No. 16-1466

# In the
# United States Court of Appeals
## for the Sixth Circuit

KEVIN BROTT; KATHALEEN BONDON; LOUIS CHURCHWELL; PHARQUIETTE CHURCHWELL; FREDRICKS CONSTRUCTION COMPANY; KAREN FRISCO; PATRICIA GREEN; VERONICA HARWELL-SMITH; RICKEY HOLDEN; CAROLYN HOLDEN; ROBERT JONES; JEREMY KEITH; JOEL F. KOWALSKI; SHARON KOWALSKI; THERESA LOPEZ; ILEINE MAXIN; THOMASINE MESHAWBOOSE; THOMAS NAVARINI; LUIS SANTILLANES; YOLANDA SANTILLANES; WESTSHORE ENGINEERING & SURVEYING, INCORPORATED; 2017 8TH, LLC; 2170 SHERMAN, LLC,

*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids, No. 1:15-cv-00038.
The Honorable **Janet T. Neff**, Judge Presiding.

## PETITION FOR REHEARING EN BANC OF PLAINTIFFS-APPELLANTS

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**RULE 35(b) STATEMENT IN SUPPORT OF REHEARING**

The panel held Congress can take an owner's property and deny the owner's ability to vindicate his or her right to just compensation in an Article III court with trial by jury. *Brott v. United States*, 858 F.3d 425 (6th. Cir. 2017) (Addendum). The panel held an owner's Fifth Amendment right to just compensation and the owner's Seventh Amendment guarantee of right to jury trial does not apply to the federal government even in cases involving a constitutionally-established right. The panel further held Article III and separation of powers does not prevent Congress from relegating Fifth Amendment taking claims to a non-Article III tribunal. The panel premised its decision upon the premise that an owner's right to be justly compensated for property the government takes from the owner is a "public right," which Congress may limit or deny under the 'public rights doctrine."

After the panel issued its opinion, the Supreme Court granted certiorari in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 639 Fed. Appx. 639 (2016), cert. granted, 2017 WL 2507340 (June 12, 2017). In *Oil States* the Supreme Court will decide "[w]hether *inter partes* review violates Article III or the Seventh Amendment by authorizing an Executive Branch agency, rather than a

court or jury, to invalidate a previously issued patent."[1] *Oil States* will decide whether an individual's interest in property is a "public right" and whether Congress may deny an owner access to an Article III court with jury trial to vindicate this property interest.

Rehearing is appropriate because "the panel's decision conflicts with a decision of the United States Supreme Court" and "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions." Rehearing is also appropriate because this appeal raises "questions of exceptional importance." Fed.R.App.P. 35(a)(2).

The panel's decision conflicts with a series of Supreme Court decisions, including *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Stern* v. *Marshall*, 564 U.S. 462 (2011), and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

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[1] *Inter partes* review is an adversarial proceeding in which the Executive Branch agency, the US Patent and Trademark Office, determines an owner's property interest in a previously-issued patent.

## BACKGROUND

The Just Compensation Clause of the Fifth Amendment 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." This is a "self-executing," "categorical" constitutional guarantee. The determination of "just compensation" is an "inherently judicial function." Article III provides the judicial power is vested in the Judicial Branch alone. The Seventh Amendment guarantees "[t]he right to trial by jury shall be preserved" and makes no exception for actions against the United States.

The federal government took property from twenty-three Michigan landowners in violation of the Fifth Amendment by not paying (nor offering to pay) any compensation. These owners sought that compensation the Fifth Amendment guarantees by filing this lawsuit in an Article III court with trial by jury.

The panel affirmed the district court's dismissal of their claims, holding "landowners are not entitled to consideration of their constitutional claims by an Article III trial court or by a jury." Add-6. 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.'"[2] 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." Add-9. The panel held "property owners could not sue the United States in [an Article III] court to seek just compensation for a taking." Add-10.

## REHEARING IS WARRANTED

### I. After the panel issued its decision the Supreme Court granted certiorari to consider this same issue in *Oil States*.

A patent is a property interest protected by the Fifth Amendment. Once granted, an owner's patent "become[s] the property of the patentee, and as such is entitled to the same legal protection as other property." *McCormick Harvesting Mach. Co.* v. *C. Aultman & Co.*, 169 U.S. 606, 608-09 (1998).

Congress authorized the Patent Trial and Appeal Board to review and extinguish existing patents in an adversarial proceeding known as *inter partes*

[2] "As soon as private property has been taken … *the self-executing character of the constitutional provision with respect to compensation is triggered*. …[T]he Fifth Amendment is not precatory: once there is a 'taking' compensation must be awarded." *San 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).

review. See 35 U.S.C. 311(a), 318(a). The Patent Trial and Appeal Board is an Executive Branch tribunal, not an Article III court and there is no right of trial by jury before the Board.

Oil States owned a patent the Board extinguished. Oil States challenged the Board's constitutional authority to determine (and invalidate) its property interest in the patent. Oil States argued the determination of its property right by an Article I tribunal is contrary to Article III and the Seventh Amendment. The United States intervened, claiming Congress can deny a property owner access to an Article III court and trial by jury because, the government argued, a property interest in a patent is a "public right."

The Federal Circuit affirmed the Board's dismissal of Oil States' action. Oil States sought certiorari and the Supreme Court granted review of the question, "[w]hether *inter partes* review … violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury." Petition for Certiorari, 2016 WL 6995217, *i; *Oil States*, 2017 WL 2507340 (June 12, 2017) (order granting certiorari).

The United States opposed certiorari, arguing that under the public rights doctrine, "[p]atents are quintessential public rights." And, "Congress [may]

designate public rights for adjudication in non-Article III tribunals." Brief in Opposition, 2017 WL 1632445 at *8-9.

This appeal raises the same question the Supreme Court agreed to hear in *Oil States*. The panel rested its decision upon the premise that Congress may deny property owners access to an Article III court and 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." Add-11.

Whether an owner's private property is a "public right" or a "private right" is explained in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, (1856), *Stern* v. *Marshall*, 564 U.S. 462 (2011), and *Northern Pipeline*, 458 U.S. at 68. The Supreme Court has never held a property owner's right to just compensation is a "public right." Accordingly, this Court should grant rehearing and await the Supreme Court's decision in *Oil States*.

## II. The panel's decision is contrary to the Supreme Court's jurisprudence.

The panel erred by labeling the Constitution's "self-executing" guarantee – that an owner will be justly compensated when the government takes his or her property – a "public right." By labeling this constitutional guarantee a "public right" the panel concluded Congress may then abrogate the owner's right to just compensation by denying the owner the ability to vindicate this right in an Article III court with jury trial.

But the Supreme Court has *never* said the Just Compensation Clause is a "public right." To the contrary, the Supreme Court repeatedly holds 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.

In the 1890s Congress passed a law taking a privately-owned lock and dam. Congress specified the amount of compensation the government would pay the owner. The owner sued in federal court asking the court to determine the appropriate compensation. *Monongahela*, 148 U.S. at 314. On appeal the Supreme Court held that determining 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. … 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.

*Id.* at 327.

The Supreme 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.[3]

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 also 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). ("[In *Monongahela* the Supreme Court] held that determining just compensation is not a task for Congress but is instead a 'judicial inquiry.' That

[3] Quoting *Isom* v. *Miss. Cent. RR Co.*, 36 Miss. 300 (1858).

statement directly undermines the notion that takings claims are public rights.... [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 *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." Add-13. *Monongahela* cannot be cabined in this manner. First, the Supreme Court premised its decision upon the *Constitution*, not the "private legislative act." Second, the Supreme 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 held that suing the Federal Government to enforce a self-executing constitutional right is a "privilege" and Congress's "power to withdraw the privilege of suing the United States … knows no limitations." Add-7. In reaching this conclusion the panel failed to "distinguish between congressionally created entitlements and constitutionally created rights." Add-8. The panel assumes the Fifth Amendment guarantee of "just compensation" is no different from any other claim "against the United States for money damages." The panel held "[s]overeign immunity … does not distinguish between congressionally created entitlements and constitutionally created rights." *Id.* This led the panel to conclude 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 "self-executing" character of the Just Compensation Clause is inconsistent with the panel's conclusion that this constitutional right is a "public right" Congress may abrogate. The Just Compensation Clause means nothing if Congress can nullify this constitutional guarantee.[4] How can one have a self-executing constitutionally-guaranteed right when Congress can deny or limit the

[4] Cf. *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 23 (1990) (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).

individual's ability to enforce 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's failure to distinguish a constitutionally-established right and a congressionally-created entitlement is fatal to the panel's analysis. The Fifth Amendment 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* v. *United States*, 274 U.S. 341, 343-44 (1927)).[5]

The panel looked to *Lynch* v. *United States*, 292 U.S. 571, 581 (1934), and *Maricopa Cty., Ariz.* v. *Valley Nat'l. Bank of Phoenix*, 318 U.S. 357, 362 (1943),

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[5] "The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right 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.* A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment." *Jacobs*, 290 U.S. at 16 (emphasis added).

for the proposition that suing the United States is a "privilege" and Congress's "power to withdraw the privilege of suing the United States … knows no limitations." Add-7. But *Lynch* and *Maricopa County* do not extend to those rights established by the Constitution. Both cases involve congressionally-created entitlements. In *Lynch* Congress modified war risk insurance contracts taking "away the right of beneficiaries of yearly renewable term policies and not to withdraw their privilege to sue the United States." 292 U.S. at 583. *Lynch* involved a congressionally-established entitlement, not a constitutionally-guaranteed right. In *Maricopa County* Congress revoked a law allowing states to tax bank stock. The Court held Congress' "sovereign power to revoke the [prior congressional] grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will." 318 U.S. at 362. *Lynch* and *Maricopa County* are limited to claims arising from congressionally-created entitlement – not constitutionally-established rights.[6]

Delegating exclusive adjudication of Fifth Amendment taking claims to an Article I legislative tribunal violates the separation of powers and is contrary to

[6] The panel also looked to *Coleman* v. *United States*, 100 F.2d 903, 905 (6th Cir. 1939), for the proposition that there is no distinction "between congressionally created entitlements and constitutionally created rights." Add-8. The panel misread *Coleman*. *Coleman* was, like *Lynch* and *Maricopa County*, a lawsuit based upon a congressional entitlement. *Coleman* does not extend to the vindication of constitutionally-established rights.

*Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986), *Northern Pipeline*, *Monongahela*, and *Stern*.

The principle that Congress may not by legislation abrogate provisions of the Constitution goes back to *Marbury* v. *Madison*. "The powers of the legislature are defined, and limited … the constitution controls any legislative act repugnant to it." 5 U.S. 137, 176-77 (1803). Chief Justice Marshall explained the Constitution is the "superior, paramount law, unchangeable by ordinary means" and that the legislature is unable to alter the Constitution by "ordinary legislative acts." *Id*. Marshall further 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 … the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

*Marbury*, 5 U.S. at 177-78.

The panel believed, "significant history contradicts the landowners' argument. 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." Add-9. The panel labored under a mistaken view of history.

While it is true that Congress would pass special bills to resolve claims against the federal government, this process did not deny owners the ability to seek compensation for Fifth Amendment takings in federal district court. There are many examples of federal taking cases tried in district court 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) (a 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"); and *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)).

*United States* v. *Lee*, 106 U.S. 196 (1882), is a celebrated example. The panel wrongly believed *Lee* was "a state-law ejectment action" against federal officers seeking to recover the land. Add-10, n.6. While *Lee* began in state court, it was removed to federal district court and tried to a jury. See Amicus Curiae Brief of National Association of Reversionary Property Owners, *et al.*, pp. 18-29. See also Anthony J. Gaughn, *The Last Battle of the Civil War: United States Versus Lee, 1861-1883* (2011).

In *Lee* the Supreme 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.* This is not unique. An owner's right to a judicial determination of the compensation the owner is owed when the king takes the owner's land goes back to Magna Carta. See Opening Brief, pp. 49-50.

The Seventh Amendment provides, "In 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, then according to the rules of the common law." The Seventh Amendment recognizes no exception for suits against the United States. Indeed, the history of the Seventh Amendment and the policy the Founders sought to accomplish by guaranteeing the right to trial by jury is especially applicable to actions between individuals and the federal government. See Opening Brief, p. 55; Reply Brief, p. 22-23; Leonard W. Levy, *The Origin of the Bill of Rights* (1999), pp. 226 (quoting Blackstone, finding the right to jury trial the "sacred palladium" of English liberties). See also Brief of Amici Curiae Pacific Legal Foundation, *et al.*, pp. 7-14.

In *Del Monte Dunes* the 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.'").

But, contrary to this authority, the panel concluded, "It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." Add-14 (quoting *Lehman* v. *Nakshian*, 453 U.S. 156,

160 (1981)). The panel's reliance on *Lehman* is misplaced. *Lehman* was an age discrimination claim arising under a congressionally-established entitlement, for which a waiver of sovereign immunity is necessary, not a constitutionally-established right not dependent upon a waiver of sovereign immunity. See 453 U.S. at 165 ("Congress did not intend to confer a right to trial by jury on ADEA plaintiffs proceeding against the Federal Government."). As noted above, an individual's constitutionally-established, self-executing right to be justly compensated does not depend upon a waiver of sovereign immunity and is not a "public right" but is rather a "private right" that has been traditionally tried to a jury.

**III. Individuals' ability to vindicate constitutionally-guaranteed rights in an Article III court with trial by jury is a matter of exceptional importance.**

This appeal involves issues of the greatest constitutional consequence – the Fifth-Amendment guarantee of just compensation, the Seventh Amendment guarantee of right to trial by jury, and the separation of powers doctrine. The importance of these matters is demonstrated by Supreme Court's recent grant of certiorari in *Oil States*.

The importance of this appeal is further attested to by the numerous amici participating in both the district court and in this Court. See briefs of amici curiae Cato Institute, National Federation of Independent Business, and Southeastern

Legal Foundation; Pacific Legal Foundation, Reason Foundation, and American Civil Rights Union; Professor James W. Ely, Jr., and Mountain States Legal Foundation; National Association of Reversionary Property Owners, Property Rights Foundation of America, Pioneer Institute, and Professor Shelley Ross Saxer.

## CONCLUSION

This Court should grant rehearing to await the Supreme Court's decision in *Oil States* and revisit the panel's decision in light of *Oil States*. The panel's decision is contrary to the Supreme Court's authority and is a matter of the greatest constitutional importance.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,899 words, excluding the parts of the brief exempted.

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) as it was prepared in Microsoft Word 2007, in Times New Roman 14 point font,

*/s/ Mark F. (Thor) Hearne, II*
Counsel for Plaintiffs-Appellants

July 14, 2017

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 14, 2017, an electronic copy of this Petition for Rehearing was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

The undersigned also certifies that participants who are registered CM/ECF users will be served via the CM/ECF system.

*/s/ Mark F. (Thor) Hearne, II*
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# ADDENDUM

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 17a0115p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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| KEVIN BROTT, et al.,<br>*Plaintiffs-Appellants*,<br><br>*v*.<br><br>UNITED STATES OF AMERICA,<br>*Defendant-Appellee*. | No. 16-1466 |

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:15-cv-00038—Janet T. Neff, District Judge.

Argued: February 2, 2017

Decided and Filed: May 31, 2017

Before: BATCHELDER, ROGERS, and WHITE, Circuit Judges.

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## COUNSEL

**ARGUED:** Mark F. Hearne II, ARENT FOX LLP, Washington, D.C., for Appellants. Brian C. Toth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Mark F. Hearne II, ARENT FOX LLP, Washington, D.C., Matthew L. Vicari, Stephen J. van Stempvoort, MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C., Grand Rapids, Michigan, for Appellants. Brian C. Toth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. John M. Groen, Ethan W. Blevins, PACIFIC LEGAL FOUNDATION, Sacramento, California, Steven J. Lechner, MOUNTAIN STATES LEGAL FOUNDATION, Lakewood, Colorado, Robert H. Thomas, DAMON KEY LEONG KUPCHAK HASTERT, Honolulu, Hawaii, Shelley Ross Saxer, PEPPERDINE SCHOOL OF LAW, Malibu, California, C. Thomas Ludden, LIPSON, NIELSON, COLE, SELTZER & GARIN, P.C., Bloomfield Hills, Michigan, for Amici Curiae.

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**OPINION**

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ALICE M. BATCHELDER, Circuit Judge. Twenty-three Michigan landowners filed suit in federal district court seeking compensation in excess of $10,000 for the United States's alleged taking of their land for use as a public recreational trail. The landowners assert that they are entitled to have their claims considered in an Article III court and by a jury. However, Congress has acted constitutionally in bestowing on the Court of Federal Claims, an Article I court, exclusive jurisdiction over the landowners' compensation claims and removing the right to a jury trial for claims brought in the Court of Federal Claims and in the district court under the Little Tucker Act. Therefore, we must affirm the district court's dismissal of the landowners' complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

**I.**

The landowners filed suit in the United States District Court for the Western District of Michigan, alleging three claims: (1) a Fifth Amendment claim for just compensation, brought under the Little Tucker Act, 28 U.S.C. § 1346; (2) a Fifth Amendment claim for just compensation, brought under 28 U.S.C. § 1331; and (3) a declaratory judgment claim requesting that the court determine that it has jurisdiction to hear the landowners' compensation claims.[1]

The district court determined that Congress, via the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, "vested the Court of Federal Claims with exclusive jurisdiction to hear all claims against the United States founded upon the Constitution where the amount in controversy exceeds $10,000." The court found no constitutional infirmity in this statutory framework, despite the fact that the Tucker Act prevents the landowners from filing their claims for damages exceeding $10,000 in an Article III court, and litigants bringing claims in the Court of Federal

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[1]The landowners also filed a parallel complaint in the United States Court of Federal Claims, Case No. 1:14-cv-567, alleging a claim for just compensation. The case is currently stayed pending the outcome of the landowners' suit in the Western District of Michigan and the present appeal. *Brott, et al. v. United States*, No. 1:14-cv-567 (Fed. Cl. Sept. 14, 2016).

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Claims[2] or in the district court under the Little Tucker Act[3] are deprived of a jury trial. Further, because the landowners had failed to demonstrate that the Tucker Act and the Little Tucker Act were unconstitutional, the district court found that they had failed to demonstrate any basis for a declaratory judgment. The court therefore dismissed the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This appeal followed.[4]

**II.**

"We review questions of subject-matter jurisdiction and statutory interpretation de novo." *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788, 798 (6th Cir. 2012) (citation and quotation marks omitted). "The party opposing dismissal has the burden of proving subject matter jurisdiction." *Elgharib v. Napolitano*, 600 F.3d 597, 600 (6th Cir. 2010) (quoting *Charvat v. GVN Mich., Inc.,* 561 F.3d 623, 627 (6th Cir. 2009)). We also review de novo a district court's decision to dismiss a declaratory judgment count for failure to state a claim. *See Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 685 (6th Cir. 2016) (en banc).

The landowners assert that the district court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331, to consider their Fifth Amendment claims. Alternatively, the landowners argue that, to the extent that the Tucker Act and the Little Tucker Act establish that the Court of Federal Claims has exclusive jurisdiction over the landowners' just-compensation claims, those Acts are unconstitutional because they deprive the landowners of review in an Article III court and by a jury.

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[2]The Court of Federal Claims does not provide a jury in any trial. "The judicial power of the United States Court of Federal Claims with respect to any action, suit, or proceeding, except congressional reference cases, shall be exercised by a single judge, who may preside alone and hold a regular or special session of court at the same time other sessions are held by other judges." 28 U.S.C. § 174(a).

[3]With one exception not relevant here, actions against the United States brought under the Little Tucker Act "shall be tried by the court without a jury." 28 U.S.C. § 2402.

[4]The landowners appealed their Little Tucker Act claim to the United States Court of Appeals for the Federal Circuit, Case No. 2016-1852, and their other two claims to this court. The Federal Circuit has stayed that appeal to allow the Sixth Circuit to rule on the subject matter jurisdiction issue. *Brott, et al. v. United States*, No. 2016-1852 (Fed Cir. July 5, 2016).

**III.**

Federal district courts do not have subject matter jurisdiction to consider just-compensation claims for money damages in excess of $10,000 against the United States. Rather the Tucker Act vests jurisdiction over such claims in the Court of Federal Claims. In pertinent part, the Tucker Act states that

> 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 or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

28 U.S.C. § 1491(a)(1). The Little Tucker Act grants federal district courts concurrent jurisdiction for non-tort claims for money damages under $10,000 against the United States. Under the Little Tucker Act,

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: . . . (2) Any 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, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . . .

28 U.S.C. § 1346(a)(2). Together, the Tucker Act and the Little Tucker Act operate to vest in the Court of Federal Claims subject matter jurisdiction to consider non-tort claims for money damages against the United States in excess of $10,000.

Moreover, the Tucker Act vests in the Court of Federal Claims exclusive jurisdiction to hear such claims. The United States Supreme Court made this clear in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), when it confirmed that a takings suit for money damages must be filed in the Court of Federal Claims but a declaratory judgment action, seeking determination that a government taking had occurred, may be filed in federal district court.

> Under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding $10,000 that is "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for

> liquidated or unliquidated damages in cases not sounding in tort." Accordingly, a claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.

*Id.* at 520 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016–19 (1984)); *see Blanchette v. Conn. Gen. Ins. Corps.* (*Reg'l Rail Reorganization Act Cases*), 419 U.S. 102, 126–27 (1974) ("The general rule is that whether or not the United States so intended, '[i]f there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.'" (citation omitted)); *cf. Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988) (explaining that the Tucker Act's grant of jurisdiction to the Court of Federal Claims is "'exclusive' only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the [Court of Federal Claims]").

Contrary to the landowners' assertion, this court has previously determined that 28 U.S.C. § 1331 does not provide federal district courts with subject matter jurisdiction when Congress has otherwise provided an exclusive forum.

> 28 U.S.C. § 1331 (1976), the general federal question provision, does not provide a jurisdictional basis on these facts. The Fifth Amendment "taking" claim "arises under the Constitution," and a remedy for a violation of this provision arguably does not require a waiver of sovereign immunity. However, a number of cases indicate that Congress has made the Court of Claims the exclusive and an adequate forum for the Fifth Amendment claims, at least those over $10,000. We conclude that 28 U.S.C. § 1346(a)(2) expressly limits the district court's jurisdiction over these types of claims against the government to those not exceeding $10,000 in amount and that to utilize the court's federal question or pendent jurisdiction as to the Fifth Amendment claim would override the express policy of Congress embodied in the Tucker Act.

*Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081, 1088 (6th Cir. 1978) (internal citations and footnote omitted);[5] *cf. Pershing Div. of Donaldson, Lufkin & Jenrette Sec. Corp. v. United States*, 22 F.3d 741, 743–44 (7th Cir. 1994) (finding that 28 U.S.C. § 1367, providing district court with supplemental jurisdiction over certain claims, does not provide a district court with

[5] Among other claims, the plaintiff in *Lenoir* alleged a taking after improvements to a waterway resulted in flooding on his land, and brought suit in the district court seeking $750,000 in damages. 586 F.2d at 1084.

subject matter jurisdiction where Congress has expressly limited such jurisdiction in the Tucker Act).

Further, "it is familiar law that a specific statute controls over a general one without regard to priority of enactment." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (citations and quotation marks omitted); *see Metro. Detroit Area Hosp. Servs., Inc. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980). To read § 1331's broad grant of subject matter jurisdiction as controlling over the Little Tucker Act's specific and limited grant of jurisdiction, as the landowners do, violates this tenet of statutory interpretation. Therefore, the district court was correct to find that the Court of Federal Claims is the exclusive forum for the landowners' compensation claims and that it lacked subject matter jurisdiction under 28 U.S.C. § 1331 to review the landowners' claims.

**IV.**

The landowners assert that, to the extent that the Tucker Act and the Little Tucker Act vest in the Court of Federal Claims exclusive jurisdiction to hear the landowners' claims for just compensation greater than $10,000, those Acts are unconstitutional, because the landowners are denied (1) adjudication of their Fifth Amendment claims in an Article III forum, in violation of the separation of powers doctrine, and (2) a jury trial, in violation of the Seventh Amendment. The landowners are not entitled to consideration of their constitutional claims by an Article III trial court or by a jury.

Suits against the United States are premised on a waiver of sovereign immunity. "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (footnote omitted); *see United States v. Sherwood*, 312 U.S. 584, 586 (1941). "[A]ny waiver of the United States' immunity from suit must be unequivocal," and "[b]ecause any exercise of a court's jurisdiction over the United States depends on the United States' consent, the waiver of sovereign immunity . . . must be strictly construed." *Clay v. United States*, 199 F.3d 876, 879 (6th Cir. 1999) (citations omitted); *see Sherwood*, 312 U.S. at 590 (explaining that the Tucker Act's waiver of sovereign immunity "must be strictly interpreted").

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Congress may generally condition any grant of jurisdiction over suits against the United States by requiring that such suits be brought in a specific forum or by limiting the means by which a right is enforced.

> Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fall.

*Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (internal citations omitted); *see Steckel v. Lurie*, 185 F.2d 921, 924 (6th Cir. 1950) ("Congress, in its unlimited discretion, may constitutionally give, withhold, restrict or take away altogether the jurisdiction of the district courts of the United States." (citation omitted)). Congress may also decline to waive sovereign immunity, or it may withdraw or modify its consent to suit, even if the right at issue is drawn from the Constitution. "Although consent to sue was thus given . . . Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded, not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration." *Lynch v. United States*, 292 U.S. 571, 581 (1934) (citations omitted); *see Maricopa Cty., Ariz. v. Valley Nat'l. Bank of Phoenix*, 318 U.S. 357, 362 (1943) ("[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." (citation omitted)).

**A.**

The Tucker Act operates as a limited waiver of sovereign immunity from suit, allowing litigants to seek money damages from the United States for certain claims. *Mitchell*, 463 U.S. at 215–16. "The Little Tucker Act and its companion statute, the Tucker Act, § 1491(a)(1), do not themselves 'creat[e] substantive rights,' but 'are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law.'" *United States v. Bormes*, 133 S. Ct. 12, 16–17 (2012) (footnote omitted) (quoting *United States v. Navajo Nation*,

556 U.S. 287, 290 (2009)). Congress has conditioned its waiver of sovereign immunity such that suits for money damages against the United States must be brought in the manner dictated by the Tucker Act and the Little Tucker Act. That is, just-compensation claims against the United States for money damages in excess of $10,000 must be brought in the Court of Federal Claims.

**1.**

The landowners assert that, while a waiver of sovereign immunity may be necessary to enforce a congressionally created entitlement, no waiver is necessary when the right being enforced is founded on the Constitution. Sovereign immunity, however, does not distinguish between congressionally created entitlements and constitutionally created rights. "The character of the cause is of no significance . . . ." *Coleman v. United States*, 100 F.2d 903, 905 (6th Cir. 1939).

> The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, and to those arising from some violation of rights conferred upon the citizen by the Constitution. The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act (24 Stat. 505)) whether consent to sue was given. Otherwise it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away.

*Lynch*, 292 U.S. at 582 (internal citations omitted). Therefore, in order for claims against it to proceed, the United States must waive sovereign immunity from suit for all those claims, regardless of the source of the rights at issue.

**2.**

Nevertheless, the landowners argue that an explicit waiver is unnecessary here because the Fifth Amendment right to just compensation is a "self-executing" right and the right to compensation itself contains a waiver of sovereign immunity. The Supreme Court has indeed referred to the Fifth Amendment right to just compensation as "self-executing." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). 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 was not necessary."

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*Id.* (quoting *Jacobs v. United States*, 290 U.S. 13, 16 (1933)); *see United States v. Dickinson*, 331 U.S. 745, 748 (1947). However, the fact that the Fifth Amendment creates a "right to recover just compensation," *First English*, 482 U.S. at 315 (quoting *Jacobs*, 290 U.S. at 16), does not mean that the United States has waived sovereign immunity such that the right may be enforced by suit for money damages. *See Minnesota v. United States*, 305 U.S. 382, 388 (1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.").

The landowners' arguments do not persuade us. First, the landowners have cited no case in which the Fifth Amendment has been found to provide litigants with the right to sue the government for money damages in federal district court. Instead,

> The doctrine of sovereign immunity—not repealed by the Constitution, but to the contrary at least partly reaffirmed as to the States by the Eleventh Amendment—is a monument to the principle that some constitutional claims can go unheard. No one would suggest that, if Congress had not passed the Tucker Act, 28 U.S.C. § 1491(a)(1), the courts would be able to order disbursements from the Treasury to pay for property taken under lawful authority (and subsequently destroyed) without just compensation.

*Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (citing *Schillinger v. United States,* 155 U.S. 163, 166–69 (1894)). The United States argues that a waiver of sovereign immunity typically requires two things: the existence of a right and provision of a judicial remedy. The Fifth Amendment details a broad right to compensation, but it does not provide a means to enforce that right. Courts must look to other sources (such as the Tucker Act and the Little Tucker Act) to determine how the right to compensation is to be enforced. *See Bormes*, 133 S. Ct. at 18.

Second, significant history contradicts the landowners' argument. 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. Before the establishment of the Court of Claims in 1855, there was no statute that expressly allowed a litigant to sue the United States to enforce monetary obligations. *See Bormes*, 133 S. Ct. at 17. Instead, claimants who were owed money by the United States had to petition Congress directly

for a private act appropriating the necessary funds, suggesting that property owners could not sue the United States in court to seek just compensation for a taking.[6] *Id.*

In 1855, Congress created the Court of Claims—the predecessor of the modern Court of Federal Claims—and gave it authority to hear and determine "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. However, even after the Court of Claims was established, it was unclear whether litigants were still unable to seek compensation in court for a taking by the federal government. In *Langford v. United States*, 101 U.S. 341 (1879), a landowner brought suit in the Court of Claims against the United States for the alleged seizure of his land and buildings. The Supreme Court dismissed the landowner's claim, reasoning that the Court of Claims had no jurisdiction over tort claims against the United States; further, because the government seized the property under a claim of superior ownership the claim was based in tort, not contract. *Id.* at 342–44. With respect to takings, the Court stated:

> It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. And we are not called on to decide that when the government, acting by the forms which are sufficient to bind it, recognizes that fact that *it is* taking *private* property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.

*Id.* at 343–44.

In 1887, Congress enacted the Tucker Act. *See* Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. The Tucker Act, like the 1855 Act before it, "provided the Federal Government's consent to suit in the Court of Claims for claims 'founded upon . . . any law of Congress.'" *Bormes*, 133 S. Ct. at 18 (citation omitted). The Tucker Act also expanded the Court of Claims's jurisdiction to include "[a]ll claims founded upon the Constitution." § 1, 24 Stat. 505 (codified

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[6] The Supreme Court has noted that "enterprising claimants" also pressed the so-called "officer's suit" as a device for circumventing federal sovereign immunity in land title disputes with the federal government. *See Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 281 (1983). For example, the claimants in *United States v. Lee*, 106 U.S. 196 (1882), sought to recover land taken by the United States by filing a state-law ejectment action against the officers who supervised the land at issue. While the Supreme Court initially appeared to accept the device, such suits "ultimately did not prove to be successful." *Block*, 461 U.S. at 281.

as amended at 28 U.S.C. § 1491(a)(1)). Section 2 of the Tucker Act also created concurrent jurisdiction in the district court for claims of up to $1,000. "The Tucker Act's jurisdictional grant, and accompanying immunity waiver"—allowing the Court of Claims to hear all Constitutional claims and the district courts to hear such claims below a threshold amount—"supplied the missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable." *Bormes*, 133 S. Ct. at 18 (footnote omitted). The Tucker Act's waiver of sovereign immunity, therefore, is a necessary ingredient for just-compensation claims brought against the United States.

**3.**

The landowners also assert that, even if Congress can condition the means by which their claims can be brought against the United States, it cannot deprive them of review by an Article III court. Contrary to the landowners' contention, their claims are "public right" claims that Congress may assign to a non-Article III court for review.

Some background is necessary. The 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. *See Stern v. Marshall*, 564 U.S. 462, 488–92 (2011). "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855); *see N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) (plurality opinion) ("[C]ontroversies [between the government and others] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination.").

At one time the public rights doctrine applied "only to matters arising '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 only to matters that historically could have been determined exclusively by those departments." *N. Pipeline*, 458

U.S. at 67–68 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932) and citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). The Supreme Court has since "rejected the limitation of the public rights exception to actions involving the Government as a party." *Stern*, 564 U.S. at 490. The Court explained that if a waiver of sovereign immunity is necessary before a case may be brought then that case involves a public right. *Id.* at 489 ("The challenge in *Murray's Lessee* . . . likewise fell within the 'public rights' category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity."). Thus, "it is still the case that what makes a right 'public' rather than private is that the right is integrally related to particular federal government action." *Id.* at 490–91 (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011)).

Alternatively, suits addressing a "private right" generally may not be assigned to a legislative court or administrative agency. *See Stern*, 564 U.S. at 494; *N. Pipeline*, 458 U.S. at 70. Private-right disputes "lie at the core of the historically recognized judicial power." *N. Pipeline*, 458 U.S. at 70. Private rights address "the liability of one individual to another under the law as defined," *id.* at 69–70 (quoting *Crowell*, 285 U.S. at 51), and concern "a suit at the common law, or in equity, or admiralty," three categories of cases "Congress may not 'withdraw from [Art. III] judicial cognizance,'" *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee*, 59 U.S. at 284).

The landowners' compensation claims are public-right claims. These are claims made by private individuals against the government in connection with the performance of a historical and constitutional function of the legislative branch, namely, the control and payment of money from the treasury. Indeed, the Court of Claims, the predecessor to the Court of Federal Claims, derived its power from the "Congressional power 'to pay the debts . . . of the United States', which it is free to exercise through judicial as well as non-judicial agencies." *Sherwood*, 312 U.S. at 587 (quoting U.S. Const. art. 1, § 8, cl. 1); *see Bakelite*, 279 U.S. at 452 (explaining that the Court of Claims "was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States").

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Therefore, Congress may delegate the landowners' just-compensation claims to a legislative court—the Court of Federal Claims—for resolution.

**4.**

But, the landowners argue, their just-compensation claims are "inherently judicial" and must be resolved by an Article III court. In support of their argument, Appellants primarily rely on *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893), for the proposition that the measure of compensation for a taking is a judicial question. *Monongahela* is inapposite. The *Monongahela* opinion addresses an 1888 private legislative act that ordered inadequate compensation for construction of a lock and dam. *Id.* at 344–45; *see* Act of Aug. 11, 1888, ch. 860, 25 Stat. 400, 410–12. The 1888 Act further provided that, should condemnation proceedings commence, jurisdiction over such proceedings was given to "the circuit court of the United States for the western district of Pennsylvania with right of appeal by either party" to the Supreme Court. *Id.* at 313 (quoting 25 Stat. at 411). Unlike the present case, the 1888 Act provided a specific Article III court with jurisdiction over the *Monongahela* litigants' claims.

Further, to the extent that *Monongahela* dictates that a question of just compensation is a judicial determination, several courts of appeals have found that this requirement is satisfied when judicial review is available in an Article III court. For example, in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit considered whether the Pole Attachment Act violated the separation of powers doctrine by allowing the FCC to determine a utility's compensation for a taking under the Act. The Eleventh Circuit found that the statutory scheme was constitutional because, while the FCC initially determined the utility's compensation, the utility could appeal the FCC's order directly to a federal appeals court. Thus, "[u]nder the statutory scheme, it is the judicial branch which will, consistent with *Monongahela*, make the ultimate determination of just compensation due for a taking of a utility's property under the Act." *Id.* at 1334; *see Wis. Cent. Ltd. v. Pub. Serv. Comm'n of Wis.*, 95 F.3d 1359, 1369 (7th Cir. 1996) (explaining that the judicial determination requirement in *Monongahela* "is satisfied by the availability of judicial review. The Fifth Amendment does not require a judicial determination of just compensation in the first instance on each occasion of a taking of private property"); *see also Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (noting that an

administrative agency may address constitutional claims in the first instance, subject to meaningful judicial review by federal appellate courts, without presenting a "serious constitutional question" (citations omitted)). The United States Court of Appeals for the Federal Circuit has "exclusive jurisdiction" "of an appeal from a final decision of the United States Court of Federal Claims." 28 U.S.C. § 1295(a)(3). The landowners will ultimately receive judicial review of their claims by an Article III court—the Federal Circuit.

The separation of powers doctrine does not prohibit Congress from denying the landowners the ability to bring their claims in an Article III forum. Therefore, the district court did not err by finding that the Tucker Act and the Little Tucker Act do not violate the separation of powers doctrine and by dismissing the landowners' declaratory judgment claim on that basis.

**B.**

Congress's conditional waiver of sovereign immunity from suits for money damages against the government also includes the requirement that claims brought in the Court of Federal Claims, or under the Little Tucker Act, shall be tried without a jury. 28 U.S.C. § 174; 28 U.S.C. § 2402. We appreciate the landowners' desire to have their compensation claims heard by a jury. However, Congress's denial of a jury trial for money damages claims against the United States is not a violation of the Seventh Amendment.

"It has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Lehman v. Nakshian,* 453 U.S. 156, 160 (1981); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999). The Seventh Amendment protects the right to a jury trial for "[s]uits at common law." U.S. Const. amend. VII; *see City of Monterey*, 526 U.S. at 708–09. Suits against the United States for money damages are not suits at common law.

> Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defen[s]e, or to any set-off, or counter-claim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a

> consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.

*McElrath v. United States*, 102 U.S. 426, 440 (1880) (emphasis added); *see Sherwood*, 312 U.S. at 587; *see also Glidden Co. v. Zdanok*, 370 U.S. 530, 572 (1962) (plurality opinion). In the present case, the landowners are taking advantage of the United States's waiver of sovereign immunity and they must do so pursuant to the conditions of that waiver, including proceeding without a jury trial.

Further, the Supreme Court has determined that "in cases in which 'public rights' are being litigated . . . the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450 (1977) (footnote omitted). As explained above, claims against the United States for money damages are public-right claims. The Seventh Amendment thus does not prohibit Congress from denying the landowners the right to a jury trial for claims against the United States for money damages. Therefore, the district court did not err by dismissing the landowners' declaratory judgment claim on that basis.

**V.**

The district court correctly determined that it lacked subject matter jurisdiction to consider the landowners' claims and that the landowners failed to state a claim. The Tucker Act and the Little Tucker Act vest in the Court of Federal Claims exclusive jurisdiction to hear just-compensation claims against the United States for money damages in excess of $10,000. Further, the Tucker Act and the Little Tucker Act are constitutional and do not violate the separation of powers doctrine or the Seventh Amendment. We certainly appreciate the landowners' desire to have their claims heard in an Article III court and by a jury. However,

Congress may, as it has done here, place conditions upon its waiver of sovereign immunity and require that just-compensation claims for money damages in excess of $10,000 against the United States be heard in the Court of Federal Claims without a jury. We therefore AFFIRM the district court's order.