No. 11-1447

# In The
# Supreme Court of the United States

COY A. KOONTZ, JR.,

*Petitioner,*

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

*Respondent.*

On Writ of Certiorari to the Supreme Court of Florida

Brief Amici Curiae Supporting Petitioner, by

Nat'l Assn. of Home Builders, Real Estate Roundtable, Public Lands Council, Nat'l Mining Assn., Nat'l Multi Housing Council, BOMA, NAIOP, Nat'l Assn. of Realtors®, Nat'l Apartment Assn., American Farm Bureau Fed., Cal. Building Industry Assn., Fla. Home Builders Assn., Int'l Council of Shopping Centers, Nat'l Cattlemen's Beef Assn., Nat'l Assn. of Real Estate Investment Trusts®, and Chamber of Commerce of the United States of America

MICHAEL M. BERGER*
**Counsel of Record*
MANATT, PHELPS & PHILLIPS
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000
mmberger@manatt.com
*Counsel for Amici Curiae*

## TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
**(continued)**

**Page**

## TABLE OF AUTHORITIES

**Page**

### CASES

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**



**CONSTITUTION**



**OTHER AUTHORITIES**

## INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioner.[1]

The composition of each *amicus* association on this brief is individually described in the attached Appendix. What unites them in this single presentation is a strong belief in the necessity of protecting the rights of private property owners as a critical lynchpin of American democracy. They have a particular interest in this case because their members are regularly confronted by government regulators seeking exactions of either property or money as a condition to the issuance of a permit. They jointly seek clarification that this Court's rules regarding land exactions apply equally to monetary exactions.

---

[1] Counsel for the *amici curiae* authored this brief in whole and no other person or entity other than the *amici curiae* on whose behalf this brief is filed, their members or counsel have made a monetary contribution to the preparation or submission of this brief. The parties have jointly given their consent to the filing of *amicus curiae* briefs and have filed their letters of consent with the Court. Counsel for the *amici curiae* timely notified counsel for the parties that we intended to file this brief.

## SUMMARY OF ARGUMENT

1. No matter how well intentioned the government may be, the Constitution was not designed to make government's life easier at the expense of private citizens. Quite the contrary. As this Court put it with simple elegance:

> "[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 [1987].)

The District can be expected to argue here, as it did below, that it was simply doing its job of protecting the environment when it demanded that Mr. Koontz perform off-site "mitigation" (in addition to dedicating the bulk of the property he wanted to develop) in exchange for a permit to make lawful use of a portion of his land. That may rationalize things for the District, but it does not constitutionalize its demand for cash and services. As discussed hereafter, good intentions cannot validate constitutional incursions.

2. This Court made it clear in *Dolan v. City of Tigard*, 512 U.S. 374, 391, n. 8 (1994) that the burden of showing the need for an exaction as the *quid pro quo* for obtaining a land development permit lay on the government regulatory entity. That is not only good law, it is good sense. After all, it is the regulator that is seeking to effect a change in the status quo by having a private citizen contribute either land, work, or cash to achieve a governmental purpose. Yet the Florida Supreme Court and the District sought to stand this salutary precept on its head by making the property owner prove that it should not be forced to pay the exaction. There is no reason for this Court to depart from its settled rule.

3. Government can perform its obligations without violating the constitutional rights of citizens.

## ARGUMENT

### I.

### GOOD GOVERNMENT INTENTIONS DO NOT VITIATE THE NEED FOR COMPENSATION — IN FACT, THEY REINFORCE IT

Plainly, there must be some limit on the ability of government agencies to impose conditions on the issuance of permits.

Otherwise, no citizen's rights as to anything would be secure. This Court's admonition in *Frost & Frost Trucking Co. v. Railroad Commn.*, 271 U.S. 583, 594 (1926) bears recall:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."[2]

For that reason, of course, there is a constitutional limit. Indeed, the central point of the Bill of Rights was to curb the power of government. (*Stanley v. Illinois*, 405 U.S. 645, 656 [1972]; *Boddie v. Connecticut*, 401 U.S. 371, 375-376 [1971].)

Petitioner's brief on the merits fully discusses the unconstitutional conditions doctrine and its application in a wide variety of cases, so that body of law need not be repeated here. Instead, this brief will focus on the policies as expressed by this Court that underlie that doctrine and mandate its

---

[2] See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), listing numerous decisions of this Court invalidating conditions placed on obtaining some governmental benefit, even those denominated mere privileges rather than rights.

protection under the circumstances presented by this case.

## A.

## The Fifth Amendment is Designed to Restrict Legitimate Governmental Action

The discussion in this section is necessary because some agencies (like the District here) and some courts (like the Florida Supreme Court) believe that, if the government's action is otherwise legitimate and proper then there can be no takings liability. That idea is wrong.

The District has defended its actions, *inter alia*, on the ground that its role as a protector of Florida's wetlands justifies the imposts on Mr. Koontz as conditions for allowing lawful development of his land. (See, e.g., BIO at 2-7.) That argument is misdirected. Indeed, it is not even relevant. None of these *amici curiae* (nor, we suspect, Mr. Koontz) disputes the District's role under Florida law. However, the Fifth Amendment is not concerned with the propriety or virtue of the regulator's purpose in demanding the exaction of money or property as a condition to granting development permission. Nothing in the law allows the District to put the cost of doing its

environmental job on Mr. Koontz's shoulders. Indeed, the law is otherwise.

Like so many constitutional takings cases, this case is about *means*, not *ends*. What is at issue is *not* whether the District can protect Florida's wetlands, but whether it can do so by demanding that Mr. Koontz pay to restore that environment in a manner not proportional to the impact of the project Mr. Koontz proposed to develop. As the Supreme Judicial Court of Massachusetts aptly observed:

> "In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the Department of Conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights." (*Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E.2d 666, 671 [Mass. 1964].)

"[S]tand[ing] guard over constitutional rights" means enforcing the 5th Amendment's protection of property owners even — indeed, especially — when government appears to be pursuing a virtuous goal.

Thus, one non-issue should be set aside at once: the Fifth Amendment deals with *proper* governmental action, not torts. In other words,

in order to find a taking and either require compensation (*First English*) or preclude the government's action (*Nollan v. California Coastal Commn.*, 483 U.S. 825 [1987]), it is necessary that the government action be legitimate, i.e., the only constitutional issue is the failure to compensate.[3]

For the proper exercise of the police or eminent domain power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of both police power and eminent domain were present:

---

[3] See also *Florida Rock Indus, Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . ." More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. (Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 [1952] [unlawful wartime seizure voided] with *United States v. Peewee Coal Co.*, 341 U.S. 114 [1951] [compensation mandatory after lawful wartime seizure].)

> "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 [1922].)

More recent authority echoes that conclusion: "the Takings Clause presupposes that the government has acted pursuant to a valid public purpose." (*Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 [2005].)

**B.**

**Otherwise Valid Government Action Constitutionally Requires Compensation When Private Property is Taken for Public Use**

Once it is determined that the government action is done to achieve a legitimate goal, then the means chosen must be examined against the constitutional matrix to ensure that private rights have not been violated.

*Pennsylvania Coal* was merely one in a long line of decisions in which this Court —

speaking through various voices along its ideological spectrum (*Pennsylvania Coal* having been authored for the Court by Justice Holmes) — patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." (260 U.S. at 417.) Eight Justices rejected that proposition.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court put it this way as it reversed:

> "The Court of Appeals determined that §828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid*."

> (*Loretto*, 458 U.S. at 425; emphasis added [Marshall, J.].)

Similarly, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Corps of Engineers had decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate question*." (*Kaiser Aetna*, 444 U.S. at 174; emphasis added [Rehnquist, J.].)

That is why this Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper interference* amounting to a taking." (482 U.S. at 315; [Rehnquist, C.J.]; first emphasis, the Court's; second emphasis added.)

In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (Brennan, J.); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Blackmun, J.); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Rehnquist, J.); and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Brennan, J.). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property without just compensation in violation of the Fifth Amendment. The governmental goal in each was plainly legitimate (respectively, the creation of recreational hiking and biking trails over abandoned railroad right-of-way easements, obtaining expert input prior to licensing of pesticides to protect the consuming public, dealing with the issue of compensation in the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless

required compensation to pass constitutional muster.[4]

This bedrock principle of the law of constitutional remedies goes back to the unanimous decision in *Hurley v. Kincaid*, 285 U.S. 95 (1932) (Brandeis, J.), where the Court held that the remedy for a taking *resulting from valid governmental action* is just compensation, not judicial second-guessing of governmental policies and decisions through disruptive injunctions.[5]

In *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987) (Scalia, J.), the Court examined California's plan to create a public easement

---

[4] To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714-715 [1999] [Kennedy, J.]; *United States v. Clarke*, 445 U.S. 253, 257 [1980].)

[5] Justice Brandeis' opinion for the Court in *Hurley* shows his acceptance of the Court's holding in *Pennsylvania Coal* that takings require compensation. Justice Brandeis had been the lone dissenter in the latter case, expressing the belief (abandoned in *Hurley*) that valid regulation does not require compensation.

along the coast from Mexico to Oregon, and concluded:

> "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it." (*Nollan*, 483 U.S. at 841-842.)[6]

And, of course, that concept is the underpinning for the Court's categorical rule that, if regulation denies all economically beneficial or productive use of private land, it is a *per se* taking — no matter how beneficial it may be. (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 [1992] [Scalia, J.].) That is why, under *Lucas*, a taking *always* occurs when economically productive use is prevented, "*without* case-specific inquiry into the public interest advanced in support of such

---

[6] See also *Griggs v. Allegheny County*, 369 U.S. 84, 89-90 (1962) (Douglas, J.) [airport operator must pay for noise-impacted property beyond the ends of its runway].

a restraint." (*Lucas*, 505 U.S. at 1015; emphasis added.)[7]

In *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (O'Connor, J.), the Court held that states are free to engage in land reform if they so desire but, when private property is taken in the process for use by others, compensation is mandatory. *Midkiff*, of course, reaffirmed the Court's seminal opinion in *Berman v. Parker*, 348 U.S. 26, 36 (1954) (Douglas, J.), which upheld the propriety of urban redevelopment because "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

Thus, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign — or done for the best of reasons —

[7] See also *Florida Rock*, 18 F.3d at 1571, n. 28, in which the Federal Circuit noted with understatement: "In *Lucas*, the South Carolina Supreme Court had held that the State's purpose in protecting oceanfront ecology excused the State from liability for its regulatory imposition. The Supreme Court held that was not the correct criterion for takings jurisprudence."

that only fortifies the need for compensation required by the Just Compensation Clause of the Fifth Amendment.[8]

Put still another way, the exercise of the power to govern — whether by eminent domain or by far-reaching regulations that *de facto* deprive the owners of their right to make productive use of their land or by exactions that seek to compel individual citizens to pay for public services or projects that are properly the burden of society at large — is not a tort. Nor is it *per se* wrongful — unless the government refuses to pay the just compensation required by the Constitution. That the District may prefer to foist the cost of wetlands protection onto the convenient citizen seeking a land use permit is not relevant. The general public, which benefits from such public action, must constitutionally bear the cost. (*Armstrong v. United States*, 364 U.S. 40, 49 [1960].)

---

[8] See *Hughes v. Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Steward, J, concurring; emphasis original.)

## II.

## THE BURDEN LIES WITH THE GOVERNMENT TO DEMONSTRATE THE NEED FOR AN EXACTION; IT IS NOT THE PROPERTY OWNER'S BURDEN TO DISPROVE THE CONNECTION

The District has not understood the nature of its burden when seeking the exaction of property (either real estate or cash) as a condition to a land use permit. Rather, it has taken the position that the duty rests upon the property owner to disprove the applicability of the District's exaction. (See, e.g., BIO at 5.)

The District is wrong. In *Dolan*, this Court made clear where the burden lies: it lies with the government. The decision there plainly held that "*the city must make* some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (512 U.S. at 391; emphasis added.) The Court then concluded that the city's findings failed to "show the required reasonable relationship" between the exaction demanded as a condition to a building permit request and the impact of the proposed development on the city. (512 U.S. at 395.) Thus, the Court placed the burden squarely on the city to justify its regulation, and to make a determination as to

each property owner affected by a regulation that affected many properties. (*Dolan*, 512 U.S. at 391, n. 8.)

From a policy standpoint, the *Dolan* burden placement is good sense as well as good law. After all, the burden should always be on the party who wants to change the *status quo*. It was reasonable to place on Mr. Koontz, for example, the burden of proving that his property was properly suited to the proposed development. But it was the District that wanted to impose a severe condition on development in the form of demanding off-site "mitigation" work on property owned by the District. To justify that, it is proper for the District to bear the burden of proving the nexus under *Nollan* and rough proportionality under *Dolan* necessary to satisfy the Fifth Amendment.

As can be seen from the Florida Supreme Court's opinion and the District's briefing, it has become facile to say that the property owner would suffer no burden if not for the desire to make heavier use of the property, thus justifying virtually any exaction. But that has not been the law for many decades with regard to conditions in general, and at least since *Dollan* with respect to land use conditions. Indeed, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, n. 17 (1982),

the Court dismissed as constitutionally unacceptable the idea that there would have been no taking had the property owner chosen not to use the land.

Similarly, in *Lucas* the Court, while remanding the case to the state courts for further action, ". . . emphasize[d] that to win its case, South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . ." (505 U.S. at 1031; internal punctuation simplified.)

In other words, this Court's opinions have plainly placed the burden on the regulator to justify any preconditions to development. This Court evidently needs to say so again, and to make clear that it applies regardless of the kind of property — real estate or cash — that is demanded as *quid pro quo*.

## III.

## THE SKY WILL NOT FALL IF THE GOVERNMENT CANNOT COERCE CITIZENS TO PAY FOR PUBLIC IMPROVEMENTS FOR WHICH THEY DID NOT CREATE THE NEED

The District can also be expected to make some variant of the argument that neither it

nor other regulatory bodies will be able to fulfill their functions if they are hamstrung by the Fifth Amendment's protections of private property owners.

Such a "parade of horribles" is as unfounded here as it has proven in the past. In *First English*, for example, this Court finally decided (after several failed attempts to answer the question [see 482 U.S. at 311]) that when regulations have the effect of taking property, the Fifth Amendment requires compensation. Numerous governmental *amici curiae* urged the Court not to provide compensation, on the ground that it would be ruinous to government.[9] This Court was not moved. To

---

[9] The Court's files in *First English* enshrine a variety of such arguments. For example, a large group of state *amici* said the church was seeking a "radical reformulation of takings jurisprudence" that would "cripple" regulators (pp. 1-2), risk "financial chaos," and have "a major chilling effect on the regulatory process" (p. 23). The State and Local Legal Center predicted that a ruling adverse to the government would "paralyze" public health and safety regulation, "threatening bankruptcy" for municipalities. (p. 3.) However, when this Court ruled against the government, life continued, and there have been no reports of municipal paralysis or bankruptcy related to the opinion.

the contrary, the Court understood that the Fifth Amendment mandated governmental restraint and/or payment:

> "We realize that even *our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations*. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' [Citation.]" (*First English*, 482 U.S. at 321; emphasis added.)

In stark contrast to this Court's holding in *First English*, the Florida Supreme Court based its holding on the theory that it "is both necessary and logical" to *preserve* government's "authority and flexibility" so that land

regulation not "become prohibitively expensive." (Pet. App. at A-20-21.)[10]

Perhaps underlying that conclusion was this Court's repeated recognition that, when the governmental interest is financial (as in obtaining the uncompensated use of Mr. Koontz's labor and monetary resources for environmental improvements to District property), its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money . . . ."]; *United States v. Winstar Corp.*, 518 U.S. 839, --- [1996] [". . . statutes tainted by a governmental object of self-relief . . . in which the Government

[10] Not only does this directly contradict *First English*, the cases cited by the Florida court do not support its conclusion. *Warth v. Seldin*, 422 U.S. 490, 508, n. 18 (1975) does no more at the cited page than note that zoning is a matter of local concern. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 324 (2002) merely cautions against treating any land use regulation that affects land in any "tangential" way as a *per se* taking, something that is not related to the facts of this case. The impact here is direct and plainly in conflict with *Dolan*.

seeks to shift the costs of meeting its legitimate public responsibilities to private parties."]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding."].)

In *Nollan*, the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841.) Particular care is needed when government conditions approval of a project on an actual conveyance of property ". . . since in that context there is heightened risk that the purpose is avoidance of the compensation requirement . . . ." (483 U.S. at 841.) The brief on the merits filed by Mr. Koontz amply shows that, from a Fifth Amendment perspective, there is no difference between real property and cash, so this brief will refrain from plowing that already tilled field.

*Lucas* is also instructive. Viewing a statute that contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, n. 10), this Court stressed that what is

important is *not* the voiced governmental rationale (because that would always justify the governmental act unless the government had "a stupid staff" [505 U.S. at 1025, n. 12]), but whether the underlying facts support the result.

On a policy level, Professor Michelman directly confronted the idea whether government ought to be able ethically to compel individuals to subsidize society as a whole, noting that:

> "any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." (Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* [1967] 80 Harv. L. Rev. 1165, 1181].)

Michelman's classic article on ethics in just compensation law built, of course, on the Court's conclusion in *United States v. Cors*, 337 U.S. 325, 332 (1949) that, "[t]he political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." That bedrock concept needs to be kept in mind in cases like this where government seeks to commandeer private capital for public use.

In short, as the Court concluded in *Watson v. Memphis*, 373 U.S. 526, 537 (1963):

> "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

## CONCLUSION

For constitutional purposes, there is no distinction between the exaction of real property and the demand for money as a *quid pro quo* for issuance of a land use permit. In either case, the Fifth Amendment and this Court's application of it in *Nollan* and *Dolan* must control.

Respectfully submitted,

MICHAEL M. BERGER*
**Counsel of Record*
MANATT, PHELPS & PHILLIPS
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000

*Counsel for Amici Curiae*

## APPENDIX OF *AMICI CURIAE* PARTIES

### The National Association of Home Builders

NAHB is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. About one-third of NAHB's 140,000 members are home builders and remodelers, and its builder members construct about 80% of the new homes built each year in the United States. The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

### The Real Estate Roundtable

The Real Estate Round Table represents the leadership of the nation's top privately owned and publicly held real estate ownership, development, lending, and management firms, as well as the elected leaders of the 17 major national real estate industry trade associations to jointly address key national policy issues related to real estate and the overall economy. Collectively, the Roundtable's members hold portfolios containing over 5 billion square feet of office, retail, and industrial properties valued at more than $1 trillion; over 1.5 million

apartment units; and in excess of 1.3 million hotel rooms.

**American Farm Bureau Federation**

AFBF is a not-for-profit, voluntary general farm organization incorporated in Illinois in 1919. It was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The American Farm Bureau has member organizations in all 50 states and Puerto Rico, representing more than 6.2 million families.

**Building Owners and Managers Association (BOMA) International**

BOMA is a federation of 93 U.S. associations and 13 international affiliates. Founded in 1907, BOMA represents the owners and managers of all commercial property types, including 9.9 billion square feet of U.S. office space that supports 3.7 million jobs and contributes $205 billion to U.S. GDP. Its mission is to advance the interests of the commercial real estate industry through advocacy, education, research, standards and information.

**California Building Industry Association**

CBIA is a statewide non-profit trade association comprising approximately 3,000 members involved in the residential

development industry. CBIA and member companies directly employ tens of thousands of people in California and are responsible for the planning and construction of approximately 70% of all new homes each year. CBIA is a recognized voice of all aspects of the residential real estate industry in California.

**Commercial Real Estate Development Association**

NAIOP, the Commercial Real Estate Development Association, is the leading organization for developers, owners, and related professionals in office, industrial, and mixed-use real estate. NAIOP comprises 15,000 members in North America, with over 50 local chapters. NAIOP advances responsible commercial real estate development and advocates for effective public policy.

**Florida Home Builders Association**

FHBA is a not-for-profit Florida corporation, with more than 10,000 members statewide, aiming to "serve, advance and protect the welfare of the home building industry in such manner that adequate housing will be made available by private enterprise to all Americans." Affiliated with the National Association of Home Builders (NAHB) and 25 local/regional home builders associations around the state, FHBA enjoys a legacy of success spanning 65 years. At its core, FHBA is

about advocacy and its legislative, legal and political initiatives have worked together to create the best possible economic and regulatory environment for our members to succeed.

**International Council of Shopping Centers**

ICSC is a not-for-profit corporation organized under the Not-for-Profit Corporation Law of the State of Illinois. It is the global trade association of the shopping center industry with over 56,000 members worldwide, more than 47,000 in the United States and 3,963 in the State of Florida. Its members include developers, owners, retailers, lenders and others that have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the more than 10,239 shopping centers in the State of Florida. In 2011, these shopping centers accounted for $179.8 billion in shopping center combined sales. That same year, these shopping centers employed more than 782,500 individuals, constituting 10.8 percent of the total nonagricultural employment in the state, and contributed $10.8 billion in state sales tax revenue.

**National Apartment Association**

NAA is the leading national advocate for quality rental housing. NAA is a federation of

170 state and local affiliated associations, representing more than 55,000 members responsible for more than 6.2 million apartment units nationwide. NAA is the largest broad-based organization dedicated solely to rental housing. In addition to providing professional industry support and education services, NAA and its affiliated state and local associations advocate for fair governmental treatment of multi-family residential businesses nationwide.

**National Association of Real Estate Investment Trusts®**

NAREIT®, the National Association of Real Estate Investment Trusts®, is the worldwide representative voice for REITs and publicly traded real estate companies with an interest in U.S. real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

**National Association of Realtors®**

NAR is a nationwide, nonprofit professional association, incorporated in Illinois, that represents persons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and

counseling. Founded in 1908, NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote the interests of its members and their professional competence. The membership of NAR includes 54 state and territorial Associations of REALTORS®, approximately 1,400 local Associations of REALTORS®, and more than 1 million REALTOR® and REALTOR ASSOCIATE® members.

**National Cattlemen's Beef Association**

The National Cattlemen's Beef Association is the marketing organization and trade association for America's cattle farmers and ranchers. NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry and represents tens of thousands of America's farmers, ranchers, and cattlemen who provide much of the nation's food supply. Its members are proud of their tradition as stewards and conservators of America's land, and good neighbors to their communities.

**National Mining Association**

NMA is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its members include manufacturers of mining and mineral processing machinery

and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries, as well. NMA works with Congress and federal and state regulatory officials to provide information and analyses on public policies of concern to its membership, and to promote policies and practices that foster the efficient and environmentally sound development and use of the country's mineral resources.

**National Multi Housing Council**
NMHC, based in Washington, DC, is a national association representing the interests of the largest and most prominent apartment firms in the United States. NMHC's members are the principal officers of firms engaged in all aspects of the rental apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, provides leadership on legislative and regulatory matters, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

**Public Lands Council**
PLC, headquartered in Washington, D.C., represents ranchers who use public lands and

preserve the natural resources and unique heritage of the West. PLC is a Colorado non-profit corporation. PLC membership consists of state and national cattle, sheep and grasslands associations. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public lands for forage.

**Chamber of Commerce of the United States of America**

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.