No. 08-1376

In the Supreme Court of the United States

GEORGE RUDY CUNDIFF AND CHRISTOPHER SETH CUNDIFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the wetlands at issue in this case are "waters of the United States" within the meaning of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (CWA); 33 U.S.C. 1362(7).

2. Whether a determination by the United States Department of Agriculture that petitioners' predecessor-in-interest had begun converting wetlands to farming use before December 23, 1985, eliminated the need to obtain a CWA permit for petitioners' activities.

3. Whether the district court correctly dismissed petitioners' takings counterclaims for lack of jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 555 F.3d 200. The opinion of the district court on statutory coverage (Pet. App. 34a-48a) is reported at 480 F. Supp. 2d 940. The opinions of the district court finding petitioners liable and dismissing their counterclaims are unreported. The opinion of the district court on the appropriate remedy (Pet. App. 49a-63a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2009. The petition for a writ of certiorari was filed on May 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. 1251 *et seq.*) (CWA or the Act), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). "Pollutant" is defined to include not only traditional contaminants but also solids such as "dredged spoil, * * * rock, sand [and] cellar dirt." 33 U.S.C. 1362(6). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The United States Army Corps of Engineers (Corps) and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing the CWA. The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). Those definitions encompass, *inter alia*, traditional navigable waters, which include waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands "adjacent" to other

covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1]

Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). The Act provides limited exemptions from this permit requirement. 33 U.S.C. 1344(f)(1). Even when the discharge of dredged or fill material qualifies for an exemption, a permit is still required under the CWA's recapture provision if the purpose of the discharge is to "bring[] an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). The United States may bring a civil enforcement action in district court against any person who violates the CWA by discharging dredged or fill material into covered wetlands without a permit. 33 U.S.C. 1319(b) and (d). In such an action, the government may seek injunctive relief and civil penalties. *Ibid.*

b. This Court has recognized that Congress, in enacting the CWA, "evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States*

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[1] To avoid confusion between the term "navigable waters" as defined in the CWA, see 33 U.S.C. 1362(7), and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to actual or proposed pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. See *id.* at 729-730 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 731 (plurality opinion); *id.* at 767-768 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 547 U.S. at 739 (plurality opinion), that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a continuous surface connection

to such water bodies, *ibid.*[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Id.* at 780. The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, concluded that the term "waters of the United States" encompasses, *inter alia*, all tributaries and wetlands that satisfy either the plurality's standard or that of Justice Kennedy. See *id.* at 810 & n.14 (Stevens, J., dissenting).

2. Petitioners own two tracts of land in Muhlenberg County, Kentucky, that together contain approximately 188 acres of wetlands. Pet. App. 3a, 5a. Those wetlands are adjacent to Pond and Caney Creeks, which are tributaries of the Green River, a traditional navigable water. *Id.* at 19a. Shortly after petitioner George Rudy Cundiff (Cundiff) purchased the southern tract in 1990, he began clearing the wetlands of trees, excavating drainage ditches, and placing the dredged spoil and other material into the wetlands next to the ditches. *Id.* at 3a-4a. Cundiff did not obtain a permit from the Corps for his activities. *Id.* at 4a. The Corps issued a cease-and-desist letter to Cundiff in October 1991. *Ibid.* De-

[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 547 U.S. at 732 n.5.

spite additional directives to stop his activities, Cundiff continued to discharge dredged spoil into the wetlands on the southern tract. *Id.* at 5a.

In 1998, Cundiff's son, petitioner Christopher Seth Cundiff (Seth Cundiff), purchased the tract immediately to the north of his father's property. Pet. App. 5a. With Seth Cundiff's knowledge, Cundiff quickly began excavating that tract and redepositing the spoil into the wetlands. *Ibid.* Federal and state officials repeatedly informed petitioners that they were required to obtain permits for their activities, but petitioners ignored those instructions and continued their activities without a CWA permit. *Id.* at 5a-6a. In total, petitioners dug approximately 11,900 linear feet of ditches on both tracts and redeposited that material into approximately 5.3 acres of wetlands. *Id.* at 25a. Petitioners' activities prevented the wetlands at the site from performing their prior functions, such as providing wildlife habitat and filtering and treating contaminants and toxins, including acid mine drainage, before they entered nearby waterways. *Id.* at 54a.

3. The United States brought suit against petitioners, alleging that they had violated Section 301(a) of the CWA by discharging pollutants into waters of the United States without a permit. Pet. App. 6a. The district court granted the government's motion for summary judgment on liability. *Ibid.* In granting the motion, the district court rejected petitioners' contention that they were not required to obtain a CWA permit because their predecessor-in-interest had obtained a determination from the United States Department of Agriculture (USDA) that he had begun converting wetlands to farming use before December 23, 1985. Mem. Op. and Order, Civ. Action No. 4:01CV-6-M at 9-10 (W.D. Ky. Apr. 24,

2003). The district court explained that "the sole purpose" of that determination was "to prevent the loss of USDA benefits," and that "the clear language of the" application form for the determination stated that "[t]he granting of [the] request . . . *does not remove other legal requirements* that may be required under State or Federal waters laws." *Id.* at 10 (quoting Pets. Resp. Br. Exh. M) (emphasis added by district court).

The district court also dismissed petitioners' counterclaims against the United States, including their claims that the government's actions constituted a taking of petitioners' property without just compensation. Mem. Op. and Order on Mot. to Dismiss Counterclaims, Civ. Action No. 4:01CV-6-M (W.D. Ky. Sep. 12, 2001). The court ruled that it lacked jurisdiction over the takings counterclaims because petitioners sought more than $10,000 in relief. *Id.* at 4-5 & n.4.

After a bench trial, the court enjoined petitioners from discharging pollutants into waters of the United States, and it ordered petitioners to restore the wetlands on their properties. Pet. App. 49a-63a. The court also imposed a civil penalty of $225,000 against Cundiff, but it suspended $200,000 of that amount on the condition that Cundiff adequately implemented the restoration plan. *Id.* at 60a-62a.

Petitioners appealed. While the appeal was pending, this Court issued its decision in *Rapanos*, *supra*. Pet. App. 6a. The court of appeals remanded the case to allow the district court to reconsider, in light of *Rapanos*, whether petitioners' wetlands are covered by the CWA. *Ibid.* On remand, the district court held that the United States may establish CWA jurisdiction over wetlands under either the standard set forth in the *Rapanos* plurality opinion or the standard identified in Justice Ken-

nedy's concurrence. *Id.* at 41a. The district court found that petitioners' wetlands were covered by the CWA under both standards. *Id.* at 42a-48a.

4. Petitioners took a second appeal, and the court of appeals affirmed. Pet. App. 1a-33a. The court held that it was unnecessary to decide whether Justice Kennedy's standard or the *Rapanos* plurality's standard governs CWA coverage because petitioners' wetlands are covered "under both Justice Kennedy's and the plurality's tests." *Id.* at 16a.

The court of appeals also held that petitioners' activities do not qualify for any of the exceptions to the CWA's permit requirements. Pet. App. 26a-27a. The court further noted that, even if petitioners' activities had qualified for one of the statutory exemptions, petitioners "would still have been required to get a permit under the 'recapture provision,' 33 U.S.C. § 1344(f)(2)," because the purpose of their activities was to "'bring[] an area of the navigable waters into a use to which it was not previously subject,' and the 'flow or circulation of navigable waters may be impaired or the reach of such waters reduced.'" *Id.* at 27a (quoting 33 U.S.C. 1344(f)(2)).

The court of appeals also affirmed the dismissal of petitioners' takings counterclaims. Pet. App. 30a. The court explained that the "Tucker Act gives the Court of Federal Claims exclusive subject matter jurisdiction over takings claims seeking more than $10,000." *Ibid.* Because petitioners sought more than $10 million for all of their counterclaims and had not limited their takings counterclaims to an amount within the jurisdictional threshold, the court of appeals held that "their takings counterclaims were properly dismissed." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioners contend (Pet. 4-20) that the Court should grant review to resolve a conflict among the circuits as to the proper application of *Rapanos*. Although the courts of appeals disagree as to the proper standard under *Rapanos* for determining whether a wetland is covered by the CWA, this case does not present a suitable opportunity to resolve that conflict. As both courts below correctly determined, petitioners' wetlands are covered by the CWA under any of the competing standards. Pet. App. 16a, 48a. The choice among those standards therefore would not affect the disposition of this case.

The First Circuit has held that the CWA covers all waters that satisfy either the standard announced by the *Rapanos* plurality or the "significant nexus" standard described in Justice Kennedy's concurrence. See *United States* v. *Johnson*, 467 F.3d 56, 60-66 (2006), cert. denied, 128 S. Ct. 375 (2007). The Eleventh Circuit, in contrast, has held that CWA coverage may be established only under the standard in Justice Kennedy's *Rapanos* concurrence. See *United States* v. *Robison*, 505 F.3d 1208, 1219-1222 (2007), cert. denied *sub nom. United States* v. *McWane, Inc.*, 129 S. Ct. 630 (2008). No court of appeals has adopted petitioners' view (see Pet. 7-9), that the *Rapanos* plurality opinion sets forth the controlling legal standard.[3]

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[3] Three other courts of appeals, in addition to the Sixth Circuit in this case, have discussed the question without definitively resolving it. See *United States* v. *Lucas*, 516 F.3d 316, 326-327 (5th Cir.), cert. denied,

This Court recently denied the government's petition for a writ of certiorari in *McWane*, which asked the Court to resolve the circuit conflict. The government continues to believe that this Court's clarification of the proper application of *Rapanos* may be warranted in an appropriate case. The present case, however, does not provide a suitable opportunity to decide which of the competing standards controls. The court of appeals concluded that the evidence established CWA coverage under both the *Rapanos* plurality's standard and that of Justice Kennedy, and it expressly declined to choose among the competing standards because that choice would make no difference to the outcome of this case. Pet. App. 16a-17a.

b. Petitioners argue that review should be granted because "the United States failed to prove that [petitioners] had met either the plurality's standard or the standard of Justice Kennedy." Pet. 10. The district court and the court of appeals concluded, however, that *both* standards were satisified. See Pet. App. 16a-17a, 48a. Petitioners' fact-bound disagreement with the concurrent determinations of the two lower courts does not warrant this Court's review. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, petitioners' objections to the rulings below lack merit.

Petitioners contend (10-18) that their wetlands do not satisfy the *Rapanos* plurality's requirement of a continuous surface connection with the adjacent creeks be-

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129 S. Ct. 116 (2008); *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 1000-1001 (9th Cir. 2007), cert. denied, 128 S. Ct. 1225 (2008); *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), cert. denied, 128 S. Ct. 45 (2007).

cause the wetlands are at a higher elevation than the creeks for much of the year. Nothing in the *Rapanos* plurality opinion, however, requires that wetlands and the traditional navigable waters or tributaries to which the wetlands connect be at the same elevation. Rather, as the court of appeals correctly held, the plurality's standard requires "that the adjacent channel contains a 'wate[r] of the United States,'" a standard clearly met here, and that the wetlands have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." Pet. App. 19a (quoting *Rapanos*, 547 U.S. at 742).

The district court found the latter requirement satisfied based on evidence that "there [is] no clear demarcation between waters and wetlands" at petitioners' site. Pet. App. 47a. The court of appeals agreed with that determination, noting the district court's finding that a channel in petitioners' wetlands "provides a largely uninterrupted permanent surface water flow between the wetlands and traditional waterways," *id.* at 21a, and "that the water flows through the channel into Pond Creek for all but a few weeks a year," *id.* at 19a. The court of appeals also noted that the district court had found "additional (and substantial) surface connections between the wetlands and permanent water bodies 'during storm events, bank full periods, and/or ordinary high flows,'" which provide "additional evidence" of a continuous surface connection. *Id.* at 21a-22a. The connections found by the courts below establish CWA coverage of the wetlands under the *Rapanos* plurality's standard.

Petitioners also contend (Pet. 18-20) that the government failed to establish a "significant nexus," within the meaning of Justice Kennedy's concurring opinion in *Rapanos*, between their wetlands and traditional naviga-

ble waters. That argument lacks merit. As both the district court and the court of appeals concluded, the wetlands have the requisite "significant nexus" to traditional navigable waters because those wetlands "perform significant ecological functions in relation to the Green River" and its tributaries, Pond and Caney Creeks. Pet. App. 17a; see *id.* at 42a-44a. Those functions include filtering acid mine runoff and sediment from a nearby abandoned mine, storing water that affects the "frequency and extent of flooding" on the Green River, and providing an "important habitat for plants and wildlife." *Id.* at 18a.

Petitioners argue (Pet. 18-20) that the government's evidence was insufficient to establish a significant nexus because the government did not conduct any soil, water, or other laboratory tests. As the court of appeals explained, however, laboratory tests are not necessary to establish CWA coverage under Justice Kennedy's standard. Pet. App. 19a. Although "a district court could find such evidence persuasive, [petitioners] point to nothing—no expert opinion, no research report or article, and nothing in any of the various *Rapanos* opinions—to indicate that [laboratory testing] is the sole method by which a significant nexus may be proved." *Ibid.*

Petitioners also contend that, under Justice Kennedy's standard, wetlands are covered by the CWA only if they "significantly affect the chemical, physical, *and* biological integrity of the other covered waters." Pet. 18 (emphasis added; internal quotation marks omitted). Contrary to that contention, a significant effect on any of those elements would be sufficient to establish a significant nexus. Cf. 33 U.S.C. 1251(a) (objective of Act "is to restore and maintain the chemical, physical, and bio-

logical integrity of the Nation's waters"). In any event, both the district court and the court of appeals found a significant effect on all three elements. See Pet. App. 17a-19a, 43a-44a.[4]

2. Petitioners also argue (Pet. 21-23) that they were not required to obtain a CWA permit because the prior owner of their land had obtained a determination from the United States Department of Agriculture (USDA) that conversion of the wetlands to farming use had begun before December 23, 1985. That argument lacks merit and does not warrant this Court's review.

The Food Security Act of 1985 (FSA), 16 U.S.C. 3821, denies certain benefits to farm program subsidy participants who convert wetlands in order to grow crops. See *United States* v. *Brace*, 41 F.3d 117, 121 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995). The law recognizes,

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[4] Petitioners assert (Pet. 13-14, 19-20) that the decision below conflicts with *Simsbury-Avon Preservation Society* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219 (D. Conn. 2007) (*Simsbury*), appeal pending, No. 07-0795CV (2d Cir.). A conflict between the decision below and a district court decision would not warrant this Court's review. See S. Ct. R. 10. In any event, there is no conflict. Contrary to petitioner's contention (Pet. 13-14), the district court in *Simsbury* did not adopt petitioners' proposed rule that wetlands and adjacent waters must be at the same elevation to have a continuous surface connection. The court found insufficient evidence of a continuous surface connection because the flow between the wetlands and the adjacent water was "intermittent." *Simsbury*, 472 F. Supp. 2d at 228-229 (citation omitted). Here, in contrast, the courts below found "a largely uninterrupted permanent surface water flow." Pet. App. 21a. Contrary to petitioners' contention (Pet. 19-20), the district court in *Simsbury* did not hold that a party seeking to establish a "significant nexus" between wetlands and adjacent waters must introduce laboratory tests. Although the court relied on laboratory "data from testing on lead concentrations," 472 F. Supp. 2d at 229, it nowhere suggested that laboratory tests are the *only* permissible evidence of a "significant nexus."

however, that wetlands converted prior to passage of the FSA (December 23, 1985) remain eligible for farm program benefits. 16 U.S.C. 3822(b)(1)(A). Petitioners' predecessor-in-interest obtained a USDA determination that conversion on his property had started before that date. See C.A. App. 1062; Pet. 22.

As the district court correctly held, that determination did not obviate the need for petitioners to obtain a CWA permit before discharging dredged or fill material into their wetlands. See Mem. Op. and Order, Civ. Action No. 4:01CV-6-M at 9-10 (W.D. Ky. Apr. 24, 2003). The CWA lists the specific circumstances in which dredged or fill material may be discharged into covered waters without a permit, 33 U.S.C. 1344(f)(1), and the Act does not exempt discharges merely because a landowner has a USDA determination that he began conversion of wetlands to farming use before December 23, 1985. The statutory and regulatory provisions under which such USDA determinations are issued make clear that the determinations simply exempt the recipients from ineligibility "for certain benefits provided by the [USDA] and agencies and instrumentalities of USDA." 7 C.F.R. 12.1(a); see 16 U.S.C. 3821-3822; 7 C.F.R. Pt. 12. The application form filled out by petitioners' predecessor-in-interest stated that the "granting of a [determination] request does not remove other legal requirements that may be required under State or Federal water laws." C.A. App. 1063; see *Brace*, 41 F.3d at 127.

In any event, petitioners do not contend that the court of appeals' resolution of this issue conflicts with any decision of this Court or another court of appeals. Nor do they assert that the issue is one of general importance. Petitioners also do not dispute the court of

appeals' holding (Pet. App. 27a) that, even if petitioners otherwise qualified for a CWA exemption, they would still have needed a permit because of the CWA's recapture provision, which requires a permit for discharges of dredged or fill material for the purpose of "bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. 1344(f)(2). Accordingly, this issue does not warrant the Court's review.

3. Petitioners also argue (Pet. 24-33) that the government's actions with respect to their wetlands effected a taking of their property without just compensation, in violation of the Fifth Amendment to the United States Constitution. Petitioners' takings claim is not properly before this Court. Neither the district court nor the court of appeals addressed the merits of that claim. Instead, the district court dismissed the claim for lack of jurisdiction, Mem. Op. and Order on Mot. to Dismiss Counterclaims, Civ. Action No. 4:01CV-6-M at 4-5 (W.D. Ky. Sep. 12, 2001), and the court of appeals affirmed that dismissal, Pet. App. 30a.

The court of appeals' resolution of the jurisdictional question is correct. The Tucker Act vests the United States Court of Federal Claims with jurisdiction over takings claims against the United States without regard to the amount in controversy. 28 U.S.C. 1491(a)(1); see *Jan's Helicopter Serv., Inc.* v. *FAA*, 525 F.3d 1299, 1304 (Fed. Cir. 2008). Federal district courts have concurrent jurisdiction over any such claims "not exceeding $10,000 in amount." 28 U.S.C. 1346(a)(2). Because petitioners sought more than $10,000 on their takings claim, the district court lacked jurisdiction over that claim. Pet. App. 30a.

Petitioners do not discuss, much less dispute, the jurisdictional rulings of the courts below. Accordingly, petitioners' takings claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009