No. 17-795

In the Supreme Court of the United States

MICHAEL SAMMONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH 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), violates Article III of the Constitution 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. 1-7) is reported at 860 F.3d 296. The order of the district court (Pet. App. 8-11) and the report and recommendation of the magistrate judge (Pet. App. 12-29) are not published in the Federal Supplement but are available at 2017 WL 3476775 and 2017 WL 3473224, respectively.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 2017. A petition for rehearing was denied on August 30, 2017 (Pet. App. 30-31). The petition for a writ of certiorari was filed on November 28, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan

Mortgage Corporation (Freddie Mac) to "promote access to mortgage credit throughout the Nation" by "increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing." 12 U.S.C. 1716(4). Fannie Mae and Freddie Mac serve those objectives by purchasing mortgage loans from banks and other lenders, thereby providing the lenders with capital to make additional loans. *Perry Capital LLC* v. *Mnuchin*, 864 F.3d 591, 599 (D.C. Cir. 2017), cert. denied, No. 17-578 (Feb. 20, 2018).

In September 2008, Fannie Mae and Freddie Mac were on the "brink of collapse" because of the "dramatic decline in the housing market." *Perry Capital*, 864 F.3d at 598; see *id.* at 600. To avert the catastrophic impact on the markets that would have resulted from a collapse, Congress enacted the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, which created the Federal Housing Finance Agency (FHFA) and empowered it to act as conservator or receiver of Fannie Mae and Freddie Mac. 12 U.S.C. 4511, 4617(a); see Pet. App. 2. Congress recognized that avoiding a collapse would require substantial federal financial assistance, and it authorized the Department of the Treasury (Treasury) to provide that assistance by "purchas[ing] any obligations and other securities issued by" Fannie Mae and Freddie Mac. 12 U.S.C. 1455(*l*)(1)(A), 1719(g)(1)(A); see *Perry Capital*, 864 F.3d at 599-600.

FHFA placed Fannie Mae and Freddie Mac into conservatorship, and Treasury immediately purchased preferred stock in each entity and committed to provide them with billions of dollars in taxpayer funds. Pet. App. 2. Under the original agreement, Treasury was

entitled to receive dividends equal to ten percent of the amount Fannie Mae and Freddie Mac had drawn from Treasury. *Ibid.*

Fannie Mae and Freddie Mac continued to experience financial difficulties in the years following 2008, and FHFA and Treasury amended the preferred stock purchase agreements several times. *Perry Capital*, 864 F.3d at 601-602. As relevant here, in 2012, Treasury and FHFA replaced the fixed dividend obligation with a variable dividend "(roughly) equal to [Fannie Mae and Freddie Mac's] quarterly net worth, however much or little that may be." *Id.* at 598; see Pet. App. 2.

2. A number of shareholders in Fannie Mae and Freddie Mac filed suits challenging the 2012 amendments. Some sued the FHFA and Treasury in district court, alleging that the amendments were arbitrary and capricious or otherwise unlawful. See, *e.g.*, *Robinson* v. *FHFA*, 876 F.3d 220, 226-227 (6th Cir. 2017); *Perry Capital*, 864 F.3d at 602-603. Others sought money damages from the United States in the Court of Federal Claims (CFC). See, *e.g.*, *Fairholme Funds, Inc.* v. *United States*, 118 Fed. Cl. 795, 796 (2014). Those shareholders alleged that the 2012 amendments constituted a taking and that they were therefore entitled to just compensation under the Fifth Amendment. *Ibid.*

The shareholders who brought takings claims in the CFC proceeded under the Tucker Act, 28 U.S.C. 1491(a)(1), which waives sovereign immunity and 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 dam-

ages in cases not sounding in tort." That grant of jurisdiction includes claims seeking just compensation for asserted takings of private property. See, *e.g.*, *Preseault* v. *ICC*, 494 U.S. 1, 11-12 (1990). The CFC's Tucker Act jurisdiction is generally exclusive, but the Little Tucker Act, 28 U.S.C. 1346(a)(2), grants federal district courts concurrent jurisdiction over claims seeking $10,000 or less.

3. Petitioner is a shareholder in Fannie Mae and Freddie Mac. Like other shareholders, he alleges that the 2012 amendments constituted a taking for which the United States owes just compensation. Pet. App. 2, 9. Unlike the other shareholders, however, he did not file suit in the CFC. Instead, petitioner (who at the time was acting pro se) filed this suit in the United States District Court for the Western District of Texas. *Id.* at 8-11. His complaint sought $900,000 in compensation for an alleged taking of the value of his shares. *Id.* at 2, 10.

Petitioner did not dispute that, under the Tucker Act, the CFC has exclusive jurisdiction over claims seeking more than $10,000 in just compensation for asserted takings by the United States. Pet. App. 20. But he argued that "the Tucker Act is unconstitutional" as applied to claims for just compensation under the Fifth Amendment. *Ibid.* The district court, accepting a magistrate judge's report and recommendation, rejected that argument and dismissed petitioner's suit for lack of jurisdiction. *Id.* at 8-11; see *id.* at 12-29.[1]

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[1] Before filing this suit, petitioner unsuccessfully sought to intervene in the lead CFC action to argue that the CFC lacked jurisdiction over the other shareholders' claims because only an Article III court may hear claims seeking just compensation for Fifth Amendment takings. See *Fairholme Funds, Inc.* v. *United States*, 681 Fed.

4. The court of appeals affirmed. Pet. App. 1-7. The court explained that it is well-settled that Congress may assign cases involving "public rights" to non-Article III courts. *Id.* at 4 (citations omitted). The court noted that public-rights cases include claims against the United States, which cannot proceed without a waiver of sovereign immunity. *Id.* at 4-5. The court explained that, because such suits "could not otherwise proceed at all," Congress may "set the terms" on which they will be litigated—including by assigning them to non-Article III courts. *Ibid.* (quoting *Stern* v. *Marshall*, 564 U.S. 462, 489 (2011)). The court thus viewed the question in this case as "whether the United States, in the absence of the Tucker Act, has sovereign immunity over takings claims." *Id.* at 5. And the court held that binding circuit precedent established that a Fifth Amendment just-compensation claim may proceed only if Congress has waived sovereign immunity. *Id.* at 6-7 (citing *Ware* v. *United States*, 626 F.2d 1278, 1279-1280 (5th Cir. 1980)).

5. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 30-31.

ARGUMENT

Petitioner renews his contention (Pet. 22-37) that Congress violated Article III by granting the CFC exclusive jurisdiction over 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, petitioner does not cite any decision,

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Appx. 945, 946 (Fed. Cir. 2017). The Federal Circuit affirmed the CFC's denial of intervention. *Id.* at 950.

by any court, endorsing his assertion that takings claims must be heard 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.[2]

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 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"

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[2] A related question is presented in the petition for a writ of certiorari in *Brott* v. *United States*, No. 17-712 (filed Nov. 6, 2017).

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," including 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. 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).

"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).[3]

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.

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

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[3] 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).

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.[4]

2. Petitioner asserts (Pet. 30) that property owners seeking compensation for asserted takings by the United States are "entitled" to have their claims heard by "an Article III judge in the first instance," and that Congress has acted unconstitutionally by failing to provide an Article III forum for claims seeking more than $10,000. Petitioner offers no sound basis for such a radical departure from centuries of established practice.

a. Petitioner asserts (Pet. 31) that his argument "comports with history," suggesting that the purported constitutional defect he identifies arose only when Congress created the CFC in 1982. But petitioner can square his argument with history only by contradicting both his own position and the historical record.

First, petitioner acknowledges (Pet. 31) that the Fifth Amendment "does not require Congress to identify an Article III court where federal takings suits can be filed." He thus concedes (*ibid.*) that, for the first cen-

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[4] Since 1887, the Little Tucker Act has also allowed takings claimants seeking $10,000 or less to sue in Article III courts. Act of Mar. 3, 1887, ch. 359, 24 Stat. 505; see 28 U.S.C. 1346(a)(2).

tury of the Nation's history, Congress permissibly reserved to itself the authority to provide compensation for asserted takings through "private bills."[5]

That concession dooms petitioner's contention. This Court has repeatedly held that the paradigmatic example of a public-rights matter that Congress may assign to a non-Article III tribunal is one "that historically could have been determined exclusively" by Congress. *Stern*, 564 U.S. at 485 (citation omitted); see, *e.g.*, *Northern Pipeline*, 458 U.S. at 67-68 (plurality opinion); *Williams*, 289 U.S. at 579-580; *Murray's Lessee*, 59 U.S. (18 How.) at 282-284. If—as petitioner concedes (Pet. 31)—Congress acted permissibly during the century in which it reserved the determination of just-compensation claims for itself, then Congress also acted permissibly when it adopted "the less drastic expedient of committing their determination to a legislative court." *Northern Pipeline*, 458 U.S. at 68 (plurality opinion). In contrast, if—as petitioner elsewhere insists (*e.g.*, Pet. 30)—the Fifth Amendment means that federal takings claimants are "entitled" to an Article III forum, then Congress

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[5] Petitioner notes (Pet. 13, 31) that before 1887, Congress also provided compensation for takings through condemnation proceedings in state and federal courts. But as petitioner acknowledges (Pet. 11-12), "a 'condemnation' proceeding is * * * an action brought *by* a condemning authority such as the Government in the exercise of its power of eminent domain." *United States* v. *Clarke*, 445 U.S. 253, 255 (1980). This case, in contrast, involves a claim *against* the United States by an owner who asserts that his property was taken without formal condemnation proceedings (sometimes termed an "inverse condemnation" suit, see *id.* at 257-258). Petitioner does not and could not suggest that property owners seeking to assert such claims before 1887 could sue the United States in state or federal court.

acted unconstitutionally by failing to provide such a forum for most of the Nation's history.

Second, petitioner's historical account assumes (Pet. 16-17, 31) that the Court of Claims was an Article III court between 1887 and 1953. In fact, this Court held that it was an Article I legislative court that "receive[d] no authority and its judges no rights from the judicial article of the Constitution." *Williams*, 289 U.S. at 581; see *Bakelite*, 279 U.S. at 451-457; see also, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 587 (1941) ("The Court of Claims is a legislative, not a constitutional court.").

As petitioner observes (Pet. 17, 31), Justice Harlan's plurality opinion in *Glidden* would have held that the Court of Claims was an Article III court even before 1953. 370 U.S. at 584. But Justice Clark and Chief Justice Warren specifically declined to overrule *Williams* and *Bakelite*, instead concluding that the Court of Claims became an Article III court only when Congress declared it to be one in 1953. *Id.* at 585-587 (Clark, J., concurring in the result). Because their votes were necessary to the result, that narrower position reflects "the holding of the Court." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted). Petitioner's position thus necessarily implies that Congress was acting unconstitutionally not only for the first century of our Nation's history, but for much of the second as well.

b. Petitioner's primary justification for rejecting that historical understanding is his assertion (Pet. 2-4, 29-32) that the Fifth Amendment's Just Compensation Clause "is a 'self-executing' waiver of sovereign immunity" that entitles claimants to sue in an Article III court even absent consent by Congress. Pet. 2 (citation omitted). That assertion contradicts a long line of this Court's decisions, is not supported by the decision on

which petitioner relies, and would not entitle petitioner 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," *Sherwood*, 312 U.S. at 586. 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 by which [a property owner] could have obtained compensation for [a] taking." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.17 (1949); 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. Petitioner errs in asserting (Pet. 2, 29-30) that his position is compelled by this Court's decision in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304 (1987) (*First English*). The question presented in that case 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." *Brott* v. *United States*, 858 F.3d 425, 432 (6th Cir.) (quoting *First English*, 482 U.S. at 315 (citation omitted)), petition for cert. pending, No. 17-712 (filed Nov. 6, 2017). 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). The Tucker Act waives sovereign immunity, but does not create any substantive rights. *Ibid.* 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 estab-

lishing 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 petitioner must, that *First English* enshrined as law the 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, petitioner would not be entitled to prevail even if he 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" was indisputably available to petitioner. As petitioner does 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 petitioner were right that the Fifth Amendment is a "self-executing" waiver of sovereign immunity that would entitle him to sue in an Article III court if Congress had provided no other avenue for obtaining compensation, it would not follow that he should be permitted to bypass the compensation procedure that Congress *has* established.[6]

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[6] 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 *Brott*, 858 F.3d at 435-436 (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). And deferential review of factual determinations was also a feature of the Article III Court of Claims' review of the court's non-Article

c. Petitioner's remaining arguments lack merit. He asserts (Pet. 26-29) that claims seeking just compensation from the United States are akin to the claim held to require Article III adjudication in *Stern*. But this Court's decision in *Stern* rested on the fact that the claim at issue there did not "'depend upon the will of congress'" because it arose "under state common law between two private parties." 564 U.S. at 493 (brackets and citation omitted). The Court reaffirmed that Congress *may* assign a claim to a non-Article III tribunal where, as here, it is "a matter that can be pursued only by grace of the other branches" or that "'historically could have been determined exclusively by' those branches." *Ibid.* (citation omitted). Petitioner also contends (Pet. 32-36) that assigning just-compensation claims to the CFC violates other separation-of-powers principles and the unconstitutional conditions doctrine. But his arguments rest on the erroneous premise that such claims are not among the public-rights matters that Congress may assign to non-Article III courts.

3. Petitioner asserts (Pet. 23-24) that the court of appeals' decision conflicts with decisions of the Fourth and Federal Circuits. That is not correct. The Fourth Circuit decision on which petitioner chiefly relies addressed the question whether a property owner seeking compensation from a *state* defendant "must use [42 U.S.C.] 1983 as the mechanism," or whether such plaintiffs "can bring direct claims under the Takings Clause." *Lawyer* v. *Hilton Head Pub. Sch. Dist. No. 1*, 220 F.3d 298, 302-303 n.4 (2000); see *Azul-Pacifico, Inc.* v. *City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992) (cited at Pet. 25) (addressing the same question), cert.

III trial judges between 1953 and 1982, see p. 10, *supra*—a procedure that petitioner concedes was constitutional.

denied, 506 U.S. 1081 (1993). The other Fourth Circuit decision on which petitioner relies (Pet. 23-24) discussed the sovereign immunity of the United States in takings cases, but only in dicta. See *Mann* v. *Haigh*, 120 F.3d 34, 37 (1997). The same is true of the Federal Circuit's decisions in *Hendler* v. *United States*, 952 F.2d 1364, 1371 (1991), and *Hair* v. *United States*, 350 F.3d 1253, 1257 (2003).

Petitioner does not cite any decision allowing a just-compensation claim to proceed against the United States without a waiver of sovereign immunity. He also does not identify any decision suggesting—much less holding—that the Tucker Act's grant of exclusive jurisdiction to the CFC for claims in excess of $10,000 is invalid. Petitioner cites only one decision considering such a claim: The Sixth Circuit's decision in *Brott*, which held, consistent with the decision below, that "the Tucker Act and the Little Tucker Act are constitutional" because "Congress may * * * require that just-compensation claims for money damages in excess of $10,000 against the United States be heard in the [CFC]." 858 F.3d at 437. The Sixth Circuit also noted the absence of any conflict on that question, emphasizing that the plaintiffs in *Brott* 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 432.

4. Finally, petitioner briefly suggests (Pet. 37) that the petition for a writ of certiorari should be held pending this 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 Just Compensation Clause; this Court's decision in *First English*; or any of the other issues petitioner raises. 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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