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 AMICI CURIAE ASSOCIATION OF FLORIDA COMMUNITY DEVELOPERS, THE FLORIDA LAND COUNCIL, THE FLORIDA FARM BUREAU, AND THE FLORIDA FRUIT AND VEGETABLE ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICI CURIAE[1]

Regulatory agencies in Florida and elsewhere are charged with avoiding, minimizing, or mitigating adverse land use impacts when approving developments. Their final land use approvals are the culmination of a give-and-take process of negotiations. At issue here is whether this Court's decisions in *Nollan v. California Coastal Comm'n,* 438 U.S. 825 (1987) and *Dolan v. City of Tigard,* 512 U.S. 374 (1994) should continue to serve as silent referees in these negotiations, as guarantors of their integrity.[2] Integrity is the difference between negotiation and extortion, between a fair deal and a shake-down. *E.g., Nat'l Labor Relations Bd. v. Truck Drivers Local Union No. 449,* 353 U.S. 87, 93 (1957).[3] For purposes of the land development process, it is the constitutional line that keeps negotiations from straying too far – in both substance and form – from the goal of avoiding,

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[1] Letters consenting to the filing of this and other amici curiae briefs have been filed with the Clerk of Court by both the Petitioner and Respondent. Counsel for Amici also verbally informed counsel for the parties of the Amici's intent to file this brief, and received their oral consent. No counsel for a party authored this brief in whole or in part, and no person, other than Amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

[2] This brief refers to *Nollan* and *Dolan* collectively as the *Nollan/Dolan* doctrine.

[3] There, in a labor dispute, this Court's decision was motivated, in part, by a desire to ensure "the preservation of the integrity of [negotiations by] the multi-employer bargaining unit."

minimizing, and mitigating adverse land use impacts. The Association of Florida Community Developers, the Florida Land Council, the Florida Farm Bureau, and the Florida Fruit and Vegetable Association submit this brief as Amici Curiae in support of the Petitioner, Mr. Koontz, to preserve that integrity.

Amici are non-profit associations whose members have substantial real property holdings throughout Florida. Together, Amici and their members represent a significant segment of Florida's regulated community. Just as Mr. Koontz, Amici and their members must obtain approval from local, state, and federal agencies for intensified land use. Amici thus have substantial experience navigating Florida's regulatory maze.

Although Amici may differ in purpose and composition, they speak with one voice to the profound importance of ensuring the integrity of the negotiation process at the heart of land use regulation. *See Gen. Dev. Corp. v. Div. of State Planning, Dep't of Admin.,* 353 So. 2d 1199, 1206 (Fla. 1st DCA 1978) (referring to "the centrality of negotiation" under Florida's modern system of land use regulation). This Court's decisions in *Nollan* and *Dolan* were motivated by a desire to preserve that integrity, to ensure that negotiations do not devolve into extortion. A clear and unequivocal articulation of the *Nollan/Dolan* doctrine's scope would forever clarify these protections. Allowing the Florida Supreme Court's decision in *St. Johns River Water Mgmt. Dist. v. Koontz,* 77 So. 3d 1220 (Fla. 2011) to stand would unravel them.

While courts around the country are currently split on scope of the *Nollan/Dolan* doctrine, *see* Pet. for Cert. at 16-18, here the Florida Supreme Court limited the *Nollan/Dolan* doctrine to a very narrow category of exactions. *Koontz,* 77 So. 3d at 1330-31. The Florida Supreme Court feared that applying the *Nollan/Dolan* doctrine as Mr. Koontz asked would make land use regulation in Florida "prohibitively expensive" because agencies would "opt to simply deny permits outright without discussion or negotiation," and "[l]and development in certain areas of Florida would come to a standstill" as a result. *Id.* at 1031. Not so.

In Florida, "the centrality of negotiation" is sacrosanct. *Gen. Dev. Corp.,* 353 So. 2d at 1206. Agencies and applicants will always negotiate within the broader regulatory framework. At issue are the contours of those negotiations, the constitutional line that balances an agency's responsibilities with the applicant's rights. To be sure, administrative convenience should never trump a constitutional right.

By drawing the line as it did, the Florida Supreme Court invited state-sanctioned mischief. Amici now remain at the mercy of savvy but cash-strapped agencies and local governments that may well escape the *Nollan/Dolan* doctrine by simply recasting land dedications as impact fees or by changing the timing of an exaction, forcing applicants to submit to an exaction before challenging its constitutionality. Amici find neither option acceptable. Amici accordingly have a real and

substantial interest in this Court overturning the Florida Supreme Court's limits on the *Nollan/Dolan* doctrine, in preserving the integrity of Florida's land development process.

SUMMARY OF THE ARGUMENT

Meaningful negotiations – those focused on conditions directly related and proportionate to impacts from a proposed land use – lead to sound public policy. Extortion does not. Yet for Floridians like Amici and their members, the Florida Supreme Court's decision reduces land use decisions to just that. It transforms an already tilted process into one where state-sanctioned abuse may go unchecked. *Nollan* and *Dolan* require more.

Under the *Nollan/Dolan* doctrine, state agencies and local governments must justify whether an exaction bears an "essential nexus" and a "rough proportionality" to the impact the exaction intends to address. These requirements should apply with equal force to all exactions, regardless of form or timing.

Limiting the *Nollan/Dolan* doctrine would spell its demise. Regulatory agencies could easily avoid the doctrine by transforming land dedications into monetary exactions. And many applicants would find it unworkable to proceed with a project that is economically infeasible in order to challenge the very condition that made it so.

By contrast, the clear and unequivocal application of the *Nollan/Dolan* doctrine to this case

would do much good. It would curb the abuses that currently occur, making land use negotiations more focused. This, in turn, would reduce the need for after-the-fact litigation. The cost of land use regulation – from both the agency and applicant perspective – would decline.

The Court must thus make a simple but stark choice: affirm the Florida Supreme Court's decision and recede from the *Nollan/Dolan* doctrine or reverse the Florida Supreme Court's decision, preserve the integrity of land use negotiations, and prevent leveraging of the police power. Amici respectfully urge the Court to reverse the Florida Supreme Court's decision in all respects.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THAT *NOLLAN* AND *DOLAN* REQUIRE A STATE AGENCY TO JUSTIFY THE EXACTIONS IT IMPOSES ON THE DEVELOPMENT OF PROPERTY REGARDLESS OF THE TYPE OF EXACTION OR ITS TIMING.

Negotiation is central to Florida's system of land use regulation. *Gen. Dev. Corp.,* 353 So. 2d at 1206. But this negotiation takes place at a bargaining table tilted distinctly in favor of the government. The situation is ripe for the type of "leveraging of the police power" feared by the *Nollan/Dolan* doctrine. *Nollan,* 438 U.S. at 837, n. 5. Abuses routinely occur. A clear application of the *Nollan/Dolan* doctrine to all exactions, regardless of timing, would provide a constitutional shield against

regulatory abuse, making negotiations more meaningful – more focused on conditions directly related and proportionate to impacts from a proposed land use.

A. The bargaining table is titled distinctly in favor of the government, creating a situation ripe for abuse.

Clothed in state-sanctioned expertise, state agencies are formidable creatures. An agency in Florida – just like a federal agency – is entitled to substantial deference at every step of the regulatory process. Its interpretation of statutes is entitled to deference, *BellSouth Telecommunications, Inc. v. Johnson,* 708 So. 2d 594, 596 (Fla. 1998), its decision to promulgate or implement a rule is entitled to deference, *Roy v. Florida Dep't of Corr.,* 600 So. 2d 544, 545 (Fla. 1st DCA 1992), and its decision to add gloss through administrative guidance is usually immune from challenge, *Envtl. Trust v. Dep't of Envtl. Prot.,* 714 So. 2d 493, 498 (Fla. 1st DCA 1998). At every step, the applicant bears the burden of refuting an agency's position.

The same is true in most takings contexts. Takings law in Florida is identical to federal law. *See, e.g., Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.,* 640 So. 2d 54, 58 (Fla. 1994). So, in Florida, there exist two narrow categories of *per se* takings: one occurs when government action causes a permanent physical invasion of property, *see Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), the other when government action completely deprives a

property owner of all economically beneficial use of the property, *see Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). A regulatory taking occurs under the *Penn Central* test depending on the economic impact of a regulation, the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

In practice, a state agency may easily avoid *per se* takings by refraining from physically taking property and leaving some residual value for the property owner. And the *ad hoc Penn Central* test rarely deters an agency since it is the functional equivalent of the rational basis test in an equal protection context. Put another way, it is a Hail Mary pass thrown in desperation with little chance of success. *Cf.* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity,* 92 Cal. L. Rev. 609, 611 (2004) ("the majority of regulatory acts enjoy deferential treatment in an *ad hoc* balancing test").

So, in any negotiation, a state agency enjoys substantial administrative and constitutional advantages. Taken together, these advantages allow an agency to leverage its superior bargaining position into concessions that it could not otherwise justify. *See* Thomas C. Schelling, Strategy of Conflict 21-80 (Paperback ed., Harvard University Press 1980) (1960) (using game theory to discuss bargaining in general). The situation is ripe for abuse, and Florida is rife with examples.

Amici highlight abuses in one specific context: the Community Planning Act ("Planning Act"), Chapter 163, Part II, Florida Statutes. The Planning Act, like the myriad of other state and federal requirements that apply to land development, is designed to help an applicant avoid, minimize, or mitigate the effects of development. Among other things, the Planning Act requires local governments to undertake a process of "comprehensive planning" to "preserve, promote, protect, and improve the public health, safety, comfort, good order, appearance, convenience, law enforcement and fire prevention, and general welfare." Fla. Stat. § 163.3161(4) (2012). Indeed, each local government must adopt and maintain a comprehensive plan, *id.* § 163.3167(2), and, with limited exceptions not pertinent here, "no public or private development shall be permitted except in conformity with the comprehensive plan[]," *id.* § 163.3161(6). Local governments often amend comprehensive plans, sometimes at an applicant's request. *E.g., id.* § 163.3162(4).

Comprehensive plan approval or amendment often comes with conditions. To obtain approval for an intensified land use like mining, for example, an applicant must comply with several conditions. Most require applicants to protect sensitive areas, and otherwise ensure the safety of adjacent properties and property owners. Such conditions are usually related and proportionate to the harm both the agency and applicant wish to avoid, minimize, or mitigate.

Some conditions for mining approval, however, require the applicant to provide millions of dollars for local parks, construction of fire stations, and college tuition for local residents. While conditioning approval on money for parks, fire stations, and tuition is commendable, it has little relationship – let alone an essential nexus – to mining. Many applicants nevertheless bear these substantial costs as the price for getting a project approved and underway. *See, e.g.,* Agreements Accompanying Hardee County Resolutions 12-21, 08-19 and Manatee County Ordinance 08-32.[4]

The same is often true for transportation concurrency. Commercial and residential development may burden a community's existing transportation network. Conditions to minimize or mitigate the burdens seem natural. Many comprehensive plans thus include a transportation concurrency requirement. The goal of this requirement is to ensure that transportation facilities and services become available concurrently with the impacts of the development. Local governments define what constitutes an adequate level of service for the transportation network, and then measure whether a proposed development would exceed the existing capacity. If adequate capacity is unavailable or the proposed development would exceed capacity, then the applicant must provide for the necessary improvements to the system, contribute money towards the improvement,

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[4] These materials are available through www.hardeecounty.net and www.manateeclerk.com respectively.

or wait until the government provides the necessary improvements.

Applicants throughout Florida have paid many millions of dollars in road improvements based on a project's expected contribution to the need for added capacity – as measured by a government approved methodology. Many have even paid more than their fair share. Some, when left with no choice other than abandoning a project, have sued.

In 2007, for instance, an applicant hoping to develop 550 acres of property near the interstate in the vibrant college town of Gainesville, Florida, sued the county over transportation concurrency issues. *See PR Gainesville, LP v. Alachua County,* Complaint Case No. 01-07-CA257 (Fla. 8th Jud. Circuit 2007-10). Using a methodology agreed upon by the county and other state agencies in a pre-application agreement, the applicant proposed that of the $40 million in needed transportation improvements, it was responsible for up to $21.5 million. *Id.* at ¶¶ 25-49. The applicant even offered to finance all $40 million in improvements, with the county repaying its share. *Id.* The county demurred and opted instead to conduct a separate analysis, which departed in material respects from the agreed upon methodology. *Id.* at ¶¶ 151-66. Using this new analysis, the county concluded that the developer was in fact responsible for $58 million out of $120 million in needed road improvements. *Id.* at ¶¶ 161-62. This exaction, however, made the applicant's project financially unviable. *Id.* at ¶¶ 354-57.[5]

[5] After almost three years of litigation in the midst of the Great Recession, the parties voluntarily dismissed the case.

The county's efforts to exact as much money as possible from the applicant should be expected. Florida's transportation system has been chronically underfunded. *Joint Report on the Mobility Fee Methodology Study,* Dec. 1, 2009 at 13-16 (noting that in 2006 the Florida Department of Transportation identified $53.2 billion in unfunded needs).[6] Transportation concurrency requirements therefore serve as a "regulatory standard on an already overburdened and deficit-ridden service system without a strategy to cure past neglect and accommodate new needs." Robert M. Rhodes, *Concurrency: Problems, Practicalities, and Prospects,* 6 J. Land Use & Envtl. L. 241, 244 (1991). Since there is no concrete plan to reform the regulatory system generally or the transportation system specifically, local governments have every incentive to shift the burden of transportation improvement to applicants. The applicants, in turn, face a Hobson's Choice: either "pay exorbitant up-front service costs far exceeding their fair share, or walk away from the project." *Id.* at 244. Many pay.

B. The *Nollan/Dolan* doctrine provides meaningful protections; the Florida Supreme Court unravels these protections.

The *Nollan/Dolan* doctrine was meant to offer protection from such abuses, "to protect against the State's cloaking within the permit process an out

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[6] The report is available at http://www.dot.state.fl.us/intermodal/mobility/MobilityFee.pdf

and out plan of extortion." *Lambert v. City & County of San Francisco,* 529 U.S. 1045, 1051 (2000) (Scalia, J., dissenting from denial of cert.). It did so by requiring the government – not the applicant – to show that a condition had an "essential nexus," *Nollan,* 483 U.S. at 835, and a "rough proportionality," *Dolan,* 512 U.S. at 391, to the impact the condition intends to address.

To be sure, the *Nollan/Dolan* doctrine's scope was vague. The Court's decisions left open three questions. Fenster *supra* at 635-40. First, the Court did not specifically address whether *Nollan* and *Dolan* apply to conditions other than land dedications, to the dedication of money, services, labor or other types of personal property. *Id.* at 635-36. Second, the Court did not resolve whether the *Nollan/Dolan* doctrine applies only to exactions imposed through decisions regarding a particular piece of property or also to decisions directed at property within the jurisdiction generally. *Id.* at 637-39. Third, the Court left open the possibility of an applicant seeking protection from *Nollan* and *Dolan* even if it refuses to submit to the proposed exaction or the state withdraws it. *Id.* at 639-40. Courts throughout the country have failed to provide consistent answers to these questions. *Id.* at 635-40; Pet. for Cert. at 16-18. And until *Koontz*, no Florida appellate court squarely addressed these questions.

Still, the Court's lack of clarity offered some protection. Applicants in Florida could use *Nollan* and *Dolan* to curb abuses at the margins. As the Nobel Laureate Thomas Schelling might put it, applicants could use the *Nollan/Dolan* doctrine to

credibly threaten state agencies with its use and, from the agency's perspective, possible extension. *See* Schelling *supra* at 119-61; Daniel B. Klein & Brendan O'Flaherty, *A game-theoretic rendering of promises and threats,* 21 Journal of Economic Behavior & Organization 295-314 (1993).

The Florida Supreme Court's decision now undoes even the virtues of ambiguity, making *Nollan* and *Dolan* altogether superfluous in the process. In clear and unambiguous terms the Florida Supreme Court held that the *Nollan/Dolan* protections apply only to conditions that ask an applicant to dedicate land and only if the applicant accepts them. *Koontz,* 77 So. 3d at 1230. This decision will allow Florida's agencies to routinely sidestep *Nollan* and *Dolan.*

Consider, for example, the facts in *Nollan.* There, the California Coastal Commission approved the Nollans' request for a building permit to expand their home. *Nollan,* 483 U.S. at 828. It did so subject to the dedication of an easement that would allow the public to pass across the beach owned by the Nollans behind their home. *Id.* The Nollans sued. *Id.* at 828-30. This Court held that the easement – the exaction – constituted an uncompensated taking because the public's ability to traverse up and down the rear of the family's property did not bear an "essential nexus" to the public's right to view the shore from the front of the home. *Id.* at 835-42.

In Florida, similar facts would now yield the opposite result. A state agency could avoid the essential nexus requirement by slightly tweaking its

condition. For example, instead of asking for the dedication of an easement on the family's property, a state agency could simply require the family to pay money into an easement acquisition fund or ask the family to provide money, services or labor to improve existing beach easements. The agency could even ask the family to fund local parks, a fire station, or college tuition for the community. While such exactions would continue to bear no essential nexus to the property or the obstruction of shore view as a result of the property's improvement, they would fall outside the protections offered by *Nollan* and *Dolan.* The exactions would thus stand. *See Koontz,* 77 So. 3d at 1230. *Nollan* and *Dolan* would not. *Id.*

It is equally impractical to require that an applicant accept an unconstitutional condition before challenging it. As the intermediate appellate court recognized in this case, an applicant must have the choice to take a permit denial and challenge the constitutional validity of the proposed condition where it "materially alters the design, density, or economic feasibility of the project." *St. Johns River Water Mgmt. Dist. v. Koontz,* 5 So. 3d 8, 12 n.4 (Fla. 5th DCA 2009). The practicalities of business planning demonstrate the soundness of the intermediate court's reasoning.

In Florida, as elsewhere, a project requires planning and financial analysis to align regulatory requirements and business goals. An applicant must, for example, understand and weigh the costs of natural resource protection, mitigation of transportation impacts, and provisions for affordable housing, among other requirements, to determine

whether a project justifies the investment of capital. A project will "pencil out" if the return on investment justifies the costs – if the project is expected to be profitable. *E.g.,* Benjamin Powell & Edward Stringham, *"The Economics of Inclusionary Zoning Reclaimed": How Effective are Price Controls?,* 33 Fla. St. U. L. Rev. 471, 484 (2005) (discussing "pencil out" concept in the context of price controls).

If a project cannot "pencil out" because of a disputed exaction, then forcing the applicant to accept a permit as a condition precedent to challenging the disputed exaction would force the applicant to accept an approval for a project it would not build in order to challenge the condition which rendered it infeasible. Stated differently, if upheld, the Florida Supreme Court's decision would require an applicant to accept a condition – binding itself in the process – before challenging the condition's constitutional validity. This would surely discourage applicants from relying on the *Nollan/Dolan* doctrine when it matters most, when a condition stands between a feasible or infeasible project. Again, the logic of *Nollan* and *Dolan* would be fatally compromised. Leveraging of the police power would go unchecked. *Compare Lambert,* 529 U.S. at 1051 ("There is no apparent reason why the phrasing of an extortionate demand as a condition precedent rather than a condition subsequent should make a difference [under the *Nollan/Dolan* doctrine]") *with Koontz,* 77 So. 3d at 1230 (holding that the *Nollan/Dolan* doctrine applies "only when the regulatory agency actually issues the permit sought").

C. A response to the Florida Supreme Court's unfounded concerns and why a clear application of the *Nollan/Dolan* doctrine makes for good policy.

The Florida Supreme Court nevertheless limited the *Nollan/Dolan* doctrine to a narrow category of exactions, justifying its decision as the way to keep agencies from denying permits without discussion or negotiation. *Koontz,* 77 So. 3d at 1330-31. The Florida Supreme Court cited no authority or social science literature to support this proposition – one that deviates from almost four decades of agency norm. *See, e.g., Gen. Dev. Corp.,* 353 So. 2d at 1206. In fact, Florida law suggests that agencies would continue to negotiate regardless of the outcome of this case.

In Florida, a final decision by a state agency – not the negotiations with staff leading up to it – serves as the basis of any takings claim. Section 373.617(2) of the Florida Statutes, for example, provides that "circuit court review shall be confined solely to determining whether final agency action is an unreasonable exercise of the state's police power constituting a taking without just compensation." The negotiations simply color the process and, unless reduced to writing as specific agreements or stipulations, provide little evidentiary value. Thus, even if the *Nollan/Dolan* doctrine were to apply the exactions imposed on Mr. Koontz, an agency risks little by negotiating with an applicant.

An applicant, by contrast, gains much if the Court were to apply the *Nollan/Dolan* doctrine in

clear and unequivocal terms. If a state agency must demonstrate that its conditions are related and proportionate to the harm it seeks to prevent, the agency would have an incentive to temper its excesses. In turn, the applicant would avoid having to negotiate over unrelated extras, like fire stations, parks, and tuition. Stated differently, the negotiation would focus exclusively on the harm that both the agency and applicant seek to avoid, minimize, or mitigate. Negotiations would then be shorter, fairer, and more predictable. Less litigation would follow.

And, in many instances, because of the doctrine of administrative exhaustion, the litigation that might follow would first go through Florida's administrative process which "permits full development of a factual record and technical issues." *Galaxy Fireworks, Inc. v. City of Orlando*, 842 So. 2d 160, 163 (Fla. 5th DCA 2003). There, the agency would have an opportunity "to correct any errors and possibly moot the need for court action." *Id.* Adverse factual findings by an impartial administrative law judge would also deter applicants from clogging the courts with meritless claims predicated on the *Nollan/Dolan* doctrine.

CONCLUSION

Amici accordingly urge the Court to reverse the Florida Supreme Court's cramped reading of *Nollan* and *Dolan*. Holding otherwise would allow regulatory agencies to easily sidestep the doctrine, frustrating its goal of reining in leveraging of the

police power and blurring the constitutional line that separates negotiations from extortion.

Respectfully submitted.

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