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 Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION, CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND REASON FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions presented* are:

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*; and

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.

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* The Questions Presented are as stated in Petitioner's Merits brief, the phrasing of the first of which was altered pursuant to Rule 24.1.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community.

Atlantic Legal Foundation has served as counsel for plaintiffs and *amici* in numerous "takings" cases, including: *Cole v. County of Santa Barbara*, 537 U.S. 973 (2002) (counsel for *amici* associations of small property owners in support of petition for certiorari in challenge to a state law procedural

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief; *amici* have complied with the conditions of such consent. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

bar to claims for unconstitutional takings based on "ripeness"; *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012) (counsel for National Association of Manufacturers as *amicus* in challenge to issuance by Environmental Protection Agency of an administrative compliance order under § 309 of the Clean Water Act; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (counsel for real property owners' associations as *amici* in challenge to development moratoria); and *Brody v. Village of Port Chester*, 345 F.3d 103 (2nd Cir. 2003) (co-counsel for plaintiff in challenge to taking of property for non-public use and inadequate notice of final decision to condemn under due process requirements of Fourteenth Amendment).

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. Their mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that private property can be taken only upon payment of just compensation. The Center provides counsel for parties in state and federal courts and has participated as *amicus curiae* before this Court in several cases of constitutional significance, including: *Sackett v. Environmental Protection Agency*, ___ U.S. ___, 132 S. Ct. 1367 (2012); *Stop the Beach Renourishment v. Florida Department of Environmental Affairs*, 560 U.S. ___, 130 S.Ct. 2592 (2010); *Rapanos v. United States*, 547 U.S.

715 (2006); and *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies – including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, http://www.reason.com/and http://www.reason.tv/, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues, *e.g.*, *Kelo v. City of New London, Connecticut*.

STATEMENT OF THE CASE

Amici rely on Petitioner's Statement of the Case, but here highlight the salient facts.

Petitioner's father and predecessor in interest, Coy Koontz, Sr. ("Koontz.") applied for permits from Respondent St. Johns River Water Management District (the "District").[2] The District demanded that Koontz transfer title to 75% of his land to the State *and* to perform costly off-site improvements to government-owned property distant from the Koontz parcel as conditions precedent to the issuance of the permits. Pet. Cert. App. A-6. When Koontz rejected the District's conditions the District denied the permits. Pet. Cert. App. D-4; J.A. 70-71. Koontz then sued.

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[2] In 1994, Koontz submitted applications to the District for permits to develop 3.7 acres within a "Riparian Habitat Protection Zone" and offered to place 11 acres of his property in a conservation easement. (Pet. Cert. App. A-5-A-6; Pet. Cert. App. D-4). As required by the District's regulations, 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). Other development projects had degraded the proposed site from its original condition and rendered it inhospitable as an animal habitat (Pet. Cert. App. D-3; *see also* J.A. 101-02, 111-19, 137-39) (describing conditions in project area). When experts inspected the property, the only standing water on the project site was in ruts along an easement road owned by the State, and used and maintained by a power company. (J.A. 117-18, 142-43).

Immediately before the hearing on his applications, Koontz was told by the District's staff that they would recommend denial of the permit applications unless, in addition to the 11-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.[3]

Koontz became concerned about the economic feasibility of the project if he complied with the District's demands, J.A. 29-30, 34-35, 100, 105, so he refused to acquiesce to the demand for off-site work. Pet. Cert. App. D-4. The Board denied his permit applications. J.A. 70-71. "[T]he denials were based exclusively on the fact that [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.

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[3] The District asserted that because the property was located in its Riparian Habitat Protection Zone, *any* use was "presumed to be harmful." J.A. 33, but the District's staff admitted that they had disregarded several experts who had concluded that the project area was already degraded and that they had not done surveys of the project site to determine the presence of riparian habitat, and they had no evidence to refute Koontz's contrary studies. J.A. 146. The District never demonstrated how the Koontz project, confined to a small part of his property, could justify either the demand for transfer of a majority of the parcel or the requirement that Koontz pay for off-site public improvements.

70. If Mr. Koontz had acceded to this condition, "the exact project [he] proposed would have been permitted." J.A. 71. Without the permits, Koontz could not use his property. Pet. Cert. App. A-5-6.

In late 1994, Koontz filed an action against the District in Florida state court under state law. J.A. 4-65. The case 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 relied on two of this Court's takings precedents – *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) – 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 by the Fourteenth Amendment. Pet. Cert. App. D-5-6, 10-11; Pet. Cert. App. B-19 n.3; J.A. 95. The trial court 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.

The trial court entered judgment for Koontz, reserving jurisdiction to award monetary damages authorized by section 373.617(b) until the District responded to the judgment. Pet. Cert. App. D-11. The trial court ordered the District to issue the permits by June 2004, but the District delayed issuing the permits until December 2005, over 11 years after it denied the permit applications. Pet. Cert. App. A-7; J.A. 183. The District approved Koontz's permit applications without the unlawful exaction. Pet. Cert. App. A-7. As provided by Fla. Stat. §373.617(2), providing for "monetary damages and other relief" for "an"), the trial court subsequently awarded damages resulting from the District's unreasonable exercise of the state's police power denying the permit applications, which constituted a taking without just compensation. Pet. Cert. App. C-2.

On appeal, the District argued that Koontz had no cause of action under section 373.617(2) because *Nollan* and *Dolan* were inapplicable to the challenged exaction and those cases apply only to exactions made on the issuance of a permit, and not to exactions imposed prior to issuance. Pet. Cert. App. B-6. The District also argued that *Nollan* and *Dolan* apply only to exactions of

interests in real-property, not to monetary exactions. Pet. Cert. App. B-9.[4]

The Florida intermediate appellate court rejected the District's arguments, and held that *Nollan* and *Dolan* apply to all property exactions, including monetary ones, that are imposed prior to permit issuance. Pet. Cert. App. B-8-10. 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 affirmed the trial court's judgment against the District. Pet. Cert. App. B-10.

The Florida Supreme Court reversed, holding that *Nollan* and *Dolan* do not apply to monetary exactions, such as 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 intended *Nollan* and *Dolan* to be strictly limited to their facts. Pet. Cert. App. A-15-16. The court also held that *Nollan* and *Dolan* did not apply to the District's exaction, because the District "did not issue [the] permits"

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[4] It is significant that the District did not dispute the trial court's factual findings that there was no essential nexus or rough proportionality between the impact of Koontz's project and the District's conditions. Pet. Cert. App. B-6 ("The District makes no challenge to the evidentiary foundation for [the] trial court's factual findings.")

and "nothing was ever taken from Koontz." Pet. Cert. App. A-21 (original emphasis omitted).[5]

The Florida Supreme Court reversed the court of appeals. Pet. Cert. App. A-21.

SUMMARY OF ARGUMENT

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The takings clause was designed to protect this core value.

This Court has long recognized that limitations on the exercise of rights in private property are as much "takings" as are physical invasion of property. Government regulation tends to become ubiquitous, and government constantly develops new and artful ways to appropriate rights to use and enjoy private property for the "public good." Unless constrained by a requirement to compensate owners of private property, in a majoritarian system, government agencies will allocate disproportionate burdens of achieving public purposes to politically weak segments of the citizenry.

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[5] The Florida Supreme Court incorrectly court assumed that in *Nollan* and *Dolan* the land-use agencies had issued permits after actually taking the exacted property. In fact, in both *Nollan* and *Dolan* the agencies had imposed the exactions *prior* to issuance of the permits, similar to the case at bar.

The District's demand that 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, triggering review under *Nollan* and *Dolan*. When Koontz refused to waive his right to compensation for the cost incurred making the off-site improvements, the District denied his permits.

The Takings Clause does not allow the government limitless power to confiscate property of any kind simply because it holds the power to grant or deny issue land use permits. The Takings Clause generally prohibits uncompensated takings, but the Court in *Nollan* recognized a narrow exception to that general rule: In the land use context, the government may exact property without compensation as a condition of permit approval, but only when the exaction has an "essential nexus" to the adverse impact of the proposed land use. Any other imposed condition is an unlawful attempt to evade the Constitution's prohibition on uncompensated takings. In *Dolan* the Court required that any permit exaction must also be "roughly proportional" to the adverse impact of the proposed land use.

The Florida Supreme Court ruled that there was no taking in this case because the District did not succeed in obtaining what it wanted to take and, in any event, it only sought to take money (in addition to most of the Koontz property). This

ruling is premised on the proposition that money is not the type of property protected by the Fifth Amendment; that the Koontz property was not taken when the permit was denied; and that the private property owner must agree to the exaction and actually suffer deprivation of constitutional liberties before a claim can be brought. The state court was wrong on all three counts.

The Florida Supreme Court attempts to limit this Court's teaching in *Nollan* and *Dolan* narrowly to instances in which a government agency has demanded transfer of real property or an interest in real property, has actually obtained such a transfer, and has issued a permit. That parsing of this Court's takings cases misconstrues the facts of those cases and does not bear doctrinal scrutiny. Contrary to the decision of the Florida Supreme Court, nothing in the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exactions subject to the "essential nexus" and "rough proportionality" limitations; whether the demand is for transfer of either real or personal property, it is subject to the same nexus and proportionality limitations. The District's demands on Koontz had neither the requisite nexus nor the required proportionality, as the trial court found.

The constitutional limitations on government's power to exact property in exchange for a government permit also does not depend upon *when* in the permit process the exaction is imposed. A decision to deny a permit application

because the property owner refuses to accede to an unlawful exaction and a decision to approve a permit application subject to acceptance of an unlawful exaction are substantively indistinguishable. In both cases, no permit issues unless and until the property owner agrees to surrender his right to compensation for the confiscated property.

The Florida Supreme Court's decision ignores reality and the logic of *Nollan* and *Dolan*. The distinctions the Florida Supreme Court drew are artificial and arbitrary. Bare uncompensated confiscation of land is rare because it would constitute an apparent violation of the Takings Clause. However, local and state governments increasingly resort to confiscating property other than interests in real property; most frequently land use regulators demand money, in the form of financing of public projects (as in this case) or payment of fees in lieu of land dedication. 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 violation will not have a remedy.

ARGUMENT

I.

REGULATORY LIMITS ON ECONOMIC USE OF PROPERTY ARE AS MUCH "TAKINGS" AS ARE PHYSICAL APPROPRIATIONS

A. Regulatory Limitations on Use of Property Are Takings.

The use and enjoyment of private property is a fundamental right, and important to a democratic society. The Takings Clause was designed to protect this core value.

Private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power.[6]

B. Denial of Permission to Use Property Is a Denial of Property Rights.

The Florida Supreme Court missed the underlying constitutional violation by focusing on the nature of the exaction and the District's failure

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[6] For the central importance of private property to the creation and preservation of democracy in the inevitable tension between the individual and government, *see* John Locke, OF CIVIL GOVERNMENT ¶¶ 135, 138 (1690); Max Weber, "Politics as a Vocation" in H. H. Gerth and C. Wright Mills, eds., FROM MAX WEBER, ESSAYS IN SOCIOLOGY 78 (Galaxy ed. 1958).

to successfully leverage the police power for monetary gain.

The right to use private property is not a privilege to be granted or withheld at the whim of local government agencies. Rights in property lie at the core of the Constitution and the liberties it seeks to protect. *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.").

The right to property – to control, use, and exclude – is not only rooted in the Constitution, *see* U.S. Const. amend. V and XIV, but it is part and parcel of the first principles of republican government. Blackstone characterized property as an absolute right consisting of "free use." William Blackstone, 1 *Commentaries on the Laws of England* 134-35 (Univ. of Chicago Press 1979). This point was well understood by the founding generation. *See* THE WRITINGS OF SAMUEL ADAMS (Harry Alonzo Cushing, ed. 1904) reprinted in 5 THE FOUNDERS' CONSTITUTION, Doc. 9 (Univ. of Chicago Press 1979).

The colonists brought their views of individual rights in property with them from England. William Blackstone noted that the right to property is an "absolute right, inherent in every Englishman . . .which consists of the free use, enjoyment, and disposal of all his acquisitions,

without any control or diminution, save only by the laws of the land." 1 COMMENTARIES ON THE LAWS OF ENGLAND 135.

The belief that individual rights in property were the key to other personal rights was recognized by the Founders as being a primary concern of government. James Madison commented on the compelling importance of protecting property rights and human faculties: "The protection of these faculties is the *first object* of government. From the protection of different and unequal faculties of acquiring property, the possession of the different degrees and kinds of property immediately results." The Federalist No. 10, at 74 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The differing and diverse "faculties of men," from which property rights "originate," require protection from unjust interference by both government and private action. *Id.*; *see also* The Federalist No. 70, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (expressing the need for a strong executive for the "protection of property" and "security of liberty").

The Founders believed that individual rights in property are the basis for all other rights, whether it is speech, religion or any other right held by individuals. John Adams emphasized, "Property must be secured, or liberty cannot exist." *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Madison summarized this view as a person has a right to property and also property in his rights:

> A man's land, or merchandize, or money is called his property. A man has property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions . . . he has a property very dear to him in the safety and liberty of his person.

James Madison, *On Property*, Mar. 29, 1792, in William T. Hutchinson, *et al.* (eds.), 14 The Papers Of James Madison 266-68 (, 1977). John Rutledge, delegate of South Carolina, argued that "property was the main object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Ferrand ed., Yale Univ. Press rev. ed. 1937). Alexander Hamilton remarked that, without this "main object," "adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." *The Defense of the Funding System*, *in* Harold C. Syrett (ed.), 19 The Papers Of Alexander Hamilton 47 (1973).

As Professor Harry V. Jaffa, a preeminent scholar of the American Founding and Civil War, noted, "For [President] Lincoln (following the Founding Fathers), the origin of the right of property, antecedent to civil society, was the natural right of every man to own himself and thus to own the product of his labor." A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR 320 (2000). The Founders recognized that an individual's "dominion over his property is absolute because" all persons have

dominion over themselves and their own faculties. *Id.* at 24.

The right to property is the civil and natural right that protects and guarantees all other rights. The primary "object of government" is to protect the property rights of every American, especially when the laws promote interference with these rights. The "interdependence" between these two rights requires protection for both, without either losing to the other. *Lynch*, 405 U.S. at 552.

The constitutionally protected individual right in property is not an abstract right to bare ownership. It is a right to use. Mere possession may be a sufficient right for Eagle feathers and works of art. *Andrus v. Allard*, 444 U.S. 51, 66 (1979). That is not, however, sufficient for real property. Property was described as the "third absolute right, inherent in every Englishman." William Blackstone, 1 Commentaries on the Laws of England at134-35; *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 310 (1795). The absolute individual right of property is not mere ownership, but "consists in the free use, enjoyment, and disposal of all his acquisitions." Blackstone, *supra*.

The requirement of a permit regulates so as to prevent "noxious" uses of property. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887); *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. at 1010 (1992). That permitting power was never meant to provide an opportunity for state and local entities to sell permits for the exercise of a right. *Nollan*, 483 U.S.

at 833 n.2 ("the right to build on one's own property-even though its exercise can be subjected to legitimate permitting requirements-cannot remotely be described as a 'governmental benefit.'"). Land is not held subject to a state power of prohibiting all use. *Lucas*, 505 U.S. at 1027-28.

When the water district in this case sought exact money for improvements unrelated to any impact of Koontz's project using its permitting authority, it deprived Koontz of the right to use his property and it violated the constitutional prohibition of taking without compensation.

In a typical regulatory takings case, a government agency adopts a measure that severely restricts the ability of the landowner to productively use her land, whether by rezoning, denials of permits or variances, density limitations, etc. *See*, *e.g.*, *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

As this Court perceived in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) :

> regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its

> natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

To similar effect, this Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) that private property cannot cavalierly be commandeered without payment simply "because the public wanted it very much." As that Court perceptively put it, "[T]he question at bottom is upon whom the loss of the changes desired should fall." *Id.*, at 416.

As Chief Justice Rehnquist wrote in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987):

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed 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."

First English, 482 U.S. at 318-319 (citations omitted). Chief Justice Rehnquist recognized the need to balance the interest of governments in protecting the public interest and the Constitution's overarching purpose in protecting the rights of individuals *as against* government power:

> 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. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S., at 416, 43 S.Ct., at 160.

First English, 482 U.S. at 321-322.

Justice Scalia, finding that a taking had occurred in *Nollan,* reasoned that even if the California Coastal Commission's policy was sound, it does not follow that coastal residents "can be compelled to contribute to its realization . . . . [I]f [the Commission] wants an easement across the Nollans' property, it must pay for it." *Nollan*, 483 U.S. at 841.

When regulations deny an owner the use of his land through the exercise of the police power, whether it is a physical invasion or a regulatory limitation, there is no effective difference. In both

situations, the owner is deprived of the use and enjoyment of the land, and it is that deprivation, not the acquisition of title by the government, that constitutes a taking.

> [T]he deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

When government action interferes with or substantially limits, the ability of a property owner to use his land in an economically viable way a taking has occurred and compensation is due:

> The language of the Fifth Amendment prohibits the "tak[ing]" of private property for "public use" without payment of "just compensation." As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered. This Court has consistently

> recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation *must* be awarded."

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981)(hereafter "*San Diego Gas & Elec. Co.*")(Brennan, J., dissenting; citations and internal quotation marks omitted; emphasis in original.)

Federal, state and local government agencies have developed new forms of regulation that make it difficult to discern clear boundaries between private property and what belongs to the community. Government entities constantly develop new and artful ways to appropriate rights to use and enjoy private property for the "public good."

The traditional common law distinctions between private property and state power have blurred as federal agencies, states, counties, cities and other local government units perform more functions – many of them "proprietary" in nature – to use property ownership to achieve governmental objectives, and to establish new forms of regulation through licenses, franchises, development subsidies, etc.

Unless constrained by a requirement to compensate owners of private property, in a majoritarian system government agencies will unfairly allocate disproportionate burdens of

achieving public purposes to politically weak segments of the citizenry.

Justice Brennan recognized the ubiquitous nature of takings. He did this both in equating regulatory takings and physical invasion. Government actors occasion losses in both regulatory and physical invasion cases.

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. . . .It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, when the effects completely deprive the owner of all or most of his interest in the property.

San Diego Gas & Elec. Co., 450 U.S. at 652-53 (Brennan, J., dissenting).

Ownership consists of three separate incidents: possession, use, and disposition. As the Court in *United States v. General Motors Corp.* expressed it:

> The critical terms [of the Takings Clause] are "property," "taken" and "just compensation." [These terms] have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

323 U.S. 373, 377-378 (1945).

Professor Richard A. Epstein argues, and *amici* urge on this Court, that nearly all regulatory restrictions on the use and disposition of private property should be seen as prima facie takings. R. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 57 (1985). ". . . [P]ossession, use and disposition do not form a random list of incidents; they form the core of a comprehensive and coherent idea of ownership." R. Epstein, *id*. at 60. If government removes or diminishes the rights of the owner in any of the incidents of ownership, "it has prima facie brought itself within the scope of the eminent domain clause, no matter how small the alteration and no matter how general its application." *Id*. at 57. In Professor Laurence Tribe's plain English statement, ". . . forcing someone to stop doing things with his property – telling him "you can keep it, but you can't use it" – is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else."

(Laurence Tribe, AMERICAN CONSTITUTIONAL LAW § 9-3 at 593 (2d ed. 1988)).

Property owners have a right to build on their property, subject only to reasonable regulation. "[T]he right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a "governmental benefit." *Nollan*, 483 U.S. at 845 n.2.

The Takings Clause prohibits uncompensated takings of property. U.S. Const. amend. V; *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003). The Takings Clause protects the right to "exercise[] . . . dominion" over, and "possess, use, and dispose" of, one's property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulation denying landowner all economically beneficial use of his property violated Takings Clause). Money is, quintessentially, a form of property. *See, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980)(The principal sum deposited in court plainly was private property, and not the property of Seminole County, and the earnings of the fund are incidents of ownership of the fund itself, and are property just as the fund itself is property.)

C. Government Attempts To Take Property Through the Land Use Permitting Process Are Takings Subject to *Nollan* and *Dolan* Limitations.

The District conditioned the issuance of permits on Koontz's agreement to finance improvements on government-owned property, unrelated to any environmental impact Koontz's proposed project would have. Pet. Cert. App. A-6. The District demanded that Koontz "donate" his money to making unrelated improvements to public property, without compensation.

Nollan and *Dolan* stand for the proposition that the Takings Clause allows the government to confiscate property as a condition of permit issuance only under strict limitations: a government actor can take an easement in property, if the exaction bears an "essential nexus" to the impact of their house on the community (*Nollan*, 483 U.S. at 837); and the government can take land only if exaction is "roughly proportional" to impact of the project (*Dolan*, 512 U.S. at 391).

Permit conditions that exceed these limitations, such as those in this case, are unconstitutional conditions. *See*, *e.g.*, *Dolan*, 512 U.S. at 385 (describing unconstitutional conditions in the land use context).[7]

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[7] *Nollan* and *Dolan* can be seen as "a special (continued...)

Nollan and *Dolan* establish two related constitutional guidelines: The Takings Clause allows government to take property by permit exaction only if the exactions bear an "essential nexus" and "rough proportionality" to the adverse impact of the property owner's proposed use of his land. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. When there is an insufficient connection between the adverse impact and the exaction, the imposition of an exaction runs afoul of the Takings Clause prohibition of uncompensated takings.

A permit condition precedent that denies the property owner an incident of ownership without meeting the *Nollan/Dolan* criteria denies the constitutional rights to make reasonable use of one's land, and the right to be compensated for an illegitimate limitation on that use. *Nollan*, 483 U.S. at 833 n.2 (a permit to build upon one's land is a right, subject to legitimate regulation); *Lucas*, 505 U.S. at 1014.

This Court based the *Nollan*/*Dolan* limitations on 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. These cases make no distinction

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[7](...continued)
application of the doctrine of unconstitutional conditions," *Lingle*, 544 U.S. at 547 (internal quotation marks omitted).

among the kinds of property that government attempts to confiscate through the permit process or the timing of the attempted exaction.

In the case at bar, the District took the position that no permit would be issued unless Koontz gave up 11 acres of his land and paid a significant sum of money for improvements to the District's located miles away.[8] This is precisely the kind of taking that *Nollan* and *Dolan* held to be unconstitutional.

If the holdings in *Nollan* and *Dolan* were be limited – as the Florida Supreme Court did – so as to exempt exactions to which the property owner refuses to buckle, thus short-circuiting the taking and to exempt exactions than those directly tied to the real property being "regulated," the potential for government abuse of the permit process would be virtually unlimited. With the proliferation of regulatory agencies with jurisdiction over land use, the opportunity for mischief is great. This is especially true when governments are in financial straits, the usual taxing powers are met with citizen hostility (or outright prohibition, as exemplified by various "tax cap" measures adopted from New York to California) and various government agencies – state and local – will be tempted to use permit fees and other monetary exactions to fund "ordinary" government

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[8] The District did not challenge the trial court's factual finding that no connection existed between the off-site-improvement demand and the impact of the Koontz project, Pet. Cert. App. B-6/

operations because money is the ultimate fungible form of property.

The Florida Supreme Court concluded that applying *Nollan* and *Dolan* to permit exactions would limit the flexibility of the government to regulate development. Pet. Cert. App. A-19–A-21. This argument has not been accepted by this Court. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court considered whether adherence to the constitutional mandates limiting takings might unduly reduce the flexibility of land-use agencies in the permit process.[9] The

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[9] In an *amicus curiae* brief filed in *First English* 23 states and one Commonwealth on behalf of nearly half the states (Alaska, Arkansas, California, Florida, Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wyoming, and Puerto Rico) argued that "Adoption of appellant's radical reformulation of takings jurisprudence would cripple amici's ability to perform regulatory functions upon which their citizens' health, safety and welfare quite literally depend." States' *amicus* brief in *First English* at 1-2. The states argued further that "Compelled payment of interim damages. . . would . . . carry the risk of financial chaos for state and local governments; and . . . have a major chilling effect on the regulatory process." *Id.* at 2, and that "[T]he rule urged by appellant could undermine the fiscal well-being of state and local governments. Judicially compelled damages in this context could have major adverse fiscal consequences." *Id.* at 23.

(continued...)

Court made it clear that the convenience of government must yield to constitutional requirements:

> We realize that even our present holding will undoubtedly lessen to some extent the

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[9](...continued)
Similar arguments were advanced by the State and Local Legal Center in its *amicus* brief on behalf of the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, the American Planning Association and others in *First English*: "such a decision could paralyze governmental efforts to regulate land use to protect the public health and safety from a host of...injuries....In the wake of such a decision, claims for compensation [would] overload[ ] court dockets and threaten[ ] bankruptcy for state and local governments." Brief of State and Local Legal Center at 3.

The same types of arguments were also made to this Court in *Nollan* by the County Supervisors Association of California, six counties and 46 cities in California: "the Court's decision in this case may affect *amici curiae's* continued ability to regulate land use for the benefit of the public. . . . A finding by this Court that dedication requirements are either permanent physical occupations or lesser physical invasions subject to stricter scrutiny than other regulatory actions is legally insupportable and would have drastic implications." California entities brief at 2.

These arguments simply ignore the point that "Once a court determines that a taking has occurred, the government retains the whole range of options already available--amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English*, 482 U.S. at 321.

> 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.

Even if constraint on government "flexibility" were a well-founded concern, it is precisely to restrain government "flexibility" that the Constitution and the Bill of Rights were adopted. As this Court observed in *Dolan*: "A strong public desire to improve the public condition [does 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).

D. The District's Permit Conditions Cannot Evade the *Nollan* and *Dolan* Limitations Based on the Timing of the Imposition of the Condition or the Type of Property Interest Demanded.

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. The Florida Supreme Court mistook the procedural posture of *Nollan* and *Dolan*.

Nollan and *Dolan*, and this case all involved challenges to permit exactions imposed prior to permit issuance. In all three cases (*Nollan, Dolan and Koontz*), 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. Like the District, the land use agencies in *Nollan* and *Dolan* did not actually issue any permits to the property owner.

In *Nollan*, the California Coastal Commission issued a Notice of Intent to Issue Permit which stated that the Commission would issue the a coastal development permit only if the Nollans first dedicated an easement to the public. *Nollan*, 483 U.S. at 825, 828. The Nollans challenged the constitutionality of the exaction without recording a deed granting the easement. *Nollan*, 483 U.S. at 828-29.

In *Dolan* the city approved an agency recommendation that it deny the variance and that it condition issuance of the building permit upon Dolan first dedicating flood-plain and bicycle-path easements to the city. Dolan

challenged the constitutionality of the conditions prior to dedicating any property to the city and prior to issuance of any permit. *Dolan*, 512 U.S. at 379.

Nollan and *Dolan* make clear that the relevant inquiry focuses on the substance of the government's action, not its timing or form. The constitutional violation occurs when the government entity makes the unlawful demand of the permit applicant. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390. Applying *Nollan* and Dolan 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.

E. The District's Permit Conditions Are Subject to the *Nollan* and *Dolan* Limitations Regardless of the Type of Property Exacted.

The Florida Supreme Court held that *Nollan* and *Dolan*did not apply to the District's requirement that Koontz pay for improvements to the District's property, because, according to that court, those cases apply only to exactions of interests in real property. Pet. Cert. App. A-19. The Florida court's holding ignores this Court's Takings Clause jurisprudence, and the logic and purpose of the unconstitutional conditions doctrine.

As discussed *supra*, the Takings Clause broadly protects "private property," not only interests in real property. The Takings Clause limits the government's power to take property, without distinguishing among the different kinds of property, and there is no principled reason why the limitations articulated in *Nollan* and *Dolan* should not apply to all types property, both real and personal. Neither decision confines the "essential nexus" and "rough proportionality" limitations to dedications of realty.

The Florida Supreme Court erred when it held that the unconstitutional conditions doctrine applies only to mandatory 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.

II.

THE DISTRICT IMPOSED UNCONSTITUTIONAL CONDITIONS ON USE OF THE KOONTZ PROPERTY

Whether viewed as a "taking" or a due process/unconstitutional conditions violation, the water district violated Koontz's property rights and the measure of damages is the same – cash value of the property or temporary takings damages and the permit to use the property.

A. Requiring Payment as a Condition for Exercise of Constitutional Rights Violates the Unconstitutional Conditions Doctrine.

Florida and several other state courts have mistakenly ruled that monetary exactions do not raise concerns under the Takings Clause. A state that seeks to withhold a discretionary permit until a property owner pays a price in either land or cash cannot argue that this leveraging of its police power is free from constitutional scrutiny. *See Speiser v. Randall*, 357 U.S. 513, 525-27 (1958). First, the idea that money is not itself protected by the Takings Clause was decisively rejected by this Court more than three decades ago. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161-62 (1980). A state cannot demand cash payments any more than it can require real estate as the price for a permit. If a state has no power to prohibit an action, speech or property development, it cannot accomplish the prohibition through the imposition of conditions. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Abood v. Detroit Board of Educ.*, 431 U.S. 209, 226 (1977).

The demand that the citizen surrender the constitutional right in property as the price of a permit is an "unconstitutional condition." *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563, 568 (1968).

The district does not escape liability for imposing the unconstitutional condition in an attempt to cash in on its permitting power. *Nollan*, 483 U.S. at 837. It is the imposition of the condition, not the success or failure of compelling the applicant to sign a check or a deed, that is the violation. *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). Thus, in unconstitutional condition cases, the Court has recognized availability of damage awards, voided the condition, or established a procedure to protect against the condition. When the condition has denied a constitutional right, such as an uncompensated taking, government must either lift the condition or pay compensation. *Nollan*, 483 U.S. at 837. The Court has not required the denial of constitutional rights before action may be taken, however. From the earliest cases on unconstitutional conditions, the Court has allowed the voiding of the condition as a means of protecting the constitutional rights at stake. *Home Ins. Co.*, 87 U.S. at 451. Modern cases have imposed prophylactic procedures to protect against the unconstitutional condition coming to fruition. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310-11 (1986); *Knox v. SEIU*, __ U.S. __, 132 S.Ct. 2277, 2291-93 (2012). The District's failure to obtain the deed and cash payment from property owner here does nothing to obviate the constitutional violation.

CONCLUSION

The Florida Supreme Court's decision would limit this Court's teaching in *Nollan* and *Dolan* to instances in which a government agency has demanded transfer of real property or an interest in real property, has actually obtained such a transfer, and has issued a permit. That parsing of this Court's takings cases misconstrues the facts of those cases and does not bear doctrinal scrutiny.

Contrary to the decision of the Florida Supreme Court, nothing in the Takings Clause, *Nollan*, or *Dolan* recognizes a relevant distinction among the *types* of permit exactions subject to the "essential nexus" and "rough proportionality" limitations; whether the demand is for transfer of either real or personal property, it is subject to the same nexus and proportionality limitations.

The District's demands on Koontz had neither the requisite nexus nor the required proportionality, as the trial court found.

For the foregoing reasons, *amici* urge the Court to reverse the decision of the Florida Supreme Court.

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