No. 16-1466

In the
United States Court of Appeals
for the Sixth Circuit

KEVIN BROTT, *et al.*,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN AT GRAND RAPIDS
NO. 1:11CV374 (HON. JANET T. NEFF)

BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, THE PROPERTY RIGHTS FOUNDATION OF AMERICA, INC., PIONEER INSTITUTE, INC., AND PROFESSOR SHELLEY ROSS SAXER IN SUPPORT OF PLAINTIFFS-APPELLANTS, URGING REVERSAL

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Shelley Ross Saxer
PEPPERDINE SCHOOL OF LAW
24255 Pacific Coast Highway
Malibu, California 90263
(310) 506-4611
Shelley.Saxer@pepperdine.edu

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1566 Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Robert H. Thomas

Pursuant to 6th Cir. R. 26.1, National Association of Reversionary Property Owners (NARPO)
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO.

CERTIFICATE OF SERVICE

I certify that on July 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Robert H. Thomas

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1566 Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Robert H. Thomas

Pursuant to 6th Cir. R. 26.1, Pioneer Institute, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO.

CERTIFICATE OF SERVICE

I certify that on July 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Robert H. Thomas

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1566 Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Robert H. Thomas

Pursuant to 6th Cir. R. 26.1, Property Rights Foundation of America, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO.

CERTIFICATE OF SERVICE

I certify that on July 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Robert H. Thomas

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1566 Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Shelley Ross Saxer

Pursuant to 6th Cir. R. 26.1, Shelley Ross Saxer
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

NO.

CERTIFICATE OF SERVICE

I certify that on July 5, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Robert H. Thomas

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

Page

Certificate of Interest

Table of Authorities ii

INTRODUCTION 1

IDENTITY AND INTEREST OF AMICI 2

- I. NARPO 2
- II. PIONEER INSTITUTE 3
- III. PROPERTY RIGHTS FOUNDATION OF AMERICA 3
- IV. PROFESSOR SHELLEY ROSS SAXER 4
- V. AMICI'S INTEREST IN THIS CASE 4

ARGUMENT 5

- I. THE SELF-EXECUTING RIGHT TO COMPENSATION 5
- II. ARLINGTON'S LESSON: WE ARE NOT "SUBJECTS," AND THE GOVERNMENT IS NOT IMMUNE 9

CONCLUSION 20

Certificate of Compliance

Certificate of Service

TABLE OF AUTHORITIES

Page

Cases

Bennett v. Hunter, 76 U.S. 326 (1869) 13

Brott v. United States, No. 1:15-cv-38
(W.D. Mich. Mar. 28, 2016) 5-6, 15

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) 19

Clay v. United States, 199 F.3d 876 (6th Cir. 1999) 15

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 16

*First English Evangelical Lutheran Church of Glendale v.
County of Los Angeles*, 482 U.S. 304 (1987) 6, 7

Jacobs v. United States, 290 U.S. 13 (1933) 7

Johnson v. City of Shorewood, 360 F.3d 810 (8th Cir. 2004) 6

Lee v. Kaufman and Strong, 15 Fed. Cas. 162 (D. Va. 1878),
aff'd sub nom., *United States v. Lee*, 106 U.S. 196 (1882).... *passim*

Lynch v. Household Fin. Corp., 405 U.S. 538 (1972)...............................8

Marbury v. Madison, 5 U.S. 137 (1803) 8, 9

Mitchell v. Harmony, 54 U.S. 115 (1851) 11

Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.,
158 F.3d 135 (D.C. Cir. 1998) 2

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 9

Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990) 2, 9

Romanoff Equities, Inc. v. United States, 815 F.3d 809
(Fed. Cir. 2016)..3

San Diego Gas & Elec. Co. v. City of San Diego,
450 U.S. 621 (1981) 6, 7

TABLE OF AUTHORITIES—Continued

Page

Tacey v. Irwin, 85 U.S. 549 (1873) 13

The Davis, 77 U.S. (10 Wall.) 15 (1869) 19

United States v. Clarke, 445 U.S. 253 (1980) 7

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 8

United States v. Lee, 106 U.S. 196 (1882) .... *passim*

Constitutions, Statutes, and Rules

Decl. of Independence (July 4, 1776) 17

U.S. Const. amend. V .... *passim*

Federal Courts Improvement Act, 28 U.S.C. § 171 (a) 17

National Trails System Act, 16 U.S.C. § 1241, *et seq.*..............................9

Fed. R. App. P. 29(c)(5)...5

Other Authorities

The Complete Madison (Saul K. Padover, ed. 1953) *published in*
National Gazette (March 29, 1792)...8-9

Ely, James W., Jr., The Guardian of Every Other Right:
A Constitutional History of Property Rights (3d ed. 2008)............8

TABLE OF AUTHORITIES—Continued

Page

Epstein, Richard A., Takings: Private Property and the Power of Eminent Domain (1985) 8

Gaughan, Anthony J., *The Arlington Cemetery Case: A Court and a Nation Divided*, 37 J. of Sup. Ct. Hist. 1 (2012) .... *passim*

Gaughan, Anthony J., The Last Battle of the Civil War: United States Versus Lee, 1861-1883 (2011) 10

Locke, John, Second Treatise on Civil Government, XI 8

Nelson, Grant, Whitman, Dale, Medill, Colleen, and Saxer, Shelley Ross, Contemporary Property (4th ed. 2013) 4

Poole, Robert M., *How Arlington National Cemetery Came to Be,* Smithsonian Magazine (Nov. 2009) 11

Poole, Robert M., On Hallowed Ground: The Story of Arlington National Cemetery 24 (2010) 11

Saxer, Shelley Ross & Callies, David, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, in Eminent Domain Use and Abuse: Kelo in Context (Dwight Merriam & Mary Massaron Ross, eds. 2006) 4

Saxer, Shelley Ross, Callies, David L., & Freilich, Robert H., Land Use (American Casebook Series) (7th ed. forthcoming) 4

Saxer, Shelley Ross, *"Rails-to-Trails": The Potential Impact of* Marvin M. Brandt Revocable Trust v. United States, 48 Loy. L.A. L. Rev. 345 (2015) 4

United States Court of Federal Claims, About the Court, available at http://www.uscfc.uscourts.gov/about-court# (last visited July 4, 2016) 17

INTRODUCTION

> *The [government's argument it cannot be sued] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.' . . . Undoubtedly those provisions of the constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them.*[1]

The story of how the Arlington, Virginia, private estate of General Robert E. Lee became Arlington National Cemetery—where more than 300,000 of our Nation's honored dead, including presidents, generals, and privates have earned their final rest in its 624 acres—is at the center of this case.

In *United States v. Lee*,[2] the U.S. Supreme Court considered and resolved the issues central to the present case: the Court held that Lee's heir was entitled—after a jury trial in an Article III court—to ownership of the property. The Court affirmed that in our system—unlike those in which kings rule over subjects—the federal government could

---

[1] *United States v. Lee*, 106 U.S. 196, 218-19 (1882).

[2] *Id.*

be sued in its own courts, and that the government had violated Lee's due process rights and had taken Arlington without compensation. The opinion may have been rendered 134 years ago, but the principles which the Court enunciated on sovereign immunity, the independent federal judiciary, and the Fifth Amendment, are still highly relevant today. Our brief details the *Lee* case and its applicability here.

IDENTITY AND INTEREST OF AMICI CURIAE

I. NARPO

The National Association of Reversionary Property Owners is a Washington State non-profit 501(c)(3) educational foundation whose primary purpose is to educate property owners on the defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements. Since its founding in 1989, NARPO has assisted over 10,000 property owners nationwide, and has been involved in litigation concerning landowners' interests in land subject to active and abandoned railroad right-of-way easements.[3] NARPO has also par-

[3] *See*, *e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (amicus curiae); *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998).

ticipated as amicus curiae in other cases involving railroad rights-of-way.[4]

II. PIONEER INSTITUTE

The Pioneer Institute, Inc. is an independent, non-partisan, privately funded research organization. It seeks to improve policy outcomes through civic discourse and intellectually rigorous, data-driven public policy solutions based on free market principles, individual liberty and responsibility, and the ideal of effective, limited and accountable government. Pioneer identified this case through *PioneerLegal*, its new public-interest law initiative (http://pioneerinstitute.org/pioneerlegal/). *PioneerLegal* is designed to work for changes to policies, statutes, and regulations that adversely affect the public interest in policy areas that include economic freedom and government accountability.

III. PROPERTY RIGHTS FOUNDATION OF AMERICA

The Property Rights Foundation of America, Inc., founded in 1994, is a national, non-profit educational organization based in Stony Creek, New York, dedicated to promoting private property rights.

---

[4] *See, e.g.*, *Romanoff Equities, Inc. v. United States*, 815 F.3d 809 (Fed. Cir. 2016).

IV. PROFESSOR SHELLEY ROSS SAXER

Shelley Ross Saxer is Vice Dean and Laure Sudreau-Rippe Endowed Professor of Law at Pepperdine University School of Law, where she has taught courses in real property, land use, community property, remedies, environmental law, and water law. She has also authored numerous scholarly articles and books on property and takings law.[5]

V. AMICI'S INTEREST IN THIS CASE

Amici are filing this brief because this appeal involves fundamental questions about whether the federal government can be sued in an Article III court for taking property without just compensation. This case and the plaintiffs' self-executing claims under the Fifth Amendment for just compensation are important to amici, and consistent with

[5] *See*, *e.g*., Shelley Ross Saxer, David L. Callies & Robert H. Freilich, Land Use (American Casebook Series) (7th ed. forthcoming); Grant Nelson, Dale Whitman, Colleen Medill, and Shelley Ross Saxer, Contemporary Property (4th ed. 2013); Shelley Ross Saxer & David Callies, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo, in Eminent Domain Use and Abuse: Kelo in Context (Dwight Merriam & Mary Massaron Ross, eds. 2006); Shelley Ross Saxer, *"Rails-to-Trails": The Potential Impact of* Marvin M. Brandt Revocable Trust v. United States, 48 Loy. L.A. L. Rev. 345 (2015).

our core missions. We believe our viewpoint and this brief's highlighting of the *Lee* case will be helpful to the court.[6]

ARGUMENT

I. THE SELF-EXECUTING RIGHT TO COMPENSATION

The District Court dismissed the complaint, holding that the United States has not waived its sovereign immunity to be sued for just compensation in excess of $10,000 in a district court. Takings cases are different from run-of-the-mill contract and tort claims because the Constitution itself mandates just compensation when property has been taken.[7] However, the court concluded that Congress must first consent to be sued in a district court before a property owner can recover just compensation in an Article III court.[8] That conclusion is contrary to the

[6] All parties to this appeal have been notified of amici's intention to file this brief, and do not object. In accordance with Fed. R. App. P. 29(c)(5), amici state that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

[7] The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

[8] *See Brott v. United States*, No. 1:15-cv-38, Opinion and Order at 6 (W.D. Mich. Mar. 28, 2016) ("Plaintiffs are not entitled to a 'judicial in-

Supreme Court's takings doctrine, which holds that the Fifth Amendment is not merely precatory, but has a "self-executing character . . . with respect to compensation."[9]

This recognition began with Justice Brennan's dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, where he wrote, "[a]s soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered."[10] Six years later, Justice Brennan's dissent was adopted by the majority in *First English Evangelical Lutheran Church v. County of Los Angeles*,[11] which held that just compensation must be provided once a taking has occurred. That case involved a temporary regulatory taking by a municipality, but the principle is equally applicable when the United States

---

quiry' by this Court of the compensation due where the alleged compensation admittedly exceeds $10,000.") (citing *Johnson v. City of Shorewood*, 360 F.3d 810, 816 (8th Cir. 2004)).

[9] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987).

[10] *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds).

[11] *First English*, 482 U.S. at 315.

takes property as it did here when it seized plaintiffs' reversionary interests and converted what should have been their private property into a public recreational park.[12] Statutory recognition of their takings claims is unnecessary, nor is a promise to pay needed because "the right to just compensation could not be taken away by statute or be qualified" by a statutory provision.[13] In other words, the right to recover just compensation for property taken by the federal government cannot be burdened by procedural limitations on the form of relief. Nothing in the Constitution hinges a property owner's ability to bring a claim asserting a violation of the self-executing right to compensation on a legislatively-created roadblock. Indeed, the very purpose of constitutional rights is that they cannot be interfered with by a legislature, a principle which

---

[12] *Id.* at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation[.]'" As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. at 654-655, it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself ") (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking").

[13] *Jacobs*, 290 U.S. at 17.

extends back to at least *Marbury v. Madison*.[14] More recently, the Supreme Court affirmed this "essential principle: Individual freedom finds tangible expression in property rights."[15] The Court has also observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized."[16] The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society,[17] and the Constitution embraces the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society."[18] The Takings

---

[14] *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.").

[15] *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

[16] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted).

[17] *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist").

[18] John Locke, Second Treatise on Civil Government, XI § 138. *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985). James Madison declared, "Government is instituted to

Clause embodies that principle, because, as Justice Holmes reminded us, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[19]

II. ARLINGTON'S LESSON: WE ARE NOT "SUBJECTS," AND THE GOVERNMENT IS NOT IMMUNE

We don't need to travel all the way back to *Marbury*, however, for a definitive Supreme Court rejection of the concept of sovereign immunity when property has been expropriated for public use. The District Court's holding here is directly contrary to the Arlington case, *United States v. Lee*,[20] in which the Supreme Court held that the federal government does *not* enjoy immunity from suit in district court, and in-

---

protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own." The Complete Madison 267-68 (Saul K. Padover, ed. 1953) *published in* National Gazette (March 29, 1792).

[19] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The Supreme Court reaffirmed that principle in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990), which held the National Trails System Act, 16 U.S.C. § 1241, *et seq*., "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests."

[20] *United States v. Lee*, 106 U.S. 196 (1882).

deed, the hallmark of our American system is that we do not have kings lording over us who must first consent before they can be sued in their own courts. In addition to being on-point authority, the background of the case itself is fascinating.[21]

The case was decided nearly two decades after the federal government occupied the Virginia homestead of Robert E. Lee during the Civil War and created Arlington National Cemetery in 1864. The property came to the Lees via Mary Lee, the General's wife, who was the great granddaughter of Martha Washington. One might assume, as we did, that Union forces simply seized the land as one of the prizes of war after Mrs. Lee fled in the early days of the conflict. But even in times of war or rebellion, legal rules were observed. While the Union could seize private property, everyone recognized that the Takings Clause required payment of compensation.[22] In response, and in order "to punish leading

---

[21] The legal history of Arlington has been studied by Professor Anthony J. Gaughan, who wrote an article, *The Arlington Cemetery Case: A Court and a Nation Divided*, 37 J. of Sup. Ct. Hist. 1 (2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188387 (last visited July 4, 2016), and a book, The Last Battle of the Civil War: United States Versus Lee, 1861-1883 (2011), about the *Lee* litigation.

[22] *See* Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 2 & n.3 ("'Unquestionably, in such cases, the government is bound to

Confederates and raise revenue for the Union war effort,"[23] Congress adopted the Doolittle Act, a provision which required rebel property owners to pay a land tax.[24] Mrs. Lee owed $90, but when a cousin, a Washington, D.C. lawyer, attempted to pay the tax personally, the commissioners refused to accept payment because in their interpretation of the statute, the property owner, Mrs. Lee, was required to pay the tax in person. Of course that never happened. The taxes were not paid, and the Treasury Department eventually auctioned the property, which the War Department purchased at the tax sale, and irrevocably

---

make full compensation to the owner' of property seized by the military.") (quoting *Mitchell v. Harmony*, 54 U.S. 115, 134 (1851)).

[23] Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 2, 4.

[24] For more on the fascinating history of Arlington, see Robert M. Poole, *How Arlington National Cemetery Came to Be*, Smithsonian Magazine (Nov. 2009), *available at* http://www.smithsonianmag.com/history/how-arlington-national-cemetery-came-to-be-145147007/?no-ist (last visited July 4, 2016). *See also* Robert M. Poole, On Hallowed Ground: The Story of Arlington National Cemetery 24 (2010) ("Former Army comrades who had admired Lee now turned against him. None was more outspoken than Montgomery C. Meigs, a fellow West Point graduate who had served amicably under Lee in the engineer corps but who now considered him a traitor who deserved hanging. 'No man who ever took the oath to support the Constitution as an officer of our Army or Navy . . . should escape without the loss of all his goods & civil rights & expatriation,' Meigs wrote that spring.").

converted to a cemetery. Neither General Lee nor Mrs. Lee ever made a claim for the seizure before their deaths.

But twelve years after the war ended, their son Custis Lee, who would have inherited Arlington had the federal government not taken it and claimed title, sued the government for a violation of his due process rights and for a taking.[25] He originally brought suit in Virginia state court against two government officials, but the case was removed by the defendants to the district court, where the case was considered by a jury. The jury ruled against the officials, and held that Lee retained ownership of the property.[26] The United States itself appealed to the Supreme Court, and made two arguments.

[25] *Lee v. Kaufman and Strong*, 15 Fed. Cas. 162 (D. Va. 1878), *aff'd sub nom.*, *United States v. Lee*, 106 U.S. 196 (1882). *See also* Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 8 ("His lawsuit alleged that the government's officers had violated the Fifth Amendment's due process clause by claiming title to Arlington on the basis of an invalid tax sale. In addition, Custis Lee contented that the government's officers had violated the amendment's takings clause by failing to compensate Mary Lee for the estate.").

[26] Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 8 ("The presence of the national cemetery made the estate's return to the Lees impossible. What Custis Lee sought instead was formal legal recognition of his ownership of Arlington. He hoped that a victory in the courts would persuade Congress to finally pay compensation to him in accordance with the government's obligations.").

First, it argued it could not be liable for a taking because it, not the Lees, possessed title. The War Department had legally purchased the property at auction after Mrs. Lee failed to pay the $90 in Doolittle Act taxes. Custis Lee's countervailing argument that Mrs. Lee could not be responsible for failure to pay because a cousin had tendered payment but had been refused, was insurmountable because the Supreme Court had recently ruled in two successive cases that in-person payment was not required by the statute, and formal tender was unnecessary because it would have been futile.[27] Thus, because there was no need for Mrs. Lee to personally appear and tender payment, the federal government's claim to possess title to Arlington was fatally weak.

The government's second defense was that it was immune from being sued without the consent of Congress. Since Lee's ownership was a foregone conclusion due to the *Bennett* and *Tacey* decisions, what really what was at stake in the *Lee* litigation "was whether Custis Lee could

---

[27] *See Bennett v. Hunter*, 76 U.S. 326 (1869) (tax auction unlawful if owner attempted to pay); *Tacey v. Irwin*, 85 U.S. 549 (1873) (a formal tender of payment was not necessary because the commissioners would have refused the offer because the owner was not there in person).

bring his suit in the first place."[28] As Professor Gaughan writes, the immunity argument "was novel," and new to American law:

> The Justice Department had an audacious goal in the *Lee* case. It sought to deny the courts' jurisdiction over Fifth Amendment takings cases that lacked congressional consent. The government's lawyers insisted that the task of providing a remedy for aggrieved parties under the Fifth Amendment should be left "to the discretion of congress and not to the courts." With no American case law available to support their provocative position, the government's lawyers relied on precedents from English courts. . . . The Justice Department's lawyers contended that, like English judges, American judges should recognize that "the domain of sovereign power is forbidden ground" to the courts and that "judicial authority" must never "trespass upon the prerogatives, property, instrumentalities, or operations of this sovereign power."[29]

The Court rejected the sovereign immunity argument, and affirmed the District Court, which had concluded, "[t]he courts are open to the humblest citizen, and there is no personage known to our laws, however exalted in station, who by mere suggestion to a court can close its doors against him."[30] All of the justices agreed that Lee retained title, and that the commissioners wrongly required Mrs. Lee to appear in person and pay. The court's majority also concluded that the government offi-

---

[28] Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 9.

[29] *Id.* at 9-10 & n.26 (citing *Kaufman*, 15 Fed. Cas. at 170, 186, 188).

[30] *Kaufman*, 15 Fed. Cas. at 189-90.

cials could be sued in federal court because in the United States, "there is no such thing as a kingly head to the nation, nor to any of the states which compose it."[31]

The majority opinion is worth quoting at length, because its conclusion is directly contrary to the District Court ruling here (that "[t]he statutory wavier of immunity by Congress determines the extent of the court's jurisdiction to entertain the suits governed").[32] The *Lee* majority held that it was "difficult to see on what solid foundation of principle the exemption from liability to suit rests," and that the English version of sovereign immunity had no place in American courts. Specifically, sovereign immunity is "inconsistent" with the Takings Clause:[33]

> *The [government's argument it cannot be sued] is also inconsistent with the principle involved in the last two clauses of article 5 of the amendments to the constitution of the United States, whose language is: 'That no person * * * shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation.'* Conceding that the property in controversy in this case is devoted to a proper public use and that this has

[31] *Lee*, 106 U.S. at 205.

[32] *Brott v. United States*, No. 1:15-cv-38, Opinion and Order at 6 (W.D. Mich. Mar. 28, 2016) (citing *Clay v. United States*, 199 F.3d 876, 879 (6th Cir. 1999)).

[33] *Lee*, 106 U.S. at 206.

been done by those having authority to establish a cemetery and a fort, *the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation. Undoubtedly those provisions of the constitution are of that character which it is intended the courts shall enforce, when cases involving their operation and effect are brought before them.* The instances in which the life and liberty of the citizen have been protected by the judicial writ of habeas corpus are too familiar to need citation, and many of these cases, indeed almost all of them, are those in which life or liberty was invaded by persons assuming to act under the authority of the government. *Ex parte Milligan*, 4 Wall. 2. If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States[.][34]

---

[34] *Lee*, 106 U.S. at 218-19 (emphasis added). The Court's conclusion that property owners cannot sue the United States directly, but could sue government officials for the same claims, is no impediment to liability here. *See id.* at 204. If the officials who took plaintiffs' property without

The American people are sovereign, not "subjects."[35] The Court also affirmed the principle that Article III courts have jurisdiction to hear and decide cases in which the executive or legislative branch takes property in violation of the Fifth Amendment. The Court focused on the paramount role of the judiciary (and by that it meant the Article III judiciary, not what are today Article I Court of Federal Claims judges[36]). The *Lee* majority emphasized that life-tenured judges, part of a separate

---

compensation should have been named as the defendants rather than the United States itself, it is merely a matter of pleading nomenclature, and not substance. *See id*. (rejecting argument that the "judgment must depend on the right of the United States to property held by such persons as officers or agents for the government").

[35] *Id.* at 208-09.

[36] *See* 28 U.S.C. § 171 (a) ("The court [of federal claims] is declared to be a court established under article I of the Constitution of the United States."). *See also* United States Court of Federal Claims, *About the Court*, *available at* http://www.uscfc.uscourts.gov/about-court# (last visited July 4, 2016) ("The United States Court of Federal Claims was recreated in October 1982 by the Federal Courts Improvement Act pursuant to Article 1 of the United States Constitution. The court consists of sixteen judges nominated by the President and confirmed by the Senate for a term of fifteen years."). *Cf.* Decl. of Independence (July 4, 1776) ("He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers. He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.").

branch of government, are the enforcers of the rights to liberty and property:

> The [government's] defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.
>
> These provisions for the security of the rights of the citizen stand in the constitution in the same connection and upon the same ground as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the government established by that constitution.[37]

This is America, and we do not treat the government with "reverence" or as if it possesses divine rights:

> Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government. It is not to be expected,

[37] *Lee*, 106 U.S. at 208.

> therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.[38]

The Court concluded:

> There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose. *The Davis*, 10 Wall. 15. Congress has created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.
> What were the reasons which forbid that the king should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. No such reason exists in our government, as process runs in the name of the president and may be served on the attorney general, as was done in the case of *Chisholm v. State of Georgia*. Nor can it be said that the dignity of the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizens to their judgment.[39]

The *Lee* case remains critically important because it emphasized the enduring principle that in the United States, "[n]o man in this country

---

[38] *Id.* at 208-09.

[39] *Id.* at 205-06.

is so high that he is above the law."[40] As Professor Gaughan writes, "[i]n rejecting the Justice Department's argument, the Supreme Court affirmed the nation's commitment to the rule of law. . . . The fundamental lesson of *United States v. Lee* was that, in the American legal system, the rule of law constrains the action of every government officer, including the President."[41]

The principle that the federal government is not immune from suit in its own courts—and that property owners cannot be forced to litigate their takings claims in a forum of the government's choosing—was firmly reinforced in *Lee*. "Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government."[42]

CONCLUSION

The principles enunciated in *Lee* endure, and should be reaffirmed by this court. Amici respectfully request this court reverse the District

---

[40] *Id.* at 220.

[41] Gaughan, *The Arlington Cemetery Case*, 37 J. of Sup. Ct. Hist. at 17.

[42] *Lee*, 106 U.S. at 220.

Court's dismissal of the plaintiffs' takings claims, and remand the case to allow a jury to consider these claims.

DATED: Honolulu, Hawaii, July 5, 2016.

Respectfully submitted,

/s/ Robert H. Thomas
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Shelley Ross Saxer
PEPPERDINE SCHOOL OF LAW
24255 Pacific Coast Highway
Malibu, California 90263
(310) 506-4611
Shelley.Saxer@pepperdine.edu

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and 29(d), amici curiae state that this brief complies with the type and volume limitations because it contains 5,009 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

DATED: Honolulu, Hawaii, July 5, 2016.

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system, and that participants in the case who are registered CM/ECF users will be served by the system.

DATED: Honolulu, Hawaii, July 5, 2016.

/s/ Robert H. Thomas

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com
Counsel for Amici Curiae