No. _____

In the
Supreme Court of the United States

COY A KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

BRIAN T. HODGES
Pacific Legal Foundation
10940 NE 33rd Place,
Suite 210
Bellevue, WA 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail:
bth@pacificlegal.org

PAUL J. BEARD II
Counsel of Record
Pacific Legal Foundation
930 G Street,
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org

MICHAEL D. JONES
P.O. Box 196130
Winter Springs, FL 32719
Telephone: (407) 359-9908

CHRISTOPHER V. CARLYLE
The Carlyle Appellate Law Firm
1950 Laurel Manor Drive, Suite 130
The Villages, FL 32162
Telephone: (352) 259-8852

Counsel for Petitioner

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 temporary taking of Koontz's property, and awarded just compensation. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking 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 can be held liable for a taking 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 v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and

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.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Statutes

United States Constitution

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

As personal representative of the Estate of Coy A. Koontz, Sr.,[1] Coy A. Koontz, Jr. (hereinafter, "Koontz"), respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), and is reproduced in Petitioner's Appendix (Pet. App.) at A. The Florida Supreme Court's decision denying rehearing and/or clarification is reported at __ So. 3d __, 2012 Fla. LEXIS 1 (Fla. 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. 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. App. at D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). Koontz filed an inverse condemnation lawsuit in the Florida state courts challenging the District's permit decisions as violating the Fifth and Fourteenth Amendments of the United States

[1] Coy Koontz, Sr., owned the subject property and filed the present lawsuit. When Koontz, Sr., passed away in the midst of litigation, his estate—as represented by his son, Koontz, Jr.—became the successor to the property and to his interest in the litigation.

Constitution, among other laws. Koontz prevailed in the Florida trial and appellate courts, but 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 Koontz's motion for reconsideration and/or clarification. On March 30, 2012, Justice Thomas granted Petitioner's application to extend the time within which to file the petition to June 1, 2012. *Koontz v. St. Johns River Water Management District*, No. 11A909.

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

A. St. Johns River Water Management District Denies Koontz's Land-Use Permits, After He Refuses to Perform Costly Off-Site Work on the District's Property As the "Price" of Permit Approval

Koontz owned 14.2 acres of vacant land in Orange County, Florida. Pet. App. A-5. Zoned for commercial use, the property is immediately south of State Road 50 and immediately east of State Road 408—two major roadways. *Id*. Koontz sought to improve 3.7 acres of the property, which surrounding residential and commercial development, road construction, and other government projects had seriously degraded. Pet. App. D-3. Although the site had become unfit for animal habitat, most of it lay officially within a habitat protection zone subject to the St. Johns River Water Management District's jurisdiction. *Id*. Of the site's 3.7 acres, 3.4 were deemed to be wetlands, and 0.3 were uplands.[2] Pet. App. A-5.

In 1994, Koontz applied to the District for permits to dredge and fill 3.25 acres of wetlands. Pet. App. A-4 – A-6. As mitigation for the proposed project's disturbance of wetlands, Koontz agreed to dedicate the remainder of his property—almost 11 acres—to the State for conservation. Pet. App. A-6. But the District was not satisfied with nearly 80% of Koontz's land and leveraged its permitting power to press Koontz for

[2] After the inverse condemnation trial, the District determined that the development would only disturb approximately 0.8 acres of degraded wetlands. St. Johns River Water Management District's Opening Brief on the Merits at 5-8 (Fla. Sup. Ct., Nov. 12, 2009).

more: It demanded that Koontz enhance 50 off-site acres of wetlands on the District's property located between 4-1/2 and 7 miles away, by replacing culverts and plugging some ditches. Pet. App. A-6, D-4. The cost of the off-site work was estimated to be in the range of $10,000 (the District's estimate) to between $90,000 and $150,000 (Koontz's expert's estimate). Pet. App. D-4. The District never demonstrated how the off-site improvement of 50 acres of wetlands on government lands was related in nature or extent to the alleged impact of the Koontz's dredge-and-fill activities on little more than three acres of degraded wetlands. Pet. App. D-11.

Koontz refused the District's demand. Because of his refusal to comply, the District denied outright his permit applications. Pet. App. A-6. The District would not issue permits unless and until Koontz submitted to its off-site-work condition. *Id*.

B. Koontz Sues for Inverse Condemnation Under *Nollan* and *Dolan*, and Prevails in the Trial and Appellate Courts

Koontz brought an inverse-condemnation suit against the District in the Florida trial court. He alleged that the District's off-site improvements condition was unconstitutional under the Fifth and Fourteenth Amendments, as interpreted in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet. App. D-4. *Nollan* and *Dolan* provide the framework for assessing the constitutionality of extortionate conditions imposed by land-use agencies in the permitting process.

In *Nollan*, a state land-use agency, the California Coastal Commission, required the Nollans, owners of beach-front property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. *Nollan*, 483 U.S. at 827-28. The condition specifically was justified 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 refused to accept the condition and brought a federal taking claim against the Commission in state court to invalidate the condition. *Id*. at 828. The Nollans argued that the condition was unlawful, because it bore no connection to the impact of their proposed remodel.

This Court agreed, holding that the Commission's easement condition lacked an "essential nexus" to the alleged social evil that the Nollans' project caused. *Id*. at 837. The Court found that because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id*. at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id*. at 837 (citations omitted).

Similarly, in *Dolan*, 512 U.S. 374, this Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land

use. There, the city imposed conditions on Dolan's permit to expand her store that required her to dedicate some of her land for flood-control and traffic improvements. *Id.* at 377. Dolan refused the conditions and sued the city, alleging that they effected an unlawful taking and should be enjoined.

This Court held that the city had established a connection between both conditions and the impact of Dolan's proposed expansion under *Nollan*, but nevertheless held that the conditions were unconstitutional. *Id.* at 394-95. Even when an "essential nexus" exists, the Court explained, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—i.e., "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. This Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and struck them down. *Id.* at 394-95.

Applying *Nollan* and *Dolan*, 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. App. D at 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" and "resulted in a regulatory taking." *Id.*

On remand from the trial court, the District concluded that the proposed development would have substantially less impacts on wildlife habitat than it had previously thought and issued the permits to Koontz. Pet. App. A-7. The trial court subsequently awarded Koontz $376,154 in damages for the District's temporary taking of his property, which spanned the eleven years during which the District unlawfully withheld permit approval. *Id.* Pet. App. C-1 – C-2. The District appealed. Pet. App. A-7.

On appeal, the District did not argue that its condition requiring Koontz to perform off-site work on its property satisfies *Nollan* and *Dolan*. Pet. App. B-5 – B-6. Instead, the District argued that *Nollan* and *Dolan* apply only to permit approvals that contain unconstitutional conditions—not to permit denials that result from the property owner's refusal to accede to unconstitutional conditions. Because the District issued no permits until after the trial court invalidated the condition, it supposedly imposed no exaction, making *Nollan* and *Dolan* review unavailable to Koontz. Pet. App. B-6. Observing that the argument raised "a question that has evoked considerable debate among academics," the appellate court rejected the District's argument. Pet. App. B-6 – B-7. The court relied on *Dolan*, along with various federal and state supreme court decisions, to conclude that the "essential nexus" and "rough proportionality" tests apply equally to conditions attached to a permit approval and to conditions whose rejection results in a permit denial. Pet. App. B-7 ("Although the *Dolan* majority did not expressly address the issue, the precise argument was

addressed by the dissent and, thus, implicitly rejected by the majority" (citing *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting))).

Moreover, the District unsuccessfully argued that the trial court erred in applying *Nollan* and *Dolan* to a condition requiring Koontz to "expend money to improve land belonging to the District." Pet. App. B-9 – B-10. According to the District, *Nollan* and *Dolan* can be applied only to those land-use exactions that compel a dedication of real property as a condition for permit approval. *Id*. Again, the court recognized that this question is the subject of broad debate and a nationwide split of authority. *Id*. at 10, 11-12, 21-22, 24-27. But, "[a]bsent a more definitive pronouncement from [this Court]," the court of appeal concluded that *Nollan* and *Dolan* apply to all property exactions—without distinction—and upheld the trial court's judgment. *Id*. at 10.

C. The Florida Supreme Court Refuses to Apply *Nollan* and *Dolan* to the District's Permit Condition and Reverses

The Florida Supreme Court accepted the District's petition for review. Pet. App. A-1. The supreme court noted that this Court "has only commented twice on the scope of the *Nollan*/*Dolan* test," and that "[s]tate and federal courts have been inconsistent with regard to interpretations of the scope of [that test]." Pet. App. A-15, A-17. In light of the lack of definitive guidance from this Court, and the court conflicts regarding the scope of *Nollan* and *Dolan*, the supreme court resigned itself to simply applying a very narrow and cramped interpretation of those cases. Because *Nollan* and

Dolan happened to involve exactions of easements imposed as part of permit approvals, the supreme court held that those cases could apply only to those kinds of exactions. Pet. App. A-18 ("Absent a more limiting or expanding statement from the United States Supreme Court with regard to the scope of *Nollan* and *Dolan*, we decline to expand this doctrine beyond the express parameters for which it has been applied by the High Court."). Importantly, the Florida Supreme Court did not consider the logic or purpose of the "essential nexus" and "rough proportionality" tests set forth in *Nollan* and *Dolan*—*i.e.*, to prevent land-use agencies from engaging in "out-and-out plan[s] of extortion," in whatever form, during the permitting process. *Nollan*, 483 U.S. at 837. Thus, the Florida Supreme Court adopted two per se rules of federal takings law:

> [U]nder the takings clauses of the United States and Florida Constitutions, the *Nollan*/*Dolan* rule with regard to "essential nexus" and "rough proportionality" is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed.

Pet. App. A-19. The court overturned the lower court's conclusion that the District's refusal to issue the permits effected a temporary regulatory taking. Pet. App. A-21.

Koontz now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on the important questions of federal law decided below.[3]

REASONS FOR GRANTING THE WRIT

I

THE FLORIDA SUPREME COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO UNCONSTITUTIONAL EXACTIONS WHOSE REJECTION RESULTS IN PERMIT DENIALS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

The Florida Supreme Court carved out a massive exception to *Nollan* and *Dolan*: Unconstitutional conditions whose rejection by the property owner results in a permit denial are immune from those decisions' heightened scrutiny. If it stands, the court's opinion threatens to effectively strip millions of Florida property owners of the important protections afforded by *Nollan* and *Dolan*—and the Takings Clause's guarantee that governments are barred "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

[3] While this case was on appeal, the Estate of Coy A. Koontz, Sr., sold the subject property. The Estate, however, remains the judgment creditor and retains standing to petition the Florida Supreme Court's decision.

(1960). To avoid *Nollan* and *Dolan* under the Florida Supreme Court's decision, land-use agencies carefully will couch their demands for land, money, or labor as conditions precedent to permit approval; in this way, agencies will be able to bully landowners into "agreeing" to otherwise unconstitutional conditions as the heavy price of permit approval.

Three Justices of this Court have made clear that the timing of an otherwise unlawful condition—whether it is imposed before or after permit approval—does not matter. *Lambert v. City & County of San Francisco*, 529 U.S. 1045, 1048 (2000) (Scalia, J., dissenting from denial of cert.). And they have made clear that the relevance of such a distinction raises an important question of federal law "that will doubtless be presented in many cases." *Id*. at 1049.

In *Lambert*, a San Francisco hotel owner sought to convert residential rooms into tourist rooms. As a condition of permit approval, the city demanded that the owner pay $600,000 in mitigation for the lost residential units. The owner refused, and the city denied the permit application. The owner sued the city, challenging the constitutionality of the mitigation requirement under *Nollan* and *Dolan*. The trial and appellate courts ruled against the owner, on the same grounds that the Florida Supreme Court did in this case: Even though there was evidence that the city's permit denial was motivated by the owner's refusal to submit to its $600,000 demand, the courts concluded that, technically, no exaction had been imposed, since the permit had been denied. *Id*. at 1045-46.

This Court denied the property owner's writ of certiorari petition, which generated a three-Justice dissent. Joined by Justices Kennedy and Thomas,

Justice Scalia rejected the distinction between permit denials and approvals, as a basis for applying *Nollan* and *Dolan*. Justice Scalia explained:

> The court's refusal to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of 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 a condition subsequent should make a difference.

Id. at 1047-48 (emphasis added); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 551 (1995) (The nexus and proportionality tests were intended to curtail the "common municipal practice of using the development exaction process as a means to capture already targeted tracts of land without paying just compensation[.]").

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 Justices observed,

> [w]hen 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.

529 U.S. at 1047-48.

Neither *Nollan* nor *Dolan* supports the distinction that the Florida Supreme Court made between conditions precedent and conditions subsequent. The question in *Nollan* and *Dolan* was whether the government could lawfully demand property as a condition of development; it was not whether the government's actual taking of property was unlawful. *Nollan*, 483 U.S. at 827; *Dolan*, 512 U.S. at 377. Both cases involved agency decisions that conditioned the issuance of a permit upon the dedication of a property interest to a public use. Neither landowner was required to actually dedicate the demanded property as a prerequisite to asserting a takings claim. *Nollan*, 483 U.S. at 828-30; *Dolan*, 512 U.S. at 382-83. And in both cases, this Court held that the constitutional violation occurred at the moment an unlawful demand was made. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 390. Similarly, Koontz's constitutional claim should not hinge on whether the District actually acquired his labor or money, but on whether the District's demands interfered with his right to make productive use of his property for its intended purpose as commercial land.

Finally, the Florida Supreme Court's distinction between conditions precedent and conditions subsequent ignore the theoretical foundations of

Nollan and *Dolan*. Both are "a special application of the 'doctrine of unconstitutional conditions,'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005), which holds that the government may not withhold a discretionary benefit on the condition that the beneficiary surrender a constitutional right. *See*, *e.g.*, *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 by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida statute unconstitutional as an abridgment of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print). In the context of a land-use exaction, the "government may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property." *Lingle*, 544 U.S. at 547 (citing *Dolan*, 512 U.S. at 391).

A violation of the unconstitutional conditions doctrine occurs the moment the government demands that a person surrender a constitutional right in exchange for a discretionary government benefit. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421-22 (1989) (The unconstitutional conditions doctrine is violated "when the government offers a benefit on the condition that the recipient perform or forgo an activity that a preferred constitutional right normally protects from government interference."). Thus, it has never mattered to this Court whether the government

ultimately grants or denies the conditioned benefit. *See*, *e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972) (refusal to renew professor's employment contract in retaliation for professor's critical testimony regarding the university's board of regents violated unconstitutional conditions doctrine); *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. Railroad Comm'n*, 271 U.S. 583, 590, 593-94 (1926) (decision prohibiting use of public highways unless private carrier assumes the duties and burdens of common carrier violated unconstitutional conditions doctrine). Indeed, when formulating the rough proportionality test, this Court relied on a decision that applied an early version of the nexus and proportionality standards to invalidate a permit denial. *See Dolan*, 512 U.S. at 390 n.7 (citing *McKain v. Toledo City Plan Commission*, 270 N.E.2d 370, 374 (Ohio 1971) (Denial of a permit based on failure to dedicate property that was not sufficiently related to the proposed development amounts to a confiscation of private property)).

It should not make any difference, therefore, whether the District approved or denied Koontz's permit. The fact remains that the District violated the Constitution the moment it conditioned permit approval upon the dedication of Koontz's money and labor to a public project that was determined to be wholly unrelated to the impacts of his proposal. The District should not be allowed to dodge liability where,

for over eleven years, it decided to withhold all permit approvals necessary for Koontz to use his property because he refused to accede to the District's unlawful exaction. This Court should grant Koontz's petition to decide this important question.

II

THERE IS A CONFLICT AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO EXACTIONS OF MONEY OR OTHER PERSONAL PROPERTY

The Florida court held that the nexus and proportionality standards of *Nollan* and *Dolan* can never be applied to dedications of money or other personal property. Pet. App. A-19 - A-21. This issue has been the subject of a significant, nationwide split of authority that has been widening among the state courts of last resort and federal circuit courts of appeals for almost two decades.[4] Pet. App. A-17 - A-18. Most courts find *Nollan* and *Dolan* applicable to all forms of property dedications, including money.[5] A

---

[4] This split of authority arose almost immediately after this Court issued its decision in *Dolan* and has continued to grow since then. *See Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Dolan* applied to rent stabilization ordinance); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994) (holding that *Dolan* cannot be applied to a monetary exaction).

[5] *See*, *e.g.*, *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-40, 641-42 (Tex. 2004); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d

(continued...)

significant minority, however, hold that the nexus and proportionality tests apply only to dedications of real property.[6] This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's clarification.

---

[5] (...continued)
821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004)*; Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 697-98 (Colo. 2001); *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 353-56 (Ohio 2000); *Benchmark Land Co. v. City of Battleground*, 972 P.2d 944, 950-51 (Wash. Ct. App. 2000) *aff'd*, 49 P.3d 860 (Wash. 2002) (affirmed on non-constitutional grounds); *Dowerk v. Charter Township of Oxford*, 592 N.W.2d 724, 728 (Mich. Ct. App. 1998); *Curtis v. Town of South Thomaston*, 708 A.2d 547, 660 (Me. 1998); *National Association of Home Builders of the United States v. Chesterfield County*, 907 F. Supp. 166, 167 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996) (unpublished), *cert. denied*, 519 U.S. 1056 (1997); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Trimen Development Co. v. King County*, 877 P.2d 187, 191 (Wash. 1994).

[6] *See e.g.*, *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir.), *cert. denied*, 132 S. Ct. 578 (2011); *West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 695-97 (Colo. 2001); *Sea Cabins on the Ocean IV Homeowners Ass'n v. City of N. Myrtle Beach*, 548 S.E.2d 595, 603 n.5 (S.C. 2001); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1579 (10th Cir. 1995); *McCarthy v. City of Leawood*, 894 P.2d 836, 845 (Kan. 1995); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712 (Md. 1994).

A. The Florida Court's Rule Conflicts with the Fifth Amendment and the Purpose of *Nollan* and *Dolan*

The choice of some lower courts to carve out certain land-use exactions from constitutional scrutiny, based solely on the type of private property demanded, ignores the plain language of the Takings Clause and this Court's precedents. The Fifth Amendment protects all private property, including money and personal property, from uncompensated takings. U.S. Const. amend. V; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980) (money); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (tangible and intangible goods); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) ("[T]he exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, or private property for public use without compensation."). The central question in any *Nollan* and *Dolan* challenge is whether, if the property demand were imposed directly, the government would have to pay just compensation. *Lingle*, 544 U.S. at 547. If so, the demand, whether for real or personal property, falls within the purview of *Nollan* and *Dolan*. *Id*. This question does not turn on the type of property being exacted, but on the impact that the exaction has on Koontz's rights in his private property and the question of who should bear the cost of the District's public improvement projects. *Id*. at 542-43.

As stated above, this Court's application of the unconstitutional conditions doctrine in *Nollan* and *Dolan* was intended to protect against the compelled

waiver of the right to compensation, which occurs whenever the government demands an excessive or unrelated dedication of property in exchange for a permit approval. *Id*. at 547. A rule that the right to just compensation will be safeguarded only when the government targets real property finds no support in this Court's unconstitutional conditions precedents. *See Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways); *Baltic Min. Co. v. Mass.*, 231 U.S. 68, 83 (1913) ("[A] state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without the due process of law[.]"). Nor is the Florida court's rule supported by *Dolan*, which relied on cases that invalidated land-use exactions requiring the applicant to pay for unrelated, off-site public improvement projects when developing the proportionality test. *Dolan*, 512 U.S. 389-90 at n.7 (citing *J.E.D. Assocs. v. Atkinson*, 432 A.2d 12, 15 (N.H. 1981); *Divan Builders v. Planning Bd. of the Township of Wayne*, 334 A.2d 30, 40 (N.J. 1975)).

The fact that *Nollan* and *Dolan* both involved dedications of real property, which if imposed directly would have effected a physical taking, does not dictate the conclusion that any other type of property dedication must be categorically excluded from scrutiny under the nexus and proportionality tests. *Lingle*, 544 U.S. at 547 (explaining that the nexus and proportionality tests were applied to the exactions in *Nollan* and *Dolan* because they involved "dedications of property so onerous that, outside the exactions context, they would be deemed per se physical

takings"). Just like real property, one's money or other personal property can be subject to a physical taking. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32, 234 (2003) (likening a government act compelling the transfer of private funds to a public use to a physical taking); *see also Pioneer Trust & Sav. Bank v. Mt. Prospect*, 176 N.E 799, 801-02 (Ill. 1961) (invalidating a permit condition requiring the developer to dedicate property for recreational and educational facilities because the dedication was the functional equivalent of forcing the landowner to pay for public improvements), (*cited by Dolan*, 512 U.S. 389-90 at n.7). Accordingly, this Court has never limited the nexus and proportionality tests to dedications of real property; instead, it has consistently explained that *Nollan* and *Dolan* apply to a "dedication of property," "dedication of private property," or "excessive exactions." *See Lingle*, 544 U.S. at 547; *Del Monte Dunes*, 526 U.S. at 702-03; *Dolan*, 512 U.S. at 390. Many lower courts, nonetheless, continue to hold to the contrary.

Moreover, the Florida court's conclusion that *Nollan* and *Dolan* apply only to compelled dedications of real property 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 (1993), *vacated and remanded*, 512 U.S. 1231 (1994). In *Ehrlich*, the owner of a private tennis club and recreational facility applied to the City of 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 *Nollan*-based regulatory takings challenge, holding that monetary exactions are not subject to heightened scrutiny under the nexus test. *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 land-use exactions that require a property owner to dedicate land or pay fees. 911 P.2d 429, 444 (Cal. 1996) ("[I]t matters little whether the local land use permit authority demands the actual conveyance of the 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.").

Since *Ehrlich*, however, this Court has denied every petition for a writ of certiorari asking whether *Nollan* and *Dolan* apply to non-real property exactions. These petitions included cases where the lower court applied *Nollan* and *Dollan* to a monetary exaction and in cases where the lower court refused to subject such exactions to the nexus and proportionality tests. *See*, *e.g.*, *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003), *cert. denied*, 541 U.S. 974 (2004) (*Dolan*'s rough proportionality test applies to an exaction of park fees); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 129 S. Ct.

2765 (2009) (holding that *Nollan* and *Dolan* are limited to dedications of real property). Faced with an irreconcilable conflict on a question of federal takings law, lower courts, like the Florida court below, have repeatedly indicated that, due to a lack of guidance from this Court, they are simply having to choose sides in a deepening split of authority. Pet. App. A-19; Pet. App. B at 10-12, 21-22, 24-27; *see also West Linn Corporate Park, LLC v. City of West Linn*, 240 P.3d 29, 45 (Or. 2010), *cert. denied*, 132 S. Ct. 181 (2011) (explaining that, without guidance from the U.S. Supreme Court, it would strictly limit *Nollan* and *Dolan* to their facts). This is a wholly inappropriate basis upon which to deny a person's right to seek compensation for a violation of his or her rights under the Takings Clause and warrants certiorari.

B. *Del Monte Dunes* Did Not Limit *Nollan* and *Dolan*

Confusion about whether *Nollan* and *Dolan* apply to exactions of personal property is driven primarily by this Court's discussion of the nexus and proportionality tests in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999); Pet. App. A-18 - A-19. In *Del Monte Dunes*, a property owner submitted a series of applications for a permit to build a multi-family residential complex on a coastal property zoned for such use. 526 U.S. at 695-98. The city delayed and denied every permit application for a variety of reasons (*id.*), and the landowner sued alleging two different regulatory takings theories: (1) that the reasons the city provided for its denials lacked a sufficient nexus to the government's stated objectives under *Nollan*; and (2) that the permit denial deprived the property owner of all economically viable

use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).[7] *Del Monte Dunes*, 526 U.S. at 700-01.

The jury delivered a general verdict that the government's actions effected a temporary regulatory taking and awarded compensation. *Id*. The Ninth Circuit Court of Appeals upheld the verdict, concluding that there was sufficient evidence in the record to support the jury's verdict on either regulatory takings theory. *Id*. at 701-02 (citing *Del Monte Dunes*, 95 F.3d at 1430-34). In doing so, however, the Ninth Circuit posited that the evidence could have also established a violation of *Dolan*'s rough proportionality test. This Court granted certiorari, in part, to determine whether the Ninth Circuit "erred in assuming that the rough-proportionality standard of [*Dolan*] applied to this case." *Id*. at 702.

This Court briefly discussed the rough proportionality test, noting that, although all regulatory takings claims include consideration of whether the burden being placed on a landowner is proportional, *Dolan*'s "rough proportionality" test was specifically developed to address excessive land-use exactions and was not readily applicable to cases where the landowner challenges the application of a general land use regulation to deny a permit application. *Id*. at 703 (*Dolan* "was not designed to address, and is not readily applicable to . . . [a situation where] the landowner's challenge is based not on

---

[7] While Del Monte Dune's lawsuit was pending, the city purchased the property. 526 U.S. at 700. Accordingly, the property owner's claims were considered as alleging a temporary taking. *Id*. at 704; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 95 F.3d 1422, 1425-26 (9th Cir. 1996).

excessive exactions but on denial of development."); *see also id*. at 733 (Souter, J., concurring in part and dissenting in part) (agreeing with lead opinion "in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally"). Ultimately, however, this Court held that it was unnecessary to address whether the Ninth Circuit erred when it considered *Dolan* because there was substantial evidence on the record demonstrating that the city's decision to deny the permit lacked a sufficient nexus to the government's stated objectives:[8]

> Del Monte provided evidence sufficient to rebut each of [the City's] reasons [for denying the final proposal]. Taken together, Del Monte argued that the City's reasons for denying their application were invalid and that it unfairly intended to forestall any reasonable development of the [property]. In light of evidence proffered by Del Monte, the City has incorrectly argued that no rational juror could conclude that the City's denial of Del Monte Dune's application lacked a sufficient nexus with its stated objective.

---

[8] The decision speaks to both *Nollan*'s nexus requirement and the requirement that the decision substantially advance a legitimate government interest. *Del Monte Dunes*, 526 U.S. at 701, 704. In *Lingle*, this Court excised the "substantially advances" requirement from the nexus and proportionality tests. *Lingle*, 544 U.S. at 545-48 (The question whether a regulation substantially advances a legitimate government interest is properly part of a due process analysis; it "has no proper place in our takings jurisprudence."). The "substantially advance a legitimate government" inquiry is now properly considered as part of a due process analysis. *Lingle*, 544 U.S. at 545-48.

Id. at 703 (quoting *Del Monte Dunes*, 95 F.3d at 1431-32).

Just like *Del Monte Dunes*, the trial court in this case concluded that the District's proffered reason for denying Koontz's permit applications—his refusal to accede to the off-site improvement condition—lacked the required nexus linking the project impacts to the government's stated objectives:

> St. Johns Water Management District did not prove the necessary relationship between the condition of off-site mitigation and the effect of development. There was neither a showing of nexus between the required off-site mitigation and the requested development of the tract, nor was there a showing of rough proportionality to the impact of site development. . . . St. Johns District's required conditions of unspecified but substantial off-site mitigation resulted in a regulatory taking. It is the opinion of this Court that the denial of the Koontz permit application by the St. Johns Water Management District was invalid[.]

Pet. App. D-11. Koontz clearly stated a cognizable claim for a regulatory taking under this Court's precedents and the Takings Clause of the U.S. Constitution. *Lingle*, 544 U.S. at 548 ("[A] plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed . . . by alleging . . . a land-use exaction violating the standards set forth in *Nollan* and *Dolan*."); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (Temporary takings "are not different in kind from permanent takings, for

which the Constitution clearly requires compensation. The only difference is that a temporary taking puts private property to public use for a limited period of time.").

The Florida court, however, focused narrowly on the one sentence from *Del Monte Dunes* where this Court explained that it had not applied the proportionality test outside the context of land-use exactions, to hold that *Del Monte Dunes* had "specifically limited the scope of *Nollan* and *Dolan* to those exactions that involve[] the dedication of real property for a public use." Pet. App. A-19; *see also McClung*, 548 F.3d at 1227 (citing *Del Monte Dunes* as having limited *Nollan* and *Dolan*); *Sea Cabins*, 548 S.E.2d at 603 n.5 (same). By overlooking the actual holding of *Del Monte Dunes*, the Florida court reached an opposite conclusion on facts similar to those in *Del Monte Dunes*. The decision below creates more confusion on a constitutional test that is already the subject of a deeply entrenched split of authority and warrants certiorari.

C. Resolving the Split of Authority Is Necessary and Warranted in This Case

This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan* and *Dolan* because it presents the issue as a pure question of law. There is no question that, if *Nollan* and *Dolan* apply to the District's off-site improvement demand, a taking occurred. The petition, therefore, squarely asks whether *Nollan* and *Dolan* apply to development conditions that compel a landowner to dedicate his or her personal property to

the public. This question arises frequently, particularly in regard to conditions compelling an applicant to make off-site public improvements, and is the subject of a nationwide split of authority. *See*, *e.g.*, *Toll Bros., Inc. v. Board of Chosen Freeholders of Burlington*, 944 A.2d 1, 4 (N.J. 2008) (The government "may only impose off-tract improvements on a developer if they are necessitated by the development."); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 635, 639-42 (Tex. 2004) ("For purposes of determining whether an exaction as a condition of governmental approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved."); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir. 2011) (nexus and proportionality tests do not apply to an exaction requiring landowner to dedicate money to off-site public improvements). And several lower courts, including the Florida court below, have indicated that they will not reconsider their positions on this question unless and until this Court clarifies that the nexus and proportionality tests protect all private property. Pet. App. A-19; *West Linn*, 240 P.3d at 45.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: June, 2011.

Respectfully submitted,

Brian T. Hodges
Pacific Legal Foundation
10940 NE 33rd Place,
Suite 210
Bellevue, WA 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail:
bth@pacificlegal.org

PAUL J. BEARD II
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org

MICHAEL D. JONES
P.O. Box 196130
Winter Springs, FL 32719
Telephone: (407) 359-9908

CHRISTOPHER V. CARLYLE
The Carlyle Appellate
Law Firm
1950 Laurel Manor Drive,
Suite 130
The Villages, FL 32162
Telephone: (352) 259-8852

Counsel for Petitioner