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Case No: 96613-3

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

Court of Appeal Cause No. 49854-5-II

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CHURCH OF THE DIVINE EARTH

Petitioner,

v.

CITY OF TACOMA,

Respondent.

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**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

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BRIAN T. HODGES, WSBA #31976  
Pacific Legal Foundation  
255 South King Street, Suite 800  
Seattle, Washington 98104  
Telephone: (916) 419-7111

*Attorney for Amicus Curiae  
Pacific Legal Foundation*

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## **ISSUE ADDRESSED BY AMICUS**

Whether City of Tacoma permitting officials “knew” or “should have known” that they were acting unlawfully and/or without lawful authority when they issued a land-use permit subject to an unconstitutional condition.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

At issue in this case is whether the City of Tacoma should be held liable for damages resulting from its unconstitutional demand that the Church of the Divine Earth dedicate a right-of-way as a mandatory condition on a building permit approval. The answer is yes. Chapter 64.40 of the Revised Code of Washington provides landowners with a cause of action “to obtain relief from acts of an agency which are arbitrary, capricious, unlawful, or exceed lawful authority,” upon a showing that “the final decision of the agency was made with knowledge of its unlawfulness or that it was in excess of lawful authority, or it should reasonably have been known to have been unlawful or in excess of lawful authority.” RCW 64.40.020(1).

There can be no reasonable dispute whether the City’s permitting officials knew or should have known that its demand violated the doctrine of unconstitutional conditions, as set forth by *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605-06, 133 S. Ct. 2586, 186 L. Ed. 2d

697 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).<sup>1</sup> Government officials have a duty to know the law in the areas of their responsibility. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). And binding precedent holds that the City lacks the authority to condition a building permit upon a requirement that the owner dedicate an interest in private property to the public, unless the government first satisfies its burden of demonstrating that there is an “essential nexus” between the demand and an identified impact of the proposed development, and that the demand is “roughly proportional” to that impact. *City of Fed. Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 44, 252 P.3d 382 (2011) (quoting *Dolan*, 512 U.S. at 391); see also *Sparks v. Douglas Cty.*, 127 Wn.2d 901, 912, 904 P.2d 738 (1995). The City’s failure to satisfy the nexus and proportionality requirements establishes, as a matter of law, that the right-of-way demand was both unlawful and exceeded the City’s lawful authority<sup>2</sup>. *Koontz*, 570 U.S. at 608 (“Even if

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<sup>1</sup> Decisions of the U.S. Supreme Court “set[] a minimum floor of protection, below which state law may not go.” *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987).

<sup>2</sup> See also *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303 (1926) (Although local government is given broad discretion to regulate the use of land, actions that do not “conform to the Constitution, of course, must fall.”); *Marbury v. Madison*, 5 U.S. 137, 180, 1 Cranch 137, 2 L. Ed. 60 (1803) (“[A] law repugnant to the constitution is void.”).

[the government] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights."). The Court of Appeals' decision to the contrary should be reversed.

## **ARGUMENT**

### **I**

#### **GOVERNMENT OFFICIALS HAVE A DUTY TO KNOW THE LAW IN THE AREA OF THEIR WORK**

The court of appeals plainly erred when it concluded that City permitting officials neither knew nor reasonably should have known that a condition requiring the Church to dedicate a private property to the public could violate *Nollan* and *Dolan*. Decision at 19-20. The law regarding permit conditions is well-settled. Before demanding a dedication as a condition of permit approval, "the government [must] make some sort of individualized determination that the required dedication of private land is related both in nature and extent to the impact of the proposed development." *Town & Country Real Estate*, 161 Wn. App. at 44 (quoting *Dolan*, 512 U.S. at 391). To satisfy the nexus portion of this inquiry, the City was required to (1) "identify a public problem or problems that the condition is designed to address," (2) "show that the development for which a permit is sought will create or exacerbate the identified public

problem,” and (3) that its proposed condition or exaction . . . tends to solve, or at least to alleviate, the identified public problem.” *Burton v. Clark Cty.*, 91 Wn. App. 505, 520-22, 958 P.2d 343 (1998). If the City could establish a nexus, then it was additionally required to “show that its proposed solution to the identified public problem was ‘roughly proportional’ to that part of the problem that is created or exacerbated by the landowner’s development.” *Id.* at 523. This last inquiry requires the City to engage in some type of individualized analysis to ensure that the dedication is “reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development” (*id.* at 523 (quoting *Sparks*, 127 Wn.2d at 907)) while at the same time ensuring that the demand does not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.* at 523-24 (quoting *Dolan*, 512 U.S. at 384).

The City acknowledged that its right-of-way demand was subject to *Nollan* and *Dolan*, but still failed to show any facts satisfying either requirement in the record. CP 2049, 2061-62. In this circumstance, it was obvious error for the lower court to conclude that the City neither knew nor should have known that its right-of-way demand could be found to violate the doctrine of unconstitutional conditions. *See, e.g., View Ridge Park Assocs. v. Mountlake Terrace*, 67 Wn. App. 588, 603, 839 P.2d 343

(1992) (City “should have known it was unlawful” to condition a building permit on a requirement that the owners reimburse the City for the cost of area sidewalks, where the condition had no nexus to the proposed development); *Ivy Club Inv’rs Ltd. P’ship v. City of Kennewick*, 40 Wn. App. 524, 531, 699 P.2d 782 (1985) (A letter from the planning director addressing the legal dispute “indicates the City was aware of its tenuous authority to impose the fee.”), *disagreed with on different grounds by R/L Assocs., Inc. v. City of Seattle*, 113 Wn.2d 402, 408, 780 P.2d 838 (1989). Indeed, the only recognized exception to the presumption that the government knows the law is where a case presents a question of first impression and, therefore, the law was unknown to all parties at the time the condition was imposed. *Isla Verde Int’l Holdings, Ltd. v. City of Camas*, 147 Wn. App. 454, 469, 196 P.3d 719 (2008). This case, however, presents no questions regarding the application of *Nollan* and *Dolan*—indeed, the violation was so obvious the City chose not to appeal.<sup>3</sup>

The U.S. Supreme Court also holds that, where the law is established, “a reasonably competent public official should know the law

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<sup>3</sup> “Without question, had the city simply required [the owner] to dedicate a strip of land ... for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.” *Dolan*, 512 U.S. at 384 (citing *Nollan*, 483 U.S. at 831). “Such public access would deprive petitioner of the right to exclude others, ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *Dolan*, 512 U.S. at 384 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)).

governing his conduct.”<sup>4</sup> *Harlow*, 457 U.S. at 818-19. If a question arises concerning the law’s application (such as the Church’s objection to the right-of-way demand), a city acting in good faith is obligated to take reasonable steps to ascertain whether the planned actions are lawful, beyond simply relying on its own idea of what the law might say (*id.*)—particularly where the City bears the burden of creating a factual record establishing the constitutionality of its right-of-way demand in the first instance. *Dolan*, 512 U.S. at 395. Thus, the City’s bare “belief” that the right-of-way could be upheld on appeal—absent a factual record showing nexus and proportionality—cannot relieve it of its duty to know the law. *Wood v. Strickland*, 420 U.S. 308, 321, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975) (An official’s disregard of settled law is no more justifiable than the presence of actual malice.).

Holding Tacoma to this well-settled standard will not impose any undue hardship on the City. A conclusion that the City knew, or should have known, that a failure to put facts on the record demonstrating nexus and proportionality would result in a decision that its demand violates the doctrine of unconstitutional conditions “imposes neither an unfair burden

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<sup>4</sup> This line of case law pertains to the question whether a government official enjoys qualified immunity in a lawsuit enforcing federal constitutional rights; thus, the decisions turn on the question whether a government official acted in good faith—a much higher standard than the “knew” or “should have known” standard in Ch. 64.40 RCW. *Harlow*, 457 U.S. at 813-14.

upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system.” *Id.* at 322. Holding the government to any lesser standard would allow the government to adopt a policy of purposeful ignorance toward established rights in order to deny citizens the promise of Ch. 64.40 RCW, which purports to vindicate those rights. *Id.* Worse yet, a standard like that applied below, turns justice on its head by rewarding the City with an award of attorneys’ fees for having violated the Church’s constitutional rights.

## II

### **THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS DEFINES A LIMITATION ON LAWFUL GOVERNMENT ACTION**

The court of appeals also committed obvious error when it concluded that the City acted within its lawful permitting authority when it imposed an unconstitutional condition on the Church’s building permit. Decision at 18-20. The doctrine of unconstitutional conditions holds that “the power of the state [ . . . ] is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights.” *Frost v. R.R. Comm’n of State of Cal.*, 271 U.S. 583, 594, 46 S. Ct. 605, 70 L. Ed. 1101 (1926); *see also* Richard A. Epstein,

*Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, “it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of that person’s constitutional rights.”); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960) (The doctrine holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.). The City’s right-of-way demand plainly exceeded its ordinary authority to impose conditions on a building permit.

**A. The Doctrine Enforces the Primacy of the U.S. Constitution Against the States**

The U.S. Supreme Court established the doctrine of unconstitutional conditions in response to a wave of protectionist state laws that had placed unconstitutional demands—such as a waiver of the right to remove lawsuits to federal court—on foreign companies seeking permission to do business in the state. *See, e.g., Lafayette Ins. Co v. French*, 59 U.S. 404, 407, 18. How. 404, 15 L. Ed. 451 (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the waiver of the right to litigate disputes in the U.S. Federal District Courts). At that time, several state courts had opined (like the court below) that the government’s “greater” power to prohibit an

activity should necessarily include the “lesser” power to place conditions on the activity—even if that condition had the effect of restricting the exercise of a constitutional right. *See, e.g., McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 216, 29 N.E. 517 (1892). The U.S. Supreme Court, however, has repeatedly rejected the “greater-includes-the-lesser” theory, holding instead that the power to regulate activity does not include the authority to deprive an individual of his or her constitutional rights. *See, e.g., Terral v. Burke Const. Co.*, 257 U.S. 529, 532-33, 42 S. Ct. 188, 66 L. Ed. 352 (1922); *see also Koontz*, 570 U.S. at 608 (“Even if [the government] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner’s forfeiture of his constitutional rights.”).

The doctrine of unconstitutional conditions, therefore, is premised on the recognition that “the sovereign power of a state . . . is subject to the limitations of the supreme fundamental law.” *Id.*; *see also Frost*, 271 U.S. at 594 (“It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.”); *Lafayette*, 59 U.S. at 407 (“This consent [to do business as a foreign corporation] may be accompanied by such condition [a state] may think fit to impose; . . . provided they are not repugnant to the constitution of laws of the United

States.”); *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543, 24 L. Ed. 148 (1876) (Bradley, J., dissenting) (“Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so”).<sup>5</sup> The court of appeals’ expansive view of the City’s permitting authority to include the power to make unconstitutional demands conflicts with decisions from the U.S. Supreme Court and must be reversed.

**B. *Nollan* and *Dolan*’s “Special Application” of the Doctrine Enforces a Limitation on Government Authority in the Context of Land-Use Permitting**

*Nollan*, *Dolan*, and *Koontz* confirm that the nexus and proportionality tests are intended to police a limitation on local government land-use permitting authority. As explained in *Koontz*, the nexus and proportionality tests constitute a “special application” of the doctrine of

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<sup>5</sup> In *Terral*, 257 U.S. at 33, the U.S. Supreme Court overruled the majority opinion in *Doyle* and adopted the dissenting opinion as a correct statement of the law. Because the doctrine enforces the Constitutional limitations on local authority, the Court has not limited the doctrine to any single constitutional provision—instead, the doctrine has been applied whenever the government conditions an approval (or the provision of a benefit) on and individual’s waiver of a constitutional right. See, e.g., *Marshall v. Barlow’s Inc.*, 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978) (Fourth Amendment); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 94 S. Ct. 2831, 41 L. Ed. 2d 730 (1974) (Freedom of the Press); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974) (Interstate Travel); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) (Free Speech); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (Freedom of Religion); *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (Free Speech); *Hanover Ins. Co. v. Harding*, 272 U.S. 494, 47 S. Ct. 179, 71 L. Ed. 372 (1926) (Commerce Clause); *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 30 S. Ct. 190, 54 L. Ed. 355 (1910) (Due Process).

unconstitutional conditions “predicated on the Fifth Amendment.”<sup>6</sup> 570 U.S. at 604, 610. Together, those tests are designed to protect a landowner’s rights in property while at the same time recognizing the government’s authority to plan for appropriate community development. *Koontz*, 570 U.S. at 604-06; *see also Nollan*, 483 U.S. at 833 n.2 (“[T]he right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’”). Thus, in lieu of the strict scrutiny typically applied in an unconstitutional conditions case, *Nollan* and *Dolan* devised a two-part test designed to define the circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may require a

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<sup>6</sup> Critical to understanding the nexus and proportionality test is the fact that, while *Nollan* and *Dolan* are predicated on a violation of the Takings Clause, the doctrine is distinct from a regulatory takings test. In the decades following *Nollan* and *Dolan*, there was substantial confusion about how and where the nexus and proportionality tests applied. This confusion was exacerbated by two factors. First, although the doctrine has a lengthy pedigree with the U.S. Supreme Court, it remained relatively obscure. *See, e.g.*, Michael Toth, *Out of Balance: Wrong Turns in Public Employee Speech Law*, 10 U. Mass. L. Rev. 346, 384 (2015). And second, the decisions in *Nollan* and *Dolan* had originally adopted a third prong to the test, holding that a permit condition must also “substantially advance” a legitimate government purpose to be valid. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 385. As authority for that prong, the Court cited the now-overruled case, *Agins v. City of Tiburon*, which concerned a facial regulatory takings challenge to the city’s adoption of certain zoning ordinances rather than a permit condition. 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), *abrogated by Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-42, 545, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). Thus, before the Court eventually clarified the nexus and proportionality tests are grounded in the doctrine of unconstitutional conditions, many courts, including this Court, mistakenly read those cases as establishing a regulatory takings test (*see, e.g., Orion Corp. v. State*, 109 Wn.2d at 642-43, 653, 655), or a due process test. *See Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 272, 255 P.3d 696 (2011).

landowner to dedicate property to a public use only where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; but (2) the government may not use the permit process to coerce landowners into surrendering property that the government would otherwise have to pay for.<sup>7</sup> *Koontz*, 570 U.S. at 604-06. Importantly, in adopting these tests, the U.S. Supreme Court continued to characterize the doctrine of unconstitutional conditions as enforcing a limitation on government power. *Id.* at 606 (The “government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”); *see also Dolan*, 512 U.S. at 385 (*Nollan* “held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments.”).

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<sup>7</sup> Holding the City to the burden of demonstrating nexus and proportionality before demanding a dedication is particularly necessary here, where there is an indication that the City had targeted the Church’s property for reasons wholly unrelated to the proposed building—*i.e.*, to secure a uniform right-of-way through the neighborhood. *See Koontz*, 570 U.S. at 604-05 (Landowners “are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.”); *see also* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. Ill. U. L. Rev. 513, 551 (1995) (Heightened scrutiny is especially necessary to distinguish a superficial relationship from one that warrants a compelled and uncompensated dedication of land, and to safeguard against extortionate permit conditions.).

A brief overview of the U.S. Supreme Court's exactions cases illustrates how the nexus and proportionality tests operate to invalidate an unauthorized and impermissible government action. In *Nollan*, the California Coastal Commission, acting pursuant to the requirements of state law, required the Nollans to dedicate an easement to allow the public to cross over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home. 483 U.S. at 827-28. The Commission justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828-29. The Nollans refused to accept the condition and brought a federal takings claim against the Commission in state court, arguing that the condition was unconstitutional because it bore no connection to the impact of their proposed development. *Id.* at 837. The U.S. Supreme Court agreed, holding that the easement condition violated the Takings Clause because it lacked an "essential nexus" to any alleged public impacts that the Nollans' project caused. *Id.* at 837. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid

regulation of land use but an ‘out-and-out plan of extortion.’” *Id.* at 837 (citations omitted).

The Court defined how close a “fit” is required between a permit condition and the alleged impact of development in *Dolan*. There, the City conditioned Florence Dolan’s permit to expand her plumbing and electrical supply store upon a requirement that she dedicate some of her land as a stream buffer and a bicycle path. 512 U.S. at 377. Dolan refused to comply with the conditions and sued the City in state court, alleging that the development conditions effected an unlawful condition and should be enjoined. *Id.* at 382. The U.S. Supreme Court initially concluded that the City established a nexus between both conditions and Dolan’s proposed expansion, but nevertheless held that the conditions were unconstitutional. *Id.* at 394-95. Even when a nexus exists, the Court explained, there still must be a “degree of connection between the exactions and the projected impact of the proposed development.” *Id.* at 386. There must be rough proportionality—*i.e.*, “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391. The *Dolan* Court held that the City had not demonstrated that the permit conditions were roughly proportional to the impact the expansion, therefore, the conditions violated the doctrine. *Id.*

The U.S. Supreme Court confirmed that local government lacks the “power to condition permit approval on [a landowner’s] forfeiture of his constitutional rights” again in *Koontz*, 570 U.S. at 608. In that case, Coy Koontz, Sr., sought permission to develop a small portion of his 14.9-acre undeveloped, commercial-zoned property located at the intersection of two major highways in Orlando. The St. Johns River Water Management District (the District), a Florida land-use agency, had designated his property a critical wetland and demanded that, in addition to dedicating 11 acres of his land in a conservation easement, Mr. Koontz pay to improve 50 acres of state-owned property miles away from his proposed development as a mandatory condition of receiving his permits. *Koontz*, 570 U.S. at 601-02. When Mr. Koontz objected that the off-site mitigation demand was excessive, the agency denied his permits, rendering his property unusable. *Id.* at 602.

Mr. Koontz filed a lawsuit in Florida state court, challenging the agency’s off-site mitigation demand under *Nollan* and *Dolan*, which, if faithfully applied as a limitation on government authority, should have provided an easy solution for Mr. Koontz. *Id.* at 602-03. But, over the years, many lower courts had limited *Nollan* and *Dolan* to their facts, providing ways for local land use authorities to avoid the nexus and proportionality requirements. Relevant to the question presented in this

case, the Florida Supreme Court held that “the *Nollan/Dolan* rule with regard to ‘essential nexus’ and ‘rough proportionality’ is applicable [. . .] 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.” *St. Johns River Water Mgmt. Distr. v. Koontz*, 77 So.3d 1220, 1230 (Fla. 2011). That conclusion allowed the U.S. Supreme Court to focus on the distinct nature of the unconstitutional conditions doctrine.

The parties’ arguments on this question focused on how to characterize the nexus and rough proportionality tests, and how that character impacted the parties’ substantive and procedural rights. Mr. Koontz argued that the tests were an application of the unconstitutional conditions doctrine.<sup>8</sup> Thus, Mr. Koontz argued a decision to deny a permit application based on refusal to accede to an unlawful demand is just as actionable as a decision to approve a permit application subject to an exaction because, in both circumstances, the government acts outside its lawful authority the moment it makes a demand that is not supported by nexus and proportionality.<sup>9</sup> The District, however, characterized *Nollan* and *Dolan* as a regulatory takings test, under which no violation of the

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<sup>8</sup> Petitioner’s Brief on the Merits at 30-39, *Koontz v. St. Johns River Water Management District* (No. 11-1447), 2012 WL 5940280.

<sup>9</sup> *Id.*

Constitution would occur until the demanded property actually changes hands.<sup>10</sup>

The U.S. Supreme Court rejected the District's argument, reaffirming once again that the nexus and proportionality tests of *Nollan* and *Dolan* constitute “‘a special application’ of the [unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property that the government takes when owners apply for land-use permits.” *Koontz*, 570 U.S. at 604. The Court explained that the nexus and proportionality tests place a limit on the government's authority to condition approval of a land use permit upon a dedication of property to a public purpose. *Id.* at 605. This principle “do[es] not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so.” *Id.* at 606. Thus, the Court held “that a demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit[.]” *Koontz*, 570 U.S. at 619.

Importantly, *Koontz* confirmed that an unconstitutional demand, alone, will cause an actionable constitutional injury, even if the condition

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<sup>10</sup> Respondent's Brief on the Merits at 26-28, *Koontz v. St. Johns River Water Management District*, (No. 11-1447), 2012 WL 6694053.

is not fulfilled. *Id.* at 608-09 (“In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies.”). Thus, on remand, the Florida courts held that, because the District’s unconstitutional demand delayed issuance of the permit, Mr. Koontz was entitled to relief under a state statute that allows owners to recover “monetary damages” if a state agency’s action is “an unreasonable exercise of the state’s police power” resulting in a violation of the right to just compensation. *St. Johns River Water Mgmt. Dist. v. Koontz*, 183 So. 3d 396, 398 n.2 (Fla. Dist. Ct. App. 2014) (citing Fla. Stat. § 373.617(2)).

### III

#### AN ACT THAT VIOLATES THE TAKINGS CLAUSE IS UNLAWFUL

The court of appeals also committed obvious error when it concluded that an unconstitutional act is not unlawful. Decision at 19-21. Case law from the U.S. Supreme Court holds that a demand that an owner dedicate his or her property to the public without just compensation is both unconstitutional and unlawful. *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999). In *Del Monte Dunes*, the City of Monterey sought relief from a jury verdict awarding damages for a violation of *Nollan*, arguing

that its unconstitutional demand did not constitute an action at law. The Supreme Court rejected that argument, concluding that a violation of the Takings Clause is unconstitutional and unlawful and therefore gives rise to an action at law. *Id.* at 717 (When the government demands property without payment of just compensation, “it violates the Constitution. In those circumstances the government’s actions are not only unconstitutional but unlawful and tortious as well.”). Indeed, the U.S. Supreme Court has long-considered a violation of the Takings Clause to constitute an unlawful act. *See, e.g., Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972) (“The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account.”); *see also Crystal Lotus Enterprises Ltd. v. City of Shoreline*, 167 Wn. App. 501, 505, 274 P.3d 1054 (2012) (“A property owner may bring an inverse condemnation claim alleging an unlawful governmental ‘taking’ or ‘damaging,’ and may seek to recover the diminished value of the property.”). Such a conclusion is compelled by the Court’s fundamental understanding that the U.S. Constitution is the “supreme fundamental law.” *Terral v. Burke Const. Co.*, 257 U.S. at 532-33. Tacoma’s decision to condition the Church’s building

permit upon an unconstitutional demand for a right-of-way was unconstitutional and unlawful.

### **CONCLUSION**

For the foregoing reasons, amicus Pacific Legal Foundation requests that the Court reverse the court of appeals' decision and remand the matter to the trial court for a determination of damages and attorney's fees owed to the Church as authorized by Ch. 64.40 RCW.

DATED: April 25, 2019.

Respectfully submitted,

By: s/ BRIAN T. HODGES  
BRIAN T. HODGES, WSBA #31976  
Pacific Legal Foundation  
255 South King Street, Suite 800  
Seattle, Washington 98104  
Telephone: (916) 419-7111  
Email: BHodges@pacificlegal.org

*Attorney for Amicus Curiae  
Pacific Legal Foundation*

**PACIFIC LEGAL FOUNDATION - WASHINGTON**

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