

No. 16-1466

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

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KEVIN BROTT, *et al.*,

*Plaintiffs-Appellants,*

vs.

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

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

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**BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF  
REVERSIONARY PROPERTY OWNERS, THE PROPERTY RIGHTS  
FOUNDATION OF AMERICA, INC., AND PROFESSOR SHELLEY ROSS SAXER  
IN SUPPORT OF PETITION FOR REHEARING EN BANC  
OF PLAINTIFFS-APPELLANTS**

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations  
and Financial Interest**

Sixth Circuit

Case Number: 16-1566

Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Robert H. Thomas

Pursuant to 6th Cir. R. 26.1, Property Rights Foundation of America, Inc.

*Name of Party*

makes the following disclosure:

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

NO.

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

NO.

**CERTIFICATE OF SERVICE**

I certify that on July 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.

s/ Robert H. Thomas

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



UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations  
and Financial Interest**

Sixth Circuit

Case Number: 16-1566

Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Robert H. Thomas

Pursuant to 6th Cir. R. 26.1, National Association of Reversionary Property Owners (NARPO)  
*Name of Party*

makes the following disclosure:

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

NO.

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations  
and Financial Interest**

Sixth Circuit

Case Number: 16-1566

Case Name: Kevin BROTT, et al. v. United States

Name of counsel: Shelley Ross Saxer

Pursuant to 6th Cir. R. 26.1, Shelley Ross Saxer  
*Name of Party*

makes the following disclosure:

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

NO.

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

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s/Robert H. Thomas  
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## IDENTITY AND INTEREST OF AMICI CURIAE

Amici's identity and reasons why the en banc court should consider the issues in this appeal, are presented in our motion for leave to file this brief, and in the interest of space will not be repeated here.<sup>1</sup>

## ARGUMENT

This case should be reviewed by the entire court for two main reasons. First, the panel decision overlooked a key decision, *United States v. Lee*, 106 U.S. 196 (1882), the case in which the U.S. Supreme Court rejected the panel's reasoning that the federal government enjoys sovereign immunity from just compensation claims. The Court concluded that it is for the courts, not the legislature, to enforce this right. *Id.* at 218-19. *Lee* has recently taken on more significance. In *Murr v. Wisconsin*, No. 15-214 (U.S. June 23, 2017), Justice Thomas noted that Fifth Amendment takings analysis should focus on how property was defined and property rights were treated by the courts after the Reconstruction

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<sup>1</sup> All parties to this appeal have been notified of amici's intention to file this brief, and do not object. In accordance with Fed. R. App. P. 29(c)(5), amici state that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.



amendments to the Constitution. *Murr*, slip op. at 1 (Thomas, J., dissenting) (“In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.”). *Lee*, the case involving the efforts to recover compensation for the taking of what is now Arlington National Cemetery, was one of the first post-Civil War decisions doing that, and has taken on greater relevance in light of *Murr*. The entire court should consider *Lee*, and its holding that federal government could be sued in its own Article III courts and could not shunt takings claims to the legislature, and that the government had violated *Lee*’s due process rights and had taken Arlington without compensation.

Second, after the panel decision was issued in this case, the U.S. Supreme Court agreed to review *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 639 Fed. Appx. 639 (2016), *cert. granted*, 2017 WL 2507340 (U.S. June 12, 2017), a case involving many of the same issues and arguments as are at stake here. In that case, the Court is considering “[w]hether *inter partes* review—an adversarial process



used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.” In our case, we are similarly asking whether Congress violates the Constitution by taking an owner’s private property rights and denying him or her access to an Article III court with trial by jury to obtain just compensation.

DATED: Honolulu, Hawaii, July 20, 2017.

Respectfully submitted,

/s/ Robert H. Thomas

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### **CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32 and 29(d), amici curiae state that this brief complies with the type and volume limitations because it contains **527** words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

DATED: Honolulu, Hawaii, July 20, 2017.

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### **CERTIFICATE OF SERVICE**

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

DATED: Honolulu, Hawaii, July 21, 2017.

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