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

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, CATO INSTITUTE, AND NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court held that the Seventh Amendment guarantees a right to a jury trial in a Fifth Amendment inverse condemnation suit – seeking just compensation for a taking of private property. As a follow up, this case raises these important questions:

(1) Does the Seventh Amendment apply in suits against the United States seeking vindication of constitutional rights?

(2) Can the United States condition the right to prosecute a constitutional claim on a requirement to waive the Seventh Amendment right to a jury trial?

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INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB SBLC

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

frequently files *amicus* briefs in cases that will impact small businesses.

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the rigorous enforcement of constitutional limitations on the activities of federal and state governments. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court. For 40 years, SLF has advocated to protect private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in regular representation of property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files *amicus curiae* briefs in support of property owners. *See, e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences

and publishes books, studies, and the annual *Cato Supreme Court Review*.

The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers. NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and economic interests of its members and those similarly situated.

This case centrally concerns *amici* because it implicates the Constitution's procedural protections for fundamental substantive rights.

SUMMARY OF ARGUMENT

This Court has made clear that the Seventh Amendment protects the right of citizens to have a jury trial in any case where a court is called upon to determine one's "legal rights" because such cases would have been heard in a court of law (as opposed to in equity or admiralty) in 1791. Under this test, the Court holds that a landowner is entitled to a jury trial in an action seeking to force the government to pay just

compensation for a taking. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). Ignoring this test, the court below held that the Seventh Amendment has *no force* against the United States.

In doing so, the Sixth Circuit refused to analyze the original public meaning of the Seventh Amendment and completely ignored the historic reality that at the time of ratification, this provision was viewed as an essential bulwark against despotic government acts. Instead it applied an expansive, judicially crafted, doctrine of sovereign immunity to abrogate Seventh Amendment rights. The Sixth Circuit's weighty decision is one of great national significance. Accordingly, the Court should grant Petitioners' writ of certiorari to repudiate the idea that the United States may condition the right to prosecute a constitutional claim on waiver of Seventh Amendment rights.[2]

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[2] This brief focuses solely on the Seventh Amendment issue presented because of its broad doctrinal importance. But, *amici* also share Petitioners' concern over the Tucker Act's requirement to litigate takings claims of more than $10,000 in the Court of Federal Claims because this requirement presents serious practical problems for litigants. *See*, *e.g.*, James S. Burling and Luke A. Wake, *American Law Institute-American Bar Association: Eminent Domain and Land Valuation Litigation, "Takings and Torts: The Role of Intention and Foreseeability in Assessing Takings Damages,"* February 19, 2011, Coral Gables, FL (explaining that the Tucker Act often forces landowners into a dilemma: "[T]akings claims may be filed only in the Court of Federal Claims. However, a takings claim cannot be filed in the Court of Federal Claims if there is another action pending arising out of the same facts and

ARGUMENT

I. Property owners are entitled to a jury trial when seeking compensation for a taking.

The Seventh Amendment right to a jury trial attaches in any suit raising claims analogous to actions that would have been heard in a court of law in 1791. *Pernell v. Southall Realty*, 416 U.S. 363, 374-75 (1974). This Court has made clear that any suit seeking a determination of legal rights should qualify. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998). Under that standard, *Del Monte Dunes* held that "a §1983 suit seeking legal relief [for vindication of constitutional rights] is an action at law within the meaning of the Seventh Amendment." 526 U.S. at 709. This is because a takings claim seeks compensation as a legal remedy. *Id*. (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974)) (concluding that the Seventh Amendment's guarantee extends to any claim "sound[ing] basically in tort"). That rationale should apply equally in the present case.

Petitioners seek a legal remedy (*i.e.*, money damages) for the Government's violation of their Fifth Amendment rights. As in *Del Monte Dunes*, their claim sounds basically in tort. *See Del Monte Dunes*, 526 U.S.

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circumstances."); *Creppel v. United States*, 30 Fed. Cl. 323 (1994) (plaintiff lost opportunity to file takings claim in choosing to challenge a permit denial in district court). Accordingly, *amici* agree that Petitioners raise a second important question in asking whether the federal government can deny an owner the ability to vindicate his constitutional right to seek just compensation in an Article III court.

at 714-17 (summarizing historical practices and observing that "[e]arly opinions . . . contemporaneous with the adoption of the Bill of Rights, suggested that when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort"). Thus, the Sixth Circuit should have concluded – consistent with *Del Monte Dunes* – that an inverse condemnation suit against the United States constitutes an action at law for which Seventh Amendment rights attach. *Id*. at 723, 727 (Scalia, J., concurring).

II. The doctrine of sovereign immunity cannot preclude citizens from invoking Seventh Amendment rights.

While the Seventh Amendment applies in all actions at law, the Sixth Circuit held that the doctrine of sovereign immunity exempts federal defendants from this rule. In doing so, it ignored this Court's rejection of an identical claim of sovereign immunity in *Del Monte Dunes*, 526 U.S. at 714. The only possible distinction between those two cases is that in *Del Monte Dunes*, the City of Monterey invoked sovereign immunity as a political subdivision of the State of California – whereas here, the United States claims unfettered sovereign immunity for all actions against federal agents. But can it be that the United States can claim

sovereign immunity against invocation of the Bill of Rights?[4]

Amici submit that this is a question of fundamental importance to our constitutional system – a matter of first principles. To be sure, the Sixth Circuit's conception of sovereign immunity conflicts with the very structure of the Constitution and the Bill of Rights – both of which imply (in the strongest sense) that there can be no federal sovereign immunity against invocation of express constitutional rights.[5] *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-31 (1816) (ruling that the lower federal courts must be authorized to hear cases concerning federal rights). Accordingly, the Court should take this case to repudiate the notion that the United States may claim sovereign immunity to avoid the strictures of the Constitution.

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[4] If anything, there would seem to have been a greater case for sovereign immunity for the political subdivision of a state because of the Eleventh Amendment. But, nothing in the Eleventh Amendment altered the relationship between citizen and the federal government. The Amendment left undisturbed the notion that ultimate sovereignty rests in the People. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (emphasizing that "sovereign powers are delegated to the agencies of government, [but that] sovereignty itself remains with the people").

[5] This expansive theory of sovereign immunity improperly assumes that the United States may act outside – or above – the law. Indeed, the Sixth Circuit's decision enables the United States to ignore express constitutional commands and prohibitions. *Brott v. United States*, 858 F.3d 425, 430-31 (6th Cir. 2017) (holding that "suits against the United States are premised on a waiver of sovereign immunity . . . " and that sovereign immunity allows an *absolute privilege* even against suits seeking vindication of constitutionally guaranteed rights).

A. This Court has never definitively ruled that the United States is immune from the Seventh Amendment.

The Supreme Court has never upheld the denial of Seventh Amendment rights in a takings case. *See* Roger W. Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 Tex. L. Rev. 549, 557 (1980) (explaining that the closest decision on point is "two steps removed"). Nonetheless, relying on dicta in *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981), the Sixth Circuit assumed that there is no right to a jury in takings cases. But *Lehman* is off point because it concerned the right to a jury trial in a suit brought *under a federal statute*, as opposed to a suit seeking to vindicate a constitutional right. *Id*. at 168-69. For that matter, none of the cases cited in *Lehman* concerned a *constitutionally* based claim. They were all suits based upon *statutory* causes of action created by Congress.

Perhaps in that context, it might make sense to conclude that Congress can deny the opportunity for a jury trial because Congress created a new cause of action that did not exist at common law. But such logic simply does not apply to a suit alleging a violation of protected constitutional rights because the cause of action inures in the Constitution itself (the very font of federal power) – not in a statute enacted by Congress. *See United States v. Clarke*, 445 U.S. 253, 257 (1980) (explaining that a landowner is entitled to bring an inverse condemnation claim because of the "self-executing character of the [Fifth Amendment]"); *cf. Malone v.*

Bowdoin, 369 U.S. 643, 648 (1962) (suggesting that sovereign immunity would not stand in the way of a suit where there is a claim of an unconstitutional taking).

B. Government cannot condition the right to sue on waiver of constitutional rights.

The Sixth Circuit's unbounded conception of sovereign immunity cannot be squared with Supreme Court precedent. The opinion alarmingly holds that the due process right to judicial review is but a *mere privilege*, subject to manipulation (or abrogation) as Congress may see fit. *Brott*, 858 F.3d at 430-31. That view of sovereign immunity conflicts irreconcilably with this Court's repeated assurance that the right to prosecute a takings claim does not hinge upon an act of legislative grace. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Clarke*, 445 U.S. at 257.[6]

Moreover, the Sixth Circuit's assumption that Congress may condition the conferral of judicial review on a requirement to waive one's Seventh Amendment rights squarely conflicts with the Supreme Court's unconstitutional conditions doctrine. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989). To be sure, this Court has consistently held that government cannot enforce legislation

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[6] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (affirming the English rule that "where there is a legal right, there is also a legal remedy"); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) (same).

requiring a waiver of constitutional rights as a condition of obtaining a government conferred benefit. *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 590, 593-94 (1926) ("It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."). And the Court has applied the unconstitutional conditions doctrine explicitly to protect landowners from being compelled to waive their right to seek just compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Koontz v. St. Johns Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013). By implication, the government cannot condition the right to vindicate Fifth Amendment rights on waiver of one's Seventh Amendment rights. Nor should the United States be permitted to require waiver of constitutional rights to prosecute any other constitutionally grounded claim in federal court.

C. The Government's theory of sovereign immunity contravenes history.

The Sixth Circuit's decision rests on the assumption that the Crown was historically immune from suit. But it was not.[7] Rather, "[a] person who claimed the

[7] It should also be irrelevant whether the King of England could be sued. To be sure, sovereignty "devolved on the people" upon independence. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793). And the American people only assented to the creation of a federal government on the terms and conditions set forth in the ratified Constitution of 1787, and subsequent amendments. As such, the doctrine of federal sovereign immunity is alien to our constitutional system. *Id.* at 471-72 (observing that the concept of

Crown had seized property wrongly or mistakenly could petition the King for return of the property." Kirst, 58 Tex. L. Rev. at 564. For that matter, English law developed "a variety of devices for getting relief against government" during the Middle Ages. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 3 (1963). English subjects could protect their property by pursuing procedures for a petition of right, and other more ancient prerogatives.[8] Kirst, 58 Tex. L. Rev. at 563-64.

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sovereignty in England "exist[ed] on feudal principles[,]" which we have rejected: "No such ideas obtain here . . . [because] the citizens of America are equal as fellow citizens, and as joint tenants in [ ] sovereignty."); *see also* Kirst, 58 Tex. L. Rev. at 552 ("Neither practical nor just in operation, the doctrine [of sovereign immunity] is supported by a theory based on erroneous interpretation of precedent.").

[8] "We can conclude on the basis of this history that the King, or the Government, or the State, as you will, has been suable throughout the whole range of law, sometimes with its consent, sometimes without." Jaffe, 77 Harv. L. Rev. at 3. For example, Parliament enacted statutes enabling subjects "who lost property to the King" to proceed in actions against the King in the common law side of chancery, without seeking consent. Kirst, 58 Tex. L. Rev. at 565-66; Jaffe, 77 Harv. L. Rev. at 6. Yet even where the King's consent was technically required, this formality was predicated upon the view that the King was "the fountain of justice and equity," which meant that the King "could not refuse to redress wrongs when petitioned to do so by his subjects." *Id*. at 3-4; *see also United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 183-84 (1870) (noting "it [was] the duty of the King to grant [a petition of right], and the right of the subject to demand it."); *see also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 912-13, n.43 (1997).

Accordingly, legal historians now suggest that the doctrine of sovereign immunity was created out of whole cloth in the nineteenth century and "did not exist in 1791." *Id*. at 551. This Court should thus question whether the 'doctrine sovereign immunity' can be applied so broadly as to abrogate protections explicitly enshrined in the Bill of Rights. Plainly, "governmental immunity [must] ha[ve] its limits, limits rooted in the Constitution." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996). To be sure, "the writ of habeas corpus provides proof enough" that sovereign immunity cannot be extended to absolve the United States from all legal actions. *Id*.

The notion that sovereign immunity should allow Congress to negate the Seventh Amendment also requires a complete disregard for colonial history. *Id*. at 146. There can be no doubt that the Seventh Amendment was intended to apply as a check on arbitrary and unlawful government conduct. "Just as the militia could check a paid professional standing army, so too the jury could thwart overreaching by powerful and ambitious government officials." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991).

The historical record demonstrates unequivocally that the revolutionary generation viewed the right to trial by jury as a bulwark against despotism, and essential for the protection of private property rights. Grant, 91 Nw. U. L. Rev. at 150-53. For example, "[t]he civil jury, in both England and America, had proved

useful in awarding damages in trespass suits against executive officials." Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 Wm. & Mary Bill Rts. J. 811, 826 (2014). For this reason, the colonists were infuriated by Parliament's repeated enactment of statutes extending jurisdiction of the admiralty courts, so as to deny their common law jury rights. *See* Grant, 91 Nw. U. L. Rev. at 150-54.

First with the Sugar Act, then with the Stamp Act, and again with the Townshend Duties Act of 1765, Parliament "continued the hated pattern of depriving Americans of their right to jury trials in forfeiture proceedings." *Id*. at 153. And all the while the colonists protested: "[These Acts] deprive[ ] us of the most essential Rights of Britons, and greatly weakens the best Security of our Lives, Liberties and Estates; which may hereafter be at the Disposal of Judges who may be Strangers to us, and perhaps malicious, mercenary, corrupt, and oppressive." 1 John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights*, 52 (1986). Thus, given these experiences with centralized government, the anti-Federalists were rightly concerned that "Congress could not be trusted to preserve jury trial by statute alone." Kirst, 58 Tex. L. Rev. at 573; Grant, 91 Nw. U. L. Rev. at 150. Accordingly, it makes no sense to assume that the United States may simply assert sovereign immunity to abrogate the Seventh Amendment. *Cf.* Philip Hamburger, *Is Administrative Law Unlawful?* 152-55 (2015) (illustrating the supreme value that the

Revolutionary generation placed on maintaining the right to a full jury trial at common law for the protection of property rights).

What is more, this Court should question whether the 'doctrine of sovereign immunity' should have any place in *constitutional* cases. If it really is true – as the Sixth Circuit holds – that the United States may invoke sovereign immunity absent a waiver of Seventh Amendment rights, then the federal government might just as well choose to withhold consent altogether for suits alleging constitutional violations. Yet of course, that would defeat the very premise of our constitutional system. *See* The Federalist No. 48, at 309 (James Madison) (Isaac Kramnick ed., 1987) (urging that the Constitution must be understood as more than mere "parchment barriers").

CONCLUSION

For the above reasons and those stated in the petition, this Court should grant a writ of certiorari.

Respectfully submitted,

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