No. 17-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the federal government take private property and deny the owner the ability to vindicate his constitutional right to be justly compensated in an Article III Court with trial by jury?

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OPINIONS BELOW

The Sixth Circuit's opinion is reported at 858 F.3d 425 (6th Cir. 2017) and reprinted at Appendix (App.) 1a. The Sixth Circuit's denial of rehearing is at App. 46a. The Western District of Michigan's unreported decision is available at 2016 WL 5922412 and App. 26a. The Federal Circuit's orders staying consideration of the parallel appeal are at App. 33a and App. 44a.

JURISDICTION

The Sixth Circuit entered judgment on May 31, 2017, and denied rehearing on August 8, 2017. App. 46a. This Court's jurisdiction is timely invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, §1 provides that federal courts shall be staffed by judges who "shall hold their Offices during good Behaviour," and whose compensation "shall not be diminished" during their tenure in office. Article III, §2 provides, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States *** [and] to Controversies to which the United States shall be a Party ***."

Amendment V to the Constitution provides "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."

Amendment VII provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ***."

28 U.S.C. 1331 provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. 1346(a), (b)(1), provides, "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of *** [a]ny other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress ***."

28 U.S.C. 1491(a)(1) provides, "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress ***."

28 U.S.C. 2201 provides, "In a case of actual controversy within its jurisdiction *** any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. 2402 provides, "any action against the United States under section 1346 [except 1346(a)(1)] shall be tried by the court without a jury ***."

STATEMENT OF THE CASE

Almost a decade ago, the federal government took property from twenty-three Muskegon County, Michigan, landowners when the Surface Transportation Board (STB) invoked section 8(d) of the Trails Act.[1] The government's invocation of section 8(d) gives rise to a compensable per se taking of the owners' state-law right to use and possess their land. See *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (*Preseault I*) (invocation of section 8(d) "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"). See also *Marvin M. Brandt Rev. Trust* v. *United States*, 134 S.Ct. 1257, 1265 (2014) ("if the beneficiary of the [railroad right-of-way] easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land"). See also *Preseault* v. *United States*, 100 F.3d 1525, 1533-36 (Fed. Cir. 1996) (*en banc*) (*Preseault II*), and *Toews* v. *United States*, 376 F.3d 1371 (Fed. Cir. 2004).

The only way these owners could vindicate their constitutional right to be justly compensated was to bring an inverse condemnation action against the United States.[2]

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1. National Trails System Act Amendments of 1983, 16 U.S.C. 1241, *et seq.* Had the government not invoked section 8(d), these Michigan owners would hold unencumbered title to their land. See *Michigan DNR* v. *Carmody-Lahti Real Estate*, 699 N.W.2d 272, 288-89 (Mich. 2005) (when railroad conveyed abandoned right-of-way easement for recreational trail the easement terminated and the owners held unencumbered right to possess the land.).

2. Landowners forced to bring an inverse condemnation lawsuit against the United States are "placed at a significant disadvantage"

A. The statutory background.

Congress enacted a scheme in which any owner seeking to be justly compensated for property the federal government has taken in excess of $10,000 must present a claim in the Court of Federal Claims (CFC) sitting in Washington DC.[3] Section 2402 of the Tucker Act provides, "any action against the United States *** shall be tried by the court without a jury ***." The Little Tucker Act allows claims for less than $10,000 to be made in a federal district court, but §2402 denies right to a jury trial in the CFC and district court. The value of the property taken from these Michigan landowners is greater than $10,000.

The CFC is not an Article III court but is an Article I legislative tribunal. The members of the CFC do not enjoy those protections afforded Article III judges. Members of the CFC are appointed for fifteen-year terms, are subject to removal by a majority of the members of the Federal Circuit, and CFC members' salary may be reduced. See 28 U.S.C. 172 (setting tenure and salary), 176 (removal from office by Federal Circuit).

Title 28 U.S.C 1331 provides federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United

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and must bear "the burden to *** take affirmative action to recover just compensation." *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). See also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711-12 (1999).

3. See the Federal Courts Improvement Act of 1982, Pub. L. 97-1264, 96 Stat. 25, 28 U.S.C. 1491 and 1346, the Tucker Act, 28 U.S.C. 1491, and Little Tucker Act, 28 U.S.C. 1346.

States." Section 1331 has been the general jurisdictional statute defining district courts' jurisdiction since 1875.

In 1983 Congress amended the Trails Act adding section 8(d) for the express purpose of granting the STB authority to take the owner's state-law possessory interest in land for the creation of new easements for public recreation and so-called railbanking. See *Preseault I*, 494 U.S. at 17-18, *National Wildlife Federation* v. *Interstate Commerce Comm'n*, 850 F.2d 694, 702-03 (DC Cir. 1988), *Citizens Against Rails-to-Trails* v. *Surface Transportation Board*, 267 F.3d 1144, 1149 (DC Cir. 2001).

B. History of this litigation.

In May 2009 and July 2010 the STB invoked section 8(d) and encumbered more than fifty Michigan landowners' property with a new easement for public recreation and railbanking. Twenty-three of these owners filed suit in the Western District of Michigan.[4]

4. Six months before bringing the district court action, these twenty-three owners also filed a claim in the CFC to preserve their right to compensation in the event the district court action is finally dismissed. See 28 U.S.C. 1500, *United States* v. *Tohono O'Odham Nation*, 563 U.S. 307 (2011), and *Tecon Engineers, Inc.* v. *United States*, 170 Ct. Cl. 389 (1965). The government asked the CFC to dismiss this alternative action. Judge Taranto of the Federal Circuit expressed §1500 "may soon present a substantial constitutional question about whether federal statutes have deprived [the landowner] of a judicial forum to secure just compensation for a taking ***." See *Ministerio Roca Solida* v. *United States*, 778 F.3d 1351, 1357 (Fed. Cir. 2015) (Taranto, J., concurring). The CFC action is stayed pending the final outcome of this appeal.

Count One invoked the district court's jurisdiction under the Little Tucker Act but pled the $10,000 limitation upon district court's jurisdiction is unconstitutional in that the CFC, as an Article I tribunal, cannot be granted exclusive jurisdiction of these owners' claims because doing so denies these owners access to an Article III court violating the separation of powers.

Count Two was brought under the district court's federal question jurisdiction. Title 28 U.S.C. 1331 states, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." The owners' Fifth Amendment lawsuit for compensation is a civil action arising under the Constitution.

Count Three was brought under the Declaratory Judgment Act. These owners asked the district court to declare the Constitution guaranteed them access to an Article III court in which to vindicate their Fifth Amendment right to be justly compensated with the right to trial by jury as guaranteed by the Seventh Amendment.

The government moved to dismiss these owners' complaint claiming federal district courts lack subject matter jurisdiction over Fifth Amendment taking cases because the Tucker Act confers "exclusive jurisdiction" upon the CFC for Fifth Amendment claims greater than $10,000. District Judge Neff embraced the government's argument and dismissed these owners' complaint. App. 37a. The owners appealed to the Sixth Circuit.[5]

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5. 28 U.S.C. 1295(a) requires that any appeal of a district court's decision in a Little Tucker Act action to be appealed to the

A panel of the Sixth Circuit affirmed the district court's dismissal holding "landowners are not entitled to consideration of their constitutional claims by an Article III trial court or by a jury." App. 9a. The panel acknowledged "the Supreme Court has explained that a Fifth Amendment takings claim is self-executing and grounded in the Constitution, such that additional '[s]tatutory recognition is not necessary.'" But, the panel then held, "the fact that the Fifth Amendment creates a 'right to recover just compensation' does not mean that the United States has waived sovereign immunity such that the right may be enforced by suit for money damages."[6] App. 13a. The panel then held "Congress may *** require that just-compensation claims for money damages in excess of $10,000 against the United States be heard in [a non-Article III court] without a jury." App. 25a. The owners sought rehearing. The Sixth Circuit denied rehearing. App. 46a. The owners now bring this petition for a writ of certiorari.

Federal Circuit. Accordingly, the owners filed a parallel appeal in the Federal Circuit and Sixth Circuit. The Federal Circuit stayed the appeal until this action involving the Sixth Circuit's decision is resolved. App. 44a-45a.

6. Citations omitted.

WHY CERTIORARI SHOULD BE GRANTED

This Court should grant this petition for certiorari for three reasons.

First, this petition for certiorari concerns Congress' power to deny Article III courts jurisdiction to rule upon a self-executing constitutional right. Chief Justice Roberts described this as an issue involving the "constitutional birthright of Article III judges." *Wellness Intern. Network, Ltd.* v. *Sharif*, 135 S.Ct. 1932, 1951 (2015) (Roberts, C.J., dissenting). Contrary to this Court's holding in *Marbury* v. *Madison,* 5 U.S. 137 (1803), *Stern* v. *Marshall*, 564 U.S. 462 (2011), and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.,* 458 U.S. 50 (1982), the Sixth Circuit panel held Congress could deny Article III courts jurisdiction to consider a case vindicating an individual's "private right," such as the self-executing constitutional right to be justly compensated when the government takes private property.

Second, this petition for certiorari concerns two constitutional guarantees of immense importance to every American – the Fifth Amendment guarantee that the government must justly compensate an owner when the government takes private property and the Seventh Amendment guarantee that "the right of trial by jury shall be preserved." This Court holds the just compensation guarantee of the Fifth Amendment is "self-executing" and is not "precatory" but is grounded on the Constitution itself and does not depend upon some subsequent act of legislative grace by Congress.[7] This

7. "As soon as private property has been taken *** the self-executing character of the constitutional provision with respect

Court further holds that determining the compensation due an owner is an "inherently judicial" responsibility that cannot be assumed by the legislature. See *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1893). This Court also recognizes that the right to trial by jury is the "sacred palladium" of English liberties. Leonard W. Levy, *The Origin of the Bill of Rights* (1999), p. 226 (quoting Blackstone). See also *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 536 U.S. 687, 708-09, 712-13, 720-21 (1999). The Sixth Circuit's decision is in direct conflict with this Court's decision in *Monongahela.*

Third, this petition for certiorari presents a question that is very similar to the question now pending before this Court in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 137 S.Ct. 2239 (2017) (granting certiorari). In *Oil States* this Court will decide "[w]hether *inter partes* review [of an owner's interest in a patent] violates Article III or the Seventh Amendment by authorizing an Executive Branch agency, rather than [an Article III] court [and] jury, to invalidate a previously issued patent."[8] Accordingly, this Court should grant

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to compensation is triggered. *** [T]he Fifth Amendment is not precatory: once there is a 'taking' compensation must be awarded." S*an Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621, 654 (1981). (Brennan, J., dissenting on other grounds) (emphasis added). See also *First English Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304, 315-16 (1987), (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"); and, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933) (claims for just compensation are grounded in the Constitution itself).

8. This case, which involves the federal government taking owners' state-law possessory right to their real property, is even

certiorari, vacate the Sixth Circuit's decision, and remand this case in light of this Court's decision in *Oil States*.

I. Congress may not deny an Article III court jurisdiction to adjudicate an owner's constitutional right to be justly compensated.

A. The Just Compensation Clause is a self-executing, constitutionally-founded right that does not depend upon legislative grace.

An owner's right to be secure in his property is one of the primary objects for which the national government was formed. In *United States* v. *Jones*, 132 S.Ct. 945, 949 (2012), the Supreme Court recalled Lord Camden's holding in *Entick* v. *Carrington*, 95 Eng. Rep. 807 (C.P. 1765), "The great end for which men entered into society was to secure their property."[9]

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more compelling than *Oil States*, which involves an owner's property interest in a federally-issued patent. See *Preseault I*, 494 U.S. at 22 (O'Connor J., concurring) ("we are mindful of the basic axiom that [p]roperty interests *** are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (citing and quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980)). See also *Horne* v. *Department of Agriculture*, 135 S.Ct. 2419, 2430 (2015).

9. "Government is instituted to 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 ***." James Madison, *The Complete Madison* (Saul K. Padover, ed., 1953), pp. 267-68 (remarks published in National Gazette, Mar. 29, 1792) (emphasis in original). See also James W. Ely, Jr., *The Guardian of*

This Court explained, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela*, 148 U.S. at 324 (followed by *Olson* v. *United States*, 292 U.S. 246, 254 (1934)).[10]

This Court held the Fifth Amendment guarantee of compensation does not "depend on the good graces of Congress." This Court explained:

> [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*, 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 *** *Jacobs* *** does not stand alone, for the Court has frequently repeated the view that, in the event of a taking,

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Every Other Right: A Constitutional History of Property Rights (3rd ed. 1998).

10. See also *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[T]he 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."); and *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("an essential principle: Individual freedom finds tangible expression in property rights."). And see, Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 Columbia L.Rev. 1630, 1654-1658 (1988).

> the compensation remedy is required by the Constitution.
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> *First English Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304, 315-16 (1987).[11]

Indeed, even before *San Diego Gas* and *First English*, this Court found:

> whether the theory *** be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment ***.
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> *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947).

The Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325. When the government takes an owner's property the government has a "categorical duty" to justly compensate the owner. See *Arkansas Game and Fish Comm'n* v. *United States*, 133 S.Ct. 511, 518 (2012),

11. Numerous citations omitted.

and *Horne* v. *Department of Agriculture*, 135 S.Ct. 2419, 2428 (2015).[12]

The federal government may not escape this "categorical duty" by creating a statutory scheme denying owners the ability to obtain just compensation or relegating the adjudication of the amount of compensation the owner is due to a non-Article III tribunal.

The Sixth Circuit panel failed to appreciate the fundamental difference between the *constitutionally*-created Fifth Amendment right to just compensation and *congressionally*-created entitlements such as contracts and employment claims. An owner's constitutional right to be justly compensated when the government takes the owner's state-law right to use and possess their land is a "private right," not a "public right" that Congress may abrogate by statute. While a statutory waiver of sovereign

12. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Justice Holmes reminded us, "We are in danger of forgetting that 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." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415, 416 (1922). "That right [to just compensation] was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary." *Jacobs*, 290 U.S. at 16. See also *Phelps* v. *United States*, 274 U.S. 341, 343-44 (1927)).

immunity may be necessary to enforce a *congressionally-created* entitlement, this does not apply when the right being enforced is founded upon *the Constitution itself.*

B. Adjudicating "just compensation" is an "inherently judicial" endeavor, not a matter for the Legislative or Executive Branch.

This Court explained,

> Congress seems to have assumed the right to determine what shall be the measure of compensation. But, this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.
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> *Monongahela*, 148 U.S. at 327.

In *Monongahela* this Court further held, "The right of the legislature *** to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it

ought to pay therefor *** cannot for a moment be admitted or tolerated under our constitution." 148 U.S. at 327-28.[13]

The CFC is not an Article III court but an Article I tribunal. See Federal Courts Improvement Act of 1983 §171(a)[14] ("The court [of Federal Claims] is declared to be a court established under article I of the Constitution of the United States."). This Court noted, "The Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the Constitution, article 3, but from the Congressional power 'to pay the debts *** of the United States,' article 1, §8, c.1." *United States* v. *Sherwood*, 312 U.S. 584, 771 (1941).

The members of the CFC, like bankruptcy judges in *Northern Pipeline*, "do not enjoy the protections constitutionally afforded Article III judges." *Northern Pipeline*, 458 U.S. at 60. See Art. III, §1, providing federal courts shall be staffed by judges who hold office during good behavior, and whose compensation "shall not be diminished" during tenure in office. Judges on the CFC are appointed for fifteen-year terms, can be removed by the Federal Circuit, and their salaries are not immune from diminution. See 28 U.S.C. 172, 176.

Delegating the exclusive adjudication of Fifth Amendment taking claims to a legislative tribunal violates the separation of powers and is contrary to this Court's holdings in *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), *Northern Pipeline*, *INS* v.

13. Quoting *Isom* v. *Miss. Cent. R. Co.*, 36 Miss. 300 (1858).

14. Codified at 28 U.S.C. 171(a).

Chadha, 462 U.S. 919 (1983), *Monongahela*, and *Stern*, among other decisions.

C. "Sovereign immunity" does not allow Congress to abrogate a self-executing constitutional right in contravention of separation of powers.

Richard Nixon infamously said, "When the President does it, that means that it is not illegal."[15] In a similar manner, the government looks to the age of Henry III, relying upon a talismanic incantation of "sovereign immunity" as though the concept is juridical garlic allowing the federal government to avoid accountability to an Article III court.

The notion of sovereign immunity is rooted in the nostrum *rex non potest peccare* (the King can do no wrong) and the divine right of kings. See George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 Louisiana L.Rev. 476, 478-79 (1953):

> The whole concept of sovereignty; and the theory of the divine right of kings lent support for the proposition that the king was above the law – that he was in fact the law-giver appointed by God, and therefore could not be subjected to the indignity of suit by his subjects.

Chief Justice John Jay expressed this Court's skepticism of sovereign immunity, "the whole nation [*i.e.*, the federal government] could in the peaceable

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15. David Frost interview (1977), available at: <http://bit.ly/2f59Foo> (last viewed November 4, 2017).

course of law, be compelled to do justice, and be sued by individual citizens." *Chisholm* v. *Georgia*, 2 U.S. 419, 478 (1793). Sovereign immunity is not the magical elixir the government supposed it to be.

Harvard Professor Richard Fallon described the inevitable collision between the ancient notion of sovereign immunity and the rule of law. "Sovereign immunity has proved problematic from the beginning, and for an obvious reason. It simply does not mesh well with the rule of law, and the idea of *Marbury* v. *Madison* that our nation should be a government of laws not of men." Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 Catholic U. L.Rev. 517. Professor Fallon continued, "The two traditions *** – one embracing sovereign immunity and permitting only limited suability of government and the other rejecting sovereign immunity and treating review in an article III court as the norm – are inconsistent, at least in terms of their underlying spirits and assumptions." *Id.* at 522-23. See also Guy I. Seidman, *The Origins of Accountability: Everything I Know about the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis L.J. 393 (2005).

Justice Scalia and Bryan Garner observed, "Unsurprisingly, Americans do not take kindly to the notion that the sovereign can do no wrong. Nor to the notion that suit against the government should be entirely forbidden." *Reading Law: The Interpretation of Legal Texts* (2012), pp. 282-83. Scalia and Garner continued, "This rigidity [in applying sovereign immunity] made sense when suits against the government were disfavored, but not in modern times." *Id.* at 285.

This collision of the rule of law and sovereign immunity is easily resolved in favor of the rule of law. It is easily resolved here because it can be avoided in the first instance by recognizing the Fifth Amendment is self-executing – meaning the Fifth Amendment is *itself* a waiver of sovereign immunity – and therefore no additional statutory waiver of sovereign immunity is necessary. But, if we pursue the topic further, we quickly find modern jurisprudence does not recognize sovereign immunity to be the get-out-of-jail-free-card the government thinks it is. Harvard Professor Louis Jaffe noted, "judicial review is the rule. It rests on the congressional grant of general jurisdiction to the article III courts. It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest." Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L.Rev. 401, 432 (1958). See also Jaffe, *The Right to Judicial Review II*, 71 Harv. L.Rev. 769 (1958).[16]

Professor Jaffe's thesis holds the Tucker Act should not be read as denying Article III courts jurisdiction of Fifth Amendment taking claims because the jurisdictional statutes do not manifest a *specific intention* to deny Article III courts jurisdiction of Fifth Amendment taking claims.

But, even assuming the Tucker Act manifests a specific congressional intent to deny Article III courts jurisdiction of Fifth Amendment taking cases, Professor Jaffe notes there are "constitutional impediments"

16. Professor Jaffe's scholarship on this point is favorably cited by Justice Scalia and this Court. See *Reading Law*, p. 283, n.8; *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 135 S.Ct. 1293, n.2 (2015); *Wellness Intern. Network*, 135 S.Ct. at 1965.

that prohibit Congress from denying Article III courts judicial review of executive or legislative action. Jaffe, 71 Harv. L.Rev. at 432. Separation of powers is such a "constitutional impediment."

"Since the days of the Declaration of Independence, the keystone of American political thought has been responsible government, and the entire history of the American Revolution would seem to negate the applicability in this country of the English maxim that the king can do no wrong." Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 Louisiana L.Rev. at 480. This Court agrees with Professor Pugh.

> The English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible; and the ministers personally, like our President, may be impeached; or, if the wrong amounts to a crime, they may be indicted and tried at law for the offence.
>
> We do not understand that *** the English maxim has an existence in this country.
>
> *Langford* v. *United States*, 101 U.S. 341, 343 (1879).[17]

17. The Court's holding in *Langford* echoes Justice James Wilson's opinion in *Chisholm*, 2 U.S. at 454, "To the Constitution of the United States the term *sovereign* is totally unknown."

The great weight of modern jurisprudence and scholarship repudiate the panel's obeisance to a capacious notion of sovereign immunity. This Court directs lower courts to view the government's invocation of sovereign immunity with skepticism, not judicial genuflection. "The doctrine of sovereign immunity has never had the effect of insulating official conduct from judicial scrutiny and control. Any other result would be not only inconsistent with the institution of judicial review but intolerable as a matter of social policy." [18]

Early jurisprudence avoided the unjust strict application of sovereign immunity by recognizing "officer suits" – lawsuits against the King's "wicked ministers."[19] Professor Roger Cramton similarly observed, "[n]o scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years."[20] Professor Walter Gellhorn likewise noted, "today the doctrine [of sovereign immunity] may be satisfactory to technicians but not at all to persons whose main concern is with justice. *** The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words." Walter Gellhorn, *Sovereign Immunity in Administrative Law – A New Diagnosis*, 9 Pub. L.J. 1, 22 (1960). Professor Cramton found:

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18. Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Michigan L.Rev. 387, 398 (Jan. 1970).

19. See Scalia and Garner, *Reading Law*, p. 283.

20. Cramton, *supra* note 18, at 419.

> [The] law [of sovereign immunity] is confused, artificial, and erratic and is likely to produce unjust results as well as wasted effort. The doctrine of sovereign immunity fulfills these unpleasant expectations by distracting attention from the real issues of whether judicial review or specific relief should be available in a particular situation and by directing attention to the sophistries, false pretenses and unreality of present law.[21]

Professor Cramton cited Professor Jaffe's scholarship and observed there is a "rare uniformity of legal scholarship" criticizing the government's recourse to sovereign immunity.[22] See this Court's holding in *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589 (2008) ("The Government seeks shelter in a canon of construction ***. The sovereign immunity canon is just that – a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction.").

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21. Cramton, *supra* note 18, at 420.

22. Crampton, *supra* note 18, at 419 ("The litigation practice of the Department of Justice, however, ensures that sovereign immunity arguments are presented in hundreds of cases each year. The Department asserts sovereign immunity, usually as one of a battery of grounds for dismissal of a plaintiff's complaint. *** This practice was recently criticized by Judge Friendly, who said: '[L]aw officers of the Government ought not to take up the time of busy judges or of opposing parties by advancing an argument so plainly foreclosed by Supreme Court decisions.' *Toilet Goods Assn.* v. *Gardner*, 360 F.2d 677, 683 n.6 (2nd Cir. 1966), *aff'd*, 387 U.S. 158 (1967).").

Simply put, sovereign immunity does not allow Congress to abrogate an owner's right to be justly compensated when the government takes private property.

D. Congress may not abrogate by statute the self-executing right to just compensation guaranteed by the Constitution.

Because the right to just compensation arises *directly* from the Constitution, Congress cannot abrogate this right by statute. See *Jacobs*, 290 U.S. at 17 ("the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest") (citing *Seaboard Air Line Ry. Co.* v. *United States*, 261 U.S. 299, 306 (1923), and *Phelps*, 274 U.S. at 343-44).

This principle goes back to *Marbury*.

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. *** 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. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written

> constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> 5 U.S. at 176-77.

When a statutory scheme prevents owners from vindicating their constitutionally-guaranteed right to be justly compensated this Court *must* invalidate the scheme. Chief Justice Marshall explained:

> It is emphatically the province and duty of the judicial department to say what the law is. *** [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> *Marbury*, 5 U.S. at 177-78.

Monongahela demonstrates this point. In *Monongahela*, the federal government argued Congress, not the court decides what compensation the government must pay an owner for property the government took from the owner. This Court emphatically rejected the notion that Congress could usurp the Judicial Branch's

authority to determine the compensation an owner is due. See *Monongahela*, 148 U.S. at 327.

II. Congress cannot deny by statute the Seventh Amendment's guarantee of a right to trial by jury.

The Seventh Amendment guarantees "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." The text makes no exception for suits against the federal government and, as we note below, the history of the Seventh Amendment makes abundantly clear the Founders were *especially concerned* about guaranteeing the right to jury trial in actions against the government.

This Court has repeatedly affirmed the fundamental importance of the right to trial by jury. In *Galloway* v. *United States*, 319 U.S. 372, 398-99 (1943), Justice Black summarized the history animating adoption of the Seventh Amendment.[23]

> [T]he first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment ***.*** [Patrick] Henry, speaking in the Virginia Constitutional Convention, had

23. Justice Blacks' statement was in an opinion dissenting on other grounds. See also *Solem* v. *Helm*, 463 U.S. 277, 286 (1893) (explaining the fundamental nature of the right to trial by jury and tracing the origin of this right to Magna Carta).

> expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom ***. We are told that we are to part with that trial by jury with which our ancestors secured their lives and property ***. I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself.

This Court's Seventh Amendment jurisprudence holds the "right of trial by jury" is guaranteed as it existed under English common law in 1791 when the Seventh Amendment was adopted. See *Custis* v. *Loether*, 415 U.S. 189, 193 (1974) ("[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791."). The Seventh Amendment guarantees "the right of trial by jury" for all suits involving legal rights – as opposed to proceedings in admiralty or equity. See *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830) ("By [suits at] 'common law,' [the Framers] meant *** suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.").[24]

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24. Emphasis in original.

At common law the type of damages a plaintiff sought as well as the subject of the action determined which court would hear the case. There were three options: law, equity and admiralty. An action seeking to enforce a legal right would be heard by the law courts with a jury, as opposed to equity and admiralty that sat without a jury. See *Parsons*, *supra.* This Court held, "if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 53 (1989).

An owner's action to be justly compensated for land the government took is historically a "suit at common law" in which the owner has the right to trial by jury.

This Court explained, "The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999) (citations omitted).

Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-American jurisprudence. This Court observed:

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A

> right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. *City of New York*, 315 U.S. 752, 752-53 (1942).[25]

Chief Justice Roberts recalled the Fifth Amendment right of compensation arises from Magna Carta:

> [The Fifth Amendment] protects "private property" without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta ***. Clause 28 of that charter forbade any "constable or other bailiff" from taking "corn or other provisions from any one without immediately tendering money therefor ***." The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property.

Horne, 135 S.Ct. at 2426.[26]

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25. See also *United States* v. *Booker*, 543 U.S. 220, 239 (2005) ("[T]he right to a jury trial had been enshrined since the Magna Carta.").

26. Quoting Magna Carta, Cl. 28 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* (2nd ed. 1914), p. 329.

In England, before 1791, actions by landowners seeking compensation for property taken by the King were tried to a jury. Magna Carta, Sections 39 and 52, guaranteed the right to a jury when the King took property.

> No free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land ***. If anyone has been dispossessed or removed by us, without the legal judgment of his peers, from his lands, castles, franchises, or from his right, we will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five-and-twenty barons of whom mention is made below in the clause for securing the peace.
>
> Magna Carta[27]

In *De Keyser's Royal Hotel Ltd.* v. *the King*, ch. 2, p. 222 (1919), Swinfen Eady M.R. described English law between 1708 and 1798:

> It appears then to be fully recognized [that by 1708] the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts to enable particular lands to be taken compulsorily

27. In James K. Wheaton, *The History of the Magna Carta* (2012).

> *** provision is made for the appointment of Commissioners to survey the lands to be purchased, and in default of agreement with the owners, *the true value is to be ascertained by a jury*.[28]

The Seventh Amendment guarantee of a right to jury trial is especially applicable to actions an individual brings against the government.

The Founders were very familiar with a sovereign's desire to avoid jury trials. King George attempted to circumvent American colonists' right to jury trial by assigning disputes over the Stamp Act tax to admiralty courts that sat without a jury. "John Adams voiced the American reaction: 'But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge ***.' Colonists vehemently denounced admiralty courts because they worked without juries ***." Colonists praised [Blackstone's] remarks [in his *Commentaries*] to the effect that trial by jury was the 'sacred palladium' of English liberties ***." Levy, *supra* p. 9, at 226. The Declaration

28. Citing Statute 7 Anne c. 26 (emphasis added). See *Baron de Bode's Case*, 8 Q.B. Rep. 208 (1845), and Levy, *supra* p. 9, at 211 ("Under an ordinance of 1164 known as the Constitutions of Clarendon, the sheriff, acting at the instigation of the bishop, could swear twelve men of the countryside to give a verdict – that is, to speak the truth on issues involving property rights ***. No one could be evicted or disposed of his land without the prior approval of a jury verdict. A verdict in his favor restored him to possession of the land. Thus trial by jury emerged as the legal remedy for a person who had faced dispossession.").

of Independence included "depriving us, in many cases, of the benefit of trial by jury" in its list of Britain's offenses against the American colonies.

> The basic argument is that civil jury trials were prized by the populace chiefly for their public law implications, that is for their utility in preventing possible oppression in tax suits, *condemnation proceedings*, and other administrative actions and, if necessary, in obtaining redress for consummated governmental wrongs through collateral suits for damages against officials.[29]

An owner's constitutional right to trial by jury when the government takes his property was a clearly established principle of American law before 1791. *Bayard* v. *Singleton*, 1 N.C. 5, 1787 WL 6 (1787), demonstrates the point. North Carolina confiscated property owned by British sympathizers, including Samuel Cornell, "the richest man in North Carolina." Cornell deeded thousands of acres of land to his daughter, Elizabeth Cornell Bayard. *Id.* at *8. North Carolina confiscated Elizabeth Bayard's land and sold it to Spyers Singleton. In 1787, Elizabeth Bayard sued to recover title to her family homestead. Elizabeth Bayard argued North Carolina confiscated her property in violation of North Carolina's constitution guaranteeing a right to jury trial. Elizabeth Bayard prevailed, and the North Carolina Supreme Court declared the legislative act authorizing the confiscation of property without a jury trial to be unconstitutional.

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29. George E. Butler, II, *Compensable Liberty: A Historical and Political Model of the Seventh Amendment Public Law Jury*, 1 Journal of Law, Ethics & Public Policy 595, 635, n.44 (1985) (emphasis added) (citing *Damsky* v. *Zavatt*, 289 F.2d 46, 49-50 (2nd Cir. 1971) (Friendly, J.), and *Federalist*, No. 83 (Hamilton)).

Congress adopted a scheme in which the federal government can take an owner's property, pay the owner nothing, force the owner to bring an inverse condemnation lawsuit against the United States and deny the owner ability to vindicate his right to be justly compensated in an Article III court with trial by jury.

The government and the Sixth Circuit premised their position upon the notion that an owner's state-law right to their property is a "public right" because the owners' claims "against the government [are] in connection with the performance of a historical and constitutional function of the legislative branch, namely, the control of payment of money from the treasury." App. 19a. This Court has *never* held the Just Compensation Clause and an owner's state-law possessory right to their land is a "public right" as that term is understood under *Martin* v. *Hunter's Lessee*, 14 U.S. 304, 351 (1816), and other cases.

To the contrary, this Court has repeatedly held the Just Compensation Clause is a self-executing constitutional guarantee founded upon the text of the Constitution and that determining the compensation due an owner is an "inherently judicial" function. See, *e.g.*, *Monongahela*, 148 U.S. at 327. An owner's possessory right to their real property is a state-law right. *Preseault I*, 494 U.S. at 20 (O'Connor, J., concurring).

In the 1890s Congress passed a law taking a lock and dam owned by Monongahela Navigation Company. The central issue in *Monongahela* was who (the legislature or the judiciary) should determine the amount of compensation the owner was due. Congress specified the compensation to be $161,733. *Monongahela*, 148 U.S. at

312. The owner, seeking $450,000, sued in federal district court asking the court to determine the appropriate compensation. *Id.* at 314.

On appeal this Court held the "just compensation" an owner is constitutionally guaranteed is an "inherently judicial" endeavor, not a matter for the Legislative or Executive Branch.

> By this legislation [specifying the amount of compensation due landowners] congress seems to have assumed the right to determine what shall be the measure of compensation. But, this is a judicial, and not a legislative, question. *** [W]hen the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.
>
> *Id.* at 327.

This Court explained, "The right of the legislature *** to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the 'just compensation' it ought to pay therefor *** cannot for a moment be admitted or tolerated under our constitution." 148 U.S. at 327-28.[30]

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30. Quoting *Isom* v. *Miss. Cent. RR Co.*, 36 Miss. 300 (1858).

Determining the compensation an owner is due under the Fifth Amendment is not a "public right" because it is an "inherently judicial" responsibility. See *Monongahela*, 148 U.S. at 327. See 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, 98-105 (2015). ("[A]fter *First English*, it is now explicit that property owners enjoy the right to bring taking claims, not because Congress has consented to their doing so, but because the Constitution guarantees that right."). See also *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932) ("the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"), and *Northern Pipeline*, 458 U.S. at 68 ("The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently *** judicial.'") (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)).

The panel sought to distinguish this Court's decision in *Monongahela* by saying, "Unlike the present case, the 1888 Act [at issue in *Monongahela*] provided a specific Article III court with jurisdiction over the Monongahela litigant's claims." App. 20a. *Monongahela* cannot be cabined in this manner. First, this Court grounded its decision in *Monongahela* upon *the Constitution*, not a "private legislative act." Secondly, this Court declared the "private legislative act" *unconstitutional* because it sought to limit the Judicial Branch's constitutional

authority to determine the compensation an owner was due.

The panel's error was its failure to "distinguish between congressionally-created entitlements and constitutionally-created rights." App. 12a. The panel assumed the Fifth Amendment guarantee of "just compensation" is no different from any other claim "against the United States for money damages." The panel wrongly held "[s]overeign immunity *** does not distinguish between congressionally created entitlements and constitutionally created rights." *Id.* This led the panel to the false notion that the government can take private property, pay the owner nothing and deny the owner any ability to vindicate this right in an Article III court with jury trial. The Just Compensation Clause means nothing if Congress can nullify this constitutional guarantee.[31] How can one have a self-executing constitutionally-guaranteed right when Congress can deny or abrogate the individual's ability to vindicate that right?

The panel's decision reduces the Just Compensation Clause to nothing more than a hortatory or precatory statement the realization of which depends upon the good grace of Congress. The panel wrongly believed that suing the Federal Government to enforce a self-executing constitutional right is a "privilege" and Congress' "power to withdraw the privilege of suing the United States *** knows no limitations." App. 11a.

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31. *Preseault I*, 494 at 23 (the government's "view" that destroying or postponing owners' state-law right to use and possess their land "threatens to read the Just Compensation Clause out of the Constitution") (O'Connor, J., concurring).

The panel wrongly believed, "Even though the Fifth Amendment establishes a right to just compensation, there was a significant period of time in which litigants were unable to enforce that right by seeking money damages in court." App. 15a. This is simply not true.

There are many examples of federal taking cases brought in federal district court with trial to a jury. See, *e.g.*, *Boom Co.* v. *Patterson*, 98 U.S. 403, 404 (1878) (a condemnation proceeding in federal district court to "'proceed to hear and determine such case in the same manner that other cases are heard and determined in said court.' Issues of fact arising therein are to be tried by a jury, unless a jury be waived. The value of the land being assessed by the jury or the court, as the case may be."); *Upshur Cnty.* v. *Rich*, 135 U.S. 467, 474-76 (1890) (citing *Kohl* v. *United States*, 91 U.S. 367, 376 (1876) (proceeding to take land and determine the compensation due the owner was "the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents" including the principle that "[i]ssues of fact were to be tried by a jury unless a jury was waived"); *Monongahela*, 148 U.S. at 329 ("it is manifest that the [compensation] was a necessary and proper subject of inquiry before the jury"); *Charles River Bridge* v. *Warren Bridge*, 36 U.S. 420, 448-49, 471 (1837) (the compensation due an owner "are all matters of evidence; facts to be proved; and courts and juries *** will give a reasonable protection to the property") (citing *VanHorne's Lessee* v. *Dorrance*, 2 U.S. 304 (1795)), *Marcus* v. *Northeast Commuter Servs. Corp.*, 1992 WL 129637 (E.D. Pa. 1992) (federal district court case in which a city condemned a road through property a railroad acquired for a railyard in which "[a] jury was summoned *** to inquire and find the value of the property taken for the street.").

United States v. *Lee*, 106 U.S. 196 (1882), is a celebrated example. The federal government took Robert E. Lee's homestead for Arlington National Cemetery. Lee's son, Custis, sued for compensation. The matter was tried to a district court with a jury. See Anthony J. Gaughn, *The Last Battle of the Civil War: United States Versus Lee, 1861-1883* (2011).

In *Lee* this Court rejected the government's "defense *** [of] absolute immunity from judicial inquiry." 106 U.S. at 220. The Court held, "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 compensation. *** It cannot be denied that both [constitutional protection of individual's liberty and property] were intended to be enforced by the judiciary as one of the departments of government established by that constitution." *Id.*

More recently, in *Del Monte Dunes* this Court held an inverse condemnation action was subject to the Seventh Amendment's guarantee of right to trial by jury. See 526 U.S. at 712-13, 720-21, 708-09 ("The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'").

III. This Court should grant certiorari, vacate the panel's decision, and remand in light of this Court's decision in *Oil States*.

Oil States asks this Court to decide if a non-Article III tribunal, without trial by jury, may issue a declaration invalidating an owner's property interest in a patent. This appeal involves a very similar question.

The Sixth Circuit panel rested its decision upon the premise that Congress may deny property owners access to an Article III court and deny the right to trial by jury because "[t]he landowners' compensation claims are public-right claims" and "[t]he public rights doctrine allows Congress to remove consideration of certain matters from the judicial branch and to assign such consideration to legislative courts or administrative agencies." App. 17a. As explained above, an owner's interest in real property established by state-law is not a "public right." And if, in *Oil States*, this Court holds that a property interest in a federally-issued patent is not a "public right" than an individual's ownership of their home is certainty not a "public right."

But the panel issued its decision without knowing this Court would decide *Oil States* and without having benefit of this Court's eventual decision in *Oil States*.

Accordingly, we ask that, if this Court does not grant this petition for certiorari with briefing on the merits, that this Court at least, grant this petition, vacate the Sixth Circuit's decision, and remand this case providing the Sixth Circuit opportunity to reconsider its decision in light of this Court's eventual decision in *Oil States*.

CONCLUSION

This Court should grant this petition for certiorari and reverse the Sixth Circuit's holding that Congress may deny Article III courts authority to determine the compensation an owner is due when the government takes private property. Alternatively, this Court should grant certiorari, vacate the Sixth Circuit's decision, and remand in light of this Court's forthcoming decision in *Oil States*.

Respectfully submitted,

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