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 *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, Restoring Liberty Action Committee, and American Business Defense Foundation in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation, Conservative Legal Defense and Education Fund, and American Business Defense Foundation are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). DownsizeDC.org is a nonprofit social welfare organization, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Petitioners are 23 Michigan landowners who held reversionary interests in railroad easements. When the railroad line was abandoned, instead of the land reverting back to the landowners, the easements were taken for a public recreational trail pursuant to federal statute. Over the government's objection, a previous Supreme Court decision held that the "rails-to-trails"

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

statute constitutes a taking of property for public use and that the landowners are entitled to just compensation under the Fifth Amendment. *See* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990).

The Tucker Act requires that any claims against the United States that exceed $10,000 must be brought exclusively in the Court of Federal Claims ("CFC"), an Article I legislative tribunal which allows no jury trials.

Petitioners sued in the U.S. District Court for the Western District of Michigan, asking for declaratory judgment that the Article III court has subject matter jurisdiction to hear their claims of just compensation for the takings, and also that Petitioners have a right to a jury trial. Petitioners asserted the Fifth Amendment as the source of their claims, and argued that the Tucker Act is unconstitutional to the extent it relegates their Fifth Amendment claims to an Article I tribunal and without a right to a jury under the Seventh Amendment. The district court dismissed the case (Brott v. United States, 2016 U.S. Dist. LEXIS 142915, *13 (W.D. Mich. 2016)), and Petitioners appealed to the Sixth Circuit.

The Sixth Circuit affirmed the district court, determining that suits against the United States require a waiver of sovereign immunity, and this is true "regardless of the source of the rights at issue." Brott v. United States, 858 F.3d 425, 432 (2017). "The Fifth Amendment," the court held, "does not provide a means to enforce that right." *Id.* "Courts must look to

... the Tucker Act ... to determine how the right to compensation is to be enforced." *Id*. at 432-33.

Furthermore, the Sixth Circuit relied on the "public rights doctrine," which allows certain claims against the United States to be heard only before legislative courts or administrative agencies. *Id*. at 434. As to public-right claims, the legislative branch "may delegate the landowners' just-compensation claims to a legislative court — the Court of Federal Claims — for resolution." *Id*. at 435.

Petitioners argued below, as they do here in their Petition, that Fifth Amendment just-compensation claims are inherently judicial, thus opening the door to an Article III court, relying, *inter alia*, on this Court's decision in Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893). However, the Sixth Circuit believed that "*Monongahela* is inapposite" because that case addressed a private legislative act which had specifically waived sovereign immunity and placed jurisdiction in the Article III court in the western district of Pennsylvania, with right of appeal to the Supreme Court. Brott at 435. Furthermore, the court below held that any decision Petitioners may receive from the Court of Federal Claims may be appealed to the U.S. Court of Appeals for the Federal Circuit, which provides sufficient access to an Article III court. *Id*. at 436.

Finally, the Sixth Circuit held that there is no Seventh Amendment right to a trial by jury in cases against the United States, because such cases are not "suits at common law" within the meaning of the

Seventh Amendment. *Id*. The court also applied the "public rights" doctrine to the jury trial claim, relying on this Court's decisions that Congress may delegate the fact-finding function of public-rights cases to an administrative forum. *Id*. at 437.

SUMMARY OF ARGUMENT

The Sixth Circuit's opinion below appears to be in direct conflict with the principles laid down by this Court more than a century ago in Monongahela v. United States. There, the Court concluded that the Fifth Amendment "stated the exact limitation on the power of the government," and yet the Sixth Circuit below claimed that Congress itself must establish the system to limit its own authority. Whereas the Monongahela Court refused to tolerate a system where Congress was permitted to "constitute itself the judge in its own case, " yet that is precisely the effect here, where takings cases must be heard by an Article I "court" sitting without a jury. More recently, in First English Evangelical Lutheran Church v. Los Angeles, the Court stated that a landowner is "entitled" to bring a takings claim against the federal government, while the Sixth Circuit below claimed that Congress must first permit him to bring such an action. The conflict between this Court's decisions and the opinion of the court below is clear, and this Court's intervention is necessary to correct the Sixth Circuit's obvious legal error. In the alternative, if Monongahela were not considered controlling, this case presents an important question of federal law which should be resolved by this Court.

Refusing to apply this Court's guidance to this specific issue, the Sixth Circuit instead pointed to *dicta* in unrelated decisions of this Court in support of the notion that the doctrine of sovereign immunity is "all embracing" and "knows no limitations." Based on these statements, made in different contexts, the court concluded that it is incumbent on Congress to create — or not create — a system by which aggrieved landowners may vindicate their Fifth Amendment rights. In other words, the court below effectively rewrote the Fifth Amendment to read that "nor shall private property be taken for public use, without just compensation, unless Congress chooses to do so." The court's holding is simply incompatible with our constitutional system where the people imposed real limits on federal power. When it comes to the Constitution, the federal government is not sovereign — rather, the Constitution arises from an act of a sovereignty people. For a government of limited powers to claim that it has the royal prerogative to disregard constitutional provisions undermines the people's sacred contract with their government.

The very nature of the Court of Federal Claims, as an Article I court, makes it completely unsuitable as a substitute for an Article III court in which trial by jury may be had. Allowing agents of the political branches which made the decision to perform the taking the power to decide what constituted "just compensation," undermines public confidence in the process and in the result.

The Sixth Circuit dismissed the application of the Seventh Amendment to this case, on the theory that a

suit against the United States for just compensation was not a suit "at common law." And, the court asserted that a suit for just compensation was "public right" suit. For these reasons, the court denied he Petitioner's entitlement to trial by jury. However, both positions are based on incorrect assumptions. Moreover, both statements are grounded in the notion that the longstanding, but atexual, doctrine of sovereign immunity may trump the clear text of U.S. Constitution.

ARGUMENT

I. THE PETITION FOR CERTIORARI MEETS THIS COURT'S TEST FOR GRANTING PETITIONS SET OUT IN U.S. SUPREME COURT RULE 10(C).

The Petition for Certiorari ("Pet. Cert.") presents to this Court a fundamental question of constitutional law, posed by Petitioners as follows:

> 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? [Pet. Cert. at i.]

In this case, the test for granting review of the decision of the Sixth Circuit, set out in Rule 10, is met in two ways. First, a case relied on repeatedly by Petitioners — Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) — should be considered controlling as to the question presented. *See* Section

II, *infra*. Thus, the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).

Nevertheless, it is undisputed that this Court's decision in Monongahela has never been applied to require Article III courts to take and decide cases seeking "just compensation" for takings by the federal government. Therefore, if Monongahela were not considered controlling, the decision of the Sixth Circuit should be reviewed because it "decided an important question of federal law that has not been, but should be, settled by this Court...." Rule 10(c).

The question presented is both simple and clearly stated, but it requires consideration of multiple constitutional principles, including:

- what limitations exist as to the type of disputes that may be decided by **Article I** legislative courts and Article I judges;
- whether **Article III** courts and Article III judges have not only jurisdiction but also a duty to hear cases seeking an independent determination of "just compensation" subsequent to a federal taking of property;
- whether the provision in **Amendment V** that states "nor shall private property be taken for public use, without just compensation" is self-executing, constitutionally granting jurisdiction to an Article III court over cases seeking "just compensation";
- whether the right to a jury trial set out in **Amendment VII** for "Suits at common law"

applies to takings by the federal government; and

- whether the **doctrine of sovereign immunity** should continue to be viewed as a presupposition which trumps the constitutional text governing takings.

The Petition for Certiorari ably addresses each of these constitutional principles. It also explains how the theory underlying the Sixth Circuit decision authorizes Congress to eviscerate by statute the Constitution's Fifth Amendment protection against takings, undermining this key protection of the American people from their government, rendering it all but a dead letter. It also explains how the Congressional scheme falls far short of the Constitution's requirements:

> Congress adopted a scheme in which the federal government can [i] take an owner's property, [ii] pay the owner nothing, [iii] force the owner to bring an inverse condemnation lawsuit against the United States and [iv] deny the owner ability to vindicate his right to be justly compensated in an Article III court with trial by jury..... [Pet. Cert. at 31.]

In sanctioning this approach, Petitioners correctly assert that: "[t]he panel's decision reduces the Just Compensation Clause to nothing more than a hortatory or precatory statement the realization of which depends upon the good grace of Congress." *Id.* at 34.

These *amici* first address the application of this Court's decision in Monongahela to this case, and then address some of the constitutional issues involved, particularly the doctrine of sovereign immunity.

II. THE SIXTH CIRCUIT DECISION BELOW DIRECTLY CONFLICTS WITH MONONGAHELA NAVIGATION CO. V. UNITED STATES.

In Monongahela, this Court was presented with a question of what was just compensation for the taking of a lock and dam on the Monongahela River. Congress had specified the amount of compensation at $161,733, but the amount only covered the value of the property, failing to take into consideration the value of the franchise of operating the lock and receiving tolls. Thus, the owner sued in federal court for $450,000 to be compensated for the full value. This Court held that the question of what private property should be taken for public use was a legislative question, but the issue of what is just compensation for such land is a judicial one. Monongahela at 327.

In Monongahela, this Court observed that "in [the] Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses." *Id.* at 325. The Court noted that the duty to determine just compensation "is **a judicial and not a legislative question**." *Id.* at 327 (emphasis added). Emphasizing the rationale for its decision, the Court explained that, for the legislature to "constitute itself the judge in its own case ... or in any manner to interfere with the just powers and

province of courts and juries in administering right and justice, cannot for a moment be ... tolerated under our Constitution." *Id.* at 327-28.

Nevertheless, the court below sanctioned Congress's establishment of a system to establish valuation without access to an Article III court or jury.[2] Rather, Congress has created a statutory regime where a federal government agency may determine whether and how much property to take from landowners, and then refer them to a quasi-judicial tribunal that derives its existence and authority from Congress. The Monongahela Court could not have been more clear — such a system "cannot for a moment be ... tolerated," yet the court below sanctioned just that system, asserting that "Congress may, as it has done here, place conditions upon its waiver of sovereign immunity and require that just-compensation claims ... be heard in the Court of Federal Claims without a jury." Brott at 437. The

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[2] The Sixth Circuit held that it was enough that an Article III court may review the decisions of the Court of Federal Claims on appeal. *See* Brott at 435-36 ("The landowners will ultimately receive judicial review of their claims by an Article III court — the Federal Circuit."). However, the Sixth Circuit failed to note that not all cases are appealed and did not address the Federal Circuit's standard of review in takings cases: "Whether a taking has occurred is a question of law based on factual underpinnings.... We conduct a plenary review of the legal conclusions of the Court of Federal Claims **while reviewing its factual conclusions for clear error**." Stearns Co. v. United States, 396 F.3d 1354, 1357 (Fed. Cir. 2005) (emphasis added). Thus, despite the Sixth Circuit's assurance of Article III judicial review, it remains that the factual determinations of the CFC are generally conclusive.

Sixth Circuit's attempt to distinguish Monongahela was altogether unavailing. Indeed, the discussion of Monongahela by the Sixth Circuit evidenced that it fundamentally misunderstood and misapplied that case. A careful analysis of the weaknesses of the Sixth Circuit's opinion on this point was presented by Petitioners. *See* Pet. Cert. at 33-35.

The constitutional principle recognized in Monongahela a century and a quarter ago has not been lost to history, but rather lives today. Indeed, in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987), the Court held that, constitutionally, "a landowner is **entitled** to bring an action in inverse condemnation." (Emphasis added.) Nevertheless, the Sixth Circuit claimed a landowner must first be **permitted** by Congress to bring an action: "the United States must waive sovereign immunity from suit for all those claims, regardless of the source of the rights at issue." Brott at 432. It is hard to imagine more conflicting conclusions than this Court's decisions in Monongahela and First English on the one hand, and the decision of the Sixth Circuit below on the other.

The Sixth Circuit cited First English for the proposition that "the Fifth Amendment right to just compensation" was "self-executing ... such that additional 'statutory recognition was not necessary.'" Brott at 432 (citation omitted). However, the court below took the position 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." *Id.* (citation omitted). In other words, the court below took the position that even though the U.S. Constitution recognizes the right of an American citizen to just compensation, that right by itself is meaningless. The right would be enforceable only if Congress were first to waive sovereign immunity and then to establish a procedure allowing for such claims to be made and heard. Constitutional rights may not be understood in this manner. As Chief Justice Marshall observed in Marbury v. Madison, 5 U.S. 137 (1803), "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. Indeed, Chief Justice Marshall concluded that a government would cease to be a "government of laws, and not of men ... if the laws furnish no remedy for the violation of a vested legal right." *Id.* *See also* Section III, *infra.*

III. THE SIXTH CIRCUIT'S INVOCATION OF SOVEREIGN IMMUNITY CANNOT TRUMP THE CONSTITUTIONAL TEXT.

The Sixth Circuit decision below sanctions the supplanting of the protections provided by the Fifth Amendment by the simple expedient of invoking the atextual doctrine of sovereign immunity. Brott at 432. The court below pointed to *dicta* in prior decisions of this Court, which employed expansive language to describe that embattled doctrine, such as "[t]he rule that the United States may not be sued without its

consent is all embracing,"[3] and "the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations."[4] Brott at 431. Of course, none of the cited cases determined, or even indicated, that this doctrine trumped the restrictions on government imposed by the Fifth Amendment. The Sixth Circuit, however, was not shy about its interpretation, claiming that "the United States must waive sovereign immunity from suit for all ... claims, **regardless of the source of the rights** at issue." *Id.* at 432 (emphasis added).

The Sixth Circuit apparently understands the Fifth Amendment as though it had been written to state: "nor shall private property be taken for public use, without just compensation, **unless Congress chooses to do so**." The circuit court's understanding would mean that Congress not only could designate the forum and rules for adjudicating takings cases, but also could deny the ability of citizens to bring a takings case at all. Such a result is wholly incompatible with the notion that the Fifth Amendment's text is self-executing, as Petitioners have demonstrated. Pet. Cert. at 10-14. The Sixth Circuit opinion is also incompatible with the more fundamental notion that our written federal Constitution both grants limited, enumerated powers to that government, as well as protects certain identified rights of the people

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[3] Lynch v. United States, 292 U.S. 571, 581 (1934).

[4] Maricopa Cty., Ariz. v. Valley Nat'l Bank of Phoenix, 318 U.S. 357, 362 (1943).

irrespective of what position a contemporary Congress may take.

In First English, this Court noted that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation' ... 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." *Id.* at 315. In Monongahela, the Court stated simply that it was "[t]he Constitution [which] has declared that just compensation shall be paid...." *Id.* at 327. *See also* First English at 316 n.9 ("it is the Constitution that dictates the remedy for interference with property rights amounting to a taking."). *See also* Pet. Cert. at 11-12.

To be sure, this Court's opinions written over a period of at least six decades are not entirely harmonious. What some commentators politely describe as a "crossroads"[5] between the Takings Clause and the sovereign immunity doctrine, others describe as a "collision course."[6] Regardless, adoption of the view of the Sixth Circuit below would lead to an absurd result. If a person has a constitutional right to "just compensation," it makes no sense to permit the government to claim sovereign immunity against

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[5] *See* Pet. Cert. at 17 (citing Richard H. Fallon, Jr., "Claims Court at the Crossroads," 40 CATHOLIC U. L. REV. 517 (1991)).

[6] *See* R. H. Seamon, "The Asymmetry of State Sovereign Immunity," 76 WASH. L. REV. 1067, 1067 (2001).

having to pay that compensation — allowing Congress to pull the welcome mat away from the courthouse door. *See* Pet. Cert. at 13 ("[t]he federal government may not escape this 'categorical duty' by creating a statutory scheme denying owners the ability to obtain just compensation...."). A "right" which cannot be enforced against the government is not much of a right.

Sovereign immunity is a judicially created construct, sourced in antiquity, but found nowhere in the Constitution. Thus, it must give way to a clear textual provision that provides explicit instructions. In Kawananakoa v. Polyblank, 205 U.S. 349 (1907), Justice Holmes famously expounded one of the main justifications employed to support the sovereign immunity doctrine: "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against **the authority that makes the law on which the right depends**." Kawananakoa at 353 (emphasis added). However, that theory hardly applies here, where the People are the authority which created the federal government through the Constitution, which in turn preserves for them the right to just compensation. It is not the government which chose to subject itself to the mandates of the Fifth Amendment.

Unlike British notions vesting sovereignty in a king or parliament, under this nation's founding compact, it is not the federal government which is sovereign, but the People. As Benjamin Franklin observed: "In free governments, the rulers are the

servants and the people their superiors and sovereigns."[7] To paraphrase Kawananakoa, it is the People who "ma[de] the law on which the right depends." It is a remarkable turn to now have the government argue that it need not abide by the Constitution's protections of the people who formed it because it is the sovereign over them. *See* Marbury v. Madison at 176 ("the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness.... The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme....").

It is no answer to say that sovereign immunity is an ancient concept, derived from common law and the English tradition, and so it must apply even to suits to enforce constitutional rights — rights which were in many respects designed to be a break from that English tradition. As Professor Erwin Chemerinsky notes, "[t]he United States was founded on a rejection of a monarchy and of royal prerogatives. American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign immunity undermines that basic notion." E. Chemerinsky, "Against Sovereign Immunity," 53 STAN. L. REV. 1201, 1202 (2001).

Although some may take the view that the federal government must have sovereign immunity, for

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[7] R. Ketchum, edt., The Political Thought of Benjamin Franklin, Hackett Publishing (2003), p. 398.

example, from a suit in tort for money damages — the type of common law suit that could be brought by or against any member of the public — this case presents a different question. The provisions of the Fifth Amendment apply specifically and exclusively against the government, and can be invoked only by the victim of a government taking. To permit the application of sovereign immunity to defeat the claim brought below would be nothing less than to subordinate the constitutional protection of the Fifth Amendment to Congress. To the extent that this Court's *dicta* in Lynch and Maricopa County have been read by the Sixth Circuit to insulate the government from its constitutional obligations, that view should be repudiated by this Court.[8]

IV. THE VERY NATURE OF AN ARTICLE I COURT PRECLUDES IT FROM BEING ENTRUSTED WITH DETERMINATION OF "JUST COMPENSATION" FOR SIGNIFICANT TAKINGS BY THE FEDERAL GOVERNMENT.

In creating the Court of Federal Claims, Congress explicitly stated that "[t]he court is declared to be a court established under article I of the Constitution of the United States." 28 U.S.C. § 171(a). As Petitioners note, "members of the CFC do not enjoy those protections afforded Article III judges." Pet. Cert. at 4.

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[8] Professor Chemerinsky argues that "Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law... The doctrine is inconsistent with the United States Constitution." Chemerinksy, *supra*, at 1201-02.

Petitioners explain that its members sit only for fifteen-year terms (rather than for life), are subject to removal by other federal judges (rather than impeachment or removal by Congress), and their salaries are set at the will of Congress (rather than being protected against reduction by constitutional provision). *Id.*

Whereas Article I judges hold their seats during periods of "good behavior," CFC members can be removed "for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability." 28 U.S.C. § 176(a). Article I judges also are subject to residency requirements (28 U.S.C. § 175(b)) that do not apply to Article III judges. Finally, the chief judge of the CFC serves in much the same way as other executive officials — "at the pleasure of the President." M. 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, 89 (2015), *see* 28 U.S.C. § 171(b).

As one observer concluded, that CFC judges "may want to please their bosses and 'get it right,'" since "[t]he chief judge ... has authority to decide which judge will hear any particular case and can replace the judge assigned to any case at will." Goodman at 94. In that sense, members of the Court of Federal Claims should be seen as acting under the authority of the legislative and executive branches.[9]

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[9] In other words, the Court of Federal Claims may "walk like a court and quack like a court," and federal statute may even give

V. THE SEVENTH AMENDMENT JURY TRIAL GUARANTEE APPLIES TO SUITS AGAINST THE FEDERAL GOVERNMENT SEEKING JUST COMPENSATION FOR TAKINGS.

In addressing Petitioners' claim to trial by jury, the Sixth Circuit stated: "We appreciate the landowners' desire to have their compensation claims heard by a jury." Brott at 436. The circuit court offered no reason as to why it believed a jury trial had been sought, or why it expressed appreciation for Petitioners' demand. However, the reasons that a landowner would want a jury trial to fix just compensation are obvious — in addition to the obvious reason that such trials are required by the Constitution.

A jury trial has multiple finders of fact, minimizing, if not avoiding, the risk of an unfair result due to the bias of a single judge — particularly when the judge in question is an Article I judge, without the independence of and protections for an Article III judge.[10] With juries, every effort is made by trial

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it the title "court" and its members the title "judges," but it is not an Article III "court" under the Constitution of the United States. Rather, it has properly been described as an "Article I court," a "tribunal," or even an "adjudicative entity."

[10] When an Article I "judge" who serves in the legislative branch of government determines just compensation for a taking by another functionary of the political branches, it violates the ancient legal principle *nemo judex in causa sua*, meaning "no one should be a judge in his own cause." Attributed by some to Sir Edward Coke, that principle extends beyond cases where a judge

judges to ensure that a jury is selected who will assess the evidence presented and reach a fair decision unaffected by bias. Since a jury member could be the victim of a taking, and yet is a taxpayer who shares in the cost of a taking, a juror can see both sides of the dispute. Common sense can be applied when jurors deliberate, each with their own strengths to bring to the case. None of these important benefits arise in trials before an Article I judge.

The court below denied Petitioners' claim to a jury trial under the Seventh Amendment of the Constitution, concluding that amendment simply does not apply to actions against the federal government. The Court reasoned that: (i) the Seventh Amendment only applied "[i]n Suits at common law..."; (ii) a suit against the United States for money damages was not a suit at common law "within its true meaning"; (iii) a special rule applied to suits against the government because the "government cannot be sued, except with its own consent"; and (iv) even if consent is given, the government "can declare in what court it may be sued

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would have a personal or financial interest in the outcome of the decision, but also an institutional interest to be defended. Such conflicts of interest must be avoided to ensure public confidence in the process and in the outcome. Indeed, this principle has a biblical foundation which requires that judges not only be independent and impartial, but also not even give the appearance of partiality. "Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's...." Deuteronomy 1:16-17; *See also* Deuteronomy 16:19; Leviticus 19:15.

... without the intervention of a jury...." Brott at 436 and at 436 n.25. Since in this case, the Petitioners are simply "taking advantage of the United States's waiver of sovereign immunity and they must do so pursuant to the conditions of that waiver." *Id*. at 437. The matter being litigated is a "public right," because claims against the United States are classified as "public-right claims." *Id*. (citations omitted).

Although the Sixth Circuit attempted to ground its decision in two rules of law — that a suit against the government for a taking is a "public-right claim" and not a suit "at common law" — both of these positions were sourced in the doctrine of sovereign immunity. Petitioners address the weaknesses in the Sixth Circuit's handling of the right to trial by jury at pages 24-35 of their Petition, pointing out: (i) the Seventh Amendment text makes no exception for suits against the federal government; (ii) the Amendment's limiting term "at common law" was understood to distinguish standard disputes from proceedings in equity or admiralty which did not allow juries; (iii) the ratifying conventions demonstrated the people's view of the centrality of trial by jury; (iv) the Amendment's linkage back to Clauses 28, 39, and 52 of Magna Carta; (v) the practice in the colonies before 1791 to have trial by jury for takings by the government; and (vi) the lack of authority for the "public right" rationale.

In addition to reinforcing these points, these *amici* add a few additional historical illustrations of the vital importance of jury trials to achieve a fair resolution of disputes — including disputes between government and citizens.

In addition to those provisions of Magna Carta cited by Petitioners, the 21st Article of Magna Carta also demanded of King John the protection afforded by a trial before a jury of one's peers as a precondition to the imposition of a fine: "Earls and barons are not to be amerced [*i.e.*, fined] except by their peers, and not except in proportion to the nature of the offence."

Insofar as the original Constitution proposed for ratification did not have a guarantee of jury trial in civil cases, that omission came under attack by Anti-Federalists. For example, Federal Farmer explained the significance of this omission as follows:

> The trial by jury in criminal as well as in civil causes, has long been considered as one of our **fundamental rights**, and has been repeatedly recognized and confirmed by most of the state conventions. But the constitution expressly establishes this trial in criminal, and wholly omits it in civil causes.... **[T]he jury trial is a solid uniform feature in a free government**; it is the substance we would save, not the little articles of form. [Federal Farmer, No. 16 (Jan. 20, 1788) (emphasis added).[11]]

Demonstrating the veracity of the statement by Federal Farmer, the Virginia Declaration of Rights of 1776, enacted only weeks before the Declaration of Independence, provided "that in controversies

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[11] Reprinted in 5 The Founder's Constitution at 358 (Kurland, P. & Lerner, R. Eds.: Univ. Of Chi. 1987).

respecting property ... the ancient trial by jury is preferable to any other, and ought to be held sacred." Virginia Declaration of Rights, sec. 11 (June 12, 1776).[12] Similarly, the Maryland Constitution provided that "No freeman ought to be taken or imprisoned, &c. or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." Bank of Columbia v. Okely, 17 U.S. (4 Wheat) 235 (1819).

Shortly after the ratification of the Constitution in 1791, Chief Justice John Jay made clear that jurors would provide a check on government, to protect their fellow Americans from unfair actions taken by an oppressive government.[13]

If the scope of the right to trial by jury for suit at common law is to be determined by the understanding of the Seventh Amendment at the time of its ratification in 1791, as asserted by Petitioners (Pet. Cert. at 24) and fully endorsed by these *amici*, there should be no question that Americans today have a right to have their "just compensation" for a government taking be decided by a jury in an Article III court.

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[12] Reprinted in 5 The Founder's Constitution at 353.

[13] *See, e.g.,* Chief Justice John Jay's Jury Charge in Georgia v. Brailsford, 3 Dall. 1 (1794), reprinted in 5 The Founder's Constitution at 364.

CONCLUSION

The issue presented by this case is fully worthy of resolution by this Court. However, it is also indicative of a much larger threat to the right to a hearing in an Article III court and the right to trial by jury. In the last several decades, there has been an exponential and unprecedented rise in the exercise of judicial power by the other branches of government. Administrative law judges determine the rights and obligations of parties on a daily basis. The agencies for which they work are truly an aconstitutional "fourth branch of government," exercising legislative, judicial, and executive power. In Federalist #47, Madison noted that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." This trend is not the separation of powers; it is the fusion of powers.

The linkage between the administrative state and the King's prerogative courts in England was demonstrated by Professor Phillip Hamburger in his recent book, Is Administrative Law Unlawful?, U. Chicago Press (2014). This Court should be on high alert when the political branches of government seek to wield judicial power. This Court should grant the petition not only to protect the Fifth Amendment rights of Petitioners, but also to protect the constitutional independence and authority of the judiciary.

For the foregoing reasons, the decision of the Sixth Circuit should be vacated and the case remanded to the district court for trial by jury.

Respectfully submitted,

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