No. 17-712

IN THE

Supreme Court of the United States

KEVIN BROTT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Solicitor General says, **"this Court has not fixed the outer limits of the public rights doctrine with precision."** Brief in Opposition (Opp.) 9. The Sixth Circuit likewise recognized, "**the outer boundaries of the [public rights] doctrine are not settled**." *Id.* at 7 (citing App. 18a-19a). These statements echo Justice Thomas' criticism of this Court's public rights jurisprudence as "muddle[d]," "blurred," and "confused." See *Wellness International Network* v. *Sharif*, 135 S.Ct. 1932, 1965-67 (2015) (Thomas, J., dissenting).

This Court can remedy this confusion by granting this petition and clarifying its public rights doctrine.

The recent plurality decision in *Patchak* v. *Zinke*, 583 U.S. __ (2018), makes the need to clarify the demarcation between "public" and "private" rights even more compelling. *Patchak* involved a jurisdiction-stripping statute in which Congress directed Article III courts to dismiss a pending action challenging the Secretary of Interior's decision to accept property into trust for an Indian tribe. Patchak's challenge to the Secretary's determination was a "public right" lawsuit brought under the Administrative Procedures Act. A plurality upheld Congress' authority to strip Article III courts of jurisdiction to hear a challenge to the Secretary's action. As Justices Ginsburg and Sotomayor noted, "What Congress grants, it may retract." *Id.* (concurring op. 1).

This case, unlike *Patchak*, involves a fundamental private right established by the Fifth Amendment's "self-executing" guarantee that the government must justly compensate an owner when it takes private property.

Delineating a clear boundary between "public rights" (of which Congress can strip the Judicial Branch of jurisdiction) and "private rights" (that do not depend upon congressional consent) is critical if this Court is to "'jealously guard [ ]' against such a basic intrusion on judicial independence." *Patchak*, slip op. 9 (Roberts, C.J., dissenting, joined by Kennedy and Gorsuch, JJ.).

ARGUMENT

I. Private property and the Just Compensation Clause are not "public rights."

This case turns upon the difference between a *public* right and a *private* right understood through the lens of this Court's public rights doctrine originating in dictum from *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855).[1] In *Murray's Lessee* this Court held "we do not consider congress can either 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." *Id.* at 284.

The Sixth Circuit, however, supposed ownership of private property is a *public* right, not a *private* right, and therefore Congress may deny Article III courts jurisdiction of an owner's claim for compensation and deny the right to trial by jury. But Chief Justice Roberts (joined

1. *Murray's Lessee* involved a warrant the United States levied against assets a customs agent had collected but had not paid to the Treasury. *Murray's Lessee* was *not* an exercise of eminent domain taking private property under the Takings Clause. The warrant was to collect monies originally collected under the United States' authority to levy customs duties.

by Justices Scalia and Thomas) explained in *Wellness*, 135 S.Ct. 1951-52,[2]

> Congress may not confer power to decide federal cases and controversies upon judges who do not comply with the structural safeguards of Article III. *** [N]arrow exceptions permit Congress to establish non-Article III courts to exercise general jurisdiction in the territories and the District of Columbia, to serve as military tribunals, and to adjudicate disputes over "public rights" such as veterans' benefits. *** Congress had no power under the Constitution to assign the resolution of a claim [not within these narrow exceptions] to a judge who lacked the structural protections of Article III.

Chief Justice Roberts said the Judiciary's authority to decide cases and controversies is its "constitutional birthright." *Wellness* Oral Argument Tr. 24:14-19. In *Bank Markazi* v. *Paterson*, 136 S.Ct. 1310, 1330 (2016), Chief Justice Roberts (joined by Justice Sotomayor) dissented and wrote,

> Article III, §1 of the Constitution vests the "judicial Power of the United States" in the Federal Judiciary. That provision *** "safeguards the role of the Judicial Branch in our tripartite system." It establishes the Judiciary's independence by giving the Judiciary distinct and inviolable authority. The separation of powers, in turn, safeguards individual freedom. As Hamilton wrote, quoting

2. Roberts, C.J., dissenting (citing *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982) (plurality opinion).

> Montesquieu, "'there is no liberty if the power of judging be not separated from the legislative and executive powers.'"[3]

In *Patchak* Chief Justice Roberts (joined by Justices Kennedy and Gorsuch) dissented to reiterate this point. See dissent, slip op. 3.

This Court has *never* held ownership of private property is a "public right." To the contrary, this Court holds private property is a constitutional right specific to the individual owner. *Lynch* v. *Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right ***."). See also *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

The Just Compensation Clause is not like a congressionally-created public welfare program such as Social Security or veterans' benefits. When the government takes private property, the government has a "categorical" constitutional duty to compensate the owner. See *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012).[4]

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3. Citing *Commodity Future Trading Comm'n* v. *Schor*, 478 U.S. 833, 850 (1986), *Stern* v. *Marshall*, 564 U.S. 462, 483 (2001), *Bond* v. *United States*, 564 U.S. 211, 223 (2011), *Federalist* No. 78, p. 466 (C. Rossiter, ed., 1961), and Montesquieu, *The Spirit of Laws*, 157 (A. Cohler, B. Miller & H. Stone, eds., 1989).

4. Citing *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002), and *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951).

In *San Diego Gas & Elec. Co.* v. *City of San Diego*, Justice Brennan explained,

> The language of the Fifth Amendment prohibits the "tak[ing]" of private property for "public use" without payment of "just compensation." As soon as private property has been taken *** the landowner has *already* suffered a constitutional violation, and "'the self-executing character of the constitutional provision with respect to compensation'" *** is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a "taking," compensation *must* be awarded.

450 U.S. 621, 654 (1981).[5]

Justice Brennan's opinion was adopted by the Court in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987) ("As noted in Justice Brennan's dissent in *San Diego Gas* [ ], it has been established at least since *Jacobs* that claims for just compensation are grounded in the Constitution itself ***."). *Clarke* explained, "a landowner is entitled to bring [an action for compensation] as a result of the 'self-executing character of the constitutional provision with respect to compensation ***.'" 445 U.S. at 257 (quoting 6 P. Nichols, *Eminent Domain* §25.41 (3rd rev. ed. 1972)).

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5. Emphasis in original, quoting *United States* v. *Clarke*, 445 U.S. 253, 257 (1980), and *Jacobs* v. *United States*, 290 U.S. 13 (1933).

Justice Thomas explained in *Wellness*, 135 S.Ct. at 1965,

> Historically, "*public* rights" were understood as "rights belonging to the people at large," as distinguished from "the private unalienable rights of each individual." This distinction is significant to our understanding of Article III, for while the legislative and executive branches may dispose of public rights at will – including through non-Article III adjudications – an exercise of the judicial power is required "when the government want[s] to act authoritatively upon core private rights that had vested in a particular individual."
>
> The distinction was well known at the time of the founding. In the tradition of John Locke, William Blackstone in his *Commentaries* identified the private rights to life, liberty, and property as the three "absolute" rights – so called because they "appertain[ed] and belong[ed] to particular men *** merely as individuals," not "to them as members of society [or] standing in various relations to each other" – that is, not dependent upon the will of the government. Public rights, by contrast, belonged to "the whole community, considered as a community, in its social aggregate capacity."[6]

6. Citations omitted, emphasis in original.

In *Gideon* v. *Wainwright*, 372 U.S. 335, 341-42 (1963), this Court "looked to the fundamental nature of the Bill of Rights guarantees" to define those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions," including the "Fifth Amendment's command that private property shall not be taken for public use without just compensation."[7]

Justice Thomas noted that "in the context of land grants, this Court recognized that once 'title had passed from the government,' a more complete form of judicial review was available because 'the question became one of *private right*.'" *B&B Hardware, Inc.* v. *Hargis Ind. Inc.*, 135 S.Ct. 1293, 1317 (2015) (Thomas, J., dissenting, joined by Scalia, J.) (quoting *Johnson* v. *Towsley*, 80 U.S. 72, 87 (1871)) (emphasis added).

Justice Thomas then explained, "historical evidence suggests that the adjudication of core private rights is a function that can be performed only by Article III courts ***." *B&B Hardware*, 135 S.Ct. at 1316 (citing Nelson, *Adjudication in the Political Branches*, 107 Colum.L.Rev. 559, 561-74 (2007), and *Department of Transportation* v. *Association of American Railroads*, 135 S.Ct. 1225, 1242 (2015) (Thomas, J., concurring) ("there are certain core functions" that require the exercise of a particular constitutional power and that only one branch can constitutionally perform).

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7. Quoting *Hurtado* v. *California*, 110 U.S. 516 (1884), and citing *Chicago B&Q R. Co.* v. *Chicago*, 166 U.S. 226, 235-41 (1897), and *Smyth* v. *Ames*, 169 U.S. 466, 522-26 (1898).

The Sixth Circuit, however, held an owner's private property and the "self-executing" Just Compensation Clause is a "public right" and Congress may strip Article III courts of jurisdiction and deny the Seventh Amendment right to jury trial.

II. A constitutional right without a remedy is no right at all.

The Sixth Circuit acknowledged, "the Supreme Court has explained that a Fifth Amendment takings claim is self-executing and grounded in the Constitution, such that additional '[s]tatutory recognition was not necessary.'" App. 13a. The Government likewise admits *First English* held "it is the Constitution that dictates the remedy for interference with property rights amounting to a taking" and "*First English* makes clear that the Fifth Amendment creates a substantive 'right to recover just compensation for property taken by the United States.'" Opp. 17-18.

But, after recognizing the Fifth Amendment's self-executing character, the Government then adopts the Sixth Circuit's Orwellian *non-sequitur*. "But 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.'" *Id.* (citing App. 13a).

The mind boggles. The notion that the Constitution guarantees a "self-executing" right to be justly compensated when the government takes private property but the government has no obligation to compensate the owner is logically incoherent. The Sixth Circuit reduces the Just Compensation Clause to a "mere parchment

barrier." If you have no remedy, you have no right. The Just Compensation Clause cannot be both "self-executing" and depend upon some subsequent act of "legislative grace" by Congress deigning to recognize the government's constitutional obligation. See *Marbury* v. *Madison*, 5 U.S. 137, 176-77 (1803) ("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.").

The Government claims landowners' only remedy historically was to go hat-in-hand begging Congress to adopt a private bill compensating the owner. Opp. 12-15. The owners and amici cite many cases where landowners sued for compensation after the government (or a party acting with the government's eminent domain power) took private property, and the compensation was adjudicated in federal court. *United States* v. *Lee*, 106 U.S. 196 (1882), cannot be dismissed as an action for ejectment against the federal government's "wicked ministers." The United States intervened in the case and asserted a sovereign immunity defense. The United States lost, and Curtis Lee was paid.

The Government says that because "several [of these cases] involved condemnation proceedings brought *by* the government" they are irrelevant. Opp. 14. But the Government never explains how the *procedural* context in which Fifth Amendment rights were adjudicated supports its argument. If an owner has a right to an Article III court when the government initiates the action taking private property, how does this mean the owner has no right to an Article III court and jury when the landowner must initiate the lawsuit? The burden upon a landowner

forced to bring an inverse condemnation action gives the constitutional guarantee of an Article III court with trial by jury even more weight. See *Clarke*, 445 U.S. at 255-58, and *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999).

More fundamentally, so what? Violating the Constitution cannot be defended by invoking historical practice or the passage of time. See, *e.g.*, *District of Columbia* v. *Heller*, 554 U.S. 570, 625-26 (2008) (passage of time); *INS* v. *Chadha*, 462 U.S. 919, 944-45 (1983) (historical practice).

The Government also dances lightly over an important point. To wit: prior to 1982 (at least since 1953) the Court of Claims *was* an Article III court. Opp. 12-13. Therefore, the Article III separation of powers violation arising from the denial of access to an Article III court is not something "we've always done," but rather is something "we've only done since 1982."

In sum, the Government argues Congress – not the Judicial Branch – determines the "just compensation" an owner is due when the government takes private property. This is *exactly* the argument this Court emphatically rejected, in *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893):

> 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 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.

This Court has repeatedly reaffirmed the *Monongahela* doctrine. See, *e.g.*, *United States* v. *New River Collieries Co.*, 262 U.S. 341, 343-44 (1923) ("The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard."), and *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 365, 367-68 (1936) ("The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause." And "when [an owner] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount.").

III. At a minimum, this appeal should be remanded in light of *Oil States*.

Defining the "boundaries" of the public rights doctrine (which the Sixth Circuit and Solicitor General find "imprecise" and not "fixed") is profoundly important.

In *Wellness*, Justice Thomas explained,

> Over time, the line between public and private rights has blurred, along with the Court's treatment of the judicial power. The source of the confusion may be *Murray's Lessee* – the putative source of the public rights doctrine itself. Dictum in the case muddles the distinction between private and public rights ***.***
>
> Another strain of cases has confused the distinction between private and public rights, with some cases treating public rights as the equivalent of private rights entitled to full judicial review, and others treating what appear to be private rights as public rights on which executive action could be conclusive ***.*** A return to the historical understanding of "public rights," however, would lead to the conclusion that the inalienable core of the judicial power vested by Article III in the federal courts is the power to adjudicate *private* rights disputes.[8]

This case is the ideal vehicle to resolve this confusion because this case involves privately-owned land. The difference between this case and *Oil States Energy*

8. 135 S.Ct. at 1966 (citations omitted, emphasis in original).

Services, LLC v. *Greene's Energy Group, LLC*, No. 16-712, is that, here, the property is land – for many their home. In *Oil States*, the property is a patent, and in *Sammons* v. *United States*, No. 17-795, the property was corporate stock. All three cases ask this Court to decide whether the respective property interest is a "public right" of which Congress may strip Article III courts of jurisdiction and deny trial by jury. But this petition presents this question in its most fundamental form. An individual's ownership of his home and land is a foundational individual right predating *Magna Carta*.

This Court should grant this petition or, at least, hold it for disposition in light of this Court's decision in *Oil States*.

CONCLUSION

A "muddle[d]" and "confused" doctrine (public vs. private rights) becomes dangerous when combined with this Court's holding that Congress is able to strip Article III courts of jurisdiction of "public rights." This Court should grant certiorari to establish "fixed" and "settled" "boundaries" to its public rights doctrine and confirm the principle that Congress may not strip Article III courts of jurisdiction over self-executing constitutional rights.

Respectfully submitted,

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