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.

On Appeal from the U.S. District Court for the
Western District of Michigan, Southern Division
Case No. 1:15-cv-00038-JTN | The Honorable Janet T. Neff,
District Judge

BRIEF OF AMICI CURIAE PROFESSOR JAMES W. ELY, JR. AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1466 Case Name: Brott v. United States

Name of counsel: Steven J. Lechner

Pursuant to 6th Cir. R. 26.1, Professor James W. Ely, Jr. and Mountain States Legal Found.
Name of Party
makes the following disclosure:

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

No.

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

No.

CERTIFICATE OF SERVICE

I certify that on July 20, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Professor James W. Ely, Jr. is a Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University. He has received national acclaim for his work as a legal historian and property rights expert. He has authored books, treatises, and articles, which have received widespread praise from legal historians and scholars, including *The Law of Easements and Licenses in Land* (Thomson Reuters/West, rev. ed. 2017) (with Jon W. Bruce), *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford Univ. Press, 3d ed. 2008), and *The Contract Clause: A Constitutional History* (Univ. Press of Kansas, 2016). Most recently, in *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1260–61 (2014), the Supreme Court cited his treatise, *Railroads and American Law* (Univ. Press of Kansas, 2001), in its discussion of the history of the transcontinental railroad.

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than Mountain States Legal Foundation ("MSLF"), its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Since its creation in 1977, MSLF attorneys have been involved in dozens of cases seeking to vindicate the right to just compensation. *E.g.*, *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001). Because the instant appeal presents an opportunity to defend both private property and the Just Compensation Clause of the Fifth Amendment, Professor Ely and MSLF respectfully submit this amicus curiae brief in support of Plaintiffs-Appellants' (hereinafter "Landowners") Petition for Rehearing *En Banc*, urging this Court to grant the Petition.

REASONS FOR GRANTING THE PETITION

I. REHEARING *EN BANC* IS NECESSARY BECAUSE THE VINDICATION OF PRIVATE PROPERTY IS OF EXCEPTIONAL IMPORTANCE.

"The right of property is the guardian of every other right[.]" Ely, *The Guardian of Every Other Right*, at 26 (quotations omitted). This principle is embodied in the Fifth Amendment to the U.S. Constitution, which provides, *inter alia*, that: "No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "The principle reflected in the Clause goes back at least 800 years to the Magna Carta[.]" *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015).

Chapter 29 of the 1225 charter of the Magna Carta provides that: "'[n]o freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, … but by lawful judgment of his peers, or by the law of the land….'" Bernard H. Siegan, *Economic Liberties and the Constitution* 7 (2d ed. 2006) (quoting Magna Carta (1225)). As such, early American colonists believed the right to property, as guaranteed in the Magna Carta, was part of their birthright as English subjects. *Id*. at 9.

The principle embodied in the Fifth Amendment was also influenced by John Locke's famous *Second Treatise of Government* (C.B. Macpherson ed., 1980) (1690), in which Locke declared that legitimate government was based on a compact whereby people gave their allegiance to the government in exchange for protection of their property. *Id*. §§ 123–31. According to Locke, the major purpose of government is to protect private property. *Id*. §§ 123, 124 ("The great and *chief end*, therefore, of men's uniting into common-wealths, and putting themselves under government, *is the preservation of their property*." (emphasis in original)).

The influence of the Magna Carta and John Locke on our government is clear. For example, "colonial leaders viewed the security of property as the principal function of government." Ely, *The Guardian of Every Other Right*, at 28. The Framers of the Constitution also recognized that "principles of good

government started with the protection of private property—that guardian of all other rights." Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections of the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2002); *see* Ely, *The Guardian of Every Other Right*, at 43. Thus, the primary role of the federal government is to protect private property.

The Supreme Court has consistently recognized that the protection of private property is essential to a free society. For example, the Court declared:

> Due protection of rights of property has been regarded as a vital principle of republican institutions. Next in degree to the right of personal liberty … is that of enjoying private property without undue interference or molestation. *The requirement that the property shall not be taken for public use without just compensation is but an affirmance of a great doctrine established by the common law for the protection of private property*. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235–36 (1897) (emphasis added) (internal citations and quotations omitted); *see Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) (Opinion of Justice Story) ("government can scarcely be deemed to be free, where the rights of property are left solely dependent on the will of a legislative body, without any restraint").

The instant appeal seeks to vindicate the protection of private property afforded by the Fifth Amendment. Without property rights, individuals have no

"buffer protecting [them] from governmental coercion." Ely, *The Guardian of Every Other Right*, at 43. The determination of just compensation by an Article III court, and trial by jury, fulfills the Fifth Amendment's guarantee to protect private property and, thereby, guards every other right. Therefore, Landowners' Petition should be granted.

II. REHEARING *EN BANC* IS NECESSARY BECAUSE THE PANEL'S DECISION IS AT ODDS WITH THIS COURT'S DECISION IN *VILLAGE OF OAKWOOD*.

In *Village of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373 (6th Cir. 2008), this Court was presented with an issue strikingly similar to this appeal, which was: "whether the Tucker Act requires that all contract claims against the FDIC exceeding $10,000 be brought in the Court of Federal Claims [("CFC")], or whether [the Financial Institutions Reform Recovery and Enforcement Act] provides an alternative source of jurisdiction." *Id*. at 379. During its analysis, this Court found that when another statute "contains a broad waiver of sovereign immunity," the Tucker Act does not preempt that alternative source of jurisdiction. *Id*. More specifically, this Court reasoned that:

> Distinguishing between suits against agencies and those against the United States would frequently be necessary if Tucker Act jurisdiction were preemptive—that is, if Tucker Act jurisdiction by its mere existence barred jurisdiction granted by another statute. It does not. If a separate waiver of sovereign immunity and grant of jurisdiction exist, district courts may hear cases over which, under the Tucker Act alone, the [CFC] would have exclusive jurisdiction.

Id. at 380 (quotations omitted). As a result, this Court ruled that the CFC was not the exclusive forum for suits against the United States in excess of $10,000, and further, that:

> [A]ll actions to which the FDIC is a party shall be deemed to arise under the laws of the United States. District courts can thus hear these actions as part of the arising under jurisdiction granted by 28 U.S.C. § 1331.

Id. at 379 (quotations omitted). Thus, this Court held that plaintiffs could bring their contract claims before an Article III court vis-à-vis 28 U.S.C. § 1331 despite the availability of jurisdiction in the CFC under the Tucker Act. *Id*. at 383.

Importantly, the Supreme Court is in agreement regarding the non-exclusivity of the Tucker Act. For instance, in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court noted that the "assumption [of exclusivity] is not based on any language in the Tucker Act"[2] and the CFC's "jurisdiction is 'exclusive' only to the extent Congress has not granted any other court authority to hear the claims …." *Id*. at 910 n.48. As Landowners argued before the panel, Congress has vested district courts with authority to hear inverse condemnation

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[2] The term "exclusive" does not appear in the Tucker Act or the Little Tucker Act. *See* 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). However, within the same statute as the Little Tucker Act, Congress provided that "district courts … shall have *exclusive* jurisdiction of civil actions on claims against the United States" for tortious actions. *Compare id*. § 1346(b)(1) (emphasis added), *with id*. § 1346(a)(2). Thus, if Congress intended for the CFC to have "exclusive" jurisdiction, it would have said so. *See Herr v. U.S. Forest Serv*., 803 F.3d 809, 821 (6th Cir. 2015); *Duncan v. Walker*, 533 U.S. 167, 173 (2001).

actions under 28 U.S.C. § 1331 and no waiver of sovereign immunity is necessary. Landowners' Op. Br. at 10–21.

In the instant appeal, the panel failed to perform the proper jurisdictional analysis. Instead, the panel relied on a number of "drive-by" rulings, which simply concluded—without much analysis—that the Tucker Act grants exclusive jurisdiction to the CFC for monetary claims exceeding $10,000. *See Brott v. United States*, 858 F.3d 425, 429–30 (6th Cir. 2017) (citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016–19 (1984); *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 126–27 (1974)). As a result, the panel's analysis is at odds with *Village of Oakwood*, which ruled that 28 U.S.C. § 1331 provides an alternative source of jurisdiction in the district courts when the claim arises under the Constitution. 539 F.3d at 379.

The panel relied on *Eastern Enterprises* to justify its ruling that the CFC has exclusive jurisdiction over just compensation claims exceeding $10,000. *Brott*, 858 F.3d at 429. However, in *Eastern Enterprises*, the Supreme Court noted, importantly, that "Eastern does not seek compensation from the Government." 524 U.S. at 520. As such, the Supreme Court's statement that "the [CFC] has exclusive jurisdiction to render judgment upon any claim against the United States for money damages exceeding $10,000[,]" *id.*, is a drive-by ruling and dicta. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 174 (2010) (Ginsburg, J., concurring)

("drive-by jurisdictional rulings … should be accorded no precedential effect" (internal quotations omitted)).

Moreover, although *Eastern Enterprises* cites to *Monsanto* to support its drive-by ruling, 524 U.S. at 520, *Monsanto* did not rule that the CFC has exclusive jurisdiction. 467 U.S. at 1016 ("*Generally*, an individual claiming that the United States has taken his property *can* seek just compensation under the Tucker Act, 28 U.S.C. § 1491." (all emphasis added)). As a result, the panel failed to perform the proper jurisdictional analysis in light of *Village of Oakwood* and the panel's reliance on "drive-by" rulings carries no weight.[3] Therefore, Landowners' Petition should be granted.

III. REHEARING *EN BANC* IS NECESSARY BECAUSE THE PANEL'S DECISION CONFLICTS WITH THE SUPREME COURT'S DECISION IN *LEE*.

The panel concluded that "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." *Brott*, 858 F.3d at 432 (internal quotations and citations omitted).

[3] The panel's secondary reliance on this Court's decision in *Lenoir v. Porters Creek Watershed District*, 586 F.2d 1081 (6th Cir. 1978) will not save its failure to perform the proper analysis. *Brott*, 858 F.3d at 429–30. First, the plaintiff in *Lenoir* had not considered whether jurisdiction was available under 28 U.S.C. § 1331 and, thus, this Court did not have briefing on the issue. 586 F.2d at 1088. Second, this Court limited its ruling to the facts of that case. *Id.* ("Though not considered by Lenoir, we also conclude that 28 U.S.C. [§] 1331 … does not provide a jurisdictional basis on these facts."); *see* Landowners' Op. Br. at 13 n.10.

However, in so concluding, the panel directly contradicts the Supreme Court's decision in *United States v. Lee*, 106 U.S. 196 (1882).

In *Lee*, the Supreme Court had to determine whether the plaintiff could sue the United States, or its officers, for taking his property in violation of the Fifth Amendment. *Id*. at 204–05. In answering this question, the Supreme Court examined the history of the doctrine of sovereign immunity and explained that:

> Under our system the *people* … are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of the monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right.

Id. at 208–09 (emphasis in original). Moreover, in regard to the Fifth Amendment, the Court stated that:

> If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Id. at 218. As a result, the Court held that the doctrine of sovereign immunity did not prohibit the plaintiff from suing officers of the United States for the taking of his property without paying just compensation under the Fifth Amendment. *Id*.

By relegating the discussion of *Lee* to a footnote and discounting the precedential value of the decision, the panel sidestepped analysis of this relevant precedent. *See Brott*, 858 F.3d at 433 n.6. While the panel correctly noted that the suit in *Lee* was styled as an ejectment action, *id*., the panel failed to note that the action was brought for the purpose of obtaining just compensation for a taking under the Fifth Amendment.[4] *Id*.

Here, Landowners seek the same relief as the plaintiff in *Lee*. As such, the doctrine of sovereign immunity can no more preclude an inverse condemnation action seeking just compensation under the Fifth Amendment today as it could during the time of *Lee*. Because the panel's decision is in irreconcilable conflict with *Lee*, Landowners' Petition should be granted.

CONCLUSION

For these reasons, Professor Ely and MSLF submit that the Landowners' Petition should be granted.

[4] The suit in *Lee* was an "ejectment action" in name only. What *Lee* sought was recognition that he owned legal title such that just compensation would be paid for the taking. Anthony J. Gaughan, *The Arlington Cemetery Case: A Court and a Nation Divided*, 37 J. of Sup. Ct. Hist. 1, 7–8 (2012) ("At no point did Lee ever seek physical possession of Arlington."); *id*. (noting that Lee's lawsuit alleged a due process claim and sought just compensation under the Fifth Amendment).

DATED this 20th day of July 2017.

Respectfully submitted,

/s/ Steven J. Lechner

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32(g), and 6 Cir. R. 32, I hereby certify that this brief contains 2,600 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f) and 6 Cir. R. 32(b)(1).

Additionally, I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Steven J. Lechner

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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