No. 23-7208

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IN THE

SUPREME COURT OF THE UNITED STATES

ABIY YIFRU,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

Abiy Yifru

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929-286-6937

QUESTION(S) PRESENTED

A consular officer issued a visa to an alien, without executing the application under oath as required by statute. Nevertheless, the officer exacted him a discretionary fee – to get a "new seed" immigrant and Americanize him. The alien who had a valid employment contract with a foreign government resigned and immigrated. The alien was provided with neither public assistance nor unemployment compensation and became homeless indefinitely. The question presented is:

1. Whether the government intentional interference with an alien's valid employment contract that results in the alien's indefinite homelessness is a taking. In other words, whether an alien's valid employment contract with a foreign government is a protected property interest.

Homeless individuals have the right to be represented by their own choice of counsel at the government expense for a denial of public benefit. The question presented is:

2. Whether a homeless individual is entitled to an assignment of counsel and injunctive reliefs to institute a taking claim for his appropriated employment contract.

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED CASES

Abiy Yifru v. United States, No. 22-567L, U.S. Court of Federal Claims. Judgment entered January 17, 2023.

Abiy Yifru v. United States, No. 23-1697, 2024 WL 119262, U.S. Court of Appeals for the Federal Circuit. Judgment entered January 11, 2024.

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The per curiam affirmance opinion of the U.S. Court of Appeals for the Federal Circuit, entered on January 11, 2024, whose judgment is sought to be reviewed, appears at App. A, 1a-5a to the petition and is unpublished and electronically reported at 2024 WL 119262. The prior opinion of the U.S. Court of Federal Claims also appears at App. B, 6a-31a and is unpublished.

JURISDICTION

The Court of Federal Claims had jurisdiction over this case under 28 U.S.C. § 1491(a)(1), the Tucker Act, based upon the takings clause. The Federal Claims entered judgment granting the U.S. motion to dismiss on January 17, 2023. Yifru (petitioner) filed a timely appeal with the Federal Circuit. On January 11, 2024, the Federal Circuit entered final judgment affirming the Federal Claims dismissal of the complaint. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution in its pertinent part provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

INTRODUCTION

This is a case that demonstrates how the exercise of governmental power disproportionately burdened a civil servant under the guise of public good. The United States (US), while poaching skilled and unskilled workers under a congressional scheme interfered with petitioner's employment contract and coerced

him to resign and immigrate involuntarily. Lack of financial resources was the factor that pressured US to tweak immigration policy. The visa-lottery winners were neither provided with relocation assistance nor granted entitlement to any public benefits. Shameful for the US claiming that preventing immigration fraud did not satisfy the "public use" requirement of the takings clause.

A taking is found by negative act, whether by destruction or by inaction or failure to carry out a governmental responsibility. It was a mockery, US encouraged participants to use by whatsoever means personal and private resources including fraudulent marriage to immigrate. Petitioner vehemently refused to complete the visa-lottery process all the way. Instead of simply denying the visa, the Kentucky Consular Center consular officer and the U.S. Embassy Addis Ababa consular officer ("U.S. consular officer" or "consular officer") approved, documentarily cleared, and issued him the visa. Subsequently, the consular officer extorted and coerced him to resign and immigrate involuntarily.

The U.S. defense as well as the lower courts' decisions were couched in terms of extolling the virtues of individual employment contracts, which petitioner actually possessed. The law protected his employment contract greater than the at-will employment contracts or collective agreements. He had the right to exclude others from interfering with his contractual relations. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *Cedar Point Nursery v. Hassid*, 594 U.S. ___, 7 (2021).

Immunizing the U.S. actions required a well-developed welfare state not the current minimalist one, a little bit of everything. The US destroyed every strand in the bundle of property rights in his employment contract – the right to exclude, the right to be employed, the right to income, the right to security, the right to reputation, the right to integrity.

Petitioner immigrated two decades ago early in his prime age. He has been homeless ever since. He had refused to execute the immigrant-visa under oath, because he did not want to leave his ideal job without at least some form of relocation assistance – homelessness is a dead end. *Lee v. Pierce*, 698 F. Supp. 332, 336 (D.D.C. 1988) (finding homelessness a concrete injury). The unemployment compensation benefit right is inalienable, and nonwaivable. N.Y. Lab. Law § 595 (McKinney, Westlaw). The denial of inalienable rights that belong to all unemployed workers has a profound significance and consequence. *Slaughter-House Cases*, 16 Wall. 36, 96 (1873) (Field, J., dissenting); *see also City and County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (executive order denying federal grants to sanctuary jurisdictions violated separation of powers). His taking claim involved a constructive ouster from his employment contract.

The consular officer was authorized to interfere with petitioner's employment contract and appropriate it. 8 U.S.C. § 1154(a)(1)(I)(ii)(II) ("random selection"), (a)(1)(I)(ii)(III) (delegating lawmaking authority of the program to Secretary of State); 22 C.F.R. §§ 42.33(c) (considering computer selected petitions as approved visas), 42.41 (authorizing officers to grant the visas). The visa-lottery program had a

built-in skill selective mechanism. Only skilled professionals can afford the full cost of the process. US carried out the congressional scheme and destroyed petitioner's employment contract to prevent other nations from employing him. Appropriating his employment contract leveraged the U.S. economy. The entire or partial destruction of private property is a taking or appropriation, a taking does not require complete destruction.

The issue involved important federal law regarding the principle of separation of powers, federalism, and comity. This case presents an ideal vehicle to resolve the issue of individual rights at the junction of takings, immigration law, and national security policy. The scope of national security has expanded beyond traditional military concerns and has come to comprise economic, environmental, and social issues. Congress rarely provided sufficient funding for diplomatic and consular services. "Immigration law can be complex, and it is a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010). Even little is known about processing visa applications at consulates. This case implicated congressional regulation of immigration, executive branch conduct of foreign affairs, and the judicial resolution of individual rights – all core functions of the three branches.

The requirement of five-year lawful permanent residence to be a U.S. citizen was a grace period for both US and petitioner to finalize the deal. 8 U.S.C. §§ 1324b (prohibiting discrimination based on citizenship), 1445 (requiring declared intent to become a citizen), 1451 (revoking naturalization if a person becomes a member of certain U.S. organizations); *but see* 1324b(a)(4) (not unfair to prefer citizen over

alien). US took his private property and deprived him of the equal protection of the law. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (requiring overriding national interests to exclude noncitizens from federal service); *Afroyim v. Rusk*, 387 U.S. 253 (1967) (Congress has no power to strip a person of citizenship); *Schneider v. Rusk*, 377 U.S. 163 (1964) (invalidating three-year limit for naturalized citizens to live abroad). The political branch discriminated invidiously against him to breed a second-class citizen. He represented a political embarrassment to the current administration or political opportunity for the Congress.

STATEMENT OF THE CASE

I. Background

Congress established the diversity visa-lottery through the Immigration Act of 1990. The Dept. of State, which administers the program, introduced the first diversity visa-lottery in Ethiopia on June 1, 1994, and then every year up to now. Petitioner was in high school – 11th grade – and did not apply for the visa-lottery. It required an astronomical amount of money and sponsorship, but he had neither of that. Since 1994 each year thousands of Ethiopians immigrated through the visa-lottery. Most of the participants obtained the visa easily by setting up marriage to cover the expenses and avoid public-charge ineligibility.

Nothing was heard from the winners after immigrating, except rare misery from over-expectation. There were also grave disappointments from visa denial after the costly process. Ethiopia is the number one visa-lottery immigrant sending country. Twice a year there was chaos and confusion in the capital city, Addis

Ababa, during the visa-lottery application and winner announcement. The program did not offer any worthy undertaking for the individual visa winners or the hosting country. In September 1995 petitioner was admitted to college. It was challenging to forge his career; however, he was an award-winning, top high school student for that matter.

Petitioner was simply curious about the visa-lottery and cautious when applying for the first time in October 1997. He was in his third year in college studying chemical engineering. He did not expect in the first place he would win the lottery, and secondly find any kind of sponsor to immigrate. In October 2002 he applied for the visa-lottery for the sixth and final time while he was at his first job. His first job was civil service employment from August 2001 to March 2003. App. C, 35a, paras. 13-15. In March 2003 he obtained his second civil service employment in Addis Ababa. App. C, 35a-36a, paras. 16-17.

Surprisingly, in May Kentucky Consular Center (KCC) mailed petitioner a package that he was a winner of the visa-lottery. The visa-lottery package contained statements such as: congratulation, welcome to the United States of America, and sponsor requirement was for three months, complete the forms immediately. App. C, 36a, para. 21. He felt a weird feeling of becoming an American instantly. The hidden catch was somebody must pay dearly.

Petitioner was thrilled when a so-called sponsor's family, his neighbor, came to Ethiopia from US at the very beginning of his second job. The so-called sponsor

family obtained their permanent resident card through fraudulent marriage, medical, and asylum documents. When he spoke with the so-called sponsor, he explained that he was working in various places, and just to tell and assist him when he got here. The so-called sponsor complained about church and other things, then he just assured simply by saying he was going and will go to church. Finally, he warned that he was working and had an excellent job, so not to give the address, he would use other means, and to disregard everything. He was trying to get rid of the diversity visa application form. App. C, 36a, paras. 19-22.

Suddenly, a son of a paralegal neighbor ("paralegal-son") came up. The paralegal-son's brother immigrated through the visa-lottery-2002 and got married to obtain sponsorship. The paralegal-son compelled petitioner to fill out the visa-lottery form. He was puzzled, because those people knew the inside-out of the immigration process and were trying to drag him into their visa conspiracy scheme. The paralegal-son did not want to give him the brother's correct address. Petitioner tried to leave the sponsor's address blank, but the paralegal-son insisted on using the so-called sponsor's address. The so-called sponsor's purpose was to commit fraud. He filled in the so-called sponsor's address and phone number. App. C, 36a-37a, paras. 22-24.

Petitioner was doubtful because the so-called sponsor was destitute and did not qualify, so the consular officer should reject the petition. He wanted to fill out saying chemical engineering for the question "Your Present Occupation," but the paralegal-son insisted that he would not work in his career and prevented him. He

filled in saying "Any legal job" for his intended occupation because it included his profession. To make sure he used the paralegal-son's post office box for correspondence, two phone numbers of his nearest neighbors for contact, and mailed the uncompleted visa form to KCC. He planned not to sign the visa form under oath at the visa interview – then the consular officer should deny the visa and the case should be closed. App. C, 37a, paras. 24-25.

It was not allowed to contact the Addis Ababa consular office for inquiries until the KCC scheduled the appointment. Making a long-distance phone call to the KCC is extremely expensive, unreliable and another huge waste of money. After the scheduling for the visa interview the Addis Ababa consular office called petitioner, mainly to make sure he got ready the visa fee. Near the final stage of the visa process, he went to the consular office to give a blood sample for HIV/AIDS screening. During that visit he had provided his passport, which included his employment information in it. The line outside was exceptionally long and crowded, because of immigrants' families and children, and he became impatient. Ironically, he felt that he could get housing if he immigrated without any employment. App. C, 37a-38a, paras. 29-31.

On about October 24, 2003, petitioner went for the visa interview appointment, and spent hours in a waiting room. He carried every original document and withdrew $ 450.00 (Birr 4,500.00) from his bank account for visa fees. He was hoping that would be the final day of the six-month grueling process, ideally without immigrating. When he became confused and agitated, the consular

officer probably contemplated repeating what the so-called sponsor and paralegal-son said, or even worse to let him walk away without paying the visa fee. Immediately, the translator directed him to the fee payment window. App. C, 38a-40a, paras. 34-36, 40.

Petitioner was in probationary period in his employment contract, and in about October 2003 he signed a performance evaluation. The result was above average but extremely poor because he had spent too much time on the visa-lottery process. After the consular officer issued him the visa, he went to the Ethiopian immigration authority to obtain an exit-visa, but the authority required him to provide a clearance letter from his employer. On November 21, 2003, he submitted a resignation letter, and the same day his employer cleared him, and he obtained the exit visa. His sealed U.S. entrance-visa was uncompleted, unsworn, and unexecuted. App. C, 40a, 43a, paras. 41, 53.

Petitioner immigrated to US on November 29, 2003. Since then up to now, he has been deprived of his freedom, liberty and property interests because of homelessness and unemployment. When he arrived at the airport an extremely aggressive immigration officer took his sealed and incomplete U.S. entrance-visa. The officer stamped one-year permanent residence evidence on his passport. He was lingering around because he had nowhere to go. The officer required him to translate for a strange Ethiopian immigrant how long has been out of US. When he spoke with the immigrant, the officer yelled at him to answer the question and he said to the officer one year. App. C, 43a, paras. 53-56.

Petitioner was ineligible for public assistance for five years after immigrating. He has been denied public and housing assistance up to now because of mandatory welfare work activities requirements. From March 2004 up to 2008 he had survived working unskilled jobs and confined himself in uninhabitable rooms. In February 2008 he was evicted from a basement and went to a homeless shelter. Then, he was going to the salvation-army, soup-kitchen, and churches. He was staying during wintertime in parking garages on Sundays and holidays in frigid cold. In January 2009 he was falsely arrested twice because the shelter discontinued his assistance. App. C, 46a-50a, paras. 69, 72, 77-78, 82-83, 90, 93, 96.

Petitioner subsites only on food-stamps up to now since he applied for the first time in January 2009. In about March 2009, he applied for U.S. citizenship. He requested a fee waiver and submitted his food-stamps approval letter. Unfortunately, the U.S. Citizenship and Immigration Services (USCIS) rejected his petition and required him to pay a $400.00 application fee. App. C, 51a, para. 100. *See* 8 U.S.C. § 1427(a).

Petitioner has to engage in welfare work activities for 35 hours per week until October 2014 to get food-stamps. App. C, 54a-55a, 61a-62a, paras. 120-26, 163, 166. Shelters and welfare centers staff coerced him to do any job, attacked him, stole his belongings, and transferred him to various shelters and changed his bed and its area countless times. App. C, 56a-58a, paras. 127, 129-30, 133, 136, 140-41. Shelters and welfare centers staff abused him, and homeless residents attacked him. App. C, 62a-63a, 66a, 71a, paras. 164, 167, 174-75, 189, 192-93, 226.

Petitioner was filing lawsuits in State courts to obtain unemployment compensation and Housing Choice Voucher; however, he was denied any assistance. App. C, 65a, 67a-68a, paras. 185, 198, 201, 206. The city shelter police officers falsely arrested him, shelters discontinued his assistance numerous times, maltreated him, withheld his mails frequently, and the State welfare office denied him housing subsidy and discontinued his welfare cash grants. App. C, 68a-69a, 71a-72a, paras. 203, 207, 211, 222, 226, 227, 231-233. His welfare cash grants were discontinued from June 2022 up to now. App. C, 74a, paras. 241, 244. Food-stamps are his only means of survival for an extended period of time.

II. Procedural history

While petitioner was still in a homeless shelter and after years of ordeal, he managed to file a complaint with the Court of Federal Claims. On May 19, 2022, he submitted the pleading under the Tucker Act and the takings clause. App. C, 32a-98a. Along with the complaint he applied for injunctive reliefs and assignment of counsel. In the complaint he alleged that the consular officer issued the diversity visa without unemployment compensation and housing assistance. Further, he alleged that the officer coerced him to resign involuntarily from his employment in violation of the takings clause. US, through the planned visa-lottery program based on the congressional scheme, interfered with, and appropriated his employment contract. US ousted him from his property and subjected him to indefinite homelessness. He subsisted on food-stamps and needed immediate assistance to avert further deprivation of his constitutional rights.

US waited sixty days and on July 25, 2022, filed a motion to dismiss the entire complaint for failure to state a claim and lack of subject matter jurisdiction. On January 13, 2023, the Court of Federal Claims issued an opinion granting the U.S. motion to dismiss the complaint. App. B, 6a-31a. On January 17, the Federal Claims' clerk entered the judgment dismissing the complaint.

Petitioner argued at the Court of Federal Circuit as well as at Court of Federal Claims that his lawsuit was a physical taking and the same real property takings principles, the flood cases, should be applied. Further he argued that he was entitled to injunctive reliefs and assignment of counsel; however, the Federal Circuit affirmed the dismissal of the complaint. The Federal Circuit issued an opinion citing a regulatory taking case as a controlling precedent and based the decision on it. The Federal Circuit filed and entered the judgment on January 11, 2024. App. A, 1a-5a.

REASONS FOR GRANTING THE PETITION

Through checks and balances, separation of powers, bicameralism, federalism, and comity the Framers sought to preserve liberty. In its simplest form the separation of powers comprises at least three strands, namely, promoting efficiency, promoting the rule of law, and protecting individual rights. On the other hand, the bundle of rights in property includes the right to possess, exclude, and transfer. "Property is nothing but a basis of expectation;" [1] "Property" applies to petitioner's labor and facultative efforts metaphorically. "The fallacy consists in

[1] Jeremy Bentham, *Theory of Legislation*, 111 (1871).

using legal terms in a popular or metaphorical sense . . . ." [2] "[L]ocal governments and officials must pay the price for the necessarily vague standards in this area of the law." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting). Petitioner possessed rights, powers, and liberties in his ownership of the employment contract.

The court should apply the law subject to all the checks with which judicial action is restrained in the interest of individual rights. US subjected petitioner's powers and liberties to the discretion of the consular officer given authority to apply an undefined standard with no principles to guide him and free from judicial review. The legal limits for the contested governmental action are the one the due process of law guaranteed by the constitution, and the other which culminated in the bills of rights.

Constitutional violation and homelessness are irreparable injury and warrant an injunctive relief. Indeed, when an alleged deprivation of a constitutional right is implicated, no further showing of irreparable injury is necessary to support an award of preliminary injunction. A number of federal statutes provide for the appointment of counsel in certain contexts. States have relied on their own constitutions to extend the right to counsel, and also provided a statutory right in several civil matters. Fundamental fairness requires the right to counsel because his liberty, freedom, and property interests are inseparably at stake.

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[2] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710, 711 n.4 (1917).

I. <u>The principles of separation of powers, federalism and comity warrant this court's review to safeguard petitioner's rights against the high-handed consular officer's actions and the rewritten law of the Federal Circuit</u>

The issue involved the taking of petitioner's employment contract by the governmental planned program. US has been administering the diversity visa-lottery since 1994 worldwide. The courts treated the separation of powers provisions as binding when the U.S. government acted against aliens abroad. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Little v. Barreme*, 2 Cranch 170 (1804). Visa integrity protects US from foreign nationals who threaten public health and safety or national security. Inviting legitimate foreign nationals strengthens the U.S. economy and facilitates international exchanges. The challenge was balancing these competing interests.

The separation of powers doctrine forbids the Congress from encroaching upon the other two branches to see that the government functions. "In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). The visa-lottery was biased against individuals but not countries, because it was targeting cheapest skilled and unskilled labor. The program was a controversial and ill intended, "it was based on the idea that 'nations and countries immigrated, rather than individuals.'" [3] The program picks random

[3] Anna O. Law, *The Diversity Visa Lottery – A Cycle of Unintended Consequences in United States Immigration Policy*, 21 J. Am. Ethnic Hist. 3, 21 (2002).

trail-blazing immigrants, who were enterprising, and can be a bedrock of immigration from Europe and Africa, the continents of major visa-lottery immigrants. US has actively, and openly, set out to poach skilled and unskilled workers globally.

Employers must hire a minimally qualified American over a more qualified alien or hire no one at all. 8 U.S.C. §§ 1182(a)(5)(A) (certifying that "there are not sufficient workers who are able, willing, qualified . . . and available"), 1153(b) ("alien has extraordinary ability"). It was a common complaint that foreign credentials were not recognized in US, but that was simply to have – a "brain drain" or a "brain in the drain." 8 U.S.C. § 1182(a)(5)(B), (C) (requiring accreditation by the Secretary of Education). At a fundamental level, these laws conflict with anti-discrimination principles established in other contexts. *See* 42 U.S.C. § 2000e-2. This government mandated invidious employment discrimination deprived him of liberty and property interests as a suspect class. On the other hand, the Declaration of Independence para. 2 (U.S. 1776) established unconditionally that "all men are created equal . . . ." Discriminating against petitioner was unconstitutional.

Congress had delegated too much of its power to the executive in the administration of the visa-lottery program. The separation of powers doctrine permits the exercise by one department of some powers of the other departments when it does not jeopardize individual liberty. Neither courts nor consulates are empowered to rewrite statutes to suit their notion of sound public policy. The legislature is the most dangerous branch. "It is not unfrequently a question of real

nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere." The Federalist No. 48 (J. Madison). US actively screened a large portion of its skilled-worker inflows to cream off the best talent.

The visa-lottery program, a reaction against chain migration, assumed that "seed immigrants should be admitted . . . not because of family relations or work skills," (Law, *supra* note 3 at 12). Nevertheless, the government did not provide any kind of relocation assistance or entitlement of public benefits for the visa winners. The purported U.S. desire for "new seed" immigrants was nothing more than wishful thinking to repeat history. First, allowing marriage to overcome public charge inadmissibility and letting the consular officer determine the life of an immigrant. Second, fetish for obtaining "new seed" immigrants to alleviate the U.S. population crisis were the most oxymoronic things and a perverted idea.

The legislative branch should not escape its duty to make difficult policy choices. Judges tended to lawmaking because Congress did not provide intelligible standards for courts to apply. In case of the judiciary department "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary." *O'Donoghue v. United States*, 289 U.S. 516, 532 (1933). The executive branch politicized the administration of the visa-lottery and encouraged its officials at the Dept. of State to bend the law to fulfill the lottery program. The separation of powers merely asked how different sets of politicians should relate to achieve lawmaking authority. "It was intimated

that the President might act in external affairs without congressional authority, but not that he might act contrary to an Act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). The U.S. immigration restriction was costly and incomplete because it prevented several legitimate actions but could not prevent many of the opportunism.

The lower court decision undermined the principles of separation of powers, federalism, and comity. The consular non-reviewability provided extremely broad discretion to the consular officer. There is no statutory appeal process for visa denial, the doctrine of consular absolutism bars any review. A simple appeal could relieve the processes of government from lawsuits. The suit at law and application for certiorari, is inaccessible except to the litigant of exceptional means. To cut off from the avenues of the judiciary all scrutiny of official action infringes individual rights. Separation of powers is a vehicle for preserving individual liberty and for promoting good, effective government.

Though this court does not establish a bright line to apply the constitution to noncitizens extraterritorially, it is irrelevant to discuss the matter here – the case speaks for itself. The constitutional limits apply wherever the government acts. Conceptions that the bill of rights is inoperative for convenience and expediency are unwarranted. "[They] destroy the benefit of a written Constitution and undermine the basis of our Government." *Reid v. Covert*, 354 U.S. 1, 14 (1957). *See Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) ("[C]ourts in peace time have little occasion to inquire whether litigants before them are alien or citizen.") Even nonresident aliens

have Fifth Amendment protection. *Russian Volunteer Fleet v. United States,* 282 U.S. 481 (1931). If US has absolute power to confiscate all the value of noncitizens' property it would render the protection provided by the takings clause a dead letter.

The consular officer issued petitioner immigrant-visa without a scintilla of due process. The visa-lottery program administration in the current form would be unobjectionable if all who met the requirement were otherwise fungibles. "Whatever the procedure authorized by Congress is, it is due process as far as an alien . . . entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). "In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process." *Galvan v. Press*, 347 U.S. 522, 531 (1954). The defect of the consular officer's coercive adjudication of the visa compelled him to resign and immigrate involuntarily. The consular officer could perform within the limits of due process of law.

The statute provided petitioner with greater protection than the minimal requirements of notice and a hearing guaranteed by the due process clause. The officer should apply the law laid down by Congress and the policies prescribed by statute. Instead, the officer was being left free to determine for himself what he conceived or made expedient for a case in hand. Nonimmigrants "overstayed their visas with the implicit consent of the United States consulate" and the consulate was "issuing nonimmigrant visas left and right." (Law, *supra* note 3 at 8-9). The visa-lottery program induced participants to marry money to immigrate. That was the intended purpose and how the program was conducted. The visa-lottery package

required a sponsor for three months only, because USCIS desperately needed it to mail the permanent resident card to him – as simple as that.

If the consular officer can only act effectively by acting without law, the whole government should be reworked to create a supranational state. The Framers "viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam). The purpose of the doctrine was to prevent an undue concentration of power in any one of the branches.

US was obligated to respect petitioner's property interest in accordance with the principle of comity. The principle is the recognition of the "acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); "Otherwise, the United States is not completely sovereign." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936). US was using estoppel as an excuse: claiming issuance of the visa to petitioner was a proprietary act, gratuity, and an act of grace. *See Monongahela Nav. Co. v. United States*, 148 U.S. 312, 335 (1893) ("it is an invitation"). In fact, nations have the right to limit entry, but not free exit – either case is a tragedy of the commons. Barriers to movement infringe on both freedom and efficiency.

The so-called sponsor, many other immigrants, and most visa-lottery winners obtained permanent residence through brazen fraudulent asylum and marriage documents. Those people probably assumed that the consular office would prescreen

him before paying the visa-fee. App. 40a, para. 43. Anti-fraud officers conduct field investigations, but the risks are inherent. A basic idea of the government is one balance. The balance between efficient operation and securing of individual rights.

The rights to life, liberty, and property are inherent, and inalienable as to one's prosperity. Petitioner ought not to be put from his livelihood without answer. If US granted him the visa to have dealing with any other trade, that is against his liberty and freedom, and against the constitution. US arbitrarily acted, restricted, and exempted him as a suspect class. US deprived him of his free choice of his occupation that not only constituted his property, but also the means of acquiring and possessing property. "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). It was absurd to allow US to injure petitioner's property and himself while his own government was forbidden and unable to do so.

The actions of the consular officer as an agent of US, acting within the scope of statutory authority, were the actions of US. Indeed, any visa issuance is integral to sovereignty and inseparable. Issuing to petitioner the visa was "equivalent to an express direction by the legislative and executive branches of the government to its officers . . . contemplated by the scheme . . . ." *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656 (1884); *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998) ("[E]ven if government officials' conduct could have been enjoined, claimant was entitled to treat the action as a taking and demand just

compensation"). There was no practical way of having a pre-deprivation hearing, the only adequate remedy existed was a taking or tort claim.

Whereby petitioner could be compensated for injuries to his property and himself. The discretion of the lower courts had been substituted for that of the consular officer, which was wrong. "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 1 Cranch 137, 170 (1803). This appeal is to remedy this situation, to safeguard his rights and at the same time safeguard legitimate exercise of the consular officer.

II. The issues at the junction of immigration, takings, and tort laws merit this court's review

The constitution does not define property, nor does it declare what shall be a taking. Those questions are left to be determined by the courts upon the facts of each particular case. Whether particular facts are enough to constitute a taking is a question of law. If a taking occurs as a result of the conduct of a federal official acting within the general scope of the official's employment, the taking will be considered authorized. Government official's conduct is not regarded as unauthorized simply because the act was imprudent, mistaken, or wrongful. *Eyherabide v. United States*, 345 F.2d 565 (Cl. Ct. 1965). Authorized but illegal actions are compensable.

The rule requiring compensation for property taken or injured by authorized government action applies to personal property, such as contracts and contractual

rights. Direct "physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002). The issue was presented squarely, and the effect of the disputed government action was apparent. The U.S. actions of pursuing for economic good, as viewed in isolation from petitioner whose performance and services US sought, was essentially indistinguishable from an action of a pursuer of a wild animal.

A. Physical taking in an employment contract and immigration context presents an important constitutional issue that has not been, but should be, settled by this court

Personal property, both tangible and intangible, is protected by the takings clause. Compensable takings have been found when the government has seized tangible personal property, *United States v. Russell*, 13 Wall. 623, 628 (1871) ("steamboats were impressed"); extinguished private liens on governmentally held property, *Armstrong v. United States*, 364 U.S. 40, 48-49 (1960); or seized interest accruing on funds deposited by private persons, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). The protection of personal property against seizure or destruction parallels the protection afforded to real property.

The complete destruction or reduction of use of land by flood is recognized as a taking. *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872); *United States v. Lynah*, 188 U.S. 445, 469 (1903) ("wholly destroyed in value"); *United States v. Cress*, 243 U.S. 316, 328 (1917) ("partial instead of a total divesting of his property"). When the value or usefulness of a land is destroyed or impaired, compensation is required.

Interference with the use and enjoyment of land required compensation. Injury to land induced by an overflow of water brought the evolution of the flooding cases from *United States v. Welch*, 217 U.S. 333, 339 (1910) ("[V]alue of the easement cannot be ascertained without reference to the dominant estate"); and *Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[S]ervitude was created by reason of intermittent overflows"); to *United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("[S]ervitude has been acquired either by agreement or in course of time."). Recurring flooding due to authorized government action effects a taking.

These gave rise to a consistent development of cases in physical intrusion on land and real property where appropriation was recognized: such as *Richards v. Washington Terminal Co.*, 233 U.S. 546, 556 (1914) (gas and smoke fanning over property); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922) (gun firing over land); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (depriving all or most of owner's interest amount to a taking); *United States v. Causby*, 328 U.S. 256, 267 (1946) ("frequent, low-level flights"); *Griggs v. Allegheny County*, 369 U.S. 84, 84 (1962) (low flight of aircraft noise, vibration and danger). Physical and tangible intrusion on private property is a taking.

Further cases of physical intrusion on land, real and personal property that results in a taking: *Kaiser Aetna v. United States*, 444 U.S. 164, 164 (1979) (government cannot make it into public aquatic park without payment); *Loretto*, 458 U.S. at 419-20 (1982) (a taking without regard to public benefit or economic impact on the owner); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998)

(interest income generated by funds subject to a physical invasion-type takings claim). Compensation is required whenever government action results in physical appropriation of private property.

In most recent instances the court applied the same physical takings principles in cases such as *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 38 (2012) ("[F]looding temporary in duration gains no automatic exemption from Takings Clause inspection."); *Horne v. Department of Agriculture*, 576 U.S. 351, 361 (2015) ("[T]he established rule [is] treating direct appropriations of real and personal property alike."); *Cedar Point Nursery v. Hassid*, 594 U.S. ___ (2021) (government appropriated a right of access for limited time). Personal property must be treated the same way as real property for takings analysis. The distinction between destruction and appropriation, since the government was the beneficiary, was deceptive; the flooding cases treat the two as coterminous.

The appropriation versus frustration test is unique in the context of contract takings. It misled to label petitioner's employment contract as merely frustrated and ended. His contract was not for future employment and remote, but rather solidified and he has been engaged in it for years as his means of livelihood. "It is a property interest sufficiently matured to take it out of the realm of an *Omnia* analysis." *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001). He and his employer have fulfilled the contractual obligation in its entirety. "While not all torts are takings, every taking that involves invasion or destruction of property is by definition tortious." *Hansen v. United States*, 65 Fed.

Cl. 76, 101 (2005), and is an injurious affection. In the present case petitioner has two options: a lawsuit under the Tucker Act and the takings clause for a taking claim, or under the Federal Tort Claims Act for a tort action.

An employment is a "tangible interest," *Paul v. Davis*, 424 U.S. 693, 701 (1976), it can be physically interfered with. An employment contract is a protected property interest and can be physically appropriated. A contract of employment is not freely alienable. Petitioner's employment contract was not separable from him when the consular officer compelled him to immigrate without due process. It was not merely frustrated and ended rather than interfered with and appropriated. Otherwise, US was committing an intentional continuing tort because the act was based on the congressional scheme. *See A.W. Duckett & Co. v. United States*, 266 U.S. 149, 152 (1924) ("Here the claimant's possession under its lease was a part of the *res*, and therefore was within the implied promise to pay.") Property and inalienability rules protected his ownership of the employment contract.

Petitioner employment contract with the Ethiopia government was a protected property interest. "Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States." *Lynch v. U.S.*, 292 U.S. 571, 579 (1934). The constitution does not create property interests that are protected by the takings clause. "Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, [including foreign law,] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Sharifi v. United*

States, 987 F.3d 1063, 1068 (Fed. Cir. 2021). His valid employment contract was personal property and protected by the takings clause. Petitioner's civil service employment was governed by the Ethiopia law.

The Ethiopia civil service and labor law [4] [5] make any employment relationship a permanent contract. An employment relationship is to be concluded for an indefinite period or for life, unless otherwise agreed upon in writing. Ethiopia Federal Civil Servants Proclamation No. 1064/2017, articles 19(3), 19(8), 20(1), 85(1); Ethiopia Labour Proclamation No. 1156/2019, articles 9, 26(1) provide

> "The period of probation of a civil servant on the position of his appointment shall be for six months;"
>
> "Unless otherwise provided in this Proclamation, a probationary civil servant shall have the same rights and obligations with that of a civil servant who has completed his probation."
>
> "Where a civil servant on probation has recorded average or higher performance result, he shall be served with a letter of permanent appointment."
>
> "The service of a civil servant who has completed his probation period may be terminated due to inefficiency . . . ."
>
> "Any contract of employment shall be deemed to have been concluded for an indefinite period . . . ."
>
> "A contract of employment may only be terminated where there are grounds attributed to the worker's conduct or with objective circumstances [arising] from his ability to do his work or the organizational or operational requirements of the undertaking."

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[4] Ethiopia Federal Civil Servants Proclamation No.1064/2017, https://www.lawethiopia.com/images/federal_proclamation/proclamations_by_number/1064.pdf; or https://ethiodata.et/wp-content/uploads/2023/01/Ethiopia-Federal-Civil-Servants-Proclamation-No.-1064_2017.pdf.

[5] Ethiopia Labour Proclamation No.1156/2019, https://www.lawethiopia.com/images/federal_proclamation/proclamations_by_number/1156%20New%20labor%20proclamation%20Ethiopia.pdf; or https://ethiodata.et/wp-content/uploads/2023/01/Ethiopia-Labour-Proclamation-No.-1156_2019.pdf.

Petitioner was employed when he won the visa-lottery and was tirelessly protecting the contract from any kind of interference, breach, or even destruction. The employment contract was a civil service and created and defined by the Ethiopia proclamation of civil service. He was a classified civil service employee under the Ethiopia proclamation of civil service, and he had a protected property interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985). The best way he had to protect his employment contract and himself was to refuse executing the visa-lottery application under oath. The consular officer made the final decision to "take" petitioner's property, and he had no means to return to his original financial position. It was an unacknowledged exercise of eminent domain.

Property means the legal right to exclude others from valued resources. Resource means a useful or valuable possession or quality. *Resource*, Black Law Dictionary (11th ed. 2019). The common way for acquiring ownership in a property system is contract. The principles of a contract set the framework for voluntary exchange of resources. The benefits of a contractual undertaking are a *chose in action* and *in rem* exclusion rights. Property does comprise a bundle of rights that is also the subject matter for all contracts. Both facultative and nonfacultative resources can be acquired under contract. Petitioner and his employer exchange facultative efforts for nonfacultative compensation (employment) with each coming to own the resources acquired from the other.

Once the employment contract was signed bundles of rights to resources were exchanged. The acquisition of petitioner's facultative resource through employment

contract was property transaction. An employment contract creates a basis for security of expectation in future employment, provides for flexible adjustments in the employment relationship, establishes a baseline for future contractual modifications, and helps obtain residual claims. He has a right to exclude others from controlling his contract. The bundle of rights in his employment contract can be elaborated as the right to exclude, the right to remunerative employment, the right to income, the right to security, the right to reputation, the right to integrity. US destroyed all of those petitioner's rights through the planned program.

To the extent that petitioner had bundled up his rights in his resource of labor-power through the contract of employment, he had property in his labor-power, therefore in his job. The contract underlines his control over the access which others may have to the benefits of his labor-power. The contract of employment being bilateral in character, he and his employer can both claim property in the same resource – here petitioner's resource of labor-power generated two sets of *choses in action*. Since his employment contract was executed and has been fully performed by both parties, it conveyed a *chose in possession*. He and his employer have the right to exclude others from his employment contract.

US charging petitioner a visa fee was a classic form of rent seeking, it was hidden and masked with necessity to promote public good. US was simply fund raising by drawing a lottery. All the time and money he had spent before and during the visa-lottery process was wasted. The visa fee interfered with his employment contract and freedom of movement, it imposed unfair costs and

barriers. The consular office prescreened the application to avoid paying the fee, it was the Secretary of State discretion to charge a fee for visa-lottery processing. App. 40a, paras. 39, 43. Congress shifted the authority to establish and review visa policy from the Dept. of State to Dept. of Homeland Security in 2002. Discrimination persists for rent seeking purposes that provide an economic benefit to the public.

Rent seeking uses up resources that detract from social wellbeing and diminishes social welfare. A basic principle is that immigration barriers are constraints on the fundamentals of freedom – the freedom to live and work where one wishes. *See Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 614 n.2 (2013) ("The unconstitutional conditions analysis requires us to set aside petitioner's *permit application*, not his ownership of a particular . . . property"). Personal property enjoys the same protection as real property from direct appropriations. US appropriated petitioner's personal property pursuant to the congressional scheme. *International Paper Co. v. United States*, 282 U.S. 399, 408 (1931) ("Government intended to take and did take"). The result of the U.S. actions was intentional, and according to the planned program.

B. The Federal Circuit decided an important federal question in a way that conflicts with relevant decisions of this court as well as with important principles of federalism and comity

The Federal Circuit improperly applied a regulatory taking case, *Huntleigh USA Corp. v. United States*, 525 F.3d 1370 (Fed. Cir. 2008), as controlling precedent in its decision. App. A, 4a, para. 1. It contradicted this court's binding cases. "The longstanding distinction between physical and regulatory takings makes it

inappropriate to treat precedent from one as controlling on the other." *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 303; *Horne*, 576 U.S. at 361. The rule for physical takings does not permit characterizing the government action as a police-power. Nor does the federal government possess a general police-power to regulate property in the interest of harm-preventing or promoting the general welfare.

The Federal Circuit decision disregarded an important principle of federalism and comity. "[N]o better example of the police power, which the Founders denied the National Government . . . ." *United States v. Morrison*, 529 U.S. 598, 618 (2000). "United States lacks the police power, and that this was reserved to the States . . . ." *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). Poaching, while ethical, may not always be legal. "[A]n act of Congress ought never to be construed to violate the law of nations . . . and . . . neutral rights," *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804). All federal powers are subject to the constraints of the Fifth Amendment.

In the takings clause case, the courts should look first to state and foreign law to define the relevant property rights. "However, the legality of an exercise of police power does not necessarily preclude a taking claim." *Int'l Indus. Park, Inc. v. United States*, 80 Fed. Cl. 522, 528 (2008). The Federal Circuit concluded that: "But Mr. Yifru alleges no *facts* to support that the conduct of a U.S. government official led the United States to assume his employment contract for public purposes. We thus agree with the CFC that Mr. Yifru fails to state a claim on which relief can be granted." App. A, 4a, para. 2.

The decision was a complete disregard of this court's physical takings jurisprudence. It conflicted with the seminal case that held destruction of private property is compensable without regard to public use. "Such a construction would pervert the constitutional provision into a restriction upon the rights . . . and make it an authority for invasion of private right under the pretext of the public good," *Pumpelly* 13 Wall. at 178. Even if the U.S. immigration policy can help the U.S. population to be culturally, racially, and economically diverse, petitioner was not required to allege any of those facts to support the public purpose claim. App. C, 44a-45a, paras. 64-65. The public purpose served by a government action is irrelevant to the merits of any inverse condemnation. Nor is it a valid defense that government destruction of private property was not for the public purpose.

The "public purpose" requirement in the takings clause is for the property owner's protection. The requisite is not placed in the constitution as a sword to be used against the property owner when the government acted in violation of the due process clause. "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426 (1982); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) ("[N]o matter how weighty the public purpose behind it, we have required compensation."); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005) ("Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.") Neither a "public use" nor a "public purpose" requirement is an element of an inverse condemnation cause of action.

The overarching aim of US in issuing the visa and coercing petitioner to immigrate was to make sure he would not utilize and exploit his skills in other competing nations – including his own native country. US by destroying his employment contract weakened other competing nations. Appropriating his contract in return sustained the U.S. economy. US with intent according to the congressional scheme interfered with petitioner's employment contract for a long period of time.

Petitioner was not expecting that his employment contract would be destroyed or taken. "When it comes to physical appropriations, people do not expect their property, real or personal, to be actually occupied or taken away." *Horne* 576 U.S. at 352. The consular officer's coercive action helped to maintain the visa-lottery program integrity. US bought time to manipulate and use petitioner's skills for its own economic advantage. *Kelo v. New London*, 545 U.S. 469, 484 (2005) ("economic development" satisfied public purpose requirement). The visa-lottery was a congressional scheme. The government acted with intent and in pursuance of the planned program. Therefore the "public purpose" requirement was met. App. C, 44a-45a, paras. 64-65.

The Federal Circuit decision undermined this court's precedent cases. "Nothing in this history suggests that personal property was any less protected against physical appropriation than real property." *Horne*, 576 U.S. at 359; *James v. Campbell*, 104 U.S. 356, 358 (1882) (taking of "patented invention"). *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 538 (1998) ("Because we have determined that the . . . Act's allocation scheme violates the Takings Clause . . . we need not address

. . . due process claim.") (finding contract a personal property). There was no legal or rational basis for the Federal Circuit requiring petitioner to allege public purpose in this case.

US mischaracterized petitioner's claim and labeled him a voluntary emigrant and that the employment contract was simply frustrated, and nothing has been taken. Even if he could be a voluntary migrant rather than be coerced to resign and immigrate, US could not gain any better benefit in the existing international norm. *See Brooks-Scanlon Corp. v. United States,* 265 U.S. 106, 121 (1924) (government could not have more effectively acquired the contract by a voluntary assignment). International law favors the right to emigrate over the right to immigrate. Consequently, the existing regime of free emigration and controlled immigration has become entrenched.

C. The case presents a significant question of federal takings and immigration law, and this one is a clean vehicle to resolve the issue

The basic question in this case does not seem to have ever come before this court. This case presents an ideal vehicle to determine whether the consular officer could carry out the discretionary duty not following fundamental procedural steps. Consequently, whether the officer while undertaking the discretionary function violated the due process law, or effected uncompensated taking, or committed a tort. These issues underpinned the remedies and protections petitioner deserved. There is no factual dispute, because this is an appeal from the grant of a motion to dismiss for failure to state a claim and lack of subject matter jurisdiction.

The unpleasant ramifications of the U.S. foreign policy are festering worldwide and spreading across the nation. Scrutinizing the issues at hand, the rights and responsibilities of the petitioner and the consular officer, is a perfect model to cure prejudice and bigotry against immigrants. "I should indulge . . . his exclusive function to command the instruments of national force . . . . But, when it is turned inward . . . because of a lawful economic struggle . . . it should have no such indulgence." *Youngstown Sheet & Tube Co.*, 343 U.S. at 645 (Jackson, J., concurring). The U.S. immigration policies are deliberately schizophrenic. Although Congress has lawmaking power, it has yet to meet the demand for immigration reform. The executive branch was unable to faithfully execute the statutory law in effect due to resource constraints and ideological preferences.

The question presented is exceptionally important and the court has not previously decided it. US acted in direct antithesis of the principle of separation of powers, federalism, and comity, and violated the constitution. The U.S. foreign policy decisions speak volumes about the nation's values and have incalculable tangible effects both on Americans and of other nations' populations. The jurisprudential focus on the distribution of power between courts and the political branches has obscured a second separation of powers issue. The issue of how immigration authority is distributed between the political branches themselves.

The court has shed little light on this question. *See, e.g.*, *United States ex rel. Knauff*, 338 U.S. at 542 ("inherent in the executive power to control the foreign affairs of the nation"); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (power of

Congress is complete over the admission of aliens); *INS v. Chadha*, 462 U.S. 919 (1983) (Article I legislation is required to deport). Hence the President's power over immigration arises from the inherent executive authority under the Constitution and another one in the administrative state from Congress' decision to delegate.

Courts have struggled to distinguish takings from regulation on one hand and takings from tort claims on the other. *See San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 649 n.15 (1981) (Brennan, J., dissenting) ("the most haunting jurisprudential problem . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark."); *Hansen*, 65 Fed. Cl. at 80 ("Despite the Serbonian Bog into which the takings jurisprudence of this court has fallen, . . . there is no clear cut distinction between torts and takings.") The just compensation clause of the Fifth Amendment impresses with its forthrightness – on its face looks absolute. State constitutions also require compensation when private property is damaged.

III. The right to injunctive reliefs and assigned counsel merits this court's review

The lower court's refusal to provide injunctive relief and assign counsel sharply departed from the accepted manner of litigating this claim. The status quo that a preliminary injunction seeks to preserve is the last actual, peaceable, non-contested condition which preceded the pending controversy. Petitioner was not homeless before the consular officer compelled him to immigrate.

The denial of an assignment of counsel deprived petitioner of the right to meaningful judicial proceeding under the due process clause. The due process provision of the Fifth Amendment requires that one who may be deprived of life or

liberty in a court proceeding be provided counsel. His inalienable rights to life, liberty, and property presented in this case warranted assignment of counsel.

A. Preliminary injunctive reliefs

Petitioner was entitled to Federal-State unemployment compensation. Federal employees are entitled to receipt of unemployment benefits. *See* 5 U.S.C. §§ 8501-8508; 20 C.F.R. § 609.1 *et seq.* (providing for a permanent program of unemployment compensation for unemployed Federal civilian employees (UCFE)).

Congress through Federal Unemployment Tax Act (FUTA) and Internal Revenue Code (IRC) provided petitioner with tax coverage and unemployment compensation entitlement. IRC § 3306(c)(11) (excepting "service performed in the employ of a foreign government"); Treas. Reg. §§ 31.3306(c)–3(c) (1963) (excepted services are deemed to be employment), 31.3306(c)(11)–1 (1960) (citizenship or residence immaterial); IRC § 7701(b)(1)(A) (treating lawfully admitted alien as a resident at any time during calendar year). The twelve months of extended legal protection of U.S. residence and entitlement to unemployment compensation was a substantial benefit. The loss of those legal rights was an irreparable injury.

FUTA excepts services performed in the employ of the U.S. government and a foreign government for the unemployment compensation tax purpose. IRC § 3306(c)(6), (c)(11). FUTA and UCFE, by analogy and virtue of the provisions of law, provide him with entitlement to Federal-State unemployment compensation. Therefore, the Secretary of Labor must pay compensation to petitioner in the same amount, terms, and conditions, if his service and wages from the Ethiopia Science

and Technology Commission had been included as employment and wages under the NY law. *See, e.g.*, 5 U.S.C. §§ 8503(a) (paying compensation), 8504 (assigning the service and wages to the State); *see also* 20 C.F.R. § 609.20 (furnishing a notice).

Petitioner was also eligible for the Housing Choice Voucher assistance that targeted homeless and at risk of homeless individuals. Congress appropriated funds and authorized the Secretary of Housing and Urban Development (HUD) to pay rental subsidies, under the U.S. Housing Act of 1937 and the related regulations 24 C.F.R. § 982.1 *et seq.*, so eligible families can afford housing. *See* the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) § 213(a), 42 U.S.C. § 4633(a) (Secretary of State should participate with HUD for relocation assistance). The Secretary of HUD must provide petitioner with HUD-targeted assistance immediately to prevent further deprivation of his constitutional rights due to homelessness. HUD-targeted assistance is a special admission (non-waiting list) to Housing Choice Voucher program under 24 C.F.R. § 982.203.

B. Assignment of counsel

Petitioner's circumstances warranted an assignment of counsel to protect his liberty and property interests. An ample statutory enactment entitled him. The emergency solution grants (ESG) program provisions require an assignment of counsel at the government expense for homeless individuals, who are denied public benefit. 42 U.S.C. §§ 11360(29) (defining "supportive service" and "legal services"), 11374(a) (providing funds for "legal services"), 24 C.F.R. § 576.102(a)(1) (providing payment for legal and attorney's fees). He was denied public benefits, such as

housing subsidies and welfare cash grants up to now. The employment contract was the only means that secured petitioner's life, liberty, and property interests.

US confiscated his money and employment contract and caused his homelessness. Petitioner's case can be analogized to a civil forfeiture of a person's home that requires an assignment of counsel at the government expense. *See, e.g.*, 42 U.S.C. § 2996f(a)(11) (ensuring an indigent is represented by an attorney); 18 U.S.C. § 983(b)(2) ("The court shall enter a judgment in favor of the Legal Services Corporation . . . .") The Legal Services Corporation distributes funds appropriated by Congress to provide free legal services to indigent clients in noncriminal matters.

Petitioner is homeless upon immigrating with a possibility of being deported or removed from US. His entrance-visa was uncompleted, unsworn, and unexecuted. *See, e.g.*, 8 U.S.C. §§ 1182(a)(7)(A)(i) (inadmissibility), 1225(a)(3) (inspection by immigration officer), (a)(5) (oath), (b)(1)(A)(i) (removal without hearing or review). He had nowhere to go except to the fraudulent so-called sponsor home or be homeless. Any attempt to obtain public assistance was even dangerous.

Petitioner's inquiry only triggers a risk of his deportation without counsel representation as he was a suspect class because of his alienage. *See, e.g.*, 8 U.S.C. §§ 1227(a)(5) (public charge deportability), 1611(c) ("Federal public benefit"), 1613(a) (ineligible for means-tested benefits for 5 years). He is going to be homeless indefinitely or certainly be deported. Yet he does not belong to this country, momentarily neither to his own home country.

US engaged in calculative, inhuman and unconstitutional conduct. Petitioner has been homeless for decades upon immigrating without a possibility of obtaining counsel. This court recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla*, 559 U.S. at 368. Deportation is worse than incarceration, similarly homelessness is worse than incarceration. "When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process." *Argersinger v. Hamlin*, 407 U.S. 25, 48 (1972) (Powell, J., concurring) (footnote omitted). He was a suspect class because of his race, national origin, and alienage.

It took petitioner decades to file this claim. In those years US deprived him of every right the general public enjoyed. The right to counsel is guaranteed in a court proceeding that leads to a complete loss of individual liberty. "But in those that end up in the actual deprivation of a person's liberty, the [individual] will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Id.* at 40. US subjected him to homelessness that adds insult to injury. US exercised complete dominion over petitioner's day-to-day life up to now.

US interfered with and took his employment contract. This court recognized that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *United States v. Robel*, 389 U.S. 258, 265 n.11 (1967). The inalienability and property rules prevented the government

from taking petitioner's employment contract without depriving him liberty completely, and even his life. Therefore, he has a constitutional right to counsel.

And finally, a sobering concern about the constitutional forest regarding individual rights. "The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). The issue was more complex because US deprived petitioner of the right to integrity.

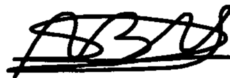
US disconnected petitioner economically and socially from his former home without probability of return. There are no portable social security schemes or information about opportunities from back home – deportability is a reality. If the court declines to take up this case for full review, it should enter an order granting expedited voluntary departure at government expense under 8 U.S.C. § 1229c.

CONCLUSION

The court should grant this petition for a writ of certiorari.

Dated: April 8, 2024

Respectfully submitted,



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