No. 17-712

In The Supreme Court of the United States

KEVIN BROTT, *ET AL.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF OF PROFESSOR JAMES W. ELY, JR. AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can the federal government take private property and deny the owner the ability to vindicate his constitutional right to be justly compensated in an Article III court?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

IDENTITY AN INTEREST OF AMICI CURIAE[1]

Professor James W. Ely, Jr. is a Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University. He has received national acclaim for his work as a legal historian and property rights expert. He has authored books, treatises, and articles that have received widespread praise from legal historians and scholars, including *The Law of Easements and Licenses in Land* (Thomson Reuters/West, rev. ed. 2017) (with Jon W. Bruce), *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford Univ. Press, 3d ed. 2008), and *The Contract Clause: A Constitutional History* (Univ. Press of Kansas, 2016). Recently, in *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1260-61 (2014), this Court cited his treatise, *Railroads and American Law* (Univ. Press of Kansas, 2001), in its discussion of the history of the transcontinental railroad.

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the

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[1] Pursuant to Supreme Court Rule 37.2(a), notice of amici's intent to file this brief was received by counsel of record for all parties at least ten days prior to the filing of this brief and all parties have consented to this filing. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to vindicate the right to just compensation. *See, e.g.*, *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001); *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000). Because the decision below presents an imminent threat to both private property rights and the Just Compensation Clause of the Fifth Amendment, Professor Ely and MSLF respectfully submit this amici curiae brief in support of Petitioners (hereinafter "Landowners") and urge this Court to grant the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

This case began when Landowners filed an inverse condemnation action under the Just Compensation Clause of the Fifth Amendment against the United States for the taking of their respective private property interests in a 3.35-mile railroad easement. *Brott v. United States*, No. 1:15-cv-38, 2016 WL 5922412 at *1 (W.D. Mich. Mar. 28, 2016) ("*Brott I*"). The Landowners invoked the jurisdiction of the district court under: (1) 28 U.S.C. § 1331, which provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"; and (2) 28 U.S.C. § 1346, *i.e.*, the Little Tucker Act, which limits the

jurisdiction of district courts to just compensation claims not exceeding $10,000 (the Landowners requested an award in excess of $10,000). *Id.*

In addition to seeking just compensation for the taking of their private property interests, the Landowners framed their case to present an as-applied challenge to the constitutionality of three federal statutes. First, the Landowners challenged the Little Tucker Act, which denies jurisdiction to Article III courts over just compensation claims exceeding $10,000. *Id.* Second, the Landowners challenged 28 U.S.C. § 1491, *i.e.*, the Big Tucker Act, which vests the Court of Federal Claims ("CFC") with jurisdiction over just compensation claims exceeding $10,000. *Id.* Finally, the Landowners challenged 28 U.S.C. § 2402, which provides that just compensation claims brought under the Little Tucker Act cannot be tried by a jury in a district court. *Id.* at *4.

On March 28, 2016, the district court granted the United States' Motion to Dismiss. *Id.* at *1. The district court held that it lacked jurisdiction over the Landowners' just compensation claim under both 28 U.S.C. § 1331 and the Little Tucker Act. *Id.* at *2-5. Despite the absence of "exclusive" language in the Big Tucker and Little Tucker Acts, the district court ruled that the Landowners' just compensation claim in excess of $10,000 "[is] within the exclusive jurisdiction of the [CFC]." *Id.* at *3. The district court also rejected the Landowners' argument "that the Fifth Amendment's guarantee of just compensation is 'self-executing'" and

does not require a waiver of sovereign immunity. *Id.* at *4.

A panel of the Sixth Circuit affirmed the district court, ruling that "Congress has acted constitutionally in bestowing on the Court of Federal Claims, an Article I court, exclusive jurisdiction over the landowners' compensation claims and removing the right to a jury trial for claims brought in the Court of Federal Claims and in the district court under the Little Tucker Act." *Brott v. United States*, 858 F.3d 425, 427 (6th Cir. 2017) ("*Brott II*"). The Landowners sought rehearing *en banc*, but the Sixth Circuit denied their petition. The Landowners now seek this Court's review.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision directly conflicts with the plain language of the Big and Little Tucker Acts, which do not vest the CFC with exclusive jurisdiction over just compensation claims exceeding $10,000. *See* 28 U.S.C. § 1346; 28 U.S.C. § 1491. The decision also directly conflicts with this Court's opinion in *United States v. Lee*, 106 U.S. 196 (1882), as well as the text of Article III, Article VI, and the Fifth Amendment. In short, the decision allows Congress to transfer jurisdiction over constitutional-based claims to a legislative tribunal that lacks the protections of Article III, places mere statutes and judge-made common law above the Constitution, and rests upon an understanding of

sovereign immunity that is entirely alien to the Constitutional text and structure devised by the Framers.

REASONS FOR GRANTING THE PETITION

I. THE VINDICATION OF PRIVATE PROPERTY IS OF EXCEPTIONAL IMPORTANCE.

"The right of property is the guardian of every other right[.]" Ely, *The Guardian of Every Other Right*, at 26 (quotations omitted). This principle is embodied in the Just Compensation Clause of the Fifth Amendment, which provides, *inter alia*, that: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. In fact, "[t]he principle reflected in the [Just Compensation] Clause goes back at least 800 years to the Magna Carta. . . ." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015).

Chapter 29 of the 1225 charter of the Magna Carta provides: "'[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, . . . but by lawful judgment of his peers, or by the law of the land. . . .'" Bernard H. Siegan, *Economic Liberties and the Constitution* 7 (2d ed. 2006) (quoting Magna Carta (1225)). Early American colonists believed the right to property, as guaranteed in the Magna Carta, was part of their birthright as English subjects. *Id.* at 9.

The influence of the Magna Carta on our government is clear. For example, "colonial leaders viewed the security of property as the principal function of

government." Ely, *The Guardian of Every Other Right*, at 28. The Framers of the Constitution also recognized that "principles of good government started with the protection of private property – that guardian of all other rights." Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections of the* Lake Tahoe *Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2002); *see* Ely, *The Guardian of Every Other Right*, at 43. Thus, the primary role of the federal government is to protect private property.

This Court has consistently recognized that the protection of private property is essential to a free society. For example, this Court declared:

> Due protection of rights of property has been regarded as a vital principle of republican institutions. Next in degree to the right of personal liberty . . . is that of enjoying private property without undue interference or molestation. *The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property.* It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (emphasis added) (internal citations and quotations omitted); *see Wilkinson v.*

Leland, 27 U.S. 627, 657 (1829) (Opinion of Justice Story) ("[G]overnment can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of a legislative body, without any restraint."). Without property rights, individuals have no "buffer protecting [them] from government coercion." Ely, *The Guardian of Every Other Right*, at 43.

II. THE SIXTH CIRCUIT'S RULING THAT THE COURT OF FEDERAL CLAIMS POSSESSES EXCLUSIVE JURISDICTION CONFLICTS WITH THE PLAIN LANGUAGE OF THE TUCKER ACT.

Contrary to the Sixth Circuit's ruling that the Tucker Act vests the Court of Federal Claims with exclusive jurisdiction over claims against the United States exceeding $10,000, the law in fact does no such thing. As this Court noted in *Bowen v. Massachusetts*, the "assumption [of exclusivity] is not based on any language in the Tucker Act," and the CFC's "jurisdiction is 'exclusive' only to the extent Congress has not granted any other court authority to hear the claims. . . ." 487 U.S. 879, 910 n.48 (1988). The term "exclusive" never appears in the Tucker Act. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). Within the same statute as the Little Tucker Act, however, Congress did provide that "district courts . . . shall have *exclusive* jurisdiction of civil actions on claims against the United States" for tortious actions. *Compare id.* § 1346(b)(1) (emphasis added) *with id.* § 1346(a)(2). This Court has long accepted the basic rule of statutory construction

that "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Thus, if Congress had intended for the CFC to have "exclusive" jurisdiction, Congress would have explicitly said so.

As it turns out, Congress has granted another court authority to hear the claims at issue in this case. In passing 28 U.S.C. § 1331, Congress vested the district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." There is no doubt the Landowners' just compensation claim "aris[es] under the Constitution. . . ." 28 U.S.C. § 1331; *see Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936) ("arising under," as used in 28 U.S.C. § 1331, means "the right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action"). Here, the Landowners sought to vindicate their right to just compensation for the taking of their private property by the United States. *Brott I*, 2016 WL 5922412 at *1. Because this right to just compensation necessarily "arises under the Constitution," it satisfies the requirement of 28 U.S.C. § 1331 for invoking the jurisdiction of the district court.

III. THE SIXTH CIRCUIT'S RULING THAT TAKINGS CLAIMS REQUIRE THE GOVERNMENT TO WAIVE ITS SOVEREIGN IMMUNITY CONFLICTS WITH THIS COURT'S OPINION IN *UNITED STATES V. LEE*.

The Sixth Circuit concluded that "the fact that the Fifth Amendment creates a right to recover just compensation does not mean that the United States has waived sovereign immunity such that the right may be enforced by suit for money damages." *Brott II*, 858 F.3d at 432 (internal quotations and citations omitted). In so concluding, however, the Sixth Circuit directly contradicts this Court's decision in *United States v. Lee*, 106 U.S. 196 (1882).

In *Lee*, this Court had to determine whether the plaintiff could sue the United States, or its officers, for taking his property in violation of the Fifth Amendment. *Id.* at 204-05. In answering this question, the Court examined the history of the doctrine of sovereign immunity and explained:

> Under our system the *people* . . . are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person . . . to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the

> United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Id. at 208-09 (emphasis in original). Additionally, regarding the Fifth Amendment, the *Lee* Court provided:

> If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Id. at 218. As a result, this Court held that the doctrine of sovereign immunity did not prohibit the plaintiff from suing officers of the United States for the taking of his property without paying just compensation under the Fifth Amendment. *Id.*

By relegating the discussion of *Lee* to a footnote and discounting its precedential value, the Sixth Circuit sidestepped this important precedent. *See Brott II*, 858 F.3d at 433 n.6. While the Sixth Circuit correctly noted that the suit in *Lee* was styled as an ejectment action, *id.*, the panel failed to note that the action was brought for the purpose of obtaining just compensation for a taking under the Fifth Amendment. *Id.*

Here, the Landowners seek the same relief as the plaintiff in *Lee*. As such, the doctrine of sovereign immunity can no more preclude an inverse condemnation

action seeking just compensation under the Fifth Amendment today than it could during the time of *Lee*.

IV. THE SIXTH CIRCUIT'S OPINION WOULD ALLOW CONGRESS TO EVADE THE JUDICIAL SAFEGUARDS OF ARTICLE III BY A SIMPLE ACT OF LEGISLATION.

Article III of the U.S. Constitution vests "the judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and then declares that the judges wielding that power "shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. The next section mandates that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies to which the United States shall be a Party. . . ." U.S. Const. art. III, § 2, cl. 1; *Marbury v. Madison*, 5 U.S. 137, 178 (1803) ("The Judicial power of the United States is extended to all cases arising under the constitution."). The "judicial Power" means "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

Any court seeking to exercise this "judicial Power" must conform to the model laid out in Article III, section 1. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) (Article III "inexorabl[y] command[s]" that: "[t]he judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."). Article III provides a "guarantee of judicial impartiality" by "defin[ing] the power and protect[ing] the independence of the Judicial Branch." *Id.* at 58. For example, district court judges hold office "during good Behavior" and receive a salary that remains undiminished while holding office. U.S. Const. art. III, § 1.

Here, the Landowners' just compensation claim requires an interpretation of the Constitution. *See Marbury*, 5 U.S. at 177 ("It is emphatically the province of the judicial department to say what the law is."). As such, the Landowners' claim will require application of the "judicial Power," which may only be exercised by an Article III court. *See Muskrat*, 219 U.S. at 357 ("Whenever a claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case[,]" within the meaning of Article III.).

Granted, this Court has upheld the constitutionality of Article I courts in three very limited circumstances: (1) territorial courts; (2) courts-martial; and (3) legislative courts and administrative agencies that adjudicate cases involving "public rights." *N. Pipeline*, 458 U.S. at 58-59, 70; *see also Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1964 (2015) (Thomas, J.,

dissenting). The only exception marginally relevant to this case, however, is the "public rights" exception.

"The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.'" *N. Pipeline*, 458 U.S. at 68 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)); *Wellness Int'l*, 135 S. Ct. at 1963 (Thomas, J., dissenting) ("Disposition of private rights to life, liberty, and property falls within the core of the judicial power, whereas disposition of public rights does not."). In short, Congress is constitutionally barred from assigning just compensation claims to a non-Article III court, like the CFC, if the determination of such claims is "inherently . . . judicial." *Ex parte Bakelite*, 279 U.S. at 458. This Court laid this issue to rest more than 100 years ago.

In *Monongahela Navigation Co. v. United States*, the question presented was whether Congress could determine the amount of just compensation to be paid a private property owner. 148 U.S. 312, 324 (1893). This Court emphatically answered the question in the negative:

> The legislature may determine what private property is needed for public purposes; that is a question of political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with . . . congress or the legislature . . . to say what compensation shall be

> paid, and the ascertainment of that is a judicial inquiry.

Id. at 327; *see United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923) ("The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard." (citing *Monongahela*, 148 U.S. at 327)). Thus, because the determination of just compensation claims is "inherently . . . judicial," such claims fall within the province of Article III's judicial power, and cannot be decided by an Article I court.

By enacting the Tucker Act, however, Congress has unconstitutionally transferred the power to adjudicate many just compensation claims from Article III courts to a tribunal under Congressional control, which possesses none of the structural protections of impartiality the Constitution requires. Under the Little Tucker Act, district courts can only decide just compensation claims not exceeding $10,000. 28 U.S.C. § 1346. Under the Big Tucker Act, the CFC, an Article I court, decides just compensation claims exceeding $10,000. *Id.* § 1491; *id.* § 171(a). Judges on the CFC, like other Article I judges, do not receive the protections of Article III.[2] *See Ex parte Bakelite Corp.*, 279

[2] Judges sitting on the CFC are appointed for fifteen-year terms, not life. *Compare* 28 U.S.C. § 172(a) *with* U.S. Const. art. III, § 1. Additionally, Congress has made their salary dependent on the salary of district court judges – a statute Congress could

U.S. at 449 (providing that legislative courts, like the CFC, "are prescribed by Congress independently of section 2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior."). This transfer of jurisdiction from the judicial branch to the legislative branch is unconstitutional.[3] *See Stern v. Marshall*, 564 U.S. 462, 502-03 (2011) ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."). Moreover, Congress's statutory control over the CFC, *i.e.*, tenure and salaries, underscores the absence of safeguards from governmental encroachment. *See Wellness Int'l*, 135 S. Ct. at 1950 (Roberts, C.J., dissenting) ("By reserving judicial power to judges with life tenure and salary protection, Article III constitutes 'an inseparable element of the constitutional system of checks and balances' – a structural safeguard that must 'be jealously guarded.'" (quoting *N. Pipeline*, 458 U.S. at 58, 60)).

The situation at hand also underscores this Court's concerns in *Monongahela* – that the legislature should not determine the amount of just compensation

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easily amend or repeal. *Compare* 28 U.S.C. § 172(b) *with* U.S. Const. art. III, § 1.

[3] Two years ago in *Wellness International*, this Court held "Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge[,]" which is a non-Article III judge. 135 S. Ct. at 1939. This does not mean, however, that Congress can force parties to litigate in a non-Article III court for constitutional-based claims that require judicial ascertainment, such as just compensation.

to be paid. *See* 148 U.S. at 327-29. The *Monongahela* Court's distinction between legislative and judicial questions resonates. *See id.* at 327 (determining the property to be taken for public use is a legislative question, while the amount of just compensation required is a judicial question). For just compensation claims exceeding $10,000, Congress has placed the determination of just compensation under its own control, *i.e.*, the CFC – a legislatively created court with no Article III protections. Because Congress has the duty to pay debts, U.S. Const. art. I, § 8, cl. 1, this allows "the fox to guard the henhouse" and eviscerates the Framers' intent to prevent the encroachment of one branch into another branch's powers. *See* The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed., 2003) ("there is no liberty if the power of judging be not separated from the legislative and executive powers" (quotations omitted)); *Bond v. United States*, 564 U.S. 211, 222 (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the . . . structural principles secured by the separation of powers protect the individual as well."). In short, Article III and the doctrine of separation of powers mandate that the judicial ascertainment of just compensation be decided by an Article III court, not the CFC.

V. THIS CASE PROVIDES AN OPPORTUNITY FOR THE COURT TO REVISIT ITS EXTRA-CONSTITUTIONAL SOVEREIGN IMMUNITY DOCTRINE.

A. Sovereign Immunity Is A Judge-Made Doctrine Entirely Foreign To The Constitution.

Sovereign immunity is a judicially created doctrine borrowed from English common law, "which assumed that the King can do no wrong." Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1201 (2001) (quotations omitted). In *United States v. Nordic Village, Inc.*, 503 U.S. 30, 42-43 (1992), Justice Stevens questioned the doctrine's validity:

> Despite its ancient lineage, the doctrine of sovereign immunity is nothing but a judge-made rule that is sometimes favored and sometimes disfavored. Its original reliance on the notion that a divinely ordained monarch "can do no wrong" is, of course, thoroughly discredited. Moreover, its persistent threat to the impartial administration of justice has been repeatedly acknowledged and recognized.

Id. (Stevens, J., dissenting) (footnotes omitted). The spurious nature of the doctrine is even more apparent when examining the Constitution itself.[4]

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[4] The doctrine of sovereign immunity also has no basis in light of the events leading up to and following the Revolutionary War. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1429-51 (June 1987); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91

There is no explicit or implicit reference to the doctrine of sovereign immunity in the Constitution. Chemerinsky, 53 Stan. L. Rev. at 1205 ("Sovereign immunity . . . is a right that cannot be found in the text or the framers' intent."); *see also* Grant, 91 Nw. U. L. Rev. at 194 n.225 (noting the same). Instead, the Constitution disavows this doctrine. For instance, Article III provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . . to *Controversies to which the United States shall be a Party*. . . ." U.S. Const. art. III, § 2, cl. 1 (emphasis added); *see Williams v. United States*, 289 U.S. 553, 573 (1933) (stating that this provision "[l]iterally, . . . includes such controversies, whether the United States be a party plaintiff or defendant . . . ," but that the doctrine of sovereign immunity makes this "conclusion inadmissible. . . ."). Additionally, "Article VI of the Constitution states that the Constitution and laws made pursuant to them are the supreme law, and, as such, it should prevail over government claims of sovereign immunity." Chemerinsky, 53 Stan. L. Rev. at 1202 (citing U.S. Const. art. VI);

Nw. U. L. Rev. 144, 194-200 (Fall 1996). The colonists explicitly disavowed such " 'sovereign' governmental omnipotence." Amar, 96 Yale L.J. at 1436. For example, the colonists' first unanimous resolution reads: " '[t]hat they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.' " Grant, 91 Nw. U. L. Rev. at 198 (quoting Res. of Oct. 14, 1774, in 1 Journals of the Continental Congress, 1774-1789, at 67 (Worthington C. Ford ed., 1904)). Moreover, the Preamble to the Constitution places sovereignty not in any organ of government, but in "WE THE PEOPLE." U.S. Const. Preamble.

id. at 1211 ("[Sovereign immunity] allows a common law doctrine to reign supreme over the Constitution and federal law."). The doctrine of sovereign immunity is inconsistent with the Constitution, and actually frustrates its enforcement, as exemplified by the district court's actions in summarily dismissing the Landowners' just compensation claim.

B. At The Very Least, Sovereign Immunity Is Incompatible With The Just Compensation Clause.

The arguments made against sovereign immunity above provide more than enough authority to justify eliminating the doctrine from American jurisprudence entirely. Should the Court refuse to take such an overdue step here, however, the text and structure of the Fifth Amendment renders the doctrine inapplicable in suits seeking just compensation. The Fifth Amendment's right to just compensation is self-executing, meaning it exists "by virtue of the Constitution[,]" not by virtue of congressional action. Grant, 91 Nw. U. L. Rev. at 200. It also specifies a remedy (just compensation) the United States is obligated to provide. These features trump any assertion of sovereign immunity the United States may make.

1. The self-executing nature of the Just Compensation Clause negates any sovereign immunity the United States may possess.

This Court has repeatedly emphasized the principle that the Just Compensation Clause is self-executing. *E.g.*, *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting); *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Jacobs v. United States*, 290 U.S. 13, 15 (1933). Thus, contrary to the judgment below, the district court had jurisdiction over this case under 28 U.S.C. § 1331. In fact, a waiver of sovereign immunity for just compensation claims is not only unnecessary, but duplicitous.

Suits brought to recover just compensation guaranteed by the Fifth Amendment cannot be qualified. *See Jacobs*, 290 U.S. at 16. In *Jacobs*, landowners sued the United States to recover just compensation for their property taken by the government. *Id.* Importantly, the Court emphatically ruled that the landowners' suit arose under the Constitution itself:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential

> nature of the claim. *The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary.* A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. *The suits were thus founded upon the Constitution of the United States*.

Id. (all emphasis added). Not only did this Court hold that inverse condemnation actions do not change the fact that just compensation claims are "founded upon the Constitution . . . ," but it recognized that the doctrine of sovereign immunity cannot limit it, nor can Congress. *Id.*; *see also Arnsberg v. United States*, 757 F.2d 971, 980 n.7 (9th Cir. 1985) ("Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule that sovereign immunity is a bar to damages against the United States for direct constitutional violations." (citing *Duarte v. United States*, 532 F.2d 850, 852 n.3 (2d Cir. 1976))). Similarly in this case, the United States' claim of sovereign immunity is no bar to the Landowners' right to just compensation. *See Lee*, 106 U.S. at 208-09 ("When he, in one of the courts of competent jurisdiction, has established his right . . . there is no reason why deference to any [monarch or sovereign], not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.").

In *First English*, this Court discussed the effect of the Just Compensation Clause on a suit filed against a

local government.[5] 482 U.S. at 308. This Court, again, "recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .'" *Id.* at 314 (quoting *Clarke*, 445 U.S. at 257) (some quotations omitted and citation omitted). Notably, this Court ruled that the Just Compensation Clause itself, and not any affirmative waiver by the local government, provided all the means necessary for the property owner to vindicate its right to just compensation. In short, the Just Compensation Clause itself eliminates any need for a waiver of sovereign immunity. *See Jacobs*, 290 U.S. at 15.

2. The remedial nature of the Just Compensation Clause proves that a waiver of sovereign immunity is unnecessary.

In addition to being self-executing, the Just Compensation Clause is also a remedial provision. *First English*, 482 U.S. at 316 ("the compensation remedy is required by the Constitution"). As such, the United States has a constitutional obligation to pay just

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[5] That the suit was brought against the County of Los Angeles, and not the United States, is of little significance here because the Fifth Amendment's prohibition applies against the states through the Fourteenth Amendment in the same manner the prohibition applies directly to the federal government. *See Chicago, Burlington & Quincy*, 166 U.S. at 241.

compensation – Congress need not provide a remedy for money damages, nor recognize it by statute.

In *First English*, this Court "refute[d] the argument of the United States that the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." *Id.* (quotations omitted); *see Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984) (When ousted by the United States, "the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government." (citing *United States v. Dow*, 357 U.S. 17, 21-22 (1958))); *United States v. Causby*, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is founded upon the Constitution. . . .") (quotations omitted); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function.").[6] Accordingly, the

[6] In *Seaboard Air Line*, the plaintiff sought to recover interest on a just compensation award against the United States. 261 U.S. at 303. The United States argued that it could not be forced to pay interest, because it had not consented to make such a payment, nor was there a waiver of sovereign immunity. *Id.* This Court rejected that argument and ordered the United States to pay interest because the right to just compensation (which necessarily includes reasonable interest) arises directly from the Constitution and no statute can take it away. *Id.* at 304-06; *cf.* Michael P. Goodman, *Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims is Unconstitutional*, 60 Vill. L. Rev. 83, 103 (2015) (concluding that *Seaboard* "stands for the proposition that sovereign immunity does not apply to takings claims.").

Court ruled that the Just Compensation Clause clearly "dictates the remedy for interference with property rights amounting to a taking." *First English*, 482 U.S. at 316 n.9.

Because the Just Compensation Clause mandates a remedy of money damages against the United States, a waiver of sovereign immunity is unnecessary. A finding to the contrary would "mean that the will of Congress, not the Constitution, is the supreme law of the land. . . ." *Hawaii v. Mankichi*, 190 U.S. 197, 239 (1903) (Harlan, J., dissenting); *United States v. Germaine*, 99 U.S. 508, 510 (1878) ("This Constitution is the supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument.").

Importantly, Congress did not statutorily create the remedy of just compensation by enacting the Big Tucker and Little Tucker Acts. *See* Goodman, 60 Vill. L. Rev. at 112 ("Congress did not create takings claims."). Rather, the remedy exists by virtue of the Just Compensation Clause itself. It is the Constitution that requires the payment of just compensation, notwithstanding the absence of a waiver of sovereign immunity. Congress cannot take away this constitutional remedy by enacting statutes that qualify the remedy the Framers intended.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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