No. 18-295

IN THE

Supreme Court of the United States

ALEXANDER ALIMANESTIANU, *et al.*,

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF

RICHARD N. CHASSIN
Counsel of Record
JESSE T. CONAN
BECKER, GLYNN, MUFFLY, CHASSIN & HOSINSKI LLP
299 Park Avenue
New York, NY 10171
(212) 888-3033
rchassin@beckerglynn.com

Counsel for Petitioners

286117

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Statutes and Other Authorities

The government's opposition ("Opp.") highlights an additional reason why the Court should grant certiorari. It suggests that there is a Circuit split on a fundamental question undergirding the Takings Clause: is a claim or cause of action a protected property interest? *See* Opp. at 11-15; *See also* Pet. at 11n.3.[1]

The government's position betrays a dim view of property rights. In contending that claims are not property under the Takings Clause, the government asserts the unfettered right to force the involuntary transfer of its citizens' claims to the government, unburdened by the property protections contained in the Fifth Amendment.

We do not believe the property protections contained in the Fifth Amendment are so anemic. Certiorari should be granted to resolve the question.

I. The Circuits Split on Whether a Cause of Action Is Protected Property

A compensable taking requires a protected property interest. Here, the underlying property interests are common law tort claims (and judgments on appeal) for wrongful death and emotional distress.

The government contends that most lower courts hold that "a pending tort claim does not constitute a vested right." Opp. at 12-13 (citations omitted). But that is far from a consensus view. *See, e.g., Alliance of*

1. "Pet." refers to Petitioners' Petition for a Writ of Certiorari. All terms herein not otherwise defined have the same meanings as provided therein.

Descendants of Texas Land Grants v. United States, 37 F.3d 1478, 1481 (Fed. Cir. 1994) ("[b]ecause a legal cause of action is property within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest" (citations omitted)). Indeed, the Federal Circuit below declined to revisit its holding in *Alliance of Descendants*, as urged by the government, and assumed, without deciding, that claims are protected property within the meaning of the Takings Clause. Pet. at 11n.3; Pet. App. 10a.

In essence, the government conflates its innate power to regulate pending claims without offending due process (via statutes concerning jurisdiction, limitations, and immunities) with the extraordinary power to appropriate and use private claims to promote a benefit for the public at large without payment of just compensation.

A. The Government's Position Allows Conduct that Offends Basic Notions of Fairness and Property

Consider the following hypothetical. A faulty brake system in a car causes the death of child. Father prosecutes a wrongful death claim against the car manufacturer, obtains a $10 million judgment, and the car manufacturer appeals. Days later, the United States steps in, takes title to the wrongful death claim, intervenes in the lawsuit as the real party of interest, enters a settlement agreement with the car manufacturer, and extracts a payment of $2 million from the car manufacturer. The government then uses $1,950,000 to fund a safe-driving campaign and distributes $50,000 to the father.

The hypothetical appears to present a classic taking—the government has seized private property and used it to benefit the public at large—implicating the Fifth Amendment's requirement of just compensation. *See, e.g., Murr v. Wisconsin*, 137 S. Ct. 1933, 1951 (2017) (Roberts, J., dissenting) ("the Takings Clause stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large"). Not so, according to the government. Since tort claims are not protected property interests, the Takings Clause would not be implicated. Opp. at 11-12.

The government quotes *New York Cent. R.R. v. White*, 243 U.S. 188, 198 (1917), and explains that under the due process clause, "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." Opp. at 12. The government further points to the rules of sovereign immunity and the Court's prior endorsement of the retroactive application of those rules to pending lawsuits as further evidence that claims are not property. *Id.*

Since there is no constitutional infirmity in the retroactive application of new laws to pending lawsuits, the government concludes that a claim must not be protected property. Opp. at 12-13, 15. But one does not follow the other. A claim might be protected property such that its appropriation requires the payment of just compensation. And the government might retain the near-limitless authority to regulate or impair that interest without running afoul of the Takings Clause. *See discussion infra* at 7-9.

B. The Court's Precedents and the Circuit Split

The Court has already held that claims are protected property under the Due Process clauses of the Constitution. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) (that claims are protected property "follows logically from the Court's more recent cases analyzing the nature of a property interest").

Property consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possess, use and dispose of it." *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998) (citations omitted). Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-1004 (1984) (trade secrets may be protected under the Takings Clause). "By protecting these established rights, the Takings Clause stands as a buffer between property owners and governments, which might naturally look to put private property to work for the public at large." *Murr*, 137 S. Ct. at 1951 (Roberts, J., dissenting).

Tort claims and the proceeds of tort claims possess the hallmarks of protected property. They can be possessed, used, disposed, compromised, and settled. *See, e.g.,* N.Y. Gen. Oblig. Law § 13-103 (McKinney 2018) ("[a] judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred"); *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 22 (Tex. 1987) ("we are mindful of the general rule that a cause of action for damages for personal injuries

may be sold or assigned"). Critically, and perhaps most importantly, they can be converted to money. *Logan,* 455 U.S. at 431 (claims may "be surrendered for value").

Despite *Logan*'s unqualified holding, Circuits have struggled with the question.

The Federal Circuit holds, with limited exceptions, that all claims are protected property. *See, e.g., Alliance of Descendants*, 37 F.3d at 1481 ("[b]ecause a legal cause of action is property within the meaning of the Fifth Amendment, claimants have properly alleged possession of a compensable property interest" (citations omitted)); *Adams v. United States*, 391 F.3d 1212, 1225-1226 (Fed. Cir. 2004) ("a cause of action may fall within the definition of property recognized under the Takings Clause").

The Ninth Circuit holds that claims are not protected until reduced to final unreviewable judgment. *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009) (tort claims are not protected because they "vest" only upon final judgment); *but see In re Aircrash In Bali, Indonesia on Apr. 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982) ("There is no question that [wrongful death tort] claims for compensation are property interests that cannot be taken for public use without compensation").

The First Circuit has also suggested that pending tort claims are not protected property. *Hammond v. United States*, 786 F.2d 8, 15 (1st Cir. 1986) ("We have already found that plaintiff had no vested property right in her tort cause of action, so it is very unlikely there could be a "taking" here"); *but see Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 814

(1st Cir. 1981) ("[t]here may well be situations when the President's extinction or 'settlement' of a claim against a foreign government, without the consent of the claimant, would constitute a 'taking' of private property for a public 'use'").

Adding to the muddle is a body of law addressing due process challenges to statutes impacting the viability of pending claims. Back in 1985, one district court observed: "there is case law supporting [plaintiff's] contention that one has a vested property right in a cause of action...Those cases are conceptually difficult to reconcile with cases that hold that a plaintiff does not have a vested property right in a claim unless there is a final nonreviewable judgment." *Jefferson Disposal Co. v. Par. of Jefferson, La.*, 603 F. Supp. 1125, 1138n.31 (E.D.La. 1985). The caselaw remains "difficult to reconcile."

Indeed, most cases relied on by the government are due process cases with little or no reference to the Takings Clause. *See, e.g., In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) ("legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right"); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (due process challenge to law extinguishing tort claim). In *Lingle v. Chevron U.S.A. Inc.*, however, a unanimous Court cautioned against the blind "commingling of due process and takings inquiries." *Id.*, 544 U.S. 528, 541 (2005).

As the government has elected to press the argument that claims are not property, certiorari should be granted to resolve that subsidiary question as well.

II. The Taking Arises Not out of the Restoration of Sovereign Immunity, But out of the Involuntary Transfer and Use of Petitioners' Claims and Judgment by the United States.

The government repeatedly states that Petitioners simply complain about a routine change in law, the restoration of Libya's sovereign immunity. *See, e.g.,* Opp. at 7, 13, 15-16, 17-18. If that were the case, Petitioners' complaint would concern the government's interference with their lawsuit and claim, not the appropriation of their private property by the government. The distinction is significant. A general law that impairs or interferes with a claim or lawsuit (*e.g.* the withdrawal of jurisdiction through the restoration of sovereign immunity) would fall within the regulatory takings paradigm. *See generally Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1014 (1992)

And in *Horne*, the Supreme Court explained that "an owner of personal property ought to be aware of the possibility that new regulation might even render his property economically worthless." *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2427 (2015) (citations omitted). The rule derives from *Lucas*, 505 U.S. at 1027-1028 (1992). With respect to personal property, both *Lucas* and *Horne* recognize that background legal principles permit near-limitless regulation. *Horne*, 135 S. Ct. at 2427-2428; *Lucas*, 505 U.S. at 1027-1030.

This is likely true with respect to claims; the government enjoys control over the means (*e.g.* forum and jurisdiction), substantive legal standards, and viability (*e.g.* immunity from suit and the statute of limitations) of legal redress. *See, e.g. Plaut v. Spendthrift Farm, Inc.,* 514

U.S. 211, 226 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly"). *See also Logan*, 455 U.S. at 432-433 (where the government impacts a claim by creating "substantive defenses or immunities . . . the legislative determination provides all the process that is due").

But Petitioners here were forced to transfer to the government their claims against Libya and the resulting judgment on appeal. The government than traded away those assets in a "Claims Settlement Agreement" entered with Libya. That is what the United States told the D.C. Circuit:

> The United States' espousal is pursuant to a claims settlement agreement with the Libyan government . . . In espousing the claims against Libya, the United States has made the plaintiffs' claims its own. Because the United States is now the real party in interest, the Court should permit it to intervene in this suit as plaintiff-appellee.

See Pet. at 7-8n.1 (providing additional context and full text of passage). The seizure and settlement of Petitioners' claims and judgment is the taking. *See* Pet. at 5-7.

Horne's mandate is clear: background legal principles and reasonable expectations (*i.e.* the *Penn Central/Lucas* factors) have no place in the face of a direct appropriation:

> Whatever *Lucas* had to say about reasonable expectations with regard to regulations, people still do not expect their property, real or personal, to be actually occupied or taken away. Our cases have stressed the "longstanding distinction" between government acquisitions of property and regulations. *Tahoe–Sierra Preservation Council*, 535 U.S. [302,] 323 [(2002)].

Horne, 135 S. Ct. at 2427. The Court concluded:

> The Government's actual taking of possession and control of the reserve [raisins] gives rise to a taking.

The rule is categorical.

III. The Commission and Payments Made to Certain Petitioners

The government lumps the Petitioners together and explains that they received $10 million as compensation. *See* Opp. *at* 2, 16, 18-19. The implication is clear: stop complaining, you got $10 million.[2]

But Petitioners are not a monolithic unit. Petitioners are (several have passed away) nine separate individuals.

2. The government speculates that Petitioners would not have been able to collect any money from Libya. Opp. at 8, 10. But neither party put any evidence in the record on the issue of collectability (such as Libya's substantial holdings in the United States or absence thereof) as neither party moved for summary judgment on the issue of just compensation.

Pet. at *ii*. They cannot be treated as a collective that received $10 million from the government. Each had his or her individual property (claims and multi-million dollar judgment) seized when the government espoused his or her claims. And each has asserted a takings claim seeking his or her "just compensation."

The State Department allowed five of the nine Petitioners some compensation from the funds received from Libya. Specifically, the State Department allocated $10 million to the Estate of Mihai Alimanestianu. Pet. App. 25a. And the State Department allowed his children to make a claim against the fund with recommended compensation of $200,000. *Id*. 26a; 80a-81a.

The State Department also decided to exclude four Petitioners from the claims process entirely (Mihai Alimanestianu's siblings and wife). Pet. at 8n.2; Pet. App. 7a; 26a; 80a-81a. For them, the State Department determined that no compensation would be available. *Id*. Even if, *arguendo*, the $10 million received by the Estate is considered "just compensation," payment to the Estate cannot fulfil the government's constitutional obligation to pay just compensation to the other individuals such as Mihai Alimanestianu's wife, children, and siblings.

Moreover, the government cannot criticize the participation of the Alimanestianu family in the proceedings before the Foreign Claims Settlement Commission. Participation in that process was a necessary predicate to the assertion of a taking claim under the Tucker Act. *See, e.g., Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (where the government sets up a process

for compensation, "taking claims against the Federal Government are premature until the property owner has availed itself of the process"). Only after that process has concluded is the question of whether Petitioners received "just compensation" ripe for adjudication. *See Dames & Moore v. Regan*, 453 U.S. 654, 691 (1981) ("The [Court's] opinion makes clear that some claims may not be adjudicated by the Claims Tribunal and that others may not be paid in full. The Court holds that parties whose valid claims are not adjudicated or not fully paid may bring a 'taking' claim against the United States in the Court of Claims, the jurisdiction of which this Court acknowledges"); *Am. Int'l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 448 (D.C. Cir. 1981) (explaining that taking claim not ripe until aggrieved plaintiff participated in the arbitration process set up by the government); *Chas. T. Main Int'l, Inc.*, 651 F.2d at 814–15 (same).

IV. This Case Presents an Ideal Vehicle to Resolve Whether the Espousal of the Claims of Americans Implicates the Takings Clause

The government argues that Petitioners' real complaint is that the government did not negotiate a good deal. The government suggests that this would be a non-justiciable political question and thus the case presents a poor vehicle to resolve the question of whether its espousal is a taking. Opp. at 19.

But the economics of the deal between the United States and Libya are not challenged. No second guessing of the Executive branch is required to resolve the narrow constitutional question of whether the United States provided "just compensation" when it appropriated each of

Petitioners' claims and judgment against Libya. Critically, that inquiry is one that the Constitution reserves to the exclusive province of the judiciary. *See, e.g., United States v. New River Collieries Co.*, 262 U.S. 341, 343–44 (1923) ("the ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard").

To answer the question, the judiciary must assess the value of the property at the time of appropriation. *Horne*, 135 S. Ct. at 2432 (just compensation generally "measured by the market value of the property at the time of the taking" (citations omitted)). The judiciary need not and should not evaluate the merits of the deal struck by the Executive. After all, the United States may have its reasons for settling valuable claims for little or no monetary compensation. *See, e.g., Gray v. United States*, 21 Ct. Cl. 340 (1886) (government traded American merchants' claims against France for the release of the United States from certain treaty obligations).

Petitioners present a classic espousal arising out of an international agreement. The question of just compensation is plainly justiciable. The case therefore presents an ideal vehicle for the Court to determine whether the government must pay just compensation to its citizens when it appropriates their claims.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully Submitted,

Richard N. Chassin
Counsel of Record
Jesse T. Conan
Becker, Glynn, Muffly, Chassin
& Hosinski LLP
299 Park Avenue
New York, NY 10171
(212) 888-3033
rchassin@beckerglynn.com

Counsel for Petitioners