

No. \_\_\_\_\_

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**In the**  
**Supreme Court of the United States**

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WILLIAM BECKER AND DARCY LYNCH,  
TRUSTEES OF THE ANTOINETTE OGLIVEY TRUST,

*Petitioners,*

v.

CITY OF HILLSBORO, MISSOURI,

*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals declined to follow this Court's opinion in *Yee v. City of Escondido*, 503 U.S. 519 (1992) by holding that Petitioners had waived on appeal the argument of an unconstitutional regulatory taking under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) even though they had consistently asserted unconstitutional taking claims under both the United States and Missouri Constitutions.
2. Whether government land use regulations which effectively eliminate all use of private property for anything but vacant land amount to an unconstitutional taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)

## **PARTIES TO THE PROCEEDINGS**

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### **Petitioners and Plaintiffs – Appellants below**

- William Becker and Darcy Lynch,  
co-trustees of the Antoinette Oglivey Trust

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### **Respondent and Defendant – Appellee below**

- City of Hillsboro Missouri,  
a municipal corporation under Missouri law

## **CORPORATE DISCLOSURE STATEMENT**

None of the parties to the proceeding are private corporations.

## LIST OF PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit  
No. 23-3367

William Becker and Darcy Lynch, co-trustees of the  
Antoinette Ogilvy Trust under the will of George  
Ogilvy, Plaintiffs-Appellants v. City of Hillsboro,  
Missouri, Defendant-Appellee

Final Opinion: January 7, 2025

Rehearing Denial: February 11, 2025

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U.S. District Court, Eastern District of Missouri  
No. 4-22-cv-00886-AGF

William Becker, Et Al., *Plaintiffs, v.*  
City of Hillsboro, Missouri, *Defendant*

Final Order: October 17, 2023

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Circuit Court of Jefferson County State of Missouri  
No. 22JE-CC00561

William Becker, Et Al., *Plaintiffs, v.*  
City of Hillsboro, Missouri, *Defendant*

Removal to Federal Court: August 24, 2022

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## **OPINIONS BELOW**

The unpublished opinion of the U.S. Court of Appeals for the Eighth Circuit, dated January 7, 2025 is included at App.1a. The opinion of the U.S. District Court, Eastern District of Missouri, 667 F. Supp. 3d 997 (E.D. Mo. 2023), is included at App.24a.



## **JURISDICTION**

The judgment of the Eighth Circuit was entered on January 7, 2025. App.1a. The Court of Appeals denied the Petitioners' Motion for Rehearing and Rehearing En Banc on February 11, 2025. App.57a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).



## **CONSTITUTIONAL PROVISIONS INVOLVED**

### **U.S. Const., amend. V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### **Missouri Const., art. I, sec. 26**

That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.



## STATEMENT OF THE CASE

### A. Background of the Case

This case arises from Petitioners' attempts to sell their 170 acres of land (the Property) for construction of country estate homes on ten or more acre lots in a largely rural area of Missouri. Those efforts were thwarted by governmental land use regulations of the City of Hillsboro, Missouri (the City) in which jurisdiction the Property is situated. These regulations prohibit the construction of any home unless the property owner agrees to install, at his own expense, the infrastructure necessary to connect to the City-owned water system, and to dedicate that infrastructure along with requisite permanent utility easements to the City without compensation. According to Petitioners' summary judgment evidence, the estimated cost of compliance with these requirements on the Property would exceed one million dollars, not including the value of the permanent utility easements. Petitioners' real estate appraiser testified by affidavit that this expense makes the sale of lots economically unfeasible. The net result is to render the Property unusable for anything but vacant land.

Petitioners requested City officials to consider some alteration or variance in the application of these regulations to the Property but the City refused. Thereafter, Petitioners filed this action claiming an unconstitutional taking in violation of both the Fifth Amendment to the U.S. Constitution as well as Article I Section 26 of the Missouri Constitution.

## B. Summary of the Law

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court established that an unconstitutional *regulatory* taking occurs where a governmental authority imposes conditions on a property owner's development of her property which conditions (1) do not bear an essential nexus to the impact of the proposed development or (2) are not roughly proportionate to that impact. Moreover, *Dolan* requires an individualized determination of whether these tests are met in each case. *Dolan v. City of Tigard* at 388-391. See also *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013) and *Scheetz v. County of El Dorado*, 144 U.S. 893 (2024).

This Court has also established that an argument that land use regulation constitutes a regulatory taking under *Nollan* and *Dolan* may be first raised on appeal in any case generally asserting unconstitutional takings claims. *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, this Court rejected Escondido's contention that the property owner's argument of a regulatory taking had been waived by having failed to assert same first before the lower court. This Court made clear in *Yee* that a regulatory takings argument under *Nollan* and *Dolan* was not a separate legal claim, but rather an alternate type of unconstitutional takings claim, and that the property owner was entitled to make such an alternative argument on appeal regardless of what arguments it had made in the lower courts. *Yee v. City of Escondido*, at 534-5.

In addition, in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), this Court held that governmental land use regulations which deprive an

owner of all economically beneficial use of private property amount to an unconstitutional taking of property in violation of the Fifth Amendment. In *Lucas*, the property owner was compelled to retain its property as vacant land, which this Court held to constitute a taking.

### **C. District Court Proceedings**

This action was removed by the City from Missouri State Court to the U.S. District Court for the Eastern District of Missouri.

After discovery, the parties filed cross-motions for summary judgment. The District Judge denied Petitioners' Motion but granted the City's Motion for Summary Judgment ruling that, under the facts presented, there was no taking by the City under *Lucas v. South Carolina Coastal Commission, supra* or *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and that Petitioners had failed to satisfy the tests set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The District Court further ruled that Petitioners had waived any argument of a regulatory taking under *Nollan* and *Dolan* because they had only cited those cases tangentially in their pleadings. App.24a.

### **D. Eighth Circuit Proceedings**

The Court of Appeals affirmed the District Court ruling in all respects including the finding of a waiver of any arguments under *Nollan* and *Dolan*, which had been fully briefed and argued to the Court of Appeals. App.1a. In their Motion for Rehearing, Petitioners urged the Court to reconsider its refusal to consider the regulatory taking issue in light of this Court's opinion in

*Yee v. City of Escondido*, (App.59a) but the Court refused to grant rehearing. App.57a.



## REASONS FOR GRANTING THE PETITION

- I. The Eighth Circuit Declined to Follow the Clear Holding of This Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992) That in an Action Claiming an Unconstitutional Taking of Property a Party May Argue on Appeal an Alternative Type of Unconstitutional Taking Not Argued Before the District Court.**
  - A. Under *Yee v. City of Escondido* the Court of Appeals Was Required to Consider Petitioners' *Nollan* and *Dolan* Claims on Appeal.**

Both the District Court and the Eighth Circuit refused to consider whether the conditions and requirements imposed by the City on the Property amounted to an unconstitutional regulatory taking under *Nollan v. California Coastal, supra* *Commission* and *Dolan v. City of Tigard, supra*. The District Court concluded that Petitioners had waived the argument on summary judgment even though both *Nollan* and *Dolan* had been cited by Petitioners in their summary judgment pleadings. App.38a. The Eighth Circuit affirmed the District Court's conclusion and likewise refused to consider the regulatory taking issue on appeal, although fully briefed by Petitioners. App.14a-15a.

The precise issue of waiver of a regulatory taking argument on appeal in a case generally alleging uncon-

stitutional takings was addressed by this Court in *Yee v. City of Escondido, supra*. In *Yee*, plaintiffs filed claims alleging that Escondido had effected an unconstitutional taking by enforcing a rent control ordinance prohibiting rent increases without City approval. Before the lower courts, the *Yee* plaintiffs had not argued that the ordinance amounted to a regulatory taking but only a “physical taking”. On appeal, the *Yee* plaintiffs claimed for the first time that the City’s regulations also constituted a regulatory taking under *Nollan* and *Dolan*. Escondido argued that plaintiffs had waived this argument by not having raised it first in the lower courts. But this Court disagreed, holding that the property owners had not waived the argument since a regulatory taking is but one of several types of unconstitutional taking claims, which had been the basis of plaintiffs’ claims throughout.

Writing for the majority, Justice O’Connor stated, at 534-5:

We must also reject respondent’s contention that the regulatory taking argument is not properly before us because it was not made below . . . Petitioners unquestionably raised a taking claim in the state courts. The question whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment’s Takings Clause, is thus properly before us. Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 78, n. 2 (1988); *Gates, supra*, at 219-220; *Dewey v. Des Moines*, 173

U.S. 193, 197-198 (1899). Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate claims. They are, rather, separate arguments in support of a single claim—that the ordinance effects an unconstitutional taking. (emphasis added)

Here, there was some dispute in the record in the District Court as to whether Petitioners had raised a regulatory taking arguments. App.14a. However, even if the District Court was correct that Petitioners had not sufficiently argued a regulatory taking there, under this Court's analysis in *Yee*, Petitioners were entitled to raise the regulatory taking argument for the first time on appeal, which they clearly did.

Therefore, it was improper for the Eighth Circuit to refuse to follow this Court's clear holding in *Yee v. City of Escondido, supra* and consider Petitioners' regulatory taking arguments on appeal.

**B. Had the Court of Appeals Considered Petitioners' Arguments Under *Nollan* and *Dolan*, It Should Have Concluded That the City's Regulations Amounted to an Unconstitutional Taking**

In *Nollan v. California Coastal Commission, supra*, the owner of beachfront property sought a coastal development permit to replace an existing residence with a larger one. The California Coastal Commission imposed as a condition on the grant of this permit a requirement that the owner dedicate a permanent easement along the shoreline for public access. While recognizing the right of governments to impose conditions on development, this Court held that there must

be a rational nexus between the permit sought and the conditions imposed. This Court concluded that the Coastal Commission's mandating the dedication of an easement across the *Nollan* property for public access was not reasonably related to a building permit to construct a new residence but rather amounted to a governmental acquisition of land for unrelated public purposes without compensation, or an exaction. *Id.* at 438-432.

Seven years later, in *Dolan v. City of Tigard*, *supra* this Court extended its holding in *Nollan* to require that any condition imposed on a development permit must also be roughly proportionate to the impact the development may have. In *Dolan*, the city had conditioned the grant of permits requested by a business owner to expand her store and parking lot on the dedication of easements for a public greenway and bicycle pathway. This Court held that, while there was an essential nexus between the required conditions and the impact of the development from increased traffic, the conditions imposed were excessive and not roughly proportionate to that impact. This Court explained that while there was no precise mathematical calculation to determine rough proportionality, any government seeking to impose such conditions must make an "individualized determination" that the conditions are related both in nature and extent to the impact of the proposed development on the surrounding area. *Id.* at 388-391.

The holdings in *Nollan* and *Dolan* were extended by this Court in *Koontz v. St. Johns River Water Management Dist.*, *supra* to situations where a permit was denied because the property owner refused to comply with an unreasonable condition. According to this Court,

such threatened conditions themselves place an impermissible burden on the owner's right not to have its property taken without just compensation. *Id.*, at 603-604.

Applying these principles to the facts presented here leads to the conclusion that the conditions and regulations sought to be imposed by the City on Petitioners to construct and extend municipal infrastructure at substantial expense and dedicate permanent utility easements across the Property for the benefit of the City bears no essential nexus to the negligible impact from the development of a small number of country homes on ten acre plus lots in a rural area. Rather, such conditions amount to nothing more than an exaction of money and property by the City to expand its own public water system.

Even if such a nexus existed, these conditions are grossly disproportionate to the impact expected from these ten or so country homes. Petitioners' evidence on summary judgment from an expert real estate analyst was that Petitioners or their successors would be required to spend between \$963,000 and \$1,578,000 to construct the required public infrastructure, not including the value of the land to be dedicated to the City as permanent utility easements. When added to other normal development costs, the development of the Property becomes cost prohibitive.

It is undisputed that the City failed to make any individualized determination of the impact of these conditions on the Property and further refused to consider any variation from its regulations for this Property as required by *Dolan*. On the contrary, the City stubbornly insisted on applying its policy uniformly to all properties in the City, regardless of impact.

The City was not entitled to summary judgment as a matter of law under *Nollan* and *Dolan*. Therefore, the District Court's granting summary judgment in favor of City was in error and should have been reversed by the Eighth Circuit.

## **II. The Eighth Circuit's Decision Misreads *Lucas v. South Carolina Coastal Council and Palazzolo v. Rhode Island* as Permitting Government Land Use Regulation Which Effectively Eliminates All Use of Private Property Other Than as Idle Vacant Land**

Under *Lucas v. South Carolina Coastal Commission*, *supra*, this Court held that an unconstitutional taking occurs when government regulation effectively denies property owners all economically beneficial use of their property. In its opinion, the Eighth Circuit construed the loss of all economically beneficial use of land as the equivalent of leaving a property valueless. App.13a. According to this view of *Lucas*, so long as a property retains some value more than zero, no *Lucas* taking has occurred even if the owner is compelled by regulations to leave it sit idle.

The Eighth Circuit's adoption of this interpretation of *Lucas* presents an issue of nationwide importance to property owners in that governments may avoid future *Lucas* type taking claims by simply asserting that a property it has mandated to remain idle, still retains some value. With respect, this was not the intent of this Court's holding in *Lucas*.

In *Lucas*, a property owner had purchased seaside property on a barrier island intending to build residences. Subsequently, an agency of the state of South Carolina prohibited any further construction on the

property for public conservation purposes. The result was that the only remaining use property owners could make of their property was as vacant recreational space.

In writing for the majority, Justice Scalia did not quantify the term all economically beneficial use of property. However, the majority concluded that the fact that the owner was forced by the regulation to leave his property vacant and idle amounted to a taking analogous to the government imposing a preservation easement on the property.

We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. (emphasis added)

*Id.* at 1019.

Nowhere in *Lucas* did this Court equate loss of all economically beneficial use with valuelessness. Indeed, such a conclusion would be nonsensical since virtually all real estate has some positive value even as vacant land.

In reaching its interpretation of *Lucas*, the Eighth Circuit relied on this Court's opinion in *Palazzolo v Rhode Island*, 533 U.S. 606 (2001). In *Palazzolo* this Court found no *Lucas* taking had occurred because while the property owner was prohibited by governmental wetland regulations from developing a majority of his property, he still retained the right to develop a portion, referred to in the opinion as the upland parcel, for what this Court described as a substantial residential

development. *Palazzolo v Rhode Island*, 533 U.S. at 621-4, and 631.

Unlike *Palazzolo*, Petitioners here have no right to develop or use any of the Property under the City's regulations unless they comply with the City's demands. As such, the facts presented here are much closer to those in *Lucas*, where the owner was left with no use of its land at all except to admire it in its vacant state.

The Eighth Circuit's reading of *Lucas* and *Palazzolo* to permit the City's regulations to effectively eliminate any use of the Property here except as idle vacant land was clearly erroneous. and should be reversed by this Court.



## CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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