No. 20-1099

In the Supreme Court of the United States

GADSDEN INDUSTRIAL PARK, LLC, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Circuit correctly concluded that petitioner did not establish an entitlement to an award under the Just Compensation Clause of the Fifth Amendment for industrial-landfill materials removed or otherwise used by the government as part of an environmental remediation project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 956 F.3d 1362. The opinion of the Court of Federal Claims (Pet. App. 21-51) is reported at 138 Fed. Cl. 79.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20) was entered on April 22, 2020. A timely filed petition for rehearing and rehearing en banc was denied on September 11, 2020 (Pet. App. 52-53). The petition for a writ of certiorari was filed on February 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the Environmental Protection Agency's (EPA) environmental-remediation project at industrial landfills located at a defunct steel mill. After

the EPA extracted and used or sold certain steelmaking-related waste materials from those landfills, petitioner brought a Fifth Amendment claim for just compensation, asserting that the government had taken property petitioner had purchased in a bankruptcy sale. Pet. App. 2, 5-6. The question presented is whether the Federal Circuit correctly concluded that petitioner was not entitled to compensation for the EPA's actions.

1. In 2002, petitioner purchased both real and personal property at an auction of a steel mill's bankruptcy estate. Pet. App. 2. Petitioner "specifically omitted some real property from the purchase," *ibid.*, so that it could "avoid potential environmental responsibility" for that area, called the "Eastern Excluded Property," *id.* at 24. That property contains two large, state-licensed, industrial landfills. *Id.* at 3. At the time of petitioner's purchase, each landfill "pile occupied more than ten acres of land, contained an estimated three to four million cubic yards of material, and was more than eighty feet high." *Ibid.* The landfill piles contained large quantities of steelmaking-related materials called slag, kish, and scrap, along with other forms of industrial waste. *Ibid.* Although petitioner did not purchase the Eastern Excluded Property itself, it did purchase certain personal property on that land, specifically "kish, assorted scrap, and 420,000 cubic yards of slag." *Id.* at 34; see also *id.* at 2-4.

In 2003, the EPA began investigating complaints of contaminants leaching from the Eastern Excluded Property piles. Pet. App. 4. Over several years, the EPA determined that contaminants were indeed migrating from the property and "began communicating

with [petitioner] regarding ownership and environmental remediation issues." *Ibid.*; see also *id.* at 29 (trial court's description of the communications as a "desultory and imprecise conversation" that did not resolve the issue of petitioner's ownership interests or its intentions with respect to the landfill piles).

Around the same time, petitioner began to explore options for recovering metals from the Eastern Excluded Property landfills, including a potential contract with Watkins Metal Co. Pet. App. 4. Petitioner and Watkins drafted, but did not consummate, an agreement under which Watkins would separate and screen the kish for petitioner to sell in exchange for $70 per ton of output. *Ibid.* Under the "non-finalized agreement," Watkins would have received other separable metals from the pile and had the right to withdraw from the agreement should recovery become unprofitable. *Ibid.*

In 2008, the EPA decided to remediate the landfills' environmental problems by hiring contractors to recover and remove saleable material, thereby reducing the piles. Pet. App. 4-5. After extracting saleable material, the EPA planned to regrade the remaining landfills to control rainwater drainage and eliminate the hazardous leachate. *Id.* at 5. The EPA also intended to place a clay "cap" over the piles to help prevent such leachate. *Id.* at 5 & n.3.

From October 2009 to February 2013, the EPA contractors recovered and sold 245,890 tons of material from the piles for about $13.5 million. Pet. App. 5. The EPA also used 92,500 cubic yards of slag for environmental remediation in another section of the Eastern Excluded Property. *Ibid.*; see *id.* at 43.

In 2013, the EPA terminated the reclamation project after it became prohibitively expensive. Pet. App. 5, 34.

EPA contractors had by then "processed approximately 50% of the material in the [landfill] piles," spending approximately $14.5 million in the recovery process—about $1 million more than they received in gross revenue from material sales. *Id.* at 5. The EPA never capped the piles. *Ibid.* "Instead, the EPA 'compacted the materials to minimize leachate,' leaving further remediation to state environmental authorities." *Ibid.* (quoting C.A. App. 3086).

2. Petitioner filed suit in the United States Court of Federal Claims, alleging it was entitled to compensation under the Fifth Amendment for the slag, kish, and scrap the EPA's contractors recovered from the Eastern Excluded Property. Pet. App. 5-6. Petitioner sought "$755,494 for 92,500 cubic yards of slag." *Id.* at 6. With respect to kish and scrap, petitioner offered a range of valuations up to approximately $10.4 million based on a fair-market-value theory. *Ibid.*

Following a seven-day trial, Pet. App. 3 n.1, the Court of Federal Claims concluded that the EPA's remediation project effected a taking of petitioner's slag, scrap, and kish. *Id.* at 8; see also *id.* at 21-51. As part of its finding with respect to slag, the trial court stated, without citing any record evidence or trial testimony, that the EPA had "sculpted the remaining piles" in such a way as to "embalm permanently" the remaining materials, including slag. *Id.* at 43. The court awarded petitioner $755,494, plus interest, for a taking of 92,500 cubic yards of slag. *Id.* at 8, 50-51.

The trial court refused, however, to award compensation for kish and scrap. Pet. App. 8-9, 48-50. Based on its contractors' actual experience, the government provided evidence that the costs associated with removing those materials was higher than their sale price had

been. *Id.* at 5 (noting trial testimony that the "EPA contractors spent $14.5 million on the recovery operation, about a million more than income from the sales"). The court found that petitioner's expert had offered "seriously distorted" figures in support of his valuation. *Id.* at 48. His "construction of an artificial sales price" was "inappropriate," relying on "abnormally high" prices and failing to "reflect the reality" of what a buyer would have paid. *Ibid.* And the court explained that petitioner's expert's cost estimation turned on the presumptions that a contractor would have voluntarily continued an unprofitable project, provided "labor at no cost," and "incur[red] less costs than th[ose] actually incurred" by the EPA contractors. *Id.* at 48-49. The court "f[ound] these assumptions unsupportable." *Id.* at 49. In the absence of "sufficient reliable proof" in support of petitioner's claim for compensation, the court awarded no compensation. *Id.* at 49-50.

3. Both petitioner and the United States appealed to the Federal Circuit. The court of appeals vacated the award for the government's use of 92,500 cubic yards of slag and affirmed the denial of compensation for the government's removal of kish and scrap. Pet. App. 19.

With respect to the trial court's award of compensation for slag, the Federal Circuit concluded that petitioner had "not demonstrated that the EPA's presence and operations on the Eastern Excluded Property intruded on any of [petitioner's] property rights to slag." Pet. App. 11. Petitioner conceded that "slag is fungible," and petitioner had title to only "420,000 undifferentiated cubic yards of slag" from the property. *Ibid.* "[T]he evidence overwhelmingly indicate[d] that even after the EPA's remediation project, sufficient slag re-

mained on the Eastern Excluded Property for [petitioner] to recover its full allotment." *Ibid.* And the court concluded that the trial court's finding that EPA "'embalm[ed]'" the remaining slag "'permanently'" was "clearly erroneous." *Id.* at 12 (citation omitted); see also *id.* at 12 n.7 (noting petitioner's concession that "EPA never capped the piles"). The court of appeals explained that petitioner did not "cite any evidence to support" the embalmment finding and that any "finding that the slag was unusable after the EPA's remediation project is belied by the record." *Id.* at 12; see also *id.* at 13 (discussing record evidence supporting the continued availability of slag at the site). Accordingly, because petitioner "has no claim to any particular subset of slag" at the property and "the trial court erred in finding that the EPA somehow prevented [petitioner] from recovering its full allotment," the court concluded that petitioner "cannot establish a cognizable property interest in the slag that the EPA recovered." *Id.* at 14. The court of appeals therefore vacated the damages award. *Ibid.*

With respect to the kish and scrap, the court of appeals rejected petitioner's argument that the trial court had been obliged to "fashion an appropriate damage award," Pet. App. 14 (citation omitted), in the absence of any "competent evidence" of damages, *id.* at 19. The court of appeals invoked its longstanding precedent that the property owner bears the burden of proving an actual loss has occurred. *Id.* at 14. The court observed that petitioner pointed to cases holding only that a trial court has discretion "to make its own findings on damages rather than adopting in full either party's damages theory." *Id.* at 15. The trial court had not erred, the

court of appeals explained, in finding petitioner's evidence unreliable. *Id.* at 16-19 (discussing multiple problems with petitioner's expert's testimony). "As the Court of Federal Claims recognized, [the expert's] calculations arbitrarily lowered [petitioner's] avoided costs at every turn," and his "unreliable calculations left open too many variables for the trial court to resolve on its own with reasonable certainty based on the evidence available." *Id.* at 19. The court thus affirmed the trial court's "award of zero damages for the Government's taking of kish and scrap." *Ibid.*

The court of appeals denied petitioner's petition for panel rehearing and rehearing en banc. Pet. App. 52-53.

ARGUMENT

The court of appeals correctly rejected petitioner's claim for compensation under the Fifth Amendment, and its fact-bound application of well-established principles does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. Contrary to petitioner's assertion (Pet. 13-30), the court of appeals correctly concluded that petitioner had, and failed to carry, the burden of establishing that the EPA's use or sale of kish or scrap from the landfills in question resulted in any actual loss to petitioner. Pet. App. 14-19.

The Federal Circuit here articulated the well-settled rule that a property owner must establish the value, if any, of property taken by the government. "Once a taking has been established, it is the [property] owner who bears the burden of proving an actual loss has occurred." Pet. App. 14 (quoting *Otay Mesa Prop., L.P.* v. *United States*, 779 F.3d 1315, 1323 (Fed. Cir. 2015))

(brackets omitted); see also *ibid.* (citing *Board of Cnty. Supervisors* v. *United States*, 276 F.3d 1359, 1364 (Fed. Cir. 2002) (explaining that the condemnee has "the burden of establishing" condemned land's "value," which "is an issue of fact")).

That rule traces back decades to *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U.S. 266 (1943), where this Court made clear that "the burden of establishing the value of the lands sought to be condemned was on" the property owner. *Id.* at 273. A property owner need not establish the value of an asserted loss with "absolute exactness" to carry that burden, it need only "show actual damages 'with reasonable certain[t]y,' which 'requires more than a guess.'" Pet. App. 14 (quoting *Otay Mesa Prop.*, 779 F.3d at 1323 (quoting *Precision Pine & Timber, Inc.* v. *United States*, 596 F.3d 817, 833 (Fed. Cir. 2010), cert. denied, 562 U.S. 1178 (2011))) (brackets in original).

The court of appeals correctly applied that rule here. As the Federal Circuit explained, the trial court did not err in concluding "that it was 'not given sufficient reliable proof of what a willing buyer would have paid for the scrap and kish' to independently determine a damages award." Pet. App. 16 (quoting 138 Fed. Cl. 79, 100). Indeed, there was insufficient evidence that petitioner suffered any pecuniary loss. The government presented evidence that the costs associated with extracting and selling the landfill materials exceeded the revenue from their sale, pointing to its contractor's actual revenues and costs. See C.A. App. 1919-1920. The trial court determined that petitioner's expert's evidence was "unreliable due to his reliance on what it deemed ill-founded assumptions to calculate avoided costs and his use of an inflated June 2008 sales price to calculate revenues for

material sold later." Pet. App. 16-17. While petitioner's evidence might have allowed "a reasonable fact finder * * * to approximate the *revenues* from sales of kish and scrap using a more accurate methodology not presented by [petitioner's expert]," "there is little in the record to allow any calculation with reasonable certainty of [petitioner's] avoided *costs*." *Id.* at 17 (emphases added). As the court of appeals explained, determining the costs associated with extracting the revenue-generating materials from the landfill was "a critical component of the just compensation calculation under both a fair market value theory and a lost profits theory." *Ibid.*

The Federal Circuit explained in detail its decision to uphold the trial court's conclusion that petitioner's expert's testimony regarding avoided costs was unreliable. See Pet. App. 17-19. The expert based his valuation on the "unreasonable" assumption that a contractor extracting material from the landfill "would willingly provide [petitioner] with free labor to recover any material from the piles which [petitioner] could not sell for a profit." *Id.* at 17. Also "unreasonable" was the expert's assumption that a contractor "would process the same amount of material at the same capacity as the EPA contractors regardless of market prices," despite evidence that the contractor would have been able to "walk away if the agreement became unprofitable." *Ibid.* The court of appeals explained that "[f]urther undermining [petitioner's expert's] avoided costs calculations," "the evidence does not support the notion that [petitioner's potential contractor] had the same capacity to process material as the EPA contractors." *Id.* at 18 (noting that petitioner's contractor thought it would take at least ten years to process the piles, and that at

minimum processing rates, "it would take [petitioner's contractor] around forty years to process the same amount of material that the EPA contractors processed in approximately four years") (citations omitted). Petitioner's expert "also did not account for additional costs [petitioner] would have incurred had it run its own recovery project, such as those associated with supervising the * * * operation and loading, marketing, and selling recovered material." *Ibid.*

Nor was "evidence of the EPA contractors' costs * * * an appropriate proxy to assess [petitioner's] avoided costs," as "even [petitioner] concede[d]." Pet. App. 18. The "EPA and [petitioner] ran 'two totally different operations' on the Eastern Excluded Property with 'different activities, different goals, [and] objectives,' and 'that account for different costs.'" *Ibid.* (quoting C.A. App. 1631-1632) (second set of brackets in original). Thus, the trial court reasonably "conclude[d] that neither [petitioner's draft] agreement nor the EPA contractors' costs provided competent evidence of [petitioner's] avoided costs." *Id.* at 18-19.

Given this unsuitability of the EPA's costs, and that petitioner's expert "arbitrarily lowered [petitioner's] avoided costs at every turn," the trial court could not "resolve on its own" this necessary element in determining whether an actual loss had occurred "with reasonable certainty based on the evidence available." Pet. App. 19. "[L]eft without competent evidence relating to a critical component of the damages calculation, the trial court did not err in determining that that it could not independently fashion a just compensation award." *Ibid.* The court of appeals thus correctly "affirm[ed] the trial court's award of zero damages for the Government's taking of kish and scrap." *Ibid.*

b. Petitioner asserts (Pet. 13-30) that the court of appeals erred by declining to award compensation for the government's use of scrap and kish. These contentions are without merit.

First, the Fifth Amendment requires only "*just* compensation." U.S. Const. Amend. V (emphasis added). Where an "owner's pecuniary loss" is "zero," the government's decision not to provide compensation is "no violation of the Just Compensation Clause of the Fifth Amendment." *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 240 (2003) (agreeing with court of appeals that where "compensation due [plaintiffs] for any taking of their property would be nil," there was "no constitutional violation when they were not compensated") (citation omitted).

Neither of the recent cases petitioner cites (Pet. 14-15) supports its contention that the Fifth Amendment invariably requires compensation whenever a taking occurs. In *Knick* v. *Township of Scott*, 139 S. Ct. 2162 (2019), this Court addressed a procedural issue, not the calculation of just compensation owed in individual cases. See *id.* at 2169-2170 (holding that property owners do not have to "seek just compensation under state law in state court before bringing a federal takings claim under [42 U.S.C. §] 1983"). And in *Horne* v. *Department of Agriculture*, 576 U.S. 350 (2015), this Court discussed a "categorical duty to pay just compensation" for appropriating either real or personal property, but did not suggest that compensation was required in the absence of evidence of pecuniary loss. *Id.* at 358; see also *id.* at 370 (looking to fair market value in determining just compensation).

Next, petitioner is incorrect to assert (Pet. 15-17) that because *it* failed to establish that the government's

use of the landfill materials caused it pecuniary loss, the trial court had an affirmative duty to seek out evidence that might help make that showing. As the court of appeals explained, petitioner cites no case for the proposition that a trial court is obliged to "fashion its own award in the absence of evidence" from which the factfinder can "determine an appropriate measure of just compensation with reasonable certainty." Pet. App. 14-15. Rather, petitioner points (Pet. 16) only to decisions indicating that trial courts have substantial discretion in conducting trials and that courts must employ legally correct valuation theories. See, *e.g.*, *Foster* v. *United States*, 2 Cl. Ct. 426, 428 (1983) (noting that "[p]ursuant to plaintiffs' request, a second trial was held"); *In re County of Nassau*, 349 N.Y.S.2d 422, 426 (N.Y. App. Div. 1973) (per curiam) (reversing and "grant[ing] a new trial * * * upon the proper theory of damages"), aff'd 39 N.Y.2d 958 (1976); *Frank Micali Cadillac-Oldsmobile, Inc.* v. *State*, 479 N.Y.S.2d 77, 81 (N.Y. App. Div. 1984) (remanding for retrial where "an improper theory of damages ha[d] been employed") (citation omitted). Petitioner suggests that the "trial judge might have ventured an approximation of market value" by looking to "'a guess by informed persons.'" Pet. 16 (quoting *United States* v. *Miller*, 317 U.S. 369, 375 (1943)). But *Miller* simply discussed the possibility that an appraisal will not necessarily "reflect true value with nicety," due to limited data regarding "what a willing buyer would pay in cash to a willing seller." 317 U.S. at 374. It imposes no duties on factfinders to seek out evidence when faced with the absence of any "competent evidence" that the government has erred in concluding that a property owner suffered no pecuniary loss. Pet. App. 19.

Petitioner errs in contending that the trial court found that it had suffered an actual pecuniary loss, but refused to quantify that loss because it "quarreled with the particulars of the valuation." Pet. 19-20. The court did find "that a theoretical willing buyer 'would have paid something for the opportunity to retrieve the materials from the piles.'" *Ibid.* (quoting Pet. App. 48). But as the court immediately thereafter explained, "[d]etermining what that value would have been * * * is not an exercise [petitioner's expert] undertook." Pet. App. 48. Petitioner sought compensation only for "the value of the material the government took from the Eastern Excluded Property," not "for the value of materials in place." *Id.* at 43 (noting that petitioner "limit[ed] its claim to materials actually removed"). Given that petitioner failed to present reliable evidence regarding the costs associated with removing the materials the government mined from the millions of cubic yards of landfill waste, see *id.* at 3, the trial court lacked a "critical component" in determining whether petitioner suffered an actual loss, let alone calculating any such loss, *id.* at 19.

Finally, any presumption that "land and buildings" have "transferable value" has no application here. Pet. 23 (quoting *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 20 (1949)) (emphasis omitted). As discussed, the parties contested whether the materials taken had any net value, given that the costs of their extraction from the landfill piles exceeded the actual revenue they generated. See p. 4-5, 8-10, *supra*. Thus, this case more closely resembles *Kimball Laundry*'s discussion of a "claimant of compensation for an intangible * * * who cannot demonstrate a value that a purchaser would pay," and thus who "has failed to sustain his burden of

proving that he is entitled to any compensation whatever." 338 U.S. at 20 (emphasizing that this "burden" is the property owner's and "must be sustained by solid evidence"). Landfill waste may not be worthless, even after the costs of mining it are accounted for, but as with intangible property, no "logic" "dictate[s]," Pet. 21, that the government should have to disprove its asserted market value.

2. a. Petitioner also seeks (Pet. 30-33) this Court's review of its unsuccessful claim for compensation for slag used by the EPA in its remediation efforts. The court of appeals correctly concluded that the district court's findings of compensable loss were clearly erroneous. See Pet. App. 10-14.

The trial court reached its finding that the government had taken 92,500 cubic yards of petitioner's slag by disregarding evidence that adequate amounts of slag remained available to petitioner on the Eastern Excluded Property and asserting that the EPA had, "for all practical purposes, * * * embalm[ed] permanently all remaining materials, including slag." Pet. App. 43. As the court of appeals explained, that was clear error, given that petitioner had "not demonstrated that the EPA's presence and operations on the Eastern Excluded Property intruded on any of [petitioner's] property rights" to "420,000 undifferentiated cubic yards of slag," which is "fungible." *Id.* at 11 (citing "overwhelming[]" evidence that "sufficient slag remained" on the property for petitioner "to recover its full allotment"). And the court of appeals explained that the trial court's embalmment finding was entirely unsupported by any evidence, as was petitioner's contention that the EPA rendered the remaining slag unusable. *Id.* at 12-13. In light of these clear errors, the court of appeals correctly

vacated the damages award for the EPA's use of slag. *Id.* at 14.

b. Petitioner identifies no error in the court of appeals' decision, largely failing to engage with the court's reasoning. Instead, petitioner simply assumes that "*all* of [its] slag was taken," Pet. 30, without addressing the Federal Circuit's legal analysis of the finite and undifferentiated nature of its slag-related property interest. Similarly, petitioner does not contest the court's conclusion that adequate slag remains at the landfill site such that petitioner can still recover its full allotment. See Pet. App. 11. Rather, petitioner deems that fact "inconsequential," apparently based on its theory that a temporary exclusion from the area where the EPA contractors were carrying out remediation efforts constituted a taking. Pet. 31. But as the court explained, petitioner did not own "first rights to mine slag" at the Eastern Excluded Property, "the right to exclude others" from the landfill site, "or any other property right that the EPA could take by merely temporarily excluding" petitioner from the area. Pet. App. 11.

Contrary to petitioner's contention (Pet. 32-33), the court of appeals did not contravene the familiar clear-error standard. Petitioner argues that "ample record" evidence supported the trial court's finding that the EPA "permanently embalmed" the remaining landfill piles. Pet. 32. But petitioner itself conceded at oral argument "that the EPA never capped the piles." Pet. App. 12 n.7. And the transcripts petitioner cites (Pet. 32) do not refer to embalmment or support a finding that the government rendered the remaining slag unavailable. See Pet. App. 54-55 (testimony that the steel mill "put * * * about ten different types of trash into" the original piles, and that EPA contractors put trash

and slag in a "newly created third pile"); *id.* at 56 (indicating trial judge may conduct a site visit); *id.* at 60-61 (court observation that material remaining in the piles seemed magnetic and asking about possible inefficiencies in the recycling process).

3. Even had the court of appeals erred in its analysis with respect to compensation for either kish and scrap or slag, this case would not warrant further review.

As an initial matter, much of the petition is devoted to highly fact-bound challenges to the court of appeals' decision. The weight of evidence regarding the status of slag remaining at a landfill site, the reliability of petitioner's expert's testimony regarding the costs associated with extracting kish and scrap from that landfill, and the reasonableness of the trial court's refusal to credit that expert's revenue estimates are not issues that merit this Court's attention. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Nor does petitioner identify any division in authority that might warrant review. Contrary to petitioner's suggestion (Pet. 22-25), no conflict exists between the Federal Circuit's approach to just compensation and that of this Court or other courts of appeals. Nothing about the court of appeals' decision here contravenes this Court's teaching that evidence regarding property's value may have "some element of uncertainty." *Montana Ry. Co.* v. *Warren*, 137 U.S. 348, 352 (1890); see Pet. 23-24 (citing cases applying *Montana* and permitting flexibility in admitting evidence to assess

market value). Under the Federal Circuit's well-established precedent, a property owner may establish the value of taken property with "less than absolute exactness." Pet. App. 14 (quoting *Otay Mesa Prop.*, 779 F.3d at 1323). The court of appeals simply required *some* competent evidence on which the trial court could base the value, if any, of such property. That rule is consistent with this Court's indication that even in "the absence of certainty," compensation should be based on "competent" evidence, such as "the opinions of witnesses familiar with the territory and its surroundings." *Montana Ry. Co.*, 137 U.S. at 352-353; see also *Westchester Cnty. Park Comm'n* v. *United States*, 143 F.2d 688, 692 (2d Cir.) (explaining that "a guess by informed persons" as to property value "must have a rational foundation," and that "the owner of the land must supply the court with materials for a guess having such a foundation," because "on the owner, and not on the United States, rests the burden of establishing the value") (citation omitted), cert. denied, 323 U.S. 726 (1944).

Finally, petitioner's suggestions (Pet. 4-5, 17-19, 25-27) that the Constitution demands that the Tucker Act, 28 U.S.C. 1491, include "procedural safeguards, such as placement of the burden of proof of value on the government," is both forfeited and meritless. Petitioner did not challenge the adequacy of the Tucker Act's procedures in the lower courts. See *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("We ordinarily will not decide questions not raised or litigated in the lower courts."). And as discussed, this Court has long held that the property owner bears the burden of proving property value in

just-compensation cases, even in condemnation proceedings. See p. 8, *supra* (citing *Powelson*, 319 U.S. at 273). Petitioner errs (Pet. 21) in contending that a different rule should apply here. In addition to creating inconsistency with the well-established rule in *Powelson*, shifting the burden of proving the value of taken property in inverse-condemnation proceedings would contravene the "ordinary default rule [in civil litigation] that plaintiffs bear the risk of failing to prove their claims." *Schaffer ex rel. Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 3.3, at 417 (4th ed. 2013) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims."). Petitioner appears to propose an inversion of this rule, requiring courts to award compensation based on a plaintiff's unproven valuation if the government fails to prove that the property in question has a lower—or no—market value. Even beyond inconsistency with the condemnation context and civil-litigation norms, such a regime would be incompatible with the principle that "[o]vercompensation is as unjust to the public as under-compensation is to the property owner." *United States* v. *69.1 Acres of Land, More or Less, Situated in Platt Springs Twp.*, 942 F.2d 290, 292 (4th Cir. 1991) (citing *Bauman* v. *Ross*, 167 U.S. 548, 574 (1897)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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