reason
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Supreme Court Rules There Is No "Legislative Exception" to the Takings Clause

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In *Sheetz v. County of El Dorado*, decided today, the Supreme Court unanimously ruled that there is no "legislative exception" to the Takings Clause. In previous cases such as *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Court ruled that state and local governments sometimes violate the Takings Clause when they impose "exactions" as a condition of allowing property owners to develop their land. Some state courts—including the California Court of Appeal in this case—have held there is no Takings Clause liability for land-use exactions in cases where the requirement was imposed by legislation instead of by regulatory agencies. In this instance, a landowner had been barred by El Dorado County from building a new home on his property unless he first paid a $23,420 "traffic impact mitigation" fee.

Oral argument revealed that the justices were in "radical agreement" (as Justice Elena Kagan put it) in rejecting the idea that there is any such legislative exception. Indeed, even counsel for the County seemed to abandon the argument that any such exception exists. Thus, today's unanimous decision to that effect comes as little surprise. Justice Amy Coney Barrett's opinion for the Court effectively summarizes the reasons why the idea that there is a legislative exception makes little sense:

Sirens and explosions in Jerusalem after Iran fires drones and missiles

Nothing in constitutional text, history, or precedent supports exempting legislatures from ordinary takings rules.

The Constitution's text does not limit the Takings Clause to a particular branch of government. The Clause itself, which speaks in the passive voice, "focuses on (and prohibits) a certain 'act': the taking of private property without just compensation." *Knight v. Metropolitan Govt. of Nashville & Davidson Cty*., 67 F. 4th 816, 829 (CA6 2023). It does not single out legislative acts for special treatment. Nor does the Fourteenth Amendment, which incorporates the Takings Clause against the States. On the contrary, the Amendment constrains the power of each "State" as an undivided whole. §1 Thus, there is "no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U. S. 702, 714 (2010) (plurality opinion). Just as the Takings Clause "protects 'private property' without any distinction

between different types," *Horne v. Department of Agriculture*, 576 U. S. 351, 358 (2015), it constrains the government without any distinction between legislation and other official acts.

I think this is clearly the correct result, for reasons well summarized in today's ruling. See also my discussion here.

At oral argument, it seemed like the justices might be interested in going beyond the legislative exception issue, possibly addressing the underlying question of whether the fee imposed in this case was a taking or not. However, the Court chose not to deal with that question, which will now be remanded back to the California state courts for their consideration.

In a concurring opinion joined by Justice Ketanji Brown Jackson, Justice Sotomayor emphasizes that the Court did not resolve the issue of whether the fee imposed on Sheetz would be a taking if imposed "outside the permitting process." She argues that the takings liability only applies if the answer to that question is yes. I am not convinced she is right on that point. Tying the fee to a land-use development permit implicates private property rights in a way that imposing a fee unrelated to development might not.

Justice Brett Kavanaugh wrote a concurring opinion joined by Justice Kagan and Justice Jackson. He notes that "the Court has not previously decided—and today explicitly declines to decide—whether 'a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.'" He further emphasizes that "today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property."

Finally, Justice Neil Gorsuch has a concurring opinion arguing (correctly, in my view) that Takings Clause standards should not vary based on whether the challenged regulation applies to a narrow class of properties or a broad one:

The Court notes but does not address a separate question: whether the Nollan/Dolan test operates differently when an alleged taking affects a "class of properties" rather than "a particular development…" But how could it? To assess whether a government has engaged in a taking by imposing a condition on the development of land, the *Nollan/Dolan* test asks whether the condition in question bears an " 'essential nexus' "to the government's land-use interest and has " 'rough proportionality' " to a property's impact on that interest… Nothing about that test depends on whether the government imposes the challenged condition on a large class of properties or a single tract or something in between. Once more, how the government acts may vary but the Constitution's standard for assessing those actions does not.

I think Gorsuch is right about this point. But, as the Kavanaugh concurrence suggests, there may well be disagreement over this issue on the Court.

When and if the Court takes another regulatory exactions takings case, there are likely to be divergences between the justices, including some that divide them along standard left-right ideological lines. But it is notable that the Court reached unanimous "radical agreement" on the

legislative exception issue. This is now the second big takings case in a row on which the justices reached unanimous agreement in favor of the property rights side, following in the footsteps of last year's important ruling in *Tyler v. Hennepin County*.

In sum, today's decision is far from a definitive resolution of outstanding questions about when regulatory exactions and permit requirements qualify as takings. But the Justices—all of them—did get the legislative exception question right. That's pretty good for government work.

NOTE: The property owner in this case is represented by the Pacific Legal Foundation, which is also my wife's employer. However, she was not part of the litigation team working on the case. PLF also litigated *Tyler v. Hennepin County*. They are clearly on a roll when it comes to winning property rights cases at SCOTUS!

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