IN THE SUPREME COURT OF FLORIDA

Case No. SC09-713

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Petitioner,

v.

COY A. KOONTZ, JR., ETC.,

Respondent.

On Appeal from the District Court of Appeal of the State of Florida,
Fifth District, Case No. 5D06-1116

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

I. NUMEROUS JURISDICTIONS HAVE HELD THAT FORCED PUBLIC IMPROVEMENTS ARE EXACTIONS SUBJECT TO *NOLLAN* AND *DOLAN* 5

A. Jurisdictions Outside of Florida Persuasively Apply *Nollan* and *Dolan* to Exactions Other than Dedications of Interests in Real Property 5

II. *NOLLAN* AND *DOLAN* HAVE THEIR ROOTS IN THE UNCONSTITUTIONAL CONDITIONS DOCTRINE, WHICH STRONGLY PROTECTS INDIVIDUAL RIGHTS AGAINST GOVERNMENT-COMPELLED FORFEITURE 11

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 6, 10

Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. Ct. App. 2000) 8

Blackburn v. City of Marshall, 42 F.3d 925 (5th Cir. 1995) 14

Clark v. City of Albany, 904 P.2d 185 (Or. App. 1995) 8-9

Dolan v. City of Tigard, 512 U.S. 374 (1994) 3-17

Dowerk v. Charter Township of Oxford, 592 N.W.2d 724 (Mich. Ct. App. 1998) ... 8

Home Builders Ass'n of Central Arizona v. City of Scottsdale, 187 Ariz. 479 (1997) 10

Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528 (2005) 11

Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997) 12

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 12

McCarthy v. City of Leawood, 257 Kan. 566, 894 P.2d 836 (1995) 10

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) 12

New Jersey Shore Builders Ass'n v. Twp. of Jackson, 972 A.2d 1151 (N.J. 2009).... 2

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 2-17

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 1

Rapanos v. United States, 547 U.S. 715 (2006) 1

Page

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47 (2006) 14

Sefzik v. City of McKinney, 198 S.W.3d 884 (Tex. App. 2006) 8, 15

St. Johns River Water Mgmt. Dist. v. Koontz, 908 So. 2d 518 (Fla. 5th DCA 2005) 2

Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997) 2

Swisher Int'l, Inc. v. Vilsack, 130 S. Ct. 71 (2009) 2

Toll Bros., Inc. v. Bd. of Chosen Freeholders of County of Burlington, 944 A.2d 1 (N.J. 2008) 7, 14

Town of Flower Mound v. Stafford Estates, L.P., 135 S.W.3d 620 (Tex. 2004) 7

Union Pac. R.R. Co. v. Pub. Serv. Comm'n of Missouri, 248 U.S. 67 (1918) 12

United States v. Petty Motor Co., 327 U.S. 372 (1946) 9

Village of Norwood v. Baker, 172 U.S. 269 (1898) 6

Walton County v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008) 2

Statutes

18 U.S.C. § 1951(b)(2) (1988) 13

Page

Rules

Fla. R. App. P. 9.370 1

Rule 9.370(a) 1

Miscellaneous

Breemer, J. David, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 (2002 2

Eagle, Steven J., Regulatory Takings 871 (3d ed., Matthew Bender & Company, Inc., 2005) 11

Epstein, Richard A., Bargaining with the State 5 (1993) 12

Epstein, Richard A., *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5 (1988) 12, 16

Huffman, James L., *Colloquium on* Dolan*: The Takings Clause Doctrine of the Supreme Court and the Federal Circuit:* Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143 (1995) 6

Reznik, Inna, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242 (2000) 14

INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure 9.370, Pacific Legal Foundation (PLF) respectfully submits this brief Amicus Curiae in support of Respondent Coy A. Koontz, Jr., etc. Counsel for both Petitioner and Respondent have consented to PLF's participation as Amicus Curiae. Pursuant to Rule 9.370(a), a motion for this Court's leave to file accompanies this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded over 35 years ago, PLF is the largest and most experienced legal organization of its kind. PLF maintains its headquarters office in Sacramento, California, and has regional offices in Bellevue, Washington, and Stuart, Florida. The Foundation is supported primarily by donations from individuals interested in the preservation of traditional individual liberties.

PLF attorneys have considerable experience litigating, as lead counsel and as amicus curiae, in defense of constitutionally protected property rights. PLF attorneys have regularly appeared before the United States Supreme Court as lead counsel on behalf of landowners whose ability to use their property was unlawfully curtailed. *See Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S.

606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). PLF also routinely participates in this Court as amicus curiae in important property rights cases. *See Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102 (Fla. 2008).

This case raises significant questions of law as to whether the constitutional requirements governing exactions of property apply to off-site mitigation demands, and whether a property owner must accede to those demands before bringing suit against the government. PLF attorneys have a wealth of experience in exactions cases, including having participated as amicus curiae in the lower court in a prior iteration of the present case. *St. Johns River Water Mgmt. Dist. v. Koontz*, 908 So. 2d 518 (Fla. 5th DCA 2005). PLF attorneys have participated in such cases across the nation, as lead counsel and as amicus curiae, affording them a broad perspective on other jurisdictions' rules governing exactions. *See Swisher Int'l, Inc. v. Vilsack*, 130 S. Ct. 71 (2009); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *New Jersey Shore Builders Ass'n v. Twp. of Jackson*, 972 A.2d 1151 (N.J. 2009).

PLF attorneys also have published law review articles relating to Fifth Amendment jurisprudence and exactions. *See, e.g.,* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 Wash. & Lee L. Rev. 373 (2002).

PLF attorneys believe their experience in litigating and publishing on matters at issue in this litigation will provide the Court a useful additional viewpoint as it considers this case.

SUMMARY OF ARGUMENT

In *Nollan*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the United States Supreme Court promulgated "nexus" and "rough proportionality" rules limiting the government's power to demand exactions in return for the grant of development permits.

In *Nollan*, the Supreme Court determined that an "essential nexus" must exist between a permit condition and the public purpose requiring the condition. *Nollan*, 483 U.S. at 837. There, the California Coastal Commission required the property owner of beach-front property to dedicate a strip of beach as a condition of obtaining permit to rebuild his house. *Id.* at 827-28. The United States Supreme Court held that there must be a nexus between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a permit exaction is an illegal regulatory taking—i.e., "not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* (citations omitted).

In *Dolan*, the Supreme Court defined how close a "fit" is required between the permit condition and the alleged impact of the proposed development. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Dolan*, 512 U.S. at 386. There must be rough proportionality—i.e., "some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added). Otherwise, the condition will be held unconstitutional as an illegal regulatory taking.

As numerous other jurisdictions have held, the *Nollan* and *Dolan* rules apply to *all* exactions that require a property owner to give up some right in exchange for a permit—whether it be a forced dedication of an interest in real property, the forced payment of fee, or (as in this case) the forced improvement of public infrastructure. Indeed, *Nollan* and *Dolan* represent just another application of the unconstitutional-conditions doctrine. This doctrine holds that governments may not compel an individual to choose between (1) surrendering a constitutional right (e.g., to free speech, to free exercise of religion, or to property interests), and (2) foregoing the benefits of some state-granted privilege (such as a license, a subsidy, or a building permit). The unconstitutional conditions doctrine provides necessary and universal protection of *all* rights enjoyed by the individual—including the right to his private

property. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

Like courts in other jurisdictions, this Court should apply the doctrine in the property rights context—through *Nollan* and *Dolan*—with the same judicial breadth and vigor as it is applied to other constitutional rights. If the Court chooses not to, property owners in the State of Florida will witness increased attempts by government to exact a "pound of flesh" from every property owner—in the form of required public improvements—for the issuance of a development permit bearing no relationship to the need for such improvements. Absent the analytical assistance and protection provided by *Nollan and Dolan*, such "out-and-out plan[s] of extortion" will go inadequately reviewed and mostly unrestrained.

ARGUMENT

I

NUMEROUS JURISDICTIONS HAVE HELD THATFORCED PUBLIC IMPROVEMENTS ARE EXACTIONS SUBJECT TO NOLLAN AND DOLAN

. Jurisdictions Outside of Florida Persuasively Apply *Nollan* and *Dolan* to Exactions Other than Dedications of Interests in Real Property

The reasoning of extra-jurisdictional cases that have applied *Nollan* and *Dolan* outside the context of forced dedications of real-property interests can be rooted in the Takings Clause of the Fifth Amendment to the United States Constitution. The United States Supreme Court has recognized that the Takings Clause's purpose is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* James L. Huffman, *Colloquium on* Dolan: *The Takings Clause Doctrine of the Supreme Court and the Federal Circuit*: Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."). Over a century ago, Justice Harlan, in *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898), concluded that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking . . . of private property for public use without compensation."

The "nexus" and "rough proportionality" rules articulated in *Nollan* and *Dolan* prohibit government from forcing individual property owners to bear burdens that are properly borne by the entire public (through, for example, taxation). To fully insure against this unfair result, *Nollan* and *Dolan*'s restrictions on the government's permitting powers must apply equally to all exactions, whether they be real-property dedications, fees, or performance of public improvements. Absent *Nollan* and *Dolan* review and protection, there is nothing to stop government entities from saddling applicants with public-improvement requirements as substitutes for compelled dedications of money or real-property interests. A cash-strapped government entity in particular sees little difference between money, real-property interests (which can be sold or leased for money), and applicant-subsidized public improvements (which saves it money). It therefore stands to reason that courts should scrutinize these effectively equivalent demands to ensure that they bear a constitutionally adequate relationship to the impacts of permit applicants' proposed projects.

Some courts outside of Florida have adopted precisely this approach. For example, the New Jersey Supreme Court, in *Toll Bros., Inc. v. Board of Chosen Freeholders of County of Burlington*, 944 A.2d 1 (N.J. 2008), held

that government officials could not require a property owner to construct substantial improvements to a county road as a condition to the grant of a development permit without complying with the requirements set forth in *Nollan and Dolan*. The *Toll Bros.* court made clear that "a planning board may only impose off-tract improvements on a developer if they are necessitated by the development," thereby recognizing that *Nollan* and *Dolan* should apply even to compelled public improvements like the exaction demanded in this case. *Id.* at 4.

Similarly, Texas courts have recognized that the *Nollan* and *Dolan* standards should be applied broadly. In *Town of Flower Mound v. Stafford Estates, L.P.*, 135 S.W.3d 620, 623, 644-45 (Tex. 2004), the Texas Supreme Court held that a permit exaction to improve an off-site public road was subject to the "essential nexus" and rough proportionality requirements. The court saw "no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved." *Id.* at 640. As one Texas court of appeal has explained, there is no reasoned basis for distinguishing between cases which impose two alternative exactions "[build the road or pay]" and those cases "which [give] the developer no alternative to constructing the road itself." *Sefzik v. City of*

McKinney, 198 S.W.3d 884, 894 (Tex. App. 2006). The *Sefzik* court warned that if such a distinction were made, "governmental entities could avoid any exposure to exaction takings claims merely by structuring its regulations to exact one of [several] alternatives and requiring the landowner to 'choose its poison.' " *Id.*

Courts in other jurisdictions have reached similar results. In *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172, 175 (Wash. Ct. App. 2000), the court of appeal applied *Dolan* scrutiny to a city's permit condition that the developer make half-street improvements to a street adjoining the development, emphasizing "the similarity of exacting land and money" (including, as in this case, public-improvement financing) and observing that "[i]t is [the City's] attempted transfer of a public burden that calls for a *Dolan* proportionality test." In *Dowerk v. Charter Township of Oxford*, 592 N.W.2d 724, 728 (Mich. App. 1998), the court held that a permit exaction requiring the owner to upgrade an off-site roadway was an exaction requiring *Nollan* and *Dolan* review. In *Clark v. City of Albany*, 904 P.2d 185, 187 (Or. App. 1995), the court concluded that there is "no relevant and meaningful distinction between conditions that require[d] conveyances and conditions [requiring that] the developer himself make improvements on

the affected and nearby property." *Id*. at 189. The court found it irrelevant, for the purposes of *Dolan*, whether a developer "retains title in, or never acquires title to, the property that he is required to improve and make available to the public." *Id.* Such a fact "does not make the requirement any the less a burden on his use and interest than corresponding requirements that happen also to entail memorialization in the deed records." *Id*.

These sister courts have considered and rejected the contention that exactions other than dedications of real-property interests are beyond the purview of *Nollan* and *Dolan*'s protections. And with good reason. *Nollan* and *Dolan* protect individuals' rights to their property, regardless of whether that property takes the form of an interest in real property, money, or the financing of public improvements as in this case. *See, e.g.*, *United States v. Petty Motor Co.*, 327 U.S. 372, 381, 66 S. Ct. 596, 90 L. Ed. 729 (1946) (recognizing that the property interests protected by the Fifth Amendment are not limited to real property). And *Nollan* and *Dolan* exist to ensure that no one property owner is forced to carry a burden which is rightfully to be shared by the entire public—precisely because the public stands to benefit from the requirement. Armstrong, 364 U.S. at 49.

There are some jurisdictions that have refused to apply *Nollan* and *Dolan* to permit exactions outside the context of compelled land dedications. For example, in *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 486 (1997), the Arizona Supreme Court said that *Dolan* was inapplicable to monetary exactions, because they represent "a considerably more benign form of regulation" than compelled land dedications. The court failed to offer any reasoned explanation for its sweeping—and arguably inaccurate—proposition.

Similarly, in *McCarthy v. City of Leawood*, 257 Kan. 566, 894 P.2d 836, 845 (1995), the Kansas Supreme Court refused to apply *Dolan* to impact fees imposed on permits, in part because "[t]he majority [in *Dolan*] concluded that the conditions which required the dedication of land constituted an uncompensated taking" and "[t]here is nothing in the [*Dolan*] opinion . . . which would apply the same conclusion to [monetary exactions]." Again, other than the unremarkable fact that *Dolan* involved land dedications, the court failed to provide any reasoned distinction among exactions.

No court of which Amicus is aware, which has endorsed only limited application of *Nollan* and *Dolan* to permit exactions, has explained why individual property owners should be forced to bear some burdens on behalf of the public—but not others—in contravention of *Armstrong*. *Armstrong*, 364 U.S. at 49. This Court should decline to follow jurisdictions not consistently applying *Nollan and Dolan*'s protections to all permit exactions. Instead, it should make clear that *all* permitexactions—including the condition here that Respondent finance public improvements unrelated to his project—are subject to heightened scrutiny.

II

NOLLAN AND *DOLAN* HAVE THEIR ROOTS IN THE UNCONSTITUTIONAL CONDITIONS DOCTRINE, WHICH STRONGLY PROTECTS INDIVIDUAL RIGHTS AGAINST GOVERNMENT-COMPELLED FORFEITURE

Nollan and *Dolan* involve "a special application of the 'doctrine of unconstitutional conditions.'" *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 530 (2005). The nexus and rough proportionality tests were adopted specifically to prevent government from extorting property from owners by virtue of conditions unrelated in nature and extent to the proposed property use or development. *Id.* As the *Lingle* Court stated, "the government may not require a person to give up the constitutional right . . . to receive just

compensation when property is taken for a public use—in exchange for a discretionary benefit . . . [that] has little or no relationship to the property." *Id.*

In its most general application, the unconstitutional conditions doctrine "holds that even if a state has absolute discretion to grant or deny any individual a privilege or benefit, it cannot grant the privilege subject to the conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights." Steven J. Eagle, Regulatory Takings 871 (3d ed., Matthew Bender & Company, Inc., 2005) (quoting Richard A. Epstein, Bargaining with the State 5 (1993)); Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 11 (1988) (Unconstitutional conditions doctrine provides substantive protections to speech, religion, and property.).

Prior to the Court's decisions in *Nollan* and *Dolan*, the unconstitutional conditions doctrine was most often applied outside the context of property rights. *See*, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (holding a business owner could not be compelled to choose between a warrantless search of his business or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a Florida

right-of-reply statute unconstitutional as an abridgment of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or removing material it desired to print); *Union Pac. R.R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. 67, 70 (1918) (applying doctrine to a case where a railroad consented to and paid for a certificate authorizing the issuance of bonds that it thought violated the Commerce Clause because the government convinced it that failure to pay would have resulted in severe penalties, including the invalidation of its bonds); *Mahoney v. Babbitt*, 105 F.3d 1452, 1454 (D.C. Cir. 1997) (invalidating a condition which purported to restrict protestors' right to freely express their opinions).

With the decisions in *Nollan* and *Dolan*, the unconstitutional conditions doctrine was explicitly applied in the property-rights context. In *Nollan*, the Supreme Court described the California Coastal Commission's demand that property owners dedicate an easement allowing the public to traverse their beachfront property as an "out-and-out plan of extortion." *Nollan*, 483 U.S. at 837; *see also* 18 U.S.C. § 1951(b)(2) (1988) (defining the term "extortion" to mean the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force under color of official right). The exaction lacked any connection to the harm allegedly resulting from the

Nollans' new house (impaired views from the public highway); nevertheless, the government presented the Nollans with the unpalatable choice of surrendering a constitutional right (an easement in his property) or foregoing a permit to build their home. *Nollan*, 483 U.S. at 837 n.5. ("[A] regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes."). In *Dolan*, the Supreme Court confirmed that the *Nollan* decision was an application of the unconstitutional conditions doctrine: "The government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385.

Permit applicants like the Nollans must often choose between the lesser of two evils—develop their property with whatever conditions are required by the government or forgo development altogether. *See Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) (government may not deny a benefit to a person on a basis that infringes his or her constitutionally protected interests); *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547

U.S. 47 (2006) (benefit cannot be conditioned on waiver of a constitutionally protected right even if the individual has no entitlement to that benefit). The New Jersey Supreme Court articulated the problems faced by property owners in concluding that a condition requiring off-site improvements must comport to the *Nollan* and *Dolan* standards.

> Authorizing off-tract improvements beyond a developer's pro-rata share through the guise of "volunteerism" is problematic from many perspectives. At heart, *it fails to provide an adequate safeguard against municipal duress to procure otherwise unlawful exactions* because the line between true volunteerism and compulsion is a fragile one.

Toll Bros., 944 A.2d at 17 (citations omitted; emphasis added).

One legal scholar has explained that "[i]n the context of exactions, extortion [is] shorthand [for] the situation in which a local government takes advantage of a developer by extracting concessions from him . . . to receive some benefit desired by the government but unrelated or disproportionate to the purposed development at hand." Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. Rev. 242, 268 (2000). In essence the government, in requiring a property owner to finance an off-site development, takes advantage of the fact that the landowner is in need of a permit; the government can therefore effectively coerce the property owner to surrender property–be it money, public-

infrastructure financing, or an interest in land—by threatening to withhold that permit.

The unconstitutional conditions doctrine recognizes that a government's mere provision of a choice does not insulate the individual decision-maker from injury. Indeed, a choice between "between Scylla and Charybdis" is no choice at all. *See Sefzik*, 198 S.W.3d at 894 (a property owner cannot be required to choose his poison as between an unconstitutional taking of property and the denial of the right to develop).

Finally, with respect to the objection that property rights are somehow "different" from other constitutionally protected rights and therefore trigger less protection, the Supreme Court has spoken. In *Dolan*, the Court discussed various cases involving constitutional challenges alleging violations of various provisions of the Bill of Rights. *Dolan*, 512 U.S. at 392, 114 S. Ct. at 2320. The Court explained that property rights are on an equal footing with other constitutionally protected individual rights, and it saw "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Id.* So there can be no question that the unconstitutional conditions doctrine applies with

equal force—through *Nollan* and *Dolan*—as it does in other non-property-rights contexts.

Applied in cases where property owners seek development permits, the *Nollan* and *Dolan* tests, as special applications of the unconstitutional conditions doctrine, require that any permit conditions be closely related to the nature and extent of the project's alleged impact on public facilities. Here, Respondent's need for a permit to make productive use of this property does not grant the District the authority to exact from him *anything of value* having no bearing on the impact of his proposed project, any more than the District would be able to make such demands of him directly, outside the permitting context. This is the quintessential application of the unconstitutional conditions doctrine, with its purpose to "prevent[] the government from asking the individual to surrender by agreement rights that the government could not take by direct action." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5, 7 (1988). In order to determine whether that doctrine has been violated, and to best protect Respondent and other similarly situated property owners against such demands, *Nollan* and *Dolan* must apply.

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed, and this Court should apply the tests articulated by the United States Supreme Court in *Nollan* and *Dolan* to Petitioner's permit demands.

DATED: January 13, 2010.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: January 13, 2010.

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I hereby certify that the foregoing Brief Amicus Curiae of Pacific Legal Foundation in Support of Respondent was furnished to the following via first-class mail, postage prepaid, the 13th day of January, 2010:

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