nothing about the [1] *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about [2] how any regulatory burden is *distributed* among property owners."[224] The Court repeated: "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."[225] Thus, the standard of review that the Court should apply to legislative exactions must address those two elements.

In determining the proper standard of review for legislative exactions, the Supreme Court should consider the approaches taken by various states. That is what the Court did when it developed the analogous "roughly proportional" test in *Dolan*.[226]

this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." (citation omitted)).

222. *Id.* at 543.

223. *Id.* at 536 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

224. *Id.* at 542 (emphasis in original). The court further explained that "the 'substantially advances' inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property . . . ." *Id.* at 547.

225. *Id.* at 543.

226. Dolan v. City of Tigard, 512 U.S. 374, 389–91 (1994) ("Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."); *see generally* Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2602 (2013) ("Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987) (Court's conclusion that

This author suggests that the Court adopt a "reasonable relationship" test like that which has been applied to legislative exactions in the states of California, Colorado, and Ohio.

In California, the Mitigation Fee Act provides a statutory reasonable relationship requirement that applies to legislative exactions.[227] The statute requires that a local agency must determine "'how there is a '*reasonable relationship*' between the proposed use of a given exaction and both 'the type of development project' and 'the need for the public facility and the type of development project on which the fee is imposed.'"[228] The California Supreme Court summarized that statutory test as follows: "fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development."[229] Indeed, *Penn Central* appeared to suggest such a test when the U.S. Supreme Court declared that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[230]

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the California Coastal Commission's imposition of a permit condition cannot be treated as an exercise of its land-use power "is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts" (citing numerous state authorities)).

227. CAL. GOV'T CODE §§ 66001(a)–(b), 66005(a), 66006(c) (West 2016).

228. Ehrlich v. Culver City, 911 P.2d 429, 436–37 (Cal. 1996) (Arabian, J., plurality opinion) (quoting CAL. GOV'T CODE §§ 66001(a)(3)–(4)) (emphasis in original); *see also* Homebuilders Ass'n of Tulare/Kings Ctys., Inc. v. City of Lemoore, 112 Cal. Rptr. 3d 7, 14 (2010) ("The Mitigation Fee Act requires the local agency to identify the purpose of the fee and the use to which the fee will be put. The local agency must also determine that both 'the fee's use' and 'the need for the public facility' are reasonably related to the type of development project on which the fee is imposed. In addition, the local agency must 'determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.'") (internal citations omitted).

229. San Remo Hotel v. City of San Francisco, 41 P.3d 87, 105 (Cal. 2002); *see also Homebuilders Ass'n of Tulare/Kings Ctys.*, 112 Cal. Rptr. 3d at 15 ("[B]efore imposing a fee under the Mitigation Fee Act, the local agency is charged with determining that the amount of the fee and the need for the public facility are reasonably related to the burden created by the development project.").

230. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978). *Cf. Nollan*, 483 U.S. at 837 ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use by 'an out-and-out plan of extortion.'") (quoting J.E.D. Assocs., Inc. v Atkinson, 432 A.2d 12, 14-15 (1981).

In Colorado, a similar statutory reasonable relationship test has been applied. For example, in *Krupp v. Breckenridge Sanitation District*, the Colorado Supreme Court held that a legislatively imposed sanitation plant investment fee was not governed by *Nollan/Dolan*, but was instead governed a state statute that required that "the amount of the fee must be *reasonably related* to the overall cost of the service."[231] Under that reasonableness standard, "[m]athematical exactitude is not required, however, and the particular mode adopted by the governmental entity in assessing the fee is generally a matter of legislative discretion."[232] Judicial review under that standard presumed that the governmental body "may rationally distinguish between different types of projects in setting its rates," and that the courts "will not set aside the methodology chosen by an entity with ratemaking authority unless it is inherently unsound."[233]

The Ohio Supreme Court similarly applied a two-part reasonable relationship test to a legislative exaction in *Dayton* (even though the court incorrectly considered that test to be an administration of *Nollan/Dolan*).[234] The Ohio court explained that, under that test, "the city must first demonstrate that there is a reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new developments," and if such a reasonable relationship exists, "it must then be demonstrated that there is a reasonable relationship between the impact fee imposed by [the city] and the benefits accruing to the developer from the construction of new roadways."[235]

Those various forms of the reasonable relationship test applied in California, Colorado, and Ohio avoid the shortcomings

231. 19 P.3d 687, 693–94 (Colo. 2001) (emphasis added).

232. *Id.* at 694.

233. *Id.* In *Krupp*, the court found that the fee at issue satisfied that "reasonably related" standard: "We conclude that the [fee] is established by legislative authority, and is reasonably related to the specific government service of providing wastewater collection and treatment to new developments within the District. It rationally differentiates between different classes of buildings based upon anticipated peak wastewater flows per unit." *Id.*

234. *See infra* Part III.D.

235. Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000).

of the *Nollan/Dolan* and *Penn Central* standards of review in the legislative exaction context. The reasonable relationship test not only avoids the judicial interference with local land-use decisions that so troubled the dissent in *Koontz,* but it also alleviates the Court's concern that land-use exactions may go "too far" and become "extortionate demands" on property owners.

Furthermore, the reasonable relationship test satisfies the two elements that *Lingle* required for any "takings" standard of review. First, the reasonable relationship test considers the actual burden imposed on property rights. For example, under the California Mitigation Fee Act, the fee determination process by the legislative body "will necessarily involve predictions regarding population trends and future building costs," and therefore "it is not to be expected that the figures will be exact."[236] On review, courts "will not concern themselves with [a local] agency's methods for compiling and evaluating scientific data."[237] Instead, a court "must be able to assure itself that before imposing the fee the [local agency] engaged in a reasoned analysis designed to establish the requisite connection between the amount of the fee imposed and the burden created."[238] Thus,

236. Shapell Indus., Inc. v. Governing Bd. of the Milpitas Unified Sch. Dist., 1 Cal. Rptr. 2d 818, 827 (Cal. Ct. App. 1991).

237. *Id.* at 835.

238. *Id.* at 827. *See* Homebuilders Assn. of Tulare/Kings Ctys. v. City of Lemoore, 112 Cal. Rptr. 3d 7, 15-16 ("If such a fee is challenged, the local agency has the burden of producing evidence in support of its determination. The local agency must show that a valid method was used for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development. [¶] [¶] [¶] In general, the imposition of various monetary exactions, such as special assessments, user fees, and impact fees, is accorded substantial judicial deference. In the absence of a legislative shifting of the burden of proof, a plaintiff challenging an impact fee has to show that the record before the local agency clearly did not support the underlying determinations regarding the reasonableness of the relationship between the fee and the development. [¶] Accordingly, the local agency has the initial burden of producing evidence sufficient to demonstrate that it used a valid method for imposing the fee in question, one that established a reasonable relationship between the fee charged and the burden posed by the development. If the local agency does not produce evidence sufficient to avoid a ruling against it on the validity of the fee, the plaintiff challenging the fee will prevail. However, if the local agency's evidence is sufficient, the plaintiff must establish a requisite degree of belief in the mind of the trier of fact or the court that the fee is invalid, *e.g.*, that the fee's use and the need for the public facility are not reasonably related to the development project on which the fee is imposed or the

the local legislative body in California has "the initial burden of producing evidence of the reasonableness of the relationship between the fee charged and the burden posed by the development," and the party challenging the fee has "the burden of proving that the record before the [local body] did not support the [local body's] underlying determinations."[239] Second, the reasonable relationship test satisfies the second element in *Lingle* regarding how regulatory burdens are distributed among property owners. For example, when it adopted that test in the Mitigation Fee Act, the California Legislature was motivated, in part, by the development community's concern "that local agencies were imposing development fees for purposes unrelated to development projects."[240] Thus, the public policies advanced by

amount of the fee bears no reasonable relationship to the cost of the public facility attributable to the development." (citations omitted)).

239. *Id.* at 16; *see, e.g.*, Cresta Bella, LP v. Poway Unified Sch. Dist., 160 Cal. Rptr. 3d 437, 447–49 (App. Dep't Super. Ct. 2013) (school impact fee imposed on a residential development project involving the demolition of an existing apartment complex and construction of a new, larger apartment complex *held* invalid under the "reasonable relationship" standard in section 66001, subdivision (a), of the Act to the extent the fees were imposed on preexisting square footage, because the school district failed to show that replacement of the preexisting square footage would generate new students); *Home Builders Assn. of Tulare/Kings Ctys.*, 112 Cal. Rptr. 3d at 23–24 (legislatively imposed fire protection impact fee on the west side of the city was valid under the Act because the city's analysis showed that additional facilities were needed to serve the new development on the west side; but the same fee for the east side of the city was invalid under the Act because the existing facilities "are already adequate to continue to provide the same level of service" and "the new development will not burden the current facilities").

240. Ehrlich v. Culver City, 911 P.2d 429, 436 (Cal. 1996) (Arabian, J., plurality opinion) (quoting Centex Real Estate Corp. v. City of Vallejo, 24 Cal. Rptr. 2d 48, 49-50 (1993), citing S. Comm. on Local Govt., analysis of AB 1600, 1987–1988 Reg. Sess. (1987), at 1). The Mitigation Fee Act arose out of a joint legislative hearing, the purpose of which was:

> [T]o generate ideas for an equitable means of financing infrastructure. Chairman Cortese opened the hearing with the comment that he anticipated a positive discussion "that points us towards a legislative solution to our current public facility financing problems." Cortese said that any fees imposed by local governments should be "in the spirit of Proposition 13" and not exceed the cost of the service provided . . . . Senator Bergeson also expressed concern that the current reliance on developer fees may unfairly shift the cost of growth to new homebuyers, but a limitation on these fees may unintentionally limit the growth that some communities desire.

the California Legislature in the reasonable relationship test mirror the two "realities of the permitting process" that undergird the Court's decision in *Koontz*.[241]

VI. CONCLUSION

Significant uncertainty exists after *Koontz* as to whether the U.S. Supreme Court will extend the heightened scrutiny of the *Nollan*/*Dolan* test to legislatively-imposed monetary exactions. As Justice Thomas advised in early 2016, the Court must act at "the earliest practicable opportunity"[242] to address that uncertainty and to remove what Justice Kagan calls "a cloud on every decision by every local government to require a person seeking a permit to pay or spend money."[243] By applying the rationales expressed in *Koontz*, and by taking note of how the majority of lower courts have addressed the issue, the Court should find that neither the heightened scrutiny of *Nollan/Dolan,* nor the *Penn Central* factored analysis, should govern legislative exactions that (1) are generally applied, and (2) are based on a set legislative formula that provides no meaningful discretion to administrators in its application to specific properties. Legislative exactions that satisfy those two criteria should be governed by the reasonable relationship test adopted by the state governments, like that in California, Colorado, and Ohio. Application of such a reasonable relationship test addresses the Court's concerns that land-use exactions do not go "too far," that local governments do not make

S. COMM. ON LOCAL GOV'T & S. SELECT COMM. ON PLANNING FOR CALIFORNIA'S GROWTH, "DEVELOPER FEES: REARRANGING WHO PAYS FOR WHAT": A BACKGROUND STAFF REPORT FOR THE JOINT HEARING, 1 (1986); *see Shapell Indus.*, 1 Cal. Rptr. 2d at 827 (describing the Act as establishing the following policies: "While it is 'only fair' that the public at large should not be obliged to pay for the increased burden on public facilities caused by new development, the converse is equally reasonable: the developer must not be required to shoulder the entire burden of financing public facilities for all future users. '[T]o impose the burden on one property owner to an extent beyond his [or her] own use shifts the government's burden unfairly to a private party . . . .' It follows that facilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development." (citation omitted)).

241. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2594–96 (2013).

242. Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 929 (2016) (Thomas, J., concurring in denial of cert.).

243. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

"extortionate demands" on property owners, and that development projects pay for the external costs they create.