No. 22-98

IN THE

Supreme Court of the United States

JOSEPH CACCIAPALLE,

Petitioner,

v.

UNITED STATES *et al.*,

Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Government ignores the central proposition of the Cacciapalle Petition, which is stated plainly in its first sentence: "a person that directly owns a specified property right is entitled to bring a claim under the Takings Clause that such specified property right has been taken by the government." Cacciapalle Pet. at 1. Rather than address this argument, the Government deliberately sidesteps the issue by blurring it with arguments that the Petition does not advance. It therefore presents no argument for why the Cacciapalle Petition should be denied.

The Court should examine the actual argument advanced in the Cacciapalle Petition, and grant review to address the untenable principle underlying the Federal Circuit's decision, *i.e.*, that shareholders are not permitted to bring their own "direct" Takings claim for the Taking of the property rights owned by those shareholders (and by them alone).

The Government also fails to say anything at all in response to Question Two of the Cacciapalle Petition, and thus has waived any right to oppose certiorari on that question.

1. The Government Ignores The Central Argument In The Cacciapalle Petition.

On page 20 of its opposition brief, the Government states that Petitioners "do not challenge the legal test that the court of appeals applied in determining that their claims are derivative rather than direct," but "instead challenge the court's application of that test to the facts of this case." Opp. at 20.

That assertion is false. In support, the Government cites only to page 17 of the Owl Creek petition, where those petitioners say that the federal case law on which they rely "aligns with and is reinforced by the *Tooley* test under Delaware law." Owl Creek Pet. at 17. The Owl Creek petitioners will address the Government's characterization of and response to their arguments. But there can be no doubt that the Government has grossly mischaracterized the Cacciapalle Petition, which is not cited anywhere in support of the Government's assertion from page 20 if its opposition.

Through its misdirection, the Government elides the distinct and very simple argument made in the Cacciapalle Petition—*i.e.*, that the Federal Circuit has in two different cases articulated and applied a ***completely wrong and confused legal standard*** for determining whether a corporate shareholder may bring a claim under the Takings Clause. According to the Federal Circuit, such a claim may be brought only if the shareholder can show that it satisfies the state law standard for bringing direct state law claims, such as fiduciary breach claims. That is wrong.

Instead, the correct legal test for determining whether a shareholder may bring a direct Takings claim is much simpler than that. The test is whether the shareholder identified a property right that the shareholder owned, and whether the shareholder has alleged that such property right was taken by the government. If the shareholder has properly alleged those two things, then the shareholder has a right to bring a Takings claim – period. The body of state law addressing when state law claims are direct versus derivative does not govern that question.

The Government has no answer to this argument. In a two-page chart set forth on pages 21-22 of the Cacciapalle Petition, the Cacciapalle Class describes in precise detail the property rights owned by the private preferred shareholders before the Net Worth Sweep, and demonstrates how those property rights were appropriated by the Government through the Net Worth Sweep. Cacciapalle Pet. at 21-22. The Government never addresses this chart or the allegations it summarizes.

Further, whatever arguments the Government might advance about the merits of the Takings claim, such arguments do not address the Federal Circuit's error in foreclosing the ability of shareholders even to bring their claim. That decision is misguided and warrants review. Only the shareholders own the property rights identified; only the shareholders can bring a claim that those rights have been Taken without payment of Just Compensation as required by the Fifth Amendment; and only the shareholders can recover any Just Compensation owed for that Taking.

2. The Government Fails To Show That State Law Regarding When A Claim Is Direct Or Derivative Overrides The Federal Right Of A Property Owner To Bring A Federal Takings Claim For The Taking Of The Property That Person Owned.

The Government argues that the Federal Circuit correctly looked to Delaware state law to determine if plaintiff shareholders had a right to bring a Takings claim for the Taking of property rights they (and they alone) owned. That is wrong.

The Government does not cite a single case holding that the ability of a private citizen to assert federal constitutional rights belonging only to that citizen can somehow be overridden by state law. They cannot. Only the private shareholders owned the rights identified in the Cacciapalle Petition. They allege those rights have been taken by the Government. They have a right to bring their own claim asserting their own constitutional rights protecting their own property. No case holds otherwise – other than the Federal Circuit's flawed decision in this case and in the similar predecessor case of *Starr Int'l Co. v. United States*, 856 F.3d 953 (2017), which the Government fails to cite and never defends.

Instead of addressing the actual argument made by the Cacciapalle Petitioners, the Government offers only misdirection. First, it quotes this Court as saying "the proper party to bring a suit on behalf of a corporation is the corporation itself." Opp. at 12 (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 542 (1984)). But the Cacciapalle Petitioners do not seek to bring a suit "on behalf of a corporation" – they seek to bring a suit based on the property rights they (and they alone) owned, and that were taken by the Net Worth Sweep.

Next, the Government invokes the case law addressing when federal common law should borrow from state law, and when it should be distinct. Opp. at 12-13 (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991) and 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4515). But that body of law is irrelevant: none of it casts any doubt on the right of private citizens to bring claims asserting rights that they alone possess under the Federal Constitution. None of it holds that whether

a person may assert his or her own federal constitutional rights somehow depends on state law.

The Government then offers the conclusory assertion that "any taking the Third Amendment [*i.e.*, the Net Worth Sweep] might have effected was a taking of the enterprises' quarterly net worth, not a taking of the shareholders' property." Opp. at 14. That is an assertion about the ***merits*** of the shareholders' Takings claim, not about the right of the shareholders to bring that claim. The Government may think that shareholders do not have a cognizable property right to future dividends; or it may think the Net Worth Sweep did not take those property rights. But those are merits arguments that were never addressed by the courts below. They are not arguments that support the ruling that shareholders have no right to even bring a claim alleging that (1) they owned property protected by the Takings Clause, and (2) the Net Worth Sweep took that property without payment of Just Compensation. The plaintiff shareholders have a right to bring that claim and have it decided on the merits, not on the erroneous ruling that they have no right to bring a "direct" claim to assert their own constitutional rights over their own property.

Further, the analysis of what the Government has taken depends on the substance of what occurred, not the form. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010).

Likewise, the Government makes the false and conclusory assertion that any recovery "would go to the enterprises, not to the shareholders as individuals." Opp. at 13. That again is a merits argument that ignores the

basic flaw of the Federal Circuit decision which misapplies state law to prevent consideration of the merits of the shareholders' Takings claim. The argument also is wrong. The Cacciapalle Petitioners seek Just Compensation for the loss of the property rights they owned – *i.e.*, the loss of their contingent rights to future dividends. They do not seek to recover the value of what was extracted from the Enterprises. The value of the Just Compensation owed to shareholders would necessarily be less than the amount of money taken from the Enterprises, and would be measured by a completely distinct analysis, *i.e.*, by measuring the value of the rights to potential future dividends owned by shareholders as of the time of the Taking (*i.e.*, as of the time the Net Worth Sweep was put in place).

Further, the Government ignores that the 2019 and 2021 amendments to the Net Worth Sweep demonstrate how shareholders are injured without there being any injury to the Enterprises. Under those amendments, the Enterprises are permitted to build up net worth, but 100% of every incremental increase in their net worth also increases the "liquidation preference" in Treasury's Senior Preferred Stock by the same amount. Cacciapalle Pet. at 10-11, 30-31 (citing JA sources). Thus, for the past three years, the Net Worth Sweep has only been harming shareholders, not the Enterprises. That illustrates how the harm the Net Worth Sweep caused to shareholders has, since inception, been separate and distinct from any harm to the Enterprises (which has now ceased). The Government has no answer to this, and therefore ignores it.

3. The Government's Discussion Of *Franchise Tax Board* And The Prudential "Shareholder Standing Doctrine" Is Misleading and Incomplete.

As shown above and in the Cacciapalle Petition, the prudential "shareholder standing doctrine" does not apply to this case because the Cacciapalle Class does not seek to assert the rights of the Enterprises. Instead, it asserts claims that only the shareholders have, i.e., the Federal Constitutional claim that the Government has taken the property rights owned by the shareholders, and the shareholders alone. That makes irrelevant the prudential standing principle that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Nevertheless, as further shown in the Cacciapalle Petition, even if that prudential doctrine were applied to the claims brought by the Cacciapalle Class, it would confirm that the Class has the right to bring those claims. Cacciapalle Pet. at 28-32. As this Court explained in *Franchise Tax Board of California v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990), the shareholder standing doctrine has "an exception….allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." That exception is easily satisfied by the Cacciapalle Class because they have "a direct, personal interest in a cause of action" – namely the cause of action that seeks to vindicate the Takings Clause's protections of the property rights that the shareholders (and they alone) owned, and that were Taken by the Net Worth Sweep.

The Cacciapalle Petition also showed that the Federal Circuit's decision in this case improperly relied on a state court case to overrule this Court's articulation of the exception in the shareholder standing doctrine. Cacciapalle Pet. at 31. That alone is grounds for granting the Petition.

The Government ignores all of the foregoing. Instead, it incorrectly asserts that this Court's discussion of the exception to the shareholder standing doctrine applies only if the plaintiffs "'have suffered * * * injuries independent of their status as shareholders.'" Opposition at 18 (quoting *Franchise Tax Board*, 493 U.S. at 336-337). But that quoted language was ***not*** what this Court held; instead, it was a summary of what the private shareholders argued in *Franchise Tax Board*. Moreover, as we showed in the Cacciapalle Petition, the Cacciapalle Class has suffered "injuries independent of their status as shareholders." That was the central argument set forth in the Cacciapalle Petition, which the Government goes to great pains to ignore. *See, e.g.*, Cacciapalle Pet. at 21-22. As illustrated by the 2019 and 2021 amendments to the Net Worth Sweep, the Net Worth Sweep injures shareholders even when it does not injure the Enterprises.

4. The Government Ignores The Federal Circuit's Unique Role In Adjudicating Federal Takings Claims While Proffering Pretextual Jurisdictional Hurdles That Provide No Basis For Denying The Petition.

After showing how the Federal Circuit's decision grossly distorts the protections the Takings Clause should give to shareholders, the Cacciapalle Petition made this

point: "Since the Federal Circuit is the exclusive court of appeals for claims seeking just compensation under the Takings Clause, this Court should grant *certiorari* to ensure that this gross distortion of the law does not stand." Cacciapalle Pet. at 2. The Government never addresses this point, and is unable to deny the unique role played by the Federal Circuit in developing jurisprudence under the Takings Clause. That makes granting the Cacciapalle Petition all the more important.

Instead of addressing the importance of this Court reviewing the Federal Circuit's uniquely important Takings Clause rulings, the Government weakly asserts that the Court would need to resolve "threshold jurisdictional issues" before it could reach the merits. The Court must address threshold jurisdictional issues, including by raising them *sua sponte*. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But that does not provide a basis for refusing to grant *certiorari* in cases that present important constitutional issues. To the contrary, heeding such a suggestion would foreclose review of both without examining either.

The questions the Government identifies only further undermine its suggestion. The Government argues that the Court would first have to address whether the claim that the Net Worth Sweep was a Taking is a claim "against the United States." Opp. at 10. Two courts have already held it is. JA 13a–18a, 534a–536a. And that is not surprising, given that the Net Worth Sweep was implemented through an agreement between two government agencies—the U.S. Department of the Treasury and the FHFA. A Takings claim based on an inter-agency agreement appropriating hundreds of

billions of dollars of private property for taxpayers is a claim "against the United States," and the Government offers no basis for suggesting otherwise. Nor could a passing musing that the Court might reach a different conclusion provide any basis for denying certiorari.

The Government also argues that, before reaching the merits, this Court would need to decide "whether 28 U.S.C. 1500 deprived the CFC of subject-matter jurisdiction" over the Cacciapalle Class claims. Opp. at 11. 28 U.S.C. § 1500 states that the CFC "shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States."

Again, this makes no sense as grounds for denying review. Under the 60-year-old interpretation of § 1500 by the Federal Circuit and its predecessor, this Court has jurisdiction to consider the petition. There could be no basis for declining to review an important question of constitutional law based on the Government's speculation that this Court might choose to reverse that sixty-year old precedent. And if there really were an important jurisdictional issue to address along with the merits, the proper approach would be to address both, rather than duck them both.

Moreover, there is no serious issue to be addressed regarding § 1500. Since 1965, the Federal Circuit and its predecessor have consistently – and correctly – held that § 1500 applies to bar the CFC from having jurisdiction only when there is another case against the United States over the same subject matter that is already "pending" in another court at the time the complaint in the CFC was

filed. *See Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966). The Federal Circuit has repeatedly reiterated that ruling. *E.g.*, *Philbert v. United States*, 779 F. App'x 733, 735-36 (Fed. Cir. 2019); *Resource Invs., Inc. v. United States*, 785 F.3d 660, 664 (Fed. Cir. 2015), *cert. denied*, 579 U.S. 927 (2016); *Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013).

This Court has, on at least two occasions, rejected the Government's effort to overturn this six-decade-old interpretation of § 1500. *See Tecon*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966); *Resource Invs.*, 785 F.3d 660 (Fed. Cir. 2015), *cert. denied*, 579 U.S. 927 (2016); *see also Keene Corp. v. United States*, 508 U.S. 200, 207-08 (1993) (applying "time-of-filing rule" to affirm CFC dismissal and explicitly declining to affirm lower court's overruling of *Tecon*). It would also raise constitutional issues to apply § 1500 to bar plaintiffs from bringing Takings claims they are otherwise entitled to bring. *See Resource Invs.*, 785 F.3d at 670. There is, in sum, no basis for the suggestion that this Court should reject a meritorious petition to avoid revisiting a sixty-year-old interpretation of § 1500 favoring jurisdiction.

CONCLUSION

The Court should grant the Cacciapalle Petition.

Respectfully submitted,

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