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 The State Of Florida

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, THE CITY OF NEW YORK, AND THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Planning Association ("APA") is a nonprofit public interest and research organization founded in 1909 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning – including physical, economic, and community planning – at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public's well-being today, as well as to the well-being of future generations, by developing sustainable and healthy communities and environments. The APA has 47 chapters and represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues, nationwide.

The APA has filed *amicus* briefs on behalf of planning interests for decades, including in such cases as *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte*

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *Amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Rapanos v. United States*, 547 U.S. 715 (2006); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010).

Amicus City of New York ("NYC") is a municipal corporation in New York State. Under New York State law and the New York City Charter, NYC adopts and administers zoning regulations and grants zoning special permits and variances pursuant to those regulations. NYC also administers environmental review procedures, which involve the fashioning of mitigation measures to address environmental harms, as well as a number of environmental permitting procedures affecting the use of land. NYC has a longstanding interest in this Court's takings jurisprudence, having been the respondent in two of this Court's most important takings cases, *Penn Central v. New York City,* 438 U.S. 104 (1978), and *Loretto v. Teleprompter,* 458 U.S. 419 (1982).

Amicus National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a nonprofit organization for the purpose of furthering the historic preservation policies of the United States and to "facilitate public participation" in the

preservation of our nation's heritage. 16 U.S.C. §§ 468-468d. In addition, Congress has designated the Chairman of the National Trust as a member of the federal Advisory Council on Historic Preservation, which is responsible for overseeing federal agency compliance with Section 106 of the National Historic Preservation Act. *Id.* § 470i(a)(8). The mission of the National Trust is to provide leadership, education, and advocacy to save America's diverse historic places and revitalize our communities. With some 750,000 members and supporters nationwide, the National Trust carries out a wide range of programs and activities to advance the public's interest in historic preservation. These activities include the promotion of public policies, legal tools, and tax incentives that support the preservation of America's heritage. The National Trust often acts as an advocate in the administrative review process for permitting actions at the federal, state, and local levels, where mitigation measures – similar to those present in the instant case – are often used to avoid, minimize, and mitigate harm to historic and cultural resources.

The National Trust frequently participates, both as *amicus curiae* and as a party, in judicial proceedings relating to the enforcement or application of laws that promote the preservation of historic places. The National Trust has previously participated as *amicus curiae* before this Court in 13 takings cases: *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte*

Dunes at Monterey, Ltd., 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 431 U.S. 104 (1978).

Amici bring a vital perspective to regulatory takings issues and have a strong interest in ensuring that takings jurisprudence remains appropriately tailored so that it does not undermine legitimate planning activities and other community protections. Because Petitioner's theory presents a grave threat to workable, collaborative land use planning, *Amici* respectfully request that this Court affirm the Florida Supreme Court's decision.

SUMMARY OF ARGUMENT

Each day in countless communities across the country, land use planning and zoning officials negotiate with developers over permit conditions that promote responsible development – including, as in this case, conditions that mitigate related environmental harms. These negotiations typically end with agreed-upon conditions, tailored to each

unique proposal, that allow development to go forward, while also providing mitigating benefits to account for the very real costs development can impose upon the community at large.

Mr. Koontz asks this Court to allow developers to cut off negotiations and state a cognizable federal takings claim any time the developer believes that land use officials are asking for too much during the course of this negotiation process.[2] Expanding the purview of the Takings Clause, and, in particular, the fact-intensive inquiries required under this Court's rulings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in this manner would be a disaster both for the land use planning process and for the federal judiciary, which would find itself, for no good reason, flooded with cases that put judges in control over the workaday operations of land use regulators.

The facts of this case illustrate why *Nollan* and *Dolan* cannot be applied coherently in the context of failed negotiations. Both *Nollan* and *Dolan* concerned finalized conditions – instances in which a permit was approved and specific conditions were attached. Under Mr. Koontz's theory, any failed negotiation could serve as the basis of a constitutional challenge based on little

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[2] In 2000, Coy Koontz, Sr., died. At that point, his son, Coy Koontz, Jr., became the personal representative of the estate and the Plaintiff/Petitioner in this action. Throughout, we simply refer to both Petitioner and Coy Koontz, Sr., collectively, as "Mr. Koontz."

more than the informal offers of a government agency. Here, the District proffered Mr. Koontz a long list of potential mitigation options that would have complied with state guidelines for projects involving the destruction of wetlands – some calling for on-site mitigation and others for off-site mitigation.[3] Indeed, contrary to Mr. Koontz's hyperbolic and unsupportable rhetoric about the District engaging in a "plan of extortion," Pet. Br. 5, 12, the record demonstrates that the District bent over backwards to find a way to allow Mr. Koontz's project to go forward – with Mr. Koontz cutting off negotiations before the parties could settle upon a single, concrete mitigation plan that complied with state guidelines. In such circumstances, it is unclear which conditions a court should scrutinize under *Nollan* and *Dolan* – all conditions proposed during the parties' negotiations, only those on the table when talks break down, or all conceivable conditions that could have been suggested by either party? No matter the answer, extending *Nollan* and *Dolan* to cover such situations would be unworkable for both public officials and judges.

As important, the doctrinal foundation of *Nollan* and *Dolan* – this Court's doctrine of unconstitutional conditions – simply does not

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[3] *Dolan* itself demonstrates that there is nothing talismanic about whether the required mitigation occurs on-site or off-site. *See* 512 U.S. at 394 ("If petitioner's proposed development had somehow encroached on existing greenway space in the city, it would have been reasonable to require petitioner to provide some alternative greenway space for the public either on her property *or elsewhere*.") (emphasis added).

permit the application of their tests to the suggested conditions at issue in this case. As the first step in any unconstitutional conditions inquiry, a claimant must demonstrate that he or she is being asked to give up a clear constitutional right in exchange for a discretionary benefit. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958). In the takings context, that requires the claimant to show that the permit condition would be a *per se* taking if required by the government unilaterally. *See Dolan*, 512 U.S. at 384; *Nollan*, 483 U.S. at 831. However, none of the conditions proposed by the District constitutes a *per se* taking, and thus Mr. Koontz's claim fails even this threshold requirement under both *Nollan* and *Dolan*. Furthermore, applying *Nollan* and *Dolan* outside the context of *per se* takings would once again blur the clear line that this Court drew between the Takings Clause and the Due Process Clause in *Lingle v. Chevron*, 544 U.S. 528 (2005), when it overturned *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and reaffirmed the limited reach of *Nollan* and *Dolan*.

Nevertheless, Mr. Koontz suggests that this Court must expand *Nollan* and *Dolan* far outside of their appropriate doctrinal application. Otherwise, according to Mr. Koontz, landowners would be left with no claim to relief when a negotiation over a land use permit breaks down and a permit is denied. *See* Pet. Br. 13, 25, 44-45. That is simply not the case. Instead, even without extending *Nollan* and *Dolan* to cover such situations, landowners have several other potential claims available under both the Takings Clause and the

Fourteenth Amendment. The problem for Mr. Koontz is that the factual record in this case does not support a finding of a constitutional violation under any of these theories.

ARGUMENT

I. THE SPECIALIZED TESTS THIS COURT DEVELOPED IN *NOLLAN* AND *DOLAN* CANNOT BE EXTENDED TO OFFERS OR SUGGESTED OFFERS BY THE DISTRICT DURING A PERMIT NEGOTIATION PROCESS.

A. *Nollan* And *Dolan* Cannot Be Applied To This Case Because Mr. Koontz Broke Off Negotiations Before Any Particular Condition Was Demanded By The District.

Mr. Koontz portrays the District's review of his permit application in Orwellian terms. *See* Pet. Br. 23 ("[T]he District sought to . . . cloak within the processing of Mr. Koontz's permit application a 'plan of extortion.' . . . The District wanted his land *and* his money.").[4] The actual process – which involved a District scientist who had never recommended a permit denial in *more than one thousand prior cases*, Trial Tr. 234, and offers by the District that Mr. Koontz's own engineer

[4] Mr. Koontz applied for both a management and storage of surface water permit and a wetland resource permit. Resp't Br. 6-7. Throughout, we simply refer to these applications, collectively, as Mr. Koontz's "permit application."

described as "excellent," Trial Tr. 62 – bears no resemblance to the one described by Mr. Koontz.[5] An accurate account of the record in this case illustrates why *Nollan* and *Dolan* are unworkable in the context of failed negotiations.

In 1994, Coy Koontz sought to develop an environmentally valuable tract of land located within a Riparian Habitat Protection Zone in Florida. Resp't Br. 9-10.[6] Development of this property required a permit from the St. Johns River Water Management District. *Id*.

Elizabeth Johnson, a District scientist, supervised the processing of Mr. Koontz's application. Trial Tr. 68. Johnson had handled more than one thousand such applications since joining the District in 1988, and, prior to Mr. Koontz's case, had never recommended a permit denial. Trial Tr. 234. In 1993, Johnson toured the proposed development site with one of Mr. Koontz's consultants. Trial Tr. 69. From there, the parties tried to negotiate a deal that would both permit Mr. Koontz to develop his property and offset related harms to protected wetlands. Trial Tr. 17-18.

Contrary to Mr. Koontz's account of these negotiations, the District's discretion was far from "limitless" or "unfettered." Pet. Br. 25, 44. Instead, it was guided and constrained throughout by state

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[5] "Trial Tr." refers to the transcript of Mr. Koontz's liability trial.

[6] "Dist. Hr'g Tr." refers to the transcript of Mr. Koontz's hearing before the District's Governing Board.

law – guidelines and constraints rooted in scientific best practices and intended to respond to decades of unchecked wetlands destruction, both in Florida and nationwide. Resp't Br. 8-13. Furthermore, the District never issued Mr. Koontz an "ultimatum" or a "'take it or leave it' demand." Pet. Br. 22, 44. Instead, from the beginning of the parties' negotiations all the way until the day of Mr. Koontz's permit hearing, the District presented him with proposals that were designed to find a way to "get to yes," Pet. App. E-1 to -3 – even though it was always *Mr. Koontz's* burden, not the District's, to come up with mitigation options that complied with state law, Fla. Stat. § 373.414(1)(b).

Throughout the parties' negotiations, the District made one thing absolutely clear: Mr. Koontz's only offer – an offer to put a conservation easement on his remaining 11 acres of wetlands – was not sufficient, on its own, to meet state guidelines. Resp't Br. 10; Trial Tr. 25. The reason for this was simple: by definition, Mr. Koontz's proposal would have resulted in a net loss of wetlands within the river basin, as he was seeking to destroy 3.4 acres of protected wetlands in exchange for agreeing not to develop 11 additional acres of already-protected wetlands – a net loss of 3.4 acres. *Id.*

This result – the net loss of wetlands – is precisely why such permit-for-conservation-easement exchanges are the most undesirable form of mitigation from the State's perspective. Resp't Br. 11. Indeed, the state guidelines applicable in this case required that proposals like Mr. Koontz's,

which placed already-protected wetlands into a conservation easement, only be pursued *after* considering possible mitigation through wetlands creation or enhancement – each of which more directly increased wetlands functions within the river basin as a whole. R. 1704. Indeed, the guidelines themselves reminded regulators that, "historically," the State had only accepted proposals for a conservation easement "*after* on-site wetland creation and/or enhancement" were deemed insufficient. R. 1703 (emphasis added).

The State's preference for mitigation through wetlands creation or enhancement was reflected in the mitigation ratios established by the state guidelines, which called for much higher ratios when applicants – like Mr. Koontz – proposed merely placing a conservation easement on already-protected wetlands. Resp't Br. at 12. Indeed, Florida, like other states, required ratios ranging from 10:1 to 100:1 for such proposals, depending on the quality of the wetlands involved. *Id.*; *cf.* Wash. State Dep't of Ecology et al., 06-06-011a, *Wetland Mitigation in Washington State – Part I: Agency Policies and Guidance* 77 (2006) ("[Mitigation] [r]atios for preservation as the sole means of mitigation shall generally start at 20:1."); Jonathan Silverstein, *Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking in a Comprehensive Approach to Wetlands Protection*, 22 B.C. Envtl. Aff. L. Rev. 129, 157 (1994) (noting that the Environmental Protection Agency Region IV (southeast) issued draft guidance that established mitigation ratios of 10:1 for wetlands preservation). The State required much lower ratios – ratios

starting at less than 1:1 – when the applicant offered to create new wetlands or enhance existing wetlands. Resp't Br. at 12.

At a minimum, then, for his permit application to be approved without running afoul of state guidelines, Mr. Koontz would have had to place 34 acres of wetlands into a conservation easement in order to compensate for destroying 3.4 acres of wetlands through new development. Because Mr. Koontz only had 11 acres of wetlands remaining on-site, Trial Tr. 240, 245-46, he had to reduce the size of his development proposal, conduct some form of on-site or off-site mitigation, or find a more suitable site for his proposed development in order to comply with state guidelines and offset the environmental harms associated with his proposed development, Trial Tr. 240-41.

With these constraints in mind, the District provided Mr. Koontz with a long (and open-ended) list of options for both satisfying state guidelines and allowing his project to go forward. Resp't Br. at 13-14.[7] First, the parties discussed reducing the scale of Mr. Koontz's development, allowing him to meet the State's suggested mitigation ratio solely by placing his remaining property into a

[7] At no point did the District even request that Mr. Koontz undertake wetlands creation, typically the most expensive form of mitigation and which, according to estimates from the mid-1990s, could cost up to $75,000 per acre. Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993*, 8 J. Land Use & Envtl. L. 521, 575 (1993).

conservation easement. Resp't Br. 13-14. In addition, the District proposed that Mr. Koontz could further reduce environmental harms on-site by constructing a subsurface storm-water management system and replacing side-slope areas with stem walls. *Id.* Mr. Koontz rejected each of these options, calling the proposal to construct a subsurface storm-water management system, in particular, "too costly," though he provided no evidence to support this assertion. R. 1616.

Finally, following up on this suggestion, and prior to Mr. Koontz's hearing, the District also went so far as to provide Mr. Koontz with two specific off-site mitigation options, each designed to comply with state guidelines: 1) a proposal to restore and enhance at least 50 acres of wetlands on a parcel 4.5 miles away by replacing culverts and plugging ditches; and 2) another to perform similar off-site mitigation at a site 7 miles away solely by plugging ditches. Resp't Br. 14-15.

Mr. Koontz suggests that these conditions were onerous, even tyrannical. However, both the hearing and trial records demonstrate otherwise, and, in any event, he cannot prove a taking by selectively attacking a subset of the alternatives that the District offered in negotiations. While the details of these off-site mitigation options were never fully settled, a District staff member testified at Mr. Koontz's hearing that the related costs "would be very minimal." Dist. Hr'g Tr. 7. And, later, at trial, a District scientist testified that the District was simply asking Mr. Koontz to install one culvert and remove another, which would

restore and enhance 50 acres off-site and, in conjunction with his proposed conservation easement, would have permitted Mr. Koontz to go forward with his entire development project. Resp't Br. 15. In fact, at trial, Mr. Koontz's own engineer, Brian Fogle, *agreed* that the off-site mitigation proposed by the District was "relatively minimal," requiring "a couple of culverts" and "only a couple thousand additional [dollars]." Trial Tr. 60. In the end, Fogle recommended that Mr. Koontz accept the District's offer to perform off-site mitigation – an offer that he called "excellent." Trial Tr. 62.

All told, therefore, the District proposed three different ways in which Mr. Koontz could have developed his property while also satisfying state guidelines: by reducing the size of his development proposal; by performing on-site remediation to improve the functioning of his own wetlands: or performing "minimal" off-site mitigation to restore other wetlands in the basin. Mr. Koontz does not attempt to demonstrate that *all* of these alternatives violated the *Nollan* and *Dolan* requirements (even if those requirements applied in this setting). Instead, he seeks to further prolong this litigation by attempting to show that a subset of the alternatives offered by the District do not satisfy *Nollan* and *Dolan*.

At the permit hearing, a District Board member asked Mr. Koontz's representative whether he "would be willing to go back with the [District] staff over the next month and renegotiate" to try to come up with a set of conditions that worked for both parties – especially since the parties had yet

to settle on a single, concrete mitigation plan. Dist. Hr'g Tr. 23; Resp't Br. at 15. However, Mr. Koontz declined, rejecting each of the District's proposals out of hand, Dist. Hr'g Tr. 23, even before his representative could get additional details from the District and even as Mr. Koontz himself understood that the related costs of such mitigation "would be minimal," Trial Tr. 65. The District then denied Mr. Koontz's permit, concluding that his proposed development would adversely affect the area's fish and wildlife without sufficient mitigation. Resp't Br. 15-16; Pet. App. A-6. Mr. Koontz then filed this lawsuit in state court.

Now, Mr. Koontz asks this Court to allow him to turn his state court lawsuit into a federal case and have this Court and lower courts across the country apply the fact-intensive inquiry of *Nollan* and *Dolan* to failed land use negotiations. *Nollan* and *Dolan* concerned finalized conditions – instances in which a permit was approved and specific conditions were attached. At that point, the relevant landowners knew precisely what was required of them, and this Court knew which conditions to scrutinize. Under Mr. Koontz's theory, any failed negotiation could serve as the basis of a constitutional challenge based on nothing more than the informal offers of a government agency. For instance, in this case, the trial court found that the off-site mitigation options offered by the District had "not been precisely prescribed" and that the cost of the proposed off-site mitigation "was not definite," ranging anywhere between $90,000 and $150,000, with some additional evidence that "it could cost as little as $10,000."

Pet. App. D-4. And this was only one of at least three alternatives proposed by the District, including options that relied solely upon on-site mitigation – options that were largely ignored by the courts below. In such circumstances, should courts apply *Nollan* and *Dolan* to all of the conditions that were mentioned during the negotiation process, only those on the table when the parties finally decided to end negotiations, or all conceivable conditions that could have been suggested by either party under state guidelines?

The answer is strongly suggested by the very analysis a court would need to perform if *Nollan* and *Dolan* govern in this setting. *Dolan*, in particular, would require an "individualized determination" that the relevant condition "is related both in nature and extent to the impact of the proposed development." *Dolan,* 512 U.S. at 391. In applying that test, this Court focused on the findings made at the time that the Tigard City Council formally imposed that condition, and asked whether the City had quantified its findings, and gone so far as to determine whether the condition "will, or is likely to," offset some of the impact. *Id.* at 395-96. This is hardly the type of analysis that a public agency should be required to perform for every alternative that it merely raises during the course of its negotiations with landowners.

In the end, extending *Nollan* and *Dolan* in this manner – in effect, constitutionalizing all run-of-the-mill land use negotiations – risks grinding both

the land use process and the judicial system itself to a halt.[8] As important, such a result would be inconsistent with the text and history of the Takings Clause, as well as this Court's takings jurisprudence.

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[8] Petitioner and *Amici* rely heavily on a study of land use planners conducted by Anne Carlson and Daniel Pollak. *See* Pet. Br. 27 (citing Anne E. Carlson & Daniel Pollack, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. Davis L. Rev. 103 (2001)); Amicus Br. for Owners' Counsel of America 15-18 (same); Amicus Br. for the Land Use Institute, Ltd. 12-14 (same). According to their argument, the Carlson-Pollak study supports Petitioner's argument that *Nollan* and *Dolan* can easily be extended to cover this case. However, that very study contradicts rather than supports Petitioner's argument. Indeed, Carlson and Pollak caution that *Nollan* and *Dolan* are *already* problematic in cases in which the government is seeking to protect the environment – let alone *after* extending those rules to cover new situations, such as failed negotiations. *See* Carlson & Pollak, *supra*, at 134-36. As Carlson and Pollak explain:

> In principle, local governments have the authority to mitigate environmental impacts as an exercise of the police power. . . . Nevertheless, the impacts of development on these public goods may be hard to quantify or even define with precision, thus *making nexus and rough proportionality difficult to quantify*.

Id. at 135 (emphasis added). In the end, Carlson and Pollak conclude that, although the ultimate effects of *Nollan* and *Dolan* on environmental projects are "not yet known," "a logical extension of [their] findings" is that if localities do not find alternative funding sources, they will face "greater amounts of hardscape," "less open space," and fewer environmental projects overall. *Id.* at 136.

B. Under The Doctrine Of Unconstitutional Conditions, *Nollan* And *Dolan* Can Only Be Applied In Special Cases, Such As Land Dedications, In Which The Condition Would Be A *Per Se* Taking If Unilaterally Imposed.

The text of the Takings Clause is narrow, applying only when property is "taken" by the government, and when the plaintiff seeks "just compensation" for that alleged taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted); *id.* at 1028 n.15 ("[E]arly constitutional theorists did not believe that the Takings Clause embraced regulations of property at all."). While this Court has, since *Mahon*, allowed takings challenges when government regulation "goes too far," every test of regulatory takings liability "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 537, 539. For this reason, the *Dolan* Court described its rough proportionality test as an "outer limit[]" on "the commendable task of land use planning," 512 U.S. at 396, and this Court has repeatedly reaffirmed

the limited reach of *Nollan* and *Dolan* to land use decisions conditioning approval of a development permit on the dedication of real property. *See Lingle*, 544 U.S. at 546 (explaining that *Nollan* and *Dolan* involved "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"); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (reaffirming that *Dolan*'s rough proportionality test applies only in the "special context of exactions . . . conditioning approval of development on the dedication of property to public use").[9]

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[9] Petitioner argues that this case involves a straightforward permit denial based "solely" on Mr. Koontz's refusal to "accede" to the District's supposed "demand" that he "dedicate his money to a public use." Pet. Br. 38-39. In so doing, Petitioner draws on lower court cases to argue that *Nollan* and *Dolan* can easily be extended to cover such situations. Pet. Br. 34-39. However, despite Petitioner's attempt to simplify the facts of this case, the District's permit decision was *not* based "solely" on Mr. Koontz's refusal to accept one of the District's off-site mitigation proposals. Instead, the District provided Mr. Koontz with a bevy of mitigation options designed to comply with state guidelines – some involving off-site mitigation, others involving exclusively on-site measures – each of which would have allowed Mr. Koontz to go forward with his development project. *See* Pet. App. E-1 to -3; R. 1625-29. As such, unlike the lower court decisions discussed in Petitioner's brief, no single, fixed demand was on the table when Mr. Koontz decided to cut off negotiations with the District and bring this lawsuit. *Compare* Section I.A, *supra* (outlining the various mitigation proposals offered by the District in this case), *with Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998) (applying *Nollan* and *Dolan* to a rezoning

These limits on the application of *Nollan* and *Dolan* are fixed by the rooting of these cases in the doctrine of unconstitutional conditions. Under this doctrine, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government." *Dolan*, 512 U.S. at 385. When considering the constitutionality of a challenged condition, courts follow a two-step approach. First, they ask whether the claimant is being asked to give up a clear constitutional right in exchange for a discretionary benefit. *See, e.g.*, *Speiser*, 357 U.S. at 518-19. Second, if a constitutional right *is* being taken away, then they ask whether that burden is justified. *See, e.g.*, *id.* at 521-29. Relevant to the issues raised by this case, unless and until a claimant can show a condition that would be a *per se* taking if unilaterally imposed, a court cannot proceed to step two of the *Nollan* and *Dolan* inquiry – the application of the "substantial nexus" and "rough proportionality" tests – which determines whether a deprivation of constitutional rights is justified.

In both *Nollan* and *Dolan*, the challenged conditions – a public right of passage in *Nollan* and a dedication of land in *Dolan* – were paradigmatic examples of *per se* takings. *See Dolan,* 512 U.S. at 384; *Nollan*, 483 U.S. at 831, *cf. Lingle*, 544 U.S. at 537 ("The paradigmatic taking requiring just

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request denial involving a single, well-defined government demand for a land dedication).

compensation is a direct government appropriation or physical invasion of private property."). Indeed, both *Nollan* and *Dolan* emphasized the fact that the challenged condition eliminated the right of the landowner to exclude others from his or her real property – "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan,* 512 U.S. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); *Nollan*, 483 U.S. at 831 (same).

In *Dolan*, for instance, the landowner applied for permission to expand her plumbing and electronic supply stores. 512 U.S. at 379. As a condition of the permit, the city required the landowner to dedicate a strip of land behind her store in a floodplain along nearby Fanno Creek. *Id.* The land would have been used as part of a public bike path, walkway, and greenway. *Id.* at 379-80. The purpose of the dedication was to reduce traffic congestion on nearby roads, as well as flood risks along the creek. *Id.* at 381-82.

In applying the doctrine of unconstitutional conditions, the *Dolan* Court began by asking whether the challenged condition deprived a landowner of a constitutional right. *Id.* at 384. The *Dolan* Court concluded that it did, observing that "had the city simply required petitioner to dedicate the strip of land along the Fanno Creek for public use, rather than condition the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." *Id.* at 384.

Since the condition itself would have violated the Takings Clause if unilaterally imposed, the *Dolan* Court then proceeded to step two of the unconstitutional conditions inquiry and considered whether such a burden was justified. *Id.* at 391. In particular, it focused on whether the challenged condition – which compelled the dedication of land without just compensation – was "roughly proportional" to the harm anticipated from the proposed development. *Id.* at 391-96. In concluding that the challenged condition failed this "rough proportionality" test, the *Dolan* Court observed that the city failed to explain "why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* at 393.

This Court applied a similar analysis in *Nollan*. There, the Nollans sought permission to replace a small oceanfront bungalow with a much larger home. 483 U.S. at 827-28. The permit included a condition requiring the Nollans to dedicate a public easement along the beach. *Id.* at 828. Because the larger house would reduce the public's view of the ocean from the coastal highway, the State argued that the dedication would help address this "psychological barrier." *Id.* at 835.

Once again, this Court rooted its analysis – albeit implicitly – in the doctrine of unconstitutional conditions. The *Nollan* Court began by asking whether the challenged condition deprived the landowner of a constitutional right. *Id.* at 831. As in *Dolan*, the *Nollan* Court concluded that it had, explaining in words echoing *Dolan*:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on agreeing to do so, we have no doubt there would have been a taking.

Id.

Since the condition itself would have violated the Takings Clause if unilaterally imposed, the *Nollan* Court next considered whether such a burden was justified. The *Nollan* Court concluded that it was not, explaining that it was "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house." *Id.* at 838.

Whereas *Nollan* and *Dolan* illustrate the application of the doctrine of unconstitutional conditions in the land use planning context, this Court's ruling in *Yee v. City of Escondido*, 503 U.S. 519 (1992), illustrates the limits of this doctrine. In *Yee,* the owners of mobile home parks challenged a rent control law and restrictions on evictions. The Yees argued, among other things, that it would be unconstitutional for the government to condition their right to rent the property on the forfeiture of their right to receive compensation for a physical occupation. The Court flatly rejected the argument

because there was no compelled occupation of their land:

> Petitioners argue that if they have to leave the mobile home park business in order to avoid the strictures of the Escondido ordinance, their ability to rent property has in fact been conditioned on such a forfeiture. This argument fails at its base, however, because there has simply been no compelled physical occupation giving rise to a right to compensation that petitioners could have forfeited.

Id. at 531-532. Distinguishing *Nollan*, the Court observed that if the city had required the Yees to rent the property to others in the first place, then the city might "lack the power to condition [the Yees'] ability to run mobile home parks on their waiver of this right." *Id.* at 532. But, because the ordinance "does not effect a physical taking in the first place," the Yees' unconstitutional-conditions argument failed. *Id.* As in *Yee*, Mr. Koontz's unconstitutional conditions argument "fails at its base."

Applying *Nollan* and *Dolan* outside the context of *per se* takings would force judges to use a test designed to adjudicate whether it is permissible to take property as a condition of granting a permit, to *decide if there has been a taking in the first place.* This would be particularly problematic because the *Nollan-Dolan* tests were derived, at least in part, from the Due Process Clause and the language of *Agins*, 447 U.S. at 260,

which asserted that land use regulations must "substantially advance legitimate state interests." *See Nollan*, 483 U.S. at 834. This Court has subsequently ruled, unanimously, in *Lingle* that *Agins*'s "substantially advance" language is not an appropriate test for takings liability. In fact, recognizing that the *Nollan-Dolan* tests were rooted in *Agins*, the *Lingle* Court specifically addressed the continued validity of these tests and explicitly limited their application to permit conditions that involved *per se* takings. 544 U.S. at 545-49. By seeking to extend *Nollan* and *Dolan* to conditions suggested in the context of a failed negotiation that are not, in any event, *per se* takings, Petitioner invites this Court to obliterate this dividing line and blur again the clear line that the *Lingle* Court drew between the Takings Clause and the Due Process Clause. The Court should reject this invitation.

C. None Of The Conditions Suggested By The District Constitutes A *Per Se* Taking, And Thus *Nollan* And *Dolan* Cannot Be Applied To This Case.

As the previous section makes clear, to invoke the tests from *Nollan* and *Dolan*, Mr. Koontz must first show that the District demanded a condition that amounts to a *per se* taking in exchange for permit approval. This is impossible for Mr. Koontz to establish for two reasons. First, as explained in Section I.A, *supra*, the negotiations with Mr. Koontz never progressed to a point where any concrete demands were made by the District. Second, none of the conditions suggested by the

District during its negotiations with Mr. Koontz – let alone the single type of condition actually challenged by Mr. Koontz in this case, a condition requiring him to "dedicate money, services, labor, or any other type of personal property to a public use," Pet. Br. ii – remotely constitutes a *per se* taking. While it is Mr. Koontz's burden to demonstrate a *per se* taking, and he has not come close to meeting that burden, it is worthwhile to consider each of the conditions suggested by the District, in turn, simply to illustrate how unmanageable it would be for judges to apply *Nollan* and *Dolan* to offers made in the context of failed negotiations.

As this Court explained in *Lingle*, there are "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes": 1) when "government requires an owner to suffer a permanent physical invasion of her property," as in *Loretto*; and 2) when a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]'" of her property, as in *Lucas*. 544 U.S. at 538 (citations omitted). Outside of these "two relatively narrow [*per se*] categories" courts apply the deferential, multifactor test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. In this case, none of the proposed conditions would have been a *per se* taking if unilaterally imposed and, therefore, none could serve as the basis of an unconstitutional conditions allegation that warrants scrutiny under *Nollan* and *Dolan*.

Conservation Easement. In this case, Mr. Koontz has not seriously challenged the proposed condition calling for him to place his remaining wetlands in a conservation easement, presumably because he offered this to the District as mitigation for his proposed destruction of 3.4 acres of wetlands. *See KMST, LLC v. Cnty. of ADA*, 67 P.3d 56, 61 n.1 (Idaho 2003) (holding that there was "no taking because [the developer] itself proposed that it would construct and dedicate the street as part of its development"). Instead, he has focused on conditions that would require him to "dedicate money, services, labor, or any other type of personal property to a public use." Pet. Br. ii. Nevertheless, Mr. Koontz inaccurately describes this easement as a "giveaway" of his property and complains to this Court that he should not be forced to give up his "property and his money," apparently seeking to have this proposed conservation easement considered as part of any application of *Nollan* and *Dolan* to the denial of his requested permit.

What is clear, however, is that the proposed conservation easement would not have required Mr. Koontz to "give away" his property at all and thus does not constitute a *per se* taking. Rather, even if Mr. Koontz put a conservation easement on his remaining land, he would still maintain ownership and control over it and such an arrangement would not affect his right to exclude others, except for possible periodic visits by District staff to ensure compliance. As a result, rather than resembling the dedications of real property at issue in *Nollan* and *Dolan*, a conservation easement is

much more akin to the routine requirements of zoning law – lot size requirements, height limits, setbacks, buffer zones, etc. – that allow a landowner to build on only one portion of her property. Similar zoning laws have been upheld for over a century. *See*, *e.g.*, *Welch v. Swasey*, 214 U.S. 91, 107 (1909) (upholding the constitutionality of building height limitations); *Gorieb v. Fox,* 274 U.S. 603, 608 (1927) (upholding the constitutionality of building setback regulations); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (upholding the constitutionality of a comprehensive zoning ordinance, which included height limits and open space requirements). While a landowner might be able to successfully bring a takings challenge to a particularly draconian zoning restriction along these lines, such restrictions certainly do not constitute *per se* takings.

On-Site Improvements. Although the option has received little attention since Mr. Koontz's permit hearing in 1994, the District also offered a proposed condition that would have permitted Mr. Koontz to further reduce environmental harms on-site by constructing a subsurface storm-water management system and replacing side-slope areas of his site with stem walls. Although Mr. Koontz's representative at the hearing argued that this option was "too costly" – without offering a shred of evidence to substantiate that conclusion – Mr. Koontz has not seriously challenged this suggested alternative in this case. Nevertheless, even if such on-site improvements were unilaterally imposed upon Mr. Koontz, such a condition would not amount to a *per se* taking and, therefore, once

again, *Nollan* and *Dolan* would not apply. Instead, such a condition would be evaluated in a manner similar to any other land use or building code requirement that might compel a landowner to alter her property to serve some public purpose – for instance, a regulation that might require a landowner to perform specific on-site improvements to make her house or business wheelchair accessible. Such a condition could be the basis of a takings claim under *Penn Central* or even of a rational basis challenge under the Fourteenth Amendment – claims that would almost certainly fail – but it is not a *per se* taking.

Off-Site Improvements. The main focus of this litigation throughout has been on the District's request for Mr. Koontz to perform some type of off-site mitigation – an option the District turned to after Mr. Koontz had rejected its suggestions about decreasing the size of his project or performing on-site remediation. Mr. Koontz has attempted to frame this proposal as a straightforward "demand" for a specific monetary exaction – a requirement for him to "dedicate his money to unrelated public improvements on the District's land." Pet. Br. 5. However, this is a gross mischaracterization of the facts underlying this case.

First, as mentioned in Section I.A, *supra*, the District did not require Mr. Koontz to perform off-site mitigation at all – let alone on "the District's land." Indeed, the District provided Mr. Koontz with on-site mitigation options as well, and was open to other, as-yet-unspecified, mitigation proposals offered by Mr. Koontz himself. The only

requirement was that any such proposals call for "equivalent mitigation enhancement options . . . within the Basin." R. 619. Second, Mr. Koontz's description of the proposed condition as a demand to "dedicate his money" – in other words, a straightforward monetary fee – is also inaccurate. Instead, as jointly stipulated by the parties before trial, the District suggested that Mr. Koontz could mitigate some of the harms caused by his proposed project by agreeing to "provide off-site mitigation by restoring and enhancing at least (50) acres of wetlands." Pet. App. E-2. At no time did the District request a "dedicat[ion] of money for those services." Instead, Mr. Koontz could satisfy the District's proposal however he saw fit – or offer an additional suggestion of his own.

Finally, even taking the proposed condition as Mr. Koontz has presented it – as a requirement to pay for off-site improvements that serve the public interest – such a condition would not amount to a *per se* taking if unilaterally imposed and, therefore, once again, *Nollan* and *Dolan* would not apply. Instead, such a requirement would be akin to a fee charged to a homeowner to repair culverts elsewhere in her community – perhaps to promote community-wide flood prevention. Such a fee – in other words, a general monetary obligation – could be challenged as an abuse of the police power under the Fourteenth Amendment, but it is not a *per se* taking. *See Concrete Pipe & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993) (rejecting the argument that a monetary obligation is a *per se* taking); *Sperry v. United States*, 493 U.S. 52, 62 n.9 (1989) ("Unlike real or

personal property, money is fungible . . . . If the deduction. . . . were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance."); *cf. E. Enters. v. Apfel*, 524 U.S. 498, 543 (Kennedy, J., concurring in the judgment and dissenting in part) ("The [general] liability imposed on [a coal company] [for healthcare benefits] no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect."). In the end, while it may be possible for *Nollan* and *Dolan* to apply to conditions calling for the relinquishment of a specific, identifiable fund of money, such as a checking account or the interest income generated in a government-created account, *see, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), this case does not raise such an issue – nor does it, as suggested by Mr. Koontz, cleanly present the question of whether *Nollan* and *Dolan* apply to monetary fees.

II. MR. KOONTZ COULD HAVE CHALLENGED THE DENIAL OF HIS PERMIT APPLICATION UNDER *LUCAS*, *PENN CENTRAL*, OR THE FOURTEENTH AMENDMENT, BUT THOSE ARGUMENTS WOULD HAVE FAILED ON THE MERITS.

While the specialized tests of *Nollan* and *Dolan* cannot be applied to the permit denial at issue in this case, such a result does not, as Mr. Koontz alleges, "give the District unbridled power" to "abuse" permit applicants. Pet. Br. 25. Instead,

Mr. Koontz – and other similarly situated landowners – have several other potential claims available under both the Takings Clause and the Fourteenth Amendment. For instance, Mr. Koontz could have argued that the District's denial of his permit worked a taking under either *Lucas* or *Penn Central*. In addition, he could have argued that the negotiation process itself was so irrational as to violate the Fourteenth Amendment. *Vill. of Willowbrook v Olech,* 528 U.S. 562, 564 (2000). However, Mr. Koontz waived his *Lucas* claim explicitly before trial. In addition, he has not argued before this Court that his permit denial violated *Penn Central*'s three-part test. Finally, although Mr. Koontz raised certain Fourteenth Amendment concerns in the lower courts, they were summarily dismissed, and he has not offered any such arguments here.

Regardless, all three of these arguments – under *Lucas*, *Penn Central*, and the Fourteenth Amendment – fail on the merits in this case. This Part considers each argument, in turn.

However, before turning to these federal constitutional claims, it is also worth noting that Florida, like most states, provides permit applicants with a speedy remedy – mandamus – when a public agency is imposing unlawful conditions on the issuance of a development permit.[10] *See*, *e.g.*, *Cook v. Di Domenico*, 135 So. 2d

[10] In addition, Mr. Koontz could have sought administrative review of his permit denial, a path he also chose not to pursue in this case. *See* Fla. Stat. § 120.68(1), (6), (7)(e); Pet. App. A-

245, 246 (Fla. Dist. Ct. App. 1961) (affirming the trial court's issuance of a pre-emptory writ of mandamus for issuance of a permit to construct a gasoline service station without the owner being compelled to waive his right to compensation for such improvements in event of a later taking for highway purposes). Had it been Mr. Koontz's objective efficiently to obtain the dredging permit he requested without being subjected to unlawful mitigation conditions, he had a clear path under *Cook* to test the legality of those conditions, and, if successful, obtain his dredging permit. Instead, Mr. Koontz bypassed that avenue and accused the District of taking his property without just compensation in violation of the Florida Constitution. By choosing a takings claim, Mr. Koontz began an odyssey of litigation that today – more than eighteen years after he first filed suit – has produced published appellate decisions known as *Koontz I* through *Koontz V*. This Court's decision – *Koontz VI* – risks a great, and wholly unnecessary, expansion of federal involvement in ordinary local land use permitting activities.

22; *Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982). This administrative review process would have permitted Mr. Koontz to challenge the validity of his permit denial, whether based on an error in administrative decision-making or "on asserted constitutional infirmities in the administrative action." *Key Haven*, 427 So. 2d at 159.

A. Although Mr. Koontz Could Have Brought A Takings Claim Under Either *Lucas* Or *Penn Central*, He Waived His *Lucas* Claim Explicitly Before Trial, And His *Penn Central* Claim Would Have Failed On The Merits.

Beginning with *Lucas v. S.C. Coastal Council*, Mr. Koontz could have argued that the District's decision worked a taking by denying him "all economically beneficial use[]" of his property. 505 U.S. 1003, 1019 (1992). However, he explicitly waived such a claim before trial and has offered no such argument before this Court. *See* R. 619 ("Plaintiff is not proceeding upon a theory that the two District final orders deprived Koontz of all or substantially all economically beneficial or productive use of the subject property.").

Turning to *Penn Central*, Mr. Koontz could have argued that the District's permit denial was so economically burdensome as to resemble a confiscation, based on that denial's overall "economic impact" on Mr. Koontz, its "character," and "the extent to which [it] interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. However, Mr. Koontz has made no such argument here. Furthermore, even if he had, such a claim would have failed on the merits.

The "aim[]" of the *Penn Central* test is to determine whether a challenged regulation is the "functional[] equivalent" of a "classic taking," where

"government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. This inquiry focuses on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540. Where a court determines that a given regulation is a legitimate exercise of the police power, it will be upheld even if it "destroy[s] . . . recognized real property interests" and "cause[s] substantial individual harm." *Penn Central*, 438 U.S. at 125. In the end, under *Penn Central*, Mr. Koontz would have had the burden of proving a constitutional violation – a high burden that he could not have met in this case. *See id.* at 130-31, 136, 138 n.36.

The District's decision to deny Mr. Koontz's permit was a legitimate exercise of the police power – an attempt to comply with state law and offset the environmental harms associated with Mr. Koontz's proposed development. Resp't Br. 4-7; 9-10. Indeed, the District could have denied Mr. Koontz's permit application outright, based on its legitimate interest in stemming the loss of wetlands in Florida. Furthermore, following the denial of his permit, Mr. Koontz was simply in the same position he was in before his negotiations with the District began; he owned an undeveloped tract of land that still had some economic value. In fact, during the course of the parties' negotiations, the District even offered Mr. Koontz an opportunity to develop one acre of his property without performing any on-site improvements or conducting any off-site mitigation – a proposal that Mr. Koontz rejected out of hand. Based on these facts alone,

Mr. Koontz's *Penn Central* claim would have failed. Finally, the challenged conditions themselves – the District's so-called "demands" for off-site mitigation – do not alter this analysis. At trial, Mr. Koontz's own expert described the costs associated with these proposals as "minimal" and actually recommended that Mr. Koontz accept the District's offer to perform off-site mitigation – an offer that he described as "excellent." Trial Tr. 60, 62.

In the end, given the limited economic burdens associated with the District's denial of Mr. Koontz's permit, the character of the District's actions, and the legitimacy of the District's underlying interests, Mr. Koontz's *Penn Central* claim would have failed on the merits.

B. Even If Mr. Koontz Had Presented An Argument Under The Fourteenth Amendment To This Court, It Would Have Failed On The Merits As Well.

Without credible claims under *Lucas* or *Penn Central*, Mr. Koontz initially relied, in substantial part, on the heightened scrutiny provided by *Agins*, arguing that the District's denial of his permit failed to "substantially advance a legitimate government interest." 447 U.S. at 260. However, during the course of Mr. Koontz's litigation, this Court unanimously overruled the *Agins* test, emphasizing the "serious practical difficulties" of applying "heightened means-ends review" to the "regulation of private property." *Lingle*, 544 U.S. at 544. In effect, *Agins* had imported due process principles into takings law – an anomaly

recognized by this Court and corrected in its unanimous decision in *Lingle*. In rejecting the *Agins* test, this Court focused, in particular, on the judiciary's limited competence in this area, noting that heightened scrutiny under *Agins* "would require courts to scrutinize the efficacy of a vast of array of state and federal regulations – a task for which courts are not well suited." *Id.* Indeed, the *Lingle* Court feared that it "would empower – and might often require – courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Id.*

After *Lingle*, the Fourteenth Amendment still provides landowners like Mr. Koontz with a federal floor of protection against "irrational" actions taken by government agencies.[11] *See Lingle*, 544 U.S. at

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[11] Beyond the Fourteenth Amendment, there are additional safeguards for landowners facing onerous permit conditions that have actually been approved by the government – safeguards under state-law doctrines derived from due process principles, such as the reasonable relationship test. *See, e.g.*, *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965) (applying Wisconsin's reasonable relationship test); *see generally* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 Hastings L.J. 729, 731-33, 758-64 (2007) (outlining the various state-law protections that apply to negotiations between property owners and land-use agencies); Jerold Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, Law & Contemp. Probs. 127 (1987) (describing how the reasonable relationship test applies to mitigation fees). These tests – which predate *Nollan* and *Dolan* and, today, stand in conjunction with them – further ensure that any conditions imposed by land use agencies are reasonably related to legitimate regulatory

542 ("[A] regulation that fails to serve any legitimate government objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."); *Olech,* 528 U.S. at 563 (concluding that an allegation that a village's demand was "irrational and wholly arbitrary" stated a claim under the Equal Protection Clause). However, Mr. Koontz has not offered any such arguments here. Furthermore, even if he had, they would surely have failed on the merits.

First, District staff members considered Mr. Koontz's application and, based on their analysis, made recommendations to the District on how best to mitigate the environmental harms associated with Mr. Koontz's proposal. These recommendations took the form of a series of mitigation options suggested to Mr. Koontz, each designed to comply with well-established state guidelines. Therefore, the District's behavior in these initial negotiations was not "irrational." *Olech,* 528 U.S. at 563.

Second, following the analysis offered by District staff, the District held a permit hearing, which allowed Mr. Koontz's chosen representative to contest the District's findings and offer Mr. Koontz's reasons for why he should receive a development permit free of any further conditions.

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interests. Such conditions, however, do not apply to landowners like Mr. Koontz, who face conditions that have been merely proposed during the course of failed land use negotiations.

Only after this hearing – and after Mr. Koontz rejected the District's offer to continue negotiating – did the District make its final decision on his permit application. These actions easily satisfy the Fourteenth Amendment. In the end, the District, like most land use agencies, was simply trying to negotiate a set of conditions that would permit development to go forward, while also providing mitigating benefits to account for the very real costs that development can impose upon the community at large – a negotiation process that Mr. Koontz short-circuited by filing this lawsuit.

CONCLUSION

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

Respectfully submitted,

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