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 *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former

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[1] Peter Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, including property owners, regardless of political correctness.

STATEMENT OF THE CASE

Petitioner Coy Koontz purchased a vacant 14.9 acre lot in 1972, located at a busy intersection of two major highways in Orange County, Florida. Florida J.A. 187; Pet. Cert. App. A-5 & n.2; J.A. 27-28. Subsequent to that purchase, the State enacted a statute governing land use on property containing wetlands and uplands including fish and wildlife habitat. J.A. 27, 67.

Under that statute and implementing regulations, the State designated a Riparian Habitat Protection Zone that included all but 1.4 acres of Koontz's property. That Zone was overseen by Respondent St. Johns River Water Management District.

The law and implementing regulations did not require that Koontz's property be found to contain any riparian habitat before it was included in the Zone, and the property actually contained no such habitat. Pet. Cert. App. D-3. The State had run a ditch across the property that had long since drained any wetlands that may have once existed on the land. J.A. 116, 137. Habitat protection experts inspecting

the property found standing water only in ruts along an easement road owned by the State, and used by a power company. J.A. 117-18, 142-43. Puddles in such ruts hardly amounted to wetlands. Moreover, the property had long since been rendered inhospitable to wildlife because of surrounding residential and commercial development, road construction, and other government approved projects, including the busy intersection of two major highways where the property is located. Pet. Cert. App. D-3; J.A. 101-02, 111-19, 137-39. Nevertheless, the designation created a legal presumption that any land use in the Zone was harmful to protected habitat, which meant that affected landowners within the Zone, like Koontz, had to obtain environmental permits for land uses from the Respondent District. J.A. 33.

In 1994, Petitioner Koontz consequently applied to the District for permits to develop 3.7 acres of his property within the Zone. Pet. Cert. App. A-5—A-6, D-4. But Koontz was informed by the District staff that they would recommend denial of the permit applications unless he agreed to finance restoration and enhancement of at least 50 acres of wetlands on District owned land miles from and unrelated to his proposed development, in addition to donating the remaining 11 acres, or 75%, of his property to the District. Pet. Cert. App. A-6, D-4; J.A. 26, 70-71, 103-104, 109, 122-23.

The District staff conceded that they had not conducted any surveys of Koontz's proposed development to determine the presence of any wildlife or riparian habitat, nor did they have any

evidence to rebut Koontz's own experts and their studies showing no harm to wildlife or riparian habitat from his proposed development. J.A. 146. But they informed Koontz that since his property was within the designated Zone, any development at all was considered harmful to riparian habitat without further evidence, and that he could consequently not develop his land at all without complying with the conditions the District required to obtain the permits. Pet. Cert. App. A-5 – 6; J.A. 33, 39, 107.

The District's Governing Board subsequently held a hearing on Koontz's permit applications, where he agreed to donate the 11 remaining acres, or 75%, of his property to the District, but he refused to spend any additional funds to finance restoration and enhancement of District property miles away from, and unrelated to, his proposed development. Pet. Cert. App. A-6, D-4; J.A. 29-30, 107, 111, 119-20, 139. The District consequently denied his permits. Pet. Cert. App. D-4; J.A. 70-71. The District conceded, "the denials were based exclusively on the fact that [Koontz] would not provide additional mitigation to offset impacts from the proposed project," meaning financing for the District's demanded restoration and enhancement of the District's own unrelated property miles away. J.A. 70. But if Koontz had agreed to such financing, "the exact project [he] proposed would have been permitted." J.A. 71. Without the permits, however, Koontz could not use his own property. Pet. Cert. App. 5-6; J.A. 70-71.

Koontz filed this action in 1994 against the District in Florida state court under a state law, seeking damages for an uncompensated taking. J.A.

4-65. The state statute provided for "monetary damages and other relief" for "an unreasonable exercise of the state's police power constituting a taking without just compensation." Fla.Stat.Sect. 373.617(2). The trial court entered judgment for Koontz, citing *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 854 P.2d 437 (Ore. 1993).

In response to the judgment, the District agreed to approve Koontz's permit applications without the unlawful conditions. Pet. Cert. App. A-7. While the court ordered the District to grant the permits by June, 2004, the District did not do so until December, 2005, more than 11 years after it denied the permit applications. Pet. Cert. App. A-7; J.A. 183. As a result, the trial court subsequently granted Koontz damages for the District's unlawful denial of his permit applications during this extended time. Pet. Cert. App. C-2.

On appeal, the District did not argue or provide any evidence to counter the trial court's factual findings that no essential nexus or rough proportionality existed between the District's demands or exactions on the permits Koontz sought and the impact of Koontz's proposed project for which the permits were requested, as required by *Nollan* and *Dolan*. So those trial court findings were not even disputed on appeal. As the appeals court said, "The District makes no challenge to the evidentiary foundation for [the trial court's] factual findings." Pet. Cert. App. B-6. The appeals court consequently upheld the trial court's judgment against the District. Pet. Cert. App. B-10.

But the Florida Supreme Court reversed. Pet. Cert. App. A-21. That Court held that *Nollan* and *Dolan* only apply to exactions or takings of real property, and not to monetary demands or conditions, which are apparently unrestrained and without limit in that Court's view. Pet. Cert. App. A-15 – A-16. Moreover, the Florida Supreme Court held that the District's actions were not unconstitutional because the District had not issued any permits when the trial court's judgment was rendered, and so "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21.

This Court granted certiorari on October 5, 2012.

SUMMARY OF ARGUMENT

The District's denial of the permits requested by Koontz was not even in compliance with constitutionally required Due Process of Law.

But denying the permits on the grounds that the District did was also a straightforward violation of the Takings Clause. By its own admission, the District did not deny the permits because of the adverse effects of the proposed development on riparian habitat and wildlife.

Rather, the record indisputably shows that the permits were denied because Koontz refused to provide payoffs in the form of payments for the restoration and enhancement of unrelated property owned by the District miles away from Koontz's proposed development on his own property. This is

exactly the kind of corruption this Court sought to prohibit in *Nollan*.

Nollan and *Dolan* provide that compensation does not have to be paid for a permit restriction on Koontz's property with an essential nexus to the public purpose of banning development on that property, and with a rough proportionality to the adverse impact of Koontz's proposed development on the governmental interest in his property. But the condition that Koontz pay for the cost of restoration and enhancement of an unrelated property miles away from Koontz's own proposed development has no nexus to Koontz's proposed development on his own property, or any rough proportionality to any adverse effect of Koontz's proposed development on his own property. So the District must pay compensation for denying Koontz the development permits under the Takings Clause, as the District does not qualify for the exceptions to that provided by *Nollan* and *Dolan*.

The Florida Supreme Court held that *Nollan* and *Dolan* do not apply to this case because the District had not issued any permits when the trial court's judgment was rendered, and so "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21. The Court said that in both *Nollan* and *Dolan* "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A-18.

But that is flatly wrong according to both the *Nollan* and *Dolan* decisions. In both cases, the permits were never issued, according to those very

decisions themselves. But that did not stop the challenge from going forward in both cases, and this Court from issuing its landmark decision in *Nollan*, and the Oregon Supreme Court from issuing its landmark decision in *Dolan*.

The Florida Supreme Court also held that *Nollan* and *Dolan* only applied to required dedication of real property interests to obtain requested permits, but not to required expenditures of personal property such as cash, as in the District's proposed condition on Koontz's permit for the restoration and enhancement of unrelated District property miles from Koontz's proposed development.

The Takings Clause is embodied in the Fifth Amendment to the U.S. Constitution, stating: "nor shall private property be taken for public use, without just compensation." That language is not limited to real property, but applies to all private property, which would include personal property, such as cash.

The same is true of the language and rationale of this Court's decision in *Nollan*. This and the plain language of the Takings Clause is why the courts have long held that the Clause applies to all property, not just real property.

Moreover, if monetary conditions on permits are allowed without limitation, that would open an enormous loophole to evade the Takings Clause. The landowner can simply be required to make a payment to the governing authority equal to the value of the property taken to gain the permit. The government

can then use that money to pay the compensation under the Takings Clause. This is the ultimate reason why such monetary expenditure conditions on permits cannot be allowed without limitation, for that would effectively nullify the Takings Clause requirement that just compensation be paid for property taken for public use.

ARGUMENT

I. THE DISTRICT'S DENIAL OF KOONTZ'S PERMIT APPLICATIONS WAS UNCONSTITUTIONAL

The District's denial of the permits requested by Koontz was not even in compliance with constitutionally required Due Process of Law.

Not only was there never any showing that Koontz's property even included any riparian habitat in the first place. The District was so arrogantly confident that it had the power to take Koontz's property that it held it did not even have to respond to Koontz's evidence that his proposed development would not harm any riparian habitat or wildlife. This does not even comply with the basic requirements of Due Process of Law. E.g. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Mathews v. Eldridge*, 424 U.S. 319 (1976);

But denying the permits on the grounds that the District did was also a straightforward violation of the Takings Clause. By its own admission, the District did not deny the permits because of the adverse effects of the proposed development on riparian habitat and wildlife. The record shows that

the District even denied that it had to provide evidence to that effect.

Rather, the record indisputably shows that the permits were denied because Koontz refused to provide payoffs in the form of payments for the restoration and enhancement of unrelated property owned by the District miles away from Koontz's proposed development on his own property. If only Koontz had agreed to such financing, the record indisputably shows, "the exact project [he] proposed would have been permitted." J.A. 71.

This is exactly the kind of corruption this Court sought to prohibit in *Nollan*. As the Court said there,

> "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 contribution in order to shout fire is a lesser restriction on speech than an outright

> ban, it would not pass constitutional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose into something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A. 2d 12, 14-15 (1981)."

483 U.S. at 837.

In the present case, the governmental purpose of the development ban on Koontz's property is to protect riparian habitat and wildlife on that property. But the purpose of the condition that Koontz can go ahead with his development as long as he bears the expense of restoration and enhancement of unrelated property owned by the District miles away from Koontz's proposed development on his own property is merely to get the money for that unrelated restoration and enhancement. That is an out-and-out plan of extortion to get the money from Koontz for another government purpose unrelated to his own development. That is very much like, and precisely analogous to, requiring a $100 payment to shout fire

in a crowded theater, which "would not pass constitutional muster."

The end result is that Koontz was denied effective use of his land, but without payment of compensation. Even if that was for the valid public purpose of protecting riparian habitat and wildlife, the District would still have to pay compensation under the Takings Clause of the U.S. Constitution, just like it would if it was taking Koontz's land for the valid public purpose of building a bridge across a river. *Nollan* and *Dolan* provide that compensation does not have to be paid for a permit restriction on Koontz's property with an essential nexus to the public purpose of banning development on that property, and with a rough proportionality to the adverse impact of Koontz's proposed development on the governmental interest in his property. But the condition that Koontz pay for the cost of restoration and enhancement of an unrelated property miles away from Koontz's own proposed development has no nexus to Koontz's proposed development on his own property, or any rough proportionality to any adverse effect of Koontz's proposed development on his own property. So the District must pay compensation for denying Koontz the development permits under the Takings Clause, as the District does not qualify for the exceptions to that provided by *Nollan* and *Dolan*.

II. THE LIMITATIONS ON PERMIT RESTRICTIONS PROVIDED IN *NOLLAN* AND *DOLAN* APPLY TO THIS CASE.

A. The Limitations on Permit Conditions in Nollan and Dolan do not depend on whether the permit was ever actually issued.

The Florida Supreme Court held that *Nollan* and *Dolan* do not apply to this case because the District had not issued any permits when the trial court's judgment was rendered, and so "nothing was ever taken from Mr. Koontz." Pet. Cert. App. A-21. Since no permits were issued, the *Nollan* and *Dolan* limitations on permit conditions could not have been violated, the Court tried to reason. This extremely confused decision took no notice of the fact that without the permits Koontz could not develop his property at all, or of the unconstitutional reasons for the permit denial, nor of the fact that Koontz had never received any compensation for this taking of his property.

But the Court's fallacy was not limited to that error. The Court said that in both *Nollan* and *Dolan* "the regulatory entities *issued* the permits sought with the objected-to exactions imposed." Pet. Cert. App. A-18. But that is flatly wrong according to both the *Nollan* and *Dolan* decisions.

In *Nollan*, the California Coastal Commission issued only a ruling that the Commission would grant the requested permit only if the Nollans first dedicated an easement to the public. *Nollan*, 483 U.S. at 828. The Commission's ruling stated,

> *Prior to the issuance of the Coastal Development Permit*, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other."

Brief of Appellants at 5, *Nollan*, 483 U.S. 825 (No. 86-133), 1986 U.S. S.Ct. Briefs LEXIS 1382, **10 (quoting Joint Appendix at 34, *Nollan*, 483 U.S. 825 (no. 86-133)).

The Nollans brought their action challenging the constitutionality of the Commission's ruling without ever recording the deed restriction required by the Commission's ruling for the permit to issue. *Nollan*, 483 U.S. at 828-29. So the challenged permit and its conditions were never issued in *Nollan* just as they were not issued in this case. But that did not stop the Nollans' challenge from going forward, or this Court from issuing its landmark decision in that case.

The same was true in *Dolan*. There, the city agency ruled that it would issue a requested building permit only if Ms. Dolan, the owner of the property, first dedicated flood-plain and bicycle-path easements to the city. The city's ruling stated,

> "*Prior to the issuance of building permits*] [t]he applicant shall dedicate to the City as greenway all portions of the site that fall

> within the 100 year floodplain [of Fanno Creek] (i.e. all portions of property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary."

Dolan, 20 Or. LUBA at 413, 199 Ore. Land Use Bd. App. LEXIS 316, at *4 (emphasis added). But, as in the Nollans' case, Dolan never granted the easements to the city required for the requested permits to be granted. So Dolan's case also went forward, and was decided in the courts, without the requested permit ever being issued either.

And that was the exact same as happened in this case. The permits requested by Koontz were never issued, as the Florida Supreme Court recognized in fact. But that is exactly the same as happened in *Nollan* and *Dolan*, not a reason for those precedents not to apply in this case.

As Justices Scalia, Kennedy and Thomas argued in urging that this Court should have granted certiorari in the one case where the permit had not been issued,

> "[T]he court's refusal [below] to apply *Nollan* and *Dolan* might rest on the distinction that it drew between the grant of a permit subject to an unlawful condition and the denial of a permit when an unconstitutional condition is not met. From one standpoint, of course, such a distinction makes no sense. The object of the Court's holding in *Nollan* and *Dolan* was to protect against the State's cloaking within the

> permit process an 'out-and-out plan of extortion." There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than as a condition subsequent should make a difference."

Lambert v. City & County of San Francisco, 529 U.S. 1045 (2000). *Accord: Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983)(rejected claim that the permit was denied and, therefore, no property had been taken); *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998)(rejected argument that *Nollan* and *Dolan* did not apply to permit denials, where landowner's objection to unlawful permit condition was grounds for denial); *McCain v. Toledo City Plan Comm'n*, 270 N.E. 370 (Ohio Ct. App. 1971)(cited by Dolan, denial of a permit because of refusal to dedicate property not sufficiently related to proposed development was unconstitional confiscation of property without compensation); *Jacobsville Developers East, LLC v. Warrick County*, 905 N.E. 2d 1034 (Ind. Ct. App. 2009)(Landowner has cause of action where permit application is denied because landowner would not agree to excessive condition); *William J. Jones Ins. Trust v. Ft. Smith*, 731 F. Supp. 912 (W.D. Ark. 1990)(enjoined city from requiring dedication of easement as precondition for permit approval where easement violated nexus rule).

B. The Limitations on Permit Conditions in Nollan and Dolan Are Not Restricted to Exactions of Real Property, But Apply to All Private Property.

The Florida Supreme Court also held that *Nollan* and *Dolan* only applied to required dedication of real property interests to obtain requested permits, such as easements, or the contribution of Koontz's remaining 11 acres to a conservation trust overseen by the District in the present case. But the Court held that the cases did not apply to required expenditures of personal property such as cash, as in the District's proposed condition on Koontz's permit for the restoration and enhancement of unrelated District property miles from Koontz's proposed development.

That would leave no restraint on the unrelated payoffs the government could demand for any development or use permits for any property. That leaves the door wide open to the "out-and-out extortion" the Supreme Court sought to prohibit in *Nollan*.

The Takings Clause is embodied in the Fifth Amendment to the U.S. Constitution, stating: "nor shall private property be taken for public use, without just compensation." That language is not limited to real property, but applies to all private property.

The same is true of the language and rationale of this Court's decision in *Nollan*. Nothing in *Nollan* limits that ruling to permit conditions relating to real property. Indeed, the rationale of *Nollan*, to prevent "out-and-out extortion" applies equally as well to personal property such as cash, as can be seen in the present case. There is no reason for the District to require Koontz to bear the costs for restoration and

enhancement of the District's own unrelated property miles away from Koontz's proposed development, except for out-and-out extortion, requiring Koontz alone to bear a cost that in the public interest should rightly be shared by everyone. *Armstrong v. United States*, 364 U.S. 40, 49 (1960)(the premise of the Takings Clause is that property owners should not be forced to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Without the limitations in *Nollan* applying to personal property as well as real property, there would be no limit to such extortion.

This and the plain language of the Takings Clause is why the courts have long held that the Clause applies to all property, not just real property. In *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1993), this Court vacated the decision of a California state court that monetary exactions on the grant of a permit were not covered by the limitations of *Nollan*, and remanded for further consideration under *Dolan*. On that remand, the California Supreme Court held that the nexus and proportionality limitations of *Nollan* and *Dolan* apply equally to protect personal property such as cash, as well as real property. *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). The court said, "[I]t matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction." 911 P.2d at 444.

Similarly, in *San Remo Hotel v. City of & County of San Francisco*, 41 P. 3d 87, 102 (Cal. 2002), the California Supreme Court later said, "Though the

members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan*/*Dolan* scrutiny." The Texas Supreme Court later further confirmed the correct rule in holding that there is no reason why "[monetary] exactions should be analyzed differently than dedications [of real property] in determining whether there has been a taking." *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W. 3d 620, 635 (Tex. 2004). *Accord:* Carlos A. Ball and Laurie Reynolds, 47 Wm. & Mary L. Rev. 1513, 1569 (2006)("[W]e do not believe that the land-monetary distinction serves as an effective proxy for the likelihood that the government overreached in imposing an exaction. Both types of exactions raise the possibility that the government may improperly leverage its police power in order to receive benefits from the owner without paying compensation.").

Moreover, if a condition on a permit requiring monetary expenditures does not fall within *Nollan*/*Dolan*, and no permit is issued because the landowner refuses to make the monetary expenditures, that does not absolve the government from paying compensation for the taking of the landowner's property, as permissible conditions under *Nollan*/*Dolan* do. The government still must pay compensation for property that is taken because no permit is issued, and the landowner is consequently deprived of use of his property. So Koontz would still be entitled to compensation for his property if the monetary condition on his permit does not fall within the conditions allowed under *Nollan*/*Dolan*.

But if monetary conditions on permits are allowed without limitation, that would open an enormous loophole to evade the Takings Clause. The landowner can simply be required to make a payment to the governing authority equal to the value of the property taken to gain the permit. The government can then use that money to pay the compensation under the Takings Clause. This is the ultimate reason why such monetary expenditure conditions on permits cannot be allowed without limitation, for that would effectively nullify the Takings Clause requirement that just compensation be paid for property taken for public use.

CONCLUSION

For all of the foregoing reasons, the decision of the Florida Supreme Court below should be reversed.

DATED: November 28, 2012

Respectfully Submitted,

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