No. 11-1447

In the
Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

For over eleven years, a Florida land-use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project—a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a taking of Koontz's property. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner cannot state a claim for violation of the Takings Clause under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where (1) permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government violates the Takings Clause when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan* and *Dolan*;[1] and

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[1] Pursuant to Rule 24.1 of this Court, Mr. Koontz has altered the phrasing of the introductory paragraph and of the first Question

(continued...)

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

[1] (...continued)
Presented to more accurately reflect the procedural posture of this case.

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220 (Fla. 2011), and is reproduced in Petitioner's Appendix to the Petition for Writ of Certiorari (Pet. Cert. App.) at A. The Florida Supreme Court's decision denying rehearing and/or clarification is reported at No. SC09-713, 2012 Fla. LEXIS 1 (Fla. Jan. 4, 2011). The opinion of the District Court of Appeal of the State of Florida, 5 So. 3d 8 (Fla. Ct. App. 2009), is reproduced in Pet. Cert. App. at B. The opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is not published, but is reproduced in Pet. Cert. App. at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Mr. Koontz filed a lawsuit in the Florida state courts challenging a permit denial under state law, on the grounds that the denial resulted from refusal to accede to an unlawful permit condition. Mr. Koontz prevailed in the Florida trial and appellate courts, which held that the permit condition was unconstitutional under this Court's decisions in *Nollan* and *Dolan* interpreting the Fifth Amendment's Takings Clause, applied to the states via the Fourteenth Amendment. The Florida Supreme Court reversed in an opinion dated November 3, 2011. The Florida Supreme Court's decision became final on January 4, 2012, when the court denied Mr. Koontz's motion for reconsideration and/or clarification. The Court granted certiorari on October 5, 2012.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Eighteen years ago, Coy Koontz, Sr.,[2] embarked on a struggle against an environmental agency to develop a small portion of his lot, located at a busy intersection of two major highways in Orange County, Florida. J.A. 187 (map of property). When he applied for permits from Respondent St. Johns River Water Management District, the District demanded that he give up 75% of his land to the State *and* perform costly off-site improvements to government-owned property. Pet. Cert. App. A-6. When Mr. Koontz rejected the District's "deal," the District outright denied him his permits and, along with it, his ability to use his land. Pet. Cert. App. D-4; J.A. 70-71. Believing that no

[2] Coy Koontz, Sr., was Petitioner Coy Koontz, Jr.'s, father. In 2000, Mr. Koontz, Sr., died. His son, Coy Koontz, Jr., became the personal representative of the estate and the Plaintiff/Petitioner in this action.

property owner should have to submit to excessive government demands just to make lawful use of his property, Mr. Koontz sued. And thus began this 18-year old legal battle.

A. Mr. Koontz Applies for Permits To Make Lawful Use of a Small Area of His Property

When Mr. Koontz purchased his vacant 14.9-acre lot in 1972, land-use laws permitted him to make full use of his property. Pet. Cert. App. A-5 & n.2.; J.A. 27-28. But over the years, state and local regulations whittled away at his ability to do so. For example, in 1985, the State enacted an environmental statute and implementing regulations to control the use of private property containing wetlands and uplands suitable for fish and wildlife habitat. J.A. 27, 67. As a consequence of those laws, all but 1.4 acres of Mr. Koontz's property suddenly were swept into a Riparian Habitat Protection Zone overseen by the District. Pet. Cert. App. A-5.

Florida's inclusion of portions of Mr. Koontz's land in the Riparian Habitat Protection Zone did not mean the land contained riparian habitat. Instead, the designation created a legal presumption that any use of land within the zone was harmful to such habitat, therefore requiring affected landowners to obtain environmental permits from the District. J.A. 33. Thus, Mr. Koontz not only had to comply with routine land-use regulations, like zoning laws, but also strict environmental regulations enforced by the District.

In 1994, Mr. Koontz submitted applications to the District for permits to develop 3.7 acres within the Riparian Habitat Protection Zone. Pet. Cert. App. A-

5—A-6; Pet. Cert. App. D-4. But given its location at the intersection of two highways, the project site had little, if any, habitat that needed protection. Pet. Cert. App. D-3. Any wetlands that may have once existed on the project site had been drained by a ditch that the State ran across Mr. Koontz's land. J.A. 116, 137. When experts inspected the property, the only standing water on the project site lay in ruts along an easement road owned by the State, and used and maintained by a power company. J.A. 117-18, 142-43. Residential and commercial development, road construction, and other government projects already had seriously degraded the proposed site from its original condition and rendered it inhospitable to animal habitat. Pet. Cert. App. D-3; *see also* J.A. 101-02, 111-19, 137-39 (describing conditions in project area). Indeed, the only wildlife found on the project site was common, non-threatened species typically found in developed areas, such as raccoons, birds, and opossums. J.A. 105-06, 139-41. And on some areas of the project site that had been designated by the District as "wetlands," homeless shelters and campfires were found. J.A. 118, 143-44.

Nevertheless, *as required by District regulations*, Mr. Koontz included in his permit applications mitigation for the presumed disturbance to riparian habitat. Pet. Cert. App. A-6; Pet. Cert. App. D-4; J.A. 29-30, 107. Specifically, he offered to place the remaining eleven acres of his property into a conservation easement. *Id.* Mr. Koontz thought that giving away about 75% of his property to the District would be more than enough to satisfy it. J.A. 29-30, 107, 119-20; *see also* J.A. 111, 119, 139 (expert conclusions that conservation area was sufficient to mitigate any impacts; additional mitigation was

unnecessary and excessive). But he was sorely mistaken.

B. The District Denies Mr. Koontz's Permit Applications After He Refuses the District's Demand To Finance Improvements to District-Owned Property

The morning of the hearing on his applications before the District's Governing Board, Mr. Koontz was dealt a surprise by the District's staff. J.A. 103, 108-09. The staff told him they would recommend *denial* of the permit applications unless, in addition to the eleven-acre dedication, he agreed to finance the restoration and enhancement of at least 50 acres of wetlands on District-owned property located miles away, by replacing culverts or plugging ditches, and building a new road. J.A. 26, 103-04, 109. In other words, to obtain the permits he needed to use his property, Mr. Koontz would have to agree to dedicate his money to unrelated public improvements on the District's land. Pet. Cert. App. A-6; Pet. Cert. App. D-4; J.A. 70-71, 122-23.

At no time did District staff ever demonstrate how Mr. Koontz's project—located on a relatively small corner of his property—could justify imposition of either the land grab or the requirement that he finance off-site public improvements. Instead, the District explained that, because the property was located within its Riparian Habitat Protection Zone, *any* use was "presumed to be harmful." J.A. 33. The District's staff admitted that they had disregarded several experts who concluded that the project area was degraded and fractured, had not performed any surveys of the project site to determine the presence of

riparian habitat, and had no evidence to refute Mr. Koontz's contrary studies. J.A. 146.

Eager to avoid any delays and difficulties in obtaining the permits he needed to use his property, Mr. Koontz agreed to the eleven-acre dedication of land. J.A. 29-30. But the requirement that he finance work on the District's property was the straw that broke the camel's back. J.A. 29-30, 107. To give away most of his land *and* to finance costly improvements to the District's land miles away were too much for Mr. Koontz to bear and raised serious concerns about the continued economic feasibility of his modest project. J.A. 29-30, 34-35, 100, 105. Adding insult to injury, the District explained that it had discounted the mitigation value of the eleven-acre dedication because it (wrongly) believed that Mr. Koontz had "already lost that [portion of his land] due to regulation"—"it's no fun, but that's the facts of life." J.A. 39, 107.

At the hearing before the District's Governing Board, Mr. Koontz refused to acquiesce to the second exaction. Pet. Cert. App. D-4. Consequently, the Board denied his permit applications. *Id*; J.A. 70-71. As the District readily concedes, "the denials were based exclusively on the fact that [Mr. Koontz] would not provide additional mitigation to offset impacts from the proposed project"—*i.e.*, restoration and enhancement of the District's property. J.A. 70. Importantly, if Mr. Koontz had acceded to this condition, "the exact project [he] proposed would have been permitted." J.A. 71.

Without the permits, Mr. Koontz could not use his property. Pet. Cert. App. A-5 - 6. Unless he agreed to finance the improvements to the District's lands, the

District would hold his property hostage. J.A. 70-71. The District would not budge, with one Board member even telling Mr. Koontz that, if he did not want to comply with its demand, he should just "get on with it" and file a lawsuit. J.A. 40. Faced with the District's unsavory ultimatum—"your money or your land!"—Mr. Koontz did just that and sued.

C. Mr. Koontz Sues and Prevails in the Trial and Appellate Courts, Which Hold That the District's Public-Improvements Exaction Is an Unconstitutional Condition

In late 1994, Mr. Koontz filed an action against the District in Florida state court for damages under state law. J.A. 4-65 (the operative complaint). His claim ultimately was tried in 2002 on the question of "whether the off-site mitigation required by the District was an unreasonable exercise of police power" constituting a taking without just compensation, under section 373.617(b) of the Florida Statutes. Pet. Cert. App. B 19 n.3.

The trial court entered judgment for Mr. Koontz, reserving jurisdiction to award monetary damages authorized by section 373.617(b) until after the District responded to the judgment. Pet. Cert. App. D-11. The court relied on two of this Court's federal takings precedents—*Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*—to conclude that the District's exaction requiring off-site public improvements on government land was unconstitutional under the Takings Clause of the Fifth Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment.

Pet. Cert. App. D-5 - 6, 10 - 11; Pet. Cert. App. B-19 n.3; J.A. 95.

Nollan and *Dolan* are takings tests applied in the unique context of land-use permitting to ensure that government agencies do not unconstitutionally condition the issuance of permits on applicants' waiver of constitutionally protected rights—namely, the right to compensation for confiscated property. In *Nollan*, this Court held that a land-use agency could demand uncompensated dedication of an easement over a permit applicant's property, but only if the easement bore an "essential nexus" to the impact of the applicant's proposed use for the property. *Nollan*, 483 U.S. at 837. In *Dolan*, the Court held that, in addition to an "essential nexus," there must also be "rough proportionality" between the permit exaction and the impact of the proposed use. *Dolan*, 512 U.S. at 391.

Applying *Nollan* and *Dolan*, the trial court in this case found that the District "did not prove the necessary relationship between the condition of off-site mitigation and the effect of development." Pet. Cert. App. D-11. The court explained that the District failed to show either an "[essential] nexus between the required off-site mitigation and the requested development of the tract[]" as required in *Nollan*, or "rough proportionality to the impact of site development," as required in *Dolan*. *Id.* Accordingly, the trial court concluded that the District's "denial of the Koontz permit application . . . was invalid" as "an unreasonable exercise of police power." *Id.* at 10-11.

In light of the judgment, the District had three choices under state law: (1) agree to issue the permits, (2) agree to pay damages, or (3) agree to modify its

decision to avoid the unreasonable exercise of police power. Fla. Stat. § 373.617(3). The District chose to approve Mr. Koontz's permit applications without the unlawful exaction. Pet. Cert. App. A-7. The trial court ordered the District to issue the permits by June 2004, but the District delayed issuing the permits until December 2005—over eleven years after it denied the permit applications. Pet. Cert. App. A-7; J.A. 183. As provided in the Florida statute under which Mr. Koontz maintained his claim, the trial court subsequently awarded Mr. Koontz damages resulting from the District's unlawful denial of the permit applications. Pet. Cert. App. C-2 (making award of damages); *see also* Fla. Stat. § 373.617(2) (providing for "monetary damages and other relief" for "an unreasonable exercise of the state's police power constituting a taking without just compensation").

On appeal, the District did not dispute the trial court's factual findings that no essential nexus or rough proportionality connection existed between the District's exaction and the impact of Mr. Koontz's project. Pet. Cert. App. B-6 ("The District makes no challenge to the evidentiary foundation for [the trial court's factual findings."). Instead, the District argued that Mr. Koontz had no cause of action under section 373.617(2), because *Nollan* and *Dolan* were inapplicable to the challenged exaction. Pet. Cert. App. B-6—B-7, n.3. First, the District argued that *Nollan* and *Dolan* do not apply to exactions imposed prior to permit issuance, but only to those exactions attached to the issuance of a permit. Pet. Cert. App. B-6. The District claimed that, because it issued no permits until after the trial court invalidated the condition, it never imposed an exaction, making *Nollan* and *Dolan* review unavailable to Mr. Koontz to begin with. Pet.

Cert. App. B-6. Second, the District argued that *Nollan* and *Dolan* apply only to real-property exactions, not to monetary exactions. Pet. Cert. App. B-9.

The appellate court rejected the District's arguments. It held that *Nollan* and *Dolan* apply to all property exactions, including monetary ones, that are imposed prior to permit issuance. Pet. Cert. App. B-8—B-10. Because the District did not dispute that, if *Nollan* and *Dolan* applied, its permit exaction would fail the "essential nexus" and "rough proportionality" tests (Pet. Cert. App. B-6), the court upheld the trial court's judgment of liability against the District. Pet. Cert. App. B-10.

D. The Florida Supreme Court Reverses, Declaring That the District's Public-Improvements Exaction Is Not Subject to Constitutional Scrutiny

The Florida Supreme Court reversed. First, the court held that *Nollan* and *Dolan* do not apply to monetary exactions, like the one imposed by the District. Misconstruing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the court held that this Court must have intended for *Nollan* and *Dolan* to be strictly limited to their facts. Pet. Cert. App. A-15—A-16. The court did not try to reconcile its cramped reading of *Nollan* and *Dolan* with the underlying logic and purpose of those precedents.

Second, the court held that *Nollan* and *Dolan* did not apply to the District's exaction, because the District "did not issue [the] permits" and "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21 (original

emphasis omitted). The court assumed that, in *Nollan* and *Dolan*, the land-use agencies had issued permits after actually taking the exacted property. The court did not consider that, in both *Nollan* and *Dolan*, the agencies actually had imposed the exactions *prior* to issuance of the permits and that no property had ever changed hands from the owners to the agencies—facts that mirror exactly what happened here.

The Florida Supreme Court reversed the court of appeal's opinion affirming the judgment in Mr. Koontz's favor and his damages award. Pet. Cert. App. A-21.

SUMMARY OF ARGUMENT

The District's demand that Mr. Koontz finance improvements to its property as a condition of permit approval—*in addition to giving up almost 75% of his land*—was an exaction implicating the Takings Clause and, therefore, triggering review under *Nollan* and *Dolan*. The District forced Mr. Koontz to choose between two fundamental constitutional rights: (1) the right to make lawful use of his property and (2) the right under the Takings Clause to compensation for the substantial cost incurred making unrelated public improvements. When Mr. Koontz would not agree to waive his right to compensation for the cost incurred making the off-site improvements, the District denied his permit applications. The District's attempt to bargain its way around the Takings Clause's requirement that property taken for a public use be compensated is precisely the kind of government "deal-making" the unconstitutional conditions doctrine, as applied in *Nollan* and *Dolan*, is meant to check.

The doctrine has long been a staple of this Court's jurisprudence. In its most basic formulation, the doctrine provides that government may not grant an individual a benefit or permit to exercise a constitutional right on the condition that he surrender another constitutional right. The doctrine has shielded countless Americans who seek a government benefit or permit from government "deals" that would strip them of their constitutionally protected rights, including the right to free speech, the right to free exercise of religion, and the right to be free from unreasonable searches. In 1987, this Court expressly recognized the doctrine's applicability in the land-use context in *Nollan* and, subsequently, in *Dolan*.

While the Takings Clause generally prohibits uncompensated takings, the Court in *Nollan* recognized a narrow exception to that general rule: In the land-use context, the government has the discretion to exact property—without having to pay for it—as a condition of permit approval. But the Court went on to place a vital limitation on that exception. Only those exactions that bear an "essential nexus" to the alleged adverse impact of the proposed land use are authorized; as the unconstitutional conditions doctrine teaches, any other exaction is merely an unlawful attempt to skirt the Takings Clause's prohibition on uncompensated takings and therefore is an unconstitutional condition. Later, in *Dolan*, the Court refined the "essential nexus" test, requiring that any permit exaction must also be "roughly proportional" to the alleged adverse impact of the proposed land use. The discretion and the limitations go hand-in-hand: The Takings Clause does not allow the government unbridled power to confiscate property of any kind,

whenever and however it wants, simply because it holds the power to issue land-use permits.

While rooted in the Takings Clause, *Nollan* and *Dolan* rely on the unconstitutional conditions doctrine to smoke out attempts by government agencies to circumvent that Clause's requirement that compensation be paid for property takings. Nothing in that doctrine, the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exaction subject to the "essential nexus" and "rough proportionality" limitations. Government demands for real or personal property—both categories protected by the Takings Clause—are subject to the same limitations. Nor does application of the limitations depend upon *when* in the permit process the exaction is imposed. A decision to deny a permit application based on refusal to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively identical: In both cases, no permit issues unless and until the permit applicant agrees to waive his right to compensation for the confiscated property.

The Florida Supreme Court's decision to the contrary fails to take into account the logic of *Nollan* and *Dolan*. Uncompensated takings in the land-use context are permissible *only* because such takings are limited by the "essential nexus" and "rough proportionality" tests in *Nollan* and *Dolan*. If those limitations do not apply, neither does the exception to the Takings Clause's prohibition against uncompensated takings recognized in those precedents. In other words, the Takings Clause does not countenance a totally *unlimited* power to confiscate

property in the permit process. Thus, if *Nollan* and *Dolan* do not apply to the District's exaction of Mr. Koontz's money, then the District must accept the Takings Clause's default rule prohibiting government from confiscating permit applicants' property. The Florida Supreme Court's decision confining the "essential nexus" and "rough proportionality" limitations to the narrow facts of those cases ignores the interdependence between the limitations and the extraordinary power that the government has to exact property from permit applicants.

The decision also leaves Floridians with little to no protection against government attempts to "cloak[] within the permit process 'an out-and-out plan of extortion." *Lambert v. City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, Kennedy, and Thomas, JJ., dissenting from denial of certiorari) (internal citations omitted). Naked, uncompensated confiscations of land are uncommon, because of the obvious application of *Nollan* and *Dolan*. Instead, land-use authorities increasingly have resorted to confiscating property other than interests in real property—most often, money, in the form of either financing of public projects (as in Mr. Koontz's case) or payment of fees in-lieu of a land dedication. Yet the constitutional injury is the same: The property owner is required, as a permit condition, to waive his right to compensation for the confiscation. If the Florida Supreme Court's decision stands, that constitutional right will rarely have a remedy.

The Florida Supreme Court based its decision in large part on its desire to preserve the freedom and flexibility of land-use agencies like the District to make "deals" with permit applicants. It did so, but at too

high a cost to the constitutional rights of those applicants. The decision of the Florida Supreme Court should be reversed.

ARGUMENT

I

NOLLAN AND *DOLAN* APPLY TO THE DISTRICT'S PERMIT EXACTION REQUIRING MR. KOONTZ TO FINANCE COSTLY IMPROVEMENTS TO THE DISTRICT'S LAND

A. The Takings Clause Requires *Nollan* and *Dolan* Review of Government Attempts To Confiscate Property in the Land-Use Permit Context

The District conditioned Mr. Koontz's permit approval on his agreement to finance improvements to government-owned property. Pet. Cert. App. A-6. In other words, the District wanted Mr. Koontz to dedicate a sum of his money to a public use, without having to compensate him for the substantial cost incurred making those unrelated improvements. When Mr. Koontz refused, the District denied him his permits. Pet. Cert. App. D-4; J.A. 70-71.

In essence, the District presented Mr. Koontz with the choice to exercise either of two rights—but not both: (1) his constitutional right to make lawful use of his property or (2) his constitutional right to compensation for the cost incurred financing improvements. The Takings Clause protects both.

The Takings Clause protects the right to "exercise[] . . . dominion" over, and "possess, use, and dispose" of, one's property. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (The Takings Clause protects interest earned on client funds.); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulation denying landowner all economically beneficial use of his property violated Takings Clause). The Clause also guarantees compensation if property is taken for a public use; put differently, it *prohibits* uncompensated takings. U.S. Const. amend. V; *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) ("The Fifth Amendment . . . proscribes taking without just compensation." (citation omitted)).

"Property" under the Takings Clause comprises both tangible (*e.g.*, real-property interests, personal property, money) and intangible property (*e.g.*, intellectual property). *See, e.g.*, *Phillips*, 524 U.S. at 170 (accrued interest); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialmen's liens); *Lynch v. United States*, 292 U.S. 571 (1934) (contracts); *Vill. of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (money). Moreover, this Court's precedents establish that, in the land-use permit context, property rights are entitled to as much protection from government abuse as any other constitutionally protected right. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

If the District had approached Mr. Koontz—outside the permit context—and directly seized his money to finance the public improvements, the District's action would have been unconstitutional, because it would have violated the Takings Clause's prohibition against uncompensated takings of property. *See, e.g.*, *Sallie Mae v. Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997) (applying takings analysis to "straightforward mandates of cash payment to the government"), *cert. denied*, 522 U.S. 913 (1997); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 493 (2nd Cir. 1995) (applying takings analysis to government act "requiring direct transfers of money to the government"), *cert. denied*, 516 U.S. 913 (1995). The fact that the District's attempted confiscation took the form of a permit exaction did not, as the Florida Supreme Court held, immunize it from judicial scrutiny under the Takings Clause's compensation guarantee. As the doctrine of unconstitutional conditions teaches, if the District had discretion via the permit process to confiscate property from Mr. Koontz, the Takings Clause imposed discernible limitations on that discretion.

The unconstitutional conditions doctrine is a "well-settled" principle of constitutional law. *Dolan*, 512 U.S. at 395. The doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1415 (1989). The doctrine's purpose is to "identif[y] a characteristic technique by which government appears not to, but in fact does burden [constitutionally preferred] liberties, triggering a demand for especially strong justification by the

state." *Id.* at 1419. If a constitutional provision prohibits a government act, then, under the doctrine, government cannot employ schemes for skirting that prohibition. Simply put, the doctrine recognizes that what a constitutional provision "precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *See*, *e.g.*, *Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990). The unconstitutional conditions doctrine has been invoked in almost every area of constitutional law, including takings law in the land-use context. James Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 407 (2009) (The unconstitutional conditions doctrine has been invoked in a wide range of cases in which "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law."); *see also Rutan*, 497 U.S. at 78 ("Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (holding that a business owner could not be compelled to choose between a warrantless search of his business and shutting down the business, and granting declaratory and injunctive relief); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur

additional costs by adding more material to an issue or to remove material it desired to print).

In 1987 and 1994, this Court decided *Nollan* and *Dolan*, respectively—precedents involving "a special application of the doctrine of unconstitutional conditions," *Lingle*, 544 U.S. at 547 (internal quotation marks omitted). Together, these cases held that the Takings Clause allows the government to confiscate property as a condition of permit issuance, but only under strict limitations. *Nollan*, 483 U.S. at 837 (Commission can take an easement in the Nollans' property, if the exaction bears an "essential nexus" to the impact of their house); *Dolan*, 512 U.S. at 391 (City can take land from Dolan, if exaction is "roughly proportional" to impact of the project). Permit exactions that violate these limitations are, in light of the doctrine's teachings, unconstitutional conditions. *See*, *e.g.*, *Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in land-use context).

In *Nollan*, the owners of beachfront property, Pat and Marilyn Nollan, applied to the California Coastal Commission for a land-use permit to replace their bungalow with a single-family home. The Commission approved the permit application subject to various conditions. *Nollan*, 483 U.S. at 828. One condition was that the Nollans dedicate a public-access easement across their private beach. *Id*. The Commission justified the easement exaction on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a 'wall' of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to

visit,' " and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission).

The Nollans rejected the exaction and never made the required dedication; consequently, the Commission did not issue them the permit to remodel. *Id.* at 828.; Part II.A.1, *infra* (demonstrating that the Commission approved the Nollans' permit application with conditions, but did not *issue* them a permit). The Nollans filed a writ of mandate under state law to invalidate the permit exaction on the grounds that, if the exaction were consummated, it would effect an uncompensated taking. *Id.* at 828. The Nollans argued that the exaction represented an unlawful attempt by the Commission to take property without compensation, and was therefore unconstitutional under the Takings Clause, because the exaction bore no connection to the impact of their new home. *Id.* at 829.

This Court agreed, holding that the Commission's easement exaction lacked an "essential nexus" to the social evil that the Nollans' project allegedly caused. *Id.* at 837. The Court found that because the Nollans' home had no adverse impact on existing public access, there was no reason why it should have to provide public access by dedicating an easement to the State. *Id.* at 838-39. Without a constitutionally sufficient connection, the easement exaction was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* at 837 (citations omitted).

Seven years later, this Court defined how close a fit there should be between a permit exaction and the impact of a proposed land use. In *Dolan*, 512 U.S. 374, Florence Dolan applied to the City of Tigard for a

building permit to expand her store. The City approved the permit application, subject to the condition that she dedicate some of her land for flood-control and traffic improvements. *Id.* at 377.

Ms. Dolan refused to agree to the exactions, did not dedicate any of her land to the City, and consequently did not receive a building permit. *Id.* at 380-82; *see also Dolan v. City of Tigard*, 20 Or. LUBA 411, 413, 1991 Ore. Land use Bd. App. LEXIS 316, at *4 (1991) (describing how permit issuance was conditioned on satisfaction of exactions). She sued the City, alleging that the exactions were unconstitutional under the Takings Clause. *Dolan*, 512 U.S. at 382-3. This Court concluded that while the City had established an essential nexus between the exactions and the impact of the expansion, it did not establish a close enough nexus to pass constitutional muster. *Id.* at 394-95. The Court held that, beyond an essential nexus, there must be rough proportionality —specifically, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391.

The basic holding in *Nollan* and *Dolan* consists of two interrelated propositions. First, in the permit context, the Takings Clause allows government to take property by permit exaction. Second, the Takings Clause puts a limit on the exaction power: authorized confiscations are allowed only if the exaction bears an "essential nexus" and "rough proportionality" to the adverse impact of the owner's proposed use of his land. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. Conversely, where an insufficient connection exists between the exaction and the adverse impact, the

Takings Clause treats the imposition of the exaction as an attempt by the government to skirt, via the permit process, the Clause's prohibition against uncompensated takings. In that case, the exaction is an unconstitutional condition in violation of the Takings Clause. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 387.

As *Nollan* and *Dolan* show, the need to protect against unconstitutional conditions is especially pronounced in the land-use permit process. A permit exaction that would confiscate property adversely affects, not just *one*, but *two* constitutional rights: (1) the right to make reasonable use of one's land, and (2) the right to be compensated for the exacted property. *Nollan*, 483 U.S. at 833 n.2 (a permit to build upon one's land is a right, subject to legitimate regulation, not a "government benefit"). It is one thing to impose burdensome conditions on a benefit to which there is no right in the first place; it is quite another thing to impose the same conditions on the exercise of constitutionally protected rights, like the right to make reasonable use of one's land. This right is extinguished—removed from the owner's "bundle of sticks"—any time the government issues an ultimatum demanding an excessive exaction as a condition that must be satisfied before issuance of a permit. *Lucas*, 505 U.S. at 1014.

The Court derived the *Nollan* and *Dolan* limitations from the requirements of the Takings Clause. An exaction that fails the "essential nexus" and "rough proportionality" tests is an unconstitutional condition, because it unlawfully requires the property owner to waive the right to compensation for a taking. *Dolan*, 512 U.S. at 385. As the doctrine of

unconstitutional conditions instructs, "government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.*; *see also Lingle*, 544 U.S. at 530 (*Nollan* and *Dolan* involve a "special application of the unconstitutional conditions doctrine.").

As *Dolan*'s formulation of the doctrine suggests, the doctrine makes no distinction among the kinds of property that government might attempt to confiscate in the permit process, and sees no relevance in the precise timing of the attempted confiscation. Consistent with the logic and purpose of the unconstitutional conditions doctrine, "[t]he object of the Court's holding in *Nollan* and *Dolan* [is] to protect against the State's cloaking within the permit process 'an out-and-out plan of extortion.'" *Lambert*, 529 U.S. at 1048 (Scalia, Kennedy, and Thomas, JJ., dissenting from denial of certiorari) (internal citations omitted).

That is exactly what the District sought to do in this case—*i.e.*, cloak within the processing of Mr. Koontz's permit applications a "plan of extortion." The District's message to Mr. Koontz was unequivocal: "No permit will issue unless and until you give us eleven acres of your land and finance significant improvements to our land located miles away." The District wanted his land *and* his money—or it would deny him the right to make lawful use of a small portion of his lot. This is precisely the kind of "negotiating" over constitutional rights that the unconstitutional conditions doctrine—via *Nollan* and *Dolan*—was intended to check. And, since the District

never challenged the trial court's factual finding that no connection existed between the off-site-improvement demand and the impact of his project, it is precisely the kind of uncompensated taking of property that the Takings Clause prohibits. Pet. Cert. App. B-6 ("The District makes no challenge to the evidentiary foundation for [the trial court's] factual findings."). The limitations in *Nollan* and *Dolan* readily can and should be applied to the District's permit exaction.

B. Applying *Nollan* and *Dolan* with Equal Force to All Government Attempts To Confiscate Property in the Permit Process Reflects Important Constitutional Values

Exempting the District's permit exaction from review under the "essential nexus" and "rough proportionality" limitations in *Nollan* and *Dolan* produces unintended adverse consequences—particularly for the District and other land-use agencies. As discussed earlier, the basic holding in both *Nollan* and *Dolan* consists of two *inextricable* propositions: (1) in the land-use context, an uncompensated exaction of property is allowed, but (2) only on the condition that the exaction bears an "essential nexus" and "rough proportionality" to the impact of the proposed use. Given the inseparability of these propositions, to say that the limitations do not apply to a particular permit exaction is to say that the entire holding is inapplicable—including that part of the holding that allows uncompensated takings in the first place. The limitations make constitutionally possible the provision of some flexibility to land-use agencies to demand property in the permit context. If the District rejects any limitations on its power to

confiscate property in the permit process, it also must forfeit the flexibility to impose permit exactions that *Nollan* and *Dolan* provide land-use agencies, and accept the general prohibition against uncompensated takings that existed prior to *Nollan*.

Even if the holding in *Nollan* and *Dolan* could be parsed to give the District unbridled power to confiscate property in the permit process, the potential for government abuse of permit applicants would be limitless. As the *Nollan* Court observed, "[o]ne would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions." *Nollan*, 483 U.S. at 837 n.5. In a world with no unconstitutional conditions doctrine, the government could prohibit a property owner's use unless and until he paid a handsome sum into its coffers; that is the world the Florida Supreme Court endorsed in this case, when it upheld as constitutional the District's decision to withhold permits until Mr. Koontz agreed to finance improvements to its land. A Florida permit applicant now faces the prospect that each of the multiple land-use and environmental agencies with permit jurisdiction will require him to dedicate money to a public project or finance burdensome improvements to public property—with no end in sight. J.A. 76 (citing other land-use permitting authorities with jurisdiction over the property).

In the wake of *Nollan* and *Dolan*, unlawful confiscations of real-property interests may have

become rarer. But in jurisdictions like Florida, where the limitations in *Nollan* and *Dolan* are applied *only* to exactions of real-property interests, other kinds of permit exactions—especially monetary exactions—have proliferated, because they escape meaningful judicial review. William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 Chi.-Kent L. Rev. 865, 881 (1991) (The author collected evidence that "many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction."); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. Rev. 177, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth."); Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 Minn. L. Rev. 459, 480 (2005) (book review) ("Over the past three decades, increasing numbers of local governments . . . have turned to new methods of financing public works projects, especially land use exactions and impact fees."). And, because tax increases are so politically unpopular, many states have turned to permit applicants for money and financing of public projects. Brad Charles, Comment, *Calling for a New Analytical Framework for Monetary Development Exactions: The "Substantial Excess" Test*, 22 T.M. Cooley L. Rev. 1, 2 (2005) ("[T]o deal with the cost of growth created by new development, about half of the states enacted an impact-fee statute, a type of development exaction, to give local governments authority to exact fees from developers for any type of development . . . ."); Rosenberg, *supra*, at 262 ("Residents now urge their

elected officials to adopt impact fees when the locality has not yet done so. Without having to face the opposition of future residents who do not currently live or vote in the locality, [municipalities] find impact fees an irresistible policy option.").

The District may argue, as the Florida Supreme Court concluded (Pet. Cert. App. A-19–A-21), that applying *Nollan* and *Dolan* to permit exactions like the one at issue here would eliminate the freedom and flexibility of the government and bring development to a "standstill." Not so. In those jurisdictions where *Nollan* and *Dolan* apply to *all* permit exactions—regardless of the timing of their imposition or the form of the property being demanded—neither the regulation of land use nor development has come to a grinding halt. Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103, 104, 142-43 (2001) (reporting findings from empirical studies about the impact of *Nollan* and *Dolan* on planners' ability to impose exactions, including the finding that "a very large percentage of municipal planners view the Supreme Court takings precedents favorably").

This is not surprising. *Nollan* and *Dolan* do not *ban* permit exactions; rather, they serve as a constitutional check against exactions that are unrelated or disproportionate to the impact of an applicant's use of his property. *Id.* at 105, 142-43 (a majority of land-use planners reported that *Nollan* and *Dolan* do not encroach on their planning discretion; the decisions provide "good planning practices"). Land-use agencies remain free to impose those permit exactions

that can survive *Nollan* and *Dolan* scrutiny. *Id.* at 120-25.

Even if it were a well-founded concern, "flexibility" cannot be an excuse for overriding applicants' constitutional rights to make reasonable use of land and to be compensated for confiscated property. As this Court observed in *Dolan*: "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan*, 512 U.S. 374, 396 (internal citation omitted).

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court considered the question of whether adherence to the Constitution might unduly reduce the flexibility of land-use agencies in the permit process. The Court made clear that the convenience of government must yield to constitutional demands:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.

Id. at 321.

The Court struck just the right balance in *Nollan* and *Dolan*, where it construed the Takings Clause as allowing land-use agencies to confiscate property in the permit process under limited circumstances. Those cases provide just the right amount of flexibility to those agencies, while preserving the rights of applicants. Adopting different standards for the different kinds of property confiscations that government may attempt to carry out in the permit process would ignore the doctrinal foundations of *Nollan* and *Dolan*, and be unworkable in its uncertainty and unpredictability. Importantly, it would undermine the constitutional rights protected by the Takings Clause of the Fifth Amendment—"as much a part of the Bill of Rights as the First Amendment or Fourth Amendment."

II

THE DISTRICT'S PERMIT EXACTION CANNOT ESCAPE THE *NOLLAN* AND *DOLAN* LIMITATIONS BASED ON ARBITRARY FACTORS LIKE THE TIMING OF THE EXACTION'S IMPOSITION OR THE PROPERTY SOUGHT TO BE CONFISCATED

A. *Nollan* and *Dolan* Apply Whenever the Government Conditions the Issuance of a Permit on the Applicant's Compliance with a Permit Exaction

The Florida Supreme Court held that *Nollan* and *Dolan* apply to permit exactions only when the government "actually issues the permit sought." Pet. Cert. App. A-19. The court based its holding on the

erroneous assumption that, in both *Nollan* and *Dolan*, "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A-18. The court's decision is based on a mistaken assumption about those precedents, and is contrary to the unconstitutional conditions doctrine.

1. *Nollan*, *Dolan*, and This Case All Involved Challenges to Permit Exactions Imposed Prior to Permit Issuance

Like the District, the land-use agencies in *Nollan* and *Dolan* did not issue any permits to the applicants. In *Nollan*, the California Coastal Commission issued a Notice of Intent to Issue Permit—in effect, an approval of the permit application, which stated that the Commission would issue the Nollans a coastal development permit only if they first dedicated an easement to the public.[3] *Nollan*, 483 U.S. at 828. The permit decision stated, in relevant part:

> *Prior to the issuance of the Coastal Development Permit*, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other."

[3] Like many land-use agencies, the California Coastal Commission first decides to approve a permit application before actually issuing the permit. The approval sets forth the conditions that the applicant must satisfy before issuance of the permit.

Brief of Appellants at 5, *Nollan*, 483 U.S. 825 (No. 86-133), 1986 U.S. S Ct. Briefs LEXIS 1382, **10 (quoting Joint Appendix at 34, *Nollan*, 483 U.S. 825 (No. 86-133)); *see also United States v. Pink*, 315 U.S. 203, 216 (1942) (recognizing the propriety of "tak[ing] judicial notice of the record in this Court" in another case).

The Nollans challenged the constitutionality of the exaction without recording the deed. *Nollan*, 483 U.S. at 828-29. Thus, no property changed hands, and no permit was issued prior to this Court's review of the permit exaction—just as in Mr. Koontz's case. *Id.*

The same thing is true of *Dolan*. There, the city considered two land use applications: an application for a building permit and an application for a variance. *Dolan v. City of Tigard*, 854 P.2d 437, 438-39 (Ore. 1993). The city approved an agency recommendation that it deny the variance and that it condition issuance of the building permit upon Ms. Dolan first dedicating flood-plain and bicycle-path easements to the city:

> [*Prior to the issuance of building permits* t]he applicant shall dedicate to the City as greenway all portions of the site that fall within the 100-year floodplain [of Fanno Creek] (i.e. all portions of property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary.

Dolan, 20 Or. LUBA at 413, 1991 Ore. Land Use Bd. App. LEXIS 316, at *4 (emphasis added) (brackets in original). Like the Nollans and Mr. Koontz, Ms. Dolan challenged the constitutionality of the conditions without dedicating any property to the city and without an issued permit.

It is certainly true that Mr. Koontz's challenge to the District's exaction comes to this Court after *denial* of his permit applications, while the Nollans' and Ms. Dolan's challenges came to the Court after *approval* of their permit applications. But that is a distinction without a difference. In all three cases, the government required the permit applicant to dedicate property to public use before it would *issue* the permits. J.A. 70-71; *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 379. Though it may have taken different forms, the constitutionally relevant threat was substantively identical in *Nollan*, *Dolan*, and this case: "Accept our permit exactions, or we will not issue you a permit."

Nollan and *Dolan* make clear that the relevant inquiry focuses on the substance of the government's action—specifically, whether the government has demanded that the permit applicant give up a constitutional right. The nexus and proportionality tests in *Nollan* and *Dolan* are intended to limit the government's ability to make such demands. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 377. And the constitutional violation occurs at the moment the government makes the unlawful demand of the permit applicant. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390; *see also* Sullivan, *supra*, at 1421-22 (The unconstitutional conditions doctrine is violated "when government offers a benefit on condition that the recipient perform or forego [sic] an activity that a preferred constitutional right normally protects from government interference.").

2. The Unconstitutional Conditions Doctrine Applies to All Permit Exactions, Regardless of When They Are Imposed in the Permit Process

That *Nollan* and *Dolan* apply where a permit is denied specifically because of the applicant's refusal to accede to an excessive exaction is consistent with the unconstitutional conditions doctrine. *Lingle*, 544 U.S. at 547. The doctrine never has been limited to conditions attached to government approvals. *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963) (denial of unemployment benefits held unconstitutional where government required person to "violate a cardinal principle of her religious faith"); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (denial of tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine); *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 590, 593-94 (1926) (decision prohibiting use of public highways unless private carrier assumed the duties and burdens of a common carrier violated the unconstitutional conditions doctrine).

In *Perry v. Sindermann*, 408 U.S. 593 (1972), a state college denied a teacher re-employment after he publically criticized the college's policies. The teacher sued on grounds that the denial of employment violated his First Amendment speech rights. The college argued that, because the teacher had no right to re-employment, he had no viable claim under the First Amendment. The Court disagreed with the college, holding:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests*—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Id. at 597 (emphasis added) (quoting *Speiser*, 357 U.S. at 526).

Even prior to this Court's decisions in *Nollan* and *Dolan*, the lower courts commonly invalidated conditions whose rejection resulted in permit denials under the unconstitutional conditions doctrine. In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), for example, the city demanded that landowners dedicate a portion of their land containing valuable geothermal wells as a condition of approval of a land-use permit necessary for the owners to build apartments on their land. *Id.* at 649-50 (*cited by Dolan*, 512 U.S. at 391, *and Nollan*, 483 U.S. at 839). The owners objected to the dedication and the city denied the application. *Watson*, 716 F.2d at 649-50.

The city claimed that the unconstitutional conditions doctrine did not apply where a permit application was denied and, therefore, no property had been taken. *Id.* at 650. The Ninth Circuit rejected the city's argument as "specious," noting that this Court had never drawn a distinction between a decision approving and a decision denying an application. *Id.* at 651-52. By demanding a dedication as a condition of approval, the city had forced the landowners to choose between using their property and giving up their right to be compensated for the geothermal wells. *Id.* In short, the city was "manipulating" its permitting authority "to exert leverage" on the owners to compel a dedication of the geothermal wells without compensation. *Id.* The Ninth Circuit explained that, "[w]hile governmental entities may negotiate agreements aggressively," the government "must stop short of imposing unconstitutional conditions." *Id.* Applying the doctrine, the court held that the city was prohibited from denying the permit on the basis that the owners would not dedicate property to the public. *Id.* at 654; *see also McKain v. Toledo City Plan Comm'n*, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971) (denial of a permit based on failure to dedicate property that was not sufficiently related to the proposed development amounted to a confiscation of private property) (*cited by Dolan*, 512 U.S. 390 n.7)).

Since *Nollan*, lower courts have continued to apply the unconstitutional conditions doctrine where a permitting agency denies a land-use application based solely on a landowner's objection to an excessive exaction. In *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998), the city denied a re-zoning application because the landowner had objected to its demand that

he dedicate 22% of his land for the expansion of a highway—a condition that violated the "essential nexus" and "rough proportionality" limitations. *Id.* at 862. On appeal, the Eighth Circuit rejected the city's argument that *Nollan* and *Dolan* did not apply to permit denials, explaining that the distinction between a permit approval and a permit denial was a "mere technicality" where the landowner's objection to an unlawful exaction provided the sole basis for the city's decision. *Id.* at 864 n.2.

Indiana's court of appeals arrived at the same conclusion in *Jacobsville Developers East, LLC v. Warrick County*, 905 N.E.2d 1034 (Ind. Ct. App. 2009). There, the court held that, where a permit application is denied on the basis that the landowner would not accede to a condition, the owner has a cause of action for an excessive exaction; the owner does not have a cause of action for a general regulatory taking. *Id.* at 1040-41; *see also William J. Jones Ins. Trust v. Ft. Smith*, 731 F. Supp. 912, 914 (W.D. Ark. 1990) (enjoining city from demanding dedication of an easement as a precondition for permit approval where the easement violated the nexus rule).

Besides the Florida Supreme Court, the only lower court that has expressly refused to apply the "essential nexus" and "rough proportionality" limitations to exactions imposed prior to a permit denial is the California Court of Appeal. *Lambert v. City & County of San Francisco*, 57 Cal. App. 4th 1172 (Cal. Ct. App. 1997). In *Lambert*, owners of a hotel applied for a permit from the city to convert residential rooms into tourist rooms. The city denied the permit after they refused the city's demand to pay $600,000 in mitigation for the lost residential units. *Id.* at 1182

("[I]t is somewhat disturbing that San Francisco's concerns about congestion, parking and preservation of a neighborhood might have been overcome by payment of significant sum of money . . . ."); *id.* (Strankman, P.J., dissenting) ("[T]he [city] sought money from [the owners] as a condition to receiving the requested zoning permit and denied the permit when [they] failed to pay the City's price.").

The owners sued the city, challenging the constitutionality of the mitigation requirement under *Nollan* and *Dolan*. *Id.* at 1176. The trial and appellate courts ruled against the owners, on the same grounds that the Florida Supreme Court did in this case: Even though the city's permit denial may have been motivated by the owners' refusal to submit to its $600,000 demand, the courts concluded that, technically, no exaction had been imposed and no property taken, since the permit had been denied. *Id.* at 1182.

This Court denied the owners' petition for writ of certiorari, and the denial generated a three-Justice dissent. *Lambert v. City & County of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting from denial of cert.). While the denial of certiorari "imports no expression of opinion upon the merits of the case," the dissent is instructive. *Teague v. Lane*, 489 U.S. 288, 296 (1989). Joined by Justices Kennedy and Thomas, Justice Scalia rejected the distinction between permit denials and permit approvals, as a basis for applying *Nollan* and *Dolan*:

> [T]he court's refusal to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of a permit subject to

> an unlawful condition and the denial of a permit when an unconstitutional condition is not met. From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the permit process an "out-and-out plan of extortion." There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference.

Lambert, 529 U.S. at 1048 (citations omitted).

If a land-use agency imposes an exaction as a condition of obtaining permit approval, it still should have to establish the exaction's relationship to the impact of the proposed project. As the dissenting Justices in *Lambert* observed:

> When there is uncontested evidence of a demand for money or other property—and still assuming that denial of a permit because of failure to meet such a demand constitutes a taking—it should be up to the permitting authority to establish either (1) that the demand met the requirements of *Nollan* and *Dolan*, or (2) that denial would have ensued even if the demand had been met.

Id. at 1047-48.

The circumstances in *Lambert* mirror this case. There was uncontested evidence of a demand that Mr. Koontz dedicate his money to a public use—specifically, that he finance public improvements.

Pet. Cert. App. A-6; Pet. Cert. App. D-4. And there was uncontested evidence that the District's permit denial was based *solely* on Mr. Koontz's refusal to accede to that demand. J.A. 70-71. On these facts, the District's exaction required review under the unconstitutional conditions doctrine, as applied in *Nollan* and *Dolan*.

B. *Nollan* and *Dolan* Apply to All Permit Exactions, Regardless of the Form of the Property Interest the Government Seeks To Confiscate

The Florida Supreme Court held that *Nollan* and *Dolan* did not apply to the District's monetary exaction requiring Mr. Koontz to finance improvements to its lands. Pet. Cert. App. A-19. According to the court, those precedents apply only to exactions of interests in real property. *Id.* The court's holding ignores this Court's Takings Clause jurisprudence, and the logic and purpose of the unconstitutional conditions doctrine.

As discussed in Part I, the Takings Clause broadly protects "private property," not just interests in real property. Under *Nollan* and *Dolan*, the Takings Clause allows some uncompensated exactions of property in the permit process, but only if the exaction bears an "essential nexus" and "rough proportionality" to the adverse impact of the proposed land use. Since the Takings Clause makes no distinction among the different kinds of property that government may exact in the permit process, there is no reason why the limitations in *Nollan* and *Dolan* also should not apply with equal force to all property, both real and personal. The limitations must apply to whatever property the government exacts as a condition of issuing a permit.

Certainly, there is nothing in the language of *Nollan* or *Dolan* to the contrary. Neither decision confines the "essential nexus" and "rough proportionality" limitations to land dedications. And with good reason. The central question in *Nollan*—a question that goes to the heart of the unconstitutional conditions doctrine—was whether the Commission could do indirectly, through the permit process, what it could not do directly outside the permit process. *Nollan*, 483 U.S. at 834. If the Nollans had not applied for a permit, could the Commission simply have demanded that they waive their right to compensation for confiscation of an interest in their land? *Id.* at 831. The same question arises in *all* cases involving confiscations of property—regardless of the property's particular form.

Here, the question is: If Mr. Koontz had not been applying for a permit, could the District have demanded that he waive his right to compensation for the cost of making forced improvements to the District's property? Only the unconstitutional conditions doctrine can answer the question—and the answer is: "no." *See*, *e.g.*, *id.* at 834 ("[R]equiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment," as applied to the Takings Clause); *Brown*, 538 U.S. at 235 (analogizing for purposes of the Takings Clause the government's confiscation of one's money interest in a bank account—"the private property of the owner of the principal"—to the taking of land).

Furthermore, the Florida court's conclusion that *Nollan* and *Dolan* apply only to real property exactions cannot be squared with this Court's grant of certiorari and remand in *Ehrlich v. City of Culver City*, 15 Cal.

App. 4th 1737, 1743 (Cal. Ct. App. 1993), *vacated and remanded*, 512 U.S. 1231 (1994). In *Ehrlich*, the owner of a private tennis club and recreational facility applied to Culver City for an amendment to a general plan, a zoning change, and amendment of the specific plan to allow replacement of the tennis club and recreational facility with a condominium complex. *Id.* The City approved the application conditioned upon the payment of certain monetary exactions, including a $280,000 fee to pay a portion of the cost of replacing the lost recreational facilities. *Id.*

The California appellate court rejected the property owner's challenge, holding that monetary exactions are not subject to heightened scrutiny under *Nollan*. *Id.* This Court granted certiorari, vacated the lower court's judgment, and remanded the case for consideration under *Dolan*. *Ehrlich*, 512 U.S. at 1231. On remand, the California Supreme Court held that the nexus and proportionality tests apply equally to exactions of real and personal property. *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996) ("[I]t matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction."); *see also San Remo Hotel v. City & County of San Francisco*, 41 P.3d 87, 102 (Cal. 2002) ("Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan/Dolan* scrutiny."); *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620, 635 (Tex. 2004) (holding that there is no reason why "[monetary] exactions should be analyzed differently than dedications in determining whether there has been a taking").

Finally, applying *Nollan* and *Dolan* to *all* exactions of property, including Mr. Koontz's monetary exaction, serves the purpose behind those decisions. Exactions requiring the dedication of a property owner's money to a public use trigger the same concerns that this Court sought to address in *Nollan* and *Dolan*. Again, the purpose of the limitations set forth in *Nollan* and *Dolan* is to root out government attempts to circumvent the Takings Clause under cover of the permitting process. *Lambert*, 529 U.S. at 1048 (Scalia, Kennedy, and Thomas, JJ., dissenting) (quoting *Nollan*, 483 U.S. at 837). And it is to protect the property owner from being singled out to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

As with a compelled dedication of land, governments can just as easily use a monetary exaction to force a property owner to bear burdens that the public as a whole should shoulder. *Del Monte Dunes*, 526 U.S. at 704 (the "essential nexus" and "rough proportionality" limitations apply to "required dedications or exactions"). The form of an exaction offers no clues about the risk of abusive leveraging by government in the permitting process. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 Wm. & Mary L. Rev. 1513, 1569 (2006) ("[W]e do not believe that the land-monetary distinction serves as an effective proxy for the likelihood that the government overreached in imposing an exaction."). "[B]oth types of exactions raise the possibility that the government may improperly leverage its police power in order to receive

benefits from the owner without paying compensation." *Id.*

Monetary exactions "pose an even greater threat of government abuse" if they are not made subject to heightened scrutiny. Jane C. Needleman, Note, *Exaction: Exploring Exactly When* Nollan *and* Dolan *Should Be Triggered*, 28 Cardozo L. Rev. 1563, 1582 (2006). Absent adequate judicial oversight, and given the fungibility of money, governments can exact fees from a property owner to finance a wide variety of public projects that benefit the entire community—even projects wholly unrelated to the impact of the proposed development. Fischel, *supra*, at 881 (reporting evidence that "many communities were using land use exactions to finance local expenditures that were only distantly related to the project that occasioned the exaction").

For example, assume a government agency wants a conservation easement over a permit applicant's land, and that a permit exaction of such an easement would have no relationship whatsoever to the impact of the applicant's project. If the agency is in a jurisdiction (like Florida) that narrowly applies the limitations in *Nollan* and *Dolan* only to real property exactions, then the agency will avoid the constitutional consequences of confiscating the easement by permit exaction. Instead, it will confiscate from the applicant a sum of money equal to the cost of condemning the easement by eminent domain, knowing that such a monetary exaction will escape the heightened scrutiny of *Nollan* and *Dolan*. Though the form of the exaction may differ, the applicant suffers the *same* constitutional injury: forced waiver of compensation for confiscated property.

The Florida Supreme Court erred when it held that the unconstitutional conditions doctrine applies only to required dedications of real property. The doctrine applies in *all* cases in which government demands the waiver of a constitutional right, including the right to compensation. Applying the doctrine in this way will ensure that the promise of the Takings Clause—that permit applicants will not be forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole"—will be realized. *Armstrong*, 364 U.S. at 49.

CONCLUSION

This case is controlled by *Nollan* and *Dolan*. These precedents construe the Takings Clause as allowing permitting agencies, like the District, *some* flexibility in land-use and environmental regulation—but no more than the Clause allows. The District was able to confiscate property as a condition of issuing Mr. Koontz's permits, but *only* if its demand bore an essential nexus and rough proportionality to the impact of his use for the land. Contrary to the Florida Supreme Court's decision, the District was not entitled to unfettered power to confiscate anything it wanted from Mr. Koontz, simply because its "take it or leave it" demand occurred prior to permit issuance, or because the target of its demand was Mr. Koontz's money, as opposed to an interest in his land. Such details are constitutionally irrelevant: The District denied him his permits because he refused to accede to its requirement that he finance unrelated, public improvements. This is not flexibility; it is extortion—a constitutional transgression that, in the absence of

Nollan and *Dolan* review, goes undetected and escapes legal redress.

For these reasons, the decision of the Florida Supreme Court should be reversed.

DATED: November, 2012.

Respectfully submitted,

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