No. _____

In The
Supreme Court of the United States

PETRO-HUNT L.L.C.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Dated: February 1, 2018

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QUESTIONS PRESENTED

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702, 715 (2010), a plurality of this Court held that "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation" (emphasis in original). The Takings Clause requires just compensation as the remedy for takings by the government. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987). Under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has exclusive and compulsory jurisdiction over takings claims against the United States for just compensation greater than $10,000.

The questions presented are:

1. Whether the Takings Clause applies to the decisions of federal courts, and if so, under what circumstances may federal courts review and remedy federal judicial takings claims.

2. Whether the Court of Federal Claims may adjudicate federal judicial takings claims against the United States when the remedy sought is just compensation and not invalidation of another federal court's decision.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are named in the caption. In accordance with Rule 29.6, Petitioner Petro-Hunt, L.L.C. certifies that its parent corporations, both of which are privately held, are: (i) Petro-Hunt Holdings, LLC; and (ii) the William Herbert Hunt Trust Estate. No publicly held corporation owns 10% or more of the stock of Petro-Hunt, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Petro-Hunt, L.L.C. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The Federal Circuit's opinion is reported at 862 F.3d 1370 (Fed. Cir. 2017). App. 1a-32a.[1] The Federal Circuit's order denying the petition for rehearing en banc is unpublished. App. 74a-75a. The Court of Federal Claims' opinion is reported at 126 Fed. Cl. 367 (2016). App. 33a-73a.

JURISDICTION

The Federal Circuit issued its opinion on July 17, 2017. The Federal Circuit denied a timely petition for rehearing en banc on October 3, 2017. App. 74a-75a. On December 15, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process

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[1] The Appendix to this Petition is cited as "App." The Joint Appendix filed in the Federal Circuit is cited as "J.A."

> of law; nor shall private property be taken for public use, without just compensation.

The Tucker Act, 28 U.S.C. § 1491(a)(1), provides, in pertinent part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

INTRODUCTION

In *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), the Court issued a fractured decision on whether the Takings Clause applies to state court judicial actions. This case presents an important and compelling opportunity to address a variation of the question that sharply divided this Court: whether, and under what circumstances, a *federal* court decision can constitute a judicial taking. The Federal Circuit has issued a series of irreconcilable opinions on this issue, resulting in a legal standard that is incoherent in theory and impossible to apply in practice. This Court's review is necessary to bring predictability to the law of federal judicial takings.

The four-Justice plurality in *Stop the Beach*, in an opinion written by Justice Scalia, held that "[i]f a

legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 715 (emphasis in original). While the Court unanimously agreed that no taking occurred, four Justices declined to embrace the plurality's judicial takings standard.[2] Justice Kennedy, joined by Justice Sotomayor, concluded that the principles that constrain the judiciary, such as due process, would usually provide the appropriate limitation for judicial power in most instances, unless those principles were inadequate to protect property owners. *Id.* at 742 (Kennedy, J., concurring in the judgment). Justices Breyer and Ginsburg found it unnecessary to answer the constitutional question. *Id.* (Breyer, J., concurring in the judgment).

Thus, six Justices in *Stop the Beach* concluded that there are constitutional limits to the judicial elimination of established property rights. Yet the Court could not agree on whether the source of those limitations is the Takings Clause, the Due Process Clause, or both, depending on the circumstances. The Court's decision prompted many practical questions, including how, where, when, or even if plaintiffs may raise a judicial takings claim, and what remedies are available when established property rights are eliminated by judicial action. Without a majority of the Court adopting the judicial takings doctrine, property owners and courts have struggled with the constitutional contours and viability of judicial takings.

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[2] Justice Stevens took no part in the consideration of the case.

No court has struggled more with this issue than the Federal Circuit. While other circuit courts have addressed the question of whether a *state* judicial decision could be a taking, the Federal Circuit—via its appellate jurisdiction over the Court of Federal Claims—has now repeatedly addressed the question of whether a *federal* judicial decision could be a taking requiring just compensation. And it has struggled mightily with this question. The Federal Circuit's difficulty is hardly surprising, given that *Stop the Beach* left open many questions as to the viability of the judicial takings doctrine as applied to *state* court judgments, and did not even begin to resolve how the fractured decision would apply to *federal* court decisions.

The facts of this case present an ideal opportunity to address the scope, if any, of the federal judicial takings doctrine. Petitioner sought just compensation from the United States in the Court of Federal Claims, alleging that the decision of the Fifth Circuit resulted in an uncompensated judicial taking of established property rights for federal public use. In the decision below, the Federal Circuit adopted the subjective rule that a federal judicial takings claim for just compensation is viable in the Court of Federal Claims only if a plaintiff's legal arguments "accept," rather than "challenge," the federal court's decision alleged to have effected the taking, regardless of the relief sought. This distinction is meaningless in the context of judicial takings claims for compensation because a plaintiff "accepts" that the decision was validly entered and seeks only just compensation for its results.

The Tucker Act, 28 U.S.C. § 1491(a)(1), requires that constitutional compensation claims against the United States be brought in the Court of Federal Claims. Yet, because the Federal Circuit's decision will operate to exclude judicial takings plaintiffs from that forum, federal judicial takings claims for just compensation can never be viable. That conclusion does not comport with the reasoning in the plurality's opinion or Justice Kennedy's concurrence in *Stop the Beach* or this Court's precedent on federal takings remedies. If federal judicial takings claims are indeed viable, and just compensation is an appropriate remedy, then this Court's review is crucial to ensure that property owners are not deprived of their constitutional right.

Justice Kennedy left the door open to a judicial takings doctrine, while observing that it posed "difficult questions" about both "how a party should properly raise a judicial takings claim" and "what remedy a reviewing court could enter after finding a judicial taking." *Id.* at 740. The plurality recognized these uncertainties, but argued that their resolution "hardly presents an awe-inspiring prospect." *Id.* at 723. This Court's resolution of these difficult issues as to federal judicial takings may not be an "awe-inspiring prospect," but it is a necessary one. By clarifying the law on federal judicial takings, the Court would provide the Federal Circuit and other federal courts much needed guidance in light of the divergent treatment of these significant and recurring issues.

STATEMENT OF THE CASE

A. Origin of the Dispute Over the Louisiana Mineral Property

There are valuable oil and gas minerals beneath what is now the Kisatchie National Forest in northern Louisiana. In Louisiana, reserved mineral interests take the form of a mineral servitude, rather than a separate mineral estate, and the servitude entitles the holder to explore for and produce minerals on another's land and reduce those minerals to possession and ownership. La. Rev. Stat. Ann. § 31:21. With certain exceptions, Louisiana mineral servitudes can be extinguished (i.e. revert back to the landowner), if no operations occur over ten years, which is called prescription for nonuse. *Id.* § 31:27(1).

To create the Kisatchie in the 1930s, the United States promised certain Louisiana landowners that if they sold their land for inclusion in the forest, they could reserve the valuable mineral rights forever. App. 35a. The landowners were originally unwilling to sell their land to the United States because they feared losing their mineral rights through prescription, which begins to run only when the surface and mineral ownership is divided. *Id.* To induce the sale of lands, the Government gave the landowners a legal opinion from the Assistant Solicitor for the U.S. Department of Agriculture affirming that the Louisiana law of prescription would not apply to lands purchased by the United States under the Weeks

Act. *Id.*[3] Relying on this assurance, between 1934 and 1937, the landowners sold to the United States over 180,000 acres of surface land—but not the mineral rights—in Grant, Winn, and Natchitoches Parishes. App. 3a-4a.

Before the land sales to the United States, the landowners formed Good Pine Oil Company and conveyed the mineral rights to it through six virtually identical conveyances, which created 96 mineral servitudes on the 180,000 acres of land. App. 3a.[4] At the time the landowners sold the land to the United States, they did not own the mineral rights and could not have conveyed them to the Government. Consistent with this approach, these mineral interests were expressly excluded from the land sales to the United States. App. 3a-4a. In 1942, Nebo Oil Company, Inc. ("Nebo") acquired the mineral rights. App. 4a. Petitioner is a successor in interest to Nebo. App. 6a

Less than ten years after the land sales, the Louisiana Legislature passed Act No. 315 of 1940, which created an exception to Louisiana's law of prescription for ten years nonuse when the surface property is owned by the United States. 1940 La. Acts No.

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[3] Weeks Act, ch. 186, § 6, 36 Stat. 961 (1911) (codified as amended in scattered sections of 16 U.S.C.) (authorizing purchase of lands to create national forests). The Weeks Act permitted owners selling land to the United States to reserve their mineral rights. 36 Stat. 962.

[4] Noncontiguous tracts create "as many mineral servitudes as there are tracts" unless the act creating the mineral servitudes provides otherwise. La. Rev. Stat. Ann. § 31:64. Tracts are noncontiguous when divided, for example, by a road or waterway or another's property.

315 (codified as amended at La. Rev. Stat. Ann. § 31:149 (2015)).[5] Act 315 retroactively confirmed that all outstanding but unprescribed mineral interests reserved in land sold to the United States were imprescriptible, so long as the United States remained the landowner. *Id.*

B. Federal Courts Deny the United States' Ownership Claim to the Louisiana Mineral Property

Reneging on its prior inducements and promises, the United States filed suit against Nebo in 1948 to test the imprescriptibility of the mineral rights under Act 315. *United States v. Nebo Oil Company, Inc.*, 90 F. Supp. 73 (W.D. La. 1950). The Government claimed that Nebo's mineral rights to an 800-acre tract of land in the Kisatchie, which was part of an 1120-acre servitude, a larger 25,000-acre conveyance of the surface, and a 37,532-acre mineral conveyance from the landowners to Good Pine Oil, had prescribed to the United States for nonuse. *Id.* at 77. After a trial on the merits, the U.S. District Court for the Western District of Louisiana made detailed findings of fact, including that the United States did not intend to buy and did not pay for the valuable mineral rights. *Id.* at 100. The district court held that Act 315 was constitutional and applied retroac-

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[5] Act 315 reads in full: "[W]hen land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America . . . , and by the act of acquisition, verdict or judgment, oil, gas, and/or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas and/or other minerals or royalties, still in force and effect, said rights so reserved or previously sold shall be imprescriptible."

tively to the deeds and conveyances to the United States, rendering the mineral interests imprescriptible. *Id.*

The United States appealed, and the U.S. Court of Appeals for the Fifth Circuit affirmed, holding that Act 315 did not impair the Government's "mere hope" as landowner to acquire the minerals through prescription, which was not a contract right under Louisiana law, and that retroactive application of Act 315 to the deeds and conveyances did not violate the Due Process Clause or dispose of the United States' property in violation of Article IV, Section 3, clause 2. *United States v. Nebo Oil Company, Inc.*, 190 F.2d 1003, 1009-10 (5th Cir. 1951).

C. Impact of the *Nebo Oil* Decision

When the litigation concluded, Nebo recorded affidavits of ownership in the parishes' land records, affirming its established property rights in all 180,000 mineral acres and attaching the Fifth Circuit's ruling and the district court's judgment and final decree that Act 315 applied to the deeds and conveyances to the United States executed prior to the effective date of the Act. J.A. 0145. The United States did not contravene Nebo's affidavits or bring any further action to dispute Nebo's title to any of the mineral acreage, and also caused the Government's own public land records to reflect that private parties owned these mineral rights in perpetuity. J.A. 0146.

In *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580 (1973), this Court held that Louisiana Act 315 of 1940 could not be applied retroactively to reserved mineral interests in lands the

United States acquired under the Migratory Bird Conservation Act before Act 315's passage. Under a threshold choice-of-law analysis, this Court found that Act 315 deprived the United States of its "bargained-for contractual interests" in that case. *Id.* at 596-97. This Court did not address Act 315's constitutionality and did not overrule *Nebo Oil*, distinguishing it in a footnote based on the fact-driven nature of that case:

> The Court of Appeals [in *Nebo Oil*] also emphasized that officials of the Department of Agriculture had represented to the Government's vendor that 'the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes.' . . . The Court of Appeals noted that the price paid by the Government did not reflect the value of any mineral rights and that the vendor would not have agreed to the land sale absent the Government's representation that Louisiana prescriptive law would not apply.

Little Lake Misere, 412 U.S. at 586 n.4 (citations omitted).

After leaving Nebo's property rights undisturbed for decades, the Government disregarded *Nebo Oil* and began sporadically issuing mineral leases on the mineral property in the 1990s. App 5a. The mineral rights owners disputed the leases with the Department of the Interior before eventually filing suit to quiet title. *Id.*

D. Petitioner's Quiet Title Action in the District Court

Petitioner acquired its undivided interest in the mineral rights in 1998. App. 6a. On February 18, 2000, Petitioner and the co-owners of the mineral rights filed a quiet title action against the United States in the U.S. District Court for the Western District of Louisiana. App. 7a-8a.[6] In 2001, the district court granted summary judgment in Petitioner's favor and held that res judicata precluded the United States from relitigating title to the mineral rights, which the court held belonged to Petitioner and co-owners in perpetuity. *Petro-Hunt, L.L.C. v. United States* (*Petro-Hunt I*), 179 F. Supp. 2d 669 (W.D. La. 2001). The district court held that all 180,000 mineral acres were equally situated to the 800 acres described in the Government's *Nebo Oil* complaint and susceptible to Act 315's application, the language in the virtually identical conveyances and mineral reservations would not have warranted a different legal conclusion in *Nebo Oil*, and any subsequent change in law did not alter the claim preclusion effect of *Nebo Oil*. *Id.* at 682.

The United States appealed, and the Fifth Circuit reversed and held that a change in law precluded the application of collateral estoppel on a threshold choice-of-law issue, and that res judicata applied only to the mineral rights in the 800-acre parcel in *Nebo Oil*, which remained imprescriptible. *Petro-Hunt, L.L.C. v. United States* (*Petro-Hunt II*), 365 F.3d 385,

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[6] The co-owners of the mineral servitudes were Kingfisher Resources, Inc. and Hunt Petroleum Corporation, who were not parties to Petitioner's later action in the Court of Federal Claims.

396-97 (5th Cir. 2004), *cert. denied*, 543 U.S. 1034 (2004). The Fifth Circuit further found that the law of prescription applied to these mineral rights and remanded the case for a determination as to whether any of the mineral servitudes had prescribed for non-use within the previous ten years. *Id.* at 398-99.

On remand, the district court entered a judgment in 2005 declaring that: (i) Petitioner remained the owner of 800 imprescriptible mineral acres of the 1120-acre *Nebo Oil* servitude and approximately 120,000 mineral acres that were now subject to the law of prescription; and (ii) approximately 60,000 mineral acres had prescribed to the United States. App. 8a-9a. The Fifth Circuit affirmed the district court's order denying Petitioner's request for a trial and the judgment on title giving ownership to the United States, even though in 1951 the Fifth Circuit affirmed the district court's finding that the Government did not pay for the mineral rights to these lands. *Petro-Hunt, L.L.C. v. United States* (*Petro-Hunt III*), No. 06-30095, 2007 WL 715270 (5th Cir. Mar. 6, 2007) (per curiam), *cert. denied*, 552 U.S. 1242 (2008).

E. Proceedings in the Court of Federal Claims

While the quiet title action was pending, Petitioner filed suit in the Court of Federal Claims on August 24, 2000, asserting a permanent takings claim in the event that Petitioner did not retain its mineral interests in the district court action. App. 9a. The Court of Federal Claims stayed the case until the title dispute ended. *Id.* Petitioner's permanent and temporary takings claims and contract

claims were later dismissed for lack of jurisdiction. App. 9a-12a.

Shortly after this Court issued its 2010 decision in *Stop the Beach*, Petitioner filed a restated second amended complaint, adding a judicial takings claim for just compensation on the grounds that the result of the Fifth Circuit's decision eliminated Petitioner's established property rights and effected an uncompensated taking of private property for public use. App. 11a. After the parties completed discovery, on February 29, 2016, the Court of Federal Claims granted the Government's motion to dismiss Petitioner's judicial takings claim for lack of jurisdiction, concluding that the court could not "determine whether the Fifth Circuit took plaintiff's property without scrutinizing the Fifth Circuit's decision," thus depriving it of jurisdiction. App. 73a. The Court of Federal Claims entered final judgment in the action.

F. The Federal Circuit's Decision

Petitioner appealed and on de novo review, the Federal Circuit affirmed the Court of Federal Claims' judgment dismissing all of Petitioner's claims for lack of jurisdiction. Petitioner seeks certiorari for the Federal Circuit's decision on its federal judicial takings claim. App. 28a-32a.

The Federal Circuit found that the Court of Federal Claims would be required "to review whether the Fifth Circuit's interpretation of precedent [on res judicata and collateral estoppel] was correct" to determine if Petitioner's established property rights in the mineral servitudes had been eliminated, resulting in a taking of private property for public use

without compensation. App. 29a. The Federal Circuit stated that "binding precedent" establishes that the Court of Federal Claims "cannot entertain a takings claim that requires the court to scrutinize the actions of another tribunal." App. 28a. Because Petitioner's claim "would require the Court of Federal Claims to overturn the decision of the Fifth Circuit," the Federal Circuit held that the Court of Federal Claims lacked jurisdiction. App. 32a.

To reconcile its contrary decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), where the Federal Circuit had approved the Court of Federal Claims' exercise of jurisdiction over a takings claim based on the decision of a federal court, the Federal Circuit found that Boise had "accepted" the validity of the other federal court's decision, while Petitioner appeared to be "challenging" the Fifth Circuit's decision with its legal arguments in support of its claim, despite the fact that both sought the same relief: just compensation. App. 30a.

Petitioner sought rehearing en banc, which the Federal Circuit denied on October 3, 2017. App. 74a-75a.

REASONS FOR GRANTING THE PETITION

This case raises the questions of whether a federal court's decision that eliminates established property rights can effect a Fifth Amendment taking, and if so, how courts may hear and remedy the taking. The Court's first attempt to answer these questions in *Stop the Beach*, in the context of a *state* court judgment, resulted in a divided decision that provided limited guidance on the many practical issues surrounding judicial takings claims—and prompted

even more questions. In the wake of that divided decision, the Federal Circuit has issued a series of irreconcilable decisions that have made the law of *federal* judicial takings hopelessly muddled.

Petitioner urges this Court to grant certiorari and remove the pervading uncertainty over the judicial takings doctrine. By using this opportunity to address the difficult questions and practical concerns left open in *Stop the Beach* in relation to a federal judicial taking, the Court can ensure that the constitutional rights of property owners are adequately protected.

I. Review is Necessary to Resolve Unsettled Questions on Judicial Takings Left Open in *Stop the Beach*

In *Stop the Beach*, this Court considered whether the Florida Supreme Court's decision effected a judicial taking by eliminating the petitioner's members' established property rights. Although unanimously holding that no judicial taking occurred because the petitioner's members had no established property rights under Florida common law, the Court split over the standard necessary to reach this conclusion. This case concerns how *Stop the Beach* applies to *federal* judicial takings.

Applying traditional Fifth Amendment doctrine, the plurality concluded that "the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking," and held that a judicial taking occurs when a court "declares that what was once an established right of private property no longer exists." *Id.* at 715. The plurality considered this

Court's precedents to provide no more special treatment to a taking effected by the judicial branch than that given to takings by the executive or legislature. *Id.* at 714-15. Ultimately, the plurality held that no judicial taking occurred because the petitioner's members lacked the established property rights that they claimed to have possessed under Florida common law. *Id.* at 733.

Justice Kennedy, joined by Justice Sotomayor, agreed that no taking occurred and would have reserved the question of whether judicial action can give rise to a takings claim, but maintained that the Due Process Clause could apply in such instances: "If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law." *Id.* at 735 (Kennedy, J., concurring in the judgment). Justice Kennedy did not conclude, however, that the Takings Clause could never apply to judicial decisions, leaving the door open to addressing the matter under the appropriate circumstances: "If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented." *Id.* at 742.

Issues of "practical considerations" arising from the plurality's approach concerned Justice Kennedy, although much of the discussion was in the context of claims for state court judicial takings and involved limits of ripeness and preclusion doctrines. *Id.* at 740-42. The first practical consideration was the

lack of clarity on how a plaintiff may bring a judicial takings claim. Justice Kennedy found it "unclear" how a plaintiff would raise a judicial takings claim and proposed that a party would possibly have to file a second, separate suit arguing that the outcome of the first case effected a taking. *Id.* at 740.

The proper remedy for a judicial taking was also a significant sticking point, with two remedies considered: just compensation and invalidation of the offending court decision. While the plurality would have reversed the Florida Supreme Court's judgment if it had effected a taking, it did not exclude compensation as a remedy for judicial takings. *Id.* at 723. Justice Scalia argued that there was "no reason why [just compensation] would be the exclusive remedy for a judicial taking," in response to Justice Kennedy's observation that "[i]t appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief . . . It is thus questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation." *Id.* at 723, 740-41 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-315 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)). These practical concerns over judicial takings procedures and remedies were not hollow—federal courts have struggled with them ever since *Stop the Beach*.

Justice Breyer, joined by Justice Ginsburg, agreed that the Florida Supreme Court's decision did not effect an unconstitutional taking but found it unnecessary to answer this constitutional question to dispose of the petitioner's case. *Id.* at 744-45

(Breyer, J., concurring in the judgment). In the context of the state court decision being considered, Justice Breyer saw the failure of the plurality's approach "to set forth procedural limitations or canons of deference" as potentially creating "the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law." *Id.* at 744. But Justice Breyer did not reject the plurality's approach: "I do not claim that all of these conclusions are unsound. I do not know." *Id.* at 743. Instead, the constitutional question was "better left for another day." *Id.* at 742.

Thus, neither concurrence rejected the plurality's conclusion that the Takings Clause places limits on the judicial elimination of established property rights. Still, without a majority of the Court approving the judicial takings doctrine, questions related to the doctrine's application have sharply divided courts faced with the issue. As to federal judicial takings, this case squarely presents for this Court's resolution the questions of constitutional law that were "better left for another day."

II. The Federal Circuit's Irreconcilable Decisions Have Resulted in an Untenable Legal Standard for Federal Judicial Takings

Addressing the judicial takings doctrine has proven difficult for the Federal Circuit. The Federal Circuit has struggled with federal judicial takings claims both before and after *Stop the Beach*. Because this Court has yet to provide guidance on the practical questions left open in *Stop the Beach* as they relate to *federal* court decisions—the plurality's

standard versus Justice Kennedy's concurrence, the proper court to hear such claims, the relief that may be awarded, and even the existence of judicial takings—coherent answers continue to elude the Federal Circuit. The Federal Circuit's decisions on federal judicial takings have injected even more uncertainty into this difficult area of law and resulted in an indeterminate legal rule.

A. The Federal Circuit Recognized the Judicial Takings Doctrine in *Smith v. United States*

In *Smith v. United States*, 709 F.3d 1114 (Fed. Cir. 2013), the Federal Circuit recognized that federal judicial action can give rise to a federal judicial takings claim in the Court of Federal Claims. The Federal Circuit was categorical in its recognition of the judicial takings doctrine: "[I]t was recognized prior to *Stop the Beach* that judicial action could constitute a taking of property . . . The Court in *Stop the Beach* did not create this law but applied it." *Id.* at 1116-17 (citing Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990)).

Smith involved a claim that the Tenth Circuit's decision revoking the plaintiff's law license constituted due process and equal protection violations and effected an uncompensated judicial taking. The Federal Circuit held that the Court of Federal Claims could provide no equitable relief for violations of the Due Process Clause or the Equal Protection Clause. *Id.* at 1116. The Federal Circuit also held that the plaintiff's judicial takings claim was untimely because it became actionable not when *Stop the Beach* was decided, but when the decision

alleged to have effected the taking was issued, which was more than six years before the claim was filed. *Id.* at 1117. The Federal Circuit did not, however, offer an opinion in *Smith* on how the judicial takings doctrine should be applied to takings claims for just compensation within its jurisdiction.

B. The Federal Circuit Previously Held That the Court of Federal Claims Could Hear a Federal Judicial Takings Claim

In *Boise*, 296 F.3d 1339, the Federal Circuit recognized that a judicial takings claim was cognizable in the Court of Federal Claims, although the claim was not explicitly termed a "judicial taking" by the courts or the parties. There, the Federal Circuit held that the Court of Federal Claims could hear the merits of a takings claim based on another federal court's injunction against certain logging activities on Boise's property under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. *Id.* at 1343-45. The Federal Circuit found that Boise "accepted" the validity of the district court's injunction and filed suit in the Court of Federal Claims to determine whether the court's decision effected a temporary taking. *Id.* at 1344. The Federal Circuit held that "[b]ecause the takings claim does not require the trial court to review the district court's actions, there is no constitutional defect in the Court of Federal Claims' assertion of jurisdiction." *Id.* at 1344-45.

C. The Federal Circuit Later Held That the Court of Federal Claims Lacks Jurisdiction Over Federal Judicial Takings Claims

After *Smith*, the Federal Circuit held in *Shinnecock Indian Nation v. United States*, 782 F.3d 1345 (Fed. Cir. 2015), that the Court of Federal Claims could not exercise jurisdiction over a federal judicial takings claim because it would require the court to review the district court's decision on the plaintiff's legal right to bring suit against the state of New York for the misappropriation of tribal lands. *Id.* at 1347. Unlike Petitioner, which had exhausted all appeals in its district court action, the Shinnecocks' appeal to the Second Circuit remained pending when the Federal Circuit decided the case. *Id.* at 1347. The Federal Circuit did not address *Smith* and concluded that the plaintiff's claim was an effort "to circumvent the statutorily defined appellate process and severely undercut the orderly resolution of claims," relying on its decisions in *Allustiarte v. United States,* 256 F.3d 1349 (Fed. Cir. 2001), *Innovair Aviation Ltd. v. United States,* 632 F.3d 1336 (Fed. Cir. 2011), and *Vereda, Ltda. v. United States,* 271 F.3d 1367 (Fed. Cir. 2001). *Id.* at 1353.

In *Allustiarte*, the Federal Circuit held that the Court of Federal Claims lacked jurisdiction over the plaintiffs' takings claim that was based on alleged errors by a court-appointed bankruptcy trustee. 256 F.3d at 1350-51. The plaintiffs contended that the bankruptcy court's approval of these actions constituted a taking, but some of the *Allustiarte* plaintiffs had not yet appealed the bankruptcy court's deci-

sion. *Id.* at 1353 & n.1. The Federal Circuit held that the case would have required the Court of Federal Claims to review the merits of the bankruptcy court's decision. *Id.* at 1352-53.

In *Vereda* and the similar *Innovair*, the Federal Circuit held that the Court of Federal Claims' jurisdiction over certain takings claims was preempted by the Controlled Substances Act ("CSA"), which gives district courts jurisdiction to review the merits of administrative forfeitures and provides mechanisms for district courts to provide just compensation for property the Government had wrongfully seized. *Vereda*, 271 F.3d at 1375; *Innovair*, 632 F.3d at 1344. The takings claim in *Vereda* was based on an allegedly invalid forfeiture of property. 271 F.3d at 1374. The claim in *Innovair* was based on an allegedly insufficient amount of compensation following an invalid forfeiture of property. 632 F.3d at 1344. The Federal Circuit held that under the CSA, the Court of Federal Claims was not free to determine the propriety of the forfeiture in *Vereda*, 271 F.3d at 1375, or to alter the just compensation awarded for the wrongful forfeiture in *Innovair*, 632 F.3d at 1344.

The Federal Circuit had previously distinguished both *Allustiarte* and *Vereda* in *Boise*. *Shinnecock* then attempted to distinguish *Boise* by noting that the sole forum to hear Boise's compensation claim was the Court of Federal Claims, while the Shinnecocks' pending Second Circuit appeal would provide the means to address errors in the district court's judgment. *Id.* at 1353 n. 9.

The Federal Circuit later applied *Shinnecock* and *Allusitiarte* in *Milgroom v. United States*, 651 Fed. App'x 1001 (Fed. Cir. 2016) (per curiam), holding that the plaintiff was "challenging" the validity of the district court's unappealed judgment authorizing a court-appointed receiver to oversee the sale of the plaintiff-debtor's property to satisfy the judgment obtained by his creditor; and thus, the Court of Federal Claims lacked jurisdiction over the federal judicial takings claim. *Id.* at 1005-06.

In *Stanford v. United States*, No. 17-809, currently before this Court on a petition for a writ of certiorari, the Federal Circuit summarily affirmed, per Federal Circuit Rule 36, the Court of Federal Claims' dismissal of the plaintiff's judicial takings claim, which based its decision on the holdings in *Allustiarte* and *Vereda*. *See Stanford v. United States*, 125 Fed. Cl. 570, 574 (2016), *aff'd*, 693 Fed. App'x 908 (Fed. Cir. 2017) (per curiam), *petition for cert. filed*, No. 17-809 (U.S. Dec. 1, 2017).

D. Attempting to Reconcile Its Conflicting Decisions, the Federal Circuit Enacted an Indeterminate Legal Rule for Federal Judicial Takings

In Petitioner's case, the Federal Circuit rejected its statements in *Smith* on judicial takings and stated that "the Court's decision in *Stop the Beach* that a cause of action for a judicial taking exists is a plurality decision and not a binding judgment." App. 32a. The Federal Circuit distinguished its decision in *Boise* from the *Shinnecock* line of cases on the ground that in *Boise*, the plaintiff "accepted the validity of the district court's injunction," whereas

here, the Federal Circuit construed Petitioner's arguments in support of its judicial takings claim as "challenging" another federal court's decision. App. 30a. Thus, in attempting to reconcile its conflicting decisions for application here, the Federal Circuit enacted the following indeterminate legal rule: federal judicial takings claims for just compensation are viable only if the plaintiff's legal arguments "accept," rather than "challenge," the federal court decision alleged to have effected a taking.

The Federal Circuit's contradictory, confusing, and indeterminate decisions illustrate the difficulty in evaluating judicial takings claims without this Court's measured guidance. It is important for property owners and the courts to have clear direction on the scope of federal judicial takings. This Court's review is necessary because the Federal Circuit's inconsistency can be corrected only by a decision of this Court.

III. The Federal Circuit's Decision Cannot Be Squared with *Stop the Beach* or This Court's Precedent on Takings Remedies

Review is warranted because the Federal Circuit has decided important questions of law left open in *Stop the Beach* that should be settled by this Court. The Federal Circuit's decision on how to bring a federal judicial takings claim and the available remedy is inconsistent with this Court's statements in *Stop the Beach* and conflicts with this Court's precedent on remedies for takings claims.

The available remedy for a federal judicial takings claim can dictate where the claim must be brought. Under the Tucker Act, the Court of Federal

Claims has exclusive jurisdiction to render judgment on claims against the United States for money damages above $10,000 that are "founded . . . upon the Constitution." 28 U.S.C. § 1491(a)(1). This Court has held that "a claim for just compensation under the Takings Clause *must* be brought in the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (emphasis added). Because the decision below operates to exclude federal judicial takings plaintiffs from the only forum available to hear and adjudicate just compensation claims against the United States, the Federal Circuit has effectively concluded that federal judicial takings claims for compensation are not viable.

The Federal Circuit's distinction between "accepting" and "challenging" another federal court's decision is meaningless in this context. A federal judicial takings claimant in the Court of Federal Claims "accepts" the premise that the judgment in question was validly entered—as it must—and requests only just compensation arising from its effects. The Court of Federal Claims need only look to another federal court's decision to determine whether it resulted in the uncompensated taking of established private property rights. Whether the decision was correctly or incorrectly decided is immaterial to the compensation question. The Court of Federal Claims could not abrogate another federal court's decision or alter the change in the property's title through a judgment awarding just compensation.

The Federal Circuit's decision embraces neither the plurality's standard for judicial takings nor Jus-

tice Kennedy's reasoning and adds more confusion to judicial takings jurisprudence. Nothing in *Stop the Beach* lends support to a decision that would suggest, much less require, the subjective threshold inquiry promulgated by the Federal Circuit.

By effectively nullifying federal judicial takings claims seeking just compensation, the Federal Circuit has ignored the crux of the *Stop the Beach* plurality opinion: judicial elimination of private property rights is subject to the limitations of the Takings Clause, just like any other legislative or executive taking. The Federal Circuit's decision also frustrates this Court's precedent on takings remedies by making just compensation unavailable for these particular takings claims. This Court has repeatedly declared that the Fifth Amendment "does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985) (citing *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981)). To that end, this Court has held that "the compensation remedy is required by the Constitution" for a taking by the government. *First English*, 482 U.S. at 316 (citations omitted).

It is important to note that the discussion of remedies for judicial takings in *Stop the Beach* concerned a state court decision, which poses a potential obstacle under the Eleventh Amendment to *federal* courts awarding just compensation for a *state* court taking. *See* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of an-

other State, or by Citizens or Subjects of any Foreign State."); *see also Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir. 2008) (citations omitted) ("[E]very court of appeals to have faced this question has expressly or implicitly . . . held that the Eleventh Amendment bars Fifth Amendment reverse condemnation claims brought in federal district court."). There are no constitutional impediments to an award of just compensation in the Court of Federal Claims for a *federal* judicial taking. Congress's power under article I, section 8, clause 1 of the Constitution to pay the debts of the United States has been delegated to the Court of Federal Claims, which "derives its being and its powers and the judges their rights from the acts of Congress passed in pursuance of other and distinct constitutional provisions." *Williams v. United States*, 289 U.S. 553, 569 (1933).[7]

If just compensation is an available remedy for federal judicial takings, then the Federal Circuit's anomalous rule cannot stand. Absent this Court's review, the Federal Circuit's decision will be the final word on this issue. Resolving the issue of federal judicial takings claims for compensation is a matter of tremendous constitutional importance. The significant and deeply-rooted interest in the efficacy of the just compensation guarantee would be well served if the question of how to secure relief for a federal judicial taking were addressed in this case.

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[7] Congress created the Court of Federal Claims as an Article I court in 1982. 28 U.S.C. § 171(a).

IV. This Case Is an Ideal Vehicle for the Court to Address Exceptionally Important and Recurring Issues

The questions presented are critical to the uniform disposition of federal judicial takings claims and concern a matter of undeniable importance—constitutional protection of property rights. Until this Court intervenes, property owners and courts will continue to expend considerable time and resources searching for answers to the judicial takings conundrum.

This case provides the Court with an excellent vehicle to address those "difficult questions" and "practical considerations" arising from the judicial takings doctrine's application to federal court decisions. The factual and procedural history of this case spans many years, but the questions of law are squarely presented for this Court's review. The Federal Circuit acknowledged that the facts necessary to determine jurisdiction over Petitioner's claim are generally undisputed. App. 3a. The judicial taking in this case involves a federal court resolving a title dispute in favor of a private party in one decision, only to revisit that dispute decades later and decide ownership of established property rights in the Government's favor. The Fifth Circuit affirmed in 1951 that the United States never paid compensation for this highly valuable mineral property that it now owns, and that fact remains unchanged. The judicial elimination of private property rights in this case also resulted in an uncompensated taking of property interests for federal public use, unlike some judicial takings claims in federal courts.

Not only are the questions presented important, they are recurring. Since *Stop the Beach* was handed down in 2010, the Federal Circuit has addressed federal judicial takings claims for compensation in five cases.[8] The plaintiff in *Stanford v. United States* has petitioned this Court to review the Federal Circuit's summary affirmance of the dismissal of her federal judicial takings claim for lack of jurisdiction. *See* Pet. for Writ of Certiorari, *Stanford v. United States*, No. 17-809 (filed Dec. 1, 2017). The Federal Circuit also addressed the jurisdictional question in several cases brought before *Stop the Beach*.[9]

Plaintiffs have pursued federal judicial takings claims in other circuits to varying results. The Third Circuit held that a bankruptcy court's adjudication of the parties' disputed and competing claims over rights under a settlement agreement could not constitute an unconstitutional taking of established property rights under *Stop the Beach*. *See In re Lazy Days' RV Center Inc.*, 724 F.3d 418, 425 (3d Cir. 2013). The plaintiffs' judicial takings claims were first addressed on appeal, but the Third Circuit made no mention of where those types of claims were properly pursued, or what remedy would be appropriate.

The Fifth Circuit, in an unpublished opinion, declined to entertain a plaintiff's argument on appeal that the district court's decision redefining the

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[8] *See Petro-Hunt*, 862 F.3d 1370; *Milgroom*, 651 Fed. App'x 1001; *Shinnecock*, 782 F.3d 1345; *Smith*, 709 F.3d 1114; *Stanford*, 125 Fed. Cl. 570, *aff'd*, 693 Fed. App'x 908.

[9] *See, e.g.*, *Allustiarte*, 256 F.3d 1349 (Fed. Cir. 2001); *Vereda*, 271 F.3d 1367 (Fed. Cir. 2001); *Boise*, 296 F.3d 1339 (Fed. Cir. 2002); *Innovair*, 632 F.3d 2011 (Fed. Cir. 2011).

boundaries of a navigable lake's high water mark, which changed the ownership of the land to the state, had effected a judicial taking, deeming the argument waived because it was not raised before the district court. *See Sanders v. Belle Exploration, Inc.*, 481 Fed. App'x 98, 103 (5th Cir. 2011) (per curiam). That conclusion begs the question: how can one argue to a court that its decision effected a taking before the court has made the decision? The Fifth Circuit's decision further illustrates this Court's need to address how and in what forum federal judicial takings claims may be brought.

Eight years have passed since *Stop the Beach*. During that time, the cases reflect the Federal Circuit's struggle to apply the judicial takings doctrine in a coherent manner. More federal judicial takings claims will arise as property owners become aware of their potential claim when judicial action eliminates their established property rights. And additional plaintiffs may bring their federal judicial takings claims in other circuits beyond the Federal Circuit, which will lead to more conflict, confusion, and unpredictability. Without this Court's direction, future federal judicial takings plaintiffs, and the courts hearing their claims, must proceed under great uncertainty.

There is no need for further percolation of these issues. The divergent treatment of federal judicial takings claims shows the difficulty in grappling with *Stop the Beach* without further clarification from this Court. It is imperative that this Court put to rest the confusion over federal judicial takings. In turn, the Court will ensure that plaintiffs are pro-

tected when judicial action eliminates their established property rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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