16-1466

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Kevin Brott et al.,

Plaintiffs-Appellants,

v.

The United States of America,

Defendant-Appellee.

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

AMICI CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER; CATO INSTITUTE; AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF REHEARING EN BANC

Submitted by
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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: C. Thomas Ludden

Pursuant to 6th Cir. R. 26.1, Southeastern Legal Foundation
Name of Party
makes the following disclosure:

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

s/ C. Thomas Ludden

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Other Authorities

INTEREST OF *AMICI CURIAE*

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts on public issues affecting them. NFIB is the nation's leading small business association, representing members in Washington and all 50 state capitals. While no standard definition of a "small business" exists, a typical NFIB member has 10 employees and annual gross sales of about $500,000. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that impact small businesses.

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies and the annual *Cato Supreme Court Review*.

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

STATEMENT OF AMICI

Pursuant to F. 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 the Amici and its counsel, made a monetary contribution specifically for the preparation of this brief.

SUMMARY OF ARGUMENT

The Supreme Court has made clear that the Seventh Amendment protects the right of citizens to have a jury trial in any case where a court is called upon to determine one's "legal rights" because such cases would have been heard in a court of law (as opposed to in equity or admiralty) in 1791. Under this test, the Supreme Court holds that a landowner is entitled to a jury trial in an action seeking to force the government to pay just compensation for a taking. *City of Monterrey v. Del Monte Dunes*, 526 U.S. 687 (1999). But shockingly, the panel held the Seventh Amendment has no force against the United States.

The panel simply refused to engage in any analysis as to the original public meaning of the Seventh Amendment and completely ignored the historic reality that the Seventh Amendment was viewed as an essential bulwark against despotic acts of government at the time of ratification. Instead the panel applied an expansive, judicially crafted, doctrine of sovereign immunity to abrogate Seventh Amendment rights. This weighty decision deserves *en banc* review.

ARGUMENT

I. PROPERTY OWNERS ARE ENTITLED TO A JURY TRIAL WHEN SEEKING COMPENSATION FOR A TAKING.

The Seventh Amendment right to a jury trial attaches in any suit raising claims analogous to actions that would have been heard in a court of law in 1791. *Pernell v. Southall Realty*, 416 U.S. 363, 374-75 (1974). And the Supreme Court has made

clear that any suit seeking a determination of legal rights should qualify. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (2011). Under that standard, *Del Monte Dunes* held that "a §1983 suit seeking legal relief [for vindication of constitutional rights] is an action at law within the meaning of the Seventh Amendment." 526 U.S. at 709. This is because a takings claim seeks compensation as a legal remedy. *Id*. (citing *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974) (concluding that the Seventh Amendment's guarantee extends to any claim "sound[ing] basically in tort."). That rationale applies equally in the present case.

Plaintiffs-Appellants seek a legal remedy (*i.e.*, money damages) for the government's violation of their Fifth Amendment rights. As in *Del Monte Dunes*, their claim sounds basically in tort. *See Del Monte Dunes*, 526 U.S. at 714-17 (summarizing historical practices and observing that "[e]arly opinions . . . contemporaneous with the adoption of the Bill of Rights, suggested that when the government took property but failed to provide a means for obtaining just compensation, an action to recover damages for the government's actions would sound in tort."). Thus, the panel should have concluded—consistent with *Del Monte Dunes*—that an inverse condemnation suit against the United States constitutes an action at law for which Seventh Amendment rights attach. *Id*. at 723, 727 (Scalia, J., concurring).

II. THE DOCTRINE OF SOVEREIGN IMMUNITY CANNOT PRECLUDE CITIZENS FROM INVOKING SEVENTH AMENDMENT RIGHTS

The panel held that the doctrine of sovereign immunity exempts federal defendants from the general rule that the Seventh Amendment applies in all actions at law.[1] But the Supreme Court rejected the City of Monterey's claim of sovereign immunity in *Del Monte Dunes*, 526 U.S. at 714. And the full Court should likewise reject the United States' claim of sovereign immunity because the very structure of the Constitution and the Bill of Rights implies that there can be no sovereign immunity against invocation of express constitutional rights. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-31 (1816) (ruling that the lower federal courts *must* be authorized to hear cases concerning federal rights).

A. The Panel's Decision is Predicated on Dicta

The Supreme Court has never upheld the denial of Seventh Amendment rights in a takings case. *See* Roger W. Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 Tex. L. Rev. 549, 557 (1980) (explaining that the closest decision on point is "two steps removed"). Nonetheless, the panel assumed that there is no right to a jury in takings cases, in drawing from dicta in *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). But *Lehman* is off point

[1] The necessary implication of the panel's conclusion is that the United States may ignore express constitutional commands and prohibitions. But that improperly assumes that the United States may act outside—or above—the law.

because it concerned a litigant's right to a jury trial in a suit brought *under a federal statute*, as opposed to a suit seeking to vindicate a *constitutional right*. *Id*. at 168-69. For that matter, none of the cases cited in *Lehman* concerned a constitutionally based claim. They were all suits based upon statutory causes of action created by Congress.

Perhaps in that context, it might make sense to conclude that Congress can deny the opportunity for a jury trial when Congress creates a new cause of action that did not exist under the common law. But such logic simply does not apply to a suit alleging a violation of protected constitutional rights because the cause of action inures in the Constitution itself—not in any statute enacted by Congress. *See United States v. Clarke*, 445 U.S. 253, 257 (1980) (explaining that a landowner is entitled to bring an inverse condemnation claim because of the "self-executing character of the [Fifth Amendment.]"); *cf. Malone v. Bowdoin*, 369 U.S. 643, 648 (1962) (suggesting that sovereign immunity would not stand in the way of a suit where there is a claim of an unconstitutional taking).

B. Government Cannot Condition the Right to Sue on Waiver of Constitutional Rights

The panel's unbounded conception of sovereign immunity cannot be squared with Supreme Court precedent. The panel opinion alarmingly holds that the due process right to judicial review is but a mere privilege, subject to manipulation (or abrogation) as Congress may see fit. But that view of sovereign immunity conflicts irreconcilably with the Supreme Court's repeated assurance that the right to

prosecute a takings claim does not hinge upon an act of legislative grace. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893); *Clarke*, 445 U.S. at 257.[2]

Moreover, the panel's assumption that Congress may condition the conferral of judicial review on a requirement to waive one's Seventh Amendment rights squarely conflicts with the Supreme Court's unconstitutional conditions doctrine. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989). Indeed, the Supreme Court has consistently held that government cannot enforce legislation requiring a waiver of constitutional rights as a condition of obtaining a government conferred benefit. *Frost Trucking v. R.R. Comm'n of California*, 271 U.S. 583, 590, 593-94 (1926) ("It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."). And the Court has applied the unconstitutional conditions doctrine explicitly to protect landowners from being compelled to waive their right to seek just compensation. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *Koontz v. St. Johns Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013). By implication, the government cannot condition the right to vindicate Fifth Amendment rights on waiver of one's Seventh Amendment rights.

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[2] *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (affirming the English rule that "where there is a legal right, there is also a legal remedy"); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) (same).

C. The Government's Theory of Sovereign Immunity Contravenes History

The panel's decision rests on the assumption that the Crown was historically immune from suit. But this is wrong. In fact, "[a] person who claimed the Crown had seized property wrongly or mistakenly could petition the King for return of the property." Kirst, 58 Tex. L. Rev. at 564. For that matter, English law developed "a variety of devices for getting relief against government" during the Middle Ages. Louis L. Jaffe, *Suits Against Governments and Officers*, 77 Harv. L. Rev. 1, 3 (1963). English subjects could protect their property rights by pursuing procedures for a petition of right, originally known as *monstrans de droit*, or traverse of office.[3] Kirst, 58 Tex. L. Rev. at 563-64.

Accordingly, legal historians now suggest that the doctrine of sovereign

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[3] "We can conclude on the basis of this history that the King, or the Government, or the State, as you will, has been suable throughout the whole range of law, sometimes with its consent, sometimes without." Jaffe, 77 Harv. L. Rev. at 3. For example, Parliament enacted statutes enabling subjects "who lost property to the King" to proceed in actions against the King in the common law side of chancery, without seeking consent. Kirst, 58 Tex. L. Rev. at 565-66; Jaffe, 77 Harv. L. Rev. at 6. Yet even where the King's consent was technically required, this formality was predicated upon the view that the King was "the fountain of justice and equity," which meant that the King "could not refuse to redress wrongs when petitioned to do so by his subjects." *Id*. at 3-4; *see also United States v. O'Keefe*, 78 U.S. (11 Wall.) 178, 183-84 (1870) (noting "it [was] the duty of the King to grant [a petition of right], and the right of the subject to demand it."); *see also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 912-13, n. 43 (1997).

immunity was created out of whole cloth in the nineteenth century and "did not exist in 1791." *Id*. at 551. As such, the full court should question whether the panel erred in extending sovereign immunity so broadly as to abrogate protections explicitly enshrined in the Bill of Rights. Plainly, "governmental immunity [must] ha[ve] its limits, limits rooted in the Constitution." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U.L. Rev. 144, 199 (1996) (emphasizing that "the writ of *habeas corpus* provides proof enough" that sovereign immunity cannot be extended to absolve the United States from all legal actions).

The notion that a doctrine of sovereign immunity should allow Congress to negate the Seventh Amendment also requires a complete disregard for colonial history. *Id*. at 146. There can be no doubt that the Seventh Amendment was intended to apply as a check on arbitrary and unlawful government conduct. "Just as the militia could check a paid professional standing army, so too the jury could thwart overreaching by powerful and ambitious government officials." Akhil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991).

The historical record demonstrates unequivocally that the revolutionary generation viewed the right to trial by jury as a bulwark against despotism, and essential for the protection of private property rights. Grant, 91 Nw. U. L. Rev. at 150-53. For example, "[t]he civil jury, in both England and America, had proved

useful in awarding damages in trespass suits against executive officials." Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 Wm. & Mary Bill Rts. J. 811, 826 (2014). For this reason, the colonists were infuriated by Parliament's repeated enactment of statutes extending jurisdiction of the admiralty courts, so as to deny their common law jury rights. *See* Grant, 91 Nw. U. L. Rev. at 150-54.

First with the Sugar Act, then with Stamp Act, and again with the Townshend Duties Act of 1765, Parliament "continued the hated pattern of depriving Americans of their right to jury trials in forfeiture proceedings." *Id*. at 153. And all the while the colonists protested: "[These Acts] deprive[] us of the most essential Rights of Britons, and greatly weakens the best Security of our Lives, Liberties and Estates; which may hereafter be at the Disposal of Judges who may be Strangers to us, and perhaps malicious, mercenary, corrupt, and oppressive." 1 John Reid, *Constitutional History of the American Revolution: The Authority of Rights*, 52 (1986). Thus, given these experiences with centralized government, the anti-Federalists were rightly concerned that "Congress could not be trusted to preserve jury trial by statute alone." Kirst, 58 Tex. L. Rev. at 573; Grant, 91 Nw. U. L. Rev. at 150. Accordingly, it makes no sense to assume that the United State may simply assert sovereign immunity to abrogate the Seventh Amendment. *Cf*. Phillip Hamburger, *Is Administrative Law Unlawful?* 152-55 (2015) (illustrating the supreme value that the Revolutionary

generation placed on maintaining the right to a full jury trial at common law for the protection of property rights).

CONCLUSION

For the foregoing reasons, the full court should review and reverse the panel decision.

Respectfully submitted,

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Dated: July 21, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40(b)(1) because this brief contains 2286 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Word 2016 in 14 point Times New Roman type style.

Respectfully submitted,

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