Supreme Court, U.S.
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No. 11-1447

In the

Supreme Court of the United States

COY A. KOONTZ, JR.,
Petitioner,

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Florida

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For over eleven years, a Florida land use agency refused to issue any of the permits necessary for Coy A. Koontz, Sr., to develop his commercial property. The reason was because Koontz would not accede to a permit condition requiring him to dedicate his money and labor to make improvements to 50 acres of government-owned property located miles away from the project—a condition that was determined to be wholly unrelated to any impacts caused by Koontz's proposed development. A Florida trial court ruled that the agency's refusal to issue the permits was invalid and effected a temporary taking of Koontz's property, and awarded just compensation. After the appellate court affirmed, the Florida Supreme Court reversed, holding that, as a matter of federal takings law, a landowner can never state a claim for a taking where (1) a permit approval is withheld based on a landowner's objection to an excessive exaction, and (2) the exaction demands dedication of personal property to the public.

The questions presented are:

1. Whether the government can be held liable for a taking when it refuses to issue a land-use permit on the sole basis that the permit applicant did not accede to a permit condition that, if applied, would violate the essential nexus and rough proportionality tests set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and

2. Whether the nexus and proportionality tests set out in *Nollan* and *Dolan* apply to a land-use exaction that takes the form of a government demand

that a permit applicant dedicate money, services, labor, or any other type of personal property to a public use.

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INTRODUCTION

The District opposes Koontz's petition on two grounds, neither of which has any merit. First, the District claims this Court lacks jurisdiction, because Koontz did not allege a federal takings claim in his amended complaint. Not so. The Florida Supreme Court deliberately rewrote the court of appeal's certified question to expressly make reference to a federal taking issue, then analyzed and disposed of that question. *See, e.g.*, Pet. App. A-1 (asking whether "the Fifth Amendment to the United States Constitution . . . recognize[s] an exactions taking" in the District's demands for off-site mitigation); Pet. App. A-6 - A-10, A-13 - A-21 (analyzing Fifth Amendment takings law). A long line of precedent recognizes that, where the highest state court holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, this Court's concern with the proper raising of the federal question in the state courts disappears, and any inquiry into how or when the question was raised in the state courts becomes irrelevant. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (applying "the elementary rule that it is irrelevant to inquiry . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided" (internal quotation marks and citations omitted)); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."). This Court has jurisdiction to hear this case.

Second, the District claims the petition does not identify issues worthy of this Court's review. It does so

by rearguing the underlying facts of this case—from the alleged "negotiations" that occurred between the District and Koontz, to the nature and amount of the exaction being challenged. The lower courts, including the Florida Supreme Court, already have resolved these factual issues: The District denied a permit after Koontz refused to submit to its demand that he improve off-site properties—these facts cannot be contested. Pet. App. A-6; Pet. App. B-4 - B-5; Pet. App. D-1, D-4, D-11.

In light of these indisputable facts, it is apparent that this petition raises important federal questions requiring the Court's resolution. Indeed, the Opposition brief's focus on the importance of exactions as regulatory tools makes clear the central point of this litigation: There must be an equitable way for landowners and permitting agencies alike to distinguish those exactions that mitigate for the impacts of a proposed development from those constitutionally infirm exactions that go too far. There is. The "essential nexus" and "rough proportionality" tests of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), provide courts with the analytical framework to make that determination and invalidate excessive exactions that "take" property. But the Florida Supreme Court declined to apply *Nollan* and *Dolan* to exactions of money and other non-real property because doing so would, in the court's opinion, interfere with the flexibility and negotiating leverage necessary for permitting agencies to achieve such goals as preserving and enhancing wetlands. Pet. App. A-19 - A-20.

Certiorari is warranted and should be granted.

CORRECTIONS TO THE DISTRICT'S MISSTATEMENT OF FACTS

The Opposition brief relates a version of the facts that the District argued during the administrative and trial court proceedings. Opp. at 2-9, 14-18. Many of its assertions were rejected below. *See* Pet. App. at D-3 - D5; Pet. App. B-2 - B6; Pet App. A-4 - A7.

First, the District repeatedly asserts that this case did not involve an exaction of money or any other property. Opp. at 14, 18, 21. That is incorrect. The trial court found that the District's final order conditioned permit approval upon Koontz enhancing, at his own expense, 50 off-site acres of wetlands on the District's property.[1] Pet. App. D-1, D-4, D-11. This was to be accomplished by replacing culverts and plugging ditches—a task that the court determined "could cost [Mr. Koontz] between $90,000 and $150,000, but there is evidence it could cost as little as $10,000."[2] Pet. App. at D-4. On review, the state appellate and supreme courts recognized that the trial court had determined that the off-site mitigation demand was an exaction. Pet. App. A-6; Pet. App. B-4 - B-5.

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[1] The District alternatively demanded that Koontz reduce the size of his development to one acre and dedicate the remaining property as a conservation area. Pet. App. A-6; Pet. App. B-4 - B-5; Pet. App. D-4. This alternative, which required an excessive dedication of real property, was rejected as well but was not addressed by the state courts. Pet. App. A, B, D.

[2] The District's quibbles about whose cost estimate is more convincing (Opp. at 17-18) are irrelevant where the trial court entered a finding on the issue. Pet. App. D-4.

Second, the District asserts that Koontz's regulatory takings claim is premature because he did not participate in negotiations that could have resulted in "alternative mitigation proposals." Opp. at 5-7, 14-18. This argument, too, was rejected below. Once the District issued a final order denying his permit applications, Koontz was not required to continue negotiating for alternative mitigation possibilities. *Koontz v. St. John's River Water Mgmt. Dist.*, 720 So. 2d 560, 562 (Fla. Ct. App. 1998) ("There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the government finally approves one before he can go to court."), *rev. denied*, 729 So. 2d 394 (Fla. 1999). His regulatory taking claim was ripe. *Id.*

Third, the District overstates the impact that Koontz's proposed development would have on wetlands, and overstates the need to demand off-site mitigation. Opp. at i, 2-4, 16 n.11. The District's mitigation demands were based on its incorrect assessments of project impacts and the existing conditions of the wetlands on Koontz's property. Pet. App. A-7; Pet. App. D-3. Because the District's premises were in error, its demand relying on those premises, that Koontz make improvements to 50 acres of wetlands on public lands, was determined to be wholly unrelated and disproportionate to the impacts of his proposed development. Pet. App. A-6 - A-7; Pet. App. D-11.

And fourth, the District asserts that the trial court did not actually decide Koontz's case under *Nollan* and *Dolan*. Opp. at 7-9, 17 (insisting that the case was decided under *Agins v. City of Tiburon*, 447 U.S. 255 (1980)). Every decision below expressly states

that the case was decided under *Nollan* and *Dolan*. *See* Pet. App. A-6 - A-7 ("[T]he trial court applied the constitutional standards enunciated in *Nollan* and *Dolan*."); *see also* Pet. App. B-5 ("[T]he trial court applied the constitutional standards enunciated by the Supreme Court in *Nollan* and *Dolan*."); Pet. App. D-10 - D-11 (*Nollan* and *Dolan* provide the "constitutional tests applicable to the Koontz property.").

There are no factual disputes in this case; all of these issues were decided below. The questions presented are pure questions of law.

ARGUMENT

I

THIS COURT HAS JURISDICTION

Where a state court of last resort rules on questions of federal constitutional law, any inquiry into how or when the question was raised in the state courts is irrelevant to this Court's exercise of jurisdiction. *Charleston Federal Savings & Loan Ass'n v. Alderson*, 472 U.S. 320, 327-28 (1985). In its opinion below, the Florida Supreme Court explicitly stated that it had taken review of Koontz's case in order to determine two questions of federal takings law. Pet. App. A-1 - A-2. In fact, the court determined that the case was "controlled by the existing interpretation of the United States Constitution by the United States Supreme Court." Pet. App. A-2. The court then extensively analyzed and ruled on those questions of federal constitutional law. Pet. App. A-6 - A-10, A-13 - A-21. So did the appellate and trial courts. Pet. App. B-18 - B-20; Pet. App. D-10 - D-11 (*Nollan* and *Dolan*

provide the "constitutional tests applicable to the Koontz property."). This Court unquestionably has jurisdiction under 28 U.S.C. § 1257(a). *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983) (jurisdiction exists where the record establishes that the federal constitutional issues were "either squarely considered or resolved in state court"); *see also Mansell v. Mansell*, 490 U.S. 581, 586 n.5 (1989) (holding that the Court had jurisdiction to review a state court decision where the lower court determined that it was necessary to reach a federal question).

The Opposition, however, insists that this Court does not have jurisdiction over a state court's determination of federal constitutional law because the complaint alleged only a violation of the state constitution. Opp. at 11-14. The District is wrong. For the purpose of establishing this Court's jurisdiction, it is irrelevant when a federal claim was raised in the proceedings below so long as the state court of last resort did, in fact, rule on the federal question. *See Orr*, 440 U.S. at 274-75; *Raley*, 360 U.S. at 436-37. It is enough that the state court "reached and decided" the federal constitutional questions (*Jenkins v. Georgia*, 418 U.S. 153, 157 (1974)) "as though properly raised." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971).

For these reasons, there is no risk that this Court's exercise of its jurisdiction would be "advisory." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (a decision is not advisory where the lower decision was controlled by federal law). This Court would be acting well within the jurisdiction conferred by 28 U.S.C. § 1257(a) to grant the petition in this case.

II

THE DECISION OF THE FLORIDA SUPREME COURT RAISES IMPORTANT QUESTIONS OF FEDERAL TAKINGS LAW

The Florida Supreme Court adopted two per se rules of federal takings law that significantly limit the protections guaranteed by *Nollan* and *Dolan*. Pet. App. A-19. First, the court concluded that, as a matter of law, the nexus and proportionality tests will never apply to an excessive exaction of money or any other non-real property. *Id.* And second, the court held that *Nollan* and *Dolan* will not apply where the government denies a permit application because the landowner refuses to accede to an excessive exaction. *Id.* Each of these rulings raises "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c); Pet. at 10-22. In addition, the Florida court's resolution of these questions conflicts with decisions of this Court, and conflicts with decisions from other state courts of last resort and federal courts of appeals. Sup. Ct. R. 10(b), (c).

The District does not dispute that these rulings implicate important questions of federal constitutional law.[3] Opp. at 18-21; Pet. at 10-16, 18-22. Instead, the Opposition makes the naked assertion—without any

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[3] The District cannot credibly dispute the importance of these questions. After all, the lower courts determined that the issues were "of great public importance." Pet. App. A-1 - A-2. And in its pleadings below, the District argued that resolving these questions about the scope and application of *Nollan* and *Dolan* was a matter of great importance to permitting agencies and the public. *See* Initial Brief of Petitioner/Appellant St. John's River Water Management District at 1 (Fla. Sup. Ct., Nov. 16, 2009).

reasoned analysis or explanation—that the Florida court correctly interpreted this Court's takings precedents. Opp. at 18-19. This argument simply presumes to predict the outcome of the merits argument. It does not contest the conflicts set out in the Petition, and does not comment on the advisability of this Court granting certiorari.

Similarly, the Opposition does not disprove the existence of a nationwide split of authority on the question whether *Nollan* and *Dolan* apply to dedications of money, or other personal property.[4] Opp. at 20 (admitting that the conflict exists); Pet. at 16-17. Nor could it credibly do so where the lower courts expressly recognized that they were ruling on matters that are the subject of wide-ranging dispute and a split of authority. Pet. App. A-17 - A-19 & n.3 (recognizing split of authority); Pet. App. B-6 - B-10, B-13 - B-15, B-22, B-24 - B-26, B-30 (discussing the wide ranging debate, split of authority, and conflicts). Instead, all the District can do is point out that the Florida court chose to side with the minority viewpoint on this issue—a viewpoint that the District prefers.[5] Opp. at 19 (citing *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir.), *cert. denied*, 132 S. Ct. 578 (2011); *Iowa Assurance*

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[4] Before admitting that there is a split of authority on this issue, the Opposition tries to deny the existence of any conflict by setting up and attacking a straw man. Opp. at 19 (arguing that it cannot locate any cases discussing whether a monetary exaction can result in inverse condemnation of the underlying property—an issue not raised in the Petition or addressed by the court below).

[5] A majority of state and federal courts hold that *Nollan* and *Dolan* are applicable to all forms of property dedications, including money. *See* Pet. at 16-17 n.4-5.

Corp. v. City of Indianola, 650 F.3d 1094, 1096-97 (8th Cir. 2011); *McClung v. City of Sumner*, 548 F.3d 1219, 1224 (9th Cir. 2008), *cert. denied*, 556 U.S. 1282 (2009)). This continuing deep and unresolved split of authority on this important question of federal takings law—twenty-five years after *Nollan*—means that landowners from state to state, and circuit to circuit, are provided significantly different protections under the federal Constitution. This fundamental inequity militates strongly in favor of certiorari.

Ironically, the Opposition discovers a second split of authority that was not identified in the Petition. Opp. at 20. In criticizing the Florida court of appeals' analysis of the question whether *Nollan* and *Dolan* apply where a permit was denied because the landowner refused to accede to an excessive exaction, the Opposition explains that the Florida Supreme Court's ruling on this issue conflicts with a decision from the Eighth Circuit. Opp. at 20 (citing *Goss v. City of Little Rock*, 90 F.3d 306, 309 (8th Cir. 1996); *Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998)). This conflict provides an additional basis for review. The District's contention that a conflict with one federal circuit court of appeals is an insufficient basis to warrant certiorari is without merit. *See* Sup. Ct. R. 10(b) (Certiorari may be granted where "a state court of last resort has decided an important federal question in a way that conflicts with . . . a United States court of appeals.").

All of this aside, this Court should not lose focus of the fundamental conflict at issue in this case. In *Nollan* and *Dolan*, this Court applied the well-recognized rule that government may not require a person to give up his or her property in exchange for an

unrelated discretionary benefit in the context of land use permitting. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005); *Dolan*, 512 U.S. at 391; *Nollan*, 483 U.S. at 837, 841. Accordingly, *Nollan* and *Dolan* placed outer limits on the government's ability to exact excessive or unrelated benefits from landowners. *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391. The Florida Supreme Court removed those limits. Pet. App. A-19. The reason it did so was because the court placed a higher value on preserving an agency's permitting discretion than an individual's constitutional rights. Pet. App. A-19 - A-20. The lower court explained that permitting agencies must retain the flexibility and negotiating leverage to achieve their regulatory policies, which includes the imposition of exactions. *Id.* That discretion, the court continued, would be interrupted if landowners were allowed to challenge excessive exactions of money or other non-real property under the nexus and proportionality tests. *Id.* at A-20. The court further speculated that if *Nollan* and *Dolan* applied to excessive exactions of money or other non-real property, agencies would "simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation." *Id.*

Nollan, however, rejected the notion that government needs broad authority to impose development conditions in order to achieve its land use goals. *Nollan*, 483 U.S. at 836-37. Indeed, under such a scheme of limitless agency authority, the *Nollan* Court concluded that one would expect to see more abuses of landowners' rights:

> One would expect that a regime in which this kind of leveraging of the police power is

> allowed would produce stringent land use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

Nollan, 483 U.S. at 837 n.5. The nexus rule, by testing the legitimacy (or illegitimacy) of a development condition, provides a necessary check on agency land use authority. *Nollan*, 483 U.S. at 836-37 ("[A] permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.").

The Florida court's interpretation of *Nollan* and *Dollan* conflicts with this Court's decisions at the most fundamental level and, if allowed to stand, will have troubling and far-reaching implications on landowners and government alike.

CONCLUSION

Thus, for the reasons set out above and in the Petition, Koontz respectfully requests that this Court

grant the petition for writ of certiorari, and reverse the decision of the Florida Supreme Court.

DATED: August, 2012.

Respectfully submitted,

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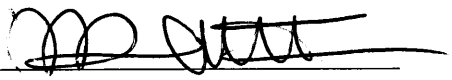
CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI contains 2,991 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 13, 2012.



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