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

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, OWNERS' COUNSEL OF AMERICA, THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC., PIONEER INSTITUTE, INC., AND PROFESSOR SHELLEY ROSS SAXER 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 with trial by jury?

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INTEREST OF AMICI CURIAE[1]

National Association of Reversionary Property Owners. NARPO is a Washington state nonprofit 501(c)(3) educational foundation whose primary purpose is to educate property owners on the defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements. Since its founding in 1989, NARPO has assisted over 10,000 property owners nationwide, and has been involved in litigation concerning landowners' interests in land subject to active and abandoned railroad right-of-way easements. *See*, *e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (amicus curiae); *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998). NARPO has also participated as amicus curiae in other takings cases involving railroad rights-of-way. *See*, *e.g.*, *Romanoff Equities, Inc. v. United States*, 815 F.3d 809 (Fed. Cir. 2016).

Owners' Counsel of America. Owners' Counsel of America is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty,

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1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for the parties received notice of the intention to file this brief three days prior to the due date of this brief; counsel for the parties have acknowledged notice and consented to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

Pioneer Institute, Inc. Pioneer is an independent, non-partisan, privately funded research organization. It seeks to improve policy outcomes through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government. Pioneer identified this case through *PioneerLegal*, its new public-interest law initiative, which is designed to work for changes to policies, statutes, and regulations that adversely affect the public interest in policy areas that include economic freedom and government accountability.

Property Rights Foundation of America, Inc. Founded in 1994, PRFA is a national, non-profit educational organization based in Stony Creek, New York, dedicated to promoting private property rights.

Professor Shelley Ross Saxer. Professor Saxer is Vice Dean and Laure Sudreau-Rippe Endowed Professor of Law at Pepperdine University School of Law, where she has taught courses in real property, land use, community property, remedies, environ-

mental law, and water law. She has also authored numerous scholarly articles and books on property and takings law. *See*, *e.g.*, Shelley Ross Saxer, David L. Callies & Robert H. Freilich, Land Use (American Casebook Series) (7th ed. forthcoming); Grant Nelson, Dale Whitman, Colleen Medill, and Shelley Ross Saxer, Contemporary Property (4th ed. 2013); Shelley Ross Saxer & David Callies, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, in Eminent Domain Use and Abuse: Kelo in Context (Dwight Merriam & Mary Massaron Ross, eds. 2006); Shelley Ross Saxer, *"Rails-to-Trails": The Potential Impact of* Marvin M. Brandt Revocable Trust v. United States, 48 Loy. L.A. L. Rev. 345 (2015).

Amici are filing this brief because this case involves fundamental questions about whether Congress can limit the forum where property owners vindicate their Constitutional right to just compensation, a right which this Court has recognized as "self-executing," and therefore not subject to claims of sovereign immunity. We believe our viewpoint and this brief's highlighting of this Court's *Lee* case will be helpful to the Court.

SUMMARY OF ARGUMENT

The government does not enjoy its usual sovereign immunity when it takes property, either affirmatively or inversely, and this Court has repeatedly confirmed that the Just Compensation Clause is "self-executing." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("We have 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.").

But what does this mean, exactly? Even as the Sixth Circuit recognized that property owners have a right to compensation that springs from the Constitution itself and the right to sue does not depend upon a waiver of sovereign immunity, it held that Congress is not compelled to provide an Article III forum to vindicate that right. Or indeed, any forum at all. Thus, even if the forum Congress created—the Article I non-jury Court of Federal Claims (CFC)—is not constitutionally adequate, well, that's good enough. In the words of the Sixth Circuit, "[t]he Fifth Amendment details a broad right to compensation, but does not provide a means to enforce that right. Courts must look to other sources (such as the Tucker Act and the Little Tucker Act) to determine how the right to compensation is to be enforced." *Brott v. United States*, 858 F.3d 425, 432-33 (6th Cir. 2017). That is sovereign immunity by another name.

However, we think this Court said it best in *United States v. Lee*, 106 U.S. 196 (1882), the takings lawsuit over what today is Arlington National Cemetery, when it held that courts (referring to Article III courts, and not what is, in essence, a Congressional

forum), must be available for those whose property has been taken:

> The [government's argument it cannot be sued] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' . . . Undoubtedly those provisions of the constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them.

Id. at 218-19.

The story of how the private estate of General Robert E. Lee's family became Arlington National Cemetery is at the center of this case: the Court held that Lee's heir was entitled—after a jury trial in an Article III court—to ownership of the property. The Court affirmed that in our system, unlike those in which monarchs rule over their subjects, the federal government could be sued in its own courts, and that the government had violated Lee's due process rights and had taken Arlington without compensation. *Lee* may have been rendered 135 years ago, but the principles which the Court enunciated on sovereign immunity, the independent federal judiciary, and the Fifth Amendment, are still highly relevant today.

ARGUMENT

I. THE SELF-EXECUTING RIGHT TO JUST COMPENSATION

Takings cases are different from run-of-the-mill lawsuits because the Constitution itself mandates just compensation when property is taken. The Sixth Circuit concluded the Fifth Amendment's Just Compensation requirement was "self-executing," and that there need not be a waiver of sovereign immunity in order to sue. The court concluded, however, that Congress can limit how property owners exercise that right. The court made no attempt to reconcile that conclusion with the notion that a right cannot truly be "self-executing" if the legislature can limit or curtail that right by depriving owners of the usual Article III forum. That conclusion is contrary to this Court's takings jurisprudence, which holds that the Fifth Amendment is not merely precatory, but has a "self-executing character . . . with respect to compensation." *First English*, 482 U.S. at 315.

This recognition began with Justice Brennan's dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, where he wrote, "[a]s soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds). Six years later, Justice Brennan's dissent was adopted by the majority in *First English*, 482 U.S. at 315, which held that just compensation must be provided once a taking has occurred, and that landowners are "entitled" to bring an action. That case involved a temporary regulatory taking by a

municipality, but the principle is equally applicable when the United States takes property as it did here when it seized plaintiffs' reversionary interests and converted what should have been their private property into a public recreational park. *Id.* The Court also noted that Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. at 654-655 relied on *Jacobs v. United States*, 290 U.S. 13 (1933), "that claims for just compensation are grounded in the Constitution itself." *First English*, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking"). Thus, Petitioners have a right to compensation, regardless of whether Congress recognizes that right. In sum, "the right to just compensation could not be taken away by statute *or be qualified*" by a statutory provision. *Jacobs*, 290 U.S. at 17 (emphasis added).

In other words, the right to recover just compensation for property taken by the federal government cannot be burdened by Congress' withholding of jurisdiction from the district courts, and assigning major takings claims to the CFC. Nothing in the Constitution hinges a property owner's ability to bring a claim asserting a violation of the self-executing right to compensation on a legislatively-created limitation. Indeed, the very point of constitutional rights is that they cannot be interfered with by a legislature, a principle which extends back to at least *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) ("[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may

alter the constitution by an ordinary act"). This principle it at its zenith where property rights are at stake. As this Court more recently concluded, this [is an] "essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Court has also observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted). The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society. James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist").

II. ARLINGTON'S LESSON: WE ARE NOT "SUBJECTS," AND THE GOVERNMENT IS NOT IMMUNE

We don't need to travel all the way back to *Marbury*, however, for a definitive rejection of the concept of sovereign immunity when property has been expropriated for public use. The Sixth Circuit's holding here is directly contrary to the Arlington Cemetery case, *United States v. Lee*, 106 U.S. 196 (1882), in which the Court held that the federal government does not enjoy immunity from suit in district court, and indeed, the hallmark of our American system is that we do not have monarchs lording over us who must first consent before they can be sued in the nation's courts. In addition to being on-

point authority, the background of the case itself is fascinating.[2]

The case was decided nearly two decades after the federal government occupied the Virginia homestead of Robert E. Lee during the Civil War and created Arlington National Cemetery in 1864. The property came to the Lees via Mary Lee, General Lee's wife, who was the great granddaughter of Martha Washington. One might assume, as we did, that Union forces simply seized the land as one of the prizes of war after Mrs. Lee fled in the early days of the conflict. But even in times of war or rebellion, legal rules were observed. While the Union could seize private property, everyone recognized that the Takings Clause required payment of compensation. *See* Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 2 & n.3 ("'Unquestionably, in such cases, the government is bound to make full compensation to the owner' of property seized by the military.") (quoting *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851)). In response, and in order "to punish leading Confederates and raise revenue for the Union war effort," Congress adopted the Doolittle Act, a provision which required rebel property owners to pay a land tax. Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 2, 4.[3] Mrs. Lee owed $90, but

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2. The legal history of Arlington has been studied by Professor Anthony J. Gaughan, who wrote an article, *The Arlington Cemetery Case: A Court and a Nation Divided*, 37 J. of Sup. Ct. Hist. 1 (2012), and a book, The Last Battle of the Civil War: United States Versus Lee, 1861-1883 (2011), about the *Lee* litigation.

3. For more on the fascinating history of Arlington, see Robert M. Poole, *How Arlington National Cemetery Came to Be*,

(…footnote continued on next page)

when a cousin, a Washington, D.C. lawyer, attempted to pay the tax on her behalf, the commissioners refused to accept payment because in their interpretation of the statute, the property owner, Mrs. Lee, was required to pay the tax in person. Of course that never happened. The taxes were not paid, and the Treasury Department eventually auctioned the property, which the War Department purchased at the tax sale, and irrevocably converted to a cemetery. Neither General Lee nor Mrs. Lee ever made a claim for the seizure before their deaths.

But twelve years after the war ended, their son Custis Lee—who would have inherited Arlington had the federal government not taken it and claimed title—sued the government for a violation of his due process rights and for a taking. *Lee v. Kaufman and Strong*, 15 Fed. Cas. 162 (D. Va. 1878), *aff'd sub nom.*, *United States v. Lee*, 106 U.S. 196 (1882). *See also* Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 8 ("His lawsuit alleged that the government's officers had violated the Fifth Amendment's due process clause by claiming title to Arling-

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Smithsonian Magazine (Nov. 2009), *available at* http://www.smithsonianmag.com/history/how-arlington-national-cemetery-came-to-be-145147007/?no-ist (last visited Dec. 11, 2017). *See also* Robert M. Poole, On Hallowed Ground: The Story of Arlington National Cemetery 24 (2010) ("Former Army comrades who had admired Lee now turned against him. None was more outspoken than Montgomery C. Meigs, a fellow West Point graduate who had served amicably under Lee in the engineer corps but who now considered him a traitor who deserved hanging. 'No man who ever took the oath to support the Constitution as an officer of our Army or Navy . . . should escape without the loss of all his goods & civil rights & expatriation,' Meigs wrote that spring.").

ton on the basis of an invalid tax sale. In addition, Custis Lee contented that the government's officers had violated the amendment's takings clause by failing to compensate Mary Lee for the estate.").He originally brought suit in Virginia state court against two federal government officials, but the case was removed by the defendants to the district court, where the case was considered by a jury. The jury ruled against the officials, and held that Lee retained ownership of the property. Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 8 ("The presence of the national cemetery made the estate's return to the Lees impossible. What Custis Lee sought instead was formal legal recognition of his ownership of Arlington. He hoped that a victory in the courts would persuade Congress to finally pay compensation to him in accordance with the government's obligations."). The United States appealed to this Court, making two arguments.

First, it argued it could not be liable for a taking because it, not the Lees, possessed title. The War Department had legally purchased the property at auction after Mrs. Lee failed to pay the $90 in Doolittle Act taxes. Custis Lee's countervailing argument that Mrs. Lee could not be responsible for failure to pay because a cousin had tendered payment but had been refused, was insurmountable because this Court had ruled in two successive cases that in-person payment was not required by the statute, and formal tender was unnecessary because it would have been futile. *See Bennett v. Hunter*, 76 U.S. 326 (1869) (tax auction unlawful if owner attempted to pay); *Tacey v. Irwin*, 85 U.S. 549 (1873) (a formal tender of payment was not necessary because the commissioners would have refused the offer because

the owner was not there in person).Thus, because there was no need for Mrs. Lee to personally appear and tender payment, the federal government's claim to possess title to Arlington was fatally weak.

The government's second defense was that it was immune from being sued without the consent of Congress. Since Lee's ownership was a foregone conclusion due to the *Bennett* and *Tacey* decisions, what really what was at stake in the *Lee* litigation "was whether Custis Lee could bring his suit in the first place." Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 9. As Professor Gaughan writes, the immunity argument "was novel," and new to American law:

> The Justice Department had an audacious goal in the *Lee* case. It sought to deny the courts' jurisdiction over Fifth Amendment takings cases that lacked congressional consent. The government's lawyers insisted that the task of providing a remedy for aggrieved parties under the Fifth Amendment should be left "to the discretion of congress and not to the courts." With no American case law available to support their provocative position, the government's lawyers relied on precedents from English courts. . . . The Justice Department's lawyers contended that, like English judges, American judges should recognize that "the domain of sovereign power is forbidden ground" to the courts and that "judicial authority" must never "trespass upon the prerogatives, property, instrumentalities, or operations of this sovereign power."

Id. at 9-10 & n.26 (citing *Kaufman*, 15 Fed. Cas. at 170, 186, 188).

The Court rejected the sovereign immunity argument, and affirmed the District Court, which had concluded, "[t]he courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors against him." *Kaufman*, 15 Fed. Cas. at 189-90. All of this Court's Justices agreed that Lee retained title, and that the commissioners wrongly required Mrs. Lee to appear in person and pay. The Court's majority also concluded that the government officials could be sued in federal court because in the United States, "there is no such thing as a kingly head to the nation, nor to any of the states which compose it." *Lee*, 106 U.S. at 205.

The *Lee* majority opinion undermines the Sixth Circuit's holding that "[t]he Fifth Amendment details a broad right to compensation, but does not provide a means to enforce that right. *Brott*, 858 F.3d at 432. The *Lee* majority held that it was "difficult to see on what solid foundation of principle the exemption from liability to suit rests," and that the English version of sovereign immunity had no place in American courts. Specifically, sovereign immunity is "inconsistent" with the Takings Clause, as shown by this passage, which is worth quoting at length:

> The [government's argument it cannot be sued] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' Conceding that the property in controversy in this case is de-

voted to a proper public use and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the constitution are of that character which it is intended *the courts shall enforce, when cases involving their operation and effect are brought before them*. The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan*, 4 Wall. 2. 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?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for

> the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States[.]

Lee, 106 U.S. at 218-19 (emphasis added). The Court's conclusion that property owners cannot sue the United States directly, but could sue government officials for the same claims, is no impediment to liability here. *See id*. at 204. If the officials who took plaintiffs' property without compensation should have been named as the defendants rather than the United States itself, it is merely a matter of pleading nomenclature, and not substance. *See id*. (rejecting argument that the "judgment must depend on the right of the United States to property held by such persons as officers or agents for the government"). The American people are sovereign, not "subjects." *Id*. at 208-09.

The Court also affirmed the principle that Article III courts have jurisdiction to hear and decide cases in which the executive or legislative branch takes property in violation of the Fifth Amendment. The Court focused on the paramount role of the judiciary (and by that it meant the Article III judiciary, not what is today the Article I CFC). *See* 28 U.S.C. § 171 (a) ("The court [of federal claims] is declared to be a court established under article I of the Constitution of the United States."). *Cf.* Decl. of Independence

(July 4, 1776) ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."). The *Lee* majority emphasized that life-tenured judges, part of a separate branch of government, are the enforcers of the rights to liberty and property:

> The [government's] defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.
>
> These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution.

Lee, 106 U.S. at 208. This is America, and we do not treat the government with "reverence" or as if it possesses divine rights:

> Notwithstanding the progress which has been made since the days of the Stuarts in strip-

> ping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government. It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Id. at 208-09. The Court concluded:

> There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis*, 10 Wall. 15. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.
>
> What were the reasons which forbid that the king should be sued in his own court, and how do these reasons apply to the political body

> corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. No such reason exists in our government, as process runs in the name of the president and may be served on the attorney general, as was done in the case of *Chisholm v. State of Georgia*. Nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizens to their judgment.

Id. at 205-06.

The *Lee* case remains critically important because it emphasized the enduring principle that in the United States, "[n]o man in this country is so high that he is above the law." *Id.* at 220. This includes the government itself. As Professor Gaughan writes, "[i]n rejecting the Justice Department's argument, the Supreme Court affirmed the nation's commitment to the rule of law. . . . The fundamental lesson of *United States v. Lee* was that, in the American legal system, the rule of law constrains the action of every government officer, including the President." Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 17.

The principle that the federal government is not immune from suit in its own courts—and that property owners cannot be forced to vindicate their right to just compensation in a forum of the government's choosing—was firmly reinforced in *Lee*. "Courts of

justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government." *Lee*, 106 U.S. at 220.

CONCLUSION

This Court should grant the petition and review the judgment of the Sixth Circuit.

Respectfully submitted.

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