Supreme Court, U.S.
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No. 11-50

In the
Supreme Court of the United States

ALTO ELDORADO PARTNERSHIP, RANCHO VERANO, LLC, CIMARRON VILLAGE, LLC, DENNIS R. BRANCH, and JOANN W. BRANCH,
Petitioners,

v.

THE COUNTY OF SANTA FE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are *Nollan* claims for prospective relief, which by definition implicate no compensation issues, outside the purview of *Williamson County*'s state-procedures rule and immediately ripe in federal court?

2. If not, should the Court overrule *Williamson County*'s state-procedures rule on the grounds that the rule effectively bars, from federal court, taking claims brought under 42 U.S.C. § 1983, in contravention of Congress's intent in enacting § 1983 to provide federal rights claimants with access to federal court?

3. Did the Tenth Circuit err in holding, contrary to this Court's precedents and the decisions of state supreme courts, that heightened review under *Nollan* does not apply to permit conditions that result from legislative enactments and that constitute non-physical-invasions of property?

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I

THE TENTH CIRCUIT'S EXPANSIVE APPLICATION OF *WILLIAMSON COUNTY*'S JUST-COMPENSATION RULE CONFLICTS WITH THIS COURT'S DECISIONS

A. *Nollan* Claims for Prospective Relief Are Exempt from *Williamson County*'s Just-Compensation Rule

The Tenth Circuit misapplied *Williamson County*'s prudential ripeness rule to Alto's *Nollan* claim, in clear conflict with this Court's precedents. *Nollan* claims like Alto's are claims for ***prospective relief*** that do not implicate compensation issues and are therefore outside the purview of *Williamson County*'s ***just-compensation*** rule. The County makes little attempt to rebut this fact.

First, the County wrongly asserts—without analysis or elaboration—that nothing in *Williamson County* restricts the rule from being applied to a prospective-relief claim. Brief in Opposition (Opp.) at 8. *Williamson County* involved a federal taking claim for just compensation, brought in federal court after a county's application of zoning regulations to the plaintiff's property had denied it "economically viable use" of the land. *Williamson County Reg'l Planning Comm'n v. Hamilton Beach*, 473 U.S. 172, 183-84 (1995). The plaintiff's claim necessarily implicated questions concerning the extent of the regulation's impact on the property and the extent to which the county was liable to the plaintiff for damages. This

Court held the claim was unripe, fashioning a prudential rule that requires litigation of just-compensation claims in state court before filing in federal court. *Id.* at 184.

By contrast, a *Nollan* claim is for prospective relief to prevent the imposition of an unconstitutional condition, not damages. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). A *Nollan* claim probes neither the extent to which a regulation impacts use of the property, nor the amount of compensation owed to the plaintiff for an otherwise lawful taking. Instead, it considers whether a threatened taking of property—via a permit condition—is lawful in the first place; if it is not, the remedy is to invalidate the unconstitutional condition, not force the property owner to submit to the unconstitutional condition then seek compensation in state court. *Id.* at 837. As a result, *Williamson County*'s rule is inapplicable to *Nollan* claims, like Alto's.

Second, the County advances arguments that have no bearing on the question of whether *Nollan* claims for prospective relief are exempt from the just-compensation rule. It contends that *Williamson County*'s rule applies, not just to as-applied claims, but to facial claims like Alto's. But Alto does not even raise the facial-versus-as-applied issue in its Petition. The County also asserts that Alto does not state a cause of action under *Nollan*. Yet the assertion (besides being wrong, as explained in Part III) does not respond to the interplay between *Nollan* claims for prospective relief and *Williamson County*'s just-compensation rule.

B. Alto's Claim Is an Unconstitutional-Conditions Claim Under *Nollan*

While not relevant to the question of whether a *Nollan* claim is exempt from *Williamson County*'s just-compensation rule, the County questions whether Alto states a claim under *Nollan*. In *Nollan*, the California Coastal Commission required the Nollans, owners of beach-front property, to dedicate an easement over a strip of their private beach as a condition of obtaining a permit to rebuild their home. *Nollan*, 483 U.S. at 827-28. The Nollans refused to accept the condition and sued the Commission—not for damages, but for the prospective remedy of "invalidat[ion of] the access condition." *Id.* at 828.

This Court held that there must be an "essential nexus" between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a permit condition would be "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted). The Court could not see how remodeling of the Nollans' home, which would have no impact on public-beach access, was in any way connected to the Commission's condition that they dedicate an easement over their property. *Id.* at 838-39. It found that the condition threatened an unlawful taking, so it granted the Nollans preventive relief. *Id.* at 837.

Nollan supports Alto's cause of action against the Ordinance's affordable-housing requirement. Alto contends that the Ordinance bears no connection whatsoever to the impact of the subdivision of land. Alto alleges that subdivision does not render housing

less affordable. As a result, the Ordinance amounts to a plan of extortion and is unconstitutional, and the only proper remedy is *prospective relief*. *Nollan* clearly provides Alto with a cause of action under the Takings Clause.

The County disagrees that Alto states a *Nollan* claim, arguing that the Alto's claim rests instead on a different theory that this Court discarded in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). Before *Lingle*, a plaintiff could challenge a law under the Takings Clause on the theory that it failed to "substantially advance a legitimate state interest." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). But in *Lingle*, the Court held that the "substantially advances" test under *Agins* sounded in due process and could not be used to support a taking claim. *Id.* Importantly, *Lingle* explicitly preserved *Nollan* as a special application of the unconstitutional-conditions doctrine. *Id.* at 547.

As explained above, Alto's taking claim is ***not*** that the Ordinance fails to advance "some legitimate state interest." It very well may. Instead, Alto claims that the Ordinance seeks to unconstitutionally single out some property owners (those who wish to subdivide) for the task of remedying a public problem they have not caused or exacerbated. Unlike *Agin*'s "substantially advances" test, the theory that Alto relies upon speaks to the very purpose of the Takings Clause—i.e., "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). And its claim rests unmistakably on the doctrine of unconstitutional conditions, as applied in *Nollan*.

C. Alto's *Nollan* Claim Properly Is for Prospective Relief

The County argues that *Lingle* eliminated prospective relief as a remedy for all taking claims. Opp. at 14-15. Not so. In *Lingle*, this Court simply held that the "substantially advances" test is not a taking test, but rather a due-process test. *Lingle*, 544 U.S. at 548. It did not affect the remedies available to claimants alleging other kinds of takings. And, importantly, it did not change the remedy available to *Nollan* plaintiffs. Quite the contrary, the Court reaffirmed *Nollan*'s continued viability as a test supporting prospective-relief claims. *Id.* at 547.

The County fails to reconcile *Nollan*'s continued viability with its assertion that, after *Lingle*, all taking claims must be for just compensation. As the *Lingle* Court explained, *Nollan* represents an unconstitutional-conditions test—a test whose purpose is to identify extortionate government demands. A plaintiff's remedy in the face of threatened extortion is to prevent it. There is no authority for the proposition that a plaintiff should first submit to the extortion, then seek compensation for the resulting injury. *See, e.g.*, *Nollan*, 483 U.S. at 841 (favorable decision in prospective relief action); *Dolan*, 512 U.S. 374, 395 (1994) (same).

II

THE TENTH CIRCUIT DECISION UNMISTAKABLY HIGHLIGHTS A CONFLICT BETWEEN A JUDICIALLY CREATED RULE AND § 1983

The Tenth Circuit decision highlights a conflict between the judicially created rule in *Williamson County* and 42 U.S.C. § 1983. After a federal taking claimant litigates his claim in state court, the Full Faith and Credit Act bars the claim's re-litigation in federal court. *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005). Thus, the rule effectively closes the federal courthouse doors to federal taking claimants, in contravention of § 1983's purpose: to provide federal rights claimants with access to federal courts.

The County claims that Alto has waived this argument, because it was not raised below. But Alto could not have asked a lower court to reverse this Court's precedents. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Moreover, the conflict between this Court's just-compensation rule and § 1983 raises a "purely legal question" that is "appropriate for [its] immediate resolution notwithstanding that it was not addressed by the court of appeals. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

On the merits of Alto's § 1983 argument, the County contends that no conflict exists between *Williamson County*'s just-compensation rule and § 1983. It relies heavily on *San Remo*, in which this Court considered the interplay between ***two federal statutes***—§ 1983's guarantee of a federal forum and

the Full Faith and Credit Act's effect of barring federal-court access to plaintiffs with state-court judgements. Asked to reconcile the commands of two statutes, the *San Remo* Court ultimately decided against creating an exception to the Full Faith and Credit Act, to the detriment of Fifth Amendment claimants. But the Court had no occasion to consider the very different question presented in this Court: Must its own judicially created, just-compensation rule—the very source of the statutory conflict in *San Remo*—yield to § 1983's promise of federal-court access? *San Remo*, 545 U.S. at 352 ("[N]o court below has addressed the correctness of *Williamson County*" and "neither party has asked us to reconsider it."). This case squarely presents the issue for this Court's review.

Besides *San Remo*, the County relies on other precedents for the proposition that § 1983 does not give federal rights claimants an "unencumbered opportunity to litigate . . . in a federal district court." Opp. at 17 (quoting *Allen v. McCurry*, 449 U.S. 90, 104 (1980). But, again, the County misses the mark.

The question is not whether federal rights claimants should have completely "unlimited" or "unencumbered" access to a federal forum. Alto takes no issue with Article III and prudential rules applicable to ***all*** federal rights claims, because those rules do not categorically and arbitrarily bar just some claims from federal court. The question here is whether a judicially created rule may categorically and altogether ban one particular kind of federal rights claim from federal court. Today, the federal taking claimant is the ***only*** kind of § 1983 claimant who lacks access to federal court.

The County's authorities are inapposite; none of them categorically forecloses a plaintiff's choice in the first instance to vindicate a particular federal right—like a First or Fourth Amendment right—in federal court. *Allen v. McCurry*, 449 U.S. 90 (1980) (holding that preclusion rules barred criminal defendant from re-litigating a § 1983 issue in federal court, after he chose to raise the issue in state court first); *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 115 (1981) ("[C]ontrolled by principles articulated even before enactment of § 1983," the Court held that no challenge to a state tax system could be brought in federal court—regardless of the federal right at issue.); *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (holding that § 1983 plaintiffs could not litigate federal-court claim that effectively sought to halt ongoing contempt proceedings in state court, not because plaintiffs sought to vindicate a particular federal right, but because "federal-court interference with the State's contempt process is an offense to the State's interest"); *Hudson v. Palmer*, 468 U.S. 517 (1984) (holding that § 1983 plaintiff had no cause of action under the Due Process Clause of the Fourteenth Amendment, but not denying that plaintiff could litigate a federal due process claim in federal court *if* he had such a claim); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983) (precluding lower federal court jurisdiction over state claims and inextricably intertwined federal claims that seek review of state court judgments); *but see Exxon Mobil Corp. v. Saudi Basic Industries*, 544 U.S. 280, 284 (2005) (limiting the *Feldman* doctrine "to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court

proceedings commenced and inviting district court review and rejection of those judgments").

Finally, the County asserts there are good reasons for applying *Williamson County*'s just-compensation rule—even to prospective-relief claims. For example, the County says that "there is no federal claim under the Fifth Amendment unless the state fails to provide just compensation." Opp. at 18. But the County ignores the "special context of land-use exactions" to which *Nollan* applies. *Lingle*, 544 U.S. at 528.

Like all unconstitutional-conditions claims, a *Nollan* claim is viable upon a government's final decision to impose an unconstitutional condition. *Id.* at 527. A *Nollan* claimant need not submit to an "out-and-out plan of extortion," then seek and be denied compensation, in order to state a federal taking claim. In *Dolan v. City of Tigard*—another case involving unconstitutional permit conditions—dissenting Justice Stevens made the very same argument that the County advances when he wrote that, "[s]ince no taking has yet occurred, there has not been any infringement of her constitutional right to compensation." *Dolan*, 512 U.S. 408 (Stevens, J., dissenting). Of course, the *Dolan* Court—like the *Nollan* Court—adjudicated the unconstitutional-conditions claim in a way that provided the property owner with prospective relief from the permit exactions. *Dolan*, 512 U.S. at 396 (invalidating unconstitutional permit conditions); *see also Nollan*, 483 U.S. at 829, 842 (affirming trial court decision issuing writ of mandate invalidating condition).

The County also claims that federal courts should "defer to state decision-making," because "state courts

are uniquely qualified to address these matters." Opp. at 20. The County cites *San Remo*, for the view that state courts are "fully competent to adjudicate constitutional challenges to local land-use decisions" and have "experience in resolving . . . questions related to zoning and land-use regulation. *Id.* (citing *San Remo*, 545 U.S. at 347). But Alto does not doubt the competency or experience of state courts; instead, it challenges a judicially created rule that bars civil rights plaintiffs from equally competent and experienced federal courts.

Besides, the superior expertise of state courts over federal courts in resolving *Nollan* claims is overstated and does not justify relegating one category of federal rights claims to state courts. As the concurrence in *San Remo* pointed out:

> [T]he Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause. In short, the affirmative case for the state-litigation requirement has yet to be made.

San Remo, 545 U.S. at 350 (Rehnquist, C.J. concurring) (internal citations omitted).

The County also cites *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) for the proposition that ***local land-use agencies*** should be

allowed to render *final decisions* on how regulations apply to properties, since they have flexibility and discretion in the regulations' application. But the point is irrelevant: Alto alleges that the Ordinance is facially unconstitutional—that it cannot be applied constitutionally *in any case*—not that the County's specific application to its property is unconstitutional. As the County acknowledged, Alto is not obligated to exhaust administrative remedies and seek a "final decision" concerning how the Ordinance applies to its property. Petitioner's Appendix at A-6. Therefore, the flexibility and discretion of local land-use agencies are simply inapposite in this case.

III

THE TENTH CIRCUIT'S DECISION TO LIMIT *NOLLAN*'S APPLICATION CONFLICTS WITH DECISIONS OF THIS COURT AND OF LOWER COURTS

There is a split among lower courts concerning *Nollan*'s application to legislatively imposed permit conditions, and to conditions that exact property interests other than land. Both *Nollan* and *Dolan* compel a robust application of the unconstitutional-conditions doctrine to *all* attempts at government extortion of property interests, regardless of the particular government entity doing the extorting or the nature of the property interest demanded.

The County denies any split exists after *Lingle*. According to the County, the *Lingle* Court definitely decided the scope of *Nollan* and limited it to administratively imposed exactions of land. For this reason, the County explains, any case preceding *Lingle*

that rejects an artificially limited application of *Nollan* must be wrong. The County errs.

In *Lingle*, the plaintiff challenged a Hawaii statute intended to control retail gasoline prices as an unlawful taking of property, on the ground that the statute did not substantially advance a legitimate state interest. *Lingle*, 544 U.S. at 533-34. After rejecting the plaintiff's taking theory, the Court unequivocally reaffirmed the continued vitality of other Fifth Amendment theories, including *Nollan*. *Id.* at 547. By reiterating without qualification that *Nollan* is a "special application of the doctrine of unconstitutional conditions," the *Lingle* Court only reaffirmed its broad applicability to all unconstitutional conditions. *Id.*

Lingle does not limit *Nollan*'s reach. The County cites *Lingle*'s objection to applying heightened scrutiny to legislative determinations challenged as violations of substantive due process. Opp. at 23 (citing *Lingle*, 544 U.S. at 545). But *Nollan* is not a "substantive due process" case; it is a takings case based on the unconstitutional-conditions doctrine, to which this Court has readily applied heightened scrutiny.

Without *Lingle*, the County is faced with the reality that the Tenth Circuit decision conflicts, not just with various lower court decisions, but with *Nollan* and *Dolan* themselves. The easement condition struck down in *Nollan* was the result of a quasi-legislative policy created and implemented for decades by the government. *Nollan*, 483 U.S. at 833 n.2, 859. And the permit conditions at issue in *Dolan* were the result of a legislative enactment as well—specifically, the city's Community Development Code. *Dolan*, 512 U.S. at 379.

The County does not attempt to reconcile its cramped view of the *Nollan* test with the facts of that case and *Dolan*. Nor does the County explain how *Nollan* limits itself exclusively to interests in real property. The County does not contest any of Alto's cases that hold—unequivocally—that the Takings Clause and the unconstitutional-conditions doctrine do not discriminate among the kinds of property rights that are protected against "out-and-out plan[s] of extortion."

CONCLUSION

For the foregoing reasons, Alto respectfully requests that the Court grant its Petition.

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Respectfully submitted,

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