No. 11-1447

In The Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, CONNECTICUT, HAWAII, ILLINOIS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, TENNESSEE, UTAH, VERMONT, WASHINGTON, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE AMICI STATES

In many varying permit contexts, states and their local subdivisions frequently use impact or mitigation fees to protect public health and safety and natural resources, as well as to fund basic infrastructure and services. Petitioner's proposed expansion of the Takings Clause to cover such monetary payments "would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts." *E. Enters. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). The risk of such litigation will place those governments in the uncomfortable position of having to choose between denying otherwise beneficial projects and permitting development to proceed without mitigating its impacts. This would seriously hamper the States' ability to protect the public health and welfare.

Moreover, the impact of subjecting monetary obligations to review under the takings doctrine could go far beyond impact and mitigation fees. That extension would be a significant step towards Takings Clause review of core state activities such as taxation and administration of workers' compensation and unemployment insurance programs.

The States represented here therefore respectfully request this Court reject petitioner's proposed new rule and instead reaffirm that the Takings

Clause does not apply to monetary payments such as impact and mitigation fees.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should decline petitioner's invitation, through the second question presented, to extend the exactions analysis of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) to a government requirement for monetary payment as a condition for a land use permit. The logic underlying this Court's Takings Clause jurisprudence precludes the application of *Nollan* and *Dolan* to such payments. Instead, the courts should continue to review monetary payment requirements under the Due Process Clause.

In *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528 (2005), this Court provided much needed clarity by disentangling the Takings Clause from the Due Process Clause. *Id.* at 542. Petitioner, however, seeks to reinsert due process concepts into takings law. He does so by equating requirements that individuals convey real property to the public with requirements that individuals make monetary payments. Government's forced acquisition of real or personal property, however, is a per se taking, while requirements that individuals make monetary payments are not. Rather, challenges to monetary payment requirements sound in due process. *E. Enters.,* 524 U.S. at 540 (Kennedy,

J., concurring in judgment and dissenting in opinion); *id.* at 554 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting).

Lingle held that the Court's prior statements to the effect that government imposes a taking where its regulation "does not substantially advance legitimate state interests" were wrong. That formula "prescribes an inquiry in the nature of a due process, not a takings, test." 544 U.S. at 537. The Court clarified, however, that its decision did not undermine its holdings in *Nollan*, 483 U.S. 825, and *Dolan,* 512 U.S. 374. *Lingle* explained that in *Nollan*, the Court held that government could demand an easement as a condition for granting a development permit "provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit," and *Dolan* further provided that the demand must be "roughly proportional" to the development's impact. *Lingle*, 544 U.S. at 546-547. *Lingle* stressed, however, that *even though* those cases referred to the "substantially advance" test in their analyses, they are actually a "special application" of the unconstitutional conditions doctrine. *Id.* at 548 (internal citation and quotation marks omitted).

As petitioner acknowledges, this special application is triggered when government seeks to "take property" in a manner that would normally violate the Takings Clause. Pet. Br. 21. It was triggered in *Nollan* and *Dolan* because, in each case, the government sought an easement or fee interest in real

property, which is normally a "per se" taking. *Lingle*, 544 U.S. at 546. That real property appropriation is nevertheless allowed under *Nollan* and *Dolan* if the permit condition is sufficiently related to the proposed development. In sharp contrast, five justices in *Eastern Enterprises* determined that the Takings Clause does not encompass monetary payment requirements. Because monetary payments are not takings, they cannot trigger *Nollan*/*Dolan* review.

Moreover, even if the Takings Clause did apply to monetary payment requirements, those requirements must be analyzed under this Court's three-factor test established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and that test cannot logically be applied alongside *Nollan* and *Dolan*. Even the four *Eastern Enterprises* justices who expressed the minority view that monetary payments could be reviewed under the Takings Clause concluded that the payments could not be "per se" takings but should instead be reviewed under this Court's three-factor analysis. *E. Enters.*, 524 U.S. at 518. That analysis requires courts to review the regulatory measure's economic impact on the "parcel as a whole," not just a discrete portion of the property. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002). But *Nollan* and *Dolan* are incompatible with the parcel-as-a-whole requirement. The whole parcel is the property that can be developed along with the challenged condition. If the impact on that package amounts to a taking, it violates the Takings Clause even if the nexus and

proportionality required by *Nollan* and *Dolan* exists. If the impact on that package is not a taking, then government has not violated the Takings Clause and *Nollan* and *Dolan* are not applicable.

In addition to doctrinal integrity, policy reasons counsel against extending the Takings Clause to monetary payments. The extension would federalize land use disputes, converting the federal courts into land use boards of appeals. It could also lead to unintended consequences, such as Takings Clause review of redistributive governmental programs, including progressive taxes, Social Security, and Medicare.

In contrast, the Due Process Clause provides a doctrinally sound and measured means for addressing governmental overreaching. It can be used to review abusive conditions without the contortions needed to fit monetary payments into Takings Clause jurisprudence. Moreover, due process' more deferential review acknowledges the many private property protections that states already provide. It also promotes the policy of resolving land use disputes at the state and local levels. As Justice Alito explained, when reviewing an impact fee case while sitting on the Third Circuit, "[l]and use decisions are matters of local concern" and a federal court should not be a "zoning board of appeals." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 402 (3d Cir. 2003).

ARGUMENT

I. UNLIKE REAL PROPERTY EXACTIONS, MONETARY PAYMENT REQUIREMENTS DO NOT RAISE TAKINGS ISSUES, AND THEREFORE DO NOT TRIGGER *NOLLAN*/*DOLAN* REVIEW

Monetary payment obligations are not covered by the Takings Clause. As a result, they cannot come within *Nollan* and *Dolan*'s special application of the unconstitutional conditions doctrine.

In *Lingle,* this Court explained that *Nollan* and *Dolan* are based upon the unconstitutional conditions doctrine. *Lingle*, 544 U.S. at 542. That doctrine has two central components. First, and of critical importance to this Court's analysis, in exchange for receiving a benefit from the government, a person must be required to relinquish a constitutional right. *Id.* at 547. In the takings context, that right is the entitlement to compensation for a taking. *Ibid*. Second, the relinquishment is nevertheless constitutional unless it has little or no connection to the government benefit. *Ibid.*; see also Pet. Br. 21-22.

Lingle thus explained that in both *Nollan* and *Dolan*, this Court's unconstitutional conditions analysis "began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Lingle*, 544 U.S. at 546. In contrast, as five justices made clear in *Eastern Enterprises,* 524 U.S. 498, governmental requirements that parties pay money do not trigger takings concerns. Thus, the first necessary step for an

unconstitutional condition in a takings case does not exist with monetary payments.

In *Eastern Enterprises*, this Court reviewed whether a federal statute that imposed retroactive liability on a coal company to fund lifetime benefits for retirees was a taking or violated due process. Although five justices found a constitutional violation (four found a taking, one a due process violation), a "second majority" consisting of Justice Kennedy together with the four dissenters concluded that the Takings Clause did not apply to obligations to pay money. Justice Kennedy reasoned that the challenged act did not involve property protected by the Takings Clause because it did not appropriate land, intellectual property, "or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits." 524 U.S. at 540 (Kennedy, J., concurring in judgment and dissenting in opinion). Although the law imposed "a staggering financial burden on the petitioner," it did not take property. *Ibid.*

The four *Eastern Enterprises* dissenters likewise concluded that the Takings Clause did not apply to "an ordinary liability to pay money." *Id.* at 554 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting). Based in significant part on this *Eastern Enterprises* "second majority," the United States Court of Appeals for the Federal Circuit, sitting en banc in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), summarized the law as follows: "In short, while a taking may

occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id.* at 1340.

Thus, while permit conditions requiring owners to dedicate a fee interest in property or an easement can be per se takings, and therefore can trigger *Nollan/Dolan* review, this Court has not previously deemed obligations to pay money to be takings. In this case, the Court should adhere to the "second majority" in *Eastern Enterprises* and find that such payments are not takings and thus, such obligations do not trigger *Nollan/Dolan* review.[1]

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[1] Prior to *Lingle*, lower courts were divided as to whether *Nollan/Dolan* review applied to permits conditioned upon the payment of fees. See *Rogers Mach., Inc. v. Wash. Cnty.,* 45 P.3d 966, 976-978 (Or. Ct. App. 2002*)* (collecting cases). The courts that extended *Nollan/Dolan* review to fees apparently based the extension upon the substantially advances test. See, *e.g.*, *Ehrlich v. City of Culver City,* 911 P.2d 429, 457-458 (Cal. 1996) (Mosk, J., concurring). As *Lingle* clarified, however, *Nollan/Dolan* review rests on the unconstitutional conditions doctrine, as opposed to the substantially advances test. See *W. Linn Corporate Park, L.L.C. v. City of W. Linn*, 240 P.3d 29, 44 (Or. 2010) (rejecting extension of *Nollan/Dolan* on that basis). Since *Lingle*, courts have declined to extend *Nollan/Dolan* review. See, *e.g., ibid.*; *Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011) (*Nollan/Dolan* review limited to conditions that amount to "physical per se takings"); *Iowa Assur. Corp. v. City of Indianola*, 650 F.3d 1094, 1099 (8th Cir. 2011) (*Nollan* does not apply to the City's requirement that an owner build a fence to screen his racecars from view; it is limited to conditions that "restrict owners' right to exclude others from their property.").

II. EVEN IF THE TAKINGS CLAUSE COULD BE APPLIED TO MONETARY PAYMENTS, THAT APPLICATION WOULD BE INCOMPATIBLE WITH *NOLLAN/DOLAN* REVIEW

Even if the Court adopted the minority view of the four *Eastern Enterprises* justices that the Takings Clause applies to government-imposed monetary liabilities, those liabilities still should not be reviewed under *Nollan* and *Dolan*. Under the minority view, monetary obligations do not create "per se" physical takings. Rather, they need to be evaluated under *Penn Central*, 438 U.S. 104. However, *Penn Central* and *Nollan/Dolan* are incongruent; they cannot logically be applied in the same case. The government's permit, including the fee condition, either does or does not amount to a taking under *Penn Central*. If it is a taking, *Nollan/Dolan* cannot undo that taking. Conversely, if it is not a taking, there is no predicate for applying *Nollan/Dolan*. Either way, there is no role for *Nollan/Dolan* review.

A. Monetary Payments are Not Per Se Physical Takings

The Court has never held that generalized monetary obligations could be per se physical takings. At most, a minority of the Court has indicated that monetary payments could be analyzed under the Takings Clause as *Penn Central* claims.

In *Brown v. Legal Foundation of Washington,* 538 U.S. 216 (2003), this Court strongly suggested that where a *discrete* fund is involved, a governmental

appropriation of money from that fund can be deemed a per se physical taking. *Id.* at 235. Cases involving generalized obligations to pay money, in contrast, do not meet the requirements for per se takings. The foundation for this principle was laid in *United States v. Sperry Corp.*, 493 U.S. 52 (1989). *Sperry* denied a regulatory takings challenge to a percentage fee the United States deducted from certain monetary awards, where the deduction was designed to offset the government's administrative costs. Citing *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982), the private claimant had argued that "the deduction was akin to a 'permanent physical occupation' of its property and therefore was a per se taking requiring just compensation, regardless of the extent of the occupation or its economic impact." *Sperry*, 493 U.S. at 62 n.9. (The claimant did not argue, and the Court therefore did not address, whether the payments could be considered "property" and therefore reviewed under *Penn Central*.)

This Court in *Sperry* unanimously rejected the *Loretto* assertion, stating that "it is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." 493 U.S. at 62 n.9. The Court went on to explain that "if the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto*." *Ibid.*

Moreover, while a majority of justices in *Eastern Enterprises* determined that the Takings Clause does not apply to monetary payments, even the four justices who concluded that it does apply expressly stated that payments are not per se takings. In their words:

> It is clear that the Act requires Eastern to turn over a dollar amount established by the Commissioner under a timetable set by the Act, with the threat of severe penalty if Eastern fails to comply. . . . That liability is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a per se taking.

E. Enters., 524 U.S. at 529-530. The plurality therefore analyzed the claim "by applying the three factors that traditionally have informed our regulatory takings analysis." *Id.* at 529. Those factors are (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action" ("a physical invasion" as opposed to "adjusting the benefits and burdens of economic life"). *Penn Central,* 438 U.S. at 124.

Thus, at a minimum, all the justices in *Eastern Enterprises* agreed that, where no specific fund of money is involved, governmental requirements that people pay money are not per se takings (the four justice plurality and the five justices who concluded that the Takings Clause never applies). At most,

monetary payment requirements might be takings under a *Penn Central* analysis, which focuses on a regulation's economic impact. But that analysis is incompatible with *Nollan* and *Dolan*.

B. *Nollan* and *Dolan* Cannot Logically be Applied to *Penn Central* Claims

Even if generalized obligations to pay money could be reviewed under the Takings Clause, applying *Nollan* and *Dolan* to a permit condition requiring a monetary payment or expenditure does not make any sense. In contrast to conditions requiring physical dedications of property, those calling for monetary payments would need to be analyzed under the parcel-as-a-whole rule. Unlike *Nollan* and *Dolan* where the taking at issue was the *permit condition*, under the parcel-as-a-whole rule the question is whether the economic burden of government requirements amounts to a taking of the *entire parcel*. If that economic burden results in a taking of the parcel, there is a taking regardless of the application of *Nollan*/*Dolan* to the permit condition. On the other hand, if the permit condition does not take the parcel as a whole, there is no taking and *Nollan*/*Dolan* review does not apply.

For permanent physical occupations – such as the real property dedications mandated in *Nollan* and *Dolan* – even a very limited acquisition is a taking. Thus, as this Court explained in *Tahoe-Sierra*, "when the government appropriates part of a rooftop

in order to provide cable TV access for apartment tenants . . . it is required to pay for that share no matter how small." 535 U.S. at 323. The Court does not look at whether the imposition is on the whole parcel. Imposition on only a limited portion is sufficient. According to *Tahoe-Sierra*, "when the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Id.* at 322.

The rule concerning economic takings, however, is very different. As *Tahoe-Sierra* pointed out, *Penn Central* itself made it clear that these claims "must focus on the 'parcel as a whole.'" *Tahoe-Sierra*, 535 U.S. at 327. Based upon the parcel rule, *Tahoe-Sierra* held that a regional planning agency's temporary moratorium on development did not impose a categorical economic taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), because the properties in question retained value as a result of their potential for use in the future. *Tahoe-Sierra*, 535 U.S. at 332. The Court explained that the parcel rule not only has a "geographic" ("metes and bounds") dimension but also a "temporal" dimension (period of time covered by the ownership interest in property). *Id.* at 331-332. Courts must look to the entirety of those interests in evaluating the economic impact of a challenged regulation. *Id.* at 332.

The parcel-as-a-whole rule makes application of *Nollan*/*Dolan* to monetary exactions illogical because

under that rule a monetary payment imposed as a condition of receipt of a permit for development results in a taking only if the economic burden is so great that the entire parcel is effectively taken. Where, for example, government issues a permit for a landowner to build a store, and conditions the permit on the owner's payment of a traffic mitigation fee, a court needs to look at whether government action's impact made the property valueless (for a *Lucas* taking), or amounted to a *Penn Central* taking.[2]

If a court concludes that there is a taking after reviewing the impact of the permit on that package, that ends the analysis. A taking of the *entire parcel* exists that cannot be undone by applying a *Nollan*/*Dolan* evaluation of the *permit condition*. Even if there is a "nexus" and "rough proportionality" between the fee and the underlying project's impacts, the governmental action has taken the property. Conversely, if a government restriction does not impose a taking on the parcel as a whole, then the property owner has failed to meet the predicate for applying a *Nollan*/*Dolan* unconstitutional conditions analysis: the imposition of a condition that, absent an adequate connection to the underlying project's impacts, would

[2] Isolating the payment condition from the parcel would pose a second problem. The economic impact of the payment when considered by itself would be total, amounting to a per se taking under *Lucas*, 505 U.S. 1003. As reviewed earlier (see p. 9, *supra*), however, even the minority of *Eastern Enterprises* justices who viewed monetary payments as potential takings concluded that they are not per se takings. 524 U.S. at 529-530.

constitute a taking. Having failed to show that a condition violated the Constitution by taking property, there is no Takings Clause justification for applying *Nollan*/*Dolan* to review the condition's relationship to the project.

Thus, the *Nollan*/*Dolan* analysis works where a condition imposes a physical taking. But even if monetary payments could be deemed property under the Takings Clause, *Nollan*/*Dolan* review would be illogical.

Respondent's suggestion that petitioner pay for off-site mitigation could not, therefore, have been a taking. Consequently, *Nollan* and *Dolan* are inapplicable. As we discuss below, however, property owners could challenge allegedly abusive permit conditions under the Due Process Clause. But first, the States will demonstrate that in addition to being doctrinally unsound, expanding *Nollan* and *Dolan* to cover monetary impositions would have highly undesirable impacts.

III. EXPANDING *NOLLAN*/*DOLAN* TO COVER MONETARY IMPOSITIONS WOULD FEDERALIZE LOCAL LAND USE DECISIONS AND POTENTIALLY EXPAND THE TAKINGS CLAUSE TO COVER TAXES AND BENEFIT TRANSFER PROGRAMS

A majority of *Eastern Enterprises* justices firmly rejected the notion that requiring a generalized monetary payment can amount to a taking. Reaching any

other conclusion, and thereby expanding *Nollan*/*Dolan*'s reach to encompass impact fees and similar monetary payments, would federalize a plethora of land use decisions. It could also greatly expand takings jurisprudence by unintentionally covering some of our most basic governmental functions, including taxation, Social Security, and Medicare.

A. Applying the Takings Clause to Monetary Payments would Federalize Local Land Use Decisions

Impact fees on developments are used by a large percentage of localities across the nation "to help offset the costs of the infrastructure (water and sewer lines, roads, school and other services) needed to support development." U.S. Gen. Accounting Office, *Local Growth Issues – Federal Opportunities and Challenges* 33 & 102 (2000), *available at* http://www.gao.gov/assets/240/230572.pdf (major survey of cities and counties found that 59 percent of responding cities and 39 percent of responding counties charged impact fees). State and local government agencies often condition approval of development projects on the provision of funds supporting adequate infrastructure and other various public goods and services related to the proposed development, including roads, bridges, and sidewalks; flood control; sewage collection and treatment; solid waste treatment and storage; water treatment and supply; police and fire protection; public transit; schools; libraries; recreational facilities;

parks and open space; affordable housing; public art; and childcare.[3]

Furthermore, to offset harm caused by proposed projects, state and local governments widely condition approvals on mitigation, often in the form of mitigation fees. Such mitigation fees often arise in the context of protecting and preserving natural resources. State and federal environmental laws require

[3] A majority of States have statutes expressly authorizing and limiting the use of impact fees, including Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. Clancy Mullen, *State Impact Fee Enabling Acts* 1, Table 1 (Aug. 21, 2012), *available at* http://www.impactfees.com/publications%20pdf/state_enabling_acts.pdf; see also n.5, *infra,* and accompanying text. The statutes vary in terms of purposes for which impact fees are authorized. For example, Illinois authorizes impact fees for roads in very narrow circumstances, 605 Ill. Comp. Stat. Ann. § 5/5-901, while other states authorize impact fees for particular categories of improvements, *e.g.,* Ariz. Rev. Stat. Ann. § 11-1102 (roads, sewer, parks, flood control), while still others are unrestricted in terms of the purposes for which the fee may be imposed, *e.g.*, Vt. Stat. Ann. tit. 24, § 5204. Local governments throughout the country have adopted ordinances pursuant to these statutes or other authorities vested in them by the States, imposing impact fees relating to affordable housing, public transit, and the various facilities and services listed above. See, *e.g.*, *Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 279-280 (N.J. 1990) (townships employing impact fees to meet affordable housing mandate); S.F., Cal., Planning Code § 411 (fee used to fund public transit); Fayetteville, Ark., Unified Development Code §§ 159.02, 159.03, 159.04 (fees for water, wastewater, police, fire, and public safety).

mitigation for impacts to natural resources including wetlands, endangered species, and water quality. *E.g.*, Cal. Pub. Res. Code §§ 21002.1(a) & 21100(b)(3)[4] (requiring mitigation for environmental impacts); Conn. Gen. Stat. Ann. § 22a-41 (including mitigation as factor for consideration in issuing wetland permits); Mich. Comp. Laws Ann. § 324.30311d (authorizing mitigation as a condition for wetland permits); N.J. Stat. Ann. § 13:9B-13 (same); Cal. Fish & Game Code § 2081 (requiring impacts to endangered and threatened species be fully mitigated as a condition to permits authorizing the take of species); Wis. Stat. Ann. § 29.604 (West, Westlaw through 2011 Legis. Sess. published Apr. 26, 2012) (same).

The types of permits that state and local government agencies issue that might include impact fees or mitigation requirements are extensive, including, for example, permits for development and redevelopment, *e.g.*, N.C. Gen. Stat. Ann. § 113A-118 (coastal development); subdivisions, *e.g.*, Cal. Gov't Code, §§ 66410-66499.38, Or. Rev. Stat. Ann. §§ 92.010-92.179; power plants, *e.g.*, Cal. Pub. Res. Code § 25500; mining, *e.g.*, Me. Rev. Stat. Ann. tit. 38, § 490-PP (West, Westlaw through 2011 2d Reg. Sess. of 125th Leg.) (effective June 1, 2014); lake and streambed alteration, *e.g.*, Cal. Fish & Game Code § 1602, Mich. Comp. Laws Ann. § 324.30102; encroachment on waterways and

[4] All references to state statutes are to the West version from Westlaw, current through the 2012 Legislative Session, unless otherwise indicated.

levees, *e.g.*, Cal. Water Code § 8710, Conn. Gen. Stat. Ann. § 22a-342; incidental take of endangered species, *e.g.*, Cal. Fish & Game Code § 2080, Me. Rev. Stat. Ann. tit. 12, § 12808 (West, Westlaw through 2011 2d Reg. Sess. of 125th Leg.); hazardous waste facilities issued by state agencies under the federal Resource Conservation and Recovery Act, 42 U.S.C. § 6926, *e.g.*, Cal. Health & Safety Code § 25200; N.Y. Envtl. Conserv. §§ 27-0101, 27-0707; dredge and fill permits issued by state agencies authorized under the Clean Water Act § 404, 33 U.S.C. § 1344(g); and National Pollutant Discharge Elimination System (NPDES) permits issued by state water pollution control agencies authorized pursuant to the Clean Water Act § 402, 33 U.S.C. § 1342(b).

This Court would respect the role of states and their subdivisions in governing land uses by not extending the Takings Clause's exaction doctrine to cover these and other monetary payment requirements. Reviewing a similar request to interpret the Constitution in an expansive manner, Justice Alito, while sitting on the Third Circuit, explained that absent a high threshold for establishing a constitutional violation, courts would be "cast in the role of a 'zoning board of appeals.'" *United Artists Theatre Circuit*, 316 F.3d at 402 (citations omitted) (reviewing due process allegation that town fatally delayed approving permit because developer refused to pay impact fee).

Federalizing these local decisions would, among other things, discourage governments from choosing

the very useful middle-ground of allowing development but mitigating its impacts through fees. Instead, to avoid risk, governments would be encouraged to choose one of two extremes: denying development, or approving it without addressing its impacts. Local governments in particular are risk adverse, which "results in their discounting the benefits and placing a premium on the costs of their actions." Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1666 (2006). Takings lawsuits can be particularly intimidating. The former chief lobbyist for the National Association of Home Builders went so far as to characterize a proposal to increase developers' ability to bring takings lawsuits in federal court as "a hammer to the head" of state and local officials. Timothy J. Dowling, *On History, Takings Jurisprudence, and* Palazzolo*: A Reply to James Burling*, 30 B.C. Envtl. Aff. L. Rev. 65, 83 (2002). A small town threatened with a federal takings lawsuit would not only need to assess the cost of losing, but also the cost of winning – such as having to absorb potentially crushing attorneys' fees incurred for its successful defense. (See, *e.g.*, William C. Smith, *The Brawl Over Sprawl,* A.B.A. Journal, Dec. 2000, at 52 (describing how Hudson, Ohio had to spend $250,000 to successfully defeat a takings lawsuit).

Rather than expanding the reach of the Takings Clause, property owners should be encouraged to use existing procedures for challenging improper permit conditions. In the instant case, for example, petitioner

"did not appeal or seek administrative review of the District's action." Resp. Br. in Opp. 16 (citing Pet. App. A-22). Yet the laws in many, if not most, states already protect land owners from improper monetary impositions.[5] State laws also typically provide an

[5] See, *e.g.*, Ariz. Rev. Stat. Ann. § 9-463.05 (Arizona local government fees must provide "beneficial use" to the development and "shall not exceed a proportionate share" of the cost of services); Cal. Gov't Code § 66001 (California local government fees must satisfy a "reasonable relationship" test); Colo. Rev. Stat. Ann. § 29-20-104.5 (Colorado local government fees must be "directly related to proposed development"); Fla. Stat. Ann. § 163.31801 (Florida local government fees must be based upon "localized data"); Ga. Code Ann. § 36-71-4 (Georgia local government impact fees limited to "proportionate share" of improvements); Haw. Rev. Stat. § 46-143 (Hawaii local government fees must be based upon development's "proportionate share" of costs"); Idaho Code Ann. § 67-8207 (similar approach in Idaho); 605 Ill. Comp. Stat. Ann. 5/5-906 (Illinois local government traffic impact fees "must be specifically and uniquely attributable to the traffic demands generated by" the development); Ind. Code Ann. § 36-7-4-1321 (Indiana local government fees must be based upon "proportionate share" of infrastructure costs to serve development); Me. Rev. Stat. tit. 30-A, § 4354 (West, Westlaw through 2011 2d Reg. Sess. of 125th Leg.) (Maine local government fees must meet a "reasonably related" test); Md. Code Ann., art. 25B, § 13D (Maryland home rule county impact fees must be "required to accommodate new construction or development"); Mont. Code Ann. § 7-6-1602 (West, Westlaw through 2011 Laws, Code Comm'r changes, and 2010 ballot measures) (Montana local government impact fees must be "reasonably related to" and "proportionate" to costs to accommodate the development); Nev. Rev. Stat. Ann. § 278B.230 (West, Westlaw through 2011 76th Reg. Sess.) (Nevada local government fees established through strict statutory process and formula); N.H. Rev. Stat. Ann. § 674:21 (New Hampshire local government fees must meet a "reasonably related" test); N.J. Stat. Ann. § 40:55D-42 (New

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opportunity for aggrieved parties to seek judicial review of administrative actions as arbitrary and

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Jersey local governments may charge developers "reasonable and necessary" costs of improvements required by development); N.M. Stat. Ann. § 5-8-7 (New Mexico local government impact fees limited to "proportionate share of the cost of system improvements . . . needed to serve new development); 53 Pa. Cons. Stat. Ann. § 10502-A (Pennsylvania local government impact fees must be for transportation costs "necessitated by and attributable to new development"); R.I. Gen. Laws Ann. § 45-22.4-5 (Rhode Island local impact fees must meet a "reasonably related" test); S.C. Code Ann. § 6-1-940 (South Carolina local government impact fees must be for costs that are "proportionate" and "attributable to" the development); Tex. Loc. Gov't Code Ann. § 395.015 (West, Westlaw through 2011 Reg. Sess. and 1st called Sess. of 82nd Leg.) (Texas local government impact fees cannot exceed a set formula); Utah Code Ann. § 11-36a-304 (Utah local government impact fees must meet "reasonably related" and "proportionate" requirements); Vt. Stat. Ann. tit. 24, § 5203 (Vermont local government impact fees may not exceed "the portion of the capital cost of a capital project which will benefit or is attributable to the development"); Va. Code Ann. § 15.2-2319 (Virginia local government impact fees allowed to pay for "reasonable road improvements that benefit the new development"); Wash. Rev. Code Ann. § 82.02.060 (Washington State local government impact fees must be based upon development's "proportionate share" of costs); W. Va. Code Ann. § 7-20-4 (West Virginia local government impact fees must meet "proportionate share" and "reasonable benefit" requirements); Wis. Stat. Ann. § 66.0617 (West, Westlaw through 2011 Act 286, published Apr. 26, 2012) (Wisconsin local government impact fees must meet "rational relationship" and "proportionate" requirements). Given these restrictions, it is not surprising that most litigation challenging impact fees is based upon state statutory grounds. See W. Andrew Gowder, Jr. & Bryan W. Wenter, *Exactions and Impact Fees 2007: The Limits of Local Authority*, 39 Urb. Law. 645, 656 (2007).

capricious.[6] These laws are part of the "web of local and state institutions" that provide a check on government overreaching. Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions,* 58 Hastings L.J. 729, 770 (2007).

This Court should leave most land use disputes to the States and their courts. The federal judiciary should only review disputes that are allegedly so serious that they violate the Due Process Clause. This is consistent with this Court's unanimous conclusion that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel v. City & Cnty. of S.F.*, 545 U.S. 323, 347 (2005). It also respects the "strong policy considerations [that] favor local resolution of land-use disputes." *Taylor Inv., Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1291 (3d Cir. 1993).

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[6] See, *e.g.*, Ala. Code § 41-22-20; Alaska Stat. Ann. § 44.62.570; Ark. Code Ann. § 25-15-212; Conn. Gen. Stat. Ann. § 4-183; Del. Code Ann. tit. 29, § 10142; Iowa Code Ann. § 17A.19; Kan. Stat. Ann. § 77-621; Ky. Rev. Stat. Ann. § 13B.150; La. Rev. Stat. Ann. § 49:964 (West, Westlaw through 2011 1st Extraordinary & Reg. Sess.); Mass. Gen. Laws Ann. ch. 30A, § 14; Mich. Comp. Laws Ann. § 24.306; Mo. Ann. Stat. § 536.140; Neb. Rev. Stat. § 84-917; N.Y. C.P.L.R. 7801; Okla. Stat. Ann. tit. 75, § 322; S.D. Codified Laws § 1-26-36; Tenn. Code Ann. § 4-5-322; Wyo. Stat. Ann. § 16-3-114.

B. Applying *Nollan/Dolan* to Monetary Payments Could Expand the Takings Clause to Cover Redistributive Programs such as Taxation and Social Security

In addition to federalizing many land use decisions, expanding the Takings Clause to cover monetary payments could lead to Takings Clause review of basic governmental functions. For example, if an obligation to pay money could be deemed a physical per se taking, then government's ability to impose taxes could be challenged on this ground. As Justice Breyer observed in *Eastern Enterprises*, "[i]f the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.,* when it assesses a tax?" 524 U.S. at 556 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting).[7]

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[7] At least one commentator, Professor Richard Epstein, has asserted that progressive income taxes and estate taxes violate the Takings Clause. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 295-305 (1985). Professor Epstein's view has virtually no support. As Professor Edwardo Moises Penalver explained:

> In his book *Takings*, Epstein invited readers to view the conceptual similarity between takings and taxes as a reason to dramatically curtail the state's power to tax. . . . Whatever influence Epstein's theory has had on discussions of takings law generally, few have accepted his invitation to turn their backs on the unqualified power to tax. [Footnote with numerous citations omitted.] . . . The constitutional doctrine

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However, if fungible money – as opposed to a discrete account – were deemed to be "property" under the Takings Clause, it could be argued that taxes physically appropriate that property. As such, they could be challenged as per se takings. This Court has never supported such an extreme view of the Takings Clause.

As far back as 1880, this Court explained that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *Cnty. of Mobile v. Kimball,* 102 U.S. 691, 703 (1880).[8] More recently in *Penn Central*, this Court emphasized that taxes are not takings: "Government may execute laws or programs that adversely affect recognized economic

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> defining the state's power to tax is so entrenched that it is nearly axiomatic.

Edwardo Moises Penalver, *Regulatory Taxings*, 104 Colum. L. Rev. 2182, 2185-2186 (2004).

[8] In a subsequent due process case, the Court's opinion confused matters slightly by stating that the Constitution's grant of taxing power to Congress would not protect an imposition that "was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." *Brushaber v. Union Pac. R.R. Co*., 240 U.S. 1, 24-25 (1916). This passage appears to reflect the Court's conflation, during that era, of due process and takings concepts. See generally William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 Geo. L. J. 813 (1998). This Court emphatically rejected that conflation in *Lingle*, 544 U.S. at 542.

values. Exercises of the taxing power are one obvious example." 438 U.S. at 124. Subsequently, Justice Scalia similarly explained that the Takings Clause's public use requirement does not apply to "taxes and user fees since they are not 'takings.'" *Brown*, 538 U.S. at 242, n.2 (2003) (Scalia, J., dissenting).

Moreover, the unintended consequences of applying the Takings Clause to generalized financial obligations could go far beyond taxes. As takings scholar Professor Steven Eagle warns, such an expansion would be "a considerable step towards judicial receptivity to the argument that the Takings Clause requires courts to enjoin any governmental program that redistributes wealth." Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 Ala. L. Rev. 977, 1001 (2000). In fact, one commentator advocates just that expansion. See Epstein, *Takings: Private Property and the Power of Eminent Domain* at 245-255 and 306-329 (asserting that the Takings Clause covers and makes suspect programs such as workers' compensation, unemployment insurance, food stamps, Social Security and Medicare).

The States respectfully submit that this Court should avoid the doctrinal contortions and unintended consequences involved in expanding the Takings Clause to cover monetary payments. Instead, the Court should affirm that payment requirements "might be so arbitrary or irrational as to violate due process." *Lingle*, 544 U.S. at 548 (Kennedy, J., concurring).

IV. ABUSIVE PERMIT CONDITIONS CAN BE REVIEWED UNDER THE DUE PROCESS CLAUSE

As five justices pointed out in *Eastern Enterprises*, although monetary payment requirements are not subject to the Takings Clause, they can be reviewed under the Due Process Clause. *E. Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in judgment and dissenting in opinion) (concluding that the retroactive payments required in that case should be reviewed under the Due Process Clause); *id.* at 554 (Breyer, J., joined by Justices Stevens, Souter and Ginsburg, dissenting) (agreeing with Justice Kennedy on that point). This makes sense, because "property" for due process purposes is defined more broadly than it is under the Takings Clause. See generally Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 978-982 (2000) (definition of property is broader for substantive and procedural due process than for takings purposes).

The distinction is based, at least in part, on the fact that while the word "property" is used in both clauses, "the word appears in the midst of different phrases with somewhat different objectives, thereby permitting differences in the way in which the term is interpreted." *E. Enters.*, 524 U.S. at 557 (Breyer, J.,

dissenting).[9] The Due Process Clause uses the term "deprived" while the Takings Clause is only invoked if property is "taken." "Deprived" encompasses but is broader than "taken." Thus, due process was historically designed to cover, among other things, general liabilities – most notably monetary deprivations through "fines." Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. at 984. The Takings Clause, in contrast, was designed to address appropriations of discrete assets, which by their nature can be "taken." *Ibid.*[10]

Consistent with this differential treatment of property, monetary payments – including taxes – are not subject to Takings Clause review (see pp. 20–22, *supra*), but they are subject to review under the Due Process Clause. See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990)

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[9] During our Nation's early years, Chief Justice Marshall similarly explained:

> The same words [in the Constitution] have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context.

Cherokee Nation v. Georgia, 30 U.S. 1, 19 (1831) (interpreting the word "foreign").

[10] The Takings Clause also refers to "private" property, while the Due Process Clause does not include that limiting adjective, possibly reflecting the intent to have due process cover a broader range of interests.

(tax exaction is a deprivation of property under the Due Process Clause).[11]

Moreover, using substantive due process principles to review permit conditions requiring monetary payments reflects the different nature of that clause. Its inquiry into whether government action is so arbitrary as to offend due process accommodates judicial analysis of whether a monetary payment condition mitigates a development's impacts, that is, a review of the condition's legitimacy. *Lingle*, 544 U.S. at 542. Takings principles, in contrast, focus on whether the government is taking property without providing just compensation. As Justice Kennedy explained in *Eastern Enterprises*, "[g]iven that the constitutionality of the [monetary imposition] appears to turn on the legitimacy of [the imposition], rather than on the availability of compensation, . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." 524 U.S. at 545 (Kennedy, J. concurring in judgment and dissenting in opinion) (internal citation and quotation marks omitted).

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[11] Persons can also challenge taxes and other monetary payment requirements under the Equal Protection Clause. As this Court explained in *Hillsborough Township v. Cromwell*, 326 U.S. 620, 623 (1946),

> [t]he equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

Thus, while courts should not use the Takings Clause to review land use decisions conditioning approvals on monetary payments, courts can review those conditions under the Due Process Clause.

CONCLUSION

This Court should not extend *Nollan* and *Dolan* beyond adjudicative land use decisions conditioning development approvals on dedications of an interest in real or personal property to public use.

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