No. 11-1447

In The
Supreme Court of the United States

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER

Karen R. Harned
Counsel of Record
Luke A. Wake, *Of Counsel*
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 314-2048
Karen.Harned@nfib.org
Luke.Wake@nfib.org

Counsel for Amicus Curiae ***Dated: November 28, 2012***

THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Can the government 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)?

2. Does 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 AUTHORTIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

RULES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief amicus curiae in support of Petitioner Coy A. Koontz, Jr.

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10

---

[1] Counsels of record have consented to the filing of this brief. Petitioners and Respondents have filed blanket consents to all amicus filings with the Clerk of Court. Amicus has given the parties timely notice of our intention to file in this matter and have provided the parties with an electronic copy of this filing. In accordance with Rule 37.6, NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center has filed in numerous other property rights cases in recent years, including *Arkansas Game & Fish Commission v. United States*, 11-597 (2012), *Stop the Beach Renourishment v. Florida*, 560 U.S. __ (2010), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). We seek to file here because small business owners are concerned that land-use authorities will predictably abuse their permitting powers if this decision should limit application of the nexus and rough proportionality tests established in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Specifically, small business owners are concerned that their property rights will be held hostage to extortionate *quid pro quo* demands unless *Nollan* and *Dolan* are held to apply in this case.

SUMMARY OF ARGUMENT

Coy A. Koontz, Sr. (Mr. Koontz),[2] was denied the right to use his property because he refused to capitulate to the government's *quid pro quo* demand that he surrender personal assets to improve public property. This was a condition that Respondent, St. Johns River Management District (St. Johns),

[2] Coy Koontz, Sr., was Petitioner Coy Koontz, Jr.'s father. Today Mr. Koontz, Jr. represents the estate of Mr. Koontz, Sr.

insisted upon as a term of approving his building permit application for a commercial development. Despite the fact that the Florida courts determined that this condition was wholly unrelated to the mitigation of any adverse impact that his project would have on the public, the Florida Supreme Court held that there was no constitutional problem here.

But, Mr. Koontz was faced with an impossible ultimatum. He was forced to choose between (a) dedicating personal resources to improve public property or (b) foregoing the right to use his property. Neither choice was acceptable because his constitutionally protected rights were on the cutting block on either side of the equation. In the end, St. Johns followed through on its threat to kill Mr. Koontz's permit application because he was unwilling to sacrifice his personal assets.

In withholding approval of Mr. Koontz's permit for his refusal to submit to this condition, St. Johns violated *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *Nollan* and *Dolan* provide that an imposed condition on a permit must bear an "essential nexus" and "rough proportionality" to some adverse public harm. If applied, that standard would hold St. Johns liable for a taking of Mr. Koontz's property because the Florida courts have already determined that the contested condition was unrelated to any impact his project would have on the public.

In defense, St. Johns contends that *Nollan* and *Dolan* do not apply where the government either

(1) denies a permit application or (2) imposes a condition requiring something other than the dedication of real property. But, St. Johns' theory must be rejected because it would allow land use authorities to predictably and systematically circumvent *Nollan* and *Dolan*. Indeed, if *Nollan* and *Dolan* only apply when a permit is approved, land use authorities will simply hold permit applications hostage until landowners give in to extortionate demands upfront. And if *Nollan* and *Dolan* only apply with regard to exactions seeking dedications of real property, the authorities will systematically demand exactions of personal property, or require the waiver of other rights, as the price of permit approval.

Moreover, as a doctrinal matter, *Nollan* and *Dolan* must apply in any case where the government seeks to leverage its position of authority in the permitting process—in an extortionate manner—so as to force a landowner into making inappropriate concessions. And it does not matter whether the government approves the permit subject to an extortionate demand or simply holds the permit hostage by making the demand a precondition of approval; the coercive effect is the same either way.

Here St. Johns sought to leverage its permitting powers so as to force Mr. Koontz into giving the public a benefit. But, this was a benefit that the government had no right to demand. St. Johns could not have directly forced Mr. Koontz to improve public property without either exercising the power of eminent domain—to take his personal assets—or violating the Constitution. And the only

way to justify such a demand under the permitting power would be to demonstrate that such conditions were necessary to mitigate reasonably anticipated harms to the public interest. Accordingly, St. Johns exceeded its permitting powers because it sought to require a condition that was unrelated to any impact Mr. Koontz's project would have on the public. As such, the contested condition must be viewed as an inappropriate *quid pro quo* demand—"an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837.

ARGUMENT

I. Limiting *Nollan* and *Dolan* Would Encourage Systematic Abuse of the State's Permitting Power

a. Regulators Will Predictably Play on the Landowner's Vulnerabilities

For a landowner, the process of acquiring necessary government approvals for a building permit can be almost maddening. What should be a relatively simple process often becomes an expensive, time-intensive and frustratingly slow affair.[3] The landowner must demonstrate that his or her plans are in conformance with layers and layers

[3] In addition to paying for services from a licensed engineer, a permit applicant often needs to pay for costly environmental field studies, as well as advice from special consultants and or legal counsel. In this case, Mr. Koontz would have needed to obtain a wetlands permit from the Army Corp of Engineers—after appeasing the local and state authorities. J.A. 76. And, as of 2002, the average wetlands permit cost applicants more than $270,000. *See Rapanos v. United States*, 547 U.S. 715, 720 (2005).

of regulation at the federal, state and local levels. In this case, Mr. Koontz not only needed approval from St. Johns, but also needed additional approvals from local land-use authorities and the Army Corps of Engineers. J.A. 76.

Moreover, attaining a building permit is not as simple as checking the necessary boxes. This is so because land-use authorities are generally vested with wide discretion to make judgment calls as to whether a proposed project satisfies all zoning requirements. *See*, *e.g.*, *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 995 (2d Cir. 1997). This discretion is a good thing in so far as it promotes rational permitting decisions tailored toward addressing reasonably anticipated impacts. But, broad discretion also enables the authorities to hold permit applications in perpetual limbo as the State engages in a one-sided bargaining process. *See* Richard Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. Ill. U. L. Rev. 479, 483 (1995) (analogizing the government's power of refusal to that of a dockmaster who might abuse his or her bargaining power, if allowed to take advantage of a crew's "abject necessity," by denying a vessel the right to port during a storm, unless the crew is willing to surrender all they own).

The authorities often threaten denial in order to coerce the landowner into repeatedly proposing less ambitious building plans. *See*, *e.g.*, California Coastal Comm'n Public Meeting, Agenda Item Th 13c-h, Presentation of Don Schmitz 3:09:53-3:42:16 (recounting the history of a permit application in which development plans were

"completely redesigned," in good faith and at great expense, multiple times to appease the authorities: "[W]hen I came back and told [my clients] that they would have to spend another $100,000 [for a third redesign], this was not well received.") (June 16, 2011).[4] And regulators do so with the assurance that they will not likely incur takings liability unless they go so far as to make a definitive final decision to impose restrictions denying the owner of all economically beneficial uses of the property.[5] *See Williamson County v. Hamilton County Bank of Johnson City*, 473 U.S. 172, 186 (1985). As a result, the land-use permitting process often degenerates into a seemingly endless procedural merry-go-round. William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After Palazzolo v. Rhode Island*, 46 St. Louis U. L.J. 833, 833-34 (2002).

---

[4] *Available at* http://www.cal-span.org/cgibin/media.pl?folder=CCC (last visited Nov. 9, 2012); *see also* Martha Groves and Tony Barboza, *Coastal Commission Rejects U2 Guitarist's Malibu Development Plan*, Los Angeles Times (June 17, 2011) (noting that the Coastal Commission went on to deny this permit application).

[5] Outside of the land-use permitting context, unless a restriction denies the owner the right to make all economically beneficial uses of his or her property, takings claims are reviewed under the amorphous balancing test established in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 528-29 (2005). But, landowners are not likely to prevail under *Penn Central*, regardless of how severe the restrictions may be. *See e.g.*, *CCA Assoc. v. U.S.*, 667 F.3d 1239, 1248-49 (Fed. Cir. 2011) (no taking where a regulation forced landowner to house families at a loss of 81.25 percent of return on equity).

It is commonplace for the authorities to delay permitting decisions indefinitely as various proposals are considered and modified.[6] During this time the landowner is unable to make any use of his or her property. This can be frustrating for any landowner because one's hopes and dreams are placed on hold during the pendency of a permit application. For Mr. Koontz it must have been all the more frustrating in light of the fact that the area around his property was already largely developed and because the surrounding properties would soon become more developed.[7] Pet. Cert. App. D-4; *see also* J.A. 101-02, 111-19, 137-39 (describing conditions in project area).

With every delay, landowners become more and more exasperated. The sense of urgency is even greater for individuals of modest means, who have tied up much of their personal assets into their property. For a small business owner or a developer, delays are all the more difficult to bear because their livelihood is at stake. A developer or small business cannot afford to stall a project for too long because

---

[6] It is also common for the authorities to force landowners to offer successive proposals by repeatedly denying permit applications. *See*, *e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 613-16 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 698 (1999) ("After five years, five formal decisions, and 19 different site plans, [] Del Monte Dunes decided the city would not permit development of the property under any circumstances.") (internal citations omitted).

[7] Today, his property is surrounded on three of four sides by other commercial developments. J.A. 76. This reality makes it all the more apparent that his permit was not withheld for any legitimate reason, but rather because he refused to "pay-to-play."

there can be no return on a real estate investment while the property remains undeveloped. P.J. Keane & A.F. Caletka, Delay Analysis in Construction Contracts, Wiley-Blackwell, 2 (Blackwell Publishing, 2008) ("The most significant unanticipated cost in most construction projects is the financial impact associated with delay and disruption to the works.").[8] Indeed, this was the case here; Mr. Koontz could not sell his property, or recoup his investment, without permit approval. J.A. 29-30, 35, 101, 105. Accordingly, it might have made sense, in a pure economic calculus, to assent to St. Johns' unconstitutional demands—even if it would have been costly.

Yet, a landowner should not have to pay off the authorities in order to exercise his or her constitutional rights, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and, the authorities should not be able to play upon an individual's vulnerabilities in this manner.[9] But unfortunately, there will always be a risk of inappropriate coercion so long as regulators know that they hold an absolute power of refusal—like a Damoclean Sword hanging over the

---

[8] *Available at* http://books.google.com/books?id=uxHXn8CctmgC&pg=PA2&dq=The+most+significant+unanticipated+cost+in+most+construction+projects+is&hl=en&sa=X&ei=dQS1UPTqGcHo0gHvsoCwBA&ved=0CEEQ6AEwAg#v=onepage&q=The%20most%20significant%20unanticipated%20cost%20in%20most%20construction%20projects%20is&f=false (last visited Nov. 27, 2012).

[9] While it may be common practice to pay for government approvals in other countries, such corrupt practices cannot be tolerated in our constitutional system. *Nollan*, 483 U.S. at 837.

landowner's head.[10] But, government should not be allowed to abuse its powers in this manner. Epstein, *supra* at 15 N. Ill. U. L. Rev. at 483 (government should not be able to take advantage of an individual's "abject necessity").

b. Land-Use Authorities Will Effectively Nullify *Nollan* and *Dolan* by Predictably Requiring Waiver as a Precondition of Approval

Nollan and *Dolan* held that land-use authorities cannot play upon an individual's vulnerabilities by insisting on conditions that bear no nexus to anticipated harms from a proposed project. *Nollan*, 483 U.S. at 837; *Dolan v. City of Tigard*, 512 U.S. 373, 390-91 (1994). But here St. Johns argues that *Nollan* and *Dolan* should have no application because Mr. Koontz's permit was never approved. This theory presumes an exception to *Nollan* and *Dolan*—an exception that would swallow the rule.

If St. Johns' argument is accepted, the protection that *Nollan* and *Dolan* offered to property owners will be rendered impotent. *See* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan & Dolan and Where They Should Go From Here*, 59 WLLR 373, 408 (2002) ("The essential nexus test cannot survive long when riddled with [] loopholes.").

---

[10] For this reason, the authorities also have a perverse incentive to push for more stringent zoning restrictions than are truly necessary. *Nollan*, 483 U.S. at 837 n. 5.

This is necessarily so because—in preconditioning permit approval on the waiver of property rights—the authorities may accomplish the same end as if they had approved the permit subject to the same conditions. Indeed, under St. Johns' theory the California Coastal Commission could have required dedication of an easement across the Nollan family's property without incurring takings liability by simply making dedication a *precondition* of approval.[11] But, that scheme would have been no less extortionate. *See Lambert v. City and County of San Francisco*, 529 U.S. at 1047-48 (2000) (Scalia, J., dissenting).

Accordingly, this formalistic exception must be rejected because it would allow land-use authorities to predictably and systematically circumvent *Nollan* and *Dolan* simply by requiring waiver of constitutional rights up-front. Indeed, some local authorities have already tried this approach. For example, in *Powell v. Humboldt County*, the County of Humboldt, California forced the Powell family into a catch-22, requiring the family to acquire an after-the-fact permit for their front porch while refusing to process their permit until they capitulated to a demand for an aviation easement over their property. *See* Ryan Burns, *Unexpected* Turbulence, The North Coast Journal

[11] But, even there, the permit would not issue unless the owner capitulated to the extortionate condition. *See Nollan*, 483 U.S. at 828 ("[T]he Commission overruled their objections and granted the permit *subject to a deed restriction*…") (emphasis added).

(Jan. 27, 2012).[12] The County simply refused to either approve or deny their permit application because the Powells refused to waive their property rights.[13]

The same could be done with any permit application under St. Johns' theory. The authorities could hold the landowner in perpetual limbo until he or she capitulates to an extortionate demand. Alternatively, the authorities could evade liability by denying permit applications outright. Either way, the owner would be perpetually denied the right to make reasonable use of the land, unless he or she submitted to the government's demands. To avoid this predictable fall out, *Nollan* and *Dolan* should apply broadly to deter—as a prophylactic matter—improper coercion. *See* Breemer, *supra* 59 WLLR at 408 ("Without a strong essential nexus test, individuals often will be forced to bear burdens that properly should be borne by the public as a whole."). This would send a clear message that the state cannot take advantage of the individual's vulnerabilities by holding a permit hostage. *Id.*

---

[12] *Available at* http://www.northcoastjournal.com/news/2011/01/27/unexpected-turbulence/2/ (last visited Nov. 27, 2012).

[13] *Powell v. County of Humboldt*, Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, No. DR110033 (Jan. 11, 2011), *available at* http://www.pacificlegal.org/document.doc?id=509 (last visited Nov. 11, 2012) ("The County is holding the Powell's permit hostage until they provide the County an overflight easement").

c. If *Nollan* and *Dolan* Are Limited to Apply Only to Dedications of Real Property, Regulators Will Predictability Extort Waiver of Other Rights

If *Nollan* and *Dolan* are interpreted narrowly to apply only where the authorities demand dedication of real property, this Court would be giving the authorities license to impose any other condition they should like. *Id.* To be sure, government will predictably push its permitting powers to the outer-limit. *See*, *e.g*, *McAllister v. Cal. Coastal Comm'n*, 169 Cal. App. 4th 912, 939 (2008) (noting that, in environmentally sensitive areas, the California Coastal Commission may be required to prohibit all development, except to the extent a permit denial would constitute a taking). And without any requirement to demonstrate a nexus—regardless of how coercive the exaction demand might be or what rights might be at issue—there would be virtually nothing stopping the authorities from abusing their power of refusal.[14]

[14] It is difficult to fathom how a landowner could ever prevail in asserting that an imposed condition lacks any rational basis if the landowner cannot prevail by demonstrating that the condition has been imposed without regard to any impact the project will have on the public interest. And, if *Nollan* and *Dolan* do not apply, a takings claim would likewise—almost assuredly—fail under the Penn Central test. *See*, *e.g.*, *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008).

II. Any Condition Unrelated to the Goal of Mitigating Anticipated Public Harms is an Unconstitutional Extortionate Demand

a. At Common Law Landowners Are Presumed Free to Use Their Property

It is axiomatic that the right to own a property is coextensive with the right to make reasonable use of the property, and to do so at the exclusion of the rest of the world. *See* 1 EDWARD COKE, THE INSTITUTES OF LAWS OF ENGLAND, ch. 1 sec. 1 (1797) (1st Am. Ed. 1812) ("What is the land but the profit thereof?"); *see also Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 39 (N.Y. App. Div. 1932) ("As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute."). This has always been the rule at common law. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens J., concurring) ("Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property."). As William Blackstone explained, the right of property is an "absolute right, inherent in every Englishman… which consists in the free use, enjoyment, and disposal of all his acquisitions, *without any control or diminution* save only by the laws of the land." 1 Bl. Comm. The Rights of Persons Ehrlich Ed. P. 41 (emphasis added).

The common law presumption holds that a landowner is at liberty to make any reasonable use of his or her property. *Bailey v. United States*, 78 Fed. Cl. 239, 271 (2007) ("[B]oth [the *Nollan* and *Palazzolo*] opinions underscore the right of owners to make reasonable use of their property, and to pass this same right of use to successors.") (citing *Nollan*, 483 U.S. at 834 n. 2; *Palazzolo*, 533 U.S. at 627). The right to freely use one's property is subject only to appropriately imposed prohibitions under positive law and the duty to refrain from activities that might cause harm to others. *See* Steven J. Eagle, Regulatory Takings, § 2-1 (3d ed. 2005) ("The police power in Anglo-American law can be traced back to Glanville's admonition in 1187 that a person may not use his or her property to the detriment of another.") (citing David A. Thomas, Thompson on Real Property Sec. 72.02 (1994)). Yet the modern trend has been to deemphasize the landowner's right to freely exercise dominion over his or her property. *Penn Cent.*, 483 U.S. at 124 (noting that takings liability is less likely to arise when a challenged restriction merely "adjust[s] the benefits and burdens of economic life").

Today, land-use authorities all across the country seek to abrogate the common law presumption—of free and unrestrained use—by subjugating the owner's rights to the demands of increasingly severe zoning and permitting regimes. *See*, *e.g.*, It's Hard to Get House Project OK: Standards for Zoning Variances Have Gotten Stricter All Over the State, Wis. St. J., Ass. Press

(Aug. 27, 2001).[15] In doing so, they turn the very concept of property rights on its head, such that the right to use one's property is often held hostage, and mischaracterized as a mere privilege or discretionary benefit. *See Nollan*, 483 U.S. at 833 n. 2 (rebuffing the suggestion that "the right to build on one's own property" may be considered a "governmental benefit"). But that does not change the reality that land-use restrictions negate constitutionally protected common law property rights. *Id*.

Under common law principles, a landowner can develop a property in whatever manner the owner should like, so long as the owner's use does not constitute a nuisance to his or her neighbors or the community at large. Keith H. Hirokawa, *Property as Capture and Care*, 74 Alb. L. Rev. 175, 198 (2010-2011). Authorities might impose land-use restrictions to abrogate his or her right to develop in certain ways; however, the owner's property rights are constitutionally protected, such that the landowner cannot be denied the right to develop without a legitimate reason. *See Lingle*, 544 U.S. at 541 ("[A] municipal zoning ordinance would survive a substantial due process challenge so long as it was not 'clearly arbitrary and unreasonable, having *no substantial relation* to the public health, safety, morals or general welfare.'") (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)) (emphasis added). And while any given restriction might be deemed a legitimate exercises of the state's police

---

[15] *Available at* http://www.highbeam.com/doc/1G177603189.html (last visited Nov. 8, 2012) (noting that Wisconsin homeowners are finding it increasingly difficult to attain permit approvals).

powers, under the near-toothless rational basis test, government cannot go *too far* in abrogating the common law right to use one's property without incurring an obligation to pay for what it is taking. *Lingle*, 544 U.S. at 537-538 ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

b. The State's Permitting Power is Limited to the Reasonable Mitigation of Affirmative Harms

i. A Legitimate Condition Must Have a Nexus to Reasonably Anticipated Public Harms

The state's permitting power is derived from its police powers, which allows government to impose restrictions in order to prevent reasonably anticipated harms to the public. *See Nollan*, 483 U.S. at 836. For example, a city council might adopt zoning restrictions with an aim to ensure that a development will not adversely affect public safety. A land-use authority, charged with the duty of administering and enforcing this zoning code, might legitimately impose any number of conditions on the grant of a development permit—so long as the

conditions bear a nexus and are roughly proportional to anticipated threats to public safety. *Dolan*, 512 U.S. at 387, 391. The authorities might legitimately condition a building permit on the requirement that the proposed project be modified to prevent fires. *Id*. The authorities might also impose conditions to minimize the risk of accidents resulting from increased traffic to and from the development site, or to avoid any other threat to public safety. *Id*.

As such, *Nollan* held that there must be a nexus between an imposed condition and some anticipated public harm. *Nollan*, 483 U.S. at 837. And *Dolan* clarified that the condition must be roughly proportional, specifically tailored to mitigate anticipated harms from a project. *Dolan*, 512 U.S. at 391. This rationale makes sense because a condition unrelated to the mitigation of a specifically anticipated public harm necessarily goes beyond the scope of those legitimate limitations authorized under the police powers. *See Village of Euclid*, 272 U.S. at 387-88 (reaffirming the common law origins of the police powers in the law of nuisance); Regulatory Takings § 2-1 ("The police power… preserve[s] the public order and prevent[s] offenses against the state… [and is] calculated to prevent [the] conflict of rights…") (citing THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 572 (1868)).

ii. An Imposed Condition Must Mitigate Public Harms That Might Justify an Outright Denial of the Permit

While it may be true that a permit application will be denied outright if the proposed project would violate a legitimately enacted zoning code, that does not give the authorities free rein to impose conditions unrelated to mitigating public harms. *See Village of Euclid*, 272 U.S. at 387-88 ("[T]he question [of] whether the power exists to forbid the erection of a building of a particular kind or for a particular use… is to be determined… by considering [the project] in connection with the circumstances and the locality."). If a project does not conform to the demands of the zoning code, the authorities may legitimately prompt the landowner to tweak the development plans to mitigate anticipated public harms. But if the authorities threaten to deny a permit on the ground that it does not satisfy aesthetic demands or health and safety standards, the authorities can only legitimately impose conditions relating to those concerns. *See Lingle*, 544 U.S. at 547 (The issue in *Nollan* and *Dolan* was "whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether."). Accordingly, a condition unrelated to the mitigation of public harms exceeds the scope of legitimate government action. *See Nollan*, 483 U.S. at 836 (A permit condition must serve "the same legitimate police-power purpose as a refusal to issue the permit…").

In *Nollan*, the California Coastal Commission sought to justify its condition, requiring a lateral easement across the Nollan family's property, on the ground that their home—once constructed—would create a psychological barrier, which might inhibit the public from exercising their right to access the beach. *Nollan*, 483 U.S. at 835-36. The Court acknowledged that such concerns might justify certain restrictions on the manner in which the property may be used. *Id*. But, the Commission could only impose conditions that would mitigate harms that might justify denial outright. *See Lingle*, 544 U.S. at 547-48. As such, concerns over a "psychological barrier" could not be invoked to justify a requirement that the Nollan's dedicate an easement to the public because that condition was completely unrelated to the asserted concern over the project's impact on the public-psyche. *Nollan*, 483 U.S. at 838-39.

Likewise, *Dolan* held that the City of Tigard, Oregon could legitimately impose certain conditions on the grant of a permit, but only those reasonably tailored to mitigate anticipated public harms. *Dolan*, 512 U.S. at 391. There a small business owner sought to expand her store and to enlarge her parking lot. *Id*. at 379. Since she was proposing a project that would likely result in greater storm-water runoff into nearby streams, it was reasonable to impose certain conditions tailored toward mitigating the impact her development would have on the watershed and the public water-control infrastructure. *Id*. at 392-93. Similarly, the authorities could justify certain conditions aimed at mitigating her project's impact on the city's

transportation systems because, by enlarging her parking lot, she would likely be contributing to vehicular traffic in the area. *Id*. at 395. But the City could not go 'too far'—in the name of addressing these concerns—without raising constitutional problems. *Id*.

The Court recognized that the state's permitting powers derived from its police powers. *Id.* at 387 ("regulatory authority" must be tied to its "constitutional moorings"). Accordingly, the Court held that an imposed condition is only legitimate if proportional to the anticipated public impact of the project. *Id*. at 395. The Court struck down conditions requiring the business owner to dedicate portions of her property to the public because those requirements exceeded those necessary to mitigate the public concerns. *Id*. at 391

c. A Condition Imposed for Any Purpose Other than Mitigation is an Extortionate Taking

Nollan recognized that a condition—unrelated to mitigation—is an "out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. Indeed, a condition serving no legitimate state interest in mitigating public harms cannot be justified under the circumstances. *Dolan*, 512 U.S. at 387. Such a condition simply holds the landowner's property rights hostage by threatening to kill a permit application unless the landowner capitulates to inappropriate demands. *Nollan*, 483 U.S. at 837 (a condition, requiring the forfeiture of a property interest, serves no purpose other than obtaining something "without payment of

compensation" to the extent it bears no relationship to any public harm).

Though *Nollan* and *Dolan* dealt specifically with conditions aimed at exacting dedications of real property for public use, both cases rely upon a singular rationale that applies with equal force to any inappropriate *quid pro quo* demand. *See Nollan*, 483 U.S. at 837 (stating that California could legitimately prohibit the public from shouting fire in a crowded theater, but that the *Nollan* rationale would prohibit the state from conditioning waivers from that rule on the requirement that individuals pay a $100 tax contribution, because "adding the unrelated condition alters the purpose to one which, while it may legitimate, is inadequate to sustain the ban."). Whether the authorities demand the dedication of real property, forfeiture of personal property, or the waiver of any other protected property right, they seek to force the landowner to give up something—presumably for the public benefit—in exchange for allowing the free exercise of his or her property rights. In any such case, the authorities seek to exact something for which they had no right to take. *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) (government must pay for the taking of any property interest); *see also Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003).

The key to *Nollan* and *Dolan* is that the regulators in both cases sought to acquire an interest in the subject properties by forcing the landowners into a catch-22. The owners were forced into the impossible situation of choosing between exercising

their property rights and submitting to an uncompensated demand for dedication of an interest in their properties. *See Nollan*, 483 U.S. at 831. Either way, a constitutionally protected property right was on the cutting block. *Id*. at 833 n. 2.

A landowner in this situation may hold title to the land in fee simple absolute, but if the owner capitulates to the government's *quid pro quo* demands, he or she surrenders an interest in the property to public. *See General Motors*, 323 U.S. at 378. The result is that the owner's estate has been burdened by a dominant servitude. *See Smith v. Town of Mendon*, 4 N.Y.3d 1, 19-20, 822 N.E.2d 1214, 122 (N.Y. 2004) (Reed J., dissenting) (a condition requiring preservation of open space compels dedication of a "conservation easement"). This is necessarily the case because the owner would no longer maintain complete and exclusive dominion over the property. *See General Motors*, 323 U.S. at 378.

In *Nollan* and *Dolan* the regulators sought to acquire an easement for the public to traverse across the subject properties. *Lingle*, 544 U.S. at 546. This would have unquestionably required just compensation under the Takings Clause if taken out right. *Nollan*, 483 U.S. at 831. But compensation would also have been required if the government had sought to formally appropriate a negative servitude to explicitly take away the owner's right to use the property in a given manner. *See* Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. Davis L. Rev. 1897, 1945

(2008) (a condemning authority must separately condemn conservation easements). This is true because the government would be asserting a dominant interest in the subject property—an interest paramount to the owner's interest in using the property as he or she might prefer. *Town of Mendon*, 4 N.Y.3d at 19-20, 822 N.E.2d at 122 (Reed J., dissenting). Indeed, in the absence of a legitimate state interest in imposing restrictions to limit the owner's right of free use and dominion over the property, no abrogation of common law property rights can be justified. *See Nollan*, 483 U.S. at 831. If permissible at all, such abrogation would require an exercise of eminent domain powers, which would require just compensation. *Id*. at 837.

The same is true here where the demanded exaction requires the forfeiture of personal property. If the state had simply sought to appropriate Mr. Koontz's personal assets out right, this would have undoubtedly constituted a taking requiring compensation. *Brown*, 538 U.S. at 235. Though St. Johns could legitimately impose conditions, which might require the expenditure of money if those conditions were roughly proportional to anticipated public harms, the lower courts have already determined that there was no connection between the contested condition and any impact the project would have on the public. *St. Johns River Water Management Dist. v. Koontz*, 5 So.3d 8, 10 (Fla. App. 5th Dist. 2009). In this light, the demanded condition is indefensible. The condition requiring the forfeiture of personal property must be viewed as an extortionate attempt to exercise the state's eminent

domain powers without paying compensation. *Id*. at 837.

d. St. Johns Violated *Nollan* and *Dolan* in Making an Extortionate *Quid Pro Quo* Demand and Carrying-Out its Threat of Denial

i. In Denying Mr. Koontz's Permit for his Refusal to Capitulate to an Extortionate Demand, St. Johns Violated *Nollan* and *Dolan*

The Florida Supreme Court held that *Nollan* and *Dolan* have no application where a permit is denied. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1231 (Fla. 2011). But, this completely misunderstands the state's permitting power. As explained above, conditions on the grant of a permit may only—legitimately—be imposed for the purpose of mitigating public harms because the permitting power can only address those harms that would justify denial outright. *Lingle*, 544 U.S. at 547. Accordingly, any condition imposed for a different reason is simply extortionate. *Nollan*, 483 U.S. at 837.

In this case St. Johns made an inappropriate *quid pro quo* demand of Mr. Koontz. *See Nollan*, 483 U.S. at 837. He was told that in order to receive permit approval—to exercise his common law right to use his own property—he would have to give the government something in return. *Koontz*, 77 So.3d at 1224. Specifically, he was told that he would have to

improve public property—at his own expense. *Id*. When he refused to accept that condition, the government carried out its threat to kill his permit application. *Id*. But, this denial was in itself an illegitimate state action because it was predicated upon Mr. Koontz's refusal to waive his rights in capitulation to an indefensible condition. *See* Regulatory Takings § 7-10(f)(1).

ii. St. Johns Cannot Immunize itself from Liability for its Wrongdoing

St. Johns argues that it has immunized itself from takings liability by denying Mr. Koontz's permit—despite the fact that it was denied because of his refusal to give in to inappropriate *quid pro quo* demands. Under this theory, takings liability only attaches if a permit is approved with extortionate conditions; however, for the purposes of *Nollan* and *Dolan*, it does not matter how precisely such conditions are imposed. *See Lambert*, 529 U.S. at 1047-48 (Scalia, J., dissenting). A violation occurred at the point in which the authorities made clear that Mr. Koontz could not enjoy his right to use his property as he planned without giving up compensation for the taking of a protected property interest in return. *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 625 (Tex. 2004); *Salt Lake County v. Bd. of Educ. Granite Sch. Dist.*, 808 P.2d 1056, 1058 (Utah 1991) (defining an exaction as any "condition precedent" to development).

It does not matter whether the contested condition was affirmatively imposed on an approved permit or made to be a precondition of approval. Such a superficial distinction cannot immunize St. Johns from liability here because the coercive effect of an extortionate demand is the same regardless of how it is imposed. *See Nollan*, 483 U.S. at 841 (The Takings Clause is "more than a pleading requirement, and compliance with it… [is] more than an exercise in cleverness..."); *see also Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-78 (1871) (applying a takings analysis despite formalistic problems with the pleadings). Either way the owner's property rights are held hostage. *Another Look at Unconstitutional Conditions*, 117 U. Pa. L. Rev. 144, 154 (1968) (The unconstitutional doctrine is most applicable where government threatens denial of "benefits… [for which the] individual is reluctant to forego…"). And the fact that the authorities carried through on their threats to kill Mr. Koontz's permit application should not relieve St. Johns of liability. *See* Regulatory Takings § 7-10(f)(1). ("Denials … may be equally without justification [as the contested condition], and [denials] buttress demands for excessive exactions by demonstrating… that refusals to cooperate [will] be punished.").

In no area of the law can the wrongdoer unilaterally evade liability for his or her wrongdoings by taking a retaliatory action against an uncooperative victim. *See generally Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.) ("[N]o one shall be permitted to take advantage of his own wrong ...").

But, that is exactly what St. Johns wants here. In suggesting that government should be able to evade *Nollan* and *Dolan* by imposing extortionate requirements as a *precondition* of approval—and then denying permit applications where the owner refuses to capitulate—St. Johns is asking this court to bless its retaliatory denial.

CONCLUSION

For the foregoing reasons, the *Nollan* and *Dolan* tests should apply in this case, and the Florida Supreme Court should be reversed.

Respectfully submitted,

KAREN R. HARNED
**Counsel of Record*
LUKE A. WAKE, *Of Counsel*
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
202-314-2048 (Telephone)
615-916-5104 (Facsimile)
Karen.Harned@nfib.org
Luke.Wake@nfib.org