No. 17-795

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Over two centuries ago, Chief Justice Marshall observed that: "To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). So it is here. Petitioner Michael Sammons seeks review of the following two questions about the nature of Congress's power to regulate the judicial determination of federal takings claims.

First, Sammons seeks review of whether Congress can withdraw federal takings claims from Article III judges in the first instance when the Takings Clause of the Fifth Amendment is a self-executing waiver of sovereign immunity. *See* Pet. i. This question has divided the circuits as a result of persisting doubts about how to read this Court's holding in *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, Cal.*, 482 U.S. 304 (1987) that the Takings Clause creates both a right and a remedy against the United States.

Second, assuming the Takings Clause is not an immunity waiver, Sammons seeks review of whether Congress can use its immunity-waiver power to compel federal takings claimants like him to litigate in the first instance before the Article I judges of the U.S. Court of Federal Claims. *See* Pet. i. This question merits review because the Court has made it clear that Congress "may no more lawfully chip away at the

authority of the Judicial Branch than it may eliminate it entirely." *Stern v. Marshall*, 564 U.S. 462, 502–03 (2011).

In response, the government does not dispute that Sammons' case indeed presents the above two questions. Nor does the government dispute that Sammons' certiorari petition affords the Court with an excellent vehicle for deciding these questions. The government instead asks the Court to deny review because the government agrees with the Sixth Circuit's answers to these questions in *Brott v. United States*, 858 F.3d 425 (6th Cir. 2017). But the government's analysis turns on a flawed view of the separation-of-powers principles that govern federal takings claims, thereby underscoring why Sammons' petition should be granted.

ARGUMENT

I. Review is needed to resolve a circuit split over whether this Court held in *First English* that the Takings Clause is a "self-executing" immunity waiver.

In *First English*, this Court held that the Takings Clause is "self-executing." 482 U.S. at 315. By this, the Court meant that when the government takes property for public use, a property owner's "claim[] for just compensation [is] grounded in the Constitution itself" and the owner is "entitled to bring an action in inverse condemnation." *Id.* The Takings Clause, in other words, furnishes both a right (just compensation for takings)

and a remedy (an action at law), and neither one is conditioned by "principles of sovereign immunity." *Id.* n.9.

This makes the Takings Clause a self-executing waiver of sovereign immunity. *See* Pet. 29–32. But "[c]ourts have struggled" to accept this conclusion. *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 302 n.4 (4th Cir. 2000). Some courts have taken *First English* at its word: the Takings Clause "authorizes suit against the federal government." *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997). Others have not. *See*, *e.g.*, *Brott*, 858 F.3d at 432 (concluding *First English* "does not mean that the United States has waived sovereign immunity").

The government answers this split through a series of arguments, addressed below, that replicate the Sixth Circuit's analysis in *Brott*. *Compare* BIO 15–17, *with Brott*, 858 F.3d at 431–36. But taking sides in a circuit split does not make the split vanish. It also does not overcome the flaws in the side that the government has picked.

A. The government fails to recognize the difference between immunity waivers and jurisdiction-creating laws.

The government's main argument for why the Court need not review the above-identified *First English* split is that "[t]o recover money damages against the United States, a plaintiff must identify both a waiver of sovereign immunity and a substantive right

. . . for money damages." BIO 16 (punctuation omitted). The government maintains that federal takings claims fit this bill because the Tucker Act, 28 U.S.C. § 1491, affords the needed immunity waiver, while the Takings Clause affords the "substantive right." *Id.* The government thus urges the Court to accept that federal takings claims hinge on a Tucker Act immunity waiver, which then enables Congress to attach any conditions that it wants to this waiver, including final adjudication by Article I judges. *See* BIO 15–17.

But this analysis misses a key step—one that is vital to understanding the proper interplay between sovereign immunity, the Takings Clause, and Article III. To raise a takings claim against the United States in federal court, three things are required: (1) a substantive right, which the Takings Clause affords; (2) a waiver of immunity, which the Takings Clause also affords; and **(3) a creation of federal court jurisdiction**, which, at present, the Tucker Act affords. By overlooking this last step, the government fails to recognize that for federal takings claims, the Tucker Act is merely a jurisdiction-creating statute—not a waiver of immunity, which the Constitution already supplies.

This is a critical distinction. Generally speaking, Congress has the final word on money-mandating rights and waivers of sovereign immunity, while the Constitution has the final word on the jurisdiction of federal courts under Article III. The exception is the Takings Clause, which functions as both a money-mandating right and an immunity waiver. For good

reason: the Framers wanted to protect federal takings claims against the possibility of legislative repeal. *See First English*, 482 U.S. at 315.

At the same time, the Framers gave Congress a free hand to decide whether to create federal courts at all. *See Patchak v. Zinke*, No. 16-148, slip op. at 7–8 (U.S. Feb. 27, 2018) (plurality op.). The Framers also enabled Congress to decide, within Article III limits, the subject-matter jurisdiction of any federal court that Congress decided to create. *See id.* Unlike the Takings Clause, the Article III power of federal courts to hear cases arising under the Constitution is "not self-executing" and requires enabling legislation. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 807–08 (1986).

To this end, as a historical matter, Congress did not enable federal courts to hear claims against the United States arising under the Constitution for "most of the Nation's first century." *Zwickler v. Koota*, 389 U.S. 241, 245 (1967). Congress instead "relied on . . . state courts to vindicate essential rights arising under the Constitution." *Id.* This explains the overall lack of federal takings litigation in federal courts from 1791 forward: Congress had not yet created federal jurisdiction over these claims.[1] *See id.*

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[1] The government tries to spin this history into a concession that Congress has free rein to decide how federal takings claims are resolved. *See* BIO 12. Yet, the same history applies to other federal constitutional rights, *see Zwickler*, 389 U.S. at 245, and the government does not suggest that Congress may assign Article I judges to be final adjudicators of these rights.

This changed when Congress finally decided to create the Court of Claims in 1855 and later passed the Tucker Act in 1887. Federal jurisdiction now existed over federal takings claims, enabling federal courts to enforce the Takings Clause's self-executing waiver of sovereign immunity. This meant that Congress had to respect Article III in organizing the Court of Claims. And this is what Congress did between 1855 and 1982 by staffing the court with life-tenured Article III judges.[2] *See* Pet. 14–19.

Then, in 1982, Congress replaced the Article III judges of the Court of Claims with Article I judges. *See id.* The government argues that the doctrine of sovereign immunity excuses the ill effect of this change on federal takings claimants seeking over $10,000 in compensation. BIO 15–17. This argument falls flat, however, because for federal takings claims, the Tucker Act's only function is to confer jurisdiction. That requires compliance with Article III—and term-limited Article I judges do not comply with Article III.

B. The government presents a reading of *First English* that cannot be squared with *First English's* text or history.

The government's next major argument against review of the *First English* split is a problematic

[2] For this reason, it is not accurate to say, as the government does, that the Court of Claims was an Article I court from 1887 to 1953. BIO 13. During this period, the main indicium of an Article III court—i.e., life-tenured judges empowered to render final, binding judgments—was always present.

reading of *First English*. BIO 16. In *First English*, this Court had to decide the full scope of government liability imposed by the Takings Clause. *See* 482 U.S. at 306–07. This led the government to file an amicus brief in *First English* urging the Court to reject the idea that the Takings Clause "standing alone and without further congressional action, mandates a damage remedy against the United States."[3] The government emphasized that "in [takings] cases arising under the Tucker Act, the government waives its sovereign immunity so as to make available . . . just compensation."[4]

The Court got the message. In its *First English* opinion, the Court took note of the government's view that the Takings Clause is "not a remedial provision" due to "principles of sovereign immunity." 483 U.S. at 315 n.9. The Court then held that a long line of earlier Supreme Court takings cases "refute[d] the argument of the United States that the Constitution does not, **of its own force**, furnish a basis for a court to award money damages against the government." *Id.* (punctuation omitted) (bold added).

The government now argues that *First English* stands for the narrow proposition that "the Fifth Amendment creates a substantive right to recover just compensation . . . that may be enforced under the Tucker Act." BIO 16 (punctuation omitted). But this is the same argument that the government made—and

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[3] Brief for the United States as *Amicus Curiae* at 21, *First English*, No. 85-1199, *available at* 1986 WL 727420.

[4] *Id.*

this Court rejected—in *First English*. 483 U.S. at 315 n.9. The government nevertheless encourages the Court to allow this argument to continue to stalk the Article III rights of federal takings claimants like the "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring).

The Court should decline the government's invitation. It is no accident that *First English* describes the Takings Clause as self-executing: it is because the Clause waives sovereign immunity. The "overwhelming majority" of state high courts dealing with state constitutional analogues of the Takings Clause have reached the same conclusion. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 633 & n.2 (Utah 1990) (collecting cases). Hence, review is merited here to end lower court doubt on this issue—doubt that is otherwise preventing courts from recognizing and protecting the Article III rights of federal takings claimants like Sammons.

C. The government errs in dismissing the existence of a circuit split.

The government's final major argument against review of the *First English* split is an assertion that no actual split exists. BIO 19–20. In particular, while Sammons' petition demonstrates that the Fourth Circuit and the Federal Circuit have ruled that the

Takings Clause waives immunity, the government argues that these rulings are dicta or distinguishable. The government is wrong.

A statement "is not dictum if it . . . constitutes an explication of the governing rules of law." *Netsphere, Inc. v. Baron*, 799 F.3d 327, 333 (5th Cir. 2015). That description fits *Hendler v. United States*, in which the Federal Circuit found, as part of a close analysis of federal takings law, that the Takings Clause waives immunity. 952 F.2d 1364, 1371 (Fed. Cir. 1991). The same goes for *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003), which cites *Hendler* for its governing-law explanation of the Takings Clause and sovereign immunity.

This brings us to the Fourth Circuit's decisions in *Mann* and *Lawyer*. In *Mann*, the Fourth Circuit's conclusion that the Takings Clause waives immunity was an integral part of the panel's holding that Title II of the Family and Medical Leave Act did not have the same effect. 120 F.3d at 37. And in *Lawyer*, the Fourth Circuit held based on *Mann* (among other cases) that "plaintiffs can bring direct claims under the Takings Clause." 220 F.3d at 302 n.4. The government dismisses *Lawyer* as only addressing state takings liability. *See* BIO 19–20. But a holding that the Takings Clause waives immunity cannot be cabined in this way—especially when one considers that for the first century of this nation, the Takings Clause was understood to apply exclusively to the federal government. *See Barron v. Baltimore*, 32 U.S. 243, 250–51 (1833).

Since the government cannot sweep away the clear circuit split that exists on the meaning of *First English*, the Court should conclude this split merits review. The alternative is the continued erosion of *First English* by courts like the Sixth Circuit in *Brott* or the Fifth Circuit here.

II. Review is needed to protect the rights of federal takings claimants like Sammons, who are being forced to submit to Article I judges exercising Article III power.

Assuming *arguendo* that the Takings Clause is not an immunity waiver, the Court still has every reason to grant Sammons' petition. This is because Congress's power to waive sovereign immunity is not unlimited. Congress cannot use this power "to attain an unconstitutional result." *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918). Yet, Congress has done just this by using the Tucker Act's purported immunity waiver to compel federal takings claimants like Sammons to litigate before Article I judges in the first instance. The government, in turn, either overlooks or assumes away this problem.

A. The government fails to address the power-mismatch problem.

Sammons' petition observes that the Court of Federal Claims now consists of Article I judges exercising Article III power—i.e., the power to issue final, binding judgments that cannot be revised by the political

branches. Pet. 33–34. The government's only response is to argue that federal takings claims are among the "public-rights matters that Congress may assign to non-Article III courts." BIO 19.

But even granting the government's premise that a federal takings claim is a public-rights matter, this Court has never held that Congress may assign public-rights matters to Article I judges exercising Article III power. Indeed, Justice Scalia had no doubt that the Court would strike down "a statute giving to non-Article III judges just a tiny bit of purely judicial power in a relatively insignificant field." *Morrison v. Olson*, 487 U.S. 654, 709–10 (1991) (Scalia, J., dissenting). This makes the government's silence on this point a powerful reason to grant review.

B. The government erroneously assumes away the judicial-cognizance problem.

Sammons' petition also observes that federal takings claims are not public-rights matters that may be removed from the original cognizance of Article III judges. *See* Pet. 34–36. This follows from the reality that: (1) federal takings claims are the subject of suits at common law; (2) federal takings claims meet the criteria of private-rights disputes; and (3) federal takings claims fall outside the criteria for public-rights matters. *See id.* The government has no answer to the first two points or the rich common law history supporting them. *See* BIO 19.

The government instead banks everything on its history-driven assumption that takings claims are public-rights matters. *See* BIO 7–11. The problem with this assumption is that federal takings claims today are a very different creature from those of earlier eras, when regulatory takings claims were unknown. *See* Pet. 11–13. Federal takings claims today almost always turn on "whether a taking has occurred"—i.e., whether a right to compensation has vested. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012). And the "question [of] whether a right has vested . . . must be tried by the judicial authority." *Marbury v. Madison*, 5 U.S. 137, 165 (1803).

Once the government's public-rights assumption is put aside, all that remains is the government's argument that federal takings claimants retain the right to "appeal to the Federal Circuit, an Article III court." BIO 18 n.6. But as Alexander Hamilton explained over two centuries ago: "The right of appeal is by no means equal to the right of applying, in the first instance, to a Tribunal agreeable to the suitor."[5] It is better "to have impartial justice . . . administered promptly and without delay; [and] not to be obliged to seek it through the long and tedious and expensive process of an appeal."[6]

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[5] Alexander Hamilton, *The Examination Number VI*, N.Y. EVENING POST, Jan. 2, 1802, in 25 THE PAPERS OF ALEXANDER HAMILTON (Harold Syrett, ed. 1977), http://bit.ly/2FrL9uS.

[6] *Id.* (punctuation omitted).

III. The questions presented should be decided now, given the key property rights and separation-of-powers issues at stake.

With review also being sought in *Brott v. United States*, No. 17-712 (U.S.), the Court now has before it two cases seeking to restore Article III as "a guardian of individual liberty and separation of powers" for federal takings claimants. *Stern*, 564 U.S. at 466. The Court should seize this opportunity, lest even more federal takings claimants be forced to accept adjudication by Article I judges whose independence is not ensured by the safeguards of Article III. In the alternative, the Court should grant-vacate-remand here in light of *Oil States Energy Services LLC v. Greene's Energy Group, LLC*, No. 16-712 (U.S.).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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