No. 17-1090

In The
Supreme Court of the United States

PETRO-HUNT L.L.C.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF OF PETITIONER

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This case is essentially about the protection of a constitutional right. A plurality of this Court in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702, 715 (2010), opened the door for plaintiffs to bring judicial takings claims under the Fifth Amendment. The plurality held that no more special treatment is owed to a taking by the judicial branch than that given to takings by the executive or legislature. The Government disagrees. The Federal Circuit agrees in theory but has created a rule that in practice bars federal judicial takings claimants at the courthouse door. If the decisions of federal courts can effect a taking that requires just compensation under the Takings Clause, then this Court can remove the confusion over federal judicial takings by providing a clear framework for reviewing and remedying such claims. By granting review in this case, the Court can ensure that Petitioner and other claimants are not deprived of an opportunity to vindicate their constitutional right.

I. The Court Should Grant Certiorari to Address the Constitutional Contours of Federal Judicial Takings After *Stop the Beach*

The Government dismisses the *Stop the Beach* plurality opinion as imprudent and without effect, arguing that the judicial takings doctrine "would break sharply with historical practice and raise significant separation-of-powers concerns." Opp. 9. While the plurality opinion may be non-binding precedent, "as the considered opinion of four Members

of the Court it should obviously be the point of reference for further discussion of the issue." *Texas v. Brown*, 460 U.S. 730, 737 (1983). Yet without a majority embracing the doctrine—or subsequent clarification from this Court—federal judicial takings claims are in legal limbo, a position that the Government would prefer to maintain so that the contours of the claims remain undefined and their dismissal is all but certain.

There are significant reasons for the fact that no court has held that a federal court's decision effected a judicial taking of private property for public use. *See* Opp. 8. First, federal courts have been hesitant to recognize or apply the judicial takings doctrine without this Court's further guidance. *Cf. Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 625-26 & n.10 (7th Cir. 2014) (stating that *Stop the Beach* set no binding precedent at all on substantive due process or the Takings Clause); *Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 435 n.5 (7th Cir. 2011) (recognizing "two issues that sharply divided [this Court] without producing a majority opinion . . . whether a court decision can effect a compensable taking of property, and second, if so, what role federal courts might play in reviewing those decisions."); *Vandevere v. Lloyd*, 644 F.3d 957, 963 n.4 (9th Cir.), *cert. denied*, 565 U.S 1093 (2011) ("[A]ny branch of government could, in theory, effect a taking."); Pet. App. 55a ("The contours—and even the existence—of a judicial takings doctrine has been debated in federal courts and in legal scholarship.") (collecting cases and authorities).

Second, few federal judicial takings cases have involved judicial decisions resulting in private

property being transferred to public use, particularly federal public use. Petitioner's case is the only federal judicial takings case after *Stop the Beach* that has involved the same parties, the same property, and the same court, but different judicial decisions made decades apart that changed ownership of the property to federal public use. In this case, nearly 70 years ago the Fifth Circuit found that the United States did not own, did not intend to buy, and did not pay any compensation for property that the Fifth Circuit later held the United States now owns.

While this Court has declined to review other judicial takings cases after *Stop the Beach,* it has also repeatedly indicated that a denial of certiorari does not reflect on the merits of the case. *E.g., Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950) (Frankfurter, J., respecting denial of petition for writ of certiorari) ("Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review."). Those cases, however, do highlight that the judicial takings question is recurring in the lower courts.

To sow confusion and distract the Court from the issues presented by this Petition, the Government erroneously states that "this Court declined to review petitioner's judicial-takings claim when petitioner sought review of the Fifth Circuit decision that petitioner asserts was a judicial taking." Opp. 15 (citing Pet. at 30, *Petro-Hunt, L.L.C. v. United States*, 543 U.S. 1034 (2004) (No. 04-190)). The

Government's assertion cannot withstand scrutiny. None of the questions presented to this Court for review during Petitioner's quiet title action concerned a judicial taking. In its 2004 petition, Petitioner noted that if the Fifth Circuit's decision became final, Petitioner would pursue its just compensation remedy against the United States in the CFC. The Court's denial of certiorari in Petitioner's quiet title action is unrelated to this case. The Government's arguments to the contrary are without merit.

The need to address the constitutional contours of federal judicial takings claims, and thus ensure the constitutional protection of property rights, is a pressing matter. The confusion created by *Stop the Beach*'s unanswered constitutional questions will only continue in federal courts absent this Court's final word.

II. This Court's Review is Necessary to Remedy the Federal Circuit's Indeterminate Legal Rule for Federal Judicial Takings Claims for Just Compensation

The Government does not defend the Federal Circuit's rule that the CFC can hear federal judicial takings claims for compensation only if the plaintiff's legal arguments "accept" rather than "challenge" the federal court decision alleged to have effected the taking. Instead, the Government recasts the decision here as one on the merits, insisting that the Federal Circuit resolved Petitioner's claim by holding that Petitioner lacked a cognizable property interest that would give rise to a taking. Opp. 8, 10, 15. The Government is mistaken.

The CFC never ruled that Petitioner lacked a cognizable property interest in the mineral servitudes at issue, only that the court was without jurisdiction to even determine if that was so, based on its understanding of the judicial takings doctrine and assessing an "established property right." *See* Pet. App. 69a ("Indeed, deciding [Petitioner's] current claim on the merits would require this court to determine if [Petitioner] had an established property right that was taken by the Fifth Circuit."). Thus, the Federal Circuit had no occasion to rule on whether Petitioner held a cognizable property interest. The issue before the Federal Circuit was whether the CFC has the authority under the Tucker Act, 28 U.S.C. § 1491(a)(1), to hear and remedy federal judicial takings claims for compensation. Despite the fact that Petitioner sought only just compensation and not invalidation of another court's decision, the Federal Circuit ultimately concluded that Petitioner's claim would require the CFC to reach beyond its jurisdiction to review whether the Fifth Circuit's decision was "correct." Pet. App. 29a, 31a.

Petitioner is seeking review of the Federal Circuit's anomalous rule, in light of the constitutional questions left open in *Stop the Beach*, so that the Court can provide a clear constitutional framework for reviewing and remedying federal judicial takings.[1] If the Takings Clause applies to the decisions of federal courts and just compensation is an available

[1] This Court frequently reviews cases to resolve a significant constitutional dispute before remanding to address the merits, particularly in takings cases. *E.g., Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 38-40 (2012); *Phillip Morris USA v. Williams*, 549 U.S. 346, 357-58 (2007); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

remedy for such claims, then the Federal Circuit's decision cannot stand. When the sole remedy sought is just compensation—not reversal of the decision in question—federal judicial takings claims should be allowed to proceed on the merits in the CFC. Any merits decision would then determine established property rights under traditional Fifth Amendment takings jurisprudence: by examining "existing rules and understandings" and "background principles" derived from independent sources of property law. *Lucas*, 505 U.S. at 1030.

The Government's assertions about the Federal Circuit's decisions in *Smith v. United States*, 709 F.3d 1114 (2013), *cert. denied*, 134 S. Ct. 259 (2013), and *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), *cert. denied*, 538 U.S. 906 (2003), only reinforce the notion that the Federal Circuit's jurisprudence on federal judicial takings is hopelessly muddled and should be resolved by this Court. The Government contends that the Federal Circuit did not recognize that judicial action could give rise to a takings claim. Opp. 14. But even the CFC in this case said that *Smith* recognized that "judicial takings can exist, although without concluding that a judicial taking actually occurred." Pet. App. 58a-59a; *see also* Pet. 19-20. The Government alternately claims that the Federal Circuit's statements in *Smith* rest on a "misunderstanding" of *Stop the Beach*. Opp. 14 n.2. Rather, the Federal Circuit's "misunderstanding" was its attempt to reconcile conflicting opinions by creating a disjointed legal rule and effectively barring federal judicial takings claims for compensation at the outset.

As the Government acknowledges, the Federal Circuit previously held in *Boise* that the CFC possessed jurisdiction to hear a federal judicial takings claim. Opp. 12-13. The Government maintains that the Federal Circuit attempted to reconcile *Boise*'s contradictory holding by finding that the plaintiff "accepted" the court's decision alleged to have effected the taking. Opp. 13; *see also* Pet. 23-24. But the Government's mere restatement of the Federal Circuit's flawed reasoning remains just as confusing and unhelpful in this context. The plaintiff in *Boise* was not "accepting the validity of the district court's injunction," insofar as the plaintiff argued that the injunction violated the Constitution.

Contrary to what the Government implies, there is no possibility for a circuit split to develop on federal judicial takings claims for compensation against the United States. Opp. 15. Under the Tucker Act, 28 U.S.C. § 1491(a)(1), if a plaintiff seeks more than $10,000 in just compensation for a federal judicial taking, the claim must go through the CFC and the Federal Circuit. *See also* Pet. 24-25. The Government's argument is not grounded in the Tucker Act's limitations and would promote more unpredictability in federal courts.

With the plurality's basic framework and the concurrences' reservations in *Stop the Beach*, this Court set the stage for the debate over the constitutional contours and practical considerations of federal judicial takings. That debate has been waged in the Federal Circuit to an untenable end, in large part due to a lack of guidance from this Court. Under its flawed decision here, the Federal Circuit will now make short shrift of federal judicial takings

claims at the threshold, regardless of their merit. This case presents the Court with an ideal opportunity to bring clarity to the law and ensure that federal judicial takings claims are properly resolved. The question of whether federal courts' decisions can effect Fifth Amendment takings entitling plaintiffs to pursue just compensation from the United States is a significant issue that is squarely presented by this case, impacts other takings claimants, and warrants this Court's review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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