No. 17-795

IN THE

Supreme Court of the United States

MICHAEL SAMMONS,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, AND PROFESSORS SHELLEY ROSS SAXER AND JAMES W. ELY, JR., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ROBERT H. THOMAS
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, HI 96813
(808) 531-8031

Counsel for Amicus Curiae Owners' Counsel of America

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
MEGHAN S. LARGENT
LINDSAY S.C. BRINTON
ABRAM J. PAFFORD
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20006
(202) 857-6000
thor@arentfox.com

Counsel for Amicus Curiae

277836

QUESTIONS PRESENTED

1. Whether the Takings Clause of the Fifth Amendment is a self-executing waiver of sovereign immunity, therefore vesting review of federal takings suits in Article III courts.

2. Whether Congress violates Article III of the Constitution by requiring owners to adjudicate Fifth Amendment claims for compensation in a non-Article III tribunal.

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INTEREST OF *AMICI CURIAE*[1]

Owners' Counsel of America (OCA) is a network of the nation's most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. See James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008). OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered and OCA members have authored and edited treatises, books, and law review articles on property law.

Founded in 1976, Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates individual liberties, limited government, and free enterprise. For forty years, SLF has advocated for the protection of private property interests from unconstitutional takings. SLF frequently files *amicus curiae* briefs supporting property owners in state and federal court. See, *e.g.*, *Murr* v. *Wisconsin*, 137 S.Ct. 1933 (2017); *Army Corps of Eng'rs* v. *Hawkes*, 136 S.Ct. 1807 (2016); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *S.C. Council*, 505 U.S. 1003 (1992); and *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153 (1978).

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1. All parties' counsel were told of *amici's* intent to file this brief more than ten days ago, and all parties have consented to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. This brief has been paid for entirely by *Amici Curiae* or their counsel.

The National Association of Reversionary Property Owners is a Washington State non-profit foundation assisting property owners in the defense of their property rights. Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners' interest in land subject to railroad right-of-way easements. See *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (DC Cir. 1998), and *amicus curiae* in *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990), and *Marvin M. Brandt Rev. Trust* v. *United States*, 134 S.Ct. 1257 (2014).

Professor Shelley Ross Saxer is the Laure Sudreau Endowed Chair at Pepperdine University School of Law, where she teaches real property, land use, community property, remedies, environmental law, and water law. She has authored numerous scholarly articles and books on property and takings law. See, *e.g.*, David L. Callies,, Robert H. Freilich and Shelley Ross Saxer, *Land Use* (American Casebook Series) (7th ed. 2017); Grant Nelson, Dale Whitman, Colleen Medill, and Shelley Ross Saxer, *Contemporary Property* (4th ed. 2013); David Callies and Shelley Ross Saxer, *Is Fair Market Value Just Compensation? An Underlying Issue Surfaced in* Kelo (in *Eminent Domain Use and Abuse:* Kelo *in Context*, Dwight Merriam and Mary Massaron Ross, eds., 2016).

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. He is a renowned property rights expert whose career accomplishments were recognized with both the Brigham-Kanner Property Rights Prize and the Owner Counsel of America Crystal Eagle Award in

2006. Professor Ely is the co-author of the leading treatise, *The Law of Easements and Licenses in Land* (revised ed. 2016) and author of *The Guardian of Every Other Right: A Constitutional History of Property Rights* and *Railroads and American Law.* This Court recently relied upon Professor Ely's scholarship in *Brandt* 134 S.Ct. at 1260-1261. Professor Ely edited the second edition of the *Oxford Companion to the Supreme Court*, and the second edition of the *Oxford Guide to Supreme Court Decisions*.

These *amici* submitted *amicus curiae* briefs in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, No. 16-712, and *Brott* v. *United States*, 17-712.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This petition for certiorari concerns essentially the same issues raised in *Oil States* and *Brott*.

In *Oil States* this Court will decide whether an adjudication before an Article I tribunal "violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury." In *Oil States* a non-Article III board invalidated an owner's property interest in a patent.

Similarly, *Brott* asks, "[c]an the federal government take private property and deny the owner the ability to vindicate his constitutional right to be justly compensated in an Article III Court with trial by jury?" In *Brott* Michigan landowners sued the federal government seeking compensation for land the government took for a public recreational trail in violation of the Fifth Amendment's Just Compensation Clause.

As in *Brott*, this petition for certiorari asks this Court to decide whether Congress may take private property and deny the property owner the ability to vindicate his right to just compensation in an Article III court with trial by jury. Sammons alleges a *Winstar* taking of his property interest in federally-regulated financial institutions.[2]

As the Petitioner explains, the lower courts are split on these questions and have applied this Court's decisions in a disparate manner. This Court should grant certiorari to resolve these important questions and reconcile the disparity among the circuits. Alternatively, this Court should grant the petition for certiorari, vacate the Fifth Circuit's underlying decision and remand this matter in light of this Court's decisions in *Oil States* and *Brott*.

ARGUMENT

I. Congress cannot strip Article III courts of jurisdiction over cases vindicating self-executing constitutional rights.

A. Article III is "'an inseparable element of the constitutional system of checks and balance that 'both defines the power and protects the independence of the Judicial Branch.'"[3]

The framers devised this nation's constitutional structure in accordance with one "fundamental insight: concentration of power in the hands of a single branch is

2. See *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

3. *Northern Pipeline* v. *Marathon Pipeline Co.*, 458 U.S. 50, 58 (1982).

a threat to liberty." *Clinton* v. *City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (citing James Madison, *Federalist No. 47*, p. 301). James Madison was unequivocal about the degree of that threat, stating that "an accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.* The framers were all too familiar with how the tyrannical impulses of consolidated power could interfere with individual pursuits of life, liberty, and property.[4]

The Constitution divides and separates the power of the federal government into three coequal branches – legislative, executive, and judicial. Article I vests "[a]ll legislative Powers *** in a Congress of the United States[;]" Article II vests the executive power "in a President of the United States[;]" and Article III vests "[t]he judicial Power of the United States *** in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., art. I, §1; art. II, §1; art. III, §1.

This structure "diffuses power the better to secure liberty." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). But the framers understood that mere "parchment barriers" between the branches could not alone ensure such security. James Madison, *Federalist No. 48*, p. 308. Accordingly,

4. See *Plaut* v. *Spendthrift Farm, Inc.,* 514 U.S. 211, 219 (1995) (noting "the Framers of the Constitution 'lived among the ruins of a system of intermingled legislative and judicial powers'") (quoted in *Wellness Inter. Network, Ltd.* v. *Sharif*, 135 S.Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting)).

the Constitution "give[s] to each [branch] a constitutional control over the others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." *Id.* The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other ***." James Madison, *Federalist No. 51*, p. 322. The substantive and procedural limitations built into this tripartite system serve as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*).

This Court explained, "[t]ime and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches. *** We have not hesitated to invalidate provisions of law which violate this principle. *Morrison* v. *Olson*, 487 U.S. 654, 693 (1988).[5]

The authority to decide cases is the "constitutional birthright" of Article III courts which Congress cannot deny.[6] "Article III establishes an independent Judiciary, a Third Branch of Government with the 'province and duty *** to say what the law is' in particular cases and

5. Citing *Bowsher* v. *Synar*, 478 U.S. 714, 725 (1986) (citing *Humphrey's Executor*, 295 U.S. 602, 629-30 (1935)), and quoting *Buckley*, 424 U.S. at 122-23).

6. "[T]he authority to decide cases, which is our Constitutional birthright, we said in *Stern* that Congress can't take that away from us." *Executive Benefits Ins. Agency* v. *Arkison*, 134 S.Ct. 2165 (2014), Oral Argument Tr., p. 51 (statement of Chief Justice Roberts).

controversies." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The Founders understood "[a] Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will*, 449 U.S. 200, 217-18 (1980). "As its text and our precedent confirm, Article III is 'an inseparable element of the constitutional system of checks and balances' that 'both defines the power and protects the independence of the Judicial Branch.'" *Northern Pipeline*, 458 U.S. at 58.

Under "the basic concept of separation of powers, the judicial power can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Bank Markazi* v. *Peterson*, 136 S.Ct. 1310, 1330 (2016) (Roberts, C.J., dissenting) (quoting *Stern* v. *Marshall*, 564 U.S. 462, 483 (2011)).

In *Executive Benefits*, 134 S.Ct. at 2172, this Court explained:

> [In *Stern* this Court found] Congress had improperly vested the Bankruptcy Court with the "judicial Power of the United States," just as in *Northern Pipeline*. Because "[n]o public right exception excuse[d] the failure to comply with Article III," we concluded that Congress could not confer on the Bankruptcy Court the authority to finally decide the claim.[7]

7. Quoting *Northern Pipeline*, 458 U.S. at 85-86. A "public rights exception" is inapplicable here. See discussion, *infra*, pp. 16-18.

Chief Justice Roberts recently recalled "Hamilton warned that the Judiciary must take 'all possible care to defend itself against [the] attacks' of the other branches." *Bank Markazi*, 136 S.Ct. at 1335 (Roberts, C.J., dissenting) (quoting *Federalist No. 78*). The "bedrock rule of Article III [is] that the judicial power is vested in the Judicial Branch alone. We first enforced that rule against an Act of Congress during the Reconstruction era in *United States* v. *Klein*." *Id.* at 1333 (citing *Klein*, 13 U.S. 128, 140-41 (1872)). Chief Justice Roberts explained, "Article III vested the judicial power in the Judiciary alone to protect against that threat to liberty. It defined not only what the Judiciary can do, but also what Congress cannot." *Bank Markazi*, 136 S.Ct. at 1333.[8]

The framers designed the federal judiciary to stand independent of the executive and legislative branches. See *Northern Pipeline*, 458 U.S. at 58. The purpose of such independence is not only to maintain checks and balances among the three branches, but also to ensure the impartiality of the adjudicative process itself. *Id.* This helps prevent injuries to the private rights of citizens from "unjust and partial laws." Alexander Hamilton, *Federalist No. 78*, p. 470.

The judiciary is charged with interpreting the law and applying it to resolve specific cases and controversies. This requires "neutral decision makers" insulated from political pressures "who will apply the law as it is, not as they wish it to be." See *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

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8. Citing *Plaut*, 514 U.S. at 218, and quoting *INS* v. *Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring).

The Good Behavior Clause grants Article III judges life tenure, subject only to impeachment. See *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 16 (1955). The Compensation Clause guarantees that Article III judges receive a fixed and irreducible salary for their services. See *Will*, 449 U.S. at 218-221. Both provisions were incorporated into the Constitution to ensure judicial independence and impartiality.

The judicial power belongs to the judiciary. "Preserving the separation of powers is one of this Court's most weighty responsibilities." *Wellness Int'l Network Ltd.* v. *Sharif*, 135 S.Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting). The framers anticipated conflicts and encroachments between the different spheres of power would periodically arise. But the framers believed (and intended) the Constitution to give each branch the "means and personal motives" to defend against such invasions. James Madison, *Federalist No. 51*, p. 356. To effectively resist encroachment, each branch must "exercise substantially all of its appropriate powers." Malcom P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U.Chi.L.Rev. 385, 409 (1935).

Article III protects the role of the judiciary by barring congressional attempts "to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating" constitutional courts. *National Mut. Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting).

Nevertheless, over the last century, Congress has delegated more and more judicial authority to non-Article III tribunals – drawing ever more power into

its "impetuous vortex." James Madison, *Federalist No. 48*, p. 309. But another branch's "willing embrace" of a separation of powers violation does not weaken the Court's scrutiny. *Wellness* 135 S.Ct. at 1955 (Roberts, C.J., dissenting). This Court has noted that "enthusiasm" by another branch for a separation of powers violation has "'sharpened rather than blunted' our review." *Id.* (citing *NLRB* v. *Noel Canning*, 134 S.Ct. at 2593 (Scalia, J., concurring) (quoting *Chadha*, 462 U.S. at 944)).

This Court has long recognized that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855).[9] When such suits are brought within the bounds of federal jurisdiction, the responsibility for deciding them belongs *only* to Article III judges presiding in Article III courts. See *Stern*, 564 U.S. at 484.

This Court explained, "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers *protect the individual as well*." *Stern*, 564 U.S. at 483 (quoting *Bond* v. *United States*, 564 U.S. 211, 222 (2011)) (emphasis added).

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9. Justice Ginsburg alluded to this point in a recent question during argument in *Patachak* v. *Zinke*, No. 16-498, Oral Argument Tr., p. 10 ("suppose Congress enacts a statute that says a federal court shall not have jurisdiction over cases involving prayer in school. It's constitutional?").

Justice Scalia observed, "The purpose of the separation and equilibration of powers in general *** was not merely to assure effective government but *to preserve individual freedom*." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting) (emphasis added). In *Bond*, this Court explained, "In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances." 564 U.S. at 222-23.

In *Stern*, Chief Justice Roberts explained:

> Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges. The colonists had been subjected to judicial abuses at the hand of the Crown, and the Framers knew the main reasons why: because the King of Great Britain "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." The Declaration of Independence para. 11.
>
> The Framers undertook in Article III to protect citizens subject to the judicial power of the new Federal Government from a repeat of those abuses. By appointing judges to serve without term limits, and restricting the ability of the other branches to remove judges or diminish their salaries, the Framers sought to ensure that each judicial decision would be rendered, not with an eye toward currying favor with

> Congress or the Executive, but rather with the "[c]lear heads *** and honest hearts" deemed "essential to good judges."
>
> 564 U.S. at 483-84.[10]

Chief Justice Robert's opinion notes that the object of Article III and the purpose of the separation of powers is to protect individual liberty *as against the government.* An independent judicial branch unbeholden to the executive or legislative branches protects individual liberty in disputes between private individuals. See, for example, *Northern Pipeline*, *Stern*, and *Schor* which were all disputes between private parties. The object of Article III is at its apogee when the adjudication involves an individual's claim against the federal government involving the vindication of a self-executing constitutional right.

In *Wellness*, 135 S.Ct. at 1962, Justice Thomas identifies two reasons why vesting exclusive authority to adjudicate Fifth Amendment takings claims in a non-Article III tribunal is unconstitutional. First, the non-Article III tribunal is purporting to exercise judicial power the Constitution vests exclusively in the Article III judicial branch with judges protected by the tenure and salary requirements of Article III. Second, by

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10. Quoting the Declaration of Independence, para. 11, and 1 *Works of James Wilson* 363 (J. Andrews, ed., 1896). See also *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986) ("Article III, §1, serves both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, and to safeguard litigants right to have claims decided before judges who are free from potential domination by other branches of government.") (internal citation and quotation omitted).

vesting authority to adjudicate Article III "claims and controversies" in a non-Article III tribunal, Congress has exceeded its authority by purporting to authorize the non-Article III tribunal to perform a function that requires the exercise of power the Constitution vests exclusively in the judicial branch.[11]

B. Fifth Amendment taking claims can only be decided by Article III courts.

The Court of Federal Claims (as presently constituted) is not an Article III court. See Petition for Certiorari, pp. 18-19; 28 U.S.C. 171(a).

Members of the CFC, like bankruptcy judges in *Northern Pipeline* and *Stern*, "do not enjoy the protections constitutionally afforded to Article III judges." *Northern Pipeline*, 458 U.S. at 60. Indeed, members of the CFC have

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11. See 28 U.S.C. 1346, 1491. There is an alternate view that avoids having to reach this constitutional issue. To wit: the Tucker Act does not vest *exclusive* jurisdiction in the CFC but is, rather, *concurrent* with the district court's jurisdiction granted under 28 U.S.C. 1331. The Tucker Act's grant of jurisdiction to the CFC does not displace the district court's separate §1331 federal question jurisdiction. The Tucker Act does not invalidate the separate grant of federal question jurisdiction found in §1331. And no statute says the CFC's jurisdiction of claims greater than $10,000 is "exclusive." In *Bowen* v. *Massachusetts*, 487 U.S. 879, 910, n.48 (1988), this Court observed: "It is often assumed that the Claims Court has exclusive jurisdiction of Tucker Act claims for more than $10,000. *** That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction 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 Claims Court."

far less salary and tenure protections and less oversight by Article III judges than do bankruptcy judges.

Delegating the exclusive authority to adjudicate an owner's constitutional right to just compensation to the CFC violates the separation of powers and is contrary to this Court's holdings in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), *Northern Pipeline*, *Schor*, *Chadha*, and *Stern*, among others.

Chief Justice Marshall explained:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. *** This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> *Marbury*, 5 U.S. at 177-78.

Monongahela illustrates this point. In *Monongahela*, the United States argued Congress, not the Judiciary, determines the amount of compensation the United States owed the Monongahela Navigation Company for property the government took. This Court emphatically rejected the government's argument and rejected the notion that Congress could usurp from the Judicial Branch the role of adjudicating the compensation an owner is due when the government takes an owner's property.

In *Monongahela*, 148 U.S. at 327, this Court held, "by this legislation congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. *** The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry." So too when Congress assigned the determination of compensation to an Article I tribunal.

C. An individual's ownership of his private property is a "private right," not a "public right."

An owner's constitutionally-guaranteed right to be justly compensated when the government takes his property is a "private-right," not a "public-right."

In *Wellness*, 135 S.Ct. at 1951, Chief Justice Roberts noted, "[w]ith narrow exceptions, Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III. Those narrow exceptions permit Congress to establish non-Article III courts to *** adjudicate disputes over 'public rights' such as veterans' benefits."

This limited class of "narrow exceptions" Chief Justice Roberts referenced arise from the dichotomy between "public rights" and "private rights" going back to *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). Justice Thomas explained, "[t]he distinction generally has to do with the types of rights at issue. Disposition of *private rights to life, liberty, and property* falls within the core of the judicial power, whereas disposition of public rights does not." *Wellness*,

135 S.Ct. at 1963 (emphasis added).[12] 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."); *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)); 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) ("After *First English [Evangelical Lutheran Church* v. *Los Angeles*, 482 U.S. 304 (1987)], 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.").

This Court has *never* held an individual's private property is a "public right," nor has this Court ever held the Fifth Amendment guarantee of just compensation when the government takes an owner's private property

12. Since before the Magna Carta an owner's interest in real property was understood to be a private right protected from unlawful encroachment by the King. "Personal liberty and private rights to property were normally beyond the reach of the King and could be taken from the individual only as provided by the law of the land. This principle was deeply rooted in English common law [and] had been confirmed by Magna Carta." Forest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (1985).

is a matter of legislative grace. To the contrary, in *Monongahela*, and other cases, this Court has held the exact opposite.

In *Monongahela* this Court held Congress could not usurp the Judicial Branch's authority to determine the amount of compensation due an owner because this is:

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

This Court has repeatedly declared that an individual's ownership of land is a property interest defined by state-law and protected by the Fifth Amendment See *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 20 (1990) (property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law") (O'Connor, J., concurring) (citing and quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155, 161 (1980), and *Ruckelshaus* v. *Monsanto Co.,* 467 U.S. 986, 1001 (1984)).

See also *Leo Sheep Co. v. United States,* 440 U.S. 668, 687-88 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.") and *United States* v. *Lee*, 106 U.S. 196 (1882).

II. Self-executing constitutional rights do not depend upon an act of legislative beneficence requiring Congress to waive sovereign immunity.

The Just Compensation Clause is self-executing. "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 *First English*, 482 U.S. at 315-16, in which a majority of this Court embraced Justice Brennan's view and held a landowner is entitled to bring an inverse condemnation action 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), holding claims for just compensation are grounded in the Constitution itself.

Being self-executing and grounded in the very text of the Constitution, the Fifth Amendment's Just Compensation Clause does not depend upon some subsequent legislative act of grace. The notion that an owner can only seek vindication of his constitutionally-

guaranteed right if Congress deigns to recognize this constitutional principle is anathema to the most fundamental premise of a constitutional republic – that the Constitution is the supreme rule of law.

The Fifth Circuit below, like the Sixth Circuit in *Brott*, wrongly believed the self-executing constitutional right to just compensation depends upon Congress waiving sovereign immunity. These lower court panels erred by conflating constitutionally-guaranteed "private rights" with congressionally-created entitlements and other "public rights" like veteran benefits. The lower court's failure to distinguish between congressionally-established entitlements (public rights) and the self-executing constitutionally-guaranteed right to be justly compensated when the government takes an owner's private property (a private right) is the fatal flaw in these lower courts' opinions.

The lower courts' premise – that one's ownership of private property is a "public right" for which Congress must pass legislation waiving the government's sovereign immunity in order for an owner to vindicate his right to just compensation guaranteed by the Fifth Amendment – is incompatible with the fundamental nature of our Constitution. Chief Justice Marshall explained in *Marbury*:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. *** It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the

> legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
>
> 5 U.S. at 176-77.

Simply put, the constitutional guarantee of just compensation does not depend upon Congress adopting legislation to allow owners to vindicate this right, nor can this constitutional guarantee be abrogated by legislation. To the extent the Tucker Act is read as doing so, this Court should invalidate the scheme. Chief Justice Marshall explained:

> It is emphatically the province and duty of the judicial department to say what the law is. *** [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of

> judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
>
> *Marbury*, 5 U.S. at 177-78.

Contending that Congress must waive sovereign immunity for an individual to vindicate his self-executing constitutional right renders the Constitution nothing more than an aspirational statement dependent upon the whim of a majority of legislators who may choose to accept or reject this notion. If this be so, then our Constitution is "nothing but words on paper – what our Framers would call a parchment barrier." See *Scalia Speaks, Reflections on Law, Faith, and Life Well Lived*, (Christopher J. Scalia and Edward Whelan, eds., 2017), p. 217.

III. The Seventh Amendment guarantees an owner the right to trial by jury when the government takes private property in violation of the Fifth Amendment.

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

This Court has repeatedly affirmed the fundamental importance of the right to trial by jury. In *Galloway* v. *United States*, 319 U.S. 372, 398-99 (1943) this Court held, "the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment."

The "right of trial by jury" is guaranteed as it existed under English common law in 1791 when the Seventh Amendment was adopted. See *Custis* v. *Loether*, 415 U.S. 189, 193 (1974) ("[T]he thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791."). The Seventh Amendment guarantees "the right of trial by jury" for all suits involving legal rights – as opposed to proceedings in admiralty or equity. See *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. 433, 446 (1830) ("By [suits at] 'common law,' [the Framers] meant *** suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.").[13]

At common law the type of damages a plaintiff sought as well as the subject of the action determined which court would hear the case. There were three options: law, equity and admiralty. An action seeking to enforce a legal right would be heard by the law courts with a jury, as opposed to equity and admiralty that sat without a jury. See *Parsons*, *supra.* This Court held, "if the action must

13. Emphasis in original.

be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature." *Granfinanciera, S.A.* v. *Norberg*, 492 U.S. 33, 53 (1989).

An owner's action to be justly compensated for land the government has taken is a "suit at common law" in which the owner has the right to trial by jury. This Court explained, "The Seventh Amendment thus applies not only to common-law causes of action but also to statutory causes of action 'analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999) (citations omitted).

Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-American jurisprudence. This Court held, "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. *Jacob* v. *City of New York*, 315 U.S. 752, 752-53 (1942). See also *United States* v. *Booker*, 543 U.S. 220, 239 (2005) ("[T]he right to a jury trial had been enshrined since the Magna Carta.")

CONCLUSION

As Sammons' petition demonstrates, the lower Courts have not faithfully applied this Court's holdings. There is a split in the circuits and there is confusion about this Court's "public right" versus "private right" doctrine as that distinction limits Congress' ability to delegate judicial authority to non-Article III courts.

This Court should grant certiorari and resolve these issues or, at least, vacate the lower court decisions in this case and *Brott* and remand in light of this Court's decision in *Oil States*.

Respectfully submitted,

ROBERT H. THOMAS
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, HI 96813
(808) 531-8031

Counsel for Amicus Curiae Owners' Counsel of America

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
MEGHAN S. LARGENT
LINDSAY S.C. BRINTON
ABRAM J. PAFFORD
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20006
(202) 857-6000
thor@arentfox.com

Counsel for Amicus Curiae