Case No. 19-16550

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYNDSEY BALLINGER; SHARON BALLINGER,
Plaintiffs – Appellants,

v.

CITY OF OAKLAND,
Defendant – Appellee,

On Appeal from the United States District Court
for the Northern District of California
Honorable Haywood S. Gilliam, Jr., District Judge

BRIEF OF *AMICI CURIAE* THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amici curiae the League of California Cities and the California State Association of Counties certify that no publicly held corporation owns more than 10% or more of their stock.

Dated: March 6, 2020

/s/ Brendan Darrow
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STATEMENT OF IDENTITY OF AMICI CURIAE

Under Federal Rule of Appellate Procedure 29, the League of California Cities ("League") and the California State Association of Counties ("CSAC") file this Brief of Amici Curiae in Support of Appellee City of Oakland. All parties to the pending appeal have consented to the filing of this brief.

The League is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is an association of all 58 California Counties. CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by the Association's Litigation Overview Committee. The Litigation Overview

Committee monitors litigation of concern to counties statewide, and has identified this case as one of interest to its members.

The League and CSAC, and their counsel are familiar with the issues presented by this case, as well as the broader impact that the decision from this Court could have for future cases. The League and CSAC are interested in this case because the issues presented are of significant importance.

In particular, the issues involve the application of the physical takings doctrine to a legislatively mandated fee and the application of the exactions doctrine to a generally applicable law. A ruling adopting either of Appellants' claims would expose a plethora of ordinary local legislation to unprecedented constitutional challenges never previously envisaged by the Constitution or the courts.

The brief was drafted by the legal staff of the City of Berkeley Rent Stabilization Board on behalf of the amici curiae. No party or counsel for any party in this matter authored any part of the brief, or contributed funds for preparation or filing of the brief. No person other than amici curiae and their counsel has contributed funds for the preparation or filing of this brief.

The League and CSAC have endeavored not to repeat arguments made by Appellee and believe their brief will assist this Court by providing a broad, policy-based perspective on the issues presented in this case.

Dated: March 6, 2020

/s/ Brendan Darrow
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INTRODUCTION

Rather than proceed under the fact-intensive regulatory takings analysis that properly applies to their claims, Appellants instead seek nothing less than to reshape the legal landscape of state and local regulation. Their sweeping and inflexible interpretation that *any* requirement to pay money in association with the ownership of land constitutes a physical taking of property would wreak havoc upon the long-standing and well-established police power of cities and counties to regulate economic relationships and would, if adopted, ignore and obviate nearly a century of regulatory takings jurisprudence. In the alternative, but with the same wide-ranging effect, Appellants seek to subject generally applicable legislation to the heightened scrutiny of exactions doctrine, again ignoring Supreme Court precedents that studiously avoid this outcome.

Whether via physical takings or exactions doctrine, Appellants seek to expose a wide array of generally applicable legislatively mandated fees to an unprecedented legal challenge. The League and CSAC see no reason why the democratic political process cannot be relied upon to safeguard against abuse in the establishment of

generally applicable fees of the sort at issue here. The trial court agreed, noting that such legislation would ordinarily be examined under regulatory takings doctrine.

1. Physical takings analysis should not be extended to apply in areas ordinarily examined under regulatory takings analysis.

Appellants seek to avoid and largely abrogate the doctrine of regulatory takings by treating money as if it were real property. Appellants would have this Court apply the much stricter standard for minimal physical invasions of property to regulation that is economic in nature and involves no physical invasion at all. This claim ignores nearly a century of precedent distinguishing economic burdens, including the payment of money, from physical invasions of real property. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.") A ruling that legislatively enacted payments constitute a *physical* invasion of property would drastically alter the legal framework for economic regulation and would subject innumerable

existing local laws to a new form of never before contemplated constitutional challenge.

a. Appellants' "physical taking" of money claim is a novel theory that would convert many potential regulatory takings into per se physical takings.

Takings jurisprudence draws a clear distinction between physical invasions of property and economic regulation of that same property. This distinction is due to the unique character of real property, as compared to fungible money. "A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). The same simply cannot be said for money, which is entirely interchangeable and subject to taxation or fees in nearly every commercial transaction. Were money to be characterized as property in the same sense as a parcel of land, then every legislatively enacted payment scheme would require a takings analysis, because even minimal financial consequences of regulation undoubtedly "eviscerate" the payers' right to use some of their money.

The Supreme Court recognized the impracticality of applying the physical takings analysis to economic regulation, and has already declined to expand physical takings to encompass monetary payments required by legislation.

> "As the range of governmental conduct subjected to takings analysis has expanded, however, we have been careful not to lose sight of the importance of identifying the property allegedly taken, **lest all governmental action be subjected to examination under the constitutional prohibition against taking without just compensation**, with the attendant potential for money damages."

Eastern Enterprises v. Apfel, 524 U.S. 498, 543 (1998), (emphasis added). All economic regulations have a direct and inescapable impact upon the distribution of money between commercial entities, even where they do not command direct transfers of assets. As such, the Supreme Court has adopted a more forgiving standard for economic regulation that distinguishes regulatory takings from public programs "adjusting the benefits and burdens of economic life to promote the common good." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Some regulatory takings "completely deprive an owner of "*all* economically beneficial us[e]" of her property. (*Lingle* citing

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)) while others require the fact-intensive assessment of the magnitude of the economic impact of the regulation and related factors to evaluate the "severity of the burden" as originally set forth in *Penn Central*. *Lingle* at 539.

Rather than rely upon the well-established and more readily applicable regulatory takings framework, Appellants seek to establish an unprecedented new doctrine in which *all* monetary payments required by regulation constitute a taking *of money* from private individuals. This aberrant interpretation is nothing less than an end-run around the regulatory takings framework and would subject a vast array of state and local laws that impose purely financial costs to a new form of constitutional scrutiny. From point-of-sale ordinances requiring payments to third parties, such as single-use bag ordinances for retailers, mandatory sewer lateral replacements and energy retrofits for home purchasers, to the carbon monoxide detector and fire protection equipment required for the protection of residential tenants, the list of longstanding state and local regulations that would become newly subject to physical takings examination is endless. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

Appellants' new physical takings doctrine would be a stark departure from Supreme Court precedent. In *Eastern Enterprises*, the Court upheld the creation of an obligation to pay money to fund health care costs of retired coal miners. In his concurring opinion, Justice Kennedy reasoned that requiring the payment of money to a particular group of people *does not constitute a physical taking*, because it "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms." *Eastern Enterprises*, 524 U.S. at 543. He went on to acknowledge that requiring a business to pay money "no doubt will reduce its net worth and its total value, but **this can be said of any law which has an adverse economic effect.**" *Ibid.* This central tenet, that all economic regulation has an economic effect upon regulated commercial actors, is the reason why Appellants' claims must fail.

The regulation at issue here is not unique. A generally applicable rule requiring a landowner to pay money as part of a regulated commercial relationship is just one of the many types of rules requiring that the owner's land can or cannot be used in a particular way. As the Court pointed out in *Yee v. Escondido*, transfers of wealth are inherent

in land-use regulations. "Traditional zoning regulations can transfer wealth from those whose activities are prohibited to their neighbors; when a property owner is barred from mining coal on his land, for example, the value of his property may decline but the value of his neighbor's property may rise." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 529 (1992). Even the *absence* of land-use regulation transfers wealth, by permitting uses that generate smoke or noise or despoil the landscape and thereby reduce the value of neighboring parcels. The mere fact that this particular regulation "may make this wealth transfer more visible than in the ordinary case" does not change the character of the transfer into a physical invasion. *Ibid.*

b. Legislatively mandated fees are political in nature and should only be examined for due process and equal protection violations.

Legislatures, especially at the local level, depend upon the freedom to act with reasonable speed to address the needs of their constituents. Given the near impossibility of achieving consensus, the democratic political process is predicated upon the right of a majority, or representatives thereof, to make choices despite some measure of disagreement. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified

by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) [quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)]

The democratic political process constrains the amount and type of fees that can be imposed by a local legislature. As the California Supreme Court stated, "[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." *San Remo Hotel L.P. v. City and Cty. of San Francisco*, 27 Cal. 4th 643, 671 (Cal. 2002). To avoid fees they oppose on political grounds, Appellants would have this Court remake the legislative process and dramatically expand the role of the courts.

2. Generally-applicable legislation is not subject to exactions analysis.

Appellants argue that this Court should greatly expand the *Koontz* decision to apply exactions doctrine beyond the traditional realm of ad hoc zoning permit approval. For the reasons discussed below, neither the reasoning in *Koontz* nor this Court's decision in

McClung extended the application of exactions doctrine outside the realm of discretionary permit approval.

a. The purpose of the exactions doctrine is to prevent individualized abuse of discretionary approval for land-use permits.

The "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). Exactions claims are examined with heightened judicial scrutiny because the "pressure" discussed in *Koontz* has the potential to "coerce" a property owner into abiding an unconstitutional condition in order to secure permission to use their property as they see fit. *Ibid.* The exactions doctrine is "a means to protect against abuse of discretion by land-use officials with respect to . . . individual parcels of land" *Bldg. Indus. Ass'n - Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056, 1058–1059 (N.D. Cal. 2018).

Appellants, relying on *Koontz* and *CBIA v. San Jose,* argue that simply because the money required to be paid is related to land, it must be a monetary exaction. OB at 29. However, all financial obligations imposed on property owners, including property taxes, special

assessments, permitting fees and point-of-sale ordinances share this connection to parcels of land. Recognizing this, the *Koontz* majority expressly avoided this wide-ranging interpretation; namely that the exactions doctrine would now encompass all manner of taxes and fees imposed upon property owners. Moreover, the California Supreme Court *did not* apply *Koontz* as expansively as Appellants suggest:

> "Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) **as a condition of approval**."

California Bldg. Indus. Assn. v. City of San Jose, 61 Cal. 4th 435, 460 (Cal. 2015) (emphasis added.) Fees are not monetary exactions merely because they involve land.

Contrary to Appellants' argument, the *Koontz* decision did not expand the exactions doctrine to apply to all land-related fees ("This case therefore 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." *Koontz*, 570 U.S. at 615.) Rather, the *Koontz* decision targets a certain type of monetary exaction offered as a substitute for a physical exaction, to prevent governments

from using monetary exactions as an end-run around heightened scrutiny.

Appellants also seek to erase the distinction, set forth in *Nollan* and *Dolan*, between ad hoc adjudicatory decisions by zoning officials and generally applicable legislation. Crucially, the *Koontz* ruling distinguished and preserved the Supreme Court's ruling in *Eastern Enterprises* because in *Koontz* the "monetary obligation burdened petitioner's ownership of a specific parcel of land." *Koontz,* 570 U.S. at 613. For this reason the trial court correctly held that "limiting the exactions doctrine to adjudicative decisions makes sense, because it is in this context that the government can most easily use its considerable power and discretion over permitting to extract concessions from landowners when it would otherwise be required to pay just compensation." (Excerpts of Record Vol. 1 (Docket Entry 8-1) "RE" at 11-12.)

In a similar case to the one at bar, Judge Chhabria emphasized the fact that ". . . the Supreme Court has only applied this exactions doctrine in cases involving a particular individual property, where government officials exercised their discretion to require something of

the property owner in exchange for approval of a project." *Bldg. Indus. Ass'n - Bay Area v. City of Oakland*, 289 F.Supp.3d 1056, 1057 (N.D. Cal. 2018). Citing *Penn Central,* this Court affirmed Judge Chhabria's analysis, and rejected the argument that the ordinance imposes an unconstitutional condition by effectuating an exaction of property in contravention of *Nollan* and *Dolan*, holding that the exactions doctrine does not apply "because the claim challenges a legislative act, rather than an adjudicative land-use determination." *Bldg. Indus. Ass'n - Bay Area v. City of Oakland*, 775 F. App'x 348, 349–50 (9th Cir. 2019).

b. The political process already adequately constrains fees.

The trial court correctly held that courts must defer to the democratic political process in evaluating the wisdom of generally applicable legislation. RE at 12. This is because generally applicable legislation does not exert any property-specific pressure, and it is no more coercive than the democratic system itself. *See San Remo Hotel L.P. v. City And Cty. of San Francisco*, 27 Cal. 4th 643, 671 (Cal. 2002) ("Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.")

This Court has already distinguished between monetary payments required by generally applicable legislation and land exactions. A monetary exaction differs from a land exaction because "[u]nlike real or personal property, money is fungible." *McClung v. City of Sumner*, 548 F.3d 1219, 1228 (9th Cir. 2008). This Court's observation of this fundamental distinction was not abrogated by the ruling in *Koontz*, which "does not implicate the question whether monetary exactions must be tied to a particular parcel of land." *Koontz* 570 U.S. at 614 fn 2. The distinction between money and property is also consistent with *Eastern Enterprises*, in which Justice Kennedy, concurring, stated that a general obligation to pay money is "indifferent as to how the regulated entity elects to comply **or the property it uses to do so**." *Eastern Enterprises*, 524 U.S. at 540 (emphasis added).

c. A system in which all legislatively enacted fees are subject to heightened scrutiny is unworkable.

The impracticality of applying heightened scrutiny to general obligations to pay money is perhaps best distilled in Justice Breyer's dissent in *Eastern Enterprises,* in which he asks, "If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when

it assesses a tax?" *Eastern Enterprises*, 524 U.S. at 556. The answer, according to a majority in *Koontz* that included Justice Kennedy (whose concurrence kept general monetary obligations free of takings analysis in *Eastern Enterprises*) is that "teasing out the difference between taxes and takings is more difficult in theory than in practice." *Koontz,* 570 U.S. at 616. Furthermore, the Court's holding states that it "will not work a revolution in land use law or unduly limit the discretion of local authorities to implement sensible land use regulations." *Id.* at 597. Given the pains taken by Justice Alito to narrow the applicability of the opinion, the only reasonable interpretation is that the *Koontz* majority did not intend to subject all legislatively mandated land-use fees to heightened scrutiny under exactions doctrine.

Appellants do not even attempt to reconcile the enormous ramifications of their novel interpretation of the exactions doctrine with the cautionary language of *Eastern Enterprises* and *Koontz.* They have not responded to the trial court's sensible assessment that "A system in which every city ordinance was subject to an unconstitutional exaction challenge would be unworkable." RE at 12. Presumably, this is because

Appellants are not disturbed by the likelihood that a great many other ordinary local laws would be called into question by their reasoning.

Rather than address the trial court's concern, Appellants disavow the well-established distinction between legislative and adjudicative powers. OB at 30. Relying upon cases that do not deal with takings or land-use, Appellants seek to downplay the distinction between legislative and adjudicative powers inherent in *Nollan* and *Dolan*, as if it were a false dichotomy that this Court could simply sweep away for the sake of simplifying the exactions doctrine. On the contrary, whereas the quasi-judicial character of adjudicative decisions is readily compatible with judicial review, the political character of legislative powers is not. Every legislative enactment faces some measure of opposition, and arming the opposition with a broadly applicable new constitutional challenge would subject the courts to an endless stream of novel challenges to virtually all land-use legislation, both new and old. In the understated language of Justice Kennedy and Justice Kagan, such an expansion of the exactions doctrine would be "unwise."

CONCLUSION

Appellants ask this Court to end local land-use authority as it is currently understood and enforced. Whether by interpreting money as if it were physical property that can be invaded, or by greatly expanding *Koontz* to apply the exaction doctrine to all land-use fees, even those enacted through generally applicable legislation, Appellants ask this Court ignore its own precedents and those of the Supreme Court. The law does not currently support Appellants' claims, and the League and CSAC urge this Court to bear in mind the drastic consequences that would result from a new takings doctrine that subjects thousands of legislatively mandated fees to heightened constitutional scrutiny.

Dated: March 6, 2020

Respectfully submitted,

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Association of Counties,

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), and 32(a)(7), the foregoing amicus curiae brief is proportionally spaced, has a typeface of 14-point Century Schoolbook, and contains 2,989 words, excluding those sections identified in Federal Rule of Appellate Procedure 32(f).

Dated: March 6, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2020, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. I certify that all parties are registered users of the Appellate Electronic Filing system and that service will be accomplished by the Appellate Electronic Filing system.

Dated: March 6, 2020

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