No. 11-1447

In the Supreme Court of the United States

COY A. KOONTZ, JR., PETITIONER

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a regulatory takings claim based on the government's denial of a development permit should be analyzed under the usual framework of *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), or, instead, under the specialized framework of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), which this Court developed in the context of land-use exactions.

2. Whether a condition on a development permit that requires a landowner to expend money can be the basis of an exaction-takings claim under *Nollan* and *Dolan*.

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INTEREST OF THE UNITED STATES

This case concerns a challenge under the Just Compensation Clause of the Fifth Amendment to a state water management district's denial of a land development permit. Most of the property the landowner sought to develop was wetlands located in a protected zone of a river basin. The permit denial was based on the district's conclusion that the landowner had proposed insufficient mitigation to offset the impact of the planned destruction of the wetlands. In implementing the Clean Water Act, 33 U.S.C. 1251 *et seq.* the federal government administers programs intended to avoid or minimize adverse impacts to wetlands caused by discharges of dredged or fill material. In deciding whether to grant permits authorizing discharges of such material into wetlands, the federal government considers whether the permit applicant could compensate for the pro-

posed loss of resources through mitigation. The United States has a substantial interest in the sound development of the relevant constitutional analysis in cases that may affect its ability to implement the Clean Water Act, consistent with constitutional protections. The United States also has a substantial interest in supporting state governments' efforts to protect the Nation's wetland resources, consistent with constitutional requirements.

STATEMENT

Wetlands are an important natural resource, and their depletion has caused significant economic and environmental harm. Like the federal government, Florida has taken measures to protect remaining wetlands and to replace some of what has been lost. When a landowner seeks a development permit for a project that will destroy wetlands, both the federal government and Florida require the landowner to mitigate the loss as a condition of issuing the permit. Petitioner sought to undertake such a project.[1] Finding petitioner's proposed mitigation insufficient, respondent suggested several possible alternative measures, including that petitioner enhance publicly owned wetlands at another location. Because petitioner declined to undertake the mitigation suggested by respondent or propose an acceptable alternative, respondent denied petitioner's permit request. Petitioner brought this inverse condemnation action, alleging that respondent's proposed off-site mitigation constituted an exaction taking without

[1] Coy A. Koontz, Sr., owned the property at issue and sought the development permit. Pet. Br. 2. Petitioner Coy A. Koontz, Jr., is the son of Coy A. Koontz, Sr., and the personal representative of his estate. *Id.* at 2 n.2. This brief uses "petitioner" to refer to either or both individuals, without distinguishing between them.

just compensation. The Supreme Court of Florida rejected that claim.

1. Wetlands are, generally, "lands where saturation with water is the dominant factor determining the nature of soil development and the types of plant and animal communities living in the soil and on its surface." U.S. Envtl. Prot. Agency (EPA), *Wetlands Definitions*, http://water.epa.gov/lawsregs/guidance/wetlands/definitions.cfm. Wetlands are essential to the environmental and economic well-being of the United States. A one-acre wetland can soak up and store a significant amount of water, typically about one million gallons. EPA, *Wetlands: Protecting Life and Property from Flooding* 1 (May 2006), http://water.epa.gov/type/wetlands/outreach/upload/Flooding.pdf. For that reason, wetlands act as natural buffers, reducing the frequency and intensity of inland and coastal flooding. EPA, *Economic Benefits of Wetlands* (*Economic Benefits*) 1 (May 2006), http://water.epa.gov/type/wetlands/outreach/upload/EconomicBenefits.pdf.

Wetlands are also natural filters, absorbing pollution, thus improving drinking water quality and protecting fish and other aquatic life. *Economic Benefits* 1. Wetlands are vital to the Nation's multi-billion-dollar fishing industry. Seventy-five percent of the fish and shellfish commercially harvested in the United States and 90 percent of the recreational fish catch depend on wetlands at some point in their life cycle. *Id.* at 3; see EPA, *Functions and Values of Wetlands* 2 (Sept. 2001), http://water.epa.gov/type/wetlands/outreach/upload/fun_val_pr.pdf (estimating that "almost $79 billion per year is generated from wetland-dependent species"); see generally *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-135 (1985) (discussing ecological im-

portance of wetlands); Br. of Amici Former Members of the Nat'l Research Council 5-10 (same).

Despite their importance, "[w]etlands are disappearing at a rapid rate." Fish & Wildlife Serv. (FWS), U.S. Dep't of the Interior, *Report to Congress: Wetlands—Losses in the United States, 1780's to 1980's* ii (*Losses*) (1990). "Over a period of 200 years, the lower 48 states lost an estimated 53 percent of their original wetlands," *id.* at 1, equaling approximately 117 million acres, see *id.* at 5. That loss has had significant economic consequences. The disappearance of wetlands in the Upper Mississippi Basin, for instance, "contributed to high floodwaters during the Great Flood of 1993 that caused billions of dollars in damage." *Economic Benefits* 1. The disappearance of wetlands also undermines the integrity of the Nation's drinking water supply. *Losses* 10.

Congress responded to the dramatic decline in wetlands in several ways. In the mid-1980s, Congress authorized federal acquisition of wetlands. 16 U.S.C. 3922; see also 16 U.S.C. 4401 *et seq.* It also confined eligibility for certain farm benefits to crops not grown on converted wetlands. 16 U.S.C. 3821 *et seq.* And, in 1990, Congress directed the Secretary of Agriculture to establish a Wetlands Reserve Program, a voluntary program under which the Natural Resources Conservation Service (NRCS) provides technical and financial support to help landowners restore and protect wetlands. 16 U.S.C. 3837 *et seq.*

Acting under these and other authorities, the federal government has helped reduce the rate of decline in wetlands from 458,000 acres per year from the mid-1950s to the mid-1970s to 13,800 acres per year between 2004 and 2009. FWS, *Report to Congress: Status and*

Trends of Wetlands in the Conterminous United States, 2004 to 2009, at 40 (2011) (*2011 Status and Trends*); see also FWS, *Report to Congress: Status and Trends of Wetlands in the Conterminous United States, 1998 to 2004*, at 16 (2006) ("[a]gricultural conservation programs were responsible for most of the gross wetland restoration" between 1998 and 2004); NRCS, *News Release* (Dec. 11, 2012) (noting that, in two decades, over 11,000 landowners have participated in the Wetlands Reserve Program, restoring more than 2.6 million acres of wetlands), http://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/newsroom/releases/?cid=stelprdb1075213.

2. Today, "development pressure is emerging as the largest cause of wetland loss." EPA, *Threats to Wetlands* 1 (Sept. 2001), http://water.epa.gov/type/wetlands/outreach/upload/threats_pr.pdf; see *2011 Status and Trends* 42 (identifying development and silviculture as the principal causes of wetland losses between 2004 and 2009). The Clean Water Act addresses that threat at the federal level. That statute prohibits "the discharge of any pollutant" into navigable waters. 33 U.S.C. 1311(a); see 33 U.S.C. 1362(6) (defining "pollutant" to include "dredged spoil" as well as "rock, sand," and "cellar dirt"); 33 U.S.C. 1362(7) (defining "navigable waters" as "the waters of the United States"). Section 404 of the Clean Water Act authorizes the Army Corps of Engineers (Corps) to "issue permits * * * for the discharge of dredged or fill material into the navigable waters." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 884, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, § 67(a) and (b), 91 Stat. 1600 (33 U.S.C. 1344(a)).

The Corps has used its Clean Water Act permitting authority to protect against environmental losses to the

waters of the United States, including covered wetlands. See *Rapanos* v. *United States*, 547 U.S. 715, 742 (2006) (plurality op.); *id.* at 767 (Kennedy, J., concurring in the judgment). Under regulations promulgated pursuant to Section 404, the Corps requires permits to discharge dredged or fill materials into covered wetlands. 33 C.F.R. 323.3; see 33 C.F.R. 328.3(a)(2), (7) and (b) (defining "waters of the United States" to include specified wetlands). In deciding whether to grant any permit under its authority, the Corps undertakes a "public interest review," which considers numerous factors (including "flood hazards," "water quality," and "considerations of property ownership"), 33 C.F.R. 320.4(a)(1), and weighs the reasonably expected benefits of granting a permit against the reasonably foreseeable harms, *ibid.* See 33 C.F.R. 320.4(b)-(q) (explaining factors in detail).

In deciding whether to issue a permit for a proposed discharge of dredged or fill material into wetlands, the Corps evaluates whether the discharge would be consistent with guidelines jointly developed by the Corps and the EPA. 33 C.F.R. 320.2(f); see 40 C.F.R. 230.41. The Corps also generally considers whether mitigation measures, such as project modifications, could ameliorate the expected loss of natural resources. 33 C.F.R. 320.4(r). Pursuant to Congress's direction, see National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, § 314(b), 117 Stat. 1431, the Corps and the EPA jointly promulgated criteria for "compensatory mitigation" designed "to offset unavoidable impacts" to wetlands and other covered waters when the Corps issues permits under Section 404. See 33 C.F.R. 332.1(a); see generally 33 C.F.R. 332.1-332.8; 40 C.F.R. 230.91-230.98).

"Compensatory mitigation" under the Corps/EPA standards means "the restoration (reestablishment or rehabilitation), establishment (creation), enhancement," and "in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 33 C.F.R. 332.2. There are three mechanisms for compensatory mitigation. Under "permittee-responsible" mitigation, the landowner applying for a permit must undertake the required mitigation, either on the site of the project or offsite. 33 C.F.R. 332.3(b)(4), (5) and (6). Alternatively, a permittee can purchase credits from a "mitigation bank" or an "in-lieu fee program," which perform mitigation off-site to compensate for adverse impacts authorized by Corps-issued permits.[2] 33 C.F.R. 332.2, 332.3(b)(2) and (3), 332.8.

Although it is the permit applicant's responsibility to propose an appropriate compensatory mitigation option, mitigation banks and in-lieu fee programs are now the federal government's preferred options because they "usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success." 33 C.F.R. 332.3(a)(1); see 33 C.F.R. 332.3(b)(2) and (3). But, regardless of the mechanism used, "the amount of required compensatory mitigation must be, to the extent practicable, sufficient

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[2] Mitigation banks and in-lieu fee programs have similar functions, but the rules governing their operation differ. See 33 C.F.R. 332.2, 332.8.

to replace lost aquatic resource functions." 33 C.F.R. 332.3(f)(1).

In determining the necessary amount of mitigation, the Corps considers "the method of compensatory mitigation" and "the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site." 33 C.F.R. 332.3(f)(2). Thus, for example, because preserving one acre of wetlands for the destruction of another would result in a net loss, "a mitigation ratio greater than one-to-one" is necessary and should include wetlands restoration, establishment, or enhancement to replace lost functions. *Ibid.*; 33 C.F.R. 332.3(h)(2).

3. Like most States, Florida has lost substantial portions of its wetlands. See FWS, *Florida's Wetlands: An Update on Status and Trends, 1985 to 1996*, at 7-8 (2005) (reporting that, of the 20.3 million acres of Florida wetlands existing in 1845, only 11.4 million survived in 1996). And like the federal government, Florida has taken steps to arrest that loss. Florida is divided into five water management districts. Fla. Stat. § 373.069(1) (1993).[3] Respondent is one. *Id.* § 373.069(1)(c). Florida law prohibits any person from dredging or filling surface waters without a permit. *Id.* §§ 373.413, 373.414. A permit may be issued only if the permitting agency determines that the proposed project is "not contrary to the public interest," considering various enumerated

[3] All citations to the Florida Statutes are to the 1993 edition.

factors, such as the project's effect on the public health, safety, or welfare or the property of others, and conservation of fish and wildlife. *Id.* § 373.414(1) and (a).

At the time of the proposed project at issue in this case, a landowner wishing to fill or drain wetlands within respondent's jurisdiction was required to obtain two permits. See Fla. Admin. Code 17-312.030(1), 40C-4.041(1) and (2)(b)(10) (1994).[4] The first, a wetland resource management permit, would issue only upon the applicant's "reasonable assurance" that the development was consistent with the statutory public interest standard described above. *Id.* 17-312.080(2). The second, a permit for management and storage of surface waters, required the applicant to provide "reasonable assurance" that, among other things, the project would not adversely affect "[w]etland functions." *Id.* 40C-4.301(2)(a)(7). If the project was in a designated riparian wildlife habitat zone, an applicant for the second permit also had to provide "reasonable assurance" that the project would not "adversely affect" the wetlands-dependent species located on the project site. *Id.* 40C-41.063(5)(d)(1).

Florida law (now and at the time of the proposed project) does not, however, require outright denial of a permit if a proposed project does not satisfy those standards. Like the Corps' Section 404 regulations, Florida law allows an applicant to propose mitigation measures to ameliorate the effect of wetlands destruction that the project would cause. Fla. Admin. Code 17-312.060(10), 17-312.300 to 312.390, 40C-41.063(5)(d)(5). Mitigation proposals typically "involve the creation, enhancement or preservation" of wetlands. *Id.* 17-

[4] All citations to the Florida Administrative Code are to the 1994 edition.

312.330. Respondent has a preference for creation and enhancement measures over preservation. J.A. Ex. 147, 152, 158-161. But Florida law does not require an applicant to undertake any particular form of mitigation, Fla. Admin. Code 17-312.300(4), and it remains the applicant's responsibility to propose appropriate mitigation, Fla. Stat. § 373.414(1)(b). Of course, an applicant who fails to propose any adequate mitigation measures when such measures are necessary to offset expected adverse effects is unlikely to receive a permit. See Fla. Admin. Code 17-312.300(3) and (5); see also *id.* 17-312.340(2) (mitigation must offset loss). For that reason, permitting agencies, such as respondent, may suggest alternative mitigation measures for the applicant's consideration. *Id.* 17-312.300(4).[5]

4. Coy A. Koontz, Sr., owned a 14.2-acre parcel of undeveloped land in Orange County, Florida. Pet. App. A5. "All but approximately 1.4 acres of the tract lies within a Riparian Habitat Protection Zone * * * of the Econlockhatchee River Hydrological Basin and is subject to jurisdiction of [respondent]." *Ibid.* Approximately 11 acres of the parcel were "wetlands bisected by a tributary of the Econlockhatchee River." J.A. 73. In 1994, petitioner applied for permits authorizing commercial development of 3.7 acres of the property. *Ibid.* The project required dredging and filling 3.4 acres of wetlands within the protection zone. J.A. 73-74. Accordingly, petitioner applied for the two necessary permits. J.A. 73; see p. 9, *supra*. To "minimiz[e]" the im-

[5] Since the conduct at issue in this case, Florida has adopted the use of mitigation banks "to minimize mitigation uncertainty associated with traditional mitigation practices and provide greater assurance of mitigation success." J.A. Ex. 114; see Fla. Stat. § 373.4135; p. 7, *supra* (discussing mitigation banks under federal regulations).

pact of his proposed development, petitioner proposed "to perpetually preserve the balance of the site in its natural state" through a conservation easement dedicated to respondent. J.A. Ex. 13; see *id.* at 45, 89.

In considering petitioner's application, respondent's technical staff visited the property to evaluate the likely impact of the proposed project. J.A. Ex. 83-92. The staff determined that the wetlands "provide a diversity of habitat and food sources, and serve as an important refuge for a variety of wildlife species." *Id.* at 85. "Based on the high quality of the wetlands, and the impacts proposed to these areas," the staff concluded that petitioner's preservation proposal was insufficient to offset the expected loss of wetlands. *Id.* at 89. The staff "suggested" (*id.* at 87) various alternatives that would have reduced the project's impact to acceptable levels, including project design modification (*id.* at 87-88), reduction of the development's size (*id.* at 91-92; see also J.A. 74-75), and a variety of possible "off-site mitigation enhancement options," such as replacing 15 inoperative culverts in a state-owned nature preserve within the same river basin (J.A. Ex. 90; see *id.* at 90-91). Petitioner also could have combined his proposed conservation easement with off-site mitigation that might have required as little as the installation of one culvert and the removal of another. *Id.* at 91; J.A. 147. But petitioner "was unwilling to consider any additional mitigation options." J.A. Ex. 90; see J.A. 37. Accordingly, the technical staff concluded that petitioner's application failed to satisfy the permitting standards and recommended denying the permits. J.A. Ex. 92.

After a hearing, J.A. 21-43, respondent denied petitioner's applications, J.A. 44-54, 55-63. Noting the various mitigation alternatives the technical staff had sug-

gested that would have been sufficient to offset the loss of wetlands, J.A. 47-50, respondent concluded that petitioner's proposal to permanently preserve the remaining 11.25 acres, but without any offset for the loss of wetlands, was inadequate, J.A. 52, 62-63; see J.A. 49, 60 (finding that petitioner could have proposed alternative mitigation); see also J.A. 75 (petitioner's admission of same).

5. a. Under Florida law, as a party aggrieved by a decision of a water management district, petitioner could have sought judicial review of the decision denying the permits under the Florida Administrative Procedure Act. Fla. Stat. § 120.68. Instead of challenging the district's decision, however, petitioner brought an inverse condemnation action seeking compensation for respondent's alleged taking of petitioner's property without just compensation in violation of the Florida Constitution. J.A. 16-18; see Fla. Stat. § 373.617; see also *Department of Agric. & Consumer Servs.* v. *Polk,* 568 So. 2d 35, 38 (Fla. 1990) ("[T]he propriety of an agency's action may not be challenged in an inverse condemnation proceeding.").

The circuit court initially denied petitioner's regulatory-takings claim as unripe, but that ruling was reversed on appeal. See *Koontz* v. *St. Johns River Water Mgmt. Dist.,* 720 So. 2d 560 (Fla. Dist. Ct. App. 1998). On remand, the circuit court held that "the off-site mitigation conditions imposed upon [petitioner] by [respondent] resulted in a regulatory taking of [petitioner's] property." Pet. App. D1. Petitioner had argued that respondent's denial of his permit applications constituted a taking without compensation under an exaction-takings theory, relying on this Court's decisions in *Nollan* v. *California Coastal Commission*, 483

U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). Pet. App. D5, D7. Although the circuit court viewed those decisions as distinguishable, *id.* at D6-D7, it believed that application of *Nollan* and *Dolan* was mandated by the appellate court's prior remand order. *Id.* at D9-D11. Concluding that respondent had failed to demonstrate a "nexus" between off-site mitigation and the proposed development and did not show "rough proportionality" between the two, the circuit court held that respondent's denial resulted in a regulatory taking. *Id.* at D11; see *Nollan*, 483 U.S. at 837 (establishing "nexus" requirement); *Dolan*, 512 U.S. at 391 (establishing "rough proportionality" requirement). The court did not consider the other mitigation options suggested by respondent.

In light of that decision, respondent had three choices: It could issue the permits, pay monetary compensation, or modify its decision. Fla. Stat. § 373.617(3). Respondent chose to issue the permits authorizing petitioner's project with petitioner's proposed preservation of 11.25 acres as the only mitigation. J.A. 183; J.A. Ex. 5; see Resp. Br. 20 (stating that respondent made that choice in light of "the significant deterioration of the quality of the wetlands on petitioner's property" during the course of the litigation). The circuit court subsequently awarded petitioner $376,154 for "temporary takings damages" for the period between respondent's denial of the permits and its eventual grant. Pet. App. C2. That amount was based on rents petitioner lost as a result of respondent's permit denials. *Id.* at B20.

b. A Florida district court of appeal affirmed the monetary award in a divided decision. Pet. App. B1-B30. Concluding that *Nollan* and *Dolan* provided the appropriate framework for analyzing petitioner's tak-

ings claim, Pet. App. B8-B9, the appeals court affirmed the circuit court's judgment, upholding the determination that any mitigation in excess of petitioner's preservation proposal would "exceed the rough proportionality" requirement identified in *Dolan*. *Id.* at B10 n.5. The dissent would have held that no exaction had occurred because the permit had been denied and petitioner was not required to give up any interest in real property. *Id.* at B21-B23; see *id.* at B23 ("In this case, *nothing* was ever taken."). That did "not mean that [petitioner] was without a remedy," because petitioner could have challenged the validity of respondent's permit denial. *Id.* at B23.

c. The Supreme Court of Florida granted review to consider whether an exaction taking occurs under the United States or Florida Constitutions where the condition imposed on the landowner "does not involve the dedication of an interest in or over real property" or where "no permit is issued by the regulatory entity." Pet. App. A3; see *id.* at A2 ("This Court has previously interpreted the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively.").

Canvassing this Court's takings decisions, the Supreme Court of Florida observed that "regulatory takings challenges are governed by the standard articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)," which principally focuses on the economic impact of the regulation on the landowner, the extent to which the regulation interferes with the landowner's reasonable investment-backed expectations, and the character of the governmental action. Pet. App. A12; see 438 U.S. at 124. The court explained that this Court developed the theory of exaction takings in

Nollan and *Dolan* to address "government demands that landowners *dedicate easements* over their land to allow the public access across their property as a condition of obtaining development permits." *Id.* at A16. In the Florida court's view, however, this Court had declined to extend *Nollan* and *Dolan* beyond that specific context. *Id.* at A15-A17 (discussing *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)). Accordingly, the court held that this Court's framework for exaction takings "is applicable only where the condition/exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought, thereby rendering the owner's interest in the real property subject to the dedication imposed." *Id.* at A19.

Because respondent "did not condition approval of the permits on [petitioner's dedication of] any portion of his interest in real property in any way to public use," and because respondent "did not issue permits" and so "*nothing was ever taken from [petitioner]*," the Supreme Court of Florida reversed the lower court's judgment. Pet. App. A21.

SUMMARY OF ARGUMENT

The government's denial of a development permit can be the basis for a Fifth Amendment claim for compensation under *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), but not under an exaction-takings theory. Similarly, the exaction-takings framework does not provide the appropriate analysis for a taking premised on the government's conditioning of a permit on the expenditure of money.

I. Government regulation of private property may effect a regulatory taking if it is so onerous that it is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Whether a regulation has such an effect usually is determined by considering the factors identified in *Penn Central*. See 438 U.S. at 124. This Court has employed a different analysis in cases in which the government granted a development permit that contained a condition requiring a landowner to forfeit a property right. Governments must provide just compensation for such "land-use exactions," *Lingle*, 544 U.S. at 546, unless the government demonstrates a nexus between the permit condition and the government's regulatory interest and shows that the condition is roughly proportional to the impact of the proposed project. *Dolan* v. *City of Tigard*, 512 U.S. 374, 386, 391 (1994).

A necessary precondition to any takings claim is government action that impairs some property interest. If the government denies a development permit because the landowner refuses to accept a condition that would constitute a per se taking, the landowner cannot state a claim for compensation for a deprivation that did not occur. In that situation, the government's permit denial may support a takings claim under *Penn Central*'s multi-factor analysis. But such a taking would not be a land-use exaction. A landowner also could challenge the validity of the permit condition, including by arguing that the government cannot constitutionally condition the permit on a requirement that the landowner dedicate a specified portion of his property to public use. Such a challenge to the validity of agency's decision,

however, "is logically prior to and distinct from the question whether a regulation effects a taking." *Lingle*, 544 U.S. at 543.

This Court's exaction-takings cases are fully consistent with the conclusion that government denial of a permit cannot support an exaction-takings claim for compensation. In *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the government approved a permit that required the landowners to grant a public easement on their property, and that easement may have actually attached. And in *Dolan*, a condition requiring the dedication of property for public use would have attached had the landowner acted on the permit the government granted. By contrast, when the government denies a permit based on a landowner's refusal to accede to an impairment of a property right, the government neither takes that property right nor threatens to do so.

The Supreme Court of Florida's judgment is consistent with these principles. Reversal of that decision would impose inappropriate burdens and costs on state and federal land-use regulation and would not be in the interests of either landowners or the government.

II. Although the Fifth Amendment's requirement of just compensation is not limited to government appropriations of real property interests, a permit conditioned on an expenditure of money does not constitute an exaction taking. Under Justice Kennedy's approach and that of the four dissenting Justices in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), a requirement to pay money from unidentified sources does not qualify as a taking at all. See *id.* at 539-547; see *id.* at 554 (Breyer, J., dissenting). And under the plurality's approach in *Eastern Enterprises*, whether such a condition constitutes a

taking would be determined by applying the *Penn Central* framework, not the exaction-takings analysis of *Nollan* and *Dolan*. See *id.* at 522-537.

Petitioner contends that the Court should examine a permit condition requiring the expenditure of money as an exaction taking, because a requirement that petitioner dedicate money to a public use would be a per se taking if not imposed as a condition of a permit. Petitioner's argument is incorrect. Governments routinely require individuals to spend money for public purposes through the imposition of taxes and fees, yet it is settled that taxes and fees do not qualify as takings. Moreover, because landowners have the ability to challenge the government's requirement to spend money on other grounds, there is no need to expand the exaction-takings doctrine to protect landowners' interests.

ARGUMENT

I. PETITIONER'S TAKINGS CLAIM BASED ON RESPONDENT'S DENIAL OF A PERMIT TO FILL WETLANDS IS PROPERLY ANALYZED UNDER THE *PENN CENTRAL* FRAMEWORK

A. *Penn Central* Provides The General Standards For Analyzing A Regulatory-Takings Claim

The Just Compensation Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, see *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." The purpose of that restriction is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012) (quoting *Armstrong* v. *United States*, 364

U.S. 40, 49 (1960)). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). If the government engages in such a per se taking, "it has a categorical duty to compensate the former owner." *Arkansas Game*, 133 S. Ct. at 518 (quoting *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)).

Outside that paradigmatic setting, this Court has recognized that government regulation of property that "goes too far" constitutes a taking requiring just compensation. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). But regulation of economic affairs and land use is extensive, and virtually all such regulation adversely affects some members of the community. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992) (quoting *Mahon*, 260 U.S. at 413); see also *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 627 (2001) ("The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions."). Two types of regulatory takings, nonetheless, are sufficiently distinct and significant in their impact that this Court has deemed them per se takings: regulation that imposes "a permanent physical invasion of [a landowner's] property," and regulation that "completely deprive[s] an owner of '*all* economically beneficial us[e]' of the property." *Lingle*, 544 U.S. at 538 (discussing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458

U.S. 419 (1982), and quoting *Lucas*, 505 U.S. at 1019) (first two alterations added).

Other regulations that interfere with the use of property may effect a taking if their application is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), announced standards for identifying such regulation. See *Lingle*, 544 U.S. at 539. Under that "essentially ad hoc," multifactor analysis, courts consider "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. Also relevant "is the character of the governmental action," such as whether the interference stems from "a physical invasion by government" or, instead, from a "public program adjusting the benefits and burdens of economic life to promote the common good." *Ibid.*; see *ibid.* (explaining that the former is more likely to constitute a taking than the latter).

This Court has employed a different analysis in the context of development permits granted on the condition "that a landowner dedicate an easement allowing public access to her property." *Lingle*, 544 U.S. at 546 (describing *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994)). Such "land-use exactions," *ibid.*, involve the impairments of property interests that would constitute appropriations requiring just compensation if the government imposed them outside the permitting context. *Id.* at 546-547; see *Dolan*, 512 U.S. at 385 (requirement that landowner deed portions of property to city);

Nollan, 483 U.S. at 828 (public easement). But unlike a per se taking under *Loretto* or *Lucas*, a land-use exaction does not result from unilateral government action. The exaction occurs only if the landowner seeks and obtains authorization to undertake conduct that the government properly may regulate through its police power. See *Dolan*, 512 U.S. at 384-385, 387; *Nollan*, 483 U.S. at 836.

Under the "well-settled doctrine of 'unconstitutional conditions,'" *Dolan*, 512 U.S. at 385, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected" rights, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006). Applying that doctrine to land-use exactions, this Court held that the government may not deny a landowner "the right to receive just compensation when property is taken for a public use," *Dolan*, 512 U.S. at 385, unless the government establishes a nexus between the government's legitimate regulatory interest "and the permit condition exacted by the [government]," *id.* at 386 (discussing *Nollan*, 483 U.S. at 837), and unless the government demonstrates, through an "individualized determination," that "the required dedication" is roughly proportional "both in nature and extent to the impact of the proposed development," *id.* at 391; see *id.* at 391 n.8 (explaining that "the burden [is] on the [government] to justify the required dedication").

B. An Exaction-Takings Claim Requires The Actual Appropriation Of Property

1. A necessary precondition to any claim seeking just compensation is government action that actually impairs some property interest to such an extent that it constitutes a taking. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294

(1981) (no taking where plaintiffs failed to "identif[y] any property in which [plaintiffs] have an interest that has allegedly been taken"); *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 194 (1910) (rejecting contention that "the city could be made to pay for a loss of theoretical creation, suffered by no one in fact"). Indeed, it is the value of the property right taken that provides the measure of compensation owed. See *Brown* v. *Legal Found.*, 538 U.S. 216, 235-236 (2003); *Boston Chamber*, 217 U.S. at 195.

Where the government denies a development permit because a landowner declined to accede to a condition (such as a public easement) that would impair a property right (such as the right to exclude others), the landowner may not state a claim for just compensation based on the impairment of the property interest that would have occurred under the proposed condition, because that impairment did not actually occur. The Just Compensation Clause imposes a payment obligation on the government "when property *is* taken," *Dolan*, 512 U.S. at 385 (emphasis added), not when the government *proposes* to take property but does not. *Cf.* Pet. Br. 15, 24 (urging adoption of just compensation requirement when "government *attempts* to confiscate property") (capitalization altered and emphasis added).[6]

A landowner denied a permit in these circumstances may have a cognizable claim for just compensation. But

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[6] Petitioner claims the right "to compensation for the substantial cost incurred making unrelated [*sic*] public improvements." Pet. Br. 11; see *id.* at 15. It is telling, however, that petitioner did not seek, and the circuit court did not award, compensation for any such costs, because they were never incurred. Instead, the circuit court based its compensation award on a calculation of lost rent on petitioner's *own* property after the permits were denied. Pet. App. C1-C2, B20.

any such claim must be based on the impact of the permit denial itself on the use of the property, not on the value of a property right that would have been lost if (as never actually happened) the permit had been issued and the development proceeded subject to that condition. Thus, the landowner could argue that the government's denial of a development permit deprived him of "all economically beneficial use" of the property. *Lucas*, 505 U.S. at 1027. Or the landowner could argue that the permit denial had such a severe economic impact and sufficiently interfered with distinct investment-backed expectations that, under the multi-factor *Penn Central* analysis, a taking requiring just compensation had occurred. See, *e.g.*, *Penn Central*, 438 U.S. at 104-105.[7]

Alternatively, the aggrieved landowner would have the option of challenging the validity of the permit denial, arguing that the agency's action was inconsistent with state or federal statutory or constitutional law. See, *e.g.*, Fla. Stat. § 120.68(7)(e); *Lingle*, 544 U.S. at 548-549 (Kennedy, J., concurring). In such a proceeding, for example, the landowner could challenge the validity of the permit denial on the basis of the unconstitutional-conditions rationale that informs the exaction-takings doctrine, as occurred in *Parks* v. *Watson*, 716 F.2d 646 (9th Cir. 1983), and *McKain* v. *Toledo City Plan Commission*, 270 N.E.2d 370 (Ohio Ct. App. 1971),

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[7] There is a dispute about whether petitioner waived or forfeited any claim under *Penn Central*. See Resp. Br. 33 n.15. Respondent acknowledges that the issue of waiver or forfeiture should be resolved by the Florida courts, should this Court affirm. *Ibid.* There appears to be no dispute that petitioner has waived any *Lucas* claim. See J.A. 76, 163. In any event, such claims generally would be available to a landowner denied a permit on the basis of his rejection of a condition that would qualify as an exaction, had it actually been consummated.

cases cited by *Dolan*, see 512 U.S. at 389 n.7 and 391, and mistakenly relied upon by petitioner to support his claim for monetary compensation, Pet. Br. 34-35. See also Resp. Br. 29-30.

But a challenge to the underlying validity of the permit denial is quite different from a claim for just compensation for an exaction that was never actually imposed. See *Lingle*, 544 U.S. at 543 (noting that the question of a regulation's underlying validity "is logically prior to and distinct from the question whether a regulation effects a taking"). Should a court determine that a permit denial is unconstitutional or otherwise unlawful, including on the ground that a proposed condition was unconstitutional, the proper remedy would be a declaration to that effect and (if necessary) an injunction prohibiting the state from continuing to deny the permit on the unlawful ground.[8] See, *Parks*, 716 F.2d at 654-655; *McKain*, 270 N.E.2d at 375; see also *e.g., Sherbert* v. *Verner*, 374 U.S. 398, 410 (1963).

2. The conclusion that the government's denial of a development permit cannot be the basis of a claim for monetary compensation premised on an alleged exaction taking that never occurred is consistent with this Court's *Nollan* and *Dolan* decisions.

In *Nollan*, the government approved a development permit on beachfront property, authorizing the landowners to demolish an existing bungalow and replace it with a three-bedroom house. 483 U.S. at 828-829. The permit was conditioned on the requirement that the

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[8] Thus, while we agree with petitioner (Pet. Br. 34) that a court properly may "invalidate[]" an unconstitutional condition underlying a government's decision to deny a permit, petitioner is mistaken in suggesting (*id.* at 33-39) that such a denial can be the basis for a claim seeking compensation for an exaction that was never imposed.

landowners "allow the public an easement to pass across a portion of their property" along the beach. *Id.* at 828. Although the owners challenged the condition, *id.* at 828-829, they tore down the bungalow and built the house while their suit was pending, *id.* at 829-830. Thus, the public easement, which was a condition of the permit, may have attached. See *Lambert* v. *City & Cnty. of San Francisco*, 529 U.S. 1045, 1048 (1999) (Scalia, J., dissenting from denial of certiorari) ("[I]n *Nollan* there was arguably a completed taking of an easement" because "the homeowner had completed construction that had been conditioned upon conveyance of the easement.").

In *Dolan*, the government had approved issuance of the landowner's development permit, subject to the condition that the landowner dedicate a portion of her property to public uses. 512 U.S. at 379-380. Unlike in *Nollan*, the landowner in *Dolan* did not develop her land in reliance on the permit while her challenge to the condition was pending. See *id.* at 394 (referring to landowner's "proposed development"). Nevertheless, "there was at least a threatened taking of an easement": "if the landowner *had* gone ahead with her contemplated expansion plans the easement would have attached." *Lambert*, 529 U.S. at 1048 (Scalia, J., dissenting from denial of certiorari).

By contrast, where the government denies a permit because the landowner refuses to accede to a condition providing for conveyance of an easement, "there is neither a taking nor a threatened taking," *Lambert*, 529 U.S. at 1048 (Scalia, J., dissenting from denial of certiorari), of a property interest in the easement. Because the government denied the permit, it has no cognizable interest in the property that would have been acquired if

the permit instead had been granted and development proceeded. Thus, if the property owner develops the land notwithstanding the permit denial, the government would have no basis to enforce the condition (*e.g.*, by exercising rights under an easement). Its only recourse would be to "sue to enjoin and punish," *ibid.*, the landowner's development on the ground that it was undertaken without the necessary permit. And, as noted above, the landowner, for his part, could challenge the permit denial as a regulatory taking under *Penn Central* (or *Lucas*) or could seek to enjoin the government's imposition of the assertedly invalid condition. See pp. 22-24, *supra*.[9]

3. The Supreme Court of Florida believed that this Court's decisions in *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and *Lingle* affirmatively foreclosed reliance on an exaction-takings theory in any respect in this case, reasoning that those decisions "specifically limited the scope of *Nollan* and *Dolan* to those exactions that involved the dedica-

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[9] A government agency would not be open to any exactions-takings claim if it denied a development permit outright, without proposing any condition. Any takings claim would have to rely on *Penn Central* or *Lucas*, based on the impact of the permit denial itself. In a situation in which an outright denial of the permit would not constitute a taking under *Penn Central* or *Lucas*, it is not evident why an agency's bare approval of the permit application subject to an unconstitutional condition would give rise to a claim for monetary compensation, as opposed to a suit to have the unlawful agency action set aside, because the mere approval without actual implementation of the condition would not constitute a transfer of any property interest. A basis for compensation would arise only after the transfer. The Court need not address that issue here, however, because the permit in this case was denied.

tion of real property for a public use," Pet. App. A19, in circumstances where "the regulatory entities *issued* the permits sought with the objected-to exactions imposed" *id.* at A18. Although, in our view, petitioner's exaction-takings claim for compensation should be rejected, we do not believe that *Del Monte Dunes* and *Lingle* themselves squarely rejected such a claim.

In *Del Monte Dunes*, a "city, in a series of repeated rejections, denied proposals to develop [a] property, each time imposing more rigorous demands on the developers." 526 U.S. at 694. Among the conditions the city imposed was a requirement that the landowner set aside "public open space." *Del Monte Dunes*, 526 U.S. at 696. The landowner sued for compensation, alleging a taking. *Id.* at 698. A jury returned a verdict in its favor, and the court of appeals affirmed. *Id.* at 701. In evaluating the propriety of submitting the takings question to the jury, this Court considered the court of appeals' conclusion that the jury's verdict could be upheld because the city's conditions on development were not roughly proportional to its regulatory interests. *Id.* at 702. This Court held that the court of appeals had erred in applying an exaction-takings standard because that standard "was not designed to address, and is not readily applicable to, the * * * questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development." *Id.* at 703.

The Florida court understood *Del Monte Dunes* to have held that a denial of a permit cannot be the basis for any exaction-takings claim. Pet. App. A15-A16, A18-A19. The landowner in *Del Monte Dunes*, however, had expressly repudiated an exaction-takings claim. See, *e.g.*, 526 U.S. at 705 ("Del Monte Dunes partnership did

not file this lawsuit because they were complaining about giving the public the beach[.] * * * One-third [of the] property is going to be given away to the public use forever. That's not what we filed the lawsuit about.") (quoting trial transcript) (first alteration added). This Court's statement that the exaction-takings standard "was not designed to address" a challenge based on a city's "denial of development," *id.* at 703, is best understood as an explanation that the exaction-takings framework does not apply in a suit challenging the denial of a development permit if the landowner does not challenge a proposed condition as a taking of an interest in property.

Lingle explained that *Nollan* and *Dolan* "involved" takings challenges "to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." 544 U.S. at 546. The Florida court understood that statement as suggesting that exaction-takings claims are limited to circumstances where the government actually imposes the condition by issuing a development permit. Pet. App. A16, A18-A19. But *Lingle*'s bare description of the particular action challenged in *Nollan* and *Dolan* need not be read to have actually imposed that limitation on the exaction-takings theory by implication.

Although the Supreme Court of Florida's decision thus was not squarely controlled by *Del Monte Dunes* and *Lingle*, that court nevertheless correctly held, for the reasons given above, see pp. 21-24, *supra*, that a landowner states a claim for monetary compensation on an exaction-takings theory "only when the regulatory agency actually issues the permit sought, thereby ren-

dering the owner's interest in the real property subject to the dedication imposed." Pet. App. A19.

4. Adoption of petitioner's contrary argument (Pet. Br. 29-39) would impose inappropriate burdens and costs on state and federal land-use and environmental regulation and would not be in the interests of either landowners or the government.

State governments may use their police powers to enact reasonable land-use regulation, without providing for compensation. See *Lucas*, 505 U.S. at 1024-1026. Landowners have a right, subject to that reasonable regulation, to make use of their property, including by developing it. See, *e.g.*, *Palazzolo*, 533 U.S. at 627. In the usual suit for just compensation, the burden is on the landowner to establish that the government's conduct so interferes with his property rights as to constitute a taking. See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989). In an exaction case, because the government's appropriation would constitute a per se taking if made outside the permit context, this Court has placed the burden on the government to establish the nexus and rough proportionality necessary to avoid liability for a taking. *Dolan*, 512 U.S. at 391 & n.8.

Placing the burden on the government in takings suits arising from the denial of development permits would have undesirable consequences. In considering permit applications involving wetlands destruction, for example, the federal government and Florida assist landowners seeking to develop their property by helping to indentify appropriate mitigation measures. See 33 C.F.R. 332.4(a); Fla. Admin. Code 17-312.300(4). If this Court were to apply the exaction-takings framework to permit denials premised on a landowner's decision not to accept a condition suggested by the government, the

foreseeable consequence would be that government agencies would refrain from assisting permit applicants to identify acceptable mitigation measures. See generally Pet. App. A20; Br. of Amici Nat'l Governors Ass'n et al. 14-15. Agencies would do so because a regulatory-takings challenge to an agency's outright denial of a permit would remain subject to review under the less stringent *Penn Central* standard, which, in addition, places the burden on the claimant. Such an outcome would not be in the interest of either landowners or governments.[10]

II. CONDITIONING THE GRANT OF A PERMIT ON AN OBLIGATION TO SPEND MONEY DOES NOT CONSTITUTE AN EXACTION TAKING

A. Imposition Of An Obligation To Spend Money Supports A Takings Claim, If At All, Only Under *Penn Central*

The Fifth Amendment's requirement of the payment of just compensation is not limited to government appropriations of private interests in real property. See, *e.g., Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998) (rights to funds in specific bank accounts); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) (rights to intangible property). This Court has not decided whether a requirement to pay money from unidentified sources can ever be the basis of a takings claim.

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[10] The consequences of imposing the exactions-takings framework in a case such as this would be especially severe. Respondent identified a variety of measures, any one of which would have been sufficient to mitigate the adverse impact of petitioner's proposed development, and some of which involved only a modification of petitioner's project with no mitigation beyond that offered by petitioner. See p. 11, *supra*.

But if such a claim is cognizable, it would be governed by *Penn Central*.

In *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), the Court considered a challenge to the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.* That statute imposed retroactive liability on coal operators, requiring them to fund the health benefits of certain retired coal miners. *Id.* at 514-515 (plurality op.). Analyzing the imposition of liability on the particular operator before the Court, a plurality of the Court concluded that application of the statute to the particular operator had effected a taking under *Penn Central* for which just compensation was required. *Id.* at 522-537 (concluding that the retroactive liability had a substantial economic impact and interfered with the coal operators' reasonable investment-backed expectations, and that the character of the governmental action was unusual).

Five Justices, however, rejected that analysis. Justice Kennedy concurred in the judgment. *Eastern Enters.*, 524 U.S. at 539. He concluded that, as a "retroactive law[] of great severity," the Coal Act violated due process. *Id.* at 549; see *id.* at 547-550. But Justice Kennedy disagreed with the plurality's view that the statute effected a taking. *Id.* at 540. He concluded that a regulatory takings claim is cognizable only "where specific and identified properties or property rights [are] alleged" to have been appropriated. *Id.* at 541. Because a statute that "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms" does not interfere with property interests protected by the Just Compensation Clause, Justice Kennedy would have held that the Coal Act did not effect a taking. *Id.* at 543. The four dissent-

ing justices agreed with that analysis of the takings issue. *Id.* at 554 (Breyer, J., dissenting, joined by three other Justices).

Even assuming that the imposition of a monetary liability could constitute a taking, however, under this Court's precedent a takings claim of that sort would be analyzed under *Penn Central* rather than under the framework established for exaction takings. Under the approach of either Justice Kennedy and Justice Breyer's dissent in *Eastern Enterprises*, on the one hand, or the plurality on the other hand, a claim that a development permit conditioned on the expenditure of money constitutes a taking would not be analyzed under exaction-takings principles. Under Justice Kennedy's approach, the condition would not constitute a taking at all, because it does not involve the impairment of rights to specific property or property interests. See *Eastern Enters.*, 524 U.S. at 541; see also *Sperry Corp.*, 493 U.S. at 62 n.9 ("It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible."). And under the plurality's approach, a court would analyze the takings claim under *Penn Central*. See *Eastern Enters.*, 524 U.S. at 523-524.

B. Petitioner's Argument To The Contrary Lacks Merit

The exaction-takings framework applies only to permit conditions "involv[ing] dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings." *Lingle*, 544 U.S. at 547. Petitioner contends that a requirement that a landowner "dedicate a sum of his money to a public use," Pet. Br. 15, as a condition of receiving a permit satisfies that requirement, *id.* at 40. But petitioner's submission, "if accepted, would prove too much." *Connolly* v. *Pen-*

sion Benefit Guar. Corp., 475 U.S. 211, 222-223 (1986) (rejecting similarly broad argument that "a statutory liability to a private party always constitutes an uncompensated taking").

Governments routinely require individuals to spend money for public purposes, through the imposition of taxes or fees—such as excise taxes, special assessments, user fees, and development fees—yet it has been settled that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *County of Mobile* v. *Kimball*, 102 U.S. 691, 703 (1881). This Court has similarly upheld reasonable fees against takings claims. See *Sperry Corp.*, 493 U.S. at 63. It cannot be, then, that any government requirement that an individual "dedicate a sum of his money to a public use," Pet. Br. 15, would be a "dedication[] of property so onerous that * * * [it] would be deemed [a] *per se* physical taking[]," *Lingle*, 544 U.S. at 547. Petitioner thus has not identified an impairment of a property interest that, if imposed outside the permitting context, would constitute an appropriation requiring just compensation. But such a showing is an essential precondition for application of the exaction-takings framework.

While exaction takings do not provide the proper framework for analyzing a requirement to expend funds as a condition of obtaining a development permit, that does not mean that such a requirement is shielded from scrutiny. A landowner may challenge the validity of the requirement under state or federal law, arguing, for example, that the required expenditure is unauthorized, is arbitrary or capricious under administrative law standards such as those in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or imposes an unconstitutional

condition. See pp. 21-24, *supra*. A landowner also might in some circumstances seek to advance a regulatory-takings claim under *Penn Central*, on the theory that the fairness of the expenditure could be considered in light of the landowner's economic interests and investment-backed expectations, and the character of the government's action. Because landowners may seek redress through these various other avenues, there is no need to reformulate or extend the exaction-takings theory to accommodate challenges to permits conditioned on the payment of funds.

CONCLUSION

The Court should affirm the judgment of the Supreme Court of Florida.

Respectfully submitted.

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