No. 17-712

In the Supreme Court of the United States

KEVIN BROTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Tucker Act, 28 U.S.C. 1491(a)(1), and the Little Tucker Act, 28 U.S.C. 1346, violate Article III of the Constitution and the Seventh Amendment by granting the United States Court of Federal Claims exclusive jurisdiction over claims seeking more than $10,000 in compensation for asserted Fifth Amendment takings of property by the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 858 F.3d 425. The opinion of the district court (Pet. App. 26a-37a) is not published in the Federal Supplement but is available at 2016 WL 5922412.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2017. A petition for rehearing was denied on August 8, 2017 (Pet. App. 46a). The petition for a writ of certiorari was filed on November 6, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1969, Congress enacted the National Trails System Act (Trails Act), 16 U.S.C. 1241 *et seq.*, to establish a nationwide system of recreational, scenic, and historic trails. In 1983, Congress amended the Trails Act

by adding Section 8(d), which was adopted "in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service." National Trails System Act Amendments of 1983, Pub. L. No. 98-11, Tit. II, § 208, 97 Stat. 48 (16 U.S.C. 1247(d)). Section 8(d) accomplishes that goal by allowing the Interstate Commerce Commission and its successor, the Surface Transportation Board (Board), "to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails." *Preseault* v. *ICC*, 494 U.S. 1, 6 (1990).

In general, a railroad may not abandon one of its lines without the Board's approval, and the Board has "plenary" authority to determine whether an abandonment is appropriate. *Chicago & N. W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 320 (1981); see 49 U.S.C. 10903(a). "Section 8(d) provides that a railroad wishing to cease operations along a particular route may negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility for the right-of-way." *Preseault*, 494 U.S. at 6-7. "If the parties reach agreement, the land may be transferred to the trail operator for interim trail use, subject to [Board]-imposed terms and conditions." *Id.* at 7. Section 8(d) provides that "such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. 1247(d).

The regulations implementing Section 8(d) provide that, when a railroad seeks to abandon one of its lines, a qualifying governmental or private organization may file a comment with the Board indicating an interest in sponsoring the line for interim trail use. 49 C.F.R.

1152.29(a). If the prospective sponsor satisfies Section 8(d)'s requirements, and if the railroad "agrees to negotiate an interim trail use/rail banking agreement, then the Board will issue" a Notice of Interim Trail Use or Abandonment (NITU). 49 C.F.R. 1152.29(d)(1). An NITU affords a 180-day period for negotiation (which may be extended) and authorizes the railroad "to fully abandon the line if no agreement is reached" within that period. *Ibid.*

If the railroad and the prospective sponsor do not reach an agreement within the negotiation period, the railroad has 60 days to decide whether to consummate abandonment of the line. 49 C.F.R. 1152.29(e)(2). If it does not notify the Board during that time that it has abandoned the line, "the authority to abandon will automatically expire." *Ibid.*

2. Petitioners claim to own real property underlying portions of a 3.35-mile right-of-way that was previously used by the Mid-Michigan Railroad (Mid-Michigan). After Mid-Michigan notified the Board that it wished to abandon the line, the Board issued two NITUs (one on May 19, 2009 and one on July 12, 2010). Mid-Michigan and a prospective trail-sponsor engaged in negotiations, and the Board extended the negotiation period several times.[1]

Petitioners assert that the Board's issuance of the NITUs constituted a taking of their property for which the United States owes just compensation under the Fifth Amendment. Petitioners' theory is that but for the issuance of the NITUs, Mid-Michigan would have

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[1] *In re Mid-Michigan R.R.—Abandonment Exemption—in Muskegon Cnty.*, No. AB 364 (Sub-No. 16X), at 1 (STB July 27, 2015), https://www.stb.gov/Decisions/readingroom.nsf/WEBUNID/9B4391A7DDFFF55885257E8F004283A3?OpenDocument.

abandoned the right-of-way and thereby unburdened their properties of rail easements.

Petitioners filed a complaint seeking just compensation in the United States Court of Federal Claims (CFC). Pet. App. 27a & n.1; see *Brott* v. *United States*, No. 14-cv-567 (filed July 3, 2014). Their complaint invoked the Tucker Act, 28 U.S.C. 1491, which grants the CFC jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. 1491(a)(1). That grant of jurisdiction includes claims seeking just compensation for the taking of private property. See, *e.g.*, *Preseault*, 494 U.S. at 11-12. The CFC's Tucker Act jurisdiction is generally exclusive, but the Little Tucker Act, 28 U.S.C. 1346, grants federal district courts concurrent jurisdiction over claims seeking $10,000 or less.

3. While their complaint was pending before the CFC, petitioners filed this suit in the United States District Court for the Western District of Michigan asserting an identical takings claim under the Little Tucker Act. Pet. App. 26a-27a.[2] Although petitioners sought more than $10,000, they asserted that the Little Tucker's Act's $10,000 cap violates Article III of the Constitution by requiring just-compensation claims exceeding that amount to be brought in a non-Article III court. *Id.* at 27a-28a. Petitioners further asserted that although a statute specifies that takings claims brought under the Little Tucker Act "shall be tried by the court

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[2] Petitioners' suit in the CFC has been stayed pending the outcome of this suit. Pet. App. 2a n.1.

without a jury," 28 U.S.C. 2402, the Seventh Amendment entitled them to a jury trial. Pet. App. 28a. And petitioners sought a declaratory judgment that the relevant statutes are unconstitutional. *Ibid.*

The district court dismissed petitioners' complaint. Pet. App. 26a-37a. The court explained that "long-established precedent" makes clear that the Tucker Act validly grants the CFC exclusive jurisdiction over claims seeking more than $10,000 in compensation for an asserted taking of property by the United States. *Id.* at 30a. The court therefore dismissed petitioners' just-compensation claim for lack of jurisdiction and dismissed their declaratory-judgment claim for failure to state a claim. *Id.* at 36a-37a.

4. The court of appeals affirmed. Pet. App. 1a-25a.

a. The court of appeals first explained that, as a statutory matter, "the Tucker Act vests in the [CFC] *exclusive* jurisdiction" over just-compensation claims seeking more than $10,000. Pet. App. 6a. "Accordingly, a claim for just compensation * * * must be brought in the [CFC] in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Ibid.* (quoting *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1988) (plurality opinion)). The court thus held that petitioners could not invoke the general federal-question statute, 28 U.S.C. 1331, to bring their just-compensation claim in district court. Pet. App. 7a-9a.

b. The court of appeals next rejected petitioners' contention that the Tucker Act's grant of exclusive jurisdiction to the CFC violates Article III. Pet. App. 9a-22a. The court emphasized that suits against the United States must be "premised on a waiver of sovereign immunity," which Congress may "condition" by "requiring

that such suits be brought in a specific forum or by limiting the means by which a right is enforced." *Id.* at 9a-10a. The court explained that Congress exercised that authority in the Tucker Act and the Little Tucker Act by waiving immunity for certain claims against the United States—including just-compensation claims—while specifying that claims seeking more than $10,000 must be brought in the CFC. *Id.* at 11a-12a.

The court of appeals rejected petitioners' contention that just-compensation claims do not require a waiver of sovereign immunity. Pet. App. 13a-17a. The court recognized that the Fifth Amendment's Just Compensation Clause is "self-executing" in that it "creates a 'right to recover just compensation'" that does not require further statutory recognition. *Id.* at 13a (quoting *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) (*First English*)) (citation omitted). But the court explained that the existence of that right "does not mean that the United States has waived sovereign immunity such that the right may be enforced by suit for money damages." *Ibid.* The court noted that petitioners had "cited no case in which the Fifth Amendment has been found to provide litigants with the right to sue the government for money damages in federal district court." *Id.* at 14a.

The court of appeals also emphasized that "significant history contradicts [petitioners'] argument." Pet. App. 15a. From the Nation's Founding until 1855, when Congress created the Court of Claims, a property owner seeking just compensation from the United States had no judicial recourse and instead "had to petition Congress directly for a private act appropriating the necessary funds." *Ibid.* Even after 1855, the Court

of Claims' authority to award just compensation for takings remained uncertain until 1887, when Congress enacted the Tucker Act. *Id.* at 15a-17a. The court of appeals concluded that this history confirms that "[t]he Tucker Act's waiver of sovereign immunity * * * is a necessary ingredient for just-compensation claims brought against the United States." *Id.* at 17a.

Based in part on that conclusion, the court of appeals held that petitioners' just-compensation claims "are 'public right' claims that Congress may assign to a non-Article III court" like the CFC. Pet. App. 17a. The court explained that although suits involving private rights generally must be heard by Article III courts, "[t]he public rights doctrine allows Congress to remove consideration of certain matters from the judicial branch and to assign such consideration to legislative courts or administrative agencies." *Ibid.* (citing *Stern* v. *Marshall*, 564 U.S. 462, 488-492 (2011)). And the court added that although the outer boundaries of the doctrine are not settled, the paradigmatic example of a public-right suit that Congress may assign to a non-Article III court is a suit against the United States that could not be brought at all absent a waiver of sovereign immunity. *Id.* at 18a-19a.

c. Finally, the court of appeals held that the Seventh Amendment does not entitle petitioners to a jury trial. Pet. App. 22a-24a. The court explained that, under this Court's longstanding precedent, suits against the United States for money damages "are not controlled by the Seventh Amendment" because Congress's authority to condition a waiver of sovereign immunity includes the authority to prescribe "rules of practice." *Id.* at 23a (quoting *McElrath* v. *United States*, 102 U.S. 426, 440 (1880)).

5. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 46a.

ARGUMENT

Petitioners renew their contention (Pet. 8-37) that Congress violated Article III and the Seventh Amendment by granting the CFC exclusive jurisdiction to hear Fifth Amendment claims seeking more than $10,000 in just compensation from the United States. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. To the contrary, petitioners do not cite any decision, by any court, endorsing their assertion that takings claims must be tried before juries in Article III courts. That assertion is particularly implausible because for most of our Nation's history—including the first 165 years after the Founding—property owners seeking compensation for asserted takings have been required to present their claims directly to Congress or to an Article I court. The petition for a writ of certiorari should be denied.[3]

1. The court of appeals correctly held that Congress may require property owners seeking compensation for asserted takings to file their claims in the CFC.

a. Article III provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. This Court has "long recognized that, in general, Congress may not 'withdraw from [the Article III courts] any matter which, from its nature, is the subject

[3] A related question is presented in the petition for a writ of certiorari in *Sammons* v. *United States*, No. 17-795 (filed Nov. 28, 2017).

of a suit at the common law, or in equity, or in admiralty.'" *Stern* v. *Marshall*, 564 U.S. 462, 484 (2011) (citation omitted). The Court has thus held, for example, that Congress may not vest non-Article III bankruptcy judges with the power to enter judgment on "state common law" claims between "two private parties." *Id.* at 493; see *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 69-79 (1982) (*Northern Pipeline*) (plurality opinion).

At the same time, this Court has also long recognized categories of cases that Congress *may* assign to non-Article III courts. Those categories include court-martial proceedings; cases arising in the federal territories and the District of Columbia; and "public rights" matters that "are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856); see *Northern Pipeline*, 458 U.S. at 63-72 (plurality opinion).

Although this Court has not fixed the outer limits of the public-rights doctrine with precision, it has long held that the public-rights cases Congress may assign to non-Article III tribunals include claims against the United States. *Stern*, 564 U.S. at 488-493. Congress's authority to assign such claims to non-Article III tribunals "may be explained in part by reference to the traditional principle of sovereign immunity." *Northern Pipeline*, 458 U.S. at 67 (plurality opinion). Because claims against the United States may not proceed at all "unless Congress consents," "Congress may attach to its consent such conditions as it deems proper," includ-

ing by "requiring that the suits be brought in a legislative court." *Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929); see *Stern*, 564 U.S. at 488-489.

In addition to sovereign immunity, "the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government." *Northern Pipeline*, 458 U.S. at 67 (plurality opinion). When a particular class of matters may be "conclusively determined by the Executive and Legislative Branches," there "can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court." *Id.* at 68; see *Murray's Lessee*, 59 U.S. (18 How.) at 280-282.

b. As the court of appeals explained, the historical treatment of claims seeking compensation for asserted takings by the United States demonstrates that those claims are not matters that "from [their] nature," *Stern*, 564 U.S. at 484 (citation omitted), require adjudication by an Article III court. Instead, they "historically could have been"—and, indeed, long were—"determined exclusively by" Congress. *Id.* at 485 (citation omitted); see Pet. App. 15a-17a.

"Before 1855 no general statute gave the consent of the United States to suit on claims for money damages." *United States* v. *Mitchell*, 463 U.S. 206, 212 (1983). As a result, "a citizen's only means of obtaining recompense from the Government"—including compensation for asserted Fifth Amendment takings—"was by requesting individually tailored waivers of sovereign immunity, through private Acts of Congress." *Library of Congress* v. *Shaw*, 478 U.S. 310, 316 n.3 (1986); see *Mitchell*, 463 U.S. at 212-213.

In 1855, Congress established the Court of Claims "to relieve the pressure created by the volume of private bills." *Mitchell*, 463 U.S. at 212-213. The court's jurisdiction did not, however, extend to constitutional claims. "Most property owners" seeking compensation for asserted takings were thus "left to petition Congress for private relief, but Congress was neither compelled to act, nor to act favorably." 2 Wilson Cowen et al., *The United States Court of Claims: A History* 45 (1978) (Cowen). As a result, "many owners had suffered the misfortune of holding a legal right for which there was no enforceable legal remedy." *Ibid.* That situation led this Court to observe that "[i]t is to be regretted that Congress has made no provision by any general law for ascertaining and paying th[e] just compensation" owed for takings of private property by the United States. *Langford* v. *United States*, 101 U.S. 341, 343 (1880).[4]

It was not until 1887 that Congress enacted the Tucker Act, waiving sovereign immunity and conferring on the Court of Claims jurisdiction to hear cases "founded upon the Constitution." Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; see *Mitchell*, 463 U.S. at 214; Cowen 45-46. Thus, for the first century of our Nation's history, claims seeking compensation for asserted takings by the United States were resolved by Congress—not by the courts.

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[4] A property owner could theoretically seek to recover by "mak[ing] out the difficult proof" that the government's actions amounted to an "implied-in-fact promise to pay," bringing the claim within the Court of Claims' jurisdiction over contract claims. Cowen 45. Some owners also sought to recover their property (but not compensation) by bringing "an action to eject the Government official who occupied the property." *Ibid.*; see, *e.g.*, *United States* v. *Lee*, 106 U.S. 196, 218-223 (1882).

c. Even after 1887, just-compensation claims against the United States generally have not been adjudicated by Article III courts. Although judges of the Court of Claims had life tenure, this Court concluded in 1929 that it was "a legislative court" and not "a constitutional court established under Article III." *Bakelite*, 279 U.S. at 454; see *Williams* v. *United States*, 289 U.S. 553, 568-571 (1933). The Court observed that the Court of Claims was "a special tribunal to examine and determine claims for money against the United States." *Bakelite*, 279 U.S. at 452. The Court explained that "[t]his is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States." *Ibid.* The Court thus emphasized that the matters heard by the Court of Claims "include nothing which inherently or necessarily requires judicial determination," and that all of its cases "are matters which are susceptible of legislative or executive determination and can have no other save under and in conformity with permissive legislation by Congress." *Id.* at 453; see *Williams*, 289 U.S. at 579-580.

In 1953, Congress declared that the Court of Claims was "established under article III of the Constitution." Act of July 28, 1953, ch. 253, § 1, 67 Stat. 226. After it did so, this Court confirmed the Court of Claims' Article III status in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). But even after the Court of Claims became an Article III court in 1953, its trials continued to be conducted by non-Article III "trial judges." Cowen 95. "All cases commenced in the court [we]re first referred to the trial judges," who "receive[d] the evidence" and "ma[d]e findings of fact and recommendations for conclusions of law." *Ibid.* Trial judges did not enter final judgments, but their findings were "presumed to be correct" when

reviewed by the Court of Claims' Article III judges. Ct. Cl. R. 147(b) (1976) (28 U.S.C. App. at 635 (1976)).

In 1982, Congress abolished the Court of Claims and vested its functions in two new courts: the CFC and the Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Tit. I, § 105, 96 Stat. 26-28; see also *United States* v. *Bormes*, 568 U.S. 6, 12 n.4 (2012). The CFC (originally called the Claims Court) is a legislative court "established under article I of the Constitution." 28 U.S.C. 171(a). The CFC inherited the Court of Claims' trial jurisdiction under the Tucker Act, including exclusive jurisdiction over claims seeking more than $10,000 in compensation for asserted takings by the United States. 28 U.S.C. 1491(a)(1). The CFC's decisions are reviewed by the Federal Circuit, an Article III court that inherited the Court of Claims' appellate functions. 28 U.S.C. 1295.

d. There is thus a "firmly established historical practice," *Stern*, 564 U.S. at 504-505 (Scalia, J., concurring), of determining just-compensation claims outside the Article III courts. Indeed, for all but a few decades of the Nation's history—the period between 1953 and 1982—claimants have generally been required to seek compensation either directly from Congress or in an Article I legislative court. And claimants have *never* had a right to have their claims tried by a jury.[5]

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[5] Since 1887, the Little Tucker Act has also allowed claims (including takings claims) seeking $10,000 or less to be brought in Article III courts. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; see 28 U.S.C. 1346(a)(2). All such claims must be "tried by the court without a jury." 28 U.S.C. 2402. Only in actions seeking recovery of internal revenue taxes or penalties under 28 U.S.C. 1346(a)(1) is a jury trial available. See *Lehman* v. *Nakshian*, 453 U.S. 156, 161 & n.8 (1981).

2. Petitioners assert (Pet. 10-36) that property owners seeking compensation for asserted takings by the United States are entitled to have their claims heard by a jury in an Article III court. But petitioners offer no sound basis for such a radical departure from centuries of established practice.

a. Petitioners briefly assert (Pet. 35) that their position is consistent with history because "[t]here are many examples of federal taking cases brought in federal district court with trial to a jury." But the cases petitioners cite were not actions brought by property owners seeking compensation for takings by the United States. Several, for example, involved condemnation proceedings brought *by* the government. See, *e.g.*, *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 313 (1893) (*Monongahela*); *Boom Co.* v. *Patterson*, 98 U.S. 403, 404 (1879); see also *United States* v. *Clarke*, 445 U.S. 253, 255-258 (1980) (distinguishing such formal condemnation proceedings from suits like this one).

Petitioners' "celebrated example" (Pet. 36) vividly illustrates their error. Petitioners correctly note (*ibid.*) that, in *United States* v. *Lee*, 106 U.S. 196 (1882), Robert E. Lee's son brought a suit challenging the United States' seizure of the land that became Arlington National Cemetery. But it was neither a suit seeking just compensation nor one brought against the United States. Instead, it was an "ejectment" action brought against individual federal officers under state law and seeking "to recover possession" of the land. *Id.* at 197-198; see *id.* at 210 ("The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property."). The Court in *Lee* recognized that Lee's son could not have sought compensation from the

United States. *Id.* at 222. And this Court has since reaffirmed that, when "[t]he *Lee* case was decided in 1882," "there clearly was no remedy available by which he could have obtained compensation for the taking of his land." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.17 (1949).

b. There is thus no historical basis for petitioners' asserted entitlement to have their claims tried in an Article III court. Petitioners nonetheless insist (Pet. 10-14, 18) that "the Fifth Amendment is *itself* a waiver of sovereign immunity" that entitles a property owner to seek just compensation in federal district court. That assertion contradicts a long line of this Court's decisions, is not supported by the decision on which petitioners principally rely, and would not entitle petitioners to relief even if it were correct.

i. "It is axiomatic that the United States may not be sued without its consent," *Mitchell*, 463 U.S. at 212, and that "the terms of [the government's] consent to be sued in any court define that court's jurisdiction to entertain the suit," *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). See, *e.g.*, *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). Those principles of sovereign immunity apply with special force to claims for monetary relief. The Appropriations Clause of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, Cl. 7. That provision independently bars a court from ordering the payment of money from the Treasury absent congressional authorization. See *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851).

Because "[t]he rule that the United States may not be sued without its consent is all embracing," *Lynch* v. *United States*, 292 U.S. 571, 581 (1934), this Court has made clear that a waiver of sovereign immunity is required when a plaintiff seeks compensation for an asserted Fifth Amendment taking, see *id.* at 579-582; *Schillinger* v. *United States*, 155 U.S. 163, 168 (1894). The Court thus recognized that, before the Tucker Act, "there clearly was no remedy available" for a property owner seeking compensation for a taking. *Larson*, 337 U.S. at 697 n.17; see *Block* v. *North Dakota*, 461 U.S. 273, 280-281 (1983) (explaining that takings claimants have been able to seek "monetary damages" only "since passage of the Tucker Act").

Consistent with that understanding, this Court has recognized that the Tucker Act grants the CFC "exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding $10,000," *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion), and that "a claim for just compensation under the Takings Clause" thus "must be brought to the [CFC] in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction," *Horne* v. *Department of Agric.*, 569 U.S. 513, 527 (2013) (citation omitted); see, *e.g.*, *Preseault* v. *ICC*, 494 U.S. 1, 11-12 (1990); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1020 (1984). And the Court has also stated that if Congress *does* withdraw Tucker Act jurisdiction in a particular class of cases, the affected property owners "have no alternative remedy" by which to obtain compensation. *Horne*, 569 U.S. at 528; see, *e.g.*, *Preseault*, 494 U.S. at 11-12; *Monsanto*, 467 U.S. at 1019; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 122-127 (1974).

ii. In asserting that the Fifth Amendment itself waives sovereign immunity and allows them to sue in federal district court, petitioners principally rely (Pet. 11-12) on this Court's decision in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987).[6] That reliance is misplaced. The question presented in *First English* was "whether the Just Compensation Clause requires the government to pay for 'temporary' regulatory takings," or whether it merely provides a basis for enjoining such takings going forward, without mandating backward-looking compensation. *Id.* at 313. The Court held that compensation is required, explaining that "in the event of a taking, the compensation remedy is required by the Constitution." *Id.* at 316. In reaching that conclusion (and rejecting the government's contrary argument) the Court stated that the Fifth Amendment is "'self-executing'" and that "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.* at 315, 316 n.9 (citations omitted).

First English thus concluded that the Fifth Amendment is self-executing in that it creates a right to compensation for a taking. But "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." Pet. App. 13a (quoting

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[6] Petitioners also quote (*e.g.*, Pet. 10-11 & nn.9-10, 12-13 & n.12) a variety of decisions recognizing the importance of property rights and the protection provided to property owners by the Just Compensation Clause. Those decisions do not assist petitioners because they neither address the sovereign immunity of the United States nor hold that the Just Compensation Clause entitles property owners to an Article III forum.

First English, 482 U.S. at 315) (citation omitted). To recover money damages against the United States, a plaintiff must identify *both* a waiver of sovereign immunity *and* a "substantive right enforceable against the United States for money damages." *Mitchell*, 463 U.S. at 216 (citations omitted); see Pet. App. 14a. The Tucker Act waives sovereign immunity, but does not create any substantive rights. *Mitchell*, 463 U.S. at 216. Instead, "[a] substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress.'" *Ibid.* (quoting 28 U.S.C. 1491).

First English makes clear that the Fifth Amendment creates a substantive "right to recover just compensation for property taken by the United States" that may be enforced under the Tucker Act without further congressional action. 482 U.S. at 315 (citation omitted) cf. *Mitchell*, 463 U.S. at 216 ("Not every claim invoking the Constitution * * * is cognizable under the Tucker Act."). But *First English* did not involve a suit against the United States, and the Court did not discuss—much less overrule—the century's worth of precedent establishing that the Tucker Act's waiver of sovereign immunity is a necessary precondition to suits seeking just compensation from the United States.

Accordingly, just a year later, Justice Scalia reaffirmed that "[n]o one would suggest that, if Congress had not passed the Tucker Act, * * * the courts would be able to order disbursements from the Treasury to pay for property taken * * * without just compensation." *Webster* v. *Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (citing *Schillinger*, 155 U.S. at 166-169). It is not tenable to maintain, as petitioners must, that the *First English* Court enshrined as law a proposition that Justice Scalia—who joined the Court's opinion—

dismissed as so implausible that "[n]o one would suggest [it]."

iii. In any event, petitioners would not be entitled to prevail even if they were correct that the "self-executing" nature of the Fifth Amendment would create a compensatory remedy absent a waiver of sovereign immunity by Congress. The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power" by requiring the payment of compensation. *First English*, 482 U.S. at 314. That compensation need not "be paid in advance of or even contemporaneously with the taking"; instead, "[a]ll that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation.'" *Preseault*, 494 U.S. at 11 (citations omitted). "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 194-195 (1985) (brackets and citation omitted). In light of those principles, this Court has instructed that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Id.* at 195; see, *e.g.*, *Preseault*, 494 U.S. at 11.

The "process provided by the Tucker Act" to obtain just compensation was indisputably available to petitioners. Indeed, this Court has specifically held that "if the rails-to-trails statute [*i.e.*, Section 8(d)] gives rise to a taking, compensation is available * * * under the Tucker Act." *Preseault*, 494 U.S. at 4. Numerous landowners with similar claims have availed themselves of

the Tucker Act process. See, *e.g.*, *Haggart* v. *Woodley*, 809 F.3d 1336, 1341-1342 (Fed. Cir.) (class action involving 253 landowners), cert. denied, 136 S. Ct. 2509 (2016); *Hash* v. *United States*, 403 F.3d 1308, 1310 (Fed. Cir. 2005) (class action involving roughly 200 landowners). As petitioners do not appear to dispute, that process is a "reasonable, certain and adequate provision for obtaining compensation." *Preseault*, 494 U.S. at 11 (citations omitted). Thus, even if petitioners were right that the Fifth Amendment is a "self-executing" waiver of sovereign immunity that would entitle them to sue in an Article III court if Congress had provided no other avenue for obtaining compensation, it would not follow that they should be permitted to bypass the compensation procedure that Congress *has* established.[7]

c. In addition to arguing that the Fifth Amendment itself waives sovereign immunity, petitioners appear to assert (Pet. 16-22) that the doctrine of sovereign immunity should be abandoned altogether. But petitioners do not acknowledge, much less provide a basis for

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[7] That is particularly true because the Tucker Act procedure includes an appeal to the Federal Circuit, an Article III court that reviews the CFC's findings of law de novo and its findings of fact for clear error. See *Otay Mesa Prop., L.P.* v. *United States*, 779 F.3d 1315, 1321 (Fed. Cir. 2015). Courts of appeals have upheld compensation procedures that rely on initial determinations by administrative agencies, followed by judicial review. See Pet. App. 20a-21a (collecting cases); see also, *e.g.*, *Wisconsin Cent. Ltd.* v. *Public Serv. Comm'n*, 95 F.3d 1359, 1369 (7th Cir. 1996) ("The Fifth Amendment does not require a judicial determination of just compensation in the first instance."). In other contexts, this Court has likewise upheld procedures in which Article III courts of appeals decide constitutional questions based on administrative records. See, *e.g.*, *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 17-18 (2012); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994).

overruling, this Court's repeated holdings that "[i]t is axiomatic that the United States may not be sued without its consent." *Mitchell*, 463 U.S. at 212; see p. 15, *supra*. Over the years, Congress has broadly waived that immunity in statutes like the Tucker Act and the Little Tucker Act; the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*; and the Administrative Procedure Act, 5 U.S.C. 702. But the Court has not retreated from the background principle that, absent such a waiver, "[s]overeign immunity shields the United States from suit." *Bormes*, 568 U.S. at 9; see, *e.g.*, *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012). And by virtue of the Appropriations Clause, that is particularly true where, as here, the suit seeks money damages.[8]

d. Petitioners also assert (Pet. 14-16) that providing just compensation for Fifth Amendment takings is an "inherently judicial" function that cannot be performed by Congress or assigned to an Article I court. But centuries of history dating to the Founding make clear that resolving claims seeking compensation for asserted takings by the United States is not an "'inherently judicial'" function because those matters "could be conclusively determined by the Executive and Legislative

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[8] Petitioners err in relying (Pet. 18-19) on Professor Jaffe's articles discussing judicial review. Those articles principally address suits seeking to enjoin agency actions alleged to be unlawful—a form of relief that could in some circumstances be obtained through a suit against federal officers even absent a waiver of sovereign immunity. See *Larson*, 337 U.S. at 690-691 & n.11. But Professor Jaffe emphasized that "[t]he United States, of course, is not suable without its consent." Louis L. Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 769 (1958). He thus did not endorse petitioners' assertion that the United States may be sued for money damages absent a waiver of sovereign immunity.

Branches." *Northern Pipeline*, 458 U.S. at 68 (plurality opinion) (citation and ellipses omitted).

This Court's decision in *Monongahela* is not to the contrary. Cf. Pet. Br. 14-15, 23-24, 31-34. As the court of appeals explained, "*Monongahela* is inapposite" because it involved condemnation proceedings brought *by* the United States under a statute that "provided a specific Article III court with jurisdiction." Pet. App. 20a; see *Monongahela*, 148 U.S. at 313. This Court held that, having vested an Article III court with jurisdiction, Congress could not dictate the result by specifying the amount of compensation required under the Fifth Amendment. *Monongahela*, 148 U.S. at 327-328. But that holding does not suggest that only Article III courts are capable of hearing just-compensation claims against the United States. This Court specifically rejected such a suggestion in *Williams*, finding "nothing which militates against [the Court of Claims' status as an Article I tribunal] in the requirement that the Court of Claims * * * must award just compensation under the Fifth Amendment." 289 U.S. at 581.

3. Petitioners separately contend (Pet. 24-36) that the Seventh Amendment entitles them to have their claims heard by a jury. That contention lacks merit. "It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981); see *id.* at 160-162 & n.9. This Court has thus held that "Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims." *Sherwood*, 312 U.S. at 587; accord *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). And, as particularly relevant here, the Court has specifically recognized that "[i]t is settled law

that the Seventh Amendment does not apply" in "suits against the United States" arising from asserted "regulatory takings." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999) (*Del Monte Dunes*).[9]

4. Petitioners do not contend that the court of appeals' decision conflicts with any decision of another court of appeals. To the contrary, they have "cited no case in which the Fifth Amendment has been found to provide litigants with the right to sue the government for money damages in federal district court." Pet. App. 14a. This case thus does not warrant this Court's plenary review. Cf. Sup. Ct. R. 10. And petitioners likewise err in suggesting (Pet. 37) that their petition for a writ of certiorari should be held pending the Court's decision in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, No. 16-712 (argued Nov. 27, 2017) (*Oil States*). That case presents the question whether inter partes review of patents before the Patent Trial and Appeal Board is consistent with Article III and with the Seventh Amendment. See U.S. Br. at 15-53, *Oil States*, *supra* (No. 16-712). It does not implicate any question about the validity of the Tucker Act; the sovereign immunity of the United States; the right to trial by jury in Fifth Amendment takings cases; this Court's

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[9] Petitioners observe (Pet. 36) that the Court held in *Del Monte Dunes* that a plaintiff who sues under 42 U.S.C. 1983 to obtain just compensation for a taking by a state or local government is entitled to a jury trial. 526 U.S. at 721. But the Court emphasized "the limitations of [its] Seventh Amendment holding," which rested on the nature of a suit under Section 1983. *Ibid.* And, as noted above, the Court specifically reaffirmed the "settled law" holding that the Seventh Amendment does not extend to just-compensation claims "against the United States." *Id.* at 719.

decision in *First English*; or any of the other issues petitioners raise. There is thus no reason to believe that the Court's decision in *Oil States* will have any bearing on the very different question presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2018