DOCKET NO. 20-1099

In the Supreme Court of the United States

GADSDEN INDUSTRIAL PARK, LLC,
Petitioner

V.

UNITED STATES,
Respondent

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Petitioner Gadsden Industrial Park, LLC has no parent corporation and no publicly held company holds 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

United States Constitution

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Introduction and Summary

The Federal Circuit's decision in this case sets a very dangerous precedent. The Federal Circuit alone is charged with ensuring that private property owners whose property has been taken by the Government without payment receive the "just compensation" that the Takings Clause promises. That court placed its imprimatur on a ruling that unequivocally finds a clear appropriation of valuable private property without payment, yet affords no compensation. The outcome in this case does not reconcile with the plain text of the Takings Clause, nor with a century of this Court's takings cases, which the Federal Circuit's opinion remarkably does not even mention.

The Government's conduct in this matter is unconstitutional; and the courts charged with preserving the protections of the Takings Clause have approved it. If allowed to stand, the decision in this case will further encourage government agencies to run roughshod over private property rights. This decision virtually sanctions direct physical appropriations of personal property without payment, so long as the agency is willing to bet that the fair market value calculation is challenging, or that the Department of Justice can successfully obscure the evidence of value. Private property of less than certain value is now fair game for unconstitutional taking by the Government and its agencies, such as unmined precious metals; unexplored mineral rights; lumber; growing crops; and any

property of fluctuating value; artworks, heirlooms, and novelties. The Government won the case - but the rights of private property owners will sustain the blow.

The Petition presents data distinctly warning that owners of personal property who would pursue inverse condemnation proceedings in the Court of Federal Claims will face substantial difficulty securing compensation. Pet.App. E. The Federal Circuit decision in this case encourages tenacious defense of inverse condemnation cases, more governmental obstinacy, less impetus for amicable settlement, and further reduces the likelihood of meaningful awards. Faced with enormous litigation costs, as well as an investment of time and energy, only the most stalwart private property owners will even venture forth. The Tucker Act remedy is vitiated by this decision, and needs repair.

The Petition places this in stark relief. It should have provoked a compelling rejoinder. Yet, despite multiple extensions, the Government's opposition brief ignores virtually every point. The Government's brief takes refuge within several Federal Circuit takings cases which are no more faithful to the Takings Clause than the decision in this case. The Federal Circuit's decisions are irreconcilable with this Court's takings jurisprudence, which uniformly recognizes that the Constitution categorically prohibits a taking without payment to begin with; and it commands that there must be an assurance of eventual just compensation. The Government makes no response. The Petition cites both takings and non-takings cases which uniformly hold that where a redressable (and, here, unconstitutional) wrong has

occurred, courts do not withhold relief ostensibly because the evidence of value damages is insufficiently "certain". The Government has no answer.

The Petition shows that the Federal Circuit has effectively engrafted onto the Takings Clause a proviso that in effect says that private property shall not be taken for public use without just compensation, *"unless the Government can successfully obscure the fair market value of the property through the litigation process"*. This Court must intervene.

Argument

I. The outcome in this case sets a dangerous precedent

This Court has very recently reaffirmed the constitutional imperative of just compensation in Knick v. Township of Scott, 139 S.Ct. 2162 (2019). And in Horne v. Dept. of Agriculture, 576 U.S. 350 (2015), the Court made clear that when the government effects a *per se* taking of property, it has a "categorical duty" to pay just compensation. Knick and Horne absolutely reaffirm the mandatory nature of the Takings Clause.[1] The Court held in U.S. v. Miller, 317 U.S. 369 (1943) that an award of just compensation is required, even though the evidence of value is uncertain, and even speculative. Miller has never been questioned by this Court. The Federal Circuit and the Government, however, see it quite differently. The

[1] Knick, *supra* at 2171 (*quoting* First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles, 482 U.S. 304, 315 (1987) (*quoting from* Armstrong v. U.S., 364 U.S. 40, 49 (1960)) ("government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.'"); Horne, *supra* at 357-358, 362-363 (*quoting* First English, *supra* at 315, 318 (*quoting* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting) ("[O]nce there is a 'taking,' compensation *must* be awarded...") (emphasis in original).

Circuit Court ignored these precedents. The Government attempts to sweep them aside without reasoning, simply stating that neither case "supports [petitioner's] contention that the Fifth Amendment invariably requires compensation whenever a taking occurs." Opp. 11. The Government trivializes Knick on the basis that it merely "addressed a procedural issue". Opp. 11. Knick has much more to say about the Takings Clause's imperatives than that. The case makes perfectly clear that not only is just compensation required, it is required the moment property is taken. The Government seeks to distinguish the seminal decision in Horne on the inane basis that that case "did not suggest that compensation was required in the absence of evidence of pecuniary loss."[2] Horne stands for a broad, salutary proposition - that whenever the government commits a *per se* taking of private property there is a "categorical duty" to pay just compensation,[3] measured by the fair market value of the property at the time of the taking. Evidence of "pecuniary loss", as the Government puts it, does not enter into the equation.

The requirement emphasized in Knick, Horne, and the dozen other takings cases collected in the Petition (at 13-15), make clear that when the government takes private property, it has a "categorical duty" to pay just compensation. These cases are as much designed to deter government agencies from cavalier appropriations as to guarantee compensation for the impairment of private property rights. The Federal Circuit decision cuts the other way; it invites the Government to

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[2] Opp. 11.

[3] Kirby Forest Indus., Inc. v. U.S., 467 U.S. 1, 9-10 (1984).

take property, pay nothing, and just out-litigate the property owner. Even when the evidence of value is speculative, uncertain, and perhaps "a guess by informed persons", Miller at 375, an award of just compensation is nonetheless required under this Court's takings jurisprudence. The Federal Circuit, however, ignored these salutary principles and cited *none* of this Court's relevant takings decisions; as if this were not even a Fifth Amendment takings case.

The Government like the Federal Circuit does little to address this Court's important precedents. It virtually ignores the import of Knick, and disregards the essential holding of Horne. The Government uselessly relegates the seminal decision in Miller to a clash of real estate appraisal opinions, and vaguely distinguishes Kimball Laundry Co v. U.S. 338, U.S. 1 (1949) on the basis that "any presumption that 'land and buildings' have 'transferable value' has no application here." Opp. 13. Kimball teaches that because the property in that case was "assumed to have transferable value" such that proof of ownership "is ipso facto proof that [the owner] is entitled to some compensation",[4] then the constitutional entitlement to compensation must necessarily apply irrespective of the "certainty" of the valuation evidence. Pet. 23. There is no dispute here that Petitioner's property had "transferable value"; the EPA transferred it to a government contractor for value. The Government offers no response to that discrete point.

The Government instead unintelligibly states that "this case more closely resembles Kimball Laundry's discussion of a 'claimant of compensation for an

[4] Kimball at 20.

intangible *** who cannot demonstrate a value that a purchaser would pay,' and thus who 'has failed to sustain his burden of proving that he is entitled to any compensation whatever.'" Opp. 13-14 (citing Kimball at 20). The instant case, however, does not involve an "intangible", valueless or otherwise. The Government physically appropriated tangible property worth millions - indeed, just a portion of it was sold for $13.5M to boot. In sum, the Government's discussion of Miller and Kimball borders on incoherent. Simply, even though fair market value is may be uncertain, even speculative, and subject to a fluctuating market, such characteristics have never served as a basis to deny any award of compensation — until now.

The Petition shows that other courts' cases, such as Frank Micoli Cadillac-Oldsmobile, Inc. v. State of N.Y., 104 A.D. 2d. 477 (N.Y. App. Div. 1984); Foster v. U.S., 2 Cl.Ct. 426 (1983); Matter of County of Nassau, 43 A.D.2d 45 (N.Y. App. Div. 1973); U.S. v. 25.406 Acres of Land, 172 F.2d 990, 992 (4th Cir. 1949); Eagle Lake Inp. Co. v. U.S., 141 F.2d 562 (5th Cir. 1944); Atlantic Coast Line R.Co. v. U.S., 132 F.2d 959 (5th Cir. 1943); Whitney Benefits, Inc. v. U.S., 18 Cl.Ct. 394, 410 (1989); Cities Service Gas Co. v. U.S., 580 F.2d 433, 579 (Ct. Cl. 1978), say much more about the dictates of the Takings Clause than the Federal Circuit decision in this case. The Government's brief conspicuously disregards these decisions. The Federal Circuit cavalierly dismissed the scholarly, yet pragmatic and salutary, decision in

Whitney Benefits as 'not binding authority'".[5] Whitney Benefits, however, is much more enlightened than the Federal Circuit decision. The Government simply completely ignores it.

The Federal Circuit and the Government similarly overlook non-takings precedents. This Court has always endorsed the view that "there is a clear distinction between the measure of proof necessary to establish the fact...[of] some damage and the measure of proof necessary to enable the jury to fix the amount." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931). "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." Story at 562 (citing Taylor v. Bradley, 39 N.Y. 129 (Ct. App. N.Y. 1868)). "[T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party." Story at 563 (citing Allison v. Chandler, 11 Mich. 542, 550-556 (Mich. 1863)). An "estimate" of damages is appropriate, since "'the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.'" Story at 564-566. The Federal Circuit's decision here flies in the face of this important precedent. The principle fosters important social objectives: fair compensation, but equally importantly, it deters conduct that threatens harm to protected rights. The Federal Circuit decision, by contrast, establishes a dangerous precedent. It deprives

[5] Pet. 24.

an owner of compensation supposedly *guaranteed* by the Constitution, and encourages takings. This decision bodes ill for the future security of private property interests, but the Government's brief offers no solution.

II. The Federal Circuit decision exonerates the EPA despite an unconstitutional taking

The Government elected to take private property without having it appraised, without making any offer, and without sharing the proceeds of its sale of some of the material. At trial, the Government chose not to introduce any evidence that the property had no market value on the date of taking. It simply argued that Petitioner should be awarded nothing for offering "uncertain" evidence of value. Knick squarely holds that when the Government takes property without paying for it, there is an immediate constitutional violation. The outcome in this case rewards that unlawful conduct. It flips the Constitutional protection of private property rights on its head, because it totally subverts both the text and spirit of the Takings Clause.

The Petition contains a thoroughgoing discussion which demonstrates the statutory distinction between condemnations of real property as contrasted with procedures that federal agencies must observe in taking personal property. Pet. 25-27. Had this been a real property taking, the EPA could not have committed the bold constitutional violation. Neither the Federal Circuit opinion nor the Government's brief address that subject at all. The omission is troubling. In sum,

the EPA violated a constitutional prohibition, and neither the Federal Circuit nor the Government cares to mention it. This sets a dangerous precedent.

These omissions are telltale. The Government has no answer. In fact the only Supreme Court case cited by the Government in support of its contention that property owners must necessarily bear the initial burden of proving value is U.S. ex rel. Tennesee Valley Auth. v. Powelson, 319 U.S. 266 (1943), which as the Petition expressly points out arose in context of a real estate condemnation under a statute requiring that the government make a tender of the payment of fair market value at the time of the taking. Pet. 21, 26. Only because the owner refused the tender did litigation ensue. It made sense in that context to place the burden of proof of value upon the owner. This is a different case. The Government devotes exactly one sentence of its brief to the *ipse dixit* that "no 'logic' 'dictate[s],' Pet. 21, that the government should have to disprove its asserted market value." Opp. 14. That self-serving declaration simply underscores that the Government is now more convinced than ever that it can take private property without paying for it, the Takings Clause notwithstanding.

III. The Federal Circuit decision does not comport with the text of the Takings Clause

Conspicuously, the Federal Circuit opinion never quotes the text of the Takings Clause; no doubt because it deviates so significantly from it. This Court recently admonished that there is no liberty to add qualifications to the Takings Clause. Knick, at 2170 ("[The Takings Clause] does not say: 'Nor shall private

property be taken for public use, without an available procedure that will result in compensation.'"). To the plain prohibition "nor shall private property be taken without just compensation", the Federal Circuit would add: "unless the Department of Justice can call the property owner's expert's fair market valuation into question". That simply is not a permissible embellishment to the Takings Clause. What the EPA did in this matter is unconstitutional. Not surprisingly, the Government's brief is no more interested in the text of the Takings Clause than the Circuit Court's Opinion.[6]

IV. The Federal Circuit decision masks an unconstitutional taking

In an effort to justify the unconstitutional result below with the mandate of the Takings Clause, the Government's brief repeatedly misrepresents that the Courts of Federal Claims found "there was insufficient evidence that Petitioner suffered any pecuniary loss" and that petitioner "failed to establish that the government's use of the landfill materials caused it pecuniary loss". Opp. 8; 11-12. It is virtually unimaginable that the Department of Justice would stoop to such mischaracterization. The federal agency did not "use a landfill"; it appropriated Petitioner's property. Pecuniary loss was not even an issue. This is a takings case,

[6] The Government's brief also does not aptly address the Circuit Court's startling reversal of the award of some compensation for the taking of slag. It stubbornly refuses to acknowledge that the Circuit Court ruling is in derogation of the strictures of Rule 52(b), F.R.C.P. Rather, the Government would prefer to quibble about the "fungibility" of slag, and whether EPA eventually unsealed the site, such that Petitioner could presumably come back and dig up some slag. The fact is, the Government took *all of Petitioner's slag*, paid nothing, and the Federal Circuit improperly vacated the meager award therefor.

not a business tort. The issue was purely one of fair market value.[7] Further, the Court of Federal Claims readily found that the property was valuable - a seemingly inescapable conclusion given the circumstances. Pet. App. 40 (trial court defining "kish" as having "economic value"), 31 ("EPA officials understood that the metal in the piles had value."), 48 (explaining that a theoretical willing buyer "would have paid something for the opportunity to retrieve the materials from the piles" and acknowledging Harsco's forecast of a potential $50 Million recovery). While the Government's brief refers to the property as "waste" from a "landfill", then the EPA's contractor sold *only some of it* for $13.5M.

The Government emphasizes and repeatedly misstates that the zero award for kish was premised upon the lower court finding that the EPA's contractor incurred reclamation costs exceeding the $13.5M. Opp. 4, 5, 8, 13. The issue was no more whether Harsco achieved pecuniary gain than it was whether Petitioner suffered pecuniary loss.[8] The Government's assertion that the lower court found the amount of Harsco's costs is flatly false. As the Petition makes clear, there was no such finding. Indeed, competent evidence of Harsco's costs was neither offered nor admitted. Tragically, by even mentioning Harsco's costs, the Federal Circuit Opinion facilitates the Government's hypothecated contention. Again, Harsco's costs

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[7] The Federal Circuit and the Government largely ignore that the issue is what a hypothetical buyer would pay for the materials *on the date of taking* (June 4, 2008). Kirby Forest Indus., Inc. v. U.S., 104 S.Ct. 2187 (1984) (citing U.S. v. 564.54 Acres of Land, 441 U.S. 506, 511-513 (1979)).

[8] Paradoxically, both the Government and the Federal Circuit recognize as much. In its brief, the Government quotes the Circuit Court's statement that Harsco's recovery costs "are not an appropriate proxy to assess GIP's avoided costs". Opp. 10 (citing Pet. App. 18). The Government, nonetheless, repeatedly invokes Harsco's costs as if not only relevant, but supported by evidence, and an important factor in the case.

were never entered into evidence. A careful examination of the section of the trial record mistakenly relied upon by the Federal Circuit for its reference to Harsco's costs shows quite clearly that no such evidence was admitted. Pet. 12-13. Further, the assertion about Harsco's costs is also totally beside the point.

The Federal Circuit decision thoroughly muddles the issue. The Federal Circuit and the Government have obscured it.

V. The outcome in this case absolves the Government of a pattern of abuse

Above all, the award of no compensation to Petitioner effectively absolves EPA of conduct that is nothing short of abusive. The Government is utterly unapologetic, and attempts to defend the outcome. EPA utilized its overwhelming governmental authority under CERCLA to seal a remediation site, which contained stockpiles of Petitioner's valuable metallic property. After effectively confiscating that property, EPA made a deal with a government contractor to reclaim the metal, sell it on the market for gain, and apply the proceeds to the amounts that EPA would otherwise owe the contractor. The confiscation of metal and metal containing property occurred without notice, and without any proceedings to determine value. EPA made no tender of payment; it made no offer of compensation; indeed, it failed even to offer Petitioner a share of $13.5M in proceeds of the sale of the property. When Petitioner learned of the confiscation and made claim for just compensation, EPA, and later the Department of Justice at its behest, employed every conceivable subterfuge to avoid payment of *any* compensation: it vigorously, but fatuously

denied Petitioner's ownership; it argued abandonment; it denied the taking; it quibbled with valuation methods and unpredictable recovery costs; and ultimately it instituted a meritless CERCLA action seeking $9.019M in damages against Petitioner for its *in terrorem* effect.[9] Ultimately, the Government forced the Petitioner's inverse condemnation suit to trial, and at trial tenaciously argued that the property had *no value*, despite undisputed evidence that its contractors sold *some of it* for $13.5M, while at the same time strategically electing to offer no evidence that might bear on what the fair market value of the property might be. Then, on appeal, the Government falsely asserted that there was evidence that its contractor's reclamation costs exceeded the $13.5M in proceeds that it received, when, in fact, there was no such evidence presented at trial. And, after 11 years of litigation, before this Court the Government clings to ridiculous assertions that rather than confiscating property, EPA "used a landfill" that contained "worthless debris", when the Court of Federal Claims made multiple, distinct fact findings to the contrary. In the meantime, in addition to having had its valuable property confiscated under suspect governmental authority,[10] Petitioner has incurred enormous litigation expense to attempt to vindicate the rights secured under the Takings Clause.

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[9] The damages expressly included the government contractors' costs for recovering Petitioner's property. Thus, the Government took the property, and sought to charge Petitioner for doing so!

[10] Petitioner does not dispute that EPA had authority to remediate the sight. Whether EPA had authority to effectively confiscate Petitioner's valuable property, which was not alleged to be environmentally hazardous, is debatable.

If the Government had scripted this scenario so as to deter citizens from vindicating the private property rights presumably secured under the Fifth Amendment, it could not have done it more effectively. The outcome thus far literally condones an orchestrative pattern of governmental abuse. If there were ever a Fifth Amendment takings case worthy of review, this is surely the one.

VI. The Federal Circuit Decision establishes that the judges of the Court of Federal Claims have no categorical constitutional duty to award just compensation - - a very dangerous precedent

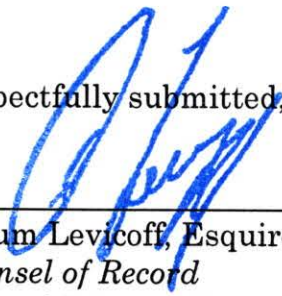
Like the Federal Circuit, the Government wholly ignored the Petitioner's discussion of the myriad tools that were available to the trial judge in fashioning an award in just compensation, notwithstanding that it found Petitioner's expert's analysis unsatisfactory. Pet. 16-17. The Circuit Court simply held that the court has no constitutional duty to do so. That is an earthshaking precedent - and a dangerous one. Of what value is it for this Court to enunciate a "categorical duty" to pay just compensation, Horne, if the Court of Federal Claims has no obligation to enforce it? That should be a burning constitutional dilemma for the Government. Yet, the Government's brief does not even address it. Like the Circuit Court, the Government merely incantates that the trial court was not obligated to make an award. The Federal Circuit's cavalier disregard of what this Court regards as a clear constitutional mandate creates bad law. The failure to come to grips with a dilemma in the adjudication of takings claims is inexplicable.

Ironically, one of the decisions relied upon both by the Circuit Court and the Government in its brief is Board of Cnty. Supervisors v. U.S., 276 F.3d 1359 (Fed. Cir. 2002), in which the trial court used the predominant tool that Petitioner has suggested, to-wit, the appointment of a neutral valuation expert. Board of Cnty. Supervisors v. U.S., 47 Fed. Cl. 714 (2000). The court used that familiar approach because the evidence of value presented by the litigants was uncertain and conflicting, and the court felt the need for a court appointed expert. As an aside, the court also found "unfortunate" and "unsettling" the tactic employed by the Government there of taking property, offering nothing, and attempting to litigate the owner into a zero award, which is exactly what the Government achieved in this case. Id. at 726. The Federal Circuit's decision, which endorses the absence of a trial court's constitutional duty to find some method by which to award just compensation, is a very strong inducement to government misbehavior. It sets a dangerous precedent.

Conclusion

The decision of the Federal Circuit threatens to further erode the protections of the Takings Clause, not only for Petitioner, but for all owners of property, especially property of fluctuating and uncertain market value. Petitioner respectfully requests that the Court grant certiorari.

Respectfully submitted,



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