No. _____

In The
Supreme Court of the United States

MICHAEL SAMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Takings Clause of the Fifth Amendment is a self-executing waiver of sovereign immunity, therefore vesting review of federal takings suits in Article III courts.

2. Whether Congress violates Article III of the Constitution to the extent Congress forces plaintiffs with federal takings suits over $10,000 to litigate these suits before the Article I judges of the United States Court of Federal Claims.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption of this petition.

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Michael Sammons respectfully petitions this Court for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

INTRODUCTION

This case is about the intersection of two of the most important guarantees in the Constitution: the guarantee of an independent judiciary under Article III, and the guarantee that private property will not be taken for public use without just compensation under the Takings Clause of the Fifth Amendment. Petitioner has a $900,000 takings claim against the federal government. He wanted to litigate this claim in the first instance before a federal judge whose independence is assured by grant of life tenure under Article III. So he sued in federal district court.

This suit was then dismissed for lack of subject-matter jurisdiction. The district court told Petitioner that he must litigate his case before the only kind of judge that Congress has presently authorized to hear claims against the United States over $10,000: a term-limited Article I judge on the U.S. Court of Federal Claims. Put another way, the district court held that the political branches may take private property for public use and then assign a non-independent judge to decide whether a taking occurred at all—and, if so, how much compensation will be paid (if any).

On appeal, the Fifth Circuit affirmed. The sole basis for this judgment was sovereign immunity: the

doctrine that a sovereign cannot be sued without its consent. The Fifth Circuit reasoned that federal takings cannot be litigated in federal court absent a statutory waiver of sovereign immunity—a waiver to which Congress can attach any condition that it wants. The Fifth Circuit then pointed to the Tucker Act, 28 U.S.C. § 1491(a), as such a waiver for federal takings suits—a waiver conditioned on the Court of Federal Claims being the exclusive jurisdiction for all claims against the United States over $10,000.

This analysis, however, flies in the face of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987). This Court announced in *First English* that because "claims for just compensation are grounded in the Constitution itself," the Takings Clause is a "self-executing" waiver of sovereign immunity that affords "a basis for a court to award money damages against the government." *Id.* at 315 & n.9. Article III dictates in turn that "[t]he judicial power shall extend to all cases . . . arising under th[e] Constitution."

The Fifth Circuit determined, however, that its hands were tied by *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980), which implicitly found that "the Fifth Amendment does not automatically waive sovereign immunity." App. 5–6. Since *Ware* predates *First English*, Petitioner asked the Fifth Circuit to grant rehearing en banc in order to overrule *Ware*. The Fifth Circuit denied rehearing. *See* App. 30–31.

This places the Fifth Circuit at odds with the Fourth Circuit and the Federal Circuit, both of which have held that the Takings Clause is a self-executing waiver of sovereign immunity. *See Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997); *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991). The Court should grant review to resolve this critical split.

The Court should also grant review because the decision below provides that Congress may force plaintiffs with federal takings claims to litigate before the Article I judges of the Court of Federal Claims. In *Stern v. Marshall*, this Court emphasized that "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely." 564 U.S. 462, 502–03 (2011). Hence, even if the Tucker Act is understood to waive sovereign immunity for federal takings suits, the Act still cannot chip away at Article III. But the Act does just this by: (1) forcing federal takings litigants to submit to Article I judges wielding Article III power; and (2) withdrawing federal takings suits from the original cognizance of Article III judges.

These separation-of-powers problems may seem surprising given that the Tucker Act has been on the books since 1887. But these problems only came into existence in 1982. Before then, property owners could be heard by an Article III judge in all federal takings cases. The Tucker Act channeled litigation of federal takings over $10,000 into the U.S. Court of Claims—a tribunal composed of life-tenured Article III judges. The Act also allowed federal takings under $10,000 to

be litigated in federal district court—something that is still true today. In 1982, however, Congress retired the Court of Claims and created what is now the Court of Federal Claims: a tribunal vested with all of the Court of Claims' Article III power and Tucker Act jurisdiction but run by Article I judges.

That reality is incompatible with the separation of powers. It also deprives Petitioner of Article III review for no good reason. Petitioner would be able to obtain Article III review if his federal takings claim was under $10,000, if the government had taken his property through condemnation, or if the government had violated any of his other constitutional rights. Petitioner is denied the benefit of Article III review here simply because this federal takings claim exceeds $10,000. That only serves to diminish the Takings Clause. But there is "no reason why the Takings Clause . . . as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). The doctrine of sovereign immunity does not stretch so far.

ORDERS & OPINIONS BELOW

The Fifth Circuit's June 19, 2017 opinion is reported at 860 F.3d 296. *See* App. 1–7. The Fifth Circuit's August 30, 2017 denial of en banc rehearing is reproduced at App. 30–31.

The March 9, 2017 order of the United States District Court for the Western District of Texas is reproduced at App. 8–11. The Magistrate Judge's February 7, 2017 Report and Recommendation is reproduced at App. 12–29.

JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. § 1254(1) given the Fifth Circuit's entry of final judgment on June 19, 2017, *see* App. 1, and its later denial on August 30, 2017 of a timely petition for rehearing en banc. *See* App. 30–31.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Article III, § 1 of the Constitution provides:

> The 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. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Article III, § 2 of the Constitution provides in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . . . ; [and] to controversies to which the United States shall be a party . . . .

The **Fifth Amendment to the Constitution** provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

The **Tucker Act, 28 U.S.C. § 1491(a)(1)**, provides in relevant part:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon 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.

The **Little Tucker Act, 28 U.S.C. § 1346(a)(2)**, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> > (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, 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. § 171(a) provides in relevant part:

> [T]he United States Court of Federal Claims . . . . is declared to be a court established under [A]rticle I of the Constitution of the United States.

28 U.S.C. § 172(b) provides:

> Each judge of the United States Court of Federal Claims shall be appointed for a term of fifteen years.

STATEMENT OF THE CASE

I. A brief history of the Takings Clause and judicial review of federal takings.

The Takings Clause of the Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." The Clause is a fundamental limit on government power whose origin can be traced back over 800 years to Magna Carta (1215). Among its many revolutionary provisions, Magna Carta "forbade any 'constable or other bailiff' from taking 'corn or other provisions from any one without immediately tendering money therefor.'"

Horne v. U.S. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015) (quoting Magna Carta cl. 28).

The work of William Blackstone sheds further light on the origin of the Takings Clause. *See* 1 WM. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 138–40 (1765). Blackstone observed that "[s]o great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community." *Id.* at 139. The quintessential example of this was a taking: "If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land." *Id.*

Blackstone then explained that to the extent "the legislature . . . [can] compel the individual to acquiesce" to a government taking, this did not mean that the legislature could "strip[ ] the subject of his property in an arbitrary manner." *Id.* The property owner still had a right to "a full indemnification and equivalent for the injury thereby sustained." *Id.* This led Blackstone to conclude that in the context of a government taking, "[t]he public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price." *Id.*

Baron de Montesquieu seconded this analysis. *See* 2 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS, bk. XXVI, ch. 15, p. 210–11 (T. Nugent transl., 1752).

Montesquieu deemed it a "certain maxim" that "it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation." *Id.* It was better to follow "the rigor of the civil law, which is the palladium of property." *Id.* This meant that, "[i]f the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual who treats with an individual." *Id.*

Magna Carta, Blackstone, and Montesquieu shaped the Framers' view of government takings. This is especially true of James Madison, "the chief architect of the Takings Clause."[1] A "committed defender of property rights," Madison recognized "the significance of national ratification of a compensation requirement, and included it among the amendments [that] he proposed to Congress."[2] Indeed, for Madison, any government that "pride[d] itself in maintaining the inviolability of property" was also a government which provided that no private property "shall be taken . . . for public use without indemnification to the owner."[3]

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[1] Jeffrey Gaba, *John Locke & the Meaning of the Takings Clause*, 72 MISSOURI L. REV. 525, 526–27 (2007).

[2] William Treanor, *The Origins & Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 709 (1985).

[3] James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, in 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 266–67 (R. Rutland & T. Mason eds. 1983), http://bit.ly/2zRd1pB.

Succeeding generations embraced and carried forward this original understanding of the Takings Clause. Justice Story, in his famed legal treatise on the Constitution, declared the Takings Clause to be "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 547–48 (T. Cooley, ed. 1873); *see Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) (quoting Justice Story on this point).

As for how the Takings Clause was meant to be enforced, Madison viewed the Clause in line with the rest of the Bill of Rights: as "a standard for judicial review."[4] In this vein, Madison expressly championed ratification of the Bill of Rights on the grounds that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [these] rights."[5] Madison further emphasized that courts would "be naturally led to resist every encroachment upon rights expressly stipulated for in the [c]onstitution by the declaration of rights."[6]

So it was. In *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (1795), Justice Paterson delivered the following

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[4] Treanor, *supra* note 2, at 710.

[5] Speech Proposing the Bill of Rights (June 8, 1789), in 12 JAMES MADISON, THE PAPERS OF JAMES MADISON 197, 207 (C. Hobson & R. Rutland eds. 1979), http://bit.ly/2B3pzbb.

[6] *Id.*

jury instructions in an early takings case. He declared that property rights were "a right not *ex gratia* from the legislature, but *ex debito* from the [C]onstitution." *Id.* at 311. The legislature therefore could not take private property unless it also ordained that the property owner "shall receive compensation." *Id.* at 312. And at this point, the legislature had to "stop"; it could not proceed to "constitutionally determine . . . the amount of the compensation." *Id*. Instead, under the Constitution, compensation had to be decided either by consent, by "persons mutually elected by the parties," or by "the intervention of the Judiciary." *Id.* at 314–15.

Justice Paterson thus affirmed the importance of an independent judiciary in deciding compensation under the Takings Clause. And in the centuries that followed, his analysis endured. In 1893, this Court affirmed that compensation for government takings "is a judicial inquiry." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893). And in 1936, this Court held that "[a]gainst the objection of the owner of private property taken for public use . . . Congress may not directly or through any legislative agency finally determine the amount . . . safeguarded to him" by the Takings Clause. *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 368 (1936).

Besides deciding compensation, an independent judiciary has also been important in deciding what entails a "taking" in the first place. This is true in two respects. First, there is the long tradition of condemnation—an "action brought by . . . the Government in the

exercise of its power of eminent domain." *United States v. Clarke*, 445 U.S. 253, 255 (1980). Condemnation actions are "suit[s] at common law" because the "right of eminent domain always was a right at common law." *Kohl v. United States*, 91 U.S. 367, 376 (1876). Article III courts have thus traditionally been responsible for administering these actions. *See United States v. Dow*, 357 U.S. 17, 22 (1958).

Next there is "inverse condemnation," which is what happens when the government takes private property and then leaves it to the property owner to recover just compensation. *Clarke*, 445 U.S. at 257–58. In these cases, property owners are "entitled to bring an action in inverse condemnation as a result of the self-executing character" of the Takings Clause. *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, Cal.*, 482 U.S. 304, 315 (1987) (punctuation omitted).

The nature of an inverse condemnation suit is illuminated by decisions "contemporaneous with the adoption of the Bill of Rights." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715 (1999) (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Thomas, JJ.). These decisions "suggest[] 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." *Id.*

In the end, inverse condemnation suits often come down to one question: "Was there a taking?" *United*

States v. Lynah, 188 U.S. 445, 468 (1903). That *constitutional* question then further demonstrates why an independent judiciary has been important in the administration of the Takings Clause. An example of this is *Pennsylvania Coal Co. v. Mahon*, in which this Court determined for the first time that regulations may cause a taking. 260 U.S. 393, 415 (1922). As a result, property owners may now seek compensation in court for regulations that cause a "'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005).

This leaves the matter of what kinds of judges have historically adjudicated federal takings. For "many years after the [C]onstitution was adopted," the federal government's practice was to condemn property "in a state court and by authority of a state statute." 1 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 106–07 (1917). The federal government later opted "to condemn directly, by authority of an act of Congress," enabling property owners to be heard by an Article III judge during the condemnation suit. *Id.* at 107–08. Finally, in 1855, Congress created the Court of Claims—a court originally comprised of Article III judges with jurisdiction over money claims against the United States, including inverse condemnation suits.

II. The evolution of the U.S. Court of Federal Claims from its predecessor's founding in 1855 to the 1887 Tucker Act to the 1982 Federal Courts Improvement Act.

In 1855, Congress created the Court of Claims to handle money claims against the United States. The Court of Claims' enabling act provided that the court would "consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate." Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612, 612. These judges were to "hold their offices during good behaviour" and "receive a compensation of four thousand dollars" per year. *Id.* This language echoes Article III of the Constitution, which provides that federal judges must "hold their office[ ] during good behaviour" and "receive, for their services, a compensation, which shall not be diminished during their continuance in office."[7]

At the same time, Congress was not sure that it wanted Court of Claims judges to render final, binding judgments—i.e., exercise Article III power. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 552–53 (1962) (plurality opinion). So Congress limited the court "to hear[ing] claims and report[ing] its findings of fact and opinions to Congress, together with drafts of bills designed to carry [the court's] recommendations into effect." *Id.*

[7] In 1863, Congress added two more judges to the Court of Claims on the same terms. *See* Act of March 3, 1863, ch. 92, § 1, 12 Stat. 765, 765.

This compromise quickly proved to be unworkable. *See id.*

Thus, in 1863, Congress gave the Court of Claims the power to issue "final judgment[s]" that were appealable to the Supreme Court. Act of March 3, 1863, ch. 92, § 5, 12 Stat. 765, 766. But there was a catch: no Court of Claims judgment would be paid absent "an appropriation . . . estimated for by the Secretary of the Treasury." *Id.* at 768 (§ 14). Recognizing that this proviso gave the Treasury "a revisory authority" over Court of Claims' judgments that could not be squared with the "exercise of judicial power," this Court refused to review Court of Claims appeals. *Glidden Co.*, 370 U.S. at 554 (citing *Gordon v. United States*, 69 U.S. 561 (1864)).

Congress promptly repealed the Treasury proviso. *See* Act of March 17, 1866, ch. 19, § 1, 14 Stat. 9. This Court then drove that repeal home by rejecting a Treasury attempt to offset a Court of Claims judgment against a debt that the judgment-holder owed to the United States. *See United States v. O'Grady*, 89 U.S. 641 (1875). The Court emphasized that a "judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under [the] existing law[] as [a] judgment of the Supreme Court." *Id.* at 648.

With the Court of Claims' Article III power now well-established, all that was left to be settled was the court's jurisdiction. When Congress created the Court of Claims in 1855, it limited the court's jurisdiction to money claims against the United States that were

based on federal laws, executive regulations, and government contracts. *See* Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612. Congress then expanded this jurisdiction in 1863 to encompass any set-offs, counterclaims, and damage claims that the United States might have against Court of Claims litigants. *See* Act of March 3, 1863, ch. 92, § 3, 12 Stat. 765.

Finally, in 1887, Congress passed the Tucker Act. *See* Act of March 3, 1887, ch. 359, 24 Stat. 505 (codified at 28 U.S.C. § 1491(a)(1)). The Tucker Act extended the Court of Claims' jurisdiction to reach "[a]ll claims founded upon the Constitution," *id.* (§ 1)—language that echoes Article III, which provides that the "judicial power shall extend to all cases . . . arising under this Constitution." Congress also gave federal district courts concurrent jurisdiction over matters within the Court of Claims' jurisdiction that did not exceed $10,000—a portion of the Tucker Act that over time came to be known as the Little Tucker Act. *See* Act of March 3, 1887, ch. 359, § 2, 24 Stat. 505 (codified at 28 U.S.C. § 1346(a)(2)).

The Court of Claims now had Article III judges, powers, and jurisdiction. Nevertheless, the Court of Claims' status as an Article III court remained a disputed question. At first, this Court recognized that the Court of Claims was an Article III court. The Court described the Court of Claims' jurisdiction as resting on the "judicial power of the United States," *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902), and found that Court of Claims judges were "judge[s] of a court of the

United States" protected by Article III. *Miles v. Graham*, 268 U.S. 501, 509 (1925).

Then, in *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) and *Williams v. United States*, 289 U.S. 553 (1933), this Court reversed course. The Court found that the Court of Claims was in fact an Article I or "legislative court" given the singular focus of the court's work: the adjudication of federal debts. *See Bakelite*, 279 U.S. at 452. In the Court's view, this work involved "nothing which inherently or necessarily requires judicial determination." *Id.* at 453.

It was not until 1962 that this Court finally put the Court of Claims' constitutional status to rest. By a 5-2 vote, the Court decided in *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962), that the Court of Claims was an Article III court. Writing for a plurality of the Court, Justice Harlan declared that "[t]he creation of the Court of Claims can be viewed as a fulfillment of the design of Article III." *Id.* at 558. Justice Harlan based this conclusion on the Court of Claims' historical record—a record that established Congress's intent to confer upon the Court of Claims the power to render final, binding judgments (i.e., Article III power) and to hear cases "aris[ing] either immediately or potentially under federal law within the meaning of Art. III, § 2."[8] *Id.* at 552–56.

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[8] The *Glidden* plurality also rejected various arguments against recognizing the Court of Claims as an Article III court, including the Court of Claims' jurisdiction being limited to cases

Fast forward to 1981. The nation needed a new federal appeals court to improve legal uniformity in areas like intellectual property law and government contracts. *See* H.R. REP. NO. 97-312 at 17 (1981). This inspired Congress to devise the Federal Circuit, which would be "a merger of the . . . Court of Claims and the United States Court of Customs and Patent Appeals." *Id.* at 16–17. Congress also conceived of a "new Article I trial forum known as the United States Claims Court" that would "inherit[ ] the trial jurisdiction of the Court of Claims." *Id.*

The final result of Congress's labor was the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. The Act created the Federal Circuit by staffing it with the Article III judges of the Court of Claims and the Court of Customs and Patent Appeals. *See id.* §§ 101, 165, 96 Stat. at 25, 50. The Act also formally abolished the Court of Customs and Patent Appeals. *See id.* § 122, 96 Stat. at 36.

But the Act did not abolish the Court of Claims. The Act instead erected a "United States Claims Court" with 16 judges each appointed to a 15-year term. *Id.* § 105(a), 96 Stat. at 26–28. The Act then labeled this tribunal an Article I court while assigning to it all the Article III powers and jurisdiction that belonged to the Court of Claims. *Id.* §§ 133, 139, 96 Stat. at 39–44. Later, in 1992, Congress gave the tribunal its

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against the United States and the ability of Congress to refer cases to the Court of Claims. *See* 370 U.S. at 562–84.

present name: the U.S. Court of Federal Claims. *See* Pub. L. No. 102–572, § 902, 106 Stat. 4506, 4516 (1992).

III. This litigation.

1. During the early 2000s, Michael Sammons, a private investor, amassed $1 million in preferred stock sold by Fannie Mae (the Federal National Mortgage Association) and Freddie Mac (the Federal Home Loan Mortgage Corporation). *See* App. 2.

2. In 2008, Fannie Mae and Freddie Mac went into conservatorship. *Id.* The Treasury then bought "$1 billion of preferred stock in each entity." *Id.*

3. In 2012, the Treasury negotiated a financial amendment to its 2008 Fannie and Freddie stock purchase that let the Treasury claim "one hundred percent of the current and future profits" of both Fannie and Freddie. *Id.* This wiped out the dividend value of Sammons' Fannie and Freddie stock. *See id.*

4. Sammons then sued the United States in Texas federal district court. App. 12–13. Sammons alleged that the Treasury's 2012 financial amendment "expropriated his property interests in his preferred [Fannie and Freddie] stock; destroyed his reasonable, investment-backed expectations; and permanently deprived him of the economic value of his shares." App. 13–14. Sammons sought an award of $900,000 in compensation under the Takings Clause. *Id.*

5. The government moved to dismiss Sammons' takings suit for lack of subject-matter jurisdiction. *See*

App. 16. The government argued that Sammons' takings suit belonged in the Court of Federal Claims because the Tucker Act, 28 U.S.C. § 1491(a), vests exclusive jurisdiction of any claim against the United States over $10,000 in that court. *See id.*

6. In response, Sammons sought "a declaratory judgment that the Tucker Act [was] unconstitutional as applied to his claim." App. 3. Sammons argued that "the Tucker Act violat[ed] Article III and the separation-of-powers doctrine by improperly granting exclusive jurisdiction over Fifth Amendment takings claims to a non-Article III court." App. 20.[9]

7. The magistrate judge recommended that Sammons' declaratory-judgment motion be denied and that the government's motion-to-dismiss be granted. *See* App. 28. This recommendation was based on a separation-of-powers analysis (*see* App. 18–28) that led the judge to find that it was constitutional for the Court of Federal Claims to exercise sole jurisdiction over federal takings claims over $10,000. App. 27.

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[9] To further protect his right to Article III review of his takings claim, Sammons asserted a jurisdictional challenge by way of a motion to intervene in *Fairholme Funds, Inc. v. United States*, 681 F. App'x 945, 946–49 (Fed. Cir. 2017)—a takings class action brought by other Fannie/Freddie investors in the Court of Federal Claims. Sammons' intervention motion was denied and, on appeal, the Federal Circuit affirmed, holding that Sammons "may fully litigate, in [his] Texas case, his claim of entitlement to an Article III forum for his takings claim." *Id.* at 949.

8. Sammons timely objected to the magistrate judge's recommendation. *See* App. 8.

9. The district court accepted the magistrate judge's recommendation and entered a dismissal for lack of subject-matter jurisdiction. *See* App. 11.

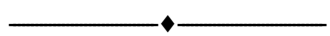
10. Sammons timely appealed the dismissal of his case to the Fifth Circuit. *See* App. 3.

11. The Fifth Circuit affirmed. *See* App. 1. The panel held that Sammons' jurisdictional argument was "foreclosed" by *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980), which established that "Congress can constitutionally require [takings] cases to be heard in an Article I court." App. 5, 7.

12. Sammons timely petitioned for rehearing en banc. Sammons argued en banc review was merited to overrule *Ware* given this Court's later rulings in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987) and *Stern v. Marshall*, 564 U.S. 462 (2011).[10]

13. The Fifth Circuit denied rehearing. App. 30.

14. This certiorari petition follows.



[10] *See* Sammons' Pet. for Reh'g En Banc at 10–11, *Sammons v. United States*, No. 17-50201 (5th Cir. Oct. 3, 2017).

REASONS TO GRANT THE PETITION

I. The circuits are split on whether this Court's decision in *First English* means that the Takings Clause is a self-executing waiver of sovereign immunity.

Petitioner wants to litigate his $900,000 federal takings suit before a judge whose "independence of action and judgment" is assured by life tenure—i.e., an Article III judge. *Evans v. Gore*, 253 U.S. 245, 253 (1920). Petitioner is entitled to such Article III review because federal takings suits do not require a statutory waiver of sovereign immunity. Rather, as this Court made clear over 30 years ago in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, it is the Constitution itself—not Congress—that enables property owners to "bring an action in inverse condemnation as a result of the self-executing character" of the Takings Clause. 482 U.S. 304, 315 (1987) (punctuation omitted).

The Fifth Circuit refused to follow *First English*. *See* App. 5 & n.8. The panel held that "whatever the merits" of Petitioner's *First English* argument might be, "the issue [was] foreclosed" by *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980)—a case that the Fifth Circuit decided seven years before *First English*. *See* App. 5–6. The panel reasoned that because of *Ware*, it was settled circuit law that "the Fifth Amendment does not automatically waive sovereign immunity." *Id*. The panel also emphasized that "one panel of this Court may not overrule another." *Id*.

Petitioner then asked for rehearing en banc to enable the Fifth Circuit to overrule *Ware*. In *First English*, after all, this Court expressly rejected the government's argument that the Takings Clause was "not a remedial provision" because of "principles of sovereign immunity." 482 U.S. at 316 n.9. The Fifth Circuit denied rehearing. App. 30–31. The Fifth Circuit has thus staked out the unyielding position that the Takings Clause is not a self-executing waiver of sovereign immunity. This places the Fifth Circuit on one side of a deep and growing circuit split over the meaning of *First English* and whether the Takings Clause actually is a self-executing waiver of sovereign immunity.

A. The Fourth and Federal Circuits see the Takings Clause as a waiver.

The Fourth and Federal Circuits stand against the Fifth Circuit here. These circuits have followed *First English* and found that the Takings Clause is a self-executing waiver of sovereign immunity.

***Fourth Circuit**:* In *Mann v. Haigh*, 120 F.3d 34 (4th Cir. 1997), the Fourth Circuit expressly noted that the Takings Clause is a "situation in which the Constitution itself authorizes suit against the federal government." *Id.* at 37 (citing *First English*). Three years later, in *Lawyer v. Hilton Head Public Service District No. 1*, 220 F.3d 298 (4th Cir. 2000), the Fourth Circuit cited *Mann* as a basis for "assum[ing] . . . that plaintiffs can bring direct claims under the Takings Clause." *Id.* at 302 n.4. The Fourth Circuit also observed that

"[o]ther courts . . . have held, in apparent conflict with *First English*, that a violation of the Takings Clause can only be redressed" through federal statutory claims. *Id.* (collecting cases).

Federal Circuit: In *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), the Federal Circuit expressly found that federal takings suits "escape[ ] the problems of sovereign immunity" because these suits rest on the Takings Clause and this "provision [is] considered to be self-executing with respect to compensation." *Id.* at 1371; *see id.* at 1373 (citing *First English*). The Federal Circuit later reaffirmed this view in *Hair v. United States*, 350 F.3d 1253 (Fed. Cir. 2003): "It is true that sovereign immunity does not protect the government from a Fifth Amendment [t]akings claim because the constitutional mandate is 'self-executing.'" *Id.* at 1258.

B. The Fifth, Sixth, Ninth, and Eleventh Circuits see no waiver.

The Sixth, Ninth, and Eleventh Circuits align with the Fifth Circuit here in terms of finding that the Takings Clause is not a self-executing waiver of sovereign immunity for federal takings suits.

Sixth Circuit: In *Brott v. United States*, 858 F.3d 425 (6th Cir. 2017), the Sixth Circuit held 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 [a] suit for money damages."

Id. at 432. In reaching this conclusion, the Sixth Circuit dismissed the fact that this Court in *First English* "referred to the Fifth Amendment right to just compensation as 'self-executing.'" *Id.*

Ninth Circuit: In *Azul Pacifico, Inc. v. City of Los Angeles (Azul II)*, 973 F.2d 704 (9th Cir. 1992), the Ninth Circuit held that "no cause of action" exists "directly" under the Takings Clause. *Id.* at 705. This was the panel's second decision. The panel's first decision—which the panel later withdrew—held that the Takings Clause was a self-executing waiver of sovereign immunity. *See Azul Pacifico, Inc. v. City of Los Angeles (Azul I)*, 948 F.2d 575, 586 (9th Cir. 1991). The panel explained that when the government fails to pay for a taking, "the property owner may bring suit under the [T]akings [C]lause to compel payment." *Id.* at 586. The panel further noted that "[i]f there was any doubt on this score it was removed by . . . *First English*." *Id.* The panel's second decision, by contrast, did not discuss *First English*. *See Azul II*, 973 F.2d at 705.

Eleventh Circuit: In *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992), the Eleventh Circuit implicitly rejected the Takings Clause as a self-executing waiver of sovereign immunity. At issue was a federal law that seemed to authorize a taking but did "not contain a just compensation provision." *Id.* at 604 & n.2. The panel concluded this meant the law had to be read in a way to avoid a taking. *See id.* at 610. A petition for rehearing en banc was then filed and denied. Judge Tjoflat

dissented.[11] *See Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 988 F.2d 1071, 1071–72 (11th Cir. 1993) (Tjoflat, J., dissental). Judge Tjoflat explained that because the Takings Clause "is self-executing," a law "need not explicitly provide for just compensation in order to be constitutional." *Id.* By failing to recognize this, the panel had "abrogate[d] . . . Supreme Court precedent holding that the [Takings] Clause is self-executing." *Id.*

* * *

"Courts have struggled with the issue of whether plaintiffs can bring direct claims under the Takings Clause." *Lawyer*, 220 F.3d at 302 n.4. As a result, a deep and growing circuit split now exists as to whether this Court meant what it said in *First English* when it described the Takings Clause as a self-executing waiver of sovereign immunity. This circuit split now controls whether claimants with federal takings suits like Petitioner are entitled to Article III review. The Court should grant review to end this split.

II. *Stern* establishes the existence of a major separation-of-powers problem with federal takings claimants being forced to litigate in the U.S. Court of Federal Claims.

In *Stern v. Marshall*, 564 U.S. 462 (2011), this Court held that it violated the separation of powers for a federal bankruptcy court—i.e., a non-Article III

[11] Judges Hatchett, Anderson, and Kravitch also dissented.

tribunal—to decide a state-law counterclaim. This was because the bankruptcy court, in deciding the counterclaim, was "exercis[ing] the essential attributes of judicial power [that] are reserved to Article III courts." *Id.* at 501. The Court later decided that this kind of separation-of-powers problem is excusable only "when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015).

Based on this standard, a major separation-of-powers problem is posed by the Tucker Act forcing Petitioner and others to litigate federal takings suits over $10,000 in the Court of Federal Claims—i.e., an Article I tribunal. *See* 28 U.S.C. §§ 171–172. In particular, adjudication of a federal takings suit by the Court of Federal Claims involves a "prototypical exercise of judicial power": "a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any [government] agency regulatory regime." *Stern*, 564 U.S. at 465–66.

- **Final, binding judgment.** Under 28 U.S.C. §§ 2517(a) and 2519, the Court of Federal Claims is able to render final, binding judgments against the United States and against private claimants.
- **Broad substantive jurisdiction.** Under the Tucker Act, 28 U.S.C. § 1491(a), the Court of Federal Claims has jurisdiction over "any claim against the United

States" based on the Constitution, federal law, executive regulations, federal contracts, or non-tort injuries. The court also has jurisdiction over federal setoffs and counterclaims against private litigants. *See* 28 U.S.C. § 1503. All these cases "arise either immediately or potentially under federal law within the meaning of [Article] III, § 2." *Glidden Co.*, 370 U.S. at 556 (plurality op.).

- **Common law cause of action.** A takings claim is "an affirmation of a great doctrine established by the common law for the protection of private property." *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897). Moreover, "as a matter of historical practice . . . suits to recover just compensation have been framed as common-law tort actions." *City of Monterey*, 526 U.S. at 715–16 (opinion of Kennedy, J., joined by Rehnquist, C.J., and Stevens and Thomas, JJ.).

- **Action does not derive from or depend on a regulatory regime.** "[S]uits . . . to recover just compensation for property taken by the United States . . . . [are] guaranteed by the Constitution." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). "Statutory recognition [is] not necessary. A promise to pay [is] not necessary." *Id.*; *see also First English*, 482 U.S. at 315–16.

Given the preceding analysis, this case merits the Court's review because the Constitution's separation of powers is threatened any time that Congress "confer[s] the judicial power outside Article III"—be it "over certain [state law] counterclaims" or over federal takings claims. *Stern*, 564 U.S. at 502. Such a threat exists here by virtue of Congress's decision to replace an Article III tribunal (the Court of Claims) with an Article I tribunal (the Court of Federal Claims) as the only court where federal takings suits over $10,000 may be heard. And now, under the decision below, this separation-of-powers threat is no longer open to challenge in the Fifth Circuit, turning Article III from "a guardian of individual liberty and separation of powers . . . into mere wishful thinking." *Stern*, 564 U.S. at 466.

II. The courts below erred in their resolution of the questions presented.

A. The Takings Clause is a self-executing waiver of sovereign immunity that in turn vests review of federal takings suits in Article III courts.

This Court's holding in *First English* is clear: when the government takes private property, the owner is "entitled to bring an action . . . as a result of the self-executing character of" the Takings Clause; "[s]tatutory recognition [is] not necessary." 482 U.S. at 315 (punctuation omitted). The Court also found in *First English* that its earlier takings cases had "frequently repeated th[is] view" and that these cases "refute[d] the argument . . . that 'the Constitution does

not, of its own force, furnish a basis for a court to award money damages against the government.'" *Id.* at 315 & n.9.

The Fifth Circuit thus erred here in holding that the Takings Clause "does not provide a self-executing waiver of sovereign immunity." App. 7. And since the Takings Clause is a sovereign-immunity waiver, then federal takings litigants are entitled to obtain Article III review if this is what they want. "While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy." *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902).

This point comes into sharp relief when one recognizes that the Tucker Act "is displaced . . . when a law assertedly imposing monetary liability on the United States contains its own judicial remedies." *United States v. Borme*s, 568 U.S. 6, 12 (2012). The Constitution is a "superior paramount law" that guarantees just compensation for takings. *Marbury v. Madison*, 5 U.S. 137, 176 (1803). "No just compensation can be made except in money." *Vanhorne's Lessee*, 2 U.S. at 315. The Constitution also contains its own judicial remedies insofar as "the judiciary is clearly discernible as the primary means through which [the Bill of Rights] . . . may be enforced." *Davis v. Passman*, 442 U.S. 228, 241 (1979). Federal takings litigants like Petitioner are therefore entitled to an Article III judge in the first instance.

This analysis comports with history. While the Takings Clause operates as a self-executing waiver of sovereign immunity, it does not require Congress to identify an Article III court where federal takings suits can be filed. "[C]ongress may constitutionally omit to vest the judicial power"—and that is just what Congress did for much of this nation's early history. *Martin v. Hunter's Lessee*, 14 U.S. 304, 337 (1816). Congress relied on state courts, condemnation proceedings, and private bills to compensate federal takings.

But when Congress finally created the Court of Claims in 1855—a court with jurisdiction over federal takings suits—Congress put Article III judges in charge (i.e., life-tenured judges with fixed salaries). *See* Act of February 24, 1855, ch. 122, § 1, 10 Stat. 612. Congress subsequently gave these judges full Article III power and broadened their jurisdiction through the Tucker Act to include constitutional claims. *See* Act of March 3, 1887, ch. 359, § 1, 24 Stat. 505. "The creation of the Court of Claims can [thus] be viewed as a fulfillment of the design of Article III." *Glidden Co.*, 370 U.S. at 584. And that explains why the Tucker Act has never raised separation-of-powers problems until now. While the Act required federal takings litigants with claims over $10,000 to file suit in the Court of Claims, these litigants still received the benefit of Article III review in that court.

All this changed in 1982 when Congress decided to replace the Article III Court of Claims with the Article I Court of Federal Claims. Congress may, of course, decide to "make available . . . quasi-judicial

mechanism[s] through which willing parties may, at their option, elect to resolve their differences." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986). But Congress cannot take litigants "entitled to an Article III court" in the first instance and send them "to an Article I forum for final decision without their consent." *Loveridge v. Hall*, 792 F.3d 1274, 1279 (10th Cir. 2015) (Gorsuch, J.). That includes federal takings litigants like Petitioner.

B. Congress cannot force federal takings claimants to litigate their suits before the Article I judges of the U.S. Court of Federal Claims.

Even if one assumes that the Takings Clause does not waive sovereign immunity, the Fifth Circuit still erred in holding that this means Congress may "require [federal takings] cases to be heard in an Article I court." App. 7. "[A] constitutional power cannot be used by way of condition to attain an unconstitutional result." *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918). Statutory waivers of sovereign immunity are no exception.

Consider *United States v. Klein*, 80 U.S. 128 (1872). Congress passed a law "direct[ing] the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any claim based on a pardon." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1324 (2016) (summarizing *Klein*). This Court held that "Congress had no authority to impair the effect of a pardon, for the Constitution

entrusted the pardon power to the executive alone." *Id.* (alterations omitted). This Court also refused to accept the argument that the jurisdictional bar was valid because "the right to sue the government in the Court of Claims [was] a matter of favor." *Klein*, 80 U.S. at 144.

Applied here, the unconstitutional-conditions doctrine means that even if the Tucker Act waives sovereign immunity for federal takings suits, Congress still cannot use this waiver to chip away at Article III. *See Stern*, 564 U.S. at 502–03. But that is what Congress has done through the Federal Courts Improvements Act of 1982, which now: (1) forces federal takings claimants to submit to Article I judges wielding Article III power; and (2) withdraws federal takings claims from the original cognizance of Article III judges.

1. The power-mismatch problem.

When Congress created what is now the Court of Federal Claims, it may well have intended for this tribunal to be a brand new Article I court. But what Congress actually did under the Federal Courts Improvement Act of 1982 is replace the Court of Claims' Article III judges with Article I judges while leaving the Court of Claims' Article III power and jurisdiction intact. *See* Pub. L. No. 97-164, §§ 133, 139, 96 Stat. at 39–44; *Glidden Co.*, 370 U.S. at 552–56 (plurality op.) (holding the Court of Claims to be an Article III court based on its powers and jurisdiction).

This makes the Court of Federal Claims an Article I court with Article III power.[12] *Compare* 28 U.S.C. § 172(a), *with*, *id.* §§ 2501–2522. This violates Article III—at least with respect to the adjudication of federal takings suits. If Congress "can shift the judicial power to judges without [life tenure]," the "Judicial Branch is weaker and less independent than it is supposed to be." *Waldman v. Stone*, 698 F.3d 910, 918 (6th Cir. 2012). And that is no less true when judicial power is shifted through a statutory waiver of sovereign immunity than through any other kind of law.

2. The judicial-cognizance problem.

"Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law . . . . " *Stern*, 564 U.S. at 484. Federal takings suits are such "action[s] at law" because "[t]he compensation which [one] may obtain in such a proceeding will be the same as that which [one] might have been awarded had the [government] instituted . . . condemnation proceedings." *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932). Congress then cannot withdraw federal takings suits from Article III judges or justify such withdrawal on the ground that the

[12] In *Morrison v. Olson*, Justice Scalia foresaw this possibility: "[C]onsider a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field . . . . Is there any doubt that [the Court] . . . would say that our 'constitutionally assigned duties' include *complete* control over all exercises of the judicial power." 487 U.S. 654, 709–10 (1991) (Scalia, J., dissenting) (emphasis in original).

Federal Circuit provides appellate review. *See Stern*, 564 U.S. at 500–01.

Congress also cannot withdraw from Article III courts matters "of private right"—i.e., "the liability of one individual to another under the law as defined." *Id.* at 465. On this score, while federal takings suits may be against the government, these suits are still private-rights disputes because when it comes to the determination of just compensation for government takings, "[t]he public is now considered as an individual treating with an individual." 1 BLACKSTONE, COMMENTARIES at 139; *see also* 2 MONTESQUIEU, SPIRIT at bk. XXVI, ch. 15, p. 211 ("[T]he public is in this respect like an individual who treats with an individual.").

Modern practice concurs. "Every sovereign State is of necessity . . . [an] artificial person . . . capable of making contracts and holding property." *Cotton v. United States*, 52 U.S. 229, 231 (1851). From this perspective, "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947). It then follows that when "the public [takes] property . . . it [takes] it as an individual buying property from another." *Kelo v. City of New London*, 545 U.S. 469, 510 (2005) (O'Connor, J., dissenting). Takings suits are thus private-rights disputes that cannot be withdrawn from Article III courts.

Finally, even if one assumes that federal takings suits are not private-rights disputes, this does not mean they fall into the public-rights exception to Article III review that this Court first identified in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856). Federal takings suits fall *outside* the public-rights exception because they are not matters "that can be pursued only by [the] grace" of the political branches. *Stern*, 564 U.S. at 493. These suits are instead "grounded in the Constitution itself"—"[s]tatutory recognition [is] not necessary. A promise to pay [is] not necessary." *First English*, 482 U.S. at 315.

Federal takings suits also are not matters that history shows could have been "determined exclusively" by the political branches. *Stern*, 564 U.S. at 493. **First**, these suits require a "determination [of] whether a taking has occurred"—i.e., whether a right to just compensation has vested. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012). "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority." *Marbury*, 5 U.S. at 165. **Second**, since the nation's founding, members of this Court have repeatedly declared that "[t]he ascertainment of [just] compensation" for a government taking "is a judicial function." *United States v. New River Collieries, Co.*, 262 U.S. 341, 343–44 (1923); *see also Monongahela*, 148 U.S. at 327; *Vanhorne's Lessee*, 2 U.S. at 314–15.

IV. The Court should evaluate certiorari here in tandem with *Oil States* and *Brott*.

There are two cases currently pending before the Court that raise issues that are similar to the ones presented in this petition. First, in *Oil States v. Energy Services LLC v. Greene's Energy Group, LLC*, No. 16-712, this Court has agreed to review whether private property rights (in the form of patents) may be extinguished through a non-Article III forum. Second, in *Brott v. United States*, No. 17-712, the Court has before it a certiorari petition that asks the Court to review whether the federal government can take private property and then deny the owner the ability to litigate this taking in an Article III court.

The present case merits certiorari on its own terms to resolve the first question presented—a clear circuit split on whether the Takings Clause is a self-executing waiver of sovereign immunity. At the same time, *Oil States* and *Brott* do raise a number of legal issues that overlap with the second question raised here—whether Congress can relegate federal takings claimants to the Article I Court of Federal Claims. To this end, the Court should treat *Oil States* and *Brott* as further reasons to grant review here to the extent that: (1) the Court's ultimate decision in *Oil States* addresses the arguments raised here about the scope of the public-rights exception to Article III review; or (2) the Court grants certiorari in *Brott*.

CONCLUSION

"Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993). Accordingly, when property rights are destroyed by a federal taking, the property owner is entitled to defend his freedom by seeking justice from the only kind of judge entrusted by the Constitution to decide "all cases, in law and equity, arising under this Constitution": a judge who holds office for life under Article III. For this reason, the petition for certiorari should be granted.

Respectfully submitted,

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