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 a Writ of Certiorari to the Supreme Court of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When a development is proposed that would destroy wetlands, Florida—like many states and the federal government—requires mitigation to offset the adverse environmental impact. Here, Petitioner sought permits to develop land composed almost entirely of wetlands and agreed that mitigation was necessary. He made one offer to mitigate, which was determined to be inadequate. He refused to consider government-offered mitigation alternatives, or to make alternative proposals of his own. Thus his permit applications were ultimately denied.

Instead of appealing or seeking administrative review, Petitioner sued and alleged a taking of his real property under the Florida Constitution. After litigating a real property-based claim in the state courts, he now poses a different, exaction of "money and labor"-based claim for review by this Court. His Petition asks:

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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The opinion of the Supreme Court of Florida (Pet.App. A-1) is reported at 77 So. 3d 1220 (Fla. 2011), *reh'g denied*, __ So. 3d __ (Jan. 4, 2012). The opinion of Florida's Fifth District Court of Appeal (Pet.App. B-1) is reported at 5 So. 3d 8 (Fla. Dist. Ct. App. 2009). The final judgment and opinion of the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, is unpublished, but reproduced in the Petition Appendix at C-1 and D-1, respectively.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 3, 2011. The Florida Supreme Court denied Petitioner's motion for rehearing on January 4, 2012. On March 30, 2012, Justice Thomas granted Petitioners' motion for an extension of time in which to file his petition for certiorari, extending the deadline through June 1, 2012. A timely petition for certiorari was filed on May 30, 2012. Petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1257(a).

Respondent *disputes* this Court's jurisdiction, which Petitioner bases on having filed "an inverse condemnation lawsuit in the Florida state courts [under] the Fifth and Fourteenth Amendments." Pet. 1. In fact, Petitioner filed only a *state law* takings claim under "Article X, Section 6, of the Florida Constitution" (R375, Am. Compl. ¶48), and he "explicitly reserve[d] the right to assert all federal claims … for later resolution by a federal court." (R368 ¶18; R375 ¶47 (incorporating paragraph 18)). This Court lacks jurisdiction.

STATEMENT OF THE CASE

Like other states and the federal government, Florida has long protected wetlands, but allowed for their development if a project's adverse impact is either negligible or offset by mitigation. Fla. Stat. § 373.414(1), Fla. Stat. (1993). *See also* Bruce Wiener & David Dagon, *Wetlands Regulation and Mitigation After the Florida Environmental Reorganization Act of 1993,* 8 J. Land Use & Envtl. L. 521, 537–39 (Summer 1993) (describing the 1984 Henderson Act that required permitting for wetland dredge and fill projects and mitigation to reduce adverse impacts). Relatively often, developers will disagree with water management officials about the value of the mitigation needed to offset a proposed project's destruction of wetlands. This is one of those cases. Coy A. Koontz, Sr.[1] and the Respondent St John's River Water Management District (the "District") had a "difference of opinion" (R1672),[2] not that mitigation would be required for his project to go forward, but as to the value of wetlands proposed for

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[1] Petitioner Coy A. Koontz, Jr. is the son and successor in interest to Coy A. Koontz, Sr., who owned the subject property and filed the lawsuit. *See* Pet. 1 n.1.

[2] References to the Record on Appeal are indicated with an "R" followed immediately by the page number. References to the transcript of the liability trial are indicated with a "T" followed by the transcript page number. Unlike the liability trial transcript, the transcript of the hearing before the District's Governing Board (R970-1001) and the transcript of the compensation trial (R1432-1500) were not separately indexed and appear as regular record ("R") cites.

development *versus* the sufficiency of proposed mitigation to offset the destruction of wetlands.

Petitioner claims incorrectly that the District engaged in an "out-and-out plan of extortion" (Pet. 9), just because the District refused Petitioner's one and only mitigation offer that would have offset only a fraction of his project's destruction of wetlands under established state guidelines. Petitioner subsequently did not collaborate with the District to find an agreeable resolution; he would not put forward an alternative mitigation proposal of his own; and he refused various alternative mitigation offers put forward by the District. Then, instead of pursuing resolution of his dispute through established Administrative Procedures Act processes (Pet.App. A-22; R619(M) (Joint Pretrial Statement), he sued.

A. Petitioner's Application For Permits To Dredge, Fill, and Eliminate Wetlands.

In 1994, the Petitioner sought permits for a project that would dredge, fill, and eliminate about 3.4 acres of undeveloped wetlands and 0.3 acres of adjacent protected uplands on his 14.2-acre parcel.[3] Petitioner sought the permits from the Respondent District, which managed state wetlands in his

[3] Koontz applied for both a management and storage of surface water permit and a wetland resource (or "dredge and fill") permit. (R1501-66, 1579-1612). The Board rendered final orders as to both applications. For simplicity, this brief will refer to the 3.4 acres of wetlands and the 0.3 acres of protected uplands collectively as "wetlands," will use the singular "final order," and will henceforth cite to only the dredge and fill final order.

proposed project zone. Consistent with Florida law and its practice, the District could only approve the permits if the project did not cause a net adverse impact to wetland water resources and functions, or if the adverse impact was offset by mitigation. *See* Fla. Stat. § 373.414(1)(b) (1993).

In this instance, it was undisputed that Petitioner's project would adversely impact wetlands and that mitigation was necessary. Identifying appropriate mitigation is generally a collaborative process between an applicant and the District and mitigation proposals can come from either side. Ultimately, however, it is up to the applicant to choose what mitigation alternative will be followed:

> [T]he governing board … in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects, [including] onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of *the applicant* to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

Fla. Stat. § 373.414(1)(b) (1993) (emphasis added). Where impasse is reached about appropriate mitigation, an applicant can challenge the agency's denial of a permit in an administrative forum. Pet.App. A-22.

In this case, Petitioner refused to collaborate to find an acceptable mitigation alternative, but put forth just one very modest proposal of his own. He proposed the preservation of his remaining 11 acres at the site as mitigation for the 3.7-acre impact area, a "mitigation ratio" that was approximately 3:1. (T187). As Petitioner's own wetlands expert later conceded at trial, this proposed mitigation ratio was less than one-third of the minimum required by state mitigation guidelines.[4] (T187-88). District staff could not accept Petitioner's modest mitigation proposal under the guidelines and commented:

> Essentially, it allows the loss of one acre of wetland for the preservation of three, a three to one ratio. If you did that on every parcel of property that was proposed for development the state would lose 25 percent of its wetlands and that would be an unacceptable cumulative loss of wetlands.

(R1685 (Board Tr.).

When the District informed Petitioner that his permit could not be issued under his initial mitigation proposal, it also generated three other mitigation alternatives for Petitioner's consideration. As a fourth option, the District encouraged him to develop his own alternatives. As Petitioner

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[4] In 1988, Florida authorized preservation mitigation through conveyance of a conservation easement and established that preservation mitigation "will not be granted [at] a ratio lower than 10:1." (R1702-1704 (Fla. Dep't of Env. Reg., *Policy for "Wetlands Preservation-as-Mitigation*," June 20, 1988)).

stipulated in the trial court, the District suggested "several design alternatives … to reduce and offset the adverse impacts … so that the District could permit the proposed project." Pet.App. E-1. And the District would "favorably consider equivalent mitigation enhancement options on other properties within the Basin proposed by [Petitioner]." Pet.App. E-3. But Petitioner would not accept any District-proposed alternatives or suggest his own alternatives; he insisted on his project on his terms.

The District's Board asked if Petitioner would like 30 additional days to consider mitigation alternatives, but this opportunity was rejected. (R1683 (Board Tr.)). Petitioner insisted that the District grant his "single [mitigation] offer," which they could not because it failed state guidelines. *Id.* His permit applications were denied. (R1681, 1686 (Board Tr.)).

The District Board's final order made clear that, although the permits were denied due to insufficient mitigation, Petitioner could have proposed "equivalent off-site mitigation enhancement options on other properties within the basin." [5] (R1628 ¶18). The final order mentioned two possible alternatives where off-site wetland enhancement mitigation could have been completed, but not because Petitioner had

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[5] Off-site mitigation must occur within the same drainage basin as the subject property because Florida law (Fla. Stat. § 373.414(8)(a)) requires the Board to consider the cumulative impacts of wetland destruction within the basin when evaluating a permit application. "In-basin" mitigation avoids cumulative impacts within the same basin.

to complete these specific projects to get a permit. (R1627-1628 (describing the Hal Scott Preserve and the Demetree Property). Rather, these "example" sites were referenced in the order to make clear that currently accessible mitigation alternatives were immediately available to Petitioner. Petitioner knew that there was no requirement to mitigate on District-owned sites and that other mitigation sites would be "favorably considered." Pet.App. E-3. In the end, Petitioner flatly opposed any additional mitigation beyond his first and only proposal. For him, his mitigation offer was "as good as it can get"; unfortunately, however, it was not good enough under state-established guidelines for the District to approve his permits. (R1683 (Board Tr.)).

B. State Court Proceedings

1. The Trial Court Finds That Real Property Was Taken Under *Agins*.

As recognized by the Florida Supreme Court, this case has an extended procedural history. Pet.App. A-3. Petitioner first filed the case in 1994. But prior to final resolution in the trial court, the Fifth District Court of Appeal had reviewed issues involving Petitioner's takings claim on three occasions. The Fifth District reversed an initial determination by the trial court that Petitioner's takings claim was not ripe and remanded the matter for a trial. *See Koontz v. St. Johns River Water Mgmt. Dist.,* 720 So. 2d 560, 562 (Fla. Dist. Ct. App. 1998) (*Koontz I*), *review denied,* 729 So. 2d 394 (Fla. 1999). After the trial court determined that a taking occurred, the Respondent District twice attempted to appeal, but the appellate court concluded that the

trial court orders did not constitute appealable orders. *See St. Johns River Water Mgmt. Dist. v. Koontz,* 861 So. 2d 1267, 1268 (Fla. Dist. Ct. App. 2003) (*Koontz II*); *St. Johns River Water Mgmt. Dist. v. Koontz,* 908 So. 2d 518, 518 (Fla. Dist. Ct. App. 2005) (*Koontz III*).

This case has traveled to this Court under an amended complaint filed in 1997, in which Petitioner alleged a temporary and permanent regulatory taking under *state law*. His takings claim was pled exclusively under "Article X, Section 6, of the Florida Constitution" (R375 ¶48 (Am. Compl.)), and Petitioner "explicitly reserve[d] the right to assert all federal claims … for later resolution by a federal court." (R368 ¶18; R375 ¶47 (incorporating paragraph 18) (Am. Compl.)).

The theory for Koontz's state law takings claim derived from *Agins v. City of Tiburon,* 447 U.S. 255 (1980). He alleged that the District's order "deprive[d] Koontz of the economically viable use of his property" (R375 ¶49 (Am. Compl.)); "restrict[ed] the use and destroy[ed] the economically viable use of Koontz's property" (R376 ¶52 (Am. Compl.)); and "does not serve a public purpose." *Id.* (¶ 53).[6]

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[6] It is notable for purposes of reviewing the instant Petition—in which the central issue is framed in terms of an exaction of "money and labor" (Pet. 15)—that Petitioner initially framed his claim as a taking of real property. In addition to multiple references in the Amended Complaint to real property as the property subject to the taking claim (R365 ¶1 and ¶4; R375 ¶49; R376 ¶52 and ¶54), the Joint Pretrial Statement's "admitted facts" section always describes the "subject property" of the taking claim as real property: "The subject property was

Ultimately, in 2002, the trial court ruled for Petitioner. Pet.App. D-1, 11. The trial court framed its ruling under *Agins* upon which Petitioner had "relied" (*id.,* D-5, 8), but its rationale also borrowed from *Nollan* and *Dolan* (*id.,* D-11), cases that the order otherwise dismissed as being "clearly distinguishable in fact and legal principle," *id.,* D-8. The court found the District to have taken Petitioner's real "property" (*id.,* D-1), not his "money" or "labor." And it ordered damages to be paid "for the temporary taking of [Petitioner's] property." Pet.App. C-1. The District appealed.

2. Florida Appellate and Supreme Court Decisions.

On appeal to the Fifth District Court, a sharply divided panel also ruled for Petitioner. Pet.App. B. Each judge wrote a separate opinion. *Id.* The dissent questioned how there could be inverse condemnation of Petitioner's real property when, in the

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a part of … [Koontz's] real property," (R618 §II(D)); Petitioner applied to the District for "…[permits] to dredge and fill 3.4 acres of wetlands on the subject property," (R618 §II(E)); "the subject property lies almost entirely within the Riparian Habitat Protection Zone of the [Econ Basin] … and is subject to the District's regulatory jurisdiction," (R618 §II (G)); "approximately 11 acres of the subject property were herbaceous wetlands," (R618 §II(I)); & "[t]he exhibit identified as 'Boundary sketch of property Koontz purchased in 1972' is an accurate representation of the boundaries of the property Koontz purchased in 1972, a purchase that included the property that is the subject of this litigation." (R619-620 §II(T)).

constitutional sense, nothing had been taken. *Id.,* B-20. The two-judge majority upheld the taking of Petitioner's real property under an exaction taking theory. *Id*., B-10. The majority saw the issue as being "whether an exaction claim is cognizable when, as here, the land owner refuses to agree to an improper request from the government resulting in the denial of the permit." *Id*., B-6. Although the Fifth District discussed in dicta whether there could be exaction takings of money, it did not find an exaction taking of money or of the cost of off-site mitigation. It found instead an exaction taking of Petitioner's real property. *Id.,* B-10.

The District appealed to the Florida's Supreme Court, which then reversed the Fifth District Court's decision. Surveying this Court's decisions in the area of exaction takings, the Florida Supreme Court determined that an exaction taking of real property could only occur where the exaction involved a dedication of real property and where the regulatory agency actually issues a permit in exchange for the dedication. Pet.App. A-19. Finding neither circumstance present in this case, Florida's Supreme Court quashed the appellate decision. Pet. App. A-21. Petitioner now seeks review in this Court.

ARGUMENT

I. This Court Lacks Jurisdiction Because Petitioner Did Not Allege A Federal Takings Claim, But Reserved "All" Of His Federal Claims.

The Petitioner pegs this Court's jurisdiction under 28 U.S.C. 1257(a), on the basis of having filed a lawsuit in state court that alleges a federal constitutional claim. Pet. 1; *see also* U.S. Sup. Ct. R. 14(g)(i) (requiring that a Petition set forth "when the federal questions sought to be reviewed were raised [and] the method or manner of raising them … so as to show that the federal question was timely and properly raised and that this Court has jurisdiction"). Specifically, Petitioner claims to have filed an "inverse condemnation lawsuit in the Florida state courts challeg[ing permitting] decisions as violating the Fifth and Fourteenth Amendments of the United States Constitution." Pet. 1.[7]

But Petitioner did not file this lawsuit under the United States Constitution at all. Rather, he pled four carefully delineated *state law* claims, including one regulatory takings claim under the Florida Constitution. Count III states: "This is an

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[7] In fact, the Petition repeatedly claims that Petitioner alleged a federal takings claim: that he "Sue[d] for Inverse Condemnation Under *Nollan* and *Dolan*" (Pet. 4); that his "inverse condemnation suit . . . alleged that the District's off-site improvements condition was unconstitutional under the Fifth and Fourteenth Amendments" (Pet. 4); and that he "clearly stated a cognizable claim for regulatory taking under this Court's precedents and the Takings Clause of the U.S. Constitution" (Pet. 25).

action . . . arising out of the taking of the Plaintiff's property . . . without compensation in violation of Article X, Section 6, of the Florida Constitution." (R375 (Am. Compl. ¶48)). Nowhere did Petitioner's lawsuit assert a takings claim under the Fifth and Fourteenth Amendments.

Furthermore, not only did Petitioner *not* allege a federal constitutional claim, but paragraph 18 of his Amended Complaint expressly disclaimed "all" federal claims in his lawsuit:

> 18. Koontz explicitly reserves the right to assert all federal claims arising out of the same incidents or occurrences alleged herein for later resolution by a federal court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) and *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992).

(R368; R375 (Am. Compl. ¶47)). Petitioner readopted and realleged paragraph 18's disclaimer in his Count III takings claim "as if [it] were fully rewritten herein." (R375).

That no Fifth or Fourteenth Amendment claim was alleged in Petitioner's lawsuit is also clear from the certified question framed by the District Court of Appeal to the Florida Supreme Court:

> WHERE A LANDOWNER CONCEDES THAT PERMIT DENIAL DID NOT DEPRIVE HIM OF ALL OR SUBSTANTIALLY ALL ECONOMICALLY VIABLE USE OF THE PROPERTY, <u>DOES</u>

> ARTICLE X, SECTION 6(a) OF THE FLORIDA CONSTITUTION RECOGNIZE AN EXACTION TAKING UNDER THE HOLDINGS OF *NOLLAN* AND *DOLAN* WHERE, INSTEAD OF A COMPELLED DEDICATION OF REAL PROPERTY TO PUBLIC USE, THE EXACTION IS A CONDITION FOR PERMIT APPROVAL THAT THE CIRCUIT COURT FINDS UNREASONABLE?

Pet.App. A-2 n.1 (emphasis added).[8]

So contrary to the Petition's jurisdictional claim, Petitioner did not file a lawsuit alleging a federal claim sufficient to confer jurisdiction under 28 U.S.C. § 1257(a).[9] For purposes of § 1257(a), that a federal right or privilege is "specially set up or

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[8] That the Florida Supreme Court's opinion later rephrased the question to reference the Fifth Amendment does not change the fact that Petitioner did not assert, and the lower courts did not decide, a federal claim in this case. Instead, Petitioner reserved his federal claims for federal court.

[9] 28 U.S.C. § 1257(a) states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

claimed" has long set strict parameters for this Court's jurisdiction. *Illinois v. Gates*, 462 U.S. 213, 217-218 (1983). In the words of one early case, this Court's jurisdiction depends upon a party "plainly and distinctly" indicating that rights are being claimed under the constitution, treaties, or statutes of the United States. *F.G. Oxley Stave Co. v. County of Butler*, 166 U.S. 648, 654-655 (1897).

> [A party] must so declare; and, unless he does so declare 'specially' (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court.

Id. See also Howell v. Mississippi, 543 U.S. 440, 444 (2005) (dismissing case as improvidently granted where a claim was not properly presented as arising under federal law). Here, in contrast, by filing only a claim under state law and reserving "all" federal claims for later resolution, Petitioner has not "unmistakably" asserted a federal right or privilege. Consequently, the Petition should be denied on jurisdictional grounds.

II. The District Did Not Exact Money Or Improvements To District Land.

Beyond the major jurisdictional problem with the Petition, no exaction occurred in this case that would support Petitioner's theory of the case. That is, the Petition erroneously states that the District "conditioned permit approval upon the dedication of Koontz's money and labor [on District property]." Pet. 15.

First, the District did not require any money or labor on District property as a condition of approving Koontz's permit applications. Per Florida's established wetlands mitigation program, the District only required that Petitioner satisfactorily mitigate the damage from his proposed project and destruction of wetlands in *any* legally sufficient way. *See also* Fla. Stat. § 373.414(1)(b) (encouraging the applicant to propose acceptable mitigation and giving the applicant *alone* the responsibility of choosing the form of mitigation).

The District laid out some alternative mitigation proposals and told Petitioner to submit his own if he did not like District-proposed alternatives. Pet.App. E-3; R1628 ¶18 (Final Order). The final order described various of the potential alternative mitigation options—including a reduction of impacts, a combination of on-site and off-site mitigation, and mitigation located entirely off-site—but also contained the specific suggestion that "equivalent off-site mitigation enhancement options on other properties within the basin could also be developed and proposed by Koontz."[10] (R1628 ¶18). The final order likewise makes clear that although the permit was denied due to insufficient mitigation, it did not demand that Petitioner

[10] Any off-site mitigation had to be somewhere within the Econ Basin because section 373.414(8)(a), Florida Statutes (1993), required the Board to consider the cumulative impacts of wetland destruction within the same drainage basin when evaluating a permit application. "In-basin" mitigation avoids having cumulative adverse impacts within the same basin.

perform work on District property or on any other specific parcel of property. (R1623-1632).[11]

Not only did Petitioner turn down District-offered alternatives, but he never cooperated in the process or offered any alternative beyond his one and only first offer. *Cf. Plantation Landing Resort, Inc. v. United States,* 30 Fed. Cl. 63, 69 (1993), *aff'd without pub. op.,* 39 F.3d 1197 (Fed. Cir. 1994), *cert. denied,* 514 U.S. 1095 (1995) (rejecting a takings challenge to the denial of a dredge and fill permit where the Army Corps of Engineers assisted plaintiff in the regulatory process by providing several mitigation alternatives which plaintiff rejected). He also did not appeal or seek administrative review of the District's action directly, Pet.App. A-22. Instead he sued. Now to bolster his "extortion" claim, Petitioner cannot legitimately recast the various mitigation alternatives offered by the District as being "extortionate demands." They simply were not.

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[11] Because Petitioner's application proposed preservation that encompassed the remainder of his on-site property, additional mitigation required to offset impacts would necessarily be off-site, either on other property owned by Petitioner or on property owned by some other person or entity. (T247). District staff could readily access District-owned property to evaluate mitigation opportunities. And thus its final order described two District-owned properties within the Econ Basin (the Hal Scott Preserve and the Demetree Property) where off-site wetland enhancement mitigation could occur. (R1627-1628, ¶¶13 & 17). The final order, however, expressly refers to them as "example sites" for wetland enhancement and did not in any way limit Petitioner's ability to choose the type or location of off-site mitigation for his project. (R1623-1632).

Second, the court did not actually decide and award damages in this case on the basis of an exaction of Petitioner's "money and labor," but upon his real property having been unlawfully taken. The trial court ordered the District to compensate Petitioner "for the temporary taking of [Petitioner's] property." Pet.App. C-1. The trial court awarded compensation of $327,500, plus interest (Pet.App. C-2), based on Petitioner's expert's estimate of the rental value of the real property during the period of the taking (R1443 (Compensation Trial Tr.). An opinion by this Court on the Petition's Question Presented—which is not predicated on a taking of real property, but instead on an exaction taking of "money and labor"—would seem thus to be to an advisory opinion.

And one more thing, the Petition inflates the amount of mitigation that District-offered alternatives would have cost to enhance 50 acres of wetlands. Petitioner inaccurately states that "Koontz's expert" projected a mitigation cost "between $90,000 and $150,000" to enhance 50 acres. Pet. 4. In fact, Petitioner had *no* such expert and he did not dispute the District's $10,000 mitigation estimate. (R1696 (District's estimate)); (Trial Tr. T3-345). Petitioner *himself* submitted a real property appraisal that validated the District's estimate showing his property with permits to appraise at $457,000 after a reduction of "$10,000 for the enhancement of 50 acres of off-site wetlands" (R1773). Rather, the estimate that Petitioner cites of "between $90,000 and $150,000" came from a wholly

different project estimate by *the District's* expert. *See* R1627-28 ¶¶13-14, 16-17 (Final Order); T148-49.[12] So the undisputed cost estimate for the District-offered mitigation alternative of enhancing 50 acres of wetlands in the basin was not the six-figure sum that the Petition suggests, but only $10,000.

In the end, this case involves no District attempt to exact either Petitioner's money or specific improvements to District property. Instead, this case features a Petitioner who chose *himself* not to cooperate with the District towards resolving a mundane mitigation valuation dispute, and who sued instead of making an effort to resolve his differences administratively.

III. Review Of The Florida Supreme Court's Discussion of Federal Precedent Is Unnecessary.

Finally, even though Petitioner filed a lawsuit alleging state claims and reserved his federal claims for future federal litigation, the Florida Supreme Court's opinion did include a substantial review of this Court's existing takings precedents. *See* Pet.App. A-11-21. But its discussion of this Court's cases, including *Nollan* and *Dolan*, did not misstate the holdings of those cases or create a conflict for purposes of Rule 10 of this Court's rules. In fact, the

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[12] This different District projection provided essentially that by replacing 15 inoperative culverts at a much higher cost, Petitioner could forego having to enhance 50 acres of wetlands or preserve *any* of his 14-acre property as mitigation. R1627 ¶13-14; R1628 ¶¶16-17; T148-49.

Florida Supreme Court's reading of this Court's exaction-takings decisions is consistent with several recent federal circuit court cases. *See, e.g., McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2765 (2009) (requirement to install a storm pipe was not a *Nollan/Dolan* issue); *Iowa Assurance Corp. v. City of Indianola,* 650 F.3d 1094, 1096–97 (8th Cir. 2011) (requirement to an construct a fence around race cars not subject to a *Nollan/Dolan* exactions analysis); *West Linn Corporate Park, LLC v. City of West Linn,* 428 Fed.Appx. 700, 702 (9th Cir. 2011), *cert denied*, 132 S.Ct. 578 (2011) (requirement to construct off-site public improvements created no *Nollan/Dolan* problem).

The Petition suggests this Court should grant review of this case because of conflict among lower courts in the United States regarding the reach of *Nollan* and *Dolan*. Petition 16-27. However, there is no national split of authority on the main issue litigated and decided in this case: whether an exaction that does not involve the landowner's real property, but requires the landowner to spend money to comply with permitting requirements, can result in the inverse condemnation of the real property that the landowner seeks to develop. The District could not locate even one un-reversed court decision akin to this case in which a court found an exaction taking of real property based on government demanding something other than real property as a prerequisite for a permit. In other cases, the property found to have been taken was the property government demanded in exchange for permit issuance.

There is also no split of authority as to the subsidiary issue in this case, whether a permit denial can support an exaction taking. Although the appellate court below suggests that four state and lower federal court decisions support such an application (Pet. App. B-8), a close reading of the cases shows that three of the four are inapposite. *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620, 623-24 (Tex. 2004) involved a challenge to conditions of a regulatory approval. *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), predated *Nollan* and *Dolan,* so it did not address the question of whether *Nollan* and *Dolan* apply to a permit denial. *Salt Lake County v. Board of Education of Granite School District*, 808 P.2d 1056 (Utah 1991), was not a takings case and did not mention *Nollan* or *Dolan*; it was decided solely on state law grounds. In the fourth case, *Goss v. City of Little Rock*, 90 F.3d 306, 309 (8th Cir. 1996), the operative fact was that Little Rock had conditioned approval of a rezoning request "on the dedication by Goss of a portion of his property." In a subsequent appeal, however, the same court stated that the application for rezoning was denied. *Goss v. City of Little Rock, Ark.*, 151 F.3d 861, 862 (8th Cir. 1998). Thus, there appears to be, at most, only one fifteen year-old case, other than the appellate decision below, where *Nollan* and *Dolan* were applied to a permit denial. *Goss* and the appellate decision in the instant case do not constitute a body of conflicting law that demands resolution by this Court.

Before this Court decided *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), a nation-wide split of authority arguably did exist as to whether there

could be an exaction taking of money or the cost of a permitting requirement, where government, as a quid pro quo for permit issuance, required the landowner to donate money or spend money to comply with the permitting requirement. But neither money nor the cost of off-site mitigation was the property claimed or found to have been taken in this case. Even if this Court wished to address the advisory exaction-of-money issue, it would first have to decide whether such an exaction taking could arise in the context of a permit denial, an issue about which there is no conflict and has not been fully vetted in lower court decisions.

Because the Florida Supreme Court's decision is correct and consistent with recent federal circuit court cases, this case does not merit a commitment of this Court's scarce judicial resources.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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August 1, 2012

Case No. 11-1447

IN THE SUPREME COURT OF THE UNITED STATES

COY A. KOONTZ, JR.,

Petitioner,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.

_____/

CERTIFICATE OF SERVICE

I hereby certify that:

1. On August 1, 2012, this Brief in Opposition was served as hereafter explained.

2. Three copies of the Brief were delivered to a third-party commercial carrier for express delivery and addressed to the following counsel for Petitioner:

Paul J. Beard II
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

3. All parties required to be served have been served.

4. I am a member of the Bar of the Supreme Court of the United States.

DATED this 1st day of August, 2012.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the Response to Petition for Certiorari filed by the Respondent, contains 5,005 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 1, 2012.

Respectfully submitted,

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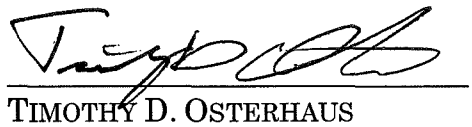

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