No. 17-712

IN THE

Supreme Court of the United States

KEVIN BROTT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* TRIN-CO INVESTMENT CO. AND KATHLEEN G. ROSE, TRUSTEE OF THE V&M ROSE TRUST–MARITAL TRUST IN SUPPORT OF PETITIONERS

WESLEY HIGBIE
HIGBIE LAW OFFICE
3030 Bridgeway Boulevard,
Suite 105
Sausalito, CA 94965

MATTHEW J. DOWD
Counsel of Record
DOWD PLLC
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, D.C. 20006
(202) 573-3853
mjdowd@dowdpllc.com

Counsel for Amici Curiae

January 22, 2018

278375

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Trin-Co Investment Co. and Kathleen Rose, as Trustee of the V&M Rose Trust, Marital Trust (collectively "Trin-Co") are private property owners with holdings of real and personal property in the State of California.

Amici have no direct stake in the outcome of the present litigation. *Amici* do have litigation pending in the U.S. Court of Federal Claims which involves takings claims that may be affected by the outcome of this litigation.

Trin-Co is a small, family-owned and family-operated business located in northern California. Trin-Co has been owned and operated by the same family for over 30 years. Trin-Co's business involves raising and harvesting merchantable timber.

In 2008, Trin-Co's merchantable timber and land were damaged and destroyed by actions of the U.S. Forest Service ("Forest Service"). The Forest Service was ostensibly responding to wildfires during that summer. The Forest Service opted for a wildfire management plan that saved it millions of dollars. The direct result of the

1. All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than amici curiae, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Forest Service's decision to save money, however, was the damage to and destruction of Trin-Co's merchantable timber and other property. Trin-Co suffered an economic loss of over $6 million due to the Forest Service's cost-saving management choice. Trin-Co's property was thus taken as a direct result of the Forest Service's actions.

In 2011, Trin-Co brought suit against the United States, asserting takings claims pursuant to the Fifth Amendment of the U.S. Constitution. In accordance with accepted practice at the time, Trin-Co filed suit in the Court of Federal Claims, an Article I tribunal. Trin-Co's case was initially dismissed by the trial court for failure to state a claim, but, on appeal, the U.S. Court of Appeals for the Federal Circuit reversed and reinstituted the suit. *See generally TrinCo Inv. Co. v. United States*, 722 F.3d 1375 (Fed. Cir. 2013).

On remand, the parties continued through discovery and prepared for trial. The case has since been stayed, however. Given the developments, Trin-Co moved to transfer its case to the U.S. District Court for the Eastern District of California because developments revealed that the Fifth Amendment takings claims cannot be properly adjudicated in an Article I tribunal without a jury. The Court of Federal Claims recognized the significance of the jurisdictional dispute and stayed the case, pending this Court's decision in *Oil States Energy Services LLC v. Greene's Energy Group, LLC*, No. 16-712 (U.S.). Even so, the question presented here is unlikely to be fully answered by *Oil States*. Thus, Trin-Co's lawsuit seeking compensation pursuant to the Fifth Amendment remains in legal limbo until the Court grants the petition here and answers the question presented.

REASONS FOR GRANTING THE PETITION

I. The Scholarship of Professor Goodman First Exposed the Jurisdictional Flaw of the Court of Federal Claims

A. The Goodman Article Detailed the Constitutional Problem with an Article I Court Adjudicating a Fifth Amendment Claim for Just Compensation

For over thirty years, a jurisdictional flaw with the U.S. Court of Federal Claims remained hidden from view. The conventional wisdom has been—and indeed the statutory requirement is—that a Fifth Amendment takings claim, brought against the federal government for over $10,000, must be filed in the Court of Federal Claims. The Tucker Act requires filing such takings claims in the Court of Federal Claims. 28 U.S.C. § 1491. And litigants have complied with the statutory mandate, not realizing that the Article I trial court lacked the constitutional authority to adjudicate those claims.

The jurisdictional flaw went unnoticed until Professor Michael Goodman (then at the George Washington University School of Law) exposed it in his 2015 law review article. *See generally* Michael P. Goodman, *Taking Back Takings Claims: Why Congress Giving Just Compensation Jurisdiction to the Court of Federal Claims is Unconstitutional*, 60 Villanova L. Rev. 83 (2015) ("the Goodman Article"). Professor Goodman's scholarship summarized the historical development of the Court of Federal Claims, including the curious way in which the court was left with jurisdiction over

constitutional just compensation claims, even though the court, in 1982, was transformed from an Article III court to an Article I court. *Id.* at 124–36.

Professor Goodman's analysis soundly concludes that the values underlying Article III, such as an independent judiciary, are strongly implicated in takings claims. *Id.* at 85–95. "Article III ... works 'to guarantee that the process of adjudication itself remain[s] impartial.'" *Id.* at 94 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)). That independence and the need to avoid an appearance of undue Congressional or Executive Branch influence are strong reasons why a claim for just compensation must be decided under the protections of Article III.

The Goodman Article explains that this "Court explicitly rejected the notion that takings claims are the province of the legislature back in 1893." Goodman, *supra*, at 97 (citing and discussing *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893)). "The Takings Clause thus cannot be said to be 'historically understood as giving the political Branches of Government' any control at all over the determination of just compensation." Goodman, *supra* at 98 (quoting *N. Pipeline Constr.*, 458 U.S. at 66 (plurality opinion)).

Moreover, "[t]he Court has since made even clearer that a waiver of sovereign immunity is not necessary for citizens to file a takings claim." Goodman, *supra,* at 102 (discussing *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 302–03 (1923)). As this Court explained in *Seaboard Air Line*: "Just compensation is provided for by the Constitution and the right to it cannot be taken away

by statute. Its ascertainment is a judicial function." 261 U.S. at 304.

And, as further noted by the Goodman Article, the self-executing nature of the Takings Clause has been accepted for at least 80 years. *See* Goodman, *supra,* at 103 ("Were there any doubt of that holding, the Court reiterated it a decade later, in 1933, in *Jacobs v. United States*."). In *Jacobs v. United States*, 290 U.S. 13, 16 (1933), this Court held that the right of a property owner "rested upon the Fifth Amendment" and that "[s]tatutory recognition was not necessary" to bring a claim for just compensation. *See also First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, Cal.*, 482 U.S. 304, 316 n.9 (1987) (explaining that the Court's cases "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking"); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 6 n.6 (1984) ("The owner's right to bring such a suit derives from 'the self-executing character of the constitutional provision with respect to condemnation . . . .'" (alteration in original) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980))).

The Goodman Article also highlights why takings claims, as private rights, cannot be litigated in the Court of Federal Claims even though that court's decisions are reviewed by the Federal Circuit, an Article III court. *See* Goodman, *supra*, at 105–09; *see also id.* at 109 ("The Federal Circuit review that is currently available would also fail to meet the standard of the *Northern Pipeline* concurring opinion, which stated that 'traditional appellate review by Art. III courts' is not sufficient to make a court a permissible 'adjunct.'" (quoting *Northern Pipeline*, 458 U.S. at 91 (Rehnquist, J., concurring))).

Professor Goodman further demonstrated that a takings claim is not the type of substantive federal right that is created by Congress and can be assigned to a non-Article III tribunal. *See* Goodman, *supra*, at 109–13. This Court has extended the public rights doctrine to a limited subset of claims that are either created by Congress or closely intertwined with a federal regulatory scheme. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). But, as the Goodman Article explains, "[t]akings claims do not fit into this category" because "Congress did not create takings claims." Goodman, *supra*, at 112.

Finally, the Goodman Article considers the various factors this Court has considered over the years. *See id.*, at 113–24. These factors, applied in cases such as *Schor* and *Stern v. Marshall*, 564 U.S. 462 (2011), do not support jurisdiction: "[E]very factor the Court has looked to . . . militates against the Court of Federal Claims considering takings cases." Goodman, *supra*, at 121. In other words, "none of the primary rationales the Court has applied to justify the use of Article I courts weigh in favor of the Court of Federal Claims considering takings claims." *Id.* at 120.

B. After the Goodman Article, Private Party Litigants Started to Appreciate the Significance of the Constitutional and Jurisdictional Flaw

Soon after the release of the Goodman Article, property owners litigating takings claims began to appreciate the significance of the constitutional and jurisdictional flaw. In 2015, Kevin Brott, together with his fellow plaintiffs, filed

a complaint seeking just compensation under the Fifth Amendment in the U.S. District Court for the Western District of Michigan, instead of the Court of Federal Claims. The district court and the Court of Appeals for the Sixth Circuit ultimately rejected Brott's argument. *See generally Brott v. United States*, 858 F.3d 425 (6th Cir. 2017). Brott's case is now the subject the present petition for writ of certiorari.

Similarly, in 2016, Michael Sammons filed a *pro se* civil complaint in the U.S. District Court for the Western District of Texas, seeking just compensation for a regulatory takings claim. *See Sammons v. United States*, No. SA-16-CV-1054-FB (W.D. Tex. filed Oct. 21, 2106). Similar to Brott and his fellow plaintiffs, Sammons contended that an Article III court was the constitutionally proper venue for his regulatory takings claim. The district court and the U.S. Court of Appeals for the Fifth Circuit rejected Sammons's arguments. *See generally Sammons v. United States*, 860 F.3d 296 (5th Cir. 2017).

Beyond the Fifth and Sixth Circuits, the constitutional issue has been brought to the Federal Circuit's attention. *See Fairholme Funds, Inc. v. United States*, No. 17–1015, slip op. at 8 (Fed. Cir. Mar. 14, 2017) (non-precedential) (recognizing that the jurisdictional questions must be addressed by the Court of Federal Claims). The Federal Circuit did not have the opportunity to evaluate the argument but noted that the Court of Federal Claims will likely have to address it in the first instance.

Most recently, and after much deliberation, Trin-Co recognized the significance of the constitutional and jurisdictional issues identified by the Goodman Article and

raised by the *Brott* and *Sammons* litigations. Trin-Co's takings case had been proceeding through discovery and was approaching trial. Trin-Co's concern, however, was that a trial on the merits might be for naught if conducted in a forum lacking constitutional authority to decide the takings claim. Regardless of who might have prevailed at trial, the losing party could have asked for the judgment to be vacated on appeal because the Court of Federal Claims lacked the constitutional authority to rule on the claim.

Trin-Co's litigation has dragged on for several years, requiring the Federal Circuit's intervention to reverse an erroneous dismissal of the suit. The drawn-out litigation has been a financial drain on the family-run business. Rather than spend more money on a trial before the Court of Federal Claims—a trial that could be vacated for want of constitutional jurisdiction—Trin-Co filed a motion to transfer to an Article III court. The Court of Federal Claims saw the significance with the jurisdictional dispute and stayed the case, pending this Court's decision in *Oil States Energy Services LLC v. Greene's Energy Group, LLC*, No. 16–712 (U.S.).

II. The Uncertainty Associated with This Important Question of Law Requires This Court's Intervention

A. The Petition Raises a Federal Question of Utmost Importance, as Revealed by the Goodman Article

The sheer analytical thoroughness of the Goodman Article is reason enough for this Court to grant the petition. The Goodman Article brought to light a serious and substantial constitutional infirmity underlying Congress's

decision to restrict a subset of Fifth Amendment takings claims to the Court of Federal Claims. Indeed, "the Court of Federal Claims is exceptional in that it is currently the only non-Article III entity being asked to adjudicate a constitutional, as opposed to statutory, right." Goodman, *supra,* at 113. Such a highly unusual allocation of judicial authority to the Legislative Branch warrants this Court's consideration.

Other commentators have since noted the importance of the federal question raised by the Goodman Article and the present petition. *See* Trevor Burrus, *Does the Seventh Amendment Mean What it Says?*, Cato At Liberty, July 24, 2107 ("Indeed, takings cases are exactly the sort of cases that should be resolved by a jury trial, because they involve factual determinations with which members of the local community are likely best acquainted.")[2]; George Leef, *If The Feds Grab Your Land, Why Can't You Get A Jury Trial On Compensation?,* Forbes, Dec. 22, 2017 ("If the Sixth Circuit's decision stands, a large hole will have been blown in the right of property owners to obtain just compensation when their land is taken.").[3]

These developments have only exacerbated the existing uncertainty in the law. *See Stern*, 564 U.S. at 494 ("We recognize that there may be instances in which the distinction between public and private rights—at least as framed by some of our recent cases—fails to provide

2. https://www.cato.org/blog/does-seventh-amendment-mean-what-it-says.

3. https://www.forbes.com/sites/georgeleef/2017/12/22/if-the-feds-grab-your-land-why-cant-you-get-a-jury-trial-on-compensation/.

concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme."); *N. Pipeline Constr.*, 458 U.S. at 91 (Rehnquist, J., concurring) ("The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis."); Goodman, *supra*, at 95 ("The Supreme Court's Article III jurisprudence is not a model of consistency, and the Court does not always speak with one voice."); Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. Rev. 85, 151 n.353 (1988) (describing the Court's jurisprudence on legislative courts as "amorphous and arcane").

The present unanswered questions also contribute to the uncertainty that is not uncommon in takings jurisprudence. For example, in *Lingle v. Chevron U.S.A. Inc.*, this Court abrogated precedent that had stood for twenty-five years. 544 U.S. 528, 532 (2005) (abrogating *Agins v. City of Tiburon*, 447 U. S. 255 (1980)). And in *Kelo v. City of New London*, the Court adopted an interpretation of the Public Use Clause that many viewed as departing from accepted meaning. 545 U.S. 469, 517 (2005) (Thomas, J., dissenting) ("A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid 'public uses.'"); *see also* Ilya Somin, *Putting* Kelo *in Perspective*, 48 Conn. L. Rev. 1551, 1553 (2016) ("More than ten years after it was decided, *Kelo v. City of New London* remains one of the modern Supreme Court's most controversial rulings.").

Private property owners continue to litigate Fifth Amendment takings claims in the Court of Federal Claims, but their decision to do so must not be seen as an acceptance of the constitutionality of the court's jurisdiction. Instead, their choice may be reflective of their counsel's preferences. Attorneys who regularly litigate before the Court of Federal Claims are a specialized segment of the bar, similar to patent attorneys. When attorneys specialize, they develop preferred practices, which here likely includes litigating at the Court of Federal Claims. The court has its own rules, it is conveniently located in the District of Columbia, and cases are not tried before juries. These features, unrelated to the constitutional question presented, likely entice many property owners to bring their Fifth Amendment takings claims in the Court of Federal Claims. Until this Court steps in, these pragmatic incentives may convince private party litigants to accept the status quo and overlook the constitutional infirmity with 28 U.S.C. § 1491.

B. The Decisions by the Fifth and Sixth Circuits Do Not Adequately Answer the Question

The decisions of the Fifth and Sixth Circuits, in *Sammons* and *Brott*, respectively, do not adequately resolve the question presented here. Rather than reiterate the reasoned arguments in the *Brott* and *Sammons* petitions for a writ of certiorari, Trin-Co allows those petitions to speak for themselves.

One additional point is worth noting. Neither the Court of Federal Claims nor the Federal Circuit has yet addressed the constitutional and jurisdictional question presented here. The Court of Federal Claims may have the

opportunity to do so in Trin-Co's litigation, but the court has stayed the case until this Court issues a decision in *Oil States*. But, as explained *infra*, *Oil States* may not resolve the question presented here. If that is the case, then the Court of Federal Claims will have to independently assess its constitutionally permissible jurisdiction, and the Federal Circuit will review on appeal. The result could conflict with decisions of the Fifth and Sixth Circuits in *Sammons* and *Brott*, respectively.

Without an answer to the important federal question raised here, Trin-Co and other property owners are almost certainly facing several more years of jurisdictional uncertainty. Trin-Co respectively submits that the resources of both the federal courts, the private litigants, and the federal defendant would be more efficiently utilized if this Court were to grant the petition and answer the question presented.

III. This Court's Eventual Decision in *Oil States* May Not Resolve the Jurisdictional Incertitude Now Associated with Fifth Amendment Takings Claims

Currently pending before the Court is *Oil States Energy Services LLC v. Greene's Energy Group, LLC*, No. 16–712 (U.S.). The Court heard oral argument on November 27, 2017. There, the question was whether *inter partes* review, an administrative proceeding in the U.S. Patent and Trademark Office used to assess the patentability of issued patent claims, violates the Constitution by extinguishing private property rights in a non-Article III forum and without a jury.

The Court's resolution of *Oil States* may create a path towards answering the questions raised by the present petition. If, for instance, the Court rules that *inter partes* review is unconstitutional because patent validity must be adjudicated in Article III courts, then it is difficult to see how the Court of Federal Claims' adjudication of a Fifth Amendment takings claim can be upheld as constitutionally permissible.

But even if the Court upholds the constitutionality of *inter partes* review of patents, that outcome would not definitively answer the present question. Patent rights may or may not be the equivalent of personal property rights. *See* 35 U.S.C. § 261 (stating that "patents shall have the attributes of personal property" but "[s]ubject to the provisions of [Title 35], patents shall have the attributes of personal property"). And real property—the type at issue here and in Trin-Co's case—concerns quintessential property rights, forming the basis of centuries of legal rules and norms that have been tried at common law before juries.

Along that line, the United States itself distinguished real property rights from patent rights. In its brief in the *Oil States* case, the United States stated: "[P]atents for land and inventions 'are not in all things alike.'" Brief for the Federal Respondent, at 50, *Oil States Energy Services LLC v. Greene's Energy Group, LLC*, No. 16–712 (U.S.) (quoting *United States v. Am. Bell Tel. Co.*, 167 U.S. 224, 238 (1897)); *see also id.* at 14 ("[T]he government in issuing a patent does not (as with a land patent) convey title to something it previously owned, but instead grants a limited franchise whose scope and contours are wholly defined by the government itself."). The Government's

distinctions are sufficient to expect that an affirmance in *Oil States*—*i.e.*, holding that patent validity need not be adjudicated in an Article III court—will not definitively put to rest the constitutional deficiency detailed in the Goodman Article.

Finally, and at a minimum, this Court should grant the petition, vacate the Sixth Circuit's decision, and remand the case so that the Sixth Circuit can reconsider its decision in light of this Court's decision in *Oil States*.

CONCLUSION

For the above reasons and those stated in the petition, this Court should grant a writ of certiorari.

Respectfully submitted,

WESLEY HIGBIE
HIGBIE LAW OFFICE
3030 Bridgeway Boulevard,
Suite 105
Sausalito, CA 94965

MATTHEW J. DOWD
Counsel of Record
DOWD PLLC
1717 Pennsylvania Avenue, NW
Suite 1025
Washington, D.C. 20006
(202) 573-3853
mjdowd@dowdpllc.com

Counsel for Amici Curiae

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