1   IN THE SUPREME COURT OF THE UNITED STATES

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3   COY A. KOONTZ, JR.,   :

4   Petitioner   :   No. 11-1447

5   v.   :

6   ST. JOHNS RIVER WATER MANAGEMENT   :

7   DISTRICT   :

8   - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Tuesday, January 15, 2013

11

12   The above-entitled matter came on for oral

13   argument before the Supreme Court of the United States

14   at 11:06 a.m.

15   APPEARANCES:

16   PAUL J. BEARD, II, ESQ., Sacramento, California; on

17   behalf of Petitioner.

18   PAUL R.Q. WOLFSON, ESQ., Washington, D.C.; on behalf of

19   Respondent.

20   EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

21   Department of Justice, Washington, D.C.; for United

22   States, as amicus curiae, supporting Respondent.

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C O N T E N T S

1   P R O C E E D I N G S

2   (11:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument next this morning in Case 11-1447,

5   Koontz v. St. Johns River Water Management District.

6   Mr. Beard?

7   ORAL ARGUMENT OF PAUL J. BEARD, II,

8   ON BEHALF OF THE PETITIONER

9   MR. BEARD: Thank you, Mr. Chief Justice,

10   and may it please the Court:

11   This case is about the extent to which

12   Nollan and Dolan review should be made available to

13   individuals to challenge excessive exactions imposed as

14   conditions to land use approval.

15   Here, before he could make small use of his

16   property, Coy Koontz was told by the district that he

17   had to finance enhancements to 50 acres of publicly

18   held --

19   JUSTICE GINSBURG: Let's back up. When he

20   asked for a permit, he voluntarily said, I -- as

21   mitigation for the loss of wetlands, I am going to

22   voluntarily create a conservation easement on the rest

23   of my property. So he recognized, from day one, that

24   there had to be some mitigation for what he was seeking

25   to do in the permit. Is that right?

1   MR. BEARD: That is correct. With his

2   application, Justice Ginsburg, he did offer a mitigation

3   in the form of a conservation easement on most of his

4   property.

5   JUSTICE GINSBURG: And if he had offered

6   nothing, and he just said, I want this permit to develop

7   my land, and the agency said, you have offered no

8   mitigation, we deny your permit, would he have a claim?

9   MR. BEARD: If there was no condition

10   attached to the permit denial, then there would be no

11   claim; although it would be up to the district, under

12   Nollan and Dolan, to make the individualized

13   determination, both of the amount of impact to wetlands

14   and the amount necessary to offset.

15   JUSTICE GINSBURG: Suppose he just put in

16   the application, no mitigating -- no mitigation of any

17   kind, and the agency says no. You recognize that he

18   would have no claim, right? That he had an obligation

19   to mitigate.

20   MR. BEARD: It depends, Your Honor. If the

21   denial was based on the idea that he was obligated to

22   offer mitigation and that was the extent of the

23   district's communication with him -- in other words,

24   that the district told him, you must offer us something,

25   we won't tell you what, and we'll let you decide what

1   you want to offer in mitigation -- if that was in the

2   record and that was the -- and the result of that was a

3   permit denial because Mr. Koontz said, for example,

4   well, gee whiz, I don't know how much I need to mitigate

5   for, you haven't told me, I still believe there would be

6   a Dolan violation because, in Dolan, the Court made

7   clear, there has to be an individualized

8   determination --

9   JUSTICE SCALIA: For what? For what? You

10   wouldn't -- you wouldn't know what property was taken.

11   MR. BEARD: He wouldn't know where --

12   JUSTICE SCALIA: You are -- you are posing a

13   situation in which he never came forward with any

14   suggestion. They never came forward with any

15   suggestion. You say he still has a cause of action for

16   a taking?

17   MR. BEARD: Not for --

18   JUSTICE SCALIA: A taking of what?

19   MR. BEARD: Not for a taking, Your Honor,

20   but he -- he may have a cause of action, under Nollan

21   and Dolan, for the imposition of an unconstitutional

22   condition that may not -- the contours of which may not

23   be known. But the fact that the district told him, you

24   need to --

25   JUSTICE SCALIA: I think the other side says

1 that you may have such a cause of action here.

2   MR. BEARD: Excuse me. I didn't understand?

3   JUSTICE SCALIA: Wouldn't -- wouldn't the

4 other side in this case acknowledge that you have such a

5 cause -- that you may have such a cause of action here?

6   MR. BEARD: Yes, Your Honor. I believe

7 they -- well, their argument --

8   JUSTICE SCALIA: But they are just saying

9 you don't have a cause of action for a taking.

10   MR. BEARD: That is correct. They -- they

11 are saying that we don't have a cause of action for a

12 taking. Of course, in Nollan and Dolan, there was no

13 transfer of property from the applicant to the relevant

14 agencies.

15   As this Court will recall, in both Nollan

16 and Dolan, there was an imposition of an exaction, and

17 immediately, the applicant in both cases sued to prevent

18 the unlawful exaction from being consummated.

19   JUSTICE SOTOMAYOR: Counsel, I've had a

20 problem with your argument, okay? From the record, it's

21 very clear that a conservation offer is not considered

22 mitigation because there's still a net loss of wetlands.

23 The policy is abundantly clear, stated, and undisputed.

24 Okay?

25   So, given that policy, why are we even in

1   this case? Meaning whether there was an exaction or no

2   exaction or whatever happened in terms of the denial,

3   you couldn't win on your offer because the policy of the

4   State was clear and, in my mind, unassailable: We have

5   to preserve wetlands. Conservation of other wetlands is

6   not enough. Mitigation means make sure that we get a

7   net gain of wetlands.

8   So why are we here?

9   MR. BEARD: Justice Sotomayor, we don't

10   contest the legitimacy of the policy, of course, in

11   preserving wetlands; nor do we contest, for that matter,

12   the ratios that the district has imposed via its

13   regulations.

14   It is undisputed -- the trial court found

15   below, the Court of Appeals affirmed, and the finding

16   was undisturbed in the Florida Supreme Court, that, in

17   fact, the offsite mitigation -- that part of the

18   mitigation that went beyond the conservation easement

19   was in excess, it violated Nollan and Dolan.

20   So the underlying factual findings are not

21   in dispute.

22   JUSTICE GINSBURG: I think you -- I think

23   you have a problem then, Mr. Beard, because, if you look

24   at the record, the record is very clear that it was

25   not -- that the district didn't come back and say, take

1   it or leave it, you -- you improve our wetlands, or you

2   get no permit.

3   There was -- and if you -- they are set out

4   in the Respondent's brief at pages 13 to 15, oh, at

5   least half a dozen, maybe more, that the -- the district

6   said, here are several ways -- several ways that you

7   could sufficiently offset the adverse impact. And some

8   of them had nothing to do with improving the

9   government's own land.

10   So if we can't -- we really can't say this

11   was a take it or leave it, either you do the

12   improvement that we are asking you to do, or you get no

13   permit, what do you do with the fact that, as the

14   appendix certainly bears out, that the district offered

15   a range, it offered many, many ways that this permit

16   might be granted. And then it says, then you are free

17   to come up with some other -- something else.

18   MR. BEARD: Justice Ginsburg, it's true that

19   there were negotiations and that a range of offers were

20   made. On Mr. Koontz's application to use 3.7 acres of

21   his property in conjunction with the conservation

22   easement, the district made a final decision denying him

23   his permit because he would not go beyond the easement

24   and offer offsite mitigation.

25   And that is --

1   JUSTICE GINSBURG: Not -- not -- because he

2   wouldn't go beyond what he was offering, but that's --

3   some of these options -- one was that he -- that he

4   adjust the size of his project, that he make it smaller.

5   The -- the staff suggested eliminating -- no, that --

6   that's a different one.

7   But there was one that suggested that he --

8   he reduce the scale, the Petitioner reduce the scale of

9   his project to one acre and preserve the rest for the

10   conservation easement. Now, if that -- if he took that,

11   would you have any -- any case here?

12   MR. BEARD: I'm sorry, Justice Ginsburg? If

13   we took --

14   JUSTICE GINSBURG: If they said, we will

15   give you -- we will give you a permit if you reduce the

16   scale of your project to one acre, and then preserve the

17   rest by a conservation easement?

18   MR. BEARD: Unlikely not, Your Honor,

19   because the trial court did conclude, based on the

20   evidence, that he was having minimal impact on any

21   viable wetlands. And so even a reduction in the size of

22   the project, with an increase in the amount of

23   mitigation, would have a fortiori gone beyond even what

24   we have in this case.

25   The court of appeals made clear, as a matter

1 of law, that Mr. Koontz did -- was entitled to a

2 determination on the application he submitted. He

3 submitted that application. And, as the district

4 admitted in a pretrial statement right before trial, the

5 denials were based exclusively -- and this is a quote --

6 "The denials were based exclusively on the fact that the

7 plaintiff would not provide additional mitigation to

8 offset impacts from the proposed project."

9   JUSTICE KAGAN: Mr. Beard, can I go back to

10 Justice Ginsburg's first question and make sure I

11 understand your answer to it?

12   Suppose that the State just had a policy

13 that said, We're concerned about wetlands; in order to

14 develop your piece of property, you have to come forward

15 with a proposal -- a mitigation proposal and an adequate

16 mitigation proposal. And then it gives some guidance

17 about what an adequate mitigation proposal would mean,

18 but it really leaves it up to the landowner.

19   And the landowner says, sorry, I'm not

20 giving you anything, I think I should be able to develop

21 this on my own without providing any mitigation. Is

22 that -- and -- and the State says, well, then, sorry,

23 you don't get a permit.

24   Is that a taking? Does the man have a

25 takings claim? I heard you answer the question yes.

1   MR. BEARD: My answer was that he may have a

2   Nollan/Dolan claim. I don't want to get confused about

3   the term "taking" because "taking" could imply many

4   kinds of regulatory takings claims.

5   JUSTICE KAGAN: Well, I -- that's the next

6   question I was going to ask you because my understanding

7   of Nollan and Dolan was that it assumed the condition,

8   if taken alone, would constitute a taking.

9   Do you disagree with that?

10   MR. BEARD: I do not disagree with that,

11 Your Honor.

12   JUSTICE KAGAN: Okay. So then you need a

13 taking someplace in the picture; isn't that right?

14 Nollan/Dolan says this is how we analyze takings in the

15 context of a permit scheme. So we have to look for a

16 taking. So, in my example, where is the taking?

17   This was Justice Ginsburg's example. Where

18 is the taking?

19   MR. BEARD: Right. And I think that's

20 correct, that, under Nollan and Dolan, you would have to

21 have a condition that was imposed on you.

22   My only point was would it be lawful --

23 or there be a problem in the district shifting its

24 burden on to the applicant and saying, we're not going

25 to establish what mitigation is required, and we're not

26 going to establish what the impacts are, we'll leave

1 that up to you, you give us what you think is -- is

2 necessary.

3   JUSTICE KENNEDY: Suppose the district

4 did -- did have, as I think it did here, a uniform

5 policy that, for every acre you develop, you have to

6 preserve 10 wetlands -- 10 acres of wetlands.

7   And then two cases, both hypothetical, one

8 is somebody had an 100-acre parcel, and they want to

9 develop five acres, and they have 50 acres that they

10 mitigate for wetlands. The other person has only one

11 acre, and he wants to -- and he has to develop the whole

12 acre.

13   Can the district then say, we'll give you

14 the one-acre development permit, if you reclaim wetlands

15 on 10 other acres that you -- that we can designate for

16 you elsewhere? The hypothetical being designed to point

17 out whether or not the crux of your argument is that he

18 had to go off -- offsite.

19   MR. BEARD: The crux is not that he had to

20 go offsite, but that -- that did play into the trial

21 court's analysis as to the connection between his impact

22 and what was being required, and there was testimony

23 below that there was no connection there. And the fact

24 that the mitigation was four to seven miles away played

25 into the analysis as to whether there was a connection.

1   It's not --

2   JUSTICE KENNEDY: So, in my hypothetical,

3   you would -- would there be a violation in my

4   hypothetical, as you understood it?

5   MR. BEARD: It depends, Your Honor, because

6   you have to determine what -- in each respective

7   hypothetical, what the impact was actually to the

8   wetlands and then determine what the appropriate

9   mitigation --

10   JUSTICE SOTOMAYOR: How do you normally

11   decide whether the agency has done that right or not?

12   MR. BEARD: Excuse me?

13   JUSTICE SOTOMAYOR: How do you normally

14   decide? Let's assume Justice Kagan's question -- or

15   Justice Ginsburg's question. No -- it just says, come

16   to us with a mitigation plan. And you say, this is what

17   I offer, and it's enough. And they say, no, it's not

18   enough; denied.

19   Would you go through the State

20   administrative process, to figure out whether that was

21   arbitrary and capricious, whether it was a Penn Central

22   violation? What would you do with that claim in the

23   normal circumstance? Justice Kennedy's question.

24   MR. BEARD: In the normal circumstance, if

25   there was no condition imposed, there would not be a

1   Nollan and Dolan claim. There may be another kind of

2   claim, say, under Penn Central, and that could be

3   brought. That wouldn't have to be brought via

4   administrative remedies, if there was a final agency

5   action --

6   JUSTICE SOTOMAYOR: It would be an inverse

7   condemnation.

8   MR. BEARD: Correct. It could be an inverse

9   condemnation type of a claim.

10   JUSTICE BREYER: So -- so what I think might

11   be driving some of these questions is the district court

12   says -- just as you say, had Koontz offered additional

13   mitigation -- the additional that would have cost

14   $10,000, he would have gotten the permit. That's what

15   he said.

16   So then you look back to see what additional

17   mitigation. And, here, we have in the record, at least

18   that my law clerk finds -- you know, that -- that they

19   went to Koontz and they said, here are some choices:

20   Install a subsurface stormwater management system in the

21   development -- I mean, right on your land -- or reduce

22   the size to one acre; or eliminate the filling of the

23   slide slope areas; or replace 15 culverts and eliminate

24   a ditch system somewhere else; or enhance 50 acres

25   somewhere else.

1   Now, at that point, when -- and then they

2   said, won't you negotiate for 30 more days, maybe we can

3   find some other things? He says, no, I'll bring a

4   lawsuit. Okay.

5   Now, I absolutely can see a Penn Central

6   claim there. But the land -- what you're talking about

7   is not some land somewhere off the site. We're talking

8   about his land. If, after all, they said you have to

9   leave all the coal in the mine to hold up the ceiling --

10   you know what I'm referring to -- then they go too far.

11   And, here, if we look at all these

12   conditions proposed and said -- you know, this is just

13   terrible, they don't do it for anybody else, your

14   client's the only one, it bears no relation, oh, it just

15   goes too far, you win under Penn Central.

16   So I can see the framework here. I'm not

17   saying you're going to win, but I got it clear what the

18   framework is. But suddenly you bring this Nollan/Dolan

19   business into it, and I get confused. And the reason is

20   because there was a different piece of land in Nollan

21   and Dolan.

22   The piece of land that was different was an

23   easement in front of -- and an easement is a piece of

24   property in Nollan, and there was a bike path in Dolan,

25   right across his property.

1   So -- so I don't see how Nollan and Dolan

2 have to do with this. I see everything that Penn

3 Central has to do with it, and that grows out of the

4 nature of what was being offered. You are saying what

5 they are offering you is simply going too far. Okay.

6 I've got that conceptually.

7   I ask this question because all these briefs

8 are about Nollan and Dolan, and I don't understand what

9 they have to do with it. I must be missing something,

10 and that's why I am asking you.

11   MR. BEARD: Justice Breyer --

12 Justice Breyer, Nollan and Dolan, fundamentally, are

13 about whether a property owner has been singled out to

14 bear public burdens that, in fairness and --

15   JUSTICE BREYER: But, of course, they are

16 land claims because they took a piece of land, which

17 everybody assumes -- right in front of his house -- and

18 said, you've got to let everybody from the beaches walk

19 back and forth from one beach in the north to another

20 one in the south, and they are going to walk over your

21 land.

22   And the Court said, you can't take his land

23 unless you have a nexus to some public purpose that is

24 related to his building the house. I got it. I just

25 don't see what it has to do with this case.

1   MR. BEARD: Because you -- you can have an

2   unconstitutional condition imposed on your right to do

3   something, in this case, make use of your property. And

4   the --

5   JUSTICE BREYER: Of course, you can. In

6   fact, there is too much coal. That's an

7   unconstitutional condition. It goes too far, and there

8   is a framework called Penn Central, which deals with it.

9   MR. BEARD: Penn Central is a special

10   takings case that goes to the question of whether a

11   regulation of the use of property that is sought to be

12   developed has gone too far so as to affect the taking.

13   Penn Central is not --

14   JUSTICE SOTOMAYOR: Which -- how does that

15   not address going too far? You just said it. If -- if

16   this is unrelated to the -- the denial of your permit of

17   all uses of your land, and you're saying that's the

18   problem, which is I still have a use, I just want more,

19   why does that entitle you to your lost profits?

20   When were you ever entitled to start with

21   the claim that, somehow, you're entitled to a permit, as

22   a matter of law?

23   MR. BEARD: We're entitled, under the

24   Unconstitutional Conditions Doctrine, to not have to

25   bear a public burden that has no bearing on the impact

1   that we're trying to use on our property.

2   JUSTICE SCALIA: Yes, that's fine. That --

3   that would enable you to challenge the denial of the

4   permit, saying it's based upon an unconstitutional

5   condition. But how does it -- how does it enable you to

6   say there's been a taking? What has been taken?

7   MR. BEARD: What has been -- what has been

8   taken, in effect, is his funds that have to be put now

9   to a public use, the enhancement of 50 acres of public

10   wetlands. And there is nothing in the Takings Clause --

11   nothing --

12   JUSTICE SCALIA: It hasn't -- it hasn't been

13   taken. I mean, he turned it down.

14   MR. BEARD: Nothing was taken in Nollan and

15   Dolan, either. What was proposed there, though, was a

16   threat of a taking.

17   JUSTICE SCALIA: The -- the permit was

18   granted in Nollan and Dolan. And -- and the condition

19   attached to the permit, therefore, took effect; namely,

20   that you had to dedicate this easement over your -- over

21   your beach, whereas, as my colleague pointed out,

22   anybody could walk back and forth, barefooted.

23   (Laughter.)

24   MR. BEARD: Justice Scalia, in Nollan and

25   Dolan, there was approval -- approval with conditions.

1   There were no permits issued, and that's -- that is an

2   important distinction to make, that most agencies,

3   including this one, you approve a permit with a -- with

4   conditions, which means, we will give you your permits

5   as soon as you comply; which is substantively the same

6   as saying, we won't give you your permits until you say

7   yes to our conditions.

8   JUSTICE BREYER: All right. Look, we have

9   the same question. I just want an answer to my

10 question. And, for the purposes of this question, I am

11 assuming enormously in your favor. I am assuming that

12 this set of conditions is the worst thing since sliced

13 bread.

14   (Laughter.)

15   JUSTICE BREYER: All right. I

16 think there -- all right. I'm assuming that in your

17 favor. All right.

18   JUSTICE SCALIA: Sliced bread's supposed to

19 be good.

20   JUSTICE BREYER: No, no. It's been proved

21 bad.

22   (Laughter.)

23   JUSTICE BREYER: The -- the -- but -- but in

24 any case, the -- the point is, you see, I assume that in

25 your favor. I'm trying to figure out the conceptual

1   framework. I assume that in your favor. I assume

2   whether they didn't issue the permit and would have, but

3   they haven't quite, or maybe they have -- it means

4   nothing.

5   Now, having assumed that, it seems to me

6   what your argument is, is that this is a form of

7   regulatory taking of the kind that Holmes was talking

8   about. And that -- that's what was going on in -- in

9   Penn Central, and so we simply look to see if it went

10 too far or whatever. The lower courts could do that. I

11 got that part.

12   Now, I want you to answer the question,

13 which is, am I right? Is there another part -- a

14 different part to this case, called the Nollan/Dolan

15 part and explain that to me. That's why I asked the

16 question. I want to hear what you're going to say.

17   MR. BEARD: Justice Breyer, there is another

18 part, a very distinct part, and that part goes to the

19 question of the condition that produced the denial. So

20 there are -- there are actually two parts here. There's

21 the -- the conditioning of your permit; in other words,

22 we will not issue you permits unless you agree to

23 perform offsite mitigation.

24   Now, the question, under Nollan and Dolan,

25 is was that condition constitutional? Was he asked to

1   give up something that the State -- or the district, in

2   this case, should not have asked him to give up in

3   exchange for his right to use his property?

4   Now, it's true as -- as, Justice Breyer, you

5   mentioned, that the permit denial and whether that

6   affects a regulatory taking of his land, of the thing he

7   wants to use, that's an entirely different question.

8   And it may raise another kind of claim -- another kind

9   of taking claim.

10   But the crux of the claim that was litigated

11   in this case, from the trial court all the way up to the

12   Florida Supreme Court, is was the condition to perform

13   offsite mitigation -- and that was accepted as true by

14   the courts below, that this was a condition that had

15   been --

16   JUSTICE GINSBURG: Suppose the record just

17   doesn't bear that out; the record shows that it wasn't

18   one option. They gave him a laundry list of things he

19   could do, some -- some of them having nothing whatever

20   to do -- anything off his own property.

21   Suppose the -- whatever the district court

22   might have said, the record shows that the agency said,

23   you're right, seven things you could do, come up with

24   here are six, if you have something else. And some of

25   them have absolutely nothing to do with other

1   properties.

2   MR. BEARD: We agree that there were

3   negotiations and that, even in the order, it's alleged

4   that various options were provided to Mr. Koontz, but,

5   ultimately, the decision -- as the district admits, the

6   decision -- the final decision to deny the permit

7   application for 3.7 acres of use was Mr. Koontz's

8   refusal to acquiesce in the condition that he perform

9   50 acres of offsite improvements.

10   And, by the way, the reference --

11   JUSTICE GINSBURG: Where -- where is that?

12   MR. BEARD: It's in the Joint Appendix,

13   pages 70 to 71, which is the pretrial statement where

14   each party sets forth his and her position. There, the

15   court -- I'm sorry -- the district made clear that the

16   condition that had been refused and was the cause of the

17   permit denial was the one to perform offsite mitigation

18   at a cost of a range between $10,000 on the low end.

19   Our experts said in the range of 100 to 150,000 -- 90 to

20   150,000.

21   So the district, later on -- even in the

22   Florida Supreme Court, Justice Ginsburg, said, in its

23   Petitioner's brief on jurisdiction, at page 1, that it

24   required additional mitigation before it would authorize

25   the permits and that, quote, "Additional mitigation

1   would be offsite because the available conservation land

2   onsite was, in the district's view, insufficient

3   mitigation."

4   So there's no question that an actual

5   condition was imposed, whose rejection produced a permit

6   denial.

7   JUSTICE KAGAN: Mr. -- Mr. Beard, I don't

8   think anybody is contesting that there was a condition

9   imposed or maybe there are. But -- you know, there's

10 another question whether that condition is a taking. And

11 we've been trying to figure out what's the taking here.

12 In Nollan and Dolan, they took an easement, they took a

13 piece of land, so that's the taking. Now, you said the

14 funds are the taking; is that correct?

15   Any time that somebody comes up with a

16 proposal for -- for a developer to pay money, in order

17 to compensate the State for the costs that are

18 associated with his development, that that is, itself, a

19 taking?

20   MR. BEARD: I want to be clear that we're

21 not saying that all monetary fees or exactions would be

22 subject to Nollan and Dolan, only within the permit

23 context -- the special context of land use permitting is

24 it --

25   JUSTICE KAGAN: No, I understand. But, in

1   the permit context, a State can't say to somebody, you

2   have to pay to perform some service or to compensate

3   without it being a taking and without it being subject

4   to Nollan and Dolan analysis.

5   MR. BEARD: Correct. If the State or if the

6   government or the permitting authority asks for the --

7   for the property owner to give up property, even money

8   to be put to a public use, and it's not an application

9   for your user fee or something like that, it's for

10   mitigation, that should be subject --

11   JUSTICE KAGAN: So -- so, for example -- and

12   I'll try to do this very quickly, if -- if the State

13   just had a policy for every acre of wetlands you fill

14   in, it costs us $10,000, you need to pay $10,000, that's

15   subject to Nollan and Dolan analysis, too.

16   MR. BEARD: Correct. It would be subject to

17   Nollan and Dolan analysis, to determine if there really,

18   on the ground, there's a connection between the

19   impact --

20   JUSTICE SCALIA: No, it -- it would be

21   subject to Nollan and Dolan analysis if they took the

22   $10,000. If they issued the permit, the developer went

23   ahead with the development, and the State then attached

24   the -- the bank account in the amount of $10,000 or

25   whatever, that would be Nollan -- in Nollan and Dolan --

1   in Nollan, there was a taking.

2   He had gone ahead with the -- with the

3   development of his house under the permit, which said,

4   if he did that, he gave away the easement. So there --

5   there was a -- a taking there. The -- the easement

6   would have been taken automatically.

7   In -- in -- in Dolan, there was -- the

8   individual had not gone ahead with the development, but

9   it was clear that any development the person undertook

10   would be subject to the -- the exaction that the

11   municipality required. So there was a -- a taking

12   there, we said.

13   Here, there's nothing that happens. The

14   permit was denied, unlike in -- unlike in -- in Dolan,

15   where the permit was granted, and it was understood

16   that, if she went ahead with it, she was going to

17   lose -- lose some land rights. Here, the permit's been

18   denied. I can't see where there's a taking here.

19   Nothing's been taken.

20   MR. BEARD: In Nollan and Dolan, Your Honor,

21   nothing was taken, either. In Nollan, you had a permit

22   approval with conditions. It's true that development

23   had not gone forward, but, here, as well, development

24   had not gone forward.

25   Presumably -- theoretically, if the

1   development had gone forward, he might have been subject

2   to conditions that he would have had to satisfy. But I

3   would submit to the Court --

4   JUSTICE SCALIA: The permit had issued. The

5   permit had issued in both of those cases, and,

6   therefore, the person was saying, to go ahead with this

7   permit, I give up -- I give up this land.

8   MR. BEARD: The permits in Nollan and Dolan

9   actually did not issue. There was only approval, with

10 conditions, and there is a difference. And that is no

11 different from what happened here. The threat is the

12 same. You don't get a permit issued to you until you --

13   JUSTICE SCALIA: There was no approval with

14 conditions. There's one thing for -- for a municipality

15 to issue an -- an approval with conditions, and a

16 municipality saying, we can't approval it unless you

17 agree to these conditions. And the person doesn't

18 agree, and the municipality says, we don't approve it.

19   MR. BEARD: But, in either case, he -- he

20 faces the threat, the unconstitutional condition on his

21 use of his property, you don't get your use until you

22 comply with our conditions.

23   Mr. Chief Justice --

24   JUSTICE KENNEDY: I -- I have one question.

25 I know we -- you are running short on your rebuttal

1   time.

2   Assume that, when we look at this record,

3   assume we think there is a due process violation, not a

4   taking violation. That is not before us here, is it?

5   MR. BEARD: No. The due -- there is no due

6   process claim here. There is only a State statute that

7   embodies sort of a due process standard, but there is no

8   due process claim here.

9   And may I reserve the balance of my time,

10 Your Honor?

11   CHIEF JUSTICE ROBERTS: And I will afford

12 you some additional time, since our questioning intruded

13 on yours.

14   MR. BEARD: Thank you.

15   CHIEF JUSTICE ROBERTS: Mr. Wolfson?

16   ORAL ARGUMENT OF PAUL R.Q. WOLFSON

17   ON BEHALF OF THE RESPONDENT

18   MR. WOLFSON: Mr. Chief Justice, and may it

19 please the Court:

20   The parties agree that Florida may require a

21 landowner to perform mitigation as a condition for a

22 permit that would allow the destruction of a wetlands.

23 The parties disagreed as to how much mitigation was

24 appropriate in this case.

25   The district thought that Mr. Koontz's

1   proposal was insufficient to mitigate the -- the damage

2   to wetlands. Mr. Koontz rejected the district's

3   counterproposals, and he refused to do anything more.

4   And the district denied his permit application because

5   he refused to do anything more.

6   CHIEF JUSTICE ROBERTS: Does it make any

7   difference, in his refusing to do anything more, whether

8   the condition is onsite or offsite?

9   MR. WOLFSON: I don't think it makes any

10   difference, Mr. Chief Justice, I mean, the -- under the

11   Florida regulatory regime, we cannot demand certain

12   conditions from the landowner.

13   The -- we are obligated -- if the -- if the

14   permit -- the landowner has to establish, under his

15   permit application -- and it's his burden -- that he

16   meets the various standards -- the public interest

17   standard, which includes no adverse impact --

18   CHIEF JUSTICE ROBERTS: Those are all

19   State -- State law provisions you are talking about.

20   MR. WOLFSON: Correct. Correct.

21   CHIEF JUSTICE ROBERTS: What about is

22   there -- is there anything in the Federal Constitution

23   that limits the conditions that you can demand?

24   MR. WOLFSON: I don't -- not -- not -- if I

25   understand your question, Mr. Chief Justice, I don't

1   think so.

2   I think that the question is -- when you are

3   talking about what analytical rubric you should apply,

4   whether it be Nollan or Dolan or Penn Central, I think

5   you can always argue that the impact of any of the

6   conditions that we would demand -- and I will assume

7   here that they are true demands -- you can always argue

8   that the impact of the conditions, be they onsite,

9   offsite, or monetary, would be so burdensome that it

10   would call into play Penn Central or --

11   CHIEF JUSTICE ROBERTS: But that's -- but

12   there is no -- there is no restraint on the agency. It

13   can ask for the moon -- before it will give a permit?

14   MR. WOLFSON: Well, I don't -- I think that

15   Penn -- first of all, I think there are many restraints

16   on the agency. First of all, I think Penn Central

17   imposes a restraint on the agency.

18   CHIEF JUSTICE ROBERTS: Do you know of any

19   case where the government has lost a Penn Central case?

20   MR. WOLFSON: In -- yes. There are several

21   in this case, Mr. Chief Justice. I mean, Hodel v.

22   Irving is a Penn Central case, I believe, and I think

23   Kaiser-Aetna was also a Penn Central case.

24   Now, they -- now, they -- so --

25   CHIEF JUSTICE ROBERTS: Let me present --

1   I'm sorry.

2   MR. WOLFSON: So it does -- it certainly

3   does -- and they --

4   CHIEF JUSTICE ROBERTS: It doesn't happen

5   very often.

6   MR. WOLFSON: Well, it is -- certainly, the

7   burden is on the landowner, but -- but I think that Penn

8   Central -- I think that, in Lingle, when this Court tried to

9   sort of restore -- you know, some -- some coherence to

10   the -- to the takings jurisprudence and repudiated the

11   Agins point, the Court pointed out that -- that the --

12   what -- that the normal -- sort of the normal

13   jurisprudence is that the government is not required to

14   establish, by a heightened scrutiny, sort of that there

15   is a connection between means-ends analysis, when it

16   engages in economic -- economic regulation.

17   And that --

18   CHIEF JUSTICE ROBERTS: Just -- just to nail

19   it down, your -- your position is that there is no limit

20   in the Federal Constitution on what the agency can

21   demand as a condition for the issuance of a permit?

22   MR. WOLFSON: No, no, no. I don't think

23   that is our position. First of all, the Due Process

24   Clause may certainly impose conditions. The Equal

25   Protection Clause may certainly impose conditions.

1 And --

2   CHIEF JUSTICE ROBERTS: But -- but the

3 Takings -- the Takings Clause does not.

4   MR. WOLFSON: If -- if the conditions are so

5 onerous that it would make it essentially impossible to

6 derive any value from the land, that may very well call

7 into question Penn Central or Lucas. I mean, in many

8 ways, this case could have been litigated as a very

9 straightforward Penn Central case.

10   JUSTICE KENNEDY: Suppose -- suppose the

11 agency said, we are really short of revenue; we will let

12 you develop your land, if you contribute a million

13 dollars to our new football stadium?

14   MR. WOLFSON: Justice Kennedy, I think that

15 that might very well raise a Penn Central or Lucas claim.

16 It also sounds like --

17   JUSTICE SCALIA: Well, it doesn't raise Penn

18 Central. You keep on running away from it by saying

19 Penn Central or Lucas.

20   MR. WOLFSON: Well, it's not --

21   JUSTICE SCALIA: It does not deprive the

22 land of all value. The land still has some value. Penn

23 Central is totally out of the case.

24   MR. WOLFSON: Well -- I mean -- it's not --

25 it's not a Nollan or Dolan claim is my point,

1   Justice Kennedy.

2   And it's not a Nollan or Dolan claim because

3   it's not a -- the -- the -- as -- as my friend

4   acknowledged, the question in Nollan and Dolan -- or the

5   rationale of Nollan and Dolan is would the condition, by

6   itself, if demanded unilaterally and outside the

7   permitting context, would -- would that have been a

8   taking of property for which just compensation would

9   have been required?

10   So the --

11   CHIEF JUSTICE ROBERTS: Sure it would have

12   been -- sure it would have been, if they just went

13   along -- to a landowner, and the landowner is there,

14   minding his own business, and they say, well, you own

15   some property, so give us a 1 million dollars to build a

16   football stadium.

17   That would be -- that would be

18   unconstitutional, right?

19   MR. WOLFSON: I think -- I think that

20   would -- I mean, I think that would violate -- could

21   well violate the Due Process Clause. It's hard to

22   see what the -- you know, what the rationality of it is.

23   But I don't think that this Court has

24   ever -- has ever extended the concept of a taking to

25   requirements that a landowner -- that anybody -- or a

1   landowner, either pay money or, more importantly,

2   because I think what really is this case, is come into

3   compliance with a regulatory requirement that would

4   have -- that -- which he would have to expend money to

5   comply with.

6   And that --

7   JUSTICE ALITO: I'm trying to understand

8   what would be -- what would be left of Nollan and Dolan,

9   if we agree with you.

10   Let me give you three situations. First,

11   the petition -- the district says, we are granting your

12   permit on the condition that you give us one-third of

13   your land. That's Nollan and Dolan, right?

14   MR. WOLFSON: Yes.

15   JUSTICE ALITO: Okay. Situation number 2,

16   permit is denied, but it will be granted, if you give us

17   one-third of your land. What about that?

18   MR. WOLFSON: I think, in that situation --

19   in other words, if the situation is really exactly the

20   same like Nollan and Dolan, but the permit is denied,

21   but it's clear that it is a concrete -- concrete

22   condition, the landowner can go up through the judicial

23   review process and say, this is -- you know, the denial

24   of the permit application is predicated on an

25   unconstitutional condition, and you should set that

1   aside.

2   JUSTICE ALITO: Is that the same as the

3   first example, for purposes of Nollan and Dolan?

4   MR. WOLFSON: Almost. Almost,

5   Justice Alito.

6   JUSTICE ALITO: All right. Now let me to get to

7   my third. The permit is denied, but it will be granted,

8   if you give us the fair market value of the third of the

9   land, and, once you have done that, then we're going to

10   condemn your land and pay you the fair market value for

11   it.

12   MR. WOLFSON: Justice Alito, I think that

13   this Court's decision -- there are -- this Court's

14   decision in Village of Norwood, essentially says, if

15   what is going on is just a pure contrivance to avoid the

16   requirement of compensation in the Just Compensation

17   Clause, that the Court has said, no, it will look

18   through and -- to the substance of the demand and

19   determine that there was -- you know, essentially, an

20   evasion of the just compensation requirement.

21   JUSTICE SCALIA: As I understand your

22   position, cash is magical, right? The -- the government

23   can come in and -- come into my house, take all of the

24   cash that's there, and that is not the basis for a takings

25   claim, right? Because cash is not -- is not a taking.

1   Does that make any sense?

2   MR. WOLFSON: Well, first of all,

3   Justice Scalia, of course, this case, we don't believe

4   involves cash. It involves a requirement to do

5   something that costs money, which is -- is different

6   from cash.

7   I mean, cash is -- the problem with

8   extending -- the problem with extending the takings

9   concept to a monetary obligation, which can be paid for

10 out of sort of undifferentiated funds --

11   JUSTICE SCALIA: Right.

12   MR. WOLFSON: -- is that it has -- it has no

13 logical stopping point. I mean, the court --

14   JUSTICE SCALIA: The stopping point is don't

15 take my cash.

16   MR. WOLFSON: Well, but the --

17   JUSTICE SCALIA: Your -- your answer to my

18 question is, that's okay, it's not a taking, right?

19   MR. WOLFSON: I think --

20   JUSTICE SCALIA: I may have some other cause

21 of action, but not a -- not a taking? The government's

22 come in and taken my money.

23   MR. WOLFSON: It's not a -- it's not a

24 Nollan and Dolan claim for the government to say, if you

25 want -- if you want a permit --

1   JUSTICE SCALIA: I'm not talking Nollan and

2   Dolan. I'm talking about your position that the taking

3   of cash cannot be a taking.

4   MR. WOLFSON: Well, if a -- I'm sorry,

5   Justice Scalia. If the -- if the government is seizing

6   the -- the identifiable dollar bills that are in your --

7   in your house, I mean, that sounds more like a case

8   like --

9   JUSTICE SCALIA: Oh, I see, I see.

10   MR. WOLFSON: Webb's Fabulous Pharmacies,

11   where --

12   JUSTICE SCALIA: If they -- if they say, you

13   have to turn over to us whatever money you have in your

14   house, or you have to turn over to us whatever's in your

15   bank account, that's not a taking.

16   MR. WOLFSON: Justice Scalia, I think there

17   are many -- there are many constitutional claims that

18   could be made. And I also want to add, there is an

19   extensive overlay of State law in this area that

20   protects landowners from arbitrary, irrational,

21   intrusive, excessive demands by government agencies.

22   CHIEF JUSTICE ROBERTS: One of the

23   things the -- the Federal provision, the Takings Clause,

24   is designed to prevent property owners from having to

25   bear the costs that should be borne by the people as a

1   whole.

2   The football stadium example, there is no

3   reason that a particular landowner should have to pay

4   for the football stadium, simply because he owns

5   property.

6   The Takings Clause is designed to make sure

7   that those exactions are not imposed on property owners,

8   but spread more evenly across the citizens who benefit

9   from it. And I guess I don't understand why you say

10   that the Takings Clause is the one provision that

11   doesn't apply in that type of situation.

12   MR. WOLFSON: Mr. Chief Justice, the -- the

13   Armstrong policy of the -- that the government -- that

14   an individual person should not be forced to bear what

15   society should -- what should be spread to society as a

16   whole -- is not violated when the government insists

17   that a landowner comply with a generally applicable

18   regulation.

19   Now, of course -- of course --

20   CHIEF JUSTICE ROBERTS: The generally

21   applicable regulation in the football stadium

22   hypothetical is not generally applicable. It says, you

23   are the owner of this property, and if you want to

24   develop it, you've got to build a football stadium.

25   MR. WOLFSON: Well, I think that is saying

1   to one particular landowner, you may have to build a

2   football stadium, where no other type of similar

3   regulation or requirement would ever be imposed on any

4   other landowner sounds -- you know, like -- you know,

5   sounds like an equal protection claim, if the government

6   just picks out one landowner.

7   JUSTICE SCALIA: What if they do it to five

8   or six other landowners, okay?

9   MR. WOLFSON: Well, then I think you have to

10   ask -- but, then, Justice Scalia, I think you have to

11   ask what -- what regulatory scheme is the government --

12   JUSTICE KENNEDY: Well, let's -- let's

13   put -- let's put it this way: I take it, it's -- it's a

14   given that the government cannot take an easement on

15   your property. It cannot use your property for its own

16   purposes. It cannot park its trucks there. It cannot

17   cut the grass.

18   Why is it that, if it can't do those, it can

19   still force you, as a condition to using your property

20   to its highest and best use, to pay them money?

21   MR. WOLFSON: Well, I think --

22   JUSTICE KENNEDY: Why isn't that an equal

23   burden -- why isn't that an equal use of the property by

24   the government?

25   MR. WOLFSON: I think -- I think, for

1   several reasons, Justice Kennedy. First of all, I think

2   that this nation has a long legal tradition of giving

3   unique legal protection to property, as opposed to

4   money.

5   I mean, there are many circumstances -- many

6   circumstances, where the government can say to an

7   individual, you must give me $1,000, but cannot say --

8   or a group of individuals or -- but cannot say to the

9   same group or individual, you must give me land worth

10   $1,000.

11   I mean, there -- that -- that is what the

12   Just Compensation Clause --

13   JUSTICE SCALIA: Really? Gee, that doesn't

14   strike me as -- as entirely true.

15   MR. WOLFSON: Well, Justice --

16   Justice Scalia, the government obviously --

17   JUSTICE SCALIA: You mean a tax that is

18   imposed only on landowners, and it's -- you know, it's a

19   tax -- $5,000 per landowner, if that were replaced by a

20   provision that said, every -- every landowner shall

21   contribute to the State a portion of his property worth

22   $5,000, that --

23   MR. WOLFSON: I think that would --

24   JUSTICE SCALIA: The latter is bad, and the

25   former's okay?

1   MR. WOLFSON: I think that would raise very

2   serious questions. I mean, I don't know that this Court

3   has ever -- has ever been faced with exactly such a

4   case, but I think that would raise very serious

5   questions.

6   JUSTICE BREYER: So that -- am I

7   wrong about -- I might have this -- I thought the

8   framework, roughly, is the following: it is not the

9   case that Penn Central applies only where there is a

10   physical invasion of property, or there is total

11   destruction of the value of the property.

12   In those two situations, what we said in

13   Lucas is it applies without case-specific inquiry, but

14   there are another set of cases where Penn Central and

15   McMahon apply with case-specific inquiry.

16   And those, to discover whether you have one,

17   you look into such things as whether the regulation

18   destroys investment-backed expectations. And then you

19   look to the nature of the government interest and the

20   relationships, et cetera. That's what I thought the

21   framework was.

22   Now, if that's the framework, then, when the

23   government says, I will let you develop your land if and

24   only if you give $50,000 to the Shriners Hospital, you

25   would say, I can't develop my land. And, besides, that

1 significantly interferes with my investment-backed

2 expectations. And, besides, there is no relation

3 whatsoever. Therefore, I win under the Takings Clause.

4   Now, I spell all that out because I -- if

5 I'm wrong about that framework -- if I am right about

6 the framework, that can apply to this case. If I am

7 wrong about the framework, I want to know where in the

8 cases I'm wrong.

9   MR. WOLFSON: Justice Breyer, we think that

10 you are right about that framework. That -- and -- and

11 just six weeks ago in the --

12   JUSTICE SCALIA: That surprises me.

13   MR. WOLFSON: In the -- well, just six weeks

14 ago, in the Arkansas Fish and Game Commission case, this

15 Court reiterated that Penn Central is presumed to be the

16 test.

17   JUSTICE BREYER: Okay. So, if I'm right

18 about the framework, that takes care of all the

19 hypotheticals you were asked. In those cases, there is

20 a significant interference with investment-backed

21 expectation. And there's no justification whatsoever,

22 so the Takings Clause applies.

23   MR. WOLFSON: We agree, Justice Scalia, and

24 we don't --

25   JUSTICE SCALIA: Justification is the

1   protection of wetlands. That's a justification, the

2   protection of wetlands.

3   There's no necessary comparison, as Nollan

4   and Dolan requires, between the harm that would be

5   occasioned if the permit were granted and what the State

6   is exacting in order to mitigate.

7   That -- that doesn't exist anywhere in -- in

8   the analysis that you are talking about.

9   MR. WOLFSON: Well, Justice Scalia, there

10   are -- there is another problem with the Nollan and

11   Dolan claim in this case, which is it's hard to see how

12   you can have an exactions takings claim when nothing has

13   ever actually been exacted --

14   JUSTICE SCALIA: Now, that is a problem.

15   (Laughter.)

16   MR. WOLFSON: And -- right.

17   And so -- and, in this case, if the -- if

18   the claim for the taking is -- for the compensation is

19   based on Nollan and Dolan, it seems that there is a

20   mismatch and that what the Petitioner is trying to do is

21   sort of take the Nollan/Dolan heightened scrutiny

22   government -- government bears the burden of proof

23   analysis and sort of convert that into what is the

24   regulatory takings analysis for the entire parcel of his

25   land, which is -- which is the measure of damages that

1   he received.

2   So I think that there is a mismatch. And,

3   now, this is --

4   CHIEF JUSTICE ROBERTS: I think that your

5   point goes to the question that has been raised about --

6   there's no permit issued. He didn't accept the -- the

7   permit. And I don't understand that proposition.

8   Are you saying that, if you are confronted

9   with an unconstitutional condition, you have to accept

10 it, and then you can challenge it? You can't simply say

11 you denied that on the basis of an unconstitutional

12 condition, and that's wrong?

13   MR. WOLFSON: No, that's not our argument,

14 Mr. Chief Justice. Florida has opened an avenue for

15 judicial relief for you to go up through the Florida EPA

16 process, just like the Federal EPA, where you can say,

17 stop -- stop the district from doing this to me; they

18 are predicating their -- either their grant or their --

19   CHIEF JUSTICE ROBERTS: Okay. I'm trying to

20 get to the Federal. You often fall back to the State

21 provisions. I'm looking at the Federal Constitution.

22   And, assuming the State provisions give you

23 no relief, is it your position that he has no claim,

24 unless he accepts a permit with unconstitutional

25 conditions?

1   MR. WOLFSON: If there is no -- if there's

2   no kind of avenue, as I was saying, then I would think

3   we would then -- you would have to obtain -- you have to

4   seek compensation, but your compensation is for the

5   value of your land that was taken.

6   And, in Lingle, this Court reiterated that

7   the Takings Clause is not a substantive limitation on

8   the government's power to regulate. The -- the Takings

9   Clause -- or as I should call it, the Just Compensation

10   Clause -- is a requirement that if -- that the

11   government will pay you just compensation for any

12   property or property interest it has seized from you.

13   It does not -- it does not, itself, impose

14   a -- a requirement that the government substantively

15   justify its regulation.

16   JUSTICE GINSBURG: Mr. Wolfson, why isn't it

17   entirely reasonable to say, if you are going to put a

18   condition on a permit, that condition has to have some

19   rough proportionate relationship to the harm that is

20   being done to the permit -- what -- that seems to me

21   perfectly sensible, that if they are going -- if they

22   are going to exact a condition, the condition has to

23   have some discrete proportional relationship to the

24   harm?

25   MR. WOLFSON: Justice Ginsburg, I think that

44

1   the district thought that they were acting roughly

2   proportional. In other words, we are -- we are not

3   saying that the government shouldn't act -- that

4   government should not act reasonably.

5   But I think that, when you force these cases

6   into court under the Nollan/Dolan framework, you have

7   a -- you have basically a mismatched and extraordinarily

8   complex situation. And you have -- you run right into

9   what this Court said in Lingle, which is that it is not

10   ordinarily the Court's -- the appropriate approach to

11   require the government to bear the burden of proof.

12   JUSTICE KENNEDY: Well, in Penn Coal v.

13   Mahon, the government didn't enter the property. It

14   didn't take the property in the physical sense of moving

15   in inappropriate. It just says, congratulations,

16   you have some coal under your land, and we hope you

17   enjoy it because you can't move it.

18   And we said that is a taking, that is a

19   regulation that goes too far. And it deprived, as

20   Justice Breyer indicated, the owner of investment-backed

21   expectations, although that word wasn't in Penn-Mahon.

22   MR. WOLFSON: Correct. And,

23   Justice Kennedy, nobody is disputing that Mr. Koontz

24   could have made the argument that the regulation goes

25   too far in the sense of the burden on his proposed

1   project. I mean, he had all of those arguments

2   available to him.

3   He bought the -- he says he bought the land

4   before the regulation went into effect. He had

5   investment-backed expectations and all the rest of it.

6   But that is not the claim that he is

7   advancing to this Court.

8   Thank you.

9   CHIEF JUSTICE ROBERTS: Thank you,

10   Mr. Wolfson.

11   Mr. Kneedler?

12   ORAL ARGUMENT OF EDWIN S. KNEEDLER,

13   FOR UNITED STATES, AS AMICUS CURIAE,

14   SUPPORTING THE RESPONDENT

15   MR. KNEEDLER: Mr. Chief Justice, and may it

16   please the Court:

17   I would like to emphasize, at the outset,

18   that Petitioner's argument that Nollan and Dolan should

19   apply in this context would -- would constitute a

20   radical change in the -- in the way standard generally

21   applicable regulatory programs are operated.

22   It is standard procedure, when someone

23   applies for a permit from the government, it is the

24   permit applicant's burden to establish that he complies

25   with the regulatory program.

1   Nollan and Dolan shift that burden to the

2   government. That has never been the case under

3   regulation, including land use regulation.

4   JUSTICE SCALIA: What was taken in Nollan

5   and Dolan?

6   MR. KNEEDLER: If -- if --

7   JUSTICE SCALIA: In Nollan, was it the

8   easement that was taken?

9   MR. KNEEDLER: That is what -- if -- if the

10   permit had issued and the -- and an easement was

11   granted, yes, it was the easement.

12   JUSTICE SCALIA: Well, but it -- wasn't what

13   was taken unreasonably the ability of this homeowner to

14   make the alterations to his house that he wanted to

15   make? He wanted to add another story and the court --

16   and the State said, you can't do it.

17   And its only basis for saying, you can't do

18   it was because you wouldn't give us the easement.

19   MR. KNEEDLER: The -- the basis of the --

20   the theory of Nollan and Dolan -- and the Court made

21   this clear in -- in Lingle -- and in Del Monte Dunes,

22   for that matter -- is those two cases apply in a

23   specific situation where there is an exaction of a right

24   of access, an easement for the public to enter the land

25   as a condition.

1   And the -- the reason for that, the Court

2   explained in Lingle -- there are really two reinforcing

3   points. The first was that there would be public

4   access, which is a permanent physical occupation, which

5   is one of -- one of the exceptions to the general Penn

6   Central test for regulatory takings.

7   The other is that it was a per se taking.

8   The -- it -- it was per se that the government could not

9   have acquired that easement for paying -- without paying

10   compensation; therefore, the government could not attach

11   as a condition to the granting of a permit that the

12   person convey something, unless it was proportional.

13   So the -- the theory began with the idea

14   that the easement itself would have been -- the taking

15   of that would have been a per se taking. This is a very

16   different situation because the other way in which

17   Petitioner's theory would constitute a radical departure

18   is that compliance with regulatory programs frequently,

19   maybe almost always, requires the expenditure of money.

20   If someone wants to build a power plant -- a

21   coal-fired power plant, he's going to have to install a

22   scrubber to protect the air, to prevent no -- diminution

23   of air quality. Constructing that costs money. It

24   can't be that the requirement to spend money to comply

25   with a regulatory program is itself a taking.

1   The taking would be --

2   CHIEF JUSTICE ROBERTS: Well, what about --

3   what about the football stadium? Do they -- can you

4   pick a particular landowner? I mean, you took a case in

5   which there is no question, under Nollan and Dolan,

6   about the relationship, proportionality, and nexus.

7   Let's put those to one side because the

8   issue is whether Nollan and Dolan apply. Can the

9   government say, okay, you want a permit, we will give

10   you the permit, if you fund the new football stadium?

11   MR. KNEEDLER: I think, in that situation,

12   there would be a very substantial equal protection challenge

13   because one landowner is being singled out with no

14   rational basis --

15   CHIEF JUSTICE ROBERTS: But the one

16   constitutional provision that is concerned with

17   protecting property owners from having to bear burdens

18   that should be borne by the public at large is not

19   applicable?

20   MR. KNEEDLER: Well, that -- that -- it

21   applies when there is an identifiable property taken.

22   If the --

23   JUSTICE BREYER: No, no. Why isn't the

24   answer, yes, it is applicable? Of course, it's

25   applicable. I own a piece of land, and they have

1   significantly interfered with my investment-backed

2   expectation.

3   MR. KNEEDLER: Right, right.

4   JUSTICE BREYER: And -- and to say that I

5   can't put a house on this because I'm supposed to pay

6   for a football field, which has nothing to do with it,

7   is as close to insisting that you have to have 4,000

8   columns of coal in your mine, so that you can never use

9   it, as I can think of. It's Holmes brought up-to-date.

10   MR. KNEEDLER: Well, certainly --

11   JUSTICE BREYER: I mean, at least that

12   argument would be made --

13   MR. KNEEDLER: Certainly --

14   JUSTICE BREYER: And why wouldn't it be a

15   winning argument?

16   MR. KNEEDLER: Certainly, a Penn Central

17   argument could be made there, but I think that's very

18   different from a Nollan argument --

19   JUSTICE BREYER: Yes, I agree with you --

20   MR. KNEEDLER: -- which -- which imposes

21   the -- the burden on the government and, basically,

22   treats the -- the payment of money as, itself, a taking.

23   JUSTICE SOTOMAYOR: Mr. Kneedler, can I go

24   back to the questions presented for a moment? The court

25   below did two separate rulings, I think.

1   One is there can't be a taking if the -- if

2   the claim is that it's of an undifferentiated money, not

3   a res. And I think you would agree with that.

4   If the only issue is an obligation to pay

5   money, that that's not a takings claim, correct?

6   MR. KNEEDLER: Yes. And this is not even an

7   obligation to pay money. It's an obligation to spend

8   money to come into compliance.

9   JUSTICE SOTOMAYOR: Right. There was a

10   second holding, however, which really gets ellipsed by

11   the second, which is a denial of a permit doesn't permit

12   you to raise the Nollan/Dolan case. And it appears, to

13   me, even if there is an easement situation -- so, even

14   if there is an actual takings claim at issue, do you

15   agree with that first holding by the court below?

16   MR. KNEEDLER: We -- we think --

17   JUSTICE SOTOMAYOR: Assuming we narrow it

18   not to undifferentiated money, but is there a difference

19   between a denial or a grant?

20   MR. KNEEDLER: No. If the -- if the agency

21   decision is written where there is an express condition,

22   we don't think that it matters -- an express condition

23   satisfying Nollan and Dolan; in other words, an

24   exaction, a per se taking, we don't think it matters

25   whether the -- whether it's a permit grant or permit

1   denial.

2   There was no actual taking in the sense that

3   compensation would be owed, but it could be challenged

4   as an unconstitutional condition under the Nollan and

5   Dolan analysis.

6   But we think it's critical, when thinking

7   about that, that the -- that the permit denial -- that

8   only applies if the permit denial expressly is based on

9   the condition because, otherwise, you would get into a

10   situation of negotiations and what was discussed and --

11   and liability could turn on an exchange of ideas;

12   whereas it should turn on the formality of the agency's

13   final decision.

14   It's akin to the Williamson County final

15   decision requirements.

16   CHIEF JUSTICE ROBERTS: Do you agree -- your

17   friend on the other side cited a number of places in the

18   record, where he thought your condition was satisfied,

19   that the denial of the permit was expressly based on the

20   failure to comply with the offered conditions.

21   MR. KNEEDLER: Well, if you look at the --

22   the orders denying the permit applications in the record

23   at -- I believe it's 49 to 51 and 59 to 61. In those

24   situations, it says the permits were denied because the

25   plaintiff did not give the reasonable assurances that

1   the statute requires in order to get the permit -- the

2   reasonable assurances of -- of no loss of wetlands

3   functions.

4   One of the ways --

5   JUSTICE SCALIA: Isn't this unreal? I mean,

6   you are saying, all along, in the negotiations, the

7   agency says, if you do X, you get the permit. And X

8   is -- would -- would be an unconstitutional condition.

9   Okay. He refuses to do X. The permit is

10   denied with a general statement like this: The permit

11   is denied because he has refused to do the -- the

12   necessary mitigation.

13   Isn't it clear that the reason he's refused

14   to do the necessary mitigation, is he has refused the

15   last demand of the agency?

16   MR. KNEEDLER: But the ultimate standard

17   under the statute is whether he has provided reasonable

18   assurances. What assurances -- the way in which he goes

19   about it, whether offsite or onsite -- the offsite part

20   just arises because this is a wetlands case.

21   Normal regulation wouldn't raise the

22   offsite -- onsite problem. But the ultimate question is

23   he didn't carry his burden of establishing no net loss

24   of wetlands.

25   JUSTICE BREYER: Well, what he's going to

1   say, in part, is -- I guess, I did a little numbers from

2   your brief, the 37 million acres in Florida, say about

3   4 million are bodies of water and say a third of them

4   are built up, and we have 11 million that are wetland

5   and 11 million that aren't. That's crude.

6   So they're saying why in heaven's name are

7   we supposed to -- everybody wants to build. And why

8   should the people that happen to live in wetland have to

9   pay for all the other wetland? That's just coincidence.

10   So he is going to say that that is like the Shriners

11   Hospital. You are going to say, no, it isn't like the

12   Shriners Hospital.

13   Now, all I'm saying is isn't it at least an

14   issue, under the Takings Clause, whether it is or isn't?

15   MR. KNEEDLER: I think it's clearly not like

16   the Shriners -- the Shriners Hospital --

17   JUSTICE BREYER: I know you'll say that. He

18   will say that it is.

19   MR. KNEEDLER: But I did want to come back

20   to Justice Scalia's question. The permit -- permit

21   denials -- just general permit denials, the Court made

22   clear, in Del Monte Dunes, are not covered by Nollan and

23   Dolan. They are covered by Penn Central.

24   And the Court made clear, in Nollan, that

25   the Court could have denied the permit without attaching

1   the condition. We think it's important that the agency

2   always have that option.

3   And the third point is --

4   JUSTICE ALITO: Well, you may be right, but

5   you are making Nollan and Dolan a trap only for really

6   stupid districts -- you know, if they -- they say the

7   right words and then they are out from under it; isn't

8   that right?

9   MR. KNEEDLER: Well, I don't think so

10   because -- because there are situations in which an

11   agency actually wants to get the easement. But this

12   Court, in Lingle, made clear that -- that the general

13   rule is Penn Central, with only the two exceptions for

14   regulatory takings --

15   JUSTICE ALITO: Well, why should it matter whether

16   the -- whether the permitting authority says expressly

17   in the denial, "It's denied because you didn't do this,"

18   or it just says, "It's denied," but it's perfectly well

19   understood what was needed -- what they were going to

20   demand in order to get it.

21   MR. KNEEDLER: Because -- if may I answer,

22   because the agency has to reserve -- has to have the

23   ability to -- to deny the permit because the conditions

24   required by the statute were not met.

25   And Nollan and Dolan deal with formality and

1   the formality of conveyance of an easement. If there is

2   not a document that requires that, then the strict

3   requirements of -- for the narrow exception in Nollan

4   and Dolan do not apply.

5   CHIEF JUSTICE ROBERTS: Thank you,

6   Mr. Kneedler.

7   Mr. Beard, you have three minutes.

8   REBUTTAL ARGUMENT OF PAUL J. BEARD, II,

9   ON BEHALF OF THE PETITIONER

10   MR. BEARD: Thank you, Mr. Chief Justice.

11   I would just like to point the Court -- and

12   particularly Justice Scalia, to pages 30 and 31 of our

13   brief on the merits where we describe, with citations to

14   the Nollan and Dolan, what precisely happened there.

15   I want to make sure that it's clear that

16   what they did there was not issue permits. They

17   approved with conditions, but the property owner still

18   had to satisfy the conditions in order to receive the

19   permit.

20   As to the question about --

21   JUSTICE SOTOMAYOR: What do we do with what

22   Mr. Kneedler says is a ruling in your favor on this

23   question, that all denials are subject to Nollan and

24   Dolan? What do we do with that?

25   I mean, what's the -- I see an enormous

1   flood gate here and one in which we are sending a signal

2   that, perhaps, States should be more quiet, rather than

3   more engaging. They should just say no because anything

4   they offer is going to be seen as an -- potentially, as

5   an unconstitutional taking.

6   They should just plain say no and not

7   explain why, not engage in any work with you to

8   mitigate.

9   MR. BEARD: Justice Sotomayor, I don't

10   believe that negotiations will suddenly break down, and

11   we will see a flurry of permit denials, if the Court

12   rules in our favor. What will happen, instead -- it's

13   true, I should say, they will lose flexibility in

14   demanding whatever it is that they want under the

15   Takings Clause.

16   They won't have any review. But the benefit

17   of applying our rule that says monetary exaction should

18   be treated like other exactions and be reviewed under

19   Nollan and Dolan --

20   JUSTICE SOTOMAYOR: But they're not. People

21   are asked to pay taxes. Homeowners are asked to pay

22   taxes all the time; development fees, if they want to

23   develop something. People are subject to money

24   exactions all of the time in this society.

25   MR. BEARD: No question that we all are

1   subject, on a daily basis, to government demands that we

2   pay or that we have a financial obligation.

3   JUSTICE SOTOMAYOR: So what happens in

4   just -- when the legislature passes a development fee?

5   Are you, now, saying that's subject to Nollan and Dolan,

6   too?

7   MR. BEARD: If the legislation requires an

8   agency who processes the permit to impose a fee in

9   exchange for a permit -- again, within the land-use

10   context, we are not talking about taxes, homeowners'

11   fees, we are talking within the discretionary land-use

12   process -- that is imposed there, then the risk of

13   coercion, undue influence, and the like arise, and

14   Nollan and Dolan should apply.

15   But I wanted to respond specifically to

16   Justice Breyer's questions about Penn Central. I think,

17   conceptually, there is an important difference between

18   the Unconstitutional Conditions Doctrine, which is what

19   we seek to apply here, and what would be a permit -- or

20   what would be a Penn Central claim.

21   The Unconstitutional Conditions Doctrine,

22   the offense there is the -- may I --

23   CHIEF JUSTICE ROBERTS: Finish your thought.

24   MR. BEARD: The offense there is the

25   conditioning -- the improper conditioning of a permit.

1   It's not did the condition force me to lose the value in

2   my land. That's a very different question that a case

3   like Penn Central might answer, subsequent to a permit

4   denial.

5   The Unconstitutional Conditions Doctrine

6   focuses exclusively on the permit exaction and on the

7   conditioning, not on subsequent decisions by the

8   government, for example, to deny the permit.

9   CHIEF JUSTICE ROBERTS: Thank you, counsel.

10   MR. BEARD: Thank you.

11   CHIEF JUSTICE ROBERTS: Counsel.

12   The case is now submitted.

13   (Whereupon, at 12:09 p.m., the case in the

14   above-entitled matter was submitted.)

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