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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 11-1447,
5 Koontz v. St. Johns River Water Management District.

6 Mr. Beard?

7 ORAL ARGUMENT OF PAUL J. BEARD, II,
8 ON BEHALF OF THE PETITIONER

9 MR. BEARD: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 This case is about the extent to which
12 Nollan and Dolan review should be made available to
13 individuals to challenge excessive exactions imposed as
14 conditions to land use approval.

15 Here, before he could make small use of his
16 property, Coy Koontz was told by the district that he
17 had to finance enhancements to 50 acres of publicly
18 held --

19 JUSTICE GINSBURG: Let's back up. When he
20 asked for a permit, he voluntarily said, I -- as
21 mitigation for the loss of wetlands, I am going to
22 voluntarily create a conservation easement on the rest
23 of my property. So he recognized, from day one, that
24 there had to be some mitigation for what he was seeking
25 to do in the permit. Is that right?

1 MR. BEARD: That is correct. With his
2 application, Justice Ginsburg, he did offer a mitigation
3 in the form of a conservation easement on most of his
4 property.

5 JUSTICE GINSBURG: And if he had offered
6 nothing, and he just said, I want this permit to develop
7 my land, and the agency said, you have offered no
8 mitigation, we deny your permit, would he have a claim?

9 MR. BEARD: If there was no condition
10 attached to the permit denial, then there would be no
11 claim; although it would be up to the district, under
12 Nollan and Dolan, to make the individualized
13 determination, both of the amount of impact to wetlands
14 and the amount necessary to offset.

15 JUSTICE GINSBURG: Suppose he just put in
16 the application, no mitigating -- no mitigation of any
17 kind, and the agency says no. You recognize that he
18 would have no claim, right? That he had an obligation
19 to mitigate.

20 MR. BEARD: It depends, Your Honor. If the
21 denial was based on the idea that he was obligated to
22 offer mitigation and that was the extent of the
23 district's communication with him -- in other words,
24 that the district told him, you must offer us something,
25 we won't tell you what, and we'll let you decide what

1 you want to offer in mitigation -- if that was in the
2 record and that was the -- and the result of that was a
3 permit denial because Mr. Koontz said, for example,
4 well, gee whiz, I don't know how much I need to mitigate
5 for, you haven't told me, I still believe there would be
6 a Dolan violation because, in Dolan, the Court made
7 clear, there has to be an individualized
8 determination --

9 JUSTICE SCALIA: For what? For what? You
10 wouldn't -- you wouldn't know what property was taken.

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

12 JUSTICE SCALIA: You are -- you are posing a
13 situation in which he never came forward with any
14 suggestion. They never came forward with any
15 suggestion. You say he still has a cause of action for
16 a taking?

17 MR. BEARD: Not for --

18 JUSTICE SCALIA: A taking of what?

19 MR. BEARD: Not for a taking, Your Honor,
20 but he -- he may have a cause of action, under Nollan
21 and Dolan, for the imposition of an unconstitutional
22 condition that may not -- the contours of which may not
23 be known. But the fact that the district told him, you
24 need to --

25 JUSTICE SCALIA: I think the other side says

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

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

3 JUSTICE SCALIA: Wouldn't -- wouldn't the
4 other side in this case acknowledge that you have such a
5 cause -- that you may have such a cause of action here?

6 MR. BEARD: Yes, Your Honor. I believe
7 they -- well, their argument --

8 JUSTICE SCALIA: But they are just saying
9 you don't have a cause of action for a taking.

10 MR. BEARD: That is correct. They -- they
11 are saying that we don't have a cause of action for a
12 taking. Of course, in Nollan and Dolan, there was no
13 transfer of property from the applicant to the relevant
14 agencies.

15 As this Court will recall, in both Nollan
16 and Dolan, there was an imposition of an exaction, and
17 immediately, the applicant in both cases sued to prevent
18 the unlawful exaction from being consummated.

19 JUSTICE SOTOMAYOR: Counsel, I've had a
20 problem with your argument, okay? From the record, it's
21 very clear that a conservation offer is not considered
22 mitigation because there's still a net loss of wetlands.
23 The policy is abundantly clear, stated, and undisputed.
24 Okay?

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

1 this case? Meaning whether there was an exaction or no
2 exaction or whatever happened in terms of the denial,
3 you couldn't win on your offer because the policy of the
4 State was clear and, in my mind, unassailable: We have
5 to preserve wetlands. Conservation of other wetlands is
6 not enough. Mitigation means make sure that we get a
7 net gain of wetlands.

8 So why are we here?

9 MR. BEARD: Justice Sotomayor, we don't
10 contest the legitimacy of the policy, of course, in
11 preserving wetlands; nor do we contest, for that matter,
12 the ratios that the district has imposed via its
13 regulations.

14 It is undisputed -- the trial court found
15 below, the Court of Appeals affirmed, and the finding
16 was undisturbed in the Florida Supreme Court, that, in
17 fact, the offsite mitigation -- that part of the
18 mitigation that went beyond the conservation easement
19 was in excess, it violated Nollan and Dolan.

20 So the underlying factual findings are not
21 in dispute.

22 JUSTICE GINSBURG: I think you -- I think
23 you have a problem then, Mr. Beard, because, if you look
24 at the record, the record is very clear that it was
25 not -- that the district didn't come back and say, take

1 it or leave it, you -- you improve our wetlands, or you
2 get no permit.

3 There was -- and if you -- they are set out
4 in the Respondent's brief at pages 13 to 15, oh, at
5 least half a dozen, maybe more, that the -- the district
6 said, here are several ways -- several ways that you
7 could sufficiently offset the adverse impact. And some
8 of them had nothing to do with improving the
9 government's own land.

10 So if we can't -- we really can't say this
11 was a take it or leave it, either you do the
12 improvement that we are asking you to do, or you get no
13 permit, what do you do with the fact that, as the
14 appendix certainly bears out, that the district offered
15 a range, it offered many, many ways that this permit
16 might be granted. And then it says, then you are free
17 to come up with some other -- something else.

18 MR. BEARD: Justice Ginsburg, it's true that
19 there were negotiations and that a range of offers were
20 made. On Mr. Koontz's application to use 3.7 acres of
21 his property in conjunction with the conservation
22 easement, the district made a final decision denying him
23 his permit because he would not go beyond the easement
24 and offer offsite mitigation.

25 And that is --

1 JUSTICE GINSBURG: Not -- not -- because he
2 wouldn't go beyond what he was offering, but that's --
3 some of these options -- one was that he -- that he
4 adjust the size of his project, that he make it smaller.
5 The -- the staff suggested eliminating -- no, that --
6 that's a different one.

7 But there was one that suggested that he --
8 he reduce the scale, the Petitioner reduce the scale of
9 his project to one acre and preserve the rest for the
10 conservation easement. Now, if that -- if he took that,
11 would you have any -- any case here?

12 MR. BEARD: I'm sorry, Justice Ginsburg? If
13 we took --

14 JUSTICE GINSBURG: If they said, we will
15 give you -- we will give you a permit if you reduce the
16 scale of your project to one acre, and then preserve the
17 rest by a conservation easement?

18 MR. BEARD: Unlikely not, Your Honor,
19 because the trial court did conclude, based on the
20 evidence, that he was having minimal impact on any
21 viable wetlands. And so even a reduction in the size of
22 the project, with an increase in the amount of
23 mitigation, would have a fortiori gone beyond even what
24 we have in this case.

25 The court of appeals made clear, as a matter

1 of law, that Mr. Koontz did -- was entitled to a
2 determination on the application he submitted. He
3 submitted that application. And, as the district
4 admitted in a pretrial statement right before trial, the
5 denials were based exclusively -- and this is a quote --
6 "The denials were based exclusively on the fact that the
7 plaintiff would not provide additional mitigation to
8 offset impacts from the proposed project."

9 JUSTICE KAGAN: Mr. Beard, can I go back to
10 Justice Ginsburg's first question and make sure I
11 understand your answer to it?

12 Suppose that the State just had a policy
13 that said, We're concerned about wetlands; in order to
14 develop your piece of property, you have to come forward
15 with a proposal -- a mitigation proposal and an adequate
16 mitigation proposal. And then it gives some guidance
17 about what an adequate mitigation proposal would mean,
18 but it really leaves it up to the landowner.

19 And the landowner says, sorry, I'm not
20 giving you anything, I think I should be able to develop
21 this on my own without providing any mitigation. Is
22 that -- and -- and the State says, well, then, sorry,
23 you don't get a permit.

24 Is that a taking? Does the man have a
25 takings claim? I heard you answer the question yes.

1 MR. BEARD: My answer was that he may have a
2 Nollan/Dolan claim. I don't want to get confused about
3 the term "taking" because "taking" could imply many
4 kinds of regulatory takings claims.

5 JUSTICE KAGAN: Well, I -- that's the next
6 question I was going to ask you because my understanding
7 of Nollan and Dolan was that it assumed the condition,
8 if taken alone, would constitute a taking.

9 Do you disagree with that?

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

12 JUSTICE KAGAN: Okay. So then you need a
13 taking someplace in the picture; isn't that right?
14 Nollan/Dolan says this is how we analyze takings in the
15 context of a permit scheme. So we have to look for a
16 taking. So, in my example, where is the taking?

17 This was Justice Ginsburg's example. Where
18 is the taking?

19 MR. BEARD: Right. And I think that's
20 correct, that, under Nollan and Dolan, you would have to
21 have a condition that was imposed on you.

22 My only point was would it be lawful --
23 or there be a problem in the district shifting its
24 burden on to the applicant and saying, we're not going
25 to establish what mitigation is required, and we're not
26 going to establish what the impacts are, we'll leave

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

3 JUSTICE KENNEDY: Suppose the district
4 did -- did have, as I think it did here, a uniform
5 policy that, for every acre you develop, you have to
6 preserve 10 wetlands -- 10 acres of wetlands.

7 And then two cases, both hypothetical, one
8 is somebody had an 100-acre parcel, and they want to
9 develop five acres, and they have 50 acres that they
10 mitigate for wetlands. The other person has only one
11 acre, and he wants to -- and he has to develop the whole
12 acre.

13 Can the district then say, we'll give you
14 the one-acre development permit, if you reclaim wetlands
15 on 10 other acres that you -- that we can designate for
16 you elsewhere? The hypothetical being designed to point
17 out whether or not the crux of your argument is that he
18 had to go off -- offsite.

19 MR. BEARD: The crux is not that he had to
20 go offsite, but that -- that did play into the trial
21 court's analysis as to the connection between his impact
22 and what was being required, and there was testimony
23 below that there was no connection there. And the fact
24 that the mitigation was four to seven miles away played
25 into the analysis as to whether there was a connection.

1 It's not --

2 JUSTICE KENNEDY: So, in my hypothetical,
3 you would -- would there be a violation in my
4 hypothetical, as you understood it?

5 MR. BEARD: It depends, Your Honor, because
6 you have to determine what -- in each respective
7 hypothetical, what the impact was actually to the
8 wetlands and then determine what the appropriate
9 mitigation --

10 JUSTICE SOTOMAYOR: How do you normally
11 decide whether the agency has done that right or not?

12 MR. BEARD: Excuse me?

13 JUSTICE SOTOMAYOR: How do you normally
14 decide? Let's assume Justice Kagan's question -- or
15 Justice Ginsburg's question. No -- it just says, come
16 to us with a mitigation plan. And you say, this is what
17 I offer, and it's enough. And they say, no, it's not
18 enough; denied.

19 Would you go through the State
20 administrative process, to figure out whether that was
21 arbitrary and capricious, whether it was a Penn Central
22 violation? What would you do with that claim in the
23 normal circumstance? Justice Kennedy's question.

24 MR. BEARD: In the normal circumstance, if
25 there was no condition imposed, there would not be a

1 Nollan and Dolan claim. There may be another kind of
2 claim, say, under Penn Central, and that could be
3 brought. That wouldn't have to be brought via
4 administrative remedies, if there was a final agency
5 action --

6 JUSTICE SOTOMAYOR: It would be an inverse
7 condemnation.

8 MR. BEARD: Correct. It could be an inverse
9 condemnation type of a claim.

10 JUSTICE BREYER: So -- so what I think might
11 be driving some of these questions is the district court
12 says -- just as you say, had Koontz offered additional
13 mitigation -- the additional that would have cost
14 \$10,000, he would have gotten the permit. That's what
15 he said.

16 So then you look back to see what additional
17 mitigation. And, here, we have in the record, at least
18 that my law clerk finds -- you know, that -- that they
19 went to Koontz and they said, here are some choices:
20 Install a subsurface stormwater management system in the
21 development -- I mean, right on your land -- or reduce
22 the size to one acre; or eliminate the filling of the
23 slide slope areas; or replace 15 culverts and eliminate
24 a ditch system somewhere else; or enhance 50 acres
25 somewhere else.

1 Now, at that point, when -- and then they
2 said, won't you negotiate for 30 more days, maybe we can
3 find some other things? He says, no, I'll bring a
4 lawsuit. Okay.

5 Now, I absolutely can see a Penn Central
6 claim there. But the land -- what you're talking about
7 is not some land somewhere off the site. We're talking
8 about his land. If, after all, they said you have to
9 leave all the coal in the mine to hold up the ceiling --
10 you know what I'm referring to -- then they go too far.

11 And, here, if we look at all these
12 conditions proposed and said -- you know, this is just
13 terrible, they don't do it for anybody else, your
14 client's the only one, it bears no relation, oh, it just
15 goes too far, you win under Penn Central.

16 So I can see the framework here. I'm not
17 saying you're going to win, but I got it clear what the
18 framework is. But suddenly you bring this Nollan/Dolan
19 business into it, and I get confused. And the reason is
20 because there was a different piece of land in Nollan
21 and Dolan.

22 The piece of land that was different was an
23 easement in front of -- and an easement is a piece of
24 property in Nollan, and there was a bike path in Dolan,
25 right across his property.

1 So -- so I don't see how Nollan and Dolan
2 have to do with this. I see everything that Penn
3 Central has to do with it, and that grows out of the
4 nature of what was being offered. You are saying what
5 they are offering you is simply going too far. Okay.
6 I've got that conceptually.

7 I ask this question because all these briefs
8 are about Nollan and Dolan, and I don't understand what
9 they have to do with it. I must be missing something,
10 and that's why I am asking you.

11 MR. BEARD: Justice Breyer --
12 Justice Breyer, Nollan and Dolan, fundamentally, are
13 about whether a property owner has been singled out to
14 bear public burdens that, in fairness and --

15 JUSTICE BREYER: But, of course, they are
16 land claims because they took a piece of land, which
17 everybody assumes -- right in front of his house -- and
18 said, you've got to let everybody from the beaches walk
19 back and forth from one beach in the north to another
20 one in the south, and they are going to walk over your
21 land.

22 And the Court said, you can't take his land
23 unless you have a nexus to some public purpose that is
24 related to his building the house. I got it. I just
25 don't see what it has to do with this case.

1 MR. BEARD: Because you -- you can have an
2 unconstitutional condition imposed on your right to do
3 something, in this case, make use of your property. And
4 the --

5 JUSTICE BREYER: Of course, you can. In
6 fact, there is too much coal. That's an
7 unconstitutional condition. It goes too far, and there
8 is a framework called Penn Central, which deals with it.

9 MR. BEARD: Penn Central is a special
10 takings case that goes to the question of whether a
11 regulation of the use of property that is sought to be
12 developed has gone too far so as to affect the taking.

13 Penn Central is not --

14 JUSTICE SOTOMAYOR: Which -- how does that
15 not address going too far? You just said it. If -- if
16 this is unrelated to the -- the denial of your permit of
17 all uses of your land, and you're saying that's the
18 problem, which is I still have a use, I just want more,
19 why does that entitle you to your lost profits?

20 When were you ever entitled to start with
21 the claim that, somehow, you're entitled to a permit, as
22 a matter of law?

23 MR. BEARD: We're entitled, under the
24 Unconstitutional Conditions Doctrine, to not have to
25 bear a public burden that has no bearing on the impact

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

2 JUSTICE SCALIA: Yes, that's fine. That --
3 that would enable you to challenge the denial of the
4 permit, saying it's based upon an unconstitutional
5 condition. But how does it -- how does it enable you to
6 say there's been a taking? What has been taken?

7 MR. BEARD: What has been -- what has been
8 taken, in effect, is his funds that have to be put now
9 to a public use, the enhancement of 50 acres of public
10 wetlands. And there is nothing in the Takings Clause --
11 nothing --

12 JUSTICE SCALIA: It hasn't -- it hasn't been
13 taken. I mean, he turned it down.

14 MR. BEARD: Nothing was taken in Nollan and
15 Dolan, either. What was proposed there, though, was a
16 threat of a taking.

17 JUSTICE SCALIA: The -- the permit was
18 granted in Nollan and Dolan. And -- and the condition
19 attached to the permit, therefore, took effect; namely,
20 that you had to dedicate this easement over your -- over
21 your beach, whereas, as my colleague pointed out,
22 anybody could walk back and forth, barefooted.

23 (Laughter.)

24 MR. BEARD: Justice Scalia, in Nollan and
25 Dolan, there was approval -- approval with conditions.

1 There were no permits issued, and that's -- that is an
2 important distinction to make, that most agencies,
3 including this one, you approve a permit with a -- with
4 conditions, which means, we will give you your permits
5 as soon as you comply; which is substantively the same
6 as saying, we won't give you your permits until you say
7 yes to our conditions.

8 JUSTICE BREYER: All right. Look, we have
9 the same question. I just want an answer to my
10 question. And, for the purposes of this question, I am
11 assuming enormously in your favor. I am assuming that
12 this set of conditions is the worst thing since sliced
13 bread.

14 (Laughter.)

15 JUSTICE BREYER: All right. I
16 think there -- all right. I'm assuming that in your
17 favor. All right.

18 JUSTICE SCALIA: Sliced bread's supposed to
19 be good.

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

22 (Laughter.)

23 JUSTICE BREYER: The -- the -- but -- but in
24 any case, the -- the point is, you see, I assume that in
25 your favor. I'm trying to figure out the conceptual

1 framework. I assume that in your favor. I assume
2 whether they didn't issue the permit and would have, but
3 they haven't quite, or maybe they have -- it means
4 nothing.

5 Now, having assumed that, it seems to me
6 what your argument is, is that this is a form of
7 regulatory taking of the kind that Holmes was talking
8 about. And that -- that's what was going on in -- in
9 Penn Central, and so we simply look to see if it went
10 too far or whatever. The lower courts could do that. I
11 got that part.

12 Now, I want you to answer the question,
13 which is, am I right? Is there another part -- a
14 different part to this case, called the Nollan/Dolan
15 part and explain that to me. That's why I asked the
16 question. I want to hear what you're going to say.

17 MR. BEARD: Justice Breyer, there is another
18 part, a very distinct part, and that part goes to the
19 question of the condition that produced the denial. So
20 there are -- there are actually two parts here. There's
21 the -- the conditioning of your permit; in other words,
22 we will not issue you permits unless you agree to
23 perform offsite mitigation.

24 Now, the question, under Nollan and Dolan,
25 is was that condition constitutional? Was he asked to

1 give up something that the State -- or the district, in
2 this case, should not have asked him to give up in
3 exchange for his right to use his property?

4 Now, it's true as -- as, Justice Breyer, you
5 mentioned, that the permit denial and whether that
6 affects a regulatory taking of his land, of the thing he
7 wants to use, that's an entirely different question.
8 And it may raise another kind of claim -- another kind
9 of taking claim.

10 But the crux of the claim that was litigated
11 in this case, from the trial court all the way up to the
12 Florida Supreme Court, is was the condition to perform
13 offsite mitigation -- and that was accepted as true by
14 the courts below, that this was a condition that had
15 been --

16 JUSTICE GINSBURG: Suppose the record just
17 doesn't bear that out; the record shows that it wasn't
18 one option. They gave him a laundry list of things he
19 could do, some -- some of them having nothing whatever
20 to do -- anything off his own property.

21 Suppose the -- whatever the district court
22 might have said, the record shows that the agency said,
23 you're right, seven things you could do, come up with
24 here are six, if you have something else. And some of
25 them have absolutely nothing to do with other

1 properties.

2 MR. BEARD: We agree that there were
3 negotiations and that, even in the order, it's alleged
4 that various options were provided to Mr. Koontz, but,
5 ultimately, the decision -- as the district admits, the
6 decision -- the final decision to deny the permit
7 application for 3.7 acres of use was Mr. Koontz's
8 refusal to acquiesce in the condition that he perform
9 50 acres of offsite improvements.

10 And, by the way, the reference --

11 JUSTICE GINSBURG: Where -- where is that?

12 MR. BEARD: It's in the Joint Appendix,
13 pages 70 to 71, which is the pretrial statement where
14 each party sets forth his and her position. There, the
15 court -- I'm sorry -- the district made clear that the
16 condition that had been refused and was the cause of the
17 permit denial was the one to perform offsite mitigation
18 at a cost of a range between \$10,000 on the low end.
19 Our experts said in the range of 100 to 150,000 -- 90 to
20 150,000.

21 So the district, later on -- even in the
22 Florida Supreme Court, Justice Ginsburg, said, in its
23 Petitioner's brief on jurisdiction, at page 1, that it
24 required additional mitigation before it would authorize
25 the permits and that, quote, "Additional mitigation

1 would be offsite because the available conservation land
2 onsite was, in the district's view, insufficient
3 mitigation."

4 So there's no question that an actual
5 condition was imposed, whose rejection produced a permit
6 denial.

7 JUSTICE KAGAN: Mr. -- Mr. Beard, I don't
8 think anybody is contesting that there was a condition
9 imposed or maybe there are. But -- you know, there's
10 another question whether that condition is a taking. And
11 we've been trying to figure out what's the taking here.
12 In Nollan and Dolan, they took an easement, they took a
13 piece of land, so that's the taking. Now, you said the
14 funds are the taking; is that correct?

15 Any time that somebody comes up with a
16 proposal for -- for a developer to pay money, in order
17 to compensate the State for the costs that are
18 associated with his development, that that is, itself, a
19 taking?

20 MR. BEARD: I want to be clear that we're
21 not saying that all monetary fees or exactions would be
22 subject to Nollan and Dolan, only within the permit
23 context -- the special context of land use permitting is
24 it --

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

1 the permit context, a State can't say to somebody, you
2 have to pay to perform some service or to compensate
3 without it being a taking and without it being subject
4 to Nollan and Dolan analysis.

5 MR. BEARD: Correct. If the State or if the
6 government or the permitting authority asks for the --
7 for the property owner to give up property, even money
8 to be put to a public use, and it's not an application
9 for your user fee or something like that, it's for
10 mitigation, that should be subject --

11 JUSTICE KAGAN: So -- so, for example -- and
12 I'll try to do this very quickly, if -- if the State
13 just had a policy for every acre of wetlands you fill
14 in, it costs us \$10,000, you need to pay \$10,000, that's
15 subject to Nollan and Dolan analysis, too.

16 MR. BEARD: Correct. It would be subject to
17 Nollan and Dolan analysis, to determine if there really,
18 on the ground, there's a connection between the
19 impact --

20 JUSTICE SCALIA: No, it -- it would be
21 subject to Nollan and Dolan analysis if they took the
22 \$10,000. If they issued the permit, the developer went
23 ahead with the development, and the State then attached
24 the -- the bank account in the amount of \$10,000 or
25 whatever, that would be Nollan -- in Nollan and Dolan --

1 in Nollan, there was a taking.

2 He had gone ahead with the -- with the
3 development of his house under the permit, which said,
4 if he did that, he gave away the easement. So there --
5 there was a -- a taking there. The -- the easement
6 would have been taken automatically.

7 In -- in -- in Dolan, there was -- the
8 individual had not gone ahead with the development, but
9 it was clear that any development the person undertook
10 would be subject to the -- the exaction that the
11 municipality required. So there was a -- a taking
12 there, we said.

13 Here, there's nothing that happens. The
14 permit was denied, unlike in -- unlike in -- in Dolan,
15 where the permit was granted, and it was understood
16 that, if she went ahead with it, she was going to
17 lose -- lose some land rights. Here, the permit's been
18 denied. I can't see where there's a taking here.
19 Nothing's been taken.

20 MR. BEARD: In Nollan and Dolan, Your Honor,
21 nothing was taken, either. In Nollan, you had a permit
22 approval with conditions. It's true that development
23 had not gone forward, but, here, as well, development
24 had not gone forward.

25 Presumably -- theoretically, if the

1 development had gone forward, he might have been subject
2 to conditions that he would have had to satisfy. But I
3 would submit to the Court --

4 JUSTICE SCALIA: The permit had issued. The
5 permit had issued in both of those cases, and,
6 therefore, the person was saying, to go ahead with this
7 permit, I give up -- I give up this land.

8 MR. BEARD: The permits in Nollan and Dolan
9 actually did not issue. There was only approval, with
10 conditions, and there is a difference. And that is no
11 different from what happened here. The threat is the
12 same. You don't get a permit issued to you until you --

13 JUSTICE SCALIA: There was no approval with
14 conditions. There's one thing for -- for a municipality
15 to issue an -- an approval with conditions, and a
16 municipality saying, we can't approval it unless you
17 agree to these conditions. And the person doesn't
18 agree, and the municipality says, we don't approve it.

19 MR. BEARD: But, in either case, he -- he
20 faces the threat, the unconstitutional condition on his
21 use of his property, you don't get your use until you
22 comply with our conditions.

23 Mr. Chief Justice --

24 JUSTICE KENNEDY: I -- I have one question.
25 I know we -- you are running short on your rebuttal

1 time.

2 Assume that, when we look at this record,
3 assume we think there is a due process violation, not a
4 taking violation. That is not before us here, is it?

5 MR. BEARD: No. The due -- there is no due
6 process claim here. There is only a State statute that
7 embodies sort of a due process standard, but there is no
8 due process claim here.

9 And may I reserve the balance of my time,
10 Your Honor?

11 CHIEF JUSTICE ROBERTS: And I will afford
12 you some additional time, since our questioning intruded
13 on yours.

14 MR. BEARD: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Wolfson?

16 ORAL ARGUMENT OF PAUL R.Q. WOLFSON

17 ON BEHALF OF THE RESPONDENT

18 MR. WOLFSON: Mr. Chief Justice, and may it
19 please the Court:

20 The parties agree that Florida may require a
21 landowner to perform mitigation as a condition for a
22 permit that would allow the destruction of a wetlands.
23 The parties disagreed as to how much mitigation was
24 appropriate in this case.

25 The district thought that Mr. Koontz's

1 proposal was insufficient to mitigate the -- the damage
2 to wetlands. Mr. Koontz rejected the district's
3 counterproposals, and he refused to do anything more.
4 And the district denied his permit application because
5 he refused to do anything more.

6 CHIEF JUSTICE ROBERTS: Does it make any
7 difference, in his refusing to do anything more, whether
8 the condition is onsite or offsite?

9 MR. WOLFSON: I don't think it makes any
10 difference, Mr. Chief Justice, I mean, the -- under the
11 Florida regulatory regime, we cannot demand certain
12 conditions from the landowner.

13 The -- we are obligated -- if the -- if the
14 permit -- the landowner has to establish, under his
15 permit application -- and it's his burden -- that he
16 meets the various standards -- the public interest
17 standard, which includes no adverse impact --

18 CHIEF JUSTICE ROBERTS: Those are all
19 State -- State law provisions you are talking about.

20 MR. WOLFSON: Correct. Correct.

21 CHIEF JUSTICE ROBERTS: What about is
22 there -- is there anything in the Federal Constitution
23 that limits the conditions that you can demand?

24 MR. WOLFSON: I don't -- not -- not -- if I
25 understand your question, Mr. Chief Justice, I don't

1 think so.

2 I think that the question is -- when you are
3 talking about what analytical rubric you should apply,
4 whether it be Nollan or Dolan or Penn Central, I think
5 you can always argue that the impact of any of the
6 conditions that we would demand -- and I will assume
7 here that they are true demands -- you can always argue
8 that the impact of the conditions, be they onsite,
9 offsite, or monetary, would be so burdensome that it
10 would call into play Penn Central or --

11 CHIEF JUSTICE ROBERTS: But that's -- but
12 there is no -- there is no restraint on the agency. It
13 can ask for the moon -- before it will give a permit?

14 MR. WOLFSON: Well, I don't -- I think that
15 Penn -- first of all, I think there are many restraints
16 on the agency. First of all, I think Penn Central
17 imposes a restraint on the agency.

18 CHIEF JUSTICE ROBERTS: Do you know of any
19 case where the government has lost a Penn Central case?

20 MR. WOLFSON: In -- yes. There are several
21 in this case, Mr. Chief Justice. I mean, Hodel v.
22 Irving is a Penn Central case, I believe, and I think
23 Kaiser-Aetna was also a Penn Central case.

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

25 CHIEF JUSTICE ROBERTS: Let me present --

1 I'm sorry.

2 MR. WOLFSON: So it does -- it certainly
3 does -- and they --

4 CHIEF JUSTICE ROBERTS: It doesn't happen
5 very often.

6 MR. WOLFSON: Well, it is -- certainly, the
7 burden is on the landowner, but -- but I think that Penn
8 Central -- I think that, in Lingle, when this Court tried to
9 sort of restore -- you know, some -- some coherence to
10 the -- to the takings jurisprudence and repudiated the
11 Agins point, the Court pointed out that -- that the --
12 what -- that the normal -- sort of the normal
13 jurisprudence is that the government is not required to
14 establish, by a heightened scrutiny, sort of that there
15 is a connection between means-ends analysis, when it
16 engages in economic -- economic regulation.

17 And that --

18 CHIEF JUSTICE ROBERTS: Just -- just to nail
19 it down, your -- your position is that there is no limit
20 in the Federal Constitution on what the agency can
21 demand as a condition for the issuance of a permit?

22 MR. WOLFSON: No, no, no. I don't think
23 that is our position. First of all, the Due Process
24 Clause may certainly impose conditions. The Equal
25 Protection Clause may certainly impose conditions.

1 And --

2 CHIEF JUSTICE ROBERTS: But -- but the
3 Takings -- the Takings Clause does not.

4 MR. WOLFSON: If -- if the conditions are so
5 onerous that it would make it essentially impossible to
6 derive any value from the land, that may very well call
7 into question Penn Central or Lucas. I mean, in many
8 ways, this case could have been litigated as a very
9 straightforward Penn Central case.

10 JUSTICE KENNEDY: Suppose -- suppose the
11 agency said, we are really short of revenue; we will let
12 you develop your land, if you contribute a million
13 dollars to our new football stadium?

14 MR. WOLFSON: Justice Kennedy, I think that
15 that might very well raise a Penn Central or Lucas claim.
16 It also sounds like --

17 JUSTICE SCALIA: Well, it doesn't raise Penn
18 Central. You keep on running away from it by saying
19 Penn Central or Lucas.

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

21 JUSTICE SCALIA: It does not deprive the
22 land of all value. The land still has some value. Penn
23 Central is totally out of the case.

24 MR. WOLFSON: Well -- I mean -- it's not --
25 it's not a Nollan or Dolan claim is my point,

1 Justice Kennedy.

2 And it's not a Nollan or Dolan claim because
3 it's not a -- the -- the -- as -- as my friend
4 acknowledged, the question in Nollan and Dolan -- or the
5 rationale of Nollan and Dolan is would the condition, by
6 itself, if demanded unilaterally and outside the
7 permitting context, would -- would that have been a
8 taking of property for which just compensation would
9 have been required?

10 So the --

11 CHIEF JUSTICE ROBERTS: Sure it would have
12 been -- sure it would have been, if they just went
13 along -- to a landowner, and the landowner is there,
14 minding his own business, and they say, well, you own
15 some property, so give us a 1 million dollars to build a
16 football stadium.

17 That would be -- that would be
18 unconstitutional, right?

19 MR. WOLFSON: I think -- I think that
20 would -- I mean, I think that would violate -- could
21 well violate the Due Process Clause. It's hard to
22 see what the -- you know, what the rationality of it is.

23 But I don't think that this Court has
24 ever -- has ever extended the concept of a taking to
25 requirements that a landowner -- that anybody -- or a

1 landowner, either pay money or, more importantly,
2 because I think what really is this case, is come into
3 compliance with a regulatory requirement that would
4 have -- that -- which he would have to expend money to
5 comply with.

6 And that --

7 JUSTICE ALITO: I'm trying to understand
8 what would be -- what would be left of Nollan and Dolan,
9 if we agree with you.

10 Let me give you three situations. First,
11 the petition -- the district says, we are granting your
12 permit on the condition that you give us one-third of
13 your land. That's Nollan and Dolan, right?

14 MR. WOLFSON: Yes.

15 JUSTICE ALITO: Okay. Situation number 2,
16 permit is denied, but it will be granted, if you give us
17 one-third of your land. What about that?

18 MR. WOLFSON: I think, in that situation --
19 in other words, if the situation is really exactly the
20 same like Nollan and Dolan, but the permit is denied,
21 but it's clear that it is a concrete -- concrete
22 condition, the landowner can go up through the judicial
23 review process and say, this is -- you know, the denial
24 of the permit application is predicated on an
25 unconstitutional condition, and you should set that

1 aside.

2 JUSTICE ALITO: Is that the same as the
3 first example, for purposes of Nollan and Dolan?

4 MR. WOLFSON: Almost. Almost,
5 Justice Alito.

6 JUSTICE ALITO: All right. Now let me to get to
7 my third. The permit is denied, but it will be granted,
8 if you give us the fair market value of the third of the
9 land, and, once you have done that, then we're going to
10 condemn your land and pay you the fair market value for
11 it.

12 MR. WOLFSON: Justice Alito, I think that
13 this Court's decision -- there are -- this Court's
14 decision in Village of Norwood, essentially says, if
15 what is going on is just a pure contrivance to avoid the
16 requirement of compensation in the Just Compensation
17 Clause, that the Court has said, no, it will look
18 through and -- to the substance of the demand and
19 determine that there was -- you know, essentially, an
20 evasion of the just compensation requirement.

21 JUSTICE SCALIA: As I understand your
22 position, cash is magical, right? The -- the government
23 can come in and -- come into my house, take all of the
24 cash that's there, and that is not the basis for a takings
25 claim, right? Because cash is not -- is not a taking.

1 Does that make any sense?

2 MR. WOLFSON: Well, first of all,
3 Justice Scalia, of course, this case, we don't believe
4 involves cash. It involves a requirement to do
5 something that costs money, which is -- is different
6 from cash.

7 I mean, cash is -- the problem with
8 extending -- the problem with extending the takings
9 concept to a monetary obligation, which can be paid for
10 out of sort of undifferentiated funds --

11 JUSTICE SCALIA: Right.

12 MR. WOLFSON: -- is that it has -- it has no
13 logical stopping point. I mean, the court --

14 JUSTICE SCALIA: The stopping point is don't
15 take my cash.

16 MR. WOLFSON: Well, but the --

17 JUSTICE SCALIA: Your -- your answer to my
18 question is, that's okay, it's not a taking, right?

19 MR. WOLFSON: I think --

20 JUSTICE SCALIA: I may have some other cause
21 of action, but not a -- not a taking? The government's
22 come in and taken my money.

23 MR. WOLFSON: It's not a -- it's not a
24 Nollan and Dolan claim for the government to say, if you
25 want -- if you want a permit --

1 JUSTICE SCALIA: I'm not talking Nollan and
2 Dolan. I'm talking about your position that the taking
3 of cash cannot be a taking.

4 MR. WOLFSON: Well, if a -- I'm sorry,
5 Justice Scalia. If the -- if the government is seizing
6 the -- the identifiable dollar bills that are in your --
7 in your house, I mean, that sounds more like a case
8 like --

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

10 MR. WOLFSON: Webb's Fabulous Pharmacies,
11 where --

12 JUSTICE SCALIA: If they -- if they say, you
13 have to turn over to us whatever money you have in your
14 house, or you have to turn over to us whatever's in your
15 bank account, that's not a taking.

16 MR. WOLFSON: Justice Scalia, I think there
17 are many -- there are many constitutional claims that
18 could be made. And I also want to add, there is an
19 extensive overlay of State law in this area that
20 protects landowners from arbitrary, irrational,
21 intrusive, excessive demands by government agencies.

22 CHIEF JUSTICE ROBERTS: One of the
23 things the -- the Federal provision, the Takings Clause,
24 is designed to prevent property owners from having to
25 bear the costs that should be borne by the people as a

1 whole.

2 The football stadium example, there is no
3 reason that a particular landowner should have to pay
4 for the football stadium, simply because he owns
5 property.

6 The Takings Clause is designed to make sure
7 that those exactions are not imposed on property owners,
8 but spread more evenly across the citizens who benefit
9 from it. And I guess I don't understand why you say
10 that the Takings Clause is the one provision that
11 doesn't apply in that type of situation.

12 MR. WOLFSON: Mr. Chief Justice, the -- the
13 Armstrong policy of the -- that the government -- that
14 an individual person should not be forced to bear what
15 society should -- what should be spread to society as a
16 whole -- is not violated when the government insists
17 that a landowner comply with a generally applicable
18 regulation.

19 Now, of course -- of course --

20 CHIEF JUSTICE ROBERTS: The generally
21 applicable regulation in the football stadium
22 hypothetical is not generally applicable. It says, you
23 are the owner of this property, and if you want to
24 develop it, you've got to build a football stadium.

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

1 to one particular landowner, you may have to build a
2 football stadium, where no other type of similar
3 regulation or requirement would ever be imposed on any
4 other landowner sounds -- you know, like -- you know,
5 sounds like an equal protection claim, if the government
6 just picks out one landowner.

7 JUSTICE SCALIA: What if they do it to five
8 or six other landowners, okay?

9 MR. WOLFSON: Well, then I think you have to
10 ask -- but, then, Justice Scalia, I think you have to
11 ask what -- what regulatory scheme is the government --

12 JUSTICE KENNEDY: Well, let's -- let's
13 put -- let's put it this way: I take it, it's -- it's a
14 given that the government cannot take an easement on
15 your property. It cannot use your property for its own
16 purposes. It cannot park its trucks there. It cannot
17 cut the grass.

18 Why is it that, if it can't do those, it can
19 still force you, as a condition to using your property
20 to its highest and best use, to pay them money?

21 MR. WOLFSON: Well, I think --

22 JUSTICE KENNEDY: Why isn't that an equal
23 burden -- why isn't that an equal use of the property by
24 the government?

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

1 several reasons, Justice Kennedy. First of all, I think
2 that this nation has a long legal tradition of giving
3 unique legal protection to property, as opposed to
4 money.

5 I mean, there are many circumstances -- many
6 circumstances, where the government can say to an
7 individual, you must give me \$1,000, but cannot say --
8 or a group of individuals or -- but cannot say to the
9 same group or individual, you must give me land worth
10 \$1,000.

11 I mean, there -- that -- that is what the
12 Just Compensation Clause --

13 JUSTICE SCALIA: Really? Gee, that doesn't
14 strike me as -- as entirely true.

15 MR. WOLFSON: Well, Justice --
16 Justice Scalia, the government obviously --

17 JUSTICE SCALIA: You mean a tax that is
18 imposed only on landowners, and it's -- you know, it's a
19 tax -- \$5,000 per landowner, if that were replaced by a
20 provision that said, every -- every landowner shall
21 contribute to the State a portion of his property worth
22 \$5,000, that --

23 MR. WOLFSON: I think that would --

24 JUSTICE SCALIA: The latter is bad, and the
25 former's okay?

1 MR. WOLFSON: I think that would raise very
2 serious questions. I mean, I don't know that this Court
3 has ever -- has ever been faced with exactly such a
4 case, but I think that would raise very serious
5 questions.

6 JUSTICE BREYER: So that -- am I
7 wrong about -- I might have this -- I thought the
8 framework, roughly, is the following: it is not the
9 case that Penn Central applies only where there is a
10 physical invasion of property, or there is total
11 destruction of the value of the property.

12 In those two situations, what we said in
13 Lucas is it applies without case-specific inquiry, but
14 there are another set of cases where Penn Central and
15 McMahon apply with case-specific inquiry.

16 And those, to discover whether you have one,
17 you look into such things as whether the regulation
18 destroys investment-backed expectations. And then you
19 look to the nature of the government interest and the
20 relationships, et cetera. That's what I thought the
21 framework was.

22 Now, if that's the framework, then, when the
23 government says, I will let you develop your land if and
24 only if you give \$50,000 to the Shriners Hospital, you
25 would say, I can't develop my land. And, besides, that

1 significantly interferes with my investment-backed
2 expectations. And, besides, there is no relation
3 whatsoever. Therefore, I win under the Takings Clause.

4 Now, I spell all that out because I -- if
5 I'm wrong about that framework -- if I am right about
6 the framework, that can apply to this case. If I am
7 wrong about the framework, I want to know where in the
8 cases I'm wrong.

9 MR. WOLFSON: Justice Breyer, we think that
10 you are right about that framework. That -- and -- and
11 just six weeks ago in the --

12 JUSTICE SCALIA: That surprises me.

13 MR. WOLFSON: In the -- well, just six weeks
14 ago, in the Arkansas Fish and Game Commission case, this
15 Court reiterated that Penn Central is presumed to be the
16 test.

17 JUSTICE BREYER: Okay. So, if I'm right
18 about the framework, that takes care of all the
19 hypotheticals you were asked. In those cases, there is
20 a significant interference with investment-backed
21 expectation. And there's no justification whatsoever,
22 so the Takings Clause applies.

23 MR. WOLFSON: We agree, Justice Scalia, and
24 we don't --

25 JUSTICE SCALIA: Justification is the

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

3 There's no necessary comparison, as Nollan
4 and Dolan requires, between the harm that would be
5 occasioned if the permit were granted and what the State
6 is exacting in order to mitigate.

7 That -- that doesn't exist anywhere in -- in
8 the analysis that you are talking about.

9 MR. WOLFSON: Well, Justice Scalia, there
10 are -- there is another problem with the Nollan and
11 Dolan claim in this case, which is it's hard to see how
12 you can have an exactions takings claim when nothing has
13 ever actually been exacted --

14 JUSTICE SCALIA: Now, that is a problem.

15 (Laughter.)

16 MR. WOLFSON: And -- right.

17 And so -- and, in this case, if the -- if
18 the claim for the taking is -- for the compensation is
19 based on Nollan and Dolan, it seems that there is a
20 mismatch and that what the Petitioner is trying to do is
21 sort of take the Nollan/Dolan heightened scrutiny
22 government -- government bears the burden of proof
23 analysis and sort of convert that into what is the
24 regulatory takings analysis for the entire parcel of his
25 land, which is -- which is the measure of damages that

1 he received.

2 So I think that there is a mismatch. And,
3 now, this is --

4 CHIEF JUSTICE ROBERTS: I think that your
5 point goes to the question that has been raised about --
6 there's no permit issued. He didn't accept the -- the
7 permit. And I don't understand that proposition.

8 Are you saying that, if you are confronted
9 with an unconstitutional condition, you have to accept
10 it, and then you can challenge it? You can't simply say
11 you denied that on the basis of an unconstitutional
12 condition, and that's wrong?

13 MR. WOLFSON: No, that's not our argument,
14 Mr. Chief Justice. Florida has opened an avenue for
15 judicial relief for you to go up through the Florida EPA
16 process, just like the Federal EPA, where you can say,
17 stop -- stop the district from doing this to me; they
18 are predicating their -- either their grant or their --

19 CHIEF JUSTICE ROBERTS: Okay. I'm trying to
20 get to the Federal. You often fall back to the State
21 provisions. I'm looking at the Federal Constitution.

22 And, assuming the State provisions give you
23 no relief, is it your position that he has no claim,
24 unless he accepts a permit with unconstitutional
25 conditions?

1 MR. WOLFSON: If there is no -- if there's
2 no kind of avenue, as I was saying, then I would think
3 we would then -- you would have to obtain -- you have to
4 seek compensation, but your compensation is for the
5 value of your land that was taken.

6 And, in Lingle, this Court reiterated that
7 the Takings Clause is not a substantive limitation on
8 the government's power to regulate. The -- the Takings
9 Clause -- or as I should call it, the Just Compensation
10 Clause -- is a requirement that if -- that the
11 government will pay you just compensation for any
12 property or property interest it has seized from you.

13 It does not -- it does not, itself, impose
14 a -- a requirement that the government substantively
15 justify its regulation.

16 JUSTICE GINSBURG: Mr. Wolfson, why isn't it
17 entirely reasonable to say, if you are going to put a
18 condition on a permit, that condition has to have some
19 rough proportionate relationship to the harm that is
20 being done to the permit -- what -- that seems to me
21 perfectly sensible, that if they are going -- if they
22 are going to exact a condition, the condition has to
23 have some discrete proportional relationship to the
24 harm?

25 MR. WOLFSON: Justice Ginsburg, I think that

1 the district thought that they were acting roughly
2 proportional. In other words, we are -- we are not
3 saying that the government shouldn't act -- that
4 government should not act reasonably.

5 But I think that, when you force these cases
6 into court under the Nollan/Dolan framework, you have
7 a -- you have basically a mismatched and extraordinarily
8 complex situation. And you have -- you run right into
9 what this Court said in Lingle, which is that it is not
10 ordinarily the Court's -- the appropriate approach to
11 require the government to bear the burden of proof.

12 JUSTICE KENNEDY: Well, in Penn Coal v.
13 Mahon, the government didn't enter the property. It
14 didn't take the property in the physical sense of moving
15 in inappropriate. It just says, congratulations,
16 you have some coal under your land, and we hope you
17 enjoy it because you can't move it.

18 And we said that is a taking, that is a
19 regulation that goes too far. And it deprived, as
20 Justice Breyer indicated, the owner of investment-backed
21 expectations, although that word wasn't in Penn-Mahon.

22 MR. WOLFSON: Correct. And,
23 Justice Kennedy, nobody is disputing that Mr. Koontz
24 could have made the argument that the regulation goes
25 too far in the sense of the burden on his proposed

1 project. I mean, he had all of those arguments
2 available to him.

3 He bought the -- he says he bought the land
4 before the regulation went into effect. He had
5 investment-backed expectations and all the rest of it.

6 But that is not the claim that he is
7 advancing to this Court.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Wolfson.

11 Mr. Kneedler?

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER,
13 FOR UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE RESPONDENT

15 MR. KNEEDLER: Mr. Chief Justice, and may it
16 please the Court:

17 I would like to emphasize, at the outset,
18 that Petitioner's argument that Nollan and Dolan should
19 apply in this context would -- would constitute a
20 radical change in the -- in the way standard generally
21 applicable regulatory programs are operated.

22 It is standard procedure, when someone
23 applies for a permit from the government, it is the
24 permit applicant's burden to establish that he complies
25 with the regulatory program.

1 Nollan and Dolan shift that burden to the
2 government. That has never been the case under
3 regulation, including land use regulation.

4 JUSTICE SCALIA: What was taken in Nollan
5 and Dolan?

6 MR. KNEEDLER: If -- if --

7 JUSTICE SCALIA: In Nollan, was it the
8 easement that was taken?

9 MR. KNEEDLER: That is what -- if -- if the
10 permit had issued and the -- and an easement was
11 granted, yes, it was the easement.

12 JUSTICE SCALIA: Well, but it -- wasn't what
13 was taken unreasonably the ability of this homeowner to
14 make the alterations to his house that he wanted to
15 make? He wanted to add another story and the court --
16 and the State said, you can't do it.

17 And its only basis for saying, you can't do
18 it was because you wouldn't give us the easement.

19 MR. KNEEDLER: The -- the basis of the --
20 the theory of Nollan and Dolan -- and the Court made
21 this clear in -- in Lingle -- and in Del Monte Dunes,
22 for that matter -- is those two cases apply in a
23 specific situation where there is an exaction of a right
24 of access, an easement for the public to enter the land
25 as a condition.

1 And the -- the reason for that, the Court
2 explained in Lingle -- there are really two reinforcing
3 points. The first was that there would be public
4 access, which is a permanent physical occupation, which
5 is one of -- one of the exceptions to the general Penn
6 Central test for regulatory takings.

7 The other is that it was a per se taking.
8 The -- it -- it was per se that the government could not
9 have acquired that easement for paying -- without paying
10 compensation; therefore, the government could not attach
11 as a condition to the granting of a permit that the
12 person convey something, unless it was proportional.

13 So the -- the theory began with the idea
14 that the easement itself would have been -- the taking
15 of that would have been a per se taking. This is a very
16 different situation because the other way in which
17 Petitioner's theory would constitute a radical departure
18 is that compliance with regulatory programs frequently,
19 maybe almost always, requires the expenditure of money.

20 If someone wants to build a power plant -- a
21 coal-fired power plant, he's going to have to install a
22 scrubber to protect the air, to prevent no -- diminution
23 of air quality. Constructing that costs money. It
24 can't be that the requirement to spend money to comply
25 with a regulatory program is itself a taking.

1 The taking would be --

2 CHIEF JUSTICE ROBERTS: Well, what about --
3 what about the football stadium? Do they -- can you
4 pick a particular landowner? I mean, you took a case in
5 which there is no question, under Nollan and Dolan,
6 about the relationship, proportionality, and nexus.

7 Let's put those to one side because the
8 issue is whether Nollan and Dolan apply. Can the
9 government say, okay, you want a permit, we will give
10 you the permit, if you fund the new football stadium?

11 MR. KNEEDLER: I think, in that situation,
12 there would be a very substantial equal protection challenge
13 because one landowner is being singled out with no
14 rational basis --

15 CHIEF JUSTICE ROBERTS: But the one
16 constitutional provision that is concerned with
17 protecting property owners from having to bear burdens
18 that should be borne by the public at large is not
19 applicable?

20 MR. KNEEDLER: Well, that -- that -- it
21 applies when there is an identifiable property taken.
22 If the --

23 JUSTICE BREYER: No, no. Why isn't the
24 answer, yes, it is applicable? Of course, it's
25 applicable. I own a piece of land, and they have

1 significantly interfered with my investment-backed
2 expectation.

3 MR. KNEEDLER: Right, right.

4 JUSTICE BREYER: And -- and to say that I
5 can't put a house on this because I'm supposed to pay
6 for a football field, which has nothing to do with it,
7 is as close to insisting that you have to have 4,000
8 columns of coal in your mine, so that you can never use
9 it, as I can think of. It's Holmes brought up-to-date.

10 MR. KNEEDLER: Well, certainly --

11 JUSTICE BREYER: I mean, at least that
12 argument would be made --

13 MR. KNEEDLER: Certainly --

14 JUSTICE BREYER: And why wouldn't it be a
15 winning argument?

16 MR. KNEEDLER: Certainly, a Penn Central
17 argument could be made there, but I think that's very
18 different from a Nollan argument --

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

20 MR. KNEEDLER: -- which -- which imposes
21 the -- the burden on the government and, basically,
22 treats the -- the payment of money as, itself, a taking.

23 JUSTICE SOTOMAYOR: Mr. Kneedler, can I go
24 back to the questions presented for a moment? The court
25 below did two separate rulings, I think.

1 One is there can't be a taking if the -- if
2 the claim is that it's of an undifferentiated money, not
3 a res. And I think you would agree with that.

4 If the only issue is an obligation to pay
5 money, that that's not a takings claim, correct?

6 MR. KNEEDLER: Yes. And this is not even an
7 obligation to pay money. It's an obligation to spend
8 money to come into compliance.

9 JUSTICE SOTOMAYOR: Right. There was a
10 second holding, however, which really gets ellipsed by
11 the second, which is a denial of a permit doesn't permit
12 you to raise the Nollan/Dolan case. And it appears, to
13 me, even if there is an easement situation -- so, even
14 if there is an actual takings claim at issue, do you
15 agree with that first holding by the court below?

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

17 JUSTICE SOTOMAYOR: Assuming we narrow it
18 not to undifferentiated money, but is there a difference
19 between a denial or a grant?

20 MR. KNEEDLER: No. If the -- if the agency
21 decision is written where there is an express condition,
22 we don't think that it matters -- an express condition
23 satisfying Nollan and Dolan; in other words, an
24 exaction, a per se taking, we don't think it matters
25 whether the -- whether it's a permit grant or permit

1 denial.

2 There was no actual taking in the sense that
3 compensation would be owed, but it could be challenged
4 as an unconstitutional condition under the Nollan and
5 Dolan analysis.

6 But we think it's critical, when thinking
7 about that, that the -- that the permit denial -- that
8 only applies if the permit denial expressly is based on
9 the condition because, otherwise, you would get into a
10 situation of negotiations and what was discussed and --
11 and liability could turn on an exchange of ideas;
12 whereas it should turn on the formality of the agency's
13 final decision.

14 It's akin to the Williamson County final
15 decision requirements.

16 CHIEF JUSTICE ROBERTS: Do you agree -- your
17 friend on the other side cited a number of places in the
18 record, where he thought your condition was satisfied,
19 that the denial of the permit was expressly based on the
20 failure to comply with the offered conditions.

21 MR. KNEEDLER: Well, if you look at the --
22 the orders denying the permit applications in the record
23 at -- I believe it's 49 to 51 and 59 to 61. In those
24 situations, it says the permits were denied because the
25 plaintiff did not give the reasonable assurances that

1 the statute requires in order to get the permit -- the
2 reasonable assurances of -- of no loss of wetlands
3 functions.

4 One of the ways --

5 JUSTICE SCALIA: Isn't this unreal? I mean,
6 you are saying, all along, in the negotiations, the
7 agency says, if you do X, you get the permit. And X
8 is -- would -- would be an unconstitutional condition.

9 Okay. He refuses to do X. The permit is
10 denied with a general statement like this: The permit
11 is denied because he has refused to do the -- the
12 necessary mitigation.

13 Isn't it clear that the reason he's refused
14 to do the necessary mitigation, is he has refused the
15 last demand of the agency?

16 MR. KNEEDLER: But the ultimate standard
17 under the statute is whether he has provided reasonable
18 assurances. What assurances -- the way in which he goes
19 about it, whether offsite or onsite -- the offsite part
20 just arises because this is a wetlands case.

21 Normal regulation wouldn't raise the
22 offsite -- onsite problem. But the ultimate question is
23 he didn't carry his burden of establishing no net loss
24 of wetlands.

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

1 say, in part, is -- I guess, I did a little numbers from
2 your brief, the 37 million acres in Florida, say about
3 4 million are bodies of water and say a third of them
4 are built up, and we have 11 million that are wetland
5 and 11 million that aren't. That's crude.

6 So they're saying why in heaven's name are
7 we supposed to -- everybody wants to build. And why
8 should the people that happen to live in wetland have to
9 pay for all the other wetland? That's just coincidence.
10 So he is going to say that that is like the Shriners
11 Hospital. You are going to say, no, it isn't like the
12 Shriners Hospital.

13 Now, all I'm saying is isn't it at least an
14 issue, under the Takings Clause, whether it is or isn't?

15 MR. KNEEDLER: I think it's clearly not like
16 the Shriners -- the Shriners Hospital --

17 JUSTICE BREYER: I know you'll say that. He
18 will say that it is.

19 MR. KNEEDLER: But I did want to come back
20 to Justice Scalia's question. The permit -- permit
21 denials -- just general permit denials, the Court made
22 clear, in Del Monte Dunes, are not covered by Nollan and
23 Dolan. They are covered by Penn Central.

24 And the Court made clear, in Nollan, that
25 the Court could have denied the permit without attaching

1 the condition. We think it's important that the agency
2 always have that option.

3 And the third point is --

4 JUSTICE ALITO: Well, you may be right, but
5 you are making Nollan and Dolan a trap only for really
6 stupid districts -- you know, if they -- they say the
7 right words and then they are out from under it; isn't
8 that right?

9 MR. KNEEDLER: Well, I don't think so
10 because -- because there are situations in which an
11 agency actually wants to get the easement. But this
12 Court, in Lingle, made clear that -- that the general
13 rule is Penn Central, with only the two exceptions for
14 regulatory takings --

15 JUSTICE ALITO: Well, why should it matter whether
16 the -- whether the permitting authority says expressly
17 in the denial, "It's denied because you didn't do this,"
18 or it just says, "It's denied," but it's perfectly well
19 understood what was needed -- what they were going to
20 demand in order to get it.

21 MR. KNEEDLER: Because -- if may I answer,
22 because the agency has to reserve -- has to have the
23 ability to -- to deny the permit because the conditions
24 required by the statute were not met.

25 And Nollan and Dolan deal with formality and

1 the formality of conveyance of an easement. If there is
2 not a document that requires that, then the strict
3 requirements of -- for the narrow exception in Nollan
4 and Dolan do not apply.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Kneedler.

7 Mr. Beard, you have three minutes.

8 REBUTTAL ARGUMENT OF PAUL J. BEARD, II,
9 ON BEHALF OF THE PETITIONER

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

11 I would just like to point the Court -- and
12 particularly Justice Scalia, to pages 30 and 31 of our
13 brief on the merits where we describe, with citations to
14 the Nollan and Dolan, what precisely happened there.

15 I want to make sure that it's clear that
16 what they did there was not issue permits. They
17 approved with conditions, but the property owner still
18 had to satisfy the conditions in order to receive the
19 permit.

20 As to the question about --

21 JUSTICE SOTOMAYOR: What do we do with what
22 Mr. Kneedler says is a ruling in your favor on this
23 question, that all denials are subject to Nollan and
24 Dolan? What do we do with that?

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

1 flood gate here and one in which we are sending a signal
2 that, perhaps, States should be more quiet, rather than
3 more engaging. They should just say no because anything
4 they offer is going to be seen as an -- potentially, as
5 an unconstitutional taking.

6 They should just plain say no and not
7 explain why, not engage in any work with you to
8 mitigate.

9 MR. BEARD: Justice Sotomayor, I don't
10 believe that negotiations will suddenly break down, and
11 we will see a flurry of permit denials, if the Court
12 rules in our favor. What will happen, instead -- it's
13 true, I should say, they will lose flexibility in
14 demanding whatever it is that they want under the
15 Takings Clause.

16 They won't have any review. But the benefit
17 of applying our rule that says monetary exaction should
18 be treated like other exactions and be reviewed under
19 Nollan and Dolan --

20 JUSTICE SOTOMAYOR: But they're not. People
21 are asked to pay taxes. Homeowners are asked to pay
22 taxes all the time; development fees, if they want to
23 develop something. People are subject to money
24 exactions all of the time in this society.

25 MR. BEARD: No question that we all are

1 subject, on a daily basis, to government demands that we
2 pay or that we have a financial obligation.

3 JUSTICE SOTOMAYOR: So what happens in
4 just -- when the legislature passes a development fee?
5 Are you, now, saying that's subject to Nollan and Dolan,
6 too?

7 MR. BEARD: If the legislation requires an
8 agency who processes the permit to impose a fee in
9 exchange for a permit -- again, within the land-use
10 context, we are not talking about taxes, homeowners'
11 fees, we are talking within the discretionary land-use
12 process -- that is imposed there, then the risk of
13 coercion, undue influence, and the like arise, and
14 Nollan and Dolan should apply.

15 But I wanted to respond specifically to
16 Justice Breyer's questions about Penn Central. I think,
17 conceptually, there is an important difference between
18 the Unconstitutional Conditions Doctrine, which is what
19 we seek to apply here, and what would be a permit -- or
20 what would be a Penn Central claim.

21 The Unconstitutional Conditions Doctrine,
22 the offense there is the -- may I --

23 CHIEF JUSTICE ROBERTS: Finish your thought.

24 MR. BEARD: The offense there is the
25 conditioning -- the improper conditioning of a permit.

1 It's not did the condition force me to lose the value in
2 my land. That's a very different question that a case
3 like Penn Central might answer, subsequent to a permit
4 denial.

5 The Unconstitutional Conditions Doctrine
6 focuses exclusively on the permit exaction and on the
7 conditioning, not on subsequent decisions by the
8 government, for example, to deny the permit.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. BEARD: Thank you.

11 CHIEF JUSTICE ROBERTS: Counsel.

12 The case is now submitted.

13 (Whereupon, at 12:09 p.m., the case in the
14 above-entitled matter was submitted.)

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