No. 11-1447

IN THE
Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner
v.
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

AMICI CURIAE BRIEF OF THE NATIONAL GOVERNORS ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE* [1]

Amici are national organizations whose members include state, county, and local governments and officials throughout the United States.

SUMMARY OF ARGUMENT

Petitioner's proposal to extend the *Nollan*/*Dolan* standards where government has denied a permit application and imposed no exaction is illogical, unworkable, and unnecessary. It is illogical because the *Nollan*/*Dolan* standards are designed to address whether government has taken private property by attaching a specific condition to its approval of a permit application. Where an application has been rejected and no exaction has been imposed, no private property has been taken within the meaning of the Takings Clause. In addition, petitioner's proposal to apply *Nollan* and *Dolan* to permit denials would effectively revive the "substantially advances" takings theory recently repudiated by the Court in *Lingle v. Chevron U.S.A., Inc*. Petitioner's proposal to extend *Nollan* and *Dolan* is unworkable because it would compel courts to attempt to make highly speculative determinations about numerous, ill-defined potential conditions that may have been considered but were ultimately not adopted. And the proposal is unnecessary because the Due Process Clause provides the natural constitutional remedy for a permit denial allegedly based on the government's

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

unreasonable refusal to come to an agreement with an applicant on permit conditions.

Petitioner's proposal to extend *Nollan* and *Dolan* to permit conditions involving mandates to pay money also should be rejected because it exceeds the logical bounds of this special doctrine. *Nollan* and *Dolan* only apply to permit conditions which, if imposed directly and outside of any permitting process, would constitute takings. In *Eastern Enterprises v. Apfel*, a majority of the Court recognized that a government-imposed mandate to pay money, such as taxes, cannot support a claim under the Takings Clause. Sound reasons based on the text, history, and purpose of the Takings Clause justify reaffirming this conclusion. Because a government mandate to pay money cannot constitute a taking, it follows that *Nollan* and *Dolan* cannot be expanded to encompass permit conditions involving money.

The Court should not cast aside its usual deferential approach in constitutional challenges to economic and social regulation by extending the special *Nollan/Dolan* standards beyond their natural domain. Expanding them as petitioner proposes would impose significant new administrative and litigation costs on local governments and undermine their ability to perform their responsibilities. Developers such as petitioner have a natural economic incentive to attempt to reap the benefits of public infrastructure investments without paying for them and to transfer the costs associated with their developments to the general taxpayers or the community as a whole. But for sound practical and constitutional reasons, outside the special context of exactions governed by *Nollan* and *Dolan*, established doctrine calls for deference to the judgments of elected officials and

expert agencies about how such benefits and costs should be defined and allocated. The Court should reject this invitation to jettison the traditional approach.

ARGUMENT

I. Petitioner's Proposal to Extend the *Nollan/Dolan* Standards to Denials of Development Applications is Illogical, Unworkable, and Unnecessary.

The *Nollan* and *Dolan* cases involve government decisions *approving* the issuance of development permits subject to conditions requiring the applicants to *dedicate* explicitly-identified property interests to the public. In that context, the Court held government can attach such "exactions" to permit approvals only if they meet the relatively strict "essential nexus" and "rough proportionality" standards. The first question posed by this case is whether the Court should extend the *Nollan*/*Dolan* standards where government officials discussed issuing a permit subject to numerous alternative conditions but, in the face of land owner objections to any conditions, decided to reject the application as submitted instead. *Amici* respectfully submit the answer to this question should be an unequivocal "no."

Legal Doctrine. In general, evaluation of a takings claim involves a two-step inquiry: first, whether the claimant owns "property" and, second, whether the property has been "taken." The Takings Clause itself places some sideboards on what can qualify as property, *see Eastern Enterprises v. Apfel*, 524 U.S. 498, 540-41 (1998) (Kennedy, J., concurring in judgment and dissenting in part), but property interests themselves "are created and their dimensions defined

by existing rules or understandings that stem from an independent source such as state law." *Webbs Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980). If a claimant asserts an interest that does not qualify as property within the meaning of the Takings Clause, or if an asserted property interest is limited by "background principles" of law, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-27 (1992), the takings claim will fail at the threshold.

The Court has identified "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005): first, where the government has subjected an owner to a "permanent physical occupation," typified by the case of *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982); and second, where a regulation deprives an owner of "all economically beneficial use" of a fee interest in real property. *See Lucas*, 505 U.S. at 1017. "Outside of these two relatively narrow categories," *Lingle*, 544 U.S. at 538, regulatory takings cases are governed by the multifactor framework established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which calls for consideration of the economic impact of the government action, the degree of interference with investment-backed expectations, and the character of the action. *Id*. at 124.

For several decades the Court's opinions had suggested a regulatory taking also could be established by demonstrating a regulation "does not substantially advance legitimate state interests." However, in *Lingle* the Court stated that this "formula is not a valid takings test" and "has no proper place in our

takings jurisprudence." 544 U.S. at 548. Instead, the Court concluded, this formula raises an issue about the validity of government action properly addressed under the Due Process Clause. *Id.* at 540-42; *see also id.* at 548 (Kennedy, J., concurring) (observing "that a regulation might be so arbitrary or irrational as to violate due process").

In the narrow, "special context of exactions," *Lingle*, 544 U.S. at 547, the Court used buildings blocks provided by its prior takings decisions to construct the *Nollan/Dolan* standards. On the one hand, the Court recognized that, had the government unilaterally imposed the exactions at issue in those cases, the result would have been a taking under *Loretto*. *Nollan v. California Coastal Commission,* 483 U.S. 825, 831 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). On the other hand, the Court also recognized it made no sense to conclude that such exactions attached to grants of regulatory approval necessarily resulted in takings. After all, if the government had simply rejected the applications (presumably to the owners' *greater* disadvantage), either the relatively less demanding *Penn Central* framework or the *Lucas* test would have applied to takings claims based on those decisions. *Nollan*, 483 U.S. at 835-36; *Dolan*, 512 U.S. at 834-35.

Based on these premises, the Court developed the "essential nexus" and "rough proportionality" tests to identify exactions that bear no logical relationship to the projected effects of the development at issue and, therefore, should constitute takings that cannot be imposed absent payment of just compensation. Under *Nollan*, an exaction will be deemed a taking if there is a lack of an "essential nexus" between the exaction and the government's regulatory interest in

the use of the property. Under *Dolan*, even if the essential nexus test is satisfied, an exaction will be deemed a taking if there is no "rough proportionality" between the burden placed on the owner by the exaction and the projected impacts of the proposed development. The Court has described these tests as involving an intermediate level of judicial scrutiny, under which government defendants bear the burden of demonstrating that exactions do not constitute takings. *See Dolan,* 512 U.S. at 391 & n.8.

The *Nollan*/*Dolan* standards cannot logically be extended to the situation where the government has *rejected* a development application and imposed *no exaction*. This step would extend the *Nollan/Dolan* standards beyond the "special context" for which they were developed. The nexus and proportionality standards resolve whether an actual exaction, imposed as a condition of a regulatory approval, constitutes a taking of the specifically identifiable property interest that has been exacted. If the exaction amounts to a taking, the government can only enforce it if it is willing to pay "just compensation." *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (observing the Takings Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking").

If government officials have not actually imposed an exaction, however, no exacted property interest supports a claim of a taking of "property" under the *Nollan*/*Dolan* framework. Put simply, if the government has imposed no exaction, it has not taken any relevant property under the Takings Clause. Furthermore, if no exaction has been imposed, there

is no basis for an award of just compensation in exchange for the taking of an exacted interest.

Both the Florida Supreme Court and Judge Jacqueline Griffin (in her dissent from the ruling of the Florida Court of Appeals) embraced this straightforward logic. In both *Nollan* and *Dolan,* the Florida Supreme Court stated, "the regulatory entities issued the permits sought with the objected-to exactions imposed," and the *Nollan*/*Dolan* standards only apply to exactions "rendering the owners' interest in . . . property subject to the dedication imposed." *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220, 1230 (Fla. 2012). Judge Griffin expressed the same idea in more colorful terms: "[I]n what parallel legal universe or deep chamber of Wonderland's rabbit hole could there be a right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none were given up by the owner?" *St. Johns River Water Management District v. Koontz*, 5 So. 3d 8, 20 (Fla. Dist. Ct. App. 2009). *See also Lambert v. City & County of San Francisco*, 67 Cal. Rptr. 2d 562 (Cal. Ct. App. 1997), *cert. denied*, 529 U.S. 1045, 1551 (2000) (Scalia, J., dissenting) (noting, in a similar case, that, "[i]t is undeniable . . . that the subject of any supposed taking in the present case is far from clear. . . . Whereas in *Nollan* and in *Dolan* [the government had imposed an actual exaction], *in the present case there is neither a taking nor a threatened taking of any [property].*") (emphasis added).

The *Nollan/Dolan* standards cannot logically be extended to denials of permit applications for the additional reason that a basic premise of these decisions was government regulators always have the

option to deny the application instead of issuing a permit with conditions and a takings claim arising from such a denial would be evaluated using the regulatory takings standards. Indeed, the fact the regulatory takings standards would apply to a takings claim arising from a denial was the central reason the Court concluded in both cases that a *per se* takings test could not apply to an exaction, and why the Court devised the intermediate-scrutiny "essential nexus" and "rough proportionality" tests instead. Because the availability of the option to deny a permit was one of the premises of the Court's analysis in *Nollan* and *Dolan*, it is plainly illogical to contend that, if the government *actually* opts to deny a permit, the permit denial can give rise to anything other than a traditional regulatory takings claim. Indeed, to suggest that the *Nollan*/*Dolan* standards should be extended to such permit denials would contradict the basic reasoning of *Nollan* and *Dolan* themselves.

All of these points emanate from the same basic fact—for constitutional purposes, there is all the difference in the world between when government contemplates taking some action and when it actually takes that action. A citizen may ponder trespassing on his or her neighbor's land but such an unneighborly thought is different as a matter of law from an actual trespass. Likewise, government contemplation of imposing an exaction cannot sensibly be equated with actually imposing an exaction. The Takings Clause only applies when government has "taken" property for public use, and the regulatory takings doctrine only applies when a regulatory act is "functionally equivalent" to an actual taking. *Lingle*, 544 U.S. at 539. The government must take an

affirmative act, not an attempted or contemplated one, before it faces takings liability. As Judge Griffin stated in her dissent, "[i]t is not the making of an offer to which unconditional conditions are attached in violation of the limitations of *Nollan*/*Dolan* that gives rise to a taking; it is the receipt of some tangible benefit under such coercive circumstances that gives rise to the taking." *See Koontz*, 5 So. 3d at 20 (Griffin, J., dissenting).

Petitioner and its *amici* go awry in invoking the "unconstitutional conditions" doctrine to support their argument for extending *Nollan* and *Dolan*. It is undeniable the *Nollan/Dolan* standards involve a "special application" of this doctrine, *Lingle*, 544 U.S. at 547, but this case is more appropriately resolved by directly addressing the proper scope of the *Nollan/Dolan* standards, and the underlying rationales for these standards, rather than by resorting to abstract discussion of the unconstitutional conditions doctrine. For example, if the government made it a condition of continued employment that an employee convert to Buddhism, but then fired the employee for refusing to accede to the condition, *amici* have no doubt the courts would conclude the First Amendment would be equally offended by either the firing or the imposition of the employment condition. But when negotiations over possible land use exactions fail, and the government exercises its authority to deny the application, the same equivalence does not exist. A permit denial differs from a permit issuance with an exaction both in terms of the property at issue (the regulated real property, versus the exacted property interest) as well as the appropriate takings test (traditional regulatory takings tests

based on limitations on use, versus the *Nollan*/*Dolan* standards applicable to exactions).

Precedent. Relevant Court precedent also supports, if not commands, rejection of petitioner's theory. In *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999), the Court rejected the argument, identical to the argument in this case, that *Dolan*'s "rough proportionality" test should govern a takings claim based on a permit denial. The Court said:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use. The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. *It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development*.

526 U.S. at 702-03 (emphasis added). The Florida Supreme Court quite properly believed the ruling in *Del Monte Dunes* required rejection of petitioner's theory, and the force of precedent compels the same conclusion in this Court.

The Court's more recent, unanimous opinion in *Lingle* also refutes petitioner's plea to extend *Nollan* and *Dolan*. The Court described "*Nollan* and *Dolan* [as] involv[ing] Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." 544

U.S. at 546. The Court also accurately described *Del Monte Dunes* as "emphasizing that we have not extended [the *Nollan*/*Dolan*] standards beyond the special context of . . . exactions." *Id.* at 547, quoting *Del Monte Dunes*, 526 U.S. at 702. *See also Lingle,* 544 U.S. at 547 (explaining that *Dolan* refined the exactions test by holding that "an adjudicative exaction *requiring* dedication of private property must also be 'roughly proportional'") (emphasis added).

Finally, petitioner's proposal to extend *Nollan* and *Dolan* is inconsistent with the Court's holding in *Lingle* that the failure-to-substantially-advance formula has "no proper place in takings jurisprudence." Indeed, petitioner's argument would reverse this important precedent. At the outset of this litigation, well before the *Lingle* decision, petitioner's principal claim was that the District's rejection of his application was a taking of his real property holding because the decision unreasonably refused to accept petitioner's objections to the appropriateness of various permit conditions the District suggested and, therefore, failed to substantially advance a legitimate state interest. *See* 1997 Second Amended Complaint, JA at 4. However, as the litigation proceeded, and following the Court's decision in *Lingle,* petitioner changed the label affixed to his case from the substantially advances formula to the *Nollan*/*Dolan* formula. *See Koontz*, 5 So. 3d at 16 (Griffin, J., dissenting) (explaining how petitioner's "original theory of liability evaporated" over the course of the litigation). Given that petitioner's present claim remains, in substance, the same as its prior substantially advances claim, allowing this novel *Nollan*/*Dolan* claim to proceed would effectively revive the substantially advances theory so recently repudiated in *Lingle*.

Because petitioner's claim is identical to a substantially advances claim, it falls outside the scope of takings doctrine for the same reasons that the substantially advances inquiry falls outside takings doctrine. In *Lingle*, the Court explained that the substantially advances inquiry does not fit in takings doctrine because it "reveals nothing about the magnitude or character of the burden a particular regulation imposes on private property rights." 544 U.S. at 542. In addition, the Court explained that the substantially advances inquiry does not fit in takings law because it "probes the regulation's underlying validity," raising an issue that "is logically prior to and distinct from the question whether a regulation effects a taking,"—that is, whether the regulation serves a valid public purpose. *Id.* at 543. Likewise, in this case, the petitioner's claim that the permit denial was unreasonable because it was based on the District's assertedly unreasonable refusal to accept petitioner's objections to various proposed conditions reveals nothing about the magnitude of the burden the permit denial placed on petitioner's real property interest. Also, petitioner's claim in this case involves a challenge to the underlying validity of the government permit denial, raising an issue that is "logically prior to" any potential question as to whether the denial resulted in a taking.

Policy. Apart from the fact that petitioner's theory is incoherent as a matter of doctrine and contrary to precedent, its adoption would create serious practical problems for local governments. The Court has recognized the importance of local land use planning and regulation to support healthy communities. *See Dolan,* 512 U.S. at 396 ("Cities have long engaged in the commendable task of land use planning, made

necessary by increasing urbanization, particularly in metropolitan areas . . . .") Applying *Nollan* and *Dolan* beyond the context of actual exactions would lead to more intrusive and frequent legal challenges to land use decisions, undermining local governments' capacity to carry out their planning and regulatory responsibilities. In *Lingle* the Court observed that the "substantially advances test" presented "serious practical difficulties" because the test "can be read to demand heightened means ends review" of government regulation. 544 U.S. at 544. The exact same "practical difficulties" would be created by petitioner's proposed extension of *Nollan* and *Dolan* because it too would involve application of a heightened standard of review. The conclusion that the substantially advances test and petitioner's proposed extension of *Nollan* and *Dolan* pose the same practical difficulties follows logically from the fact that the proposed extension of *Nollan* and *Dolan* is, in fact, the substantially advances theory dressed up in new terminology.

Petitioner's proposed expansion of the *Nollan*/*Dolan* doctrine is also unworkable because it would foster frequent, unsolvable controversies. Was the permit denied because of the government's inability to negotiate acceptable exactions, or for some other reason? *See Lambert*, 529 U.S. at 1550-51 (Scalia, J., dissenting) (identifying and struggling with this question). Which specific exaction or exactions might have been imposed if a permit had been issued? Would any or all of such possible exactions have met the *Nollan*/*Dolan* standards, and how should a trial court decide this question absent an administrative record? *See Koontz*, 77 So. 3d at 1231-32 (Polston, J., concurring) (noting administrative exhaustion

requirements that petitioner evaded). All of these questions would lead the courts into hopeless speculation over what might-have-beens. The potential problems for local government are highlighted by the facts of this particular case; the record shows that the District suggested over a half dozen different conditions to petitioner to mitigate the effects of the development, all of which he rejected.

Petitioner's proposal also would have perverse, harmful consequences for property owners seeking to develop their property for profit. Conditions attached to development authorizations often provide an effective and relatively inexpensive way of addressing the negative externalities associated with development. Thus, exactions and other conditions attached to development approvals often produce "win-win solutions" that allow developers to achieve all or most of their development objectives while addressing the legitimate concerns of public officials and their constituents about the adverse effects of development. *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 50 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 668-78 (2004). If even discussing potential exactions could expose local governments to takings claims under *Nollan* and *Dolan*, local officials would be reluctant to discuss such compromise solutions. Instead, they would frequently seek to protect the public interest by simply rejecting development proposals. *See Koontz*, 77 So. 3d at 1231 (to avoid liability under petitioner's expanded version of *Nollan* and *Dolan*, "agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the

crushing costs of litigation"); *see also Koontz,* 5 So. 3d at 21 (Griffin, J., dissenting) ("No agency in its right mind will wander into this swamp."). This outcome may well safeguard the public fisc, but it would hardly serve the interests of property owners seeking to develop their property.

Finally, even if accepting petitioner's theory would not completely freeze the negotiating process, it would badly skew it. Under petitioner's theory, local officials would expose their communities to potential liability if they proposed specific permit conditions that property owners objected to and ultimately sued over. Local officials' probable response to this risk would be to remain completely mute in response to offers from a developer, unless and until the developer arrived at an offer that the officials believed was acceptable. No practical purpose would be served by encouraging this type of one-sided conversation between developers and communities.

Other Potential Claims. The conclusion that a property owner cannot bring a *Nollan*/*Dolan* exactions claim when no exaction has been imposed certainly does not mean that a property owner could never bring a potentially viable constitutional challenge in circumstances such as these. First, as discussed above, whenever the government rejects a development application, such a decision potentially gives rise to a claim under *Penn Central* or, in some instances, under *Lucas.* Thus, like any frustrated property owner who feels he or she has suffered an unfair permit denial, a plaintiff might pursue a regulatory takings claim. Petitioner apparently waived any possible regulatory takings claim in this case. But the important point going forward is that the Court's rejection of the petitioner's novel

Nollan/*Dolan* theory would not preclude a future claimant from proceeding in this fashion.

Second, plaintiffs in petitioner's position could challenge a permit denial in circumstances such as these under the Due Process Clause. *See, e.g., United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003) (Alito, J.) (evaluating a due process claim based on a permit denial purportedly motivated by a developer's refusal to pay an impact fee a city proposed). In general, the Due Process Clause provides protection for property owners against egregious government action. *See Lingle,* 544 U.S. at 548 (Kennedy, J., concurring). Judicial review of government action under the Due Process Clause unquestionably is and should be deferential. *See Lingle,* 544 U.S. at 545 ("we have long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation"). Indeed, petitioner's attempt to import heightened scrutiny into this case by reframing what is in substance a due process claim as a takings claim is one of the basic reasons *amici* urge the Court to reject petitioner's position.

Nonetheless, the Due Process Clause can be deployed to provide appropriate relief in appropriate cases. *Amici* reject the suggestion of petitioner and many of his *amici* that affording a claimant the Due Process Clause's protection is equivalent to offering him or her no constitutional protection at all. Just as the Takings Clause is "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," *Dolan*, 512 U.S. at 392, so too the Due Process Clause is as much a part of the Bill of Rights as these other provisions. *See*, *e.g.*, *Romer v. Evans*,

517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

II. The *Nollan/Dolan* Standards Do Not Apply to Permit Conditions Imposing Monetary Payment Obligations.

There is a second, independent reason the Court should affirm the judgment below. Petitioner's takings claim seeks to apply *Nollan* and *Dolan* to the situation where an alleged exaction does not affect tangible property, but instead involves a government-imposed monetary liability. Because *Nollan* and *Dolan* cannot logically be extended in this fashion either, the Court should reject petitioner's takings claim on this ground as well.

As discussed above, the *Nollan/Dolan* framework only applies when an alleged exaction involves an intrusion on private property that, imposed independently of any regulatory review process, would constitute a compensable taking under the Takings Clause. Thus, the threshold question in deciding whether *Nollan* and *Dolan* apply to regulatory conditions imposing monetary liability is whether the unilateral imposition by the government of an obligation to pay money constitutes a taking. Because the answer to this question is "no," *Nollan* and *Dolan* do not apply to permit conditions involving a monetary obligation.[2]

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[2] *Amici* do not rely on the suggestion that *Nollan* and *Dolan* should be limited to alleged exactions involving interests in real property. It is accurate to observe that *Nollan* and *Dolan* involved exactions of interests in land. However, in principle, the logic of these precedents extends to alleged exactions involving any type of property, real or personal. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-04 (1984).

A five-justice majority already answered this question in *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998); *see id.* at 539-45 (Kennedy, J., concurring in judgment and dissenting in part); *id.* at 554-56 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg). The case involved a constitutional challenge to the retroactive liability provisions of federal legislation requiring coal operators to fund the health care costs of former miners. There was no majority opinion for the Court, but five justices joined in concluding that this kind of generally applicable financial liability cannot support a takings claim. As Justice Kennedy explained, "one constant limitation" in the Court's takings jurisprudence "has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake." *Id*. at 541. Therefore, he concluded, the challenged legislation could not give rise to a viable takings claim:

> The Coal Act imposes a staggering financial burden on the petitioner . . . but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.,* a lien on a particular piece of property), a valuable interest in an intangible (*e.g.,* intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

This straightforward point does not resolve the question of whether *Nollan* and *Dolan* can or should extend to conditions involving government-imposed mandates to pay money.

Id. at 540. The four dissenting justices in *Eastern Enterprises* agreed with Justice Kennedy that the claimant had no viable takings claim, because "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money . . . ." *Id.* at 554 (Breyer, J., dissenting).

Petitioner properly accepts the premise that, in order for *Nollan* and *Dolan* to apply, an alleged exaction must be such that its unilateral imposition, outside of the regulatory permitting context, would constitute a taking. Pet. Brief at 17. But petitioner offers no persuasive support for the argument that this precondition can be met in this case. Petitioner completely ignores *Eastern Enterprises*. At the same time, he relies instead on two federal appeals court decisions that simply advertise the weakness of his position. *See id*. citing *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997); *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir. 1995). Both of these decisions pre-date *Eastern Enterprises* and therefore do not reflect the teachings of that decision. In addition, neither case addresses the question of whether a monetary imposition can constitute a taking. Instead, in both cases the courts merely *assumed* that the plaintiffs had viable takings claims in the course of addressing the threshold question of whether the federal District Court or the U.S. Court of Federal Claims had jurisdiction over plaintiffs' claims. Weaker authority is hard to imagine.

As Justice Kennedy indicated in *Eastern Enterprises*, the general principle that imposition of monetary liability does not implicate the Takings Clause

does not alter the fact that government seizures of specific funds contained in discrete accounts can constitute takings. *See* 524 U.S. at 540; *see, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (interest income generated by funds held in IOLTA accounts constitutes property of the owner of the principal under the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980) (interest generated by funds in segregated escrow account constitutes property for takings purposes). The difference between these two types of cases is that the imposition of a generalized liability affects total wealth or, in the case of corporations, total asset value, whereas in the case of segregated funds a government action dictating disposition of the funds affects an identifiable property interest. As the Court stated in *United States v. Sperry Corp.,* 493 U.S. 52, 66 n.9 (1989), "[u]nlike real or personal property, money is fungible."

As a matter of first principles, the conclusion of the five-justice majority in *Eastern Enterprises* was correct, and the Court should take this opportunity to reaffirm that ruling. Starting with the constitutional text, the language of the Takings Clause indicates that it does not extend to financial liabilities imposed by the government. The word "taking" in the Takings Clause is naturally read to refer to government action affecting some identifiable "thing." *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA L. REV. 885, 976-77 (2000) ("In order to expropriate, confiscate, seize, or take property, one must identify a particular piece of property—a 'thing'—that has been expropriated, confiscated, seized, or taken."). Imposition of a generalized obligation to pay money is not within the scope of the

Takings Clause because such a mandate does not affect a particular "thing." As Professor Merrill succinctly observed, "[o]ne cannot 'take' the bottom line of a balance sheet." *Id.*

The historical background to the Takings Clause confirms that the drafters were motivated by a concern about potential takings of an actual "thing," or to use Justice Kennedy's terminology, an "identified property interest." "The Takings Clause was prompted in part by concerns that emerged during the Revolutionary War years about military units requisitioning supplies without compensation." *Id*. at 984, citing 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 305-06 (1803). The drafters also were motivated in part by a concern about potential seizures of the most controversial form of property in U.S. history, slaves. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 839 (1995). Nothing in this history supports the idea that government impositions of financial liability on citizens should expose the public to takings claims.

Furthermore, the modern regulatory takings tests cannot be applied easily to alleged takings based on government impositions of monetary liability, supporting the conclusion that this type of government imposition is outside the scope of the Takings Clause. *See* Merrill, *The Landscape of Constitutional Property, supra* at 977. This is hardly surprising because the Court's modern takings jurisprudence "aims to identify regulatory actions that are functionally

equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. An asserted taking involving the imposition of monetary liability cannot easily be equated with a "classic taking."

Petitioner could attempt to frame his claim in one of two ways, each equally unavailing. On the one hand, he could argue that every government imposition of financial liability could be conceptualized as a *per se* taking, on the theory that a transfer of funds from a private citizen to the government constitutes a form of outright appropriation. *Cf. Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949) (government appropriation of leasehold in real property constitutes a compensable taking). But, on that view, the government presumably would be disabled from directly imposing virtually *any* type of financial assessment, user fee, or tax without triggering the Takings Clause. That conclusion is so far outside our legal traditions as to be unthinkable.

On the other hand, Petitioner could argue that takings claims based on government impositions of financial liability must be reviewed under the Court's regulatory takings tests. But it would be nonsensical to attempt to address whether the imposition of some financial liability deprived a claimant of "all economically viable use" of an asserted property interest in money. *See Lucas,* 505 U.S. at 1004. It would be equally difficult to apply the three-factor *Penn Central* framework to this type of case. *Penn Central* requires courts to consider the economic impact of the government action, the degree of interference with investment-backed expectations, and the character of the government action. None of these factors can

sensibly apply to an alleged taking based on government-imposed financial liability; they are only designed to apply to an alleged taking of some discrete item of property. "The diminution in value is the loss in value of a discrete thing. The interference with investment-backed expectations refers to the expectations regarding a discrete investment. And the character of the government's action, that is to say, how intrusive it is, refers to its action with respect to an identified resource." Merrill, *The Landscape of Constitutional Property, supra* at 977.

If the Takings Clause were expanded as petitioner requests, government entities that levy ordinary taxes could face takings liability. There is no principled basis for distinguishing between the types of monetary assessments discussed in this case, the financial liability imposed in *Eastern Enterprises*, and a wide variety of public taxation programs. *See Eastern Enterprises*, 524 U.S. at 556 (Breyer, J., dissenting) (observing that the idea of applying the Takings Clause to financial liabilities "bristles with conceptual difficulties," not least because "If the [Takings] 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?"). Converting taxes into potential takings would be a revolutionary step, for as far back as 1880, the 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." *Mobile County v. Kimball*, 102 U.S. 691, 703 (1880). The Court has never wavered from this position. *See also Brown v. Legal Foundation of Washington,* 538 U.S. 216, 243 (2003)

(Scalia, J., dissenting) ("[t]axes and user fees . . . are not takings").

Last but certainly not least from the perspective of *amici*, representing state and local governments across the country, petitioner's proposed expansion of the takings doctrine threatens to place major burdens on them, not only in the context of alleged exactions, but, for reasons just discussed, in the context of taxation. As Justice Kennedy explained in *Eastern Enterprises*, expanding the Takings Clause to encompass generalized financial obligations would "subject[] States and municipalities to the potential of new and unforeseen claims in vast amounts." 524 U.S. at 542. That statement accurately captures the problem *amici* would face if the Takings Clause encompassed government-imposed generalized financial liabilities.

The Takings Clause's specified remedy of "just compensation" raises additional difficulties for petitioner's argument that a mandate to pay money can establish takings liability. As the Court explained in *Lingle,* "the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" 544 U.S. at 536-37 (quoting *First English Evangelical Lutheran Church,* 482 U.S. at 314). "In other words, it 'is designed not to limit the governmental interference with property rights *per se,* but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'" *Id*. at 536-37, (quoting *First English Evangelical Lutheran Church,* 482 U.S. at 315). It would be awkward, at best, to attempt to implement the Takings Clause's compensation requirement in the case of an alleged taking of money, because such a claim would simply attempt to

force the government to return to the claimant the money the government has just "taken" from the claimant. At a minimum, expanding takings doctrine to encompass general monetary liabilities would require thorough redesign of the basic architecture of takings law. *Cf. Eastern Enterprises,* 524 U.S. at 522 (plurality opinion) (proposing an *ad hoc* exception to the principle that the Takings Clause is a money-mandating constitutional provision to accommodate the possibility of a takings claim based on a federal statute mandating monetary payments).

Beyond all this, there is simply no need to torture the Takings Clause in an attempt to make it fit this type of case, just as there was no justification for torturing the Takings Clause to address the claim in *Eastern Enterprises*. As Justice Kennedy stated in *Eastern Enterprises*, in a constitutional challenge to a monetary mandate, "the more appropriate constitutional analysis arises under the general due process principles rather than under the Takings Clause." 524 U.S. at 545. Moreover, the practical availability of the due process alternative is well established. *See, e.g., United Artists Theatre Circuit*, 316 F.3d 392; *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 136 (Fla. 2000) (striking down a school impact fee for failing both prongs of Florida's "dual rational nexus" test for impact fees).

The text of the Due Process Clause indicates that it has a broader scope than the Takings Clause. The Due Process Clause protects against "deprivations" of "property," in contrast with the Takings Clause's protection against "takings" of "private property." As discussed above, the term "taking" connotes a seizure or appropriation of some "thing;" by contrast, the term deprivation is sensibly read to be broader and

include government monetary exactions affecting wealth. In addition, use of the term "property" in the Due Process Clause, in contrast to the use of the phrase "private property" in the Takings Clause, also suggests that the Due Process Clause has a broader scope than the Takings Clause.

For all of these reasons, the five-justice majority in *Eastern Enterprises* correctly recognized that a challenge to government-imposed financial liability cannot raise a viable Takings Clause claim. Given this fact, a development condition imposing a mandate to pay money cannot trigger *Nollan* and *Dolan*, and the mere discussion of possible conditions of this type between a developer and local officials certainly cannot do so.

III. Local Governments Require Reasonable Latitude in Constitutional Review of their Regulatory Activity in Order to Function Effectively and Responsibly.

Apart from the doctrinal incoherence and utter impracticability of petitioner's attempt to apply the *Nollan*/*Dolan* framework to possible conditions on development approval that were never actually imposed and/or to government impositions of monetary liability, the broader policy arguments by petitioner and his *amici* for extending *Nollan* and *Dolan* to this type of case also are misguided.

The *amici*s' attacks on local government paint a picture that, based on our knowledge and experience, bears no relationship to reality. For example, one brief asserts that "municipalities will take any available opportunity to use exactions to impose extortionate conditions on property owners." Brief for Institute for Justice et al. as Amici Curiae Sup-

porting Petitioner at 37. In fact, conscientious local officials work hard on a daily basis to fairly balance the numerous competing demands they confront in administering the regulatory process. Local elected officials and their appointees seek not only to follow the law but to respond, as they properly must, to the expressed preferences of voters, who, of course, include property owners and developers. Developers and organizations of developers play a very active role in the local political process, *see* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 COLUM. L. REV. 473, 479 (1991), and their interests are well represented and taken into account in the development review process. This particular case, in which the District identified half a dozen alternative pathways for getting to "yes" on petitioner's development proposal (plus any pathways petitioner might have suggested), typifies the way in which local officials generally make strong efforts to approve development proposals while also safeguarding the public welfare.

In a twist on the old saying that a lawyer with bad facts should argue the law and a lawyer with bad law should argue the facts, petitioner's *amici* expend enormous time and effort arguing the asserted facts of *other* cases. These anecdotes are variously based on (1) untested allegations included in complaints, (2) newspaper accounts, (3) anecdotes recycled from earlier *amicus* briefs filed in other cases, (4) accounts of alleged conditions that were never challenged in court or that were the subject of legal challenges that failed for procedural reasons, (5) blog postings or web entries by property rights advocates, (6) assertions in (unsuccessful) petitions for *certiorari*, (7) cases

involving unrelated legal issues, such as condemnation actions, or (8) simply bald assertions. This hodgepodge of unreliable, unverifiable, and irrelevant stories provides no help to the Court in resolving *this* case.[3]

Petitioner's argument for expanding takings doctrine should be assessed in light of the significant challenges that the Court's recent expansion of takings doctrine has already created for local government. As a result of the decision in *First English Evangelical Lutheran Church*, if local officials guess wrong on whether a regulatory action will give rise to takings liability, and even if they are willing to promptly rescind the regulation in the face of an adverse court judgment, the community can be held liable for millions of dollars to a developer for a "temporary taking." Furthermore, as a result of the Court's determination that most taking cases should be resolved based on the facts and circumstances of the particular case, it is often difficult for expert counsel, and even more so for a general practitioner typically representing local governments, to accurately predict how takings cases will be decided. Finally, local governments generally lack and cannot obtain insurance to cover takings awards, and, of course, have no access to the unlimited Judgment Fund from which the United States covers its takings liabilities. Add all of these factors together and it is obvious why the threat of takings litigation under modern takings doctrine has had a chilling effect on local land use regulatory authority. Attorneys representing developers have been empowered to

[3] Preliminary research into several of *amici*s' anecdotes confirms that there would be a great deal to say on the other side, if they were before the Court.

routinely threaten local officials with potentially expensive takings lawsuits, and just as routinely, prudent local officials have felt compelled to reverse or alter their intended course to forestall litigation. *See* DANIEL POLLACK, CALIFORNIA RESEARCH BUREAU, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA?, CALIFORNIA RESEARCH BUREAU REPORT NO. CRB-00-004 (Mar. 2000).

The vulnerability of local governments to this kind of intimidation is due in part to the small size and modest budgets of many local governments. There are some 36,000 cities and towns across the country. Over 90 percent of all cities and towns have populations less than 25,000, and approximately 85 percent have populations less than 10,000. *See* U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS (Dec. 2002), *available at* http://www.census.gov/prod/2003pubs/gc021x1.pdf. Similarly, out of 3,068 counties, 23 percent have populations less than 10,000. *See County Intelligence Connection*, NATIONAL ASSOCIATION OF COUNTIES, http://www.naco.org/research/data/Pages/default.aspx (last visited Dec. 24, 2012). Virtually without exception, local governments with populations under 10,000 have no full-time legal staff. These smaller communities are typically forced to hire outside legal counsel each time they are sued, or even threatened with suit, imposing large and unexpected burdens on small governmental budgets. An actual takings award, even for a mere temporary taking, can come close to bankrupting a small town and imposes burdensome costs on all but the very largest jurisdictions.

Admittedly, the actual consequences in particular communities of the substantial leverage provided to

developers by modern takings jurisprudence is hard to document. But is fair to observe that the increasing challenges communities face today in controlling sprawl development, protecting critical natural resources, increasing housing affordability, preserving agricultural lands, and achieving other important land use goals are attributable in part to the modern expansion of takings doctrine. Further expansion of takings doctrine, as advocated by petitioner, would simply compound the challenges.

Petitioner's proposed expansion of takings law also would have serious constitutional costs. By constraining the authority of local officials such a move would undermine the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"), the Guaranty Clause in Article IV, section 4 of the Constitution ("The United States shall guarantee to every State in this Union a Republican Form of Government"), and the promise implicit in the opening lines of the Constitution, "We the People of the United States," that is, in the immortal words of President Abraham Lincoln, a "government of the people, by the people, for the people." Petitioner's proposed expansion of takings law represents a genuine threat to democratic government at the local level, where a primary function of government is precisely to manage land use.

Petitioner's proposal to expand *Nollan* and *Dolan* is particularly troubling because those decisions represent dramatic departures from the Court's normal approach of mandating deferential review of the constitutionally of social and economic regulation. *See Lingle,* 544 U.S. at 545; *see also City of Cuyahoga*

Falls v. Buckeye Community Hope Foundation, 538 U.S. 188, 198 (2003) (rejecting a due process challenge to denial of a building permit that in "no sense constituted egregious or arbitrary government conduct"). Without questioning that *Nollan* and *Dolan* represent binding precedent, or the justifications for the heightened scrutiny established by those decisions in the "special context of exactions," an expansion of those precedents beyond their proper domain would have serious adverse consequences for local governments. Under ordinary substantive due process review of administrative action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). In addition, the party challenging the constitutionality of government action ordinarily bears the burden of proof. Under *Nollan* and *Dolan*, by contrast, the courts must make an "individualized determination" about whether an exaction meets the particularized "essential nexus" and "rough proportionality" tests. The review standard involves intermediate scrutiny, rather than ordinary deferential review. And, perhaps most importantly, the burden of proof has been shifted from the regulated party to the government.

The reasons supporting deferential review of social and economic legislation are by now well established. The courts are not "well suited" to judge "the efficacy of" government regulations, an observation that applies with special force to the vast array of state and local land use regulations. *Lingle*, 544 U.S. at 544; *see also Village of Belle Terre v. Boraas*, 416 U.S. 1, 16 (1974) ("Our role is not and should not be to sit

as a zoning board of appeals."). In addition, under the separation of powers doctrine, courts are reluctant to "substitute their predictive judgments for those of elected legislatures and expert agencies." 544 U.S. at 544. And, in the context of a suit involving local government, deferential federal constitutional review supports federalism. Contrary to the suggestion of certain of petitioner's *amici*, the Court's fidelity to the principle of judicial deference is not designed to suit the "convenience" of government bureaucrats. Instead, it is central to the U.S. constitutional system of government. In sum, the extraordinary and settled character of the *Nollan/Dolan* standards, by itself, argues forcefully against extending those decisions.

Another important consideration in evaluating petitioner's proposal is that the *Nollan/Dolan* standards necessarily apply to every permit application. Extension of those standards would also presumably apply in a similar manner, precluding any exemption for small-scale development projects. Legislation mandating that government agencies review proposed development activity typically includes some kind of threshold. *See, e.g.*, National Environmental Policy Act, 42 U.S.C. § 4332 (restricting the requirement to prepare an environmental impact statement to "major Federal actions significantly affecting the quality of the human environment"). By their nature, however, the *Nollan/Dolan* standards, including the requirement of an "individualized determination" to support each exaction imposed, must be applied to any development project authorized subject to any exaction, regardless of the developments size or impact. Under petitioner's proposal, the same requirement of an individualized

determination would also apply across the board, regardless of the size of the development, and it would apply in each instance in which any of a variety of possible exactions were even considered. The volume of government decision-making that would be swept up by these new requirements is staggering.

Finally, monetary impact fees imposed on developers represent a common and entirely legitimate way for communities to address the costs that development places on the larger community. Impact fees come in essentially two forms: first, impact fees that are designed to reimburse the community for the special benefits that new, publicly-financed infrastructure or other public projects confer on particular developers; and, second, impact fees that help finance efforts to mitigate the burdens or harms to the community produced by a particular development. In either case, the essential inquiry is whether a cost (either of providing a benefit, or mitigating a harm) should be imposed on the general community by having all taxpayers pay it (or, what may amount to same thing, by simply leaving a harm or burden unaddressed) or on a specific portion of the community specially benefited by a public project or specially responsible for a harm.

As Justice Holmes explained many years ago, determining the proper allocation of such financial responsibilities is a matter of "forecast and estimate," *Louisville & Nashville Railroad Co. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433 (1905), and hence peculiarly within the purview of the legislatures and expert agencies. As a result, the Court has long said courts must uphold the other branches' judgments about how to allocate the costs of special benefits

unless they are "palpably arbitrary." *Houck v. Little River Drainage District*, 239 U.S. 254, 262 (1915). Logic supports application of the same deferential standard when government seeks to assess impact fees to address the burdens and harms caused by specific development projects.

Developers operating in a competitive environment have an obvious economic incentive to seek to reduce their costs and maximize their profits by reaping the benefits of public infrastructure investments without helping to pay for them and avoiding or minimizing responsibility to pay to mitigate the harms associated with their projects and shunting these costs to the general taxpayers or the community. But every time a developer succeeds in avoiding paying a cost that should fairly be assigned to the developer, the cost does not disappear. It is simply shifted to others.

These types of conflicts are frequent, complicated, and not generally susceptible to easy, across-the-board solutions. The Court has consistently opted in favor of assigning primary responsibility for making these judgments to elected officials and their appointees, and upholding their judgments absent some clear abuse of power. In seeking to force government officials to bear the burden of proof in each instance to justify particular impact fees—and even potential impact fees that were merely contemplated but never actually imposed—petitioner is advocating nothing less than a revolutionary change in the law. The Court should reject the invitation.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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