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 REPLY BRIEF

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INTRODUCTION

The District skirts the first Question Presented, never explaining why a permit exaction resulting in permit denial should be exempt from review under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Instead, it writes and answers its own "question presented" based on a fundamental misunderstanding of Mr. Koontz's claim, and an improper re-litigation of the record. Introducing a "straw man" argument, the District asks whether just compensation under *Nollan* and *Dolan* is available for the taking of land. But Mr. Koontz litigated his claim on the very different question of whether *Nollan* and *Dolan* apply to invalidate a permit exaction. That is the only issue the Florida Supreme Court resolved, the only issue before this Court, and the one issue the District avoids for most of its brief.

The District does address the second Question Presented of whether monetary exactions should be exempt from *Nollan*/*Dolan* review. After arguing—contrary to the lower courts' findings—that it never imposed any permit condition, it urges this Court to simply exempt from Takings Clause review under *Nollan* and *Dolan* all monetary exactions. But the District's proposed rule finds no support in this Court's precedents, including the principal case on which the District relies, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which is a fractured decision easily distinguishable from the facts of this case.

Nor is the exception supported by the District's "the sky will fall" arguments. After *Nollan* and *Dolan*, land-use regulation did not come to a halt. And, in those states that apply them to monetary exactions,

agencies still impose all manner of exactions—only now, they must do so within the parameters of the Takings Clause, so that no unconstitutional conditions are imposed.

In the District's view, the Takings Clause should impose ***no limitation whatsoever*** on an agency's flexibility to demand that an individual dedicate her money to a public use in exchange for a permit—presumably, because agencies can be "trusted" to not impose excessive exactions. Of course, the record in this case belies the District's dubious assurances. It is undisputed that Mr. Koontz was unfairly singled out to bear a public burden (improving government-owned lands) that should have been borne by the public as a whole; the demand bore no connection or proportionality to the impact of Mr. Koontz's modest project—a fact that the District itself recognized eleven years after imposing it, when it issued his permits without the condition. This kind of heavy handedness —exacting as much property out of a permit applicant as needed or wanted—will persist, so long as agencies know there is no Takings Clause limitation on their power. Trusting agencies to do the right thing is not the answer; making *Nollan* and *Dolan* review available to individuals faced with coercive property exactions—whatever their form and regardless of their timing—is.

SUPPLEMENTAL STATEMENT OF FACTS

A. This Matter Comes to the Court As a Permit Exaction Challenge

The District contends that Mr. Koontz invokes *Nollan* and *Dolan*, not to invalidate a permit condition,

but to obtain "just compensation" under federal takings law for a permit denial. The District is wrong. *Nollan* and *Dolan* were invoked to test the validity of the District's permit exaction that led to permit denial. The exaction's invalidity under federal constitutional law was, in turn, the ***predicate*** for Mr. Koontz's state law claim for state law damages against the District under section 373.617 of the Florida Statutes—a fact that may explain the District's confusion. Pet. Cert. App. B-6. While the interpretation of that Florida statute is neither before the Court nor necessary to its resolution of the Questions Presented, how the statute operates and was applied by the courts below helps to put the *Nollan*/*Dolan* issue in context.

Section 373.617(2) provides landowners and state agencies, like the District, a convenient procedure for testing whether agency action "is an unreasonable exercise of the state's police power constituting a taking without just compensation." Appendices to Brief for Respondent (Resp. App.) at 15a-16a. The statute allows an agency to correct an action that the trial court finds unlawful, without incurring further liability. *Id*.

If the court determines that agency action constitutes an unreasonable exercise of police power, it remands the matter to the agency, which has ninety days to propose to the court an order correcting the infirmity. Resp. App. at 16a (§ 373.617(4)). The statute gives agencies the alternatives of agreeing to issue the permit, pay appropriate damages, or modify its decision to avoid an unreasonable exercise of police power. *Id*. (§ 373.617(3)). If the agency proposes a satisfactory order within ninety days, the court "shall enter its final order approving the proposed order." *Id*.

(§ 373.617(4)). The statute contemplates no further remedial action.

On the other hand, if the agency fails to propose a satisfactory order within ninety days, "the court may order the agency to perform any of the alternatives" specified in the statute. *Id*. (§ 373.617(4)). For example, the court may order the agency to both issue the permit and pay damages, as authorized by section 373.617(3)(b). *Id*. That is precisely what happened here.

In 2002, Mr. Koontz's claim "was tried on whether the off-site mitigation required by the District was an unreasonable exercise of police power" under Section 373.617, with "the *Nollan* and *Dolan* cases . . . providing [the] constitutional tests." Pet. Cert. App. D-10 - D-11; R 887-88. The trial court held that the District's exaction was unconstitutional under *Nollan* and *Dolan*, and invalidated it. *Id.* at D-11; R 1324 (District recognizing trial court "invalidated" the permit exaction). The court then relied upon the exaction's invalidity as the predicate for finding statutory liability under section 373.617. Pet. Cert. App. D-11. The court concluded that the District unreasonably exercised its police power by denying Mr. Koontz's permits for his refusal to acquiesce in an unconstitutional condition. *Id*.

In its judgment, the court instructed the District to propose an order curing the violation "within ninety (90) days," as provided in section 373.617(4). *Id*. But the District proposed no order, dug in its heels, and pursued an improper appeal, thereby exposing itself to further statutory remedies under section 373.617. *St. Johns River Water Management Dist. v. Koontz*, 861 So. 2d 1267, 1268 (Fla. Ct. App. 2003) (dismissing appeal

as premature, because District had to first propose order remedying violation).

Following the appeal, the District in 2004 proposed an order approving Mr. Koontz's permits without the unconstitutional exaction. R 1028. The trial court approved the District's proposal, ordered it to approve Mr. Koontz's permits within thirty days, and reserved jurisdiction to determine statutory damages. JA 183. But instead of approving the permits as ordered, the District pursued a second premature appeal. *St. Johns River Water Management Dist. v. Koontz*, 908 So. 2d 518 (Fla. Ct. App. 2005) (dismissing appeal as premature, because trial court still had to determine damages). The District finally approved the permits in 2005—after realizing (as Mr. Koontz had argued all along) that the amount of wetlands on Mr. Koontz's property was ***significantly less*** that originally believed." Pet. Cert. App. A-7 (emphasis added); *see also* Pet. Cert. App. C-2; JA 183.

In 2006, the court awarded Mr. Koontz statutory damages under section 373.617. Pet. Cert. App. C-1 - C-2; Pet. Cert. App. D-11; JA 182-84. Importantly, the court did not award the constitutional remedy of just compensation for a *Nollan/Dolan* violation. *That* specific violation (imposing an unconstitutional condition) already had been remedied by the exaction's invalidation and subsequent approval of the permits without it. *Id*. Damages were a statutory remedy that compensated Mr. Koontz for the District's unreasonable exercise of the police power under state law for the period when it unlawfully withheld permits. The District did not appeal the availability of a damages remedy under section 373.617.

Thereafter, the District appealed the judgment of statutory liability that was premised on the unconstitutionality of the District's permit exaction under *Nollan* and *Dolan*. R 1331-44; *See* Initial Br. of Appellant St. Johns River Water Management District (Fla. Ct. App. No. 5D06-1116, Jul., 17, 2006). The Florida appellate and supreme courts resolved one issue—i.e., whether *Nollan* and *Dolan* applied to invalidate the District's permit exaction.[1] Like the trial court, the court of appeal concluded they did; the Florida Supreme Court concluded they did not. Pet. Cert App. A-19; Pet. Cert. App. B-8 - B-10; Pet. Cert. App. D-10 - D-11; JA 94-96; JA 186. That federal-law issue is now properly before this Court; the application of section 373.617 and its remedies are not.

Nor is it necessary for the Court to address state-law issues in order to resolve the federal Questions Presented. *Nollan* and *Dolan*'s application to the District's exaction—a purely federal-law issue—does not turn on whether such application might also support a state-law claim or remedy, like damages under section 373.617. The Takings Clause either does or does not protect against monetary exactions resulting in permit denial, regardless of the state claims and remedies available to a successful plaintiff.

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[1] *See, e.g.*, Pet. Cert. App. A-1 (asking whether "the Fifth Amendment to the United States Constitution . . . recognize[s] an exactions taking" in the District's demands for off-site mitigation); *id.* at A-6 - A-7 ("[T]he trial court applied the constitutional standards enunciated in *Nollan* and *Dolan*."); *id.* at B-5 ("[T]he trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*."); *id.* at D-10 - D-11 (*Nollan* and *Dolan* provide the "constitutional tests applicable to the Koontz property.").

B. The District Imposed Specific Exactions

The District disputes that it "demand[ed]" something of Mr. Koontz, because it was Mr. Koontz's obligation—not the District's—to identify mitigation sufficient for permit approval. Resp. Brief at 38-39. The District also disputes that it imposed a "particular condition," given that it proposed mitigation alternatives before denying the permits. *Id.*

The District contradicts its own position throughout the litigation, and findings made by the lower courts. In the parties' Joint Pre-Trial Statement, the District admitted that "the denials [of Mr. Koontz's permits] were based exclusively on the fact that [he] would not provide additional mitigation to offset impacts from the proposed project." JA 70. "Had [he] offered the additional mitigation . . . the exact project Koontz proposed would have been permitted." JA 70-71. In its brief to the Florida Supreme Court, the District admitted that "[it] required additional mitigation before it would authorize" the permits and that "[a]dditional mitigation would be 'off-site' because the available conservation land on-site was, in [the District's] view, insufficient mitigation." Petitioner's Br. on Jurisdiction, at 1 (Fla. Sup. Ct. No. SC09-713, May 7, 2009).

Consistent with the District's representations, the trial court found that "the off-site mitigation conditions [were] imposed upon Koontz by the District." Pet. Cert. App. D-1. The court of appeal affirmed the trial court's judgment "that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to

the relief requested by Mr. Koontz." *Id*. at B-5 - B-6. Significantly, the appeals court stated that "[t]he District makes no challenge to the evidentiary foundation for these factual findings"—including the finding that the District had in fact imposed the off-site-improvement exaction. *Id*. at B-6.

The District also did not challenge the evidentiary foundation for the findings in the Florida Supreme Court, but only the propriety of applying *Nollan* and *Dolan* to the undisputed facts. Petitioner's Br. on Jurisdiction (Fla. Sup. Ct. No. SC09-713). Consequently, the supreme court adopted the trial court's finding that the District required off-site mitigation as a condition of permit approval, but held that *Nollan* and *Dolan* did not apply. Pet. Cert. App. A-19; *id*. at A-6 (reciting trial court findings).

Moreover, the fact that the District proposed alternative forms of mitigation prior to denying Mr. Koontz's permit is irrelevant. As the court of appeal noted, "the trial court decided ***as fact*** that the conservation easement offered by Mr. Koontz was enough and that any more would exceed the rough proportionality threshold, whether in the form of off-site mitigation or a greater easement dedication for conservation." Pet. Cert. App. B-10 n.5 (emphasis added). Neither the court of appeal nor the supreme court disturbed that finding.[2]

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[2] The undisputed fact that the project site had no viable wetlands, fish, or wildlife (Pet. Cert. App. D-3; JA 113-17, 137, 146) renders irrelevant the District's and its amici's lengthy discussions about the importance of wetlands, and the legitimacy of federal and state efforts to protect them—which Mr. Koontz does not dispute.

Finally, it is disingenuous for the District to deny that it required specific permit exactions. The District alone holds the power to grant or deny permits. While applicants may have some "choice" about the form of mitigation they undertake, they have absolutely no say as to whether mitigation is necessary or how much mitigation is sufficient to secure permit approval. The District alone mandates the need for and sufficiency of mitigation.

ARGUMENT

I

NOLLAN AND *DOLAN* SHOULD APPLY WHERE AN APPLICANT'S REFUSAL TO ACCEDE TO AN UNCONSTITUTIONAL CONDITION RESULTS IN PERMIT DENIAL

The District demanded that Mr. Koontz finance improvements to 50 acres of wetlands on District-owned property as a condition of permit approval. When Mr. Koontz refused, the District denied his permit applications. The Florida Supreme Court held that *Nollan* and *Dolan* did not apply to the exaction, in part because no permit ever issued and, therefore, no property ever changed hands. Pet. Cert. App. A-21.

This holding is the basis of the first Question Presented: Is it constitutionally relevant for the purpose of applying *Nollan* and *Dolan* that the District's exaction was imposed as a condition precedent to permit approval and resulted in permit denial? It is not. As explained in Mr. Koontz's Brief on the Merits (at 29-39), because the only constitutionally

relevant fact is that the District imposed its exaction as a condition of permit ***issuance***, *Nollan* and *Dolan* apply.

Nowhere in its brief does the District contest this point. Resp. Brief at 28 (dismissing, without discussion, the question of "whether or not the timing is relevant when a landowner seeks to invalidate an unconstitutional condition"). The District does not dispute that the Takings Clause and the unconstitutional conditions doctrine attribute no constitutional significance to an exaction's timing. Nor does the District dispute that, in both *Nollan* and *Dolan*, the agencies had imposed the exactions before issuing permits, which is precisely what happened here.

Instead, the District improperly re-litigates the facts of this case so as to escape *Nollan* and *Dolan* review. The District alleges that it imposed no exaction on Mr. Koontz's permits, so there is nothing for *Nollan* and *Dolan* to apply to. Resp. Brief at 38-39. But as explained above, the District's allegation contradicts findings made by the trial court, and adopted by the court of appeal and supreme court. The District indisputably ***did*** impose two specific exactions—the on-site and off-site exactions.

Moreover, it makes no constitutional difference that the District "negotiates" with applicants over suggested mitigation alternatives, and leaves it to them to decide the nature and amount of the exactions necessary for permit approval. Resp. Brief at 39. This exaction scheme—whereby the District requires applicants to choose their own poison—is an attempt to skirt its constitutional burden of establishing the requisite connection between exactions and the impact

of a project. *Dolan*, 512 U.S. at 398. If all permitting agencies constitutionally could employ this artifice for imposing exactions, *Nollan* and *Dolan* would be dead letters, for applicants could simply be pressured by "suggestions" to acquiesce in otherwise unconstitutional exactions.

Furthermore, the District raises concerns about how *Nollan* and *Dolan* could apply "where there is no final 'required dedication,' but only a series of alternative proposals, none of which is ever insisted upon as the *sine qua non* of a permitting decision." Resp. Brief at 41. The District worries that courts "would have to examine each of the potential options that the agency suggested to the applicant during the permitting process." *Id.* There is no basis for the District's concerns.

Here, there is no question that the District took final agency action to deny Mr. Koontz's permits, simply because he refused to acquiesce in a specific unconstitutional condition. *Koontz v. St. Johns River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. Ct. App. 1998) ("There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the government finally approves one before he can go to court."), *rev. denied*, 729 So. 2d 394 (Fla. 1999). In any event, Mr. Koontz does not contend that an agency's mitigation suggestions—without final agency action—are actionable under *Nollan* and *Dolan*.

The District's concern over a court having to review, under *Nollan* and *Dolan*, multiple alternatives for mitigation contained in a final agency action is equally unfounded. If a permit is denied for failure to

accept any one of several mitigation alternatives, all of them should be reviewed under those precedents. Those alternatives bearing an essential nexus and proportionality to the impact of a proposed use would be upheld, while the others would be invalidated. There is nothing particularly problematic with applying *Nollan* and *Dolan* fairly and consistently to all permit exactions of property.

Of course, this issue is not pertinent here. It is true that the District's final orders cite mitigation alternatives that Mr. Koontz could have accepted to secure permit approval. But, as the Florida court of appeal noted, the trial court decided "as fact" that any exaction beyond Mr. Koontz's 11-acre conservation easement would bear no relationship or proportionality to the impact of his proposed use. Pet. Cert. App. B-10 n.5. And in its brief to the Florida Supreme Court, the District was more specific about the exaction whose rejection triggered permit denial, admitting that the "[a]dditional mitigation would be 'off-site' because the available conservation land on-site was, in [the District's] view, insufficient mitigation." Petitioner's Br. On Jurisdiction, at 1 (Fla. Sup. Ct. No. SC09-713).

Finally, the District warns that *Nollan* and *Dolan* review of exactions resulting in permit denial would lead agencies to deny permits outright without any discussion or negotiation. Resp. Brief at 40. Not so. Denying a permit for no reason would expose agencies to liability for arbitrary and capricious decision-making, and violation of laws requiring final decisions to contain findings of facts and conclusions of law. *See*, *e.g.*, *Graham v. Estuary Props., Inc.*, 399 So. 2d 1374, 1379 (Fla. 1981) ("If the state denied a permit without showing the existence of an adverse or

unfavorable impact, there would be no showing that the regulation protected the health, safety, or welfare of the public; without such a showing the denial would be arbitrary and capricious."). *Nollan* and *Dolan* do not change agencies' obligation to be fair and transparent in the decision-making process. On the other hand, providing legitimate reasons for a permit denial—like an applicant's refusal to accept ***lawful*** permit conditions—shields agencies from liability. Thus, applying *Nollan* and *Dolan* to permit exactions whose rejection results in permit denials not only protects property owners against extortionate conditions; it also provides clear guidance to agencies who seek to protect permit denials against legal challenge.

On the other hand, exempting exactions that lead to permit denial from *Nollan*/*Dolan* review would create a dangerous loophole. To insulate all permit exactions, all an agency would have to do is make them conditions precedent to permit approval. If an applicant refused to accede to an excessive exaction—or even agreed under protest, in order to preserve a later challenge—the agency would deny the permit. If the applicant were coerced into acquiescing in the exaction without objection, the permit would be approved, but the applicant would forever lose the right to challenge the exaction. Thus, all permit exactions would escape Takings Clause scrutiny, effectively nullifying *Nollan* and *Dolan*.

II

NOLLAN AND *DOLAN* SHOULD APPLY TO PERMIT EXACTIONS REGARDLESS OF THE FORM OF THE PROPERTY EXACTED

The District's demand that Mr. Koontz personally finance improvements to public lands was a demand that he dedicate his money to a public use with no compensation. The uncompensated taking of private property is prohibited by the Takings Clause, whose purpose is to "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). That prohibition extends to confiscations of money, which has long been recognized by the Court as private property presumptively entitled to Takings Clause protection. *Village of Norwood v. Baker*, 172 U.S. 269 (1898);[3] *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235 (2003) (acknowledging that money interest could be "taken"); *id.* at 252 (Scalia, J. dissenting) (state law taking private parties' interest on principal "confiscated property" without compensation in violation of the Takings Clause).

[3] The District argues that *Village of Norwood* is not on point, because the challenged assessment "effected an uncompensated condemnation of real property." Resp. Brief at 47 n.17. It misreads the case. Norwood condemned petitioner's property for a road, paid compensation, then tried to reclaim the money by demanding that she pay it back as an alleged assessment on her property. She sued, claiming the assessment effected an uncompensated taking. The Court held that imposing upon the property owner the entire financial obligation of paying for the condemnation effected a taking. The Court viewed Norwood's monetary demand as actionable under the Takings Clause.

Phillips v. Wash. Legal. Found., 524 U.S. 156, 169, 172 (1998) (money and interest accrued thereon is property within the meaning of the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (finding Takings Clause violation where "exaction [of money interest] is a forced contribution to general governmental revenues").

Certainly, this Court has recognized circumstances where a governmental appropriation of money does not effect a taking. For example, "taxes and user fees . . . are not takings." *Brown*, 538 U.S. at 243 n.2 (Scalia, J., dissenting); *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (holding that user fee was not a taking); *County of Mobile v. Kimball*, 102 U.S. 691, 703 (1880) (concluding that "taxation for a public purpose" was not a taking). That is uncontroversial; certainly, Mr. Koontz does not dispute that taxes, user fees, and other ordinary charges that are different in kind from permit exactions are exempt from takings challenges. At the same time, the long-recognized power of governments to engage in these particular kinds of money appropriation is not a license to confiscate money willy-nilly without Takings Clause oversight. Ultimately, a takings claim must be assessed on the facts of the case, "not by resorting to blanket exclusionary rules." *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, No. 11-597 slip op. at 12 (Dec. 4, 2012); see also *id.* at 7 ("In view of the nearly infinite ways in which government actions or regulations can affect private property interests, the Court has recognized few invariable rules in this area."). To carve out of the Takings Clause a blanket exemption for all money confiscations would nullify the Clause's protections: Government could condemn an individual's land, pay just compensation,

then reclaim the money by demanding it from her, with no limitation under the Takings Clause.[4]

A. The District's Proposed Rule To Exempt Money Confiscations from the Takings Clause Should Be Rejected

The District would have this Court create a blanket exemption in the Takings Clause for money confiscations. Under the District's rule, the government's demand that an individual dedicate money to a public use is never a compensable taking under the Takings Clause. Resp. Brief at 43. The District justifies its categorical rule on several grounds, none of which has any merit.

The District claims that the Court's "money takings" cases—*Phillips*, *Brown,* and *Webb's Fabulous Pharmacies*—are inapposite. Resp. Brief at 46. Those cases involved a "specific property interest" (accrued interest) that was actually seized, while this case involves "fungible money" that the District never took. Resp. Brief at 46. Property may not have changed hands here as it did in those cases, but property is not *supposed* to change hands in a permit-exaction case: *Nollan* and *Dolan* exist to prevent the consummation of unlawful permit exactions.

Moreover, while *Phillips*, *Brown*, and *Webb's Fabulous Pharmacies* each had to do with the taking of a particular form of money (accrued interest), the holdings did not turn on the "specific property v.

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[4] As explained below, there may be *other* limitations, but only the Takings Clause would address the fundamental concern that the government was forcing one individual to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

fungible money" distinction that the District eagerly plays up.[5] And the decisions do not support the District's attempt to carve out a massive exception to the Takings Clause for certain kinds of monetary confiscations. Quite the contrary, they only affirm Mr. Koontz's point that the Takings Clause generally protects against monetary confiscations.

In *Phillips*, the Court held that money interest is "the 'private property' of the owner of the principal." *Phillips*, 524 U.S. at 172. In *Brown*, the Court held that, because money interest is private property protected by the Takings Clause, a law requiring "the transfer of the interest" to a third party is a per se taking. *Brown*, 538 U.S. at 235 (ultimately concluding that no compensation was due for the taking). And in *Webb's Fabulous Pharmacies*, the Court found that a county's "exaction" of interest on principal deposited in a court registry was "a forced contribution to general governmental revenues, and it is not reasonably related to the costs of using the courts." *Webb's Fabulous Pharmacies*, 449 U.S. at 163. The Court held that the confiscation of the interest was an unlawful taking without compensation. *Id*. at 164. These cases

[5] The "fungibility of money" point is of recent vintage, having been mentioned for the first time in dicta in *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). In *Sperry*, the United States and Iran set up a tribunal in order to process claims made by Americans against Iran. Federal law required the deduction of a "user fee" from tribunal awards to reimburse the United States Government for costs associated with maintaining the tribunal. The Court held that user fees are not takings. The "fungibility of money" point was unnecessary to the holding and has not been invoked to create a Takings Clause exception for monetary confiscations.

stand for the proposition that money confiscations generally are analyzed as takings.

The District also claims its rule is compelled by *Eastern Enterprises*. There, a plurality concluded that a federal statute imposing retroactive liability on a former coal company to provide lifetime medical benefits for retirees resulted in an unconstitutional taking of the company's property in violation of the Takings Clause. *Eastern Enterprises*, 524 U.S. at 517-19 (O'Connor, J., plurality opinion). Justice Kennedy concurred in the judgment and partly dissented; he too found the statute unconstitutional, but on the grounds that it violated the Due Process Clause. *Id*. at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Four dissenting Justices would have upheld the statute against both takings and due process challenges. *Id*. at 567-68 (Breyer, J., dissenting, joined by Stevens, Souter, Ginsburg, JJ.). Because the decision produced no majority rationale, its only precedential effect is in the "specific result"—*i.e.*, the statute was unconstitutional. *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998). Certainly, the case does not stand for the District's proposition that a government demand that an individual dedicate his money to a public use never can be a taking.

The District nevertheless relies on Justice Kennedy's partial dissent and Justice Breyer's dissent, in which they found the Takings Clause inapplicable. But the facts of *Eastern Enterprises* are so distinguishable from this case that the concerns raised by them are not present here. *Eastern Enterprises* involved a legislative effort to retroactively transfer money from one private party to

another, without enriching the government. *Eastern Enterprises*, 524 U.S. at 554 (Breyer, J., dissenting); *id*. at 545 (Kennedy, J. concurring in the judgment and dissenting in part). It looked more like a regulation adjusting the burdens and benefits of economic life than a direct and individualized confiscation of an individual's property for public use. *Id*. at 522-23 (O'Connor, J., plurality). Furthermore, the crux of the company's claim appears to have rested on "the potential unfairness of retroactive liability"—a quintessentially due process issue—rather than the unfairness of forcing one person to bear public burdens that should be borne by the public as a whole—a quintessentially takings issue. *Id*. at 556 (Breyer, J., dissenting); *id*. at 547 (Kennedy, J., concurring in the judgment and dissenting in part).

In stark contrast, the District's requirement that Mr. Koontz personally finance public improvements to its lands was not an economic regulation, but a targeted and individualized demand for his funds that unequivocally stood to enrich the District. The exaction was imposed with regard to a specific property interest: his land. Indeed, the District based the need and amount of the exaction on the alleged impact of his proposed land use and the extent to which he could dedicate his undeveloped land to conservation. Petitioner's Br. on Jurisdiction, at 1 (Fla. Sup. Ct. No. SC09-713). Unlike the statute in *Eastern Enterprises*, the District's exaction not only implicated his right to keep and dispose of a protected property interest (his money), but independently burdened his right under the Takings Clause to make reasonable use of his land. And Mr. Koontz's challenge goes right to the heart of the Takings Clause inquiry: Was he singled out to bear a public

burden that should be borne by the public as a whole? Only *Nollan* and *Dolan* can answer that question.

Unsurprisingly, the District is unable to find a single case applying *Eastern Enterprises* to a monetary exaction. Instead, it cites to a handful of appellate decisions applying Justice Kennedy's partial dissent to general laws providing employment benefits, setting traffic fines, and imposing assessments—laws much like the statute in *Eastern Enterprises*. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 386-87 (4th Cir. 2011) (survivor's benefits under Black Lung Benefits Act); *McCarthy v. City of Cleveland*, 626 F.3d 280, 284-86 (6th Cir. 2010) (fines allowed by traffic camera ordinance); *Swisher Int'l v. Schafer*, 550 F.3d 1046, 1057 (11th Cir. 2008) (statute imposing general assessment on cigar manufacturers); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (utility assessment).

In sum, the District's attempt to shoehorn this case into the *Eastern Enterprises* dissents fails. *Eastern Enterprises*—a fractured decision producing no majority rationale—is not the case on which to base a blanket exemption to the Takings Clause. The District's sweeping rule to exempt an entire category of government confiscations from the Takings Clause lacks support in any of this Court's precedents. And it flies in the face of the Court's admonition against categorical rules in takings law. *Arkansas*, 133 S. Ct. 511, No. 11-597 slip op. at 12; *see also id.* at 7 ("In view of the nearly infinite ways in which government actions or regulations can affect private property interests, the Court has recognized few invariable rules in this area.").

B. The Sky Will Not Fall If Government Must Show That Monetary Exactions Satisfy *Nollan* and *Dolan*

The District raises three concerns about applying *Nollan* and *Dolan* to monetary exactions. First, the District fears that, without some limiting principle, applying those cases to monetary exactions means that they must apply to taxes, user fees, and other ordinary charges. Resp. Brief at 48-49. Of course, there is an important limitation to *Nollan* and *Dolan*'s applicability that the District ignores. They apply only within the land-use permitting context to exactions of property imposed as permit conditions. Taxes, user fees, and the like are not imposed in the land-use permitting context and, therefore, are not subject to *Nollan*/*Dolan* review. Some jurisdictions already recognize *Nollan* and *Dolan*'s application to monetary exactions. *See* Brief Amicus Curiae of Owners' Counsel of America at 10. But there is no evidence—and the District cites none—of an explosion of "takings litigation" challenging taxes, user fees, and similar charges under *Nollan* and *Dolan*.

Second, the District expresses concern that, under Mr. Koontz's theory, there would be "an exaction taking every time a permit applicant incurs costs to bring himself into compliance with a generally applicable regulatory standard." Resp. Brief at 49. But *Nollan* and *Dolan* do not prohibit monetary exactions; the scrutiny they require simply smokes out those that bear no nexus or proportionality to the impact of a proposed project. There is no evidence that land-use regulation has come to a halt in those jurisdictions that apply *Nollan* and *Dolan* to monetary exactions, including heavily regulated jurisdictions

like California. *See*, *e.g.*, *Ocean Harbor House Homeowners Assn. v. Cal. Coastal Comm'n*, 163 Cal. App. 4th 215, 220 (2008) (applying *Nollan*/*Dolan* review to and upholding monetary exaction); *see also* Brief Amicus Curiae of Owners' Counsel of America at 14-19 (detailing *Nollan*/*Dolan*'s benefits to land-use planning).

The District assures the Court that, even if monetary exactions are exempt from review under *Nollan* and *Dolan*, agencies still face constitutional restraints. Resp. Brief at 50. The District cites the availability of other takings claims under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) or *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) claims under the Due Process and Equal Protection Clauses, and state-law takings and due process claims. But none of these alternatives address the unique concerns raised by permit exactions: (1) Is the property owner being singled out to bear a public burden that should be borne by the general public?; and (2) Is the property owner being coerced into giving up a constitutional right in order to exercise another right or obtain a benefit?

Lucas and *Penn Central* are regulatory takings tests used for the specific purpose of assessing whether a regulation or permit denial restricts the use of land to such an extent that it effects a taking of that land. Those cases have no bearing whatsoever on the very different question of whether a permit *condition* bears a constitutionally sufficient relationship to the impact of a proposed use of the land. Only *Nollan* and *Dolan* can answer that question, which is why they—rather than *Lucas* and *Penn Central*—apply in the "special context of land-

use exactions." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005).

Due process and equal protection claims are also inapt. A due process claim questions whether the exaction serves some legitimate purpose, and an equal protection claim asks whether the exaction is applied equally to similarly situated individuals. But neither claim addresses whether a particular individual has been targeted to bear a public burden that should be borne by the general public, or whether he should be required to give up a constitutional right in exchange for the ability to use his land. Again, only *Nollan* and *Dolan* can answer these constitutional concerns.

Finally, some state-law claims may address the concerns that permit exactions raise. But the relevant question is whether the Federal Constitution provides a floor of protection against excessive monetary exactions imposed in the permitting process. Given the specific values that the Takings Clause and the unconstitutional conditions doctrine embody, it must: *Nollan* and *Dolan* should apply to all monetary exactions to ensure that no landowner is singled out to unfairly bear public burdens that benefit everyone.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

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Respectfully submitted,

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