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

AMICI CURIAE BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER; CATO INSTITUTE; AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

CORPORTE DISCLOSURES i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

QUESTIONS PRESENTED xi

STATEMENT OF CONSENT xii

STATEMENT OF INTEREST xii

STATEMENT REQUIRED BY FED. R. APP. P. 29(C)(5) xiv

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. PROPERTY OWNERS ARE ENTITLED TO A JURY TRIAL WHEN SEEKING COMPENSATION FOR A TAKING 4

A. An Inverse Condemnation Claim Would Have Been Heard in a Court of Law in 1791. 4

B. Takings Cases Present Issues Appropriate for the Jury 7

II. The Doctrine of Sovereign Immunity Cannot Preclude Citizens From Invoking Their Seventh Amendment Rights. 8

A. The Supreme Court has Never Ruled that Seventh Amendment Rights may be Denied in Cases Seeking Enforcement of Constitutional Rights. 10

B. Modern Precedent Makes Clear that Government Cannot Condition the Right to Sue on Waiver of Rights 13

C. The Government's Theory of Sovereign Immunity Contravenes History. 16

1. Historically the Crown Could be Sued to Protect Property Rights 16

2. The Right to Trial by Jury Was Utilized as a Protection Against Unlawful or Despotic Deprivations of Property in the Colonial Era 19

CONCLUSION 21

TABLE OF AUTHORITIES

Case Law

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 14, 15

Arkansas Game & Fish Comm'n v. United States,
133 S. Ct. 511 (2012) 8

City of Columbia v. Omni Outdoor Advert., Inc.,
499 U.S. 365 (1991) 9

City of Monterrey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) .... *passim*

Feltner v. Columbia Pictures Television, Inc.,
523 U.S. 340 (2011) 4, 5

Frost Trucking v. R.R. Comm'n of California,
271 U.S. 583 (1926) 14, 15, 16

Galloway v. United States,
319 U.S. 372 (1943) 12, 13

Hammond v. United States,
786 F.2d 8 (1st. Cir. 1986) 11

Koontz v. St. Johns Water Mgmt. Dist.,
133 S. Ct. 2586 (2013) 15

Lehman v. Nakshian,
453 U.S. 156 (1981) 10, 11

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005) 10

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 8

Malone v. Bowdoin,
369 U.S. 643 (1962) 12

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 14

Markman v. Westview Instruments, Inc.,
517 U.S. 370 (1996) 7

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat) 304 (1816) 9, 10

McElrath v. United States,
102 U.S. 426 (1880) 11, 13

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) 16

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 15

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978) 7, 8

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 7

Pernell v. Southall Realty,
416 U.S. 363 (1974) 4

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 14

St. Joseph Stock Yards Co. v. United States,
298 U.S. 38 (1936) 14

Sherbert v. Verner,
374 U.S. 398 (1963) 15

Southern Pacific Co. v. Denton,
146 U.S. 202 (1892) 14

Speiser v. Randall,
357 U.S. 513 (1958) 15

United States v. Clarke,
445 U.S. 253 (1980) 11, 12

United States v. O'Keefe,
78 U.S. (11 Wall.) 178 (1870) 17, 18

United States v. Lee,
106 U.S. 196 (1882) 19

United States v. Mitchell,
445 U.S. 535 (1980) 11

United States v. Sherwood,
312 U.S. 584 (1941) 11

United States v. Testan,
424 U.S. 392 (1976) 11

Wilson v. Garcia,
471 U.S. 261 (1985) 6

Constitutional Provisions

U.S. Const. amend. VII 4

Other Authorities

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(1991) 19

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Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 Wm. & Mary Bill Rts. J. 811 (2014) 20

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Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989) 14

The Federalist No. 45 (James Madison) (C. Rossiter ed., 1961) 9

Luke A. Wake & Jarod M. Bona, *Legislative Exactions After Koontz v. St. Johns River Management District*, 27 Geo. Int'l Envtl. L. Rev. 539 (2015) 15

Jason Weeden, *Historically Immune Defendants and the Seventh Amendment*, 74 Tex. L. Rev. 655 (1996) 13

QUESTIONS PRESENTED

(1) Whether suits initiated against the government—seeking protection of private property rights—would have been heard by a jury at the time of the Seventh Amendment's adoption in 1791?

(2) Whether Congress may condition one's Fifth Amendment right to seek just compensation for the taking of property on a requirement to surrender the Seventh Amendment right to a jury trial?

STATEMENT OF CONSENT

This brief *amici curiae* is filed pursuant to Rule 29(a) of the Federal Rules of Civil Procedure. All of the Plaintiffs-Appellants and the Defendant-Appellee have consented to this filing.

STATEMENT OF INTEREST

All of the *Amici* joining in this filing share an interest in protecting the common law right to trial by jury because that right is an essential bulwark against the unlawful abrogation of property rights. *Amici* share an interest in this issue because "[j]uries [historically] secured the right to property by providing determiners of fact who (1) were disinterested and not associated with the [Government], and (2) shared with the litigant a community interest in the security of his property." 1 John P. Reid, *Constitutional History of The American Revolution: The Authority Of Rights* 48-9 (1986).

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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, including such cases as *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

STATEMENT REQUIRED BY FED. R. APP. P. 29(C)(5)

This brief was authored entirely by in-house and local counsel for the amici curiae. Neither the Plaintiffs-Appellants nor their counsel contributed any money that was intended to fund the preparation of submission of this brief. No person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Plaintiffs-Appellants allege that the United States government has unconstitutionally taken their property in violation of the Fifth Amendment. That is a serious charge. And equally serious is their invocation of the Seventh Amendment right to a jury trial.

The Supreme Court has made clear that the Seventh Amendment protects the right of citizens to have a jury trial in cases that would have been heard in a court of law at the time of the Amendment. The presumption is that all matters would have been heard in a court of law, except those falling within the jurisdiction of the admiralty courts or a court of equity. Thus, it is now settled that an action would be heard in a court of law if the court is called upon to determine the "legal rights" of the parties—regardless of whether the specific cause of action was, or was not, available in 1791. In this sense, the test is functional, not formalistic.

What is more, the Supreme Court has already applied this test in a takings case. In *City of Monterrey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court ruled that a landowner is entitled to invoke the right to a jury trial in an action seeking to force the government to pay for a taking. 526 U.S. 687 (1999). There is only one arguable distinction between that case and the present: In *Del Monte Dunes* the landowner prosecuted its takings claim against a California municipality (*i.e.*, a political subdivision of the State of California), whereas the

landowners in this case have invoked their Fifth Amendment rights against the United States. But this is a distinction without a difference.

To be sure, the Seventh Amendment test does not hinge upon the defendant's identity. If a claim would have been heard in a court of law against one party, then it must be necessarily be an action at law when advanced against another. The identity of the defendant does not change the nature of the underlying claim. For that matter, there is no meaningful distinction between the substantive claims advanced in *Del Monte Dunes* and those in the present case because—in both cases—the plaintiffs seek the same thing: a determination that their property has been taken and that compensation is owed.[1] And, lest there be any confusion, *Amici* explain how the common law right to a jury attached in claims filed against the government in 1791.

Unfortunately, the District Court blithely rejected Plaintiffs-Appellants' right to a jury, on the view that the United States is exempt from the Seventh Amendment. Such a rule would fly in the face of history because the Seventh Amendment was viewed as an essential bulwark against despotic acts of government and was specifically invoked as a protection against unlawful deprivations of property. More fundamentally, it would be wholly improper for the

[1] In *Del Monte Dunes* the suit was brought via § 1983, whereas the present action is brought against the federal government alleging a direct violation of the Fifth Amendment. But as explained in Section I, the claim is substantively the same for the purposes of the Seventh Amendment analysis.

courts to craft a rule exempting the federal government from respecting any of the protections set forth in the Bill of Rights.

The Supreme Court has never held that the United States may exempt itself from the Seventh Amendment—at least not in any case in which a plaintiff has invoked a right to jury when claiming a violation of constitutionally protected rights. Nonetheless the government relies on an 1880 decision in which the Supreme Court said, without any meaningful analysis, that the United States retains the prerogative to assert sovereign immunity and may therefore dictate the terms of its consent to suit—including by requiring waiver of the right to a jury trial. But, the Supreme Court has since repudiated the notion that government may condition the receipt of conferred benefits on a waiver of constitutional rights. And, in any event, the tortured doctrine of sovereign immunity cannot be employed as a shield against the Constitution because that would allow the federal government to act outside the law.

ARGUMENT

The right to a jury trial is guaranteed by the Seventh Amendment to the United States Constitution. This right is one of the most ancient existing under Anglo-American law. Parliament's abrogation of this right by expanding the jurisdiction of Admiralty Courts was one of the primary grievances that led to the American Revolution. The Seventh Amendment exists to prevent the United

States government from doing what Parliament did during the 1760s.

This Court should follow Supreme Court precedent and find that the district court erred by not finding that Plaintiffs-Appellants are entitled, under the Seventh Amendment, to a jury trial on their takings claim.

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

An inverse condemnation claim would have been heard by a court of law in 1791. Takings claims also present precisely the type of factual issues that are best resolved by a jury of one's peers. Therefore, this Court should find that Plaintiffs-Appellants are entitled to a jury trial on their takings claim.

A. An Inverse Condemnation Claim Would Have Been Heard in a Court of Law in 1791

The Seventh Amendment guarantees citizens a right to a jury trial in all suits at law. U.S. Const. amend. VII. Accordingly, the right attaches in any suit raising claims analogous to actions that would have been heard in a court of law—as opposed to in a court of equity or admiralty—in 1791. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (*Del Monte Dunes*); *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (2011). The Supreme Court has made clear that any suit seeking a determination of legal rights should qualify. *Del Monte Dunes*, 526 U.S. at 708 (quoting *Parsons v. Bedford*, 3 Pet. 433, 7 L.Ed. 732 (1830)).

Under this 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." *Id.* at 709 (noting that Justice Scalia's concurrence offered a "comprehensive and convincing analysis of the historical and constitutional reasons for this conclusion."). The Court was clear in explaining that a takings claim seeks legal relief because the claimant 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 "soun[ding] basically in tort.")). And that rationale applies equally to this case.

Here, Plaintiffs-Appellants advance an inverse condemnation action in which they allege that the government has unlawfully taken private property without paying compensation as the Constitution requires. Just as in *Del Monte Dunes*, the landowners seek a legal remedy (*i.e.*, money damages) for the government's violation of their rights.[2] Accordingly, the present action sounds in

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[2] "Here Del Monte Dunes sought legal relief. … The constitutional injury alleged … [is] that [private property] was taken without just compensation... [I]n a strict sense Del Monte Dunes sought not just compensation *per se* but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy… [But,] [e]ven when viewed as a simple suit for just compensation, we believe Del Monte Dunes' action sought essentially legal relief." *Del Monte Dunes*, 526 U.S. at 710 (citing *Teamsters v. Terry*, 494 U.S. 558 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law."); *Feltner*, 523 U.S. at 352 ("We have recognized the 'general rule' that monetary relief is legal.")).

tort because it is entirely analogous to a § 1983 claim. *See Wilson v. Garcia*, 471 U.S. 261, 272-73 (1985) (observing that § 1983 claims are predicated upon constitutional violations and that "[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action…"). In fact, for the purpose of analysis under the Seventh Amendment, a suit seeking compensation for a violation of the Fifth Amendment is essentially the same claim as was advanced in *Del Monte Dunes*. *Id*. at 715 (concluding that the "gravamen of the § 1983 [claim] … [s]ounds in tort and is most analogous to the various actions that lay at common law to recover damages for interference with property interests.").

The government cannot escape the force of the Court's conclusions in *Del Monte Dunes*. To be sure, the Court gave strong signals that it would rule just the same in an inverse condemnation suit. For example, the Court observed that "[e]arly opinions, nearly 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 governments actions would sound in tort." *Id*. at 714-17. Thus, an inverse condemnation suit must also be viewed as an action at law—analogous to a tort—to which a claimant is entitled to a jury trial.[3] *Id*. at 723, 727 (J. Scalia, concurring) (citing T. Cooley,

[3] "When the government repudiates [its] duty, either by denying just compensation

Law of Torts 2-3 (1880)); *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57 (1999).

B. Takings Cases Present Issues Appropriate for the Jury

Once a court determines that a case would have been heard in a court of law in 1791, the question arises as to what issues the jury must resolve. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996). Historically juries would decide "predominantly factual issues…" *Del Monte Dunes*, 526 U.S. at 720. With that premise in mind, *Amici* suggest that takings cases raise questions of mixed fact-and-law of which juries are uniquely capable of resolving. To be sure, the plurality opinion in *Del Monte Dunes* emphasized that the question of whether a taking has occurred very much "depends upon the particular facts." *Id*. (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

In regulatory takings cases, the question ultimately boils down to whether the regulation has "gone too far[,]" which is the sort of judgment that a jury of one's peers—drawn from the local community—is qualified to make. *Pennsylvania Coal Co.*, 260 U.S. at 415; *Penn Central Transp. Co. v. New York*

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in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well." *Del Monte Dunes*, 526 U.S. at 714-15, 717.

City, 438 U.S. 104, 123 (1978) (stating that the three factors set forth for evaluating regulatory takings claims amount to an "essentially ad hoc, factual inquir[y]."); *Cf.* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1557 (2003) ("[T]he *Penn Central* approach is admittedly standardless."). Moreover, juries are especially well suited to resolve essential factual questions in physical takings cases. *See Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) (making clear that most physical takings claims will turn on simple factual questions); *see also Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012) (suggesting that, in temporary takings cases, the court must carefully "weigh the relevant factors and circumstances…"). For that matter, the jury was instituted early in England for the express purpose of resolving land disputes.[4] *See* Theodore F.T. Plucknett, *A Concise History Of Common Law*, 1130 (5th Ed. 1956) (summarizing the early history of juries, including use in "trial of right to real property").

II. The Doctrine of Sovereign Immunity Cannot Preclude Citizens From Invoking their Seventh Amendment Rights

In light of *Del Monte Dunes*, there is no question that a court of law would

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[4] Jurors were presumes to have special local knowledge, which was vital in resolving land disputes. *See* Renée Lettow Lerner, *The Uncivil Jury, Part 2: The Unromantic Origins and Continuous Need for an Alternative*, Volokh Conspiracy (May 27, 2015), *available* online at https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/27/the-uncivil-jury-part-2-the-unromantic-origins -of-the-jury-and-the-continuous-need-for-an-alternative/ (last visited June 30, 2016).

have heard an inverse condemnation suits in 1791. Even in dissent, Justice Souter acknowledged as much—though he characterized an inverse condemnation suit as a peculiar action for which the right to a jury trial did not attach. 526 U.S. at 737-38 (Souter J., dissenting). Therefore, the question is whether some special privilege or prerogative exempts governmental defendants from the general rule that the Seventh Amendment applies to all actions at law.

The government urges that the doctrine of sovereign immunity should shield the United States from the Seventh Amendment.[5] But that argument must be rejected. The United States cannot evade constitutional commands, or ignore prohibitions, because the government is not above the law. Indeed, the very structure of the Constitution and the Bill of Rights implies—in the strongest sense—that there can be no sovereign immunity against invocation of express constitutional rights. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-

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[5] The Supreme Court rejected the City of Monterey's claim of sovereign immunity in *Del Monte Dunes*. 526 U.S. at 714. But this raises doubts as to whether the doctrine may be invoked by the States to evade the Seventh Amendment. Indeed, the City of Monterey was merely a political subdivision of the State of California, and fully vested with the State's police powers. *Cf.*, *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 370 (1991) (holding that municipalities may claim immunity from antitrust lawsuits where regulating within the confines of delegated sovereign powers from the State). And if there is reason to doubt whether the States' retain a sovereign immunity against the Seventh Amendment—those concerns are all the more compelling with regard to the federal government, which has only been vested with specifically enumerated powers. *The Federalist* No. 45 (James Madison) (C. Rossiter ed., 1961) (the powers of the federal government are "few and defined").

31 (1816) (ruling that the lower federal courts must be authorized to hear cases concerning federal rights); *see also* Akil Amar, *America's Constitution*, 105-06, 335 (2005).

A. The Supreme Court has Never Ruled that Seventh Amendment Rights may be Denied in Cases Seeking Enforcement of Constitutional Rights

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 courts have generally assumed that there is no right to a jury in takings cases. For example, Justice Kennedy alluded to this long-running assumption, in dicta, while explaining why we see so few jury trial cases in our regulatory takings jurisprudence. *Del Monte Dunes*, 526 U.S. at 719*; but see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531 (2005) (warning that sometimes "a would-be doctrinal rule or test finds its way into our case law [in error] through simple repetition of a phrase-however fortuitously coined").

Justice Kennedy referenced *Lehman v. Nakshian*, in which Justice Stewart suggested that "that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." 453 U.S. 156, 160 (1981). But *Lehman* is off point because it concerned a litigant's right to a jury trial in a suit brought

under a federal statute, not a suit seeking to vindicate a *constitutional right*. *Id*. at 168-69 (finding no right to a jury trial for claims brought under the Age Discrimination in Employment Act). For that matter, none of the cases cited in *Lehman* concerned a constitutionally based claim. They were all suits advanced under statutes enacted by Congress. *See E.g. United States v. Testan*, 424 U.S. 392, 399 (1976) (suit under the Classification Act); *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (suit under the General Allotment Act); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (suit for breach of contract under a federal statute); *McElrath v. United States*, 102 U.S. 426, 440 (1880) (same).

And, at least in that context, it makes some degree of sense to say that Congress can deny the opportunity for a jury trial because Congress created the cause of action in question and defined its contours—including statutory requirements to pursue administrative procedures and or to file suit within a specified time period.[6] As the First Circuit reasoned, "[i]f the United States can abolish the right to a cause of action altogether, it can also abolish the right to a jury trial as part of it." *Hammond v. United States*, 786 F.2d 8, 15 (1st. Cir. 1986). But such logic is simply inapplicable 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,

[6] But, as explained in Section II(B), even this rationale stands in conflict with the unconstitutional conditions doctrine.

257 (1980) (explaining that a landowner is entitled to bring an inverse condemnation claim because of the "self-executing character of the [Fifth Amendment.]") (quoting 6 P. Nichols, Eminent Domain § 25.41 (3d rev.ed.1972)); *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).

What is more, these Seventh Amendment issues are much less settled than Justice Stewart suggested. *Lehman's* comments relied primarily on language from *Galloway v. United States*, which concerned the use of a directed verdict under the War Risk Insurance Acts. 319 U.S. 372, 388-89 (1943). And that portion of *Galloway* was plainly dicta. To be sure, the Court had already "dispose[d] of the case" by the time it suggested that the doctrine of sovereign immunity might offer an alternative justification for its ruling. *Id.* at 388 (stating that Section III of the opinion was unnecessary to its analysis: "Perhaps nothing more need be said.").

Galloway's analysis was geared entirely toward the question at hand—*i.e.*, whether the Seventh Amendment precluded the practice of directed verdicts. Accordingly, the decision is inapposite and its general comments on the doctrine of sovereign immunity are of only limited value.[7] And peeling the onion back further,

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[7] Moreover, the *Gallaway* Court qualified its comments: "The Court of Claims has functioned for almost a century without affording jury trial ***in cases of this sort*** [] without offending the requirements of the Amendment." 319 U.S. at 388, n. 17

the *Galloway* Court relied entirely on *McElrath*, which has been severely criticized by scholars for its failure to offer any doctrinal basis for its conclusions.[8] But in any event, *McElrath's* rule has been supplanted by subsequent precedent. Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 N.W. U. L. Rev. 144, 192 (1996) (arguing that, under modern precedent, "there is no logical reason why a lawsuit brought against government cannot constitute a 'Suit at common law.'").

B. Modern Precedent Makes Clear that Government cannot Condition the Right to Sue on Waiver of Rights

Without meaningful analysis, *McElrath* suggested that Congress can require an individual to waive his or her Seventh Amendment rights as a condition of seeking judicial review under an enacted statute. 102 U.S. at 426. But, that logic cannot possibly extend to takings claims under the Fifth Amendment. For one, *McElrath's* conclusion was premised on the assumption that the right to judicial review may be deemed a discretionary "privilege." *Id*. Yet that assumption has

(emphasis added).

[8] Kirst, 58 Tex. L. Rev. at 560-61 (observing that "*McElrath* gave no authority in support of its conclusion…"); Jason Weeden, *Historically Immune Defendants and the Seventh Amendment*, 74 Tex. L. Rev. 655, 657, 665 (1996) (observing that the rule in *McElrath* is "backed even now only by sparse and underdeveloped" case law, and that the argument that "Congress may ignore an express constitutional mandate as a condition of the government's consent to be sued[,] … rests on shaky ground[.]").

been unequivocally rejected by modern precedent.[9] *See Del Monte Dunes*, 526 U.S. at 707. ("To the extent the city argues that, as matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles.").

Yet even if the right of judicial review were deemed a government conferred benefit for the purpose of Seventh Amendment analysis, *McElrath's* rationale has been wholly repudiated since the Supreme Court formulated the unconstitutional conditions doctrine. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989). Since the 1890s the Supreme Court has consistently held that government cannot enforce legislation requiring a waiver of constitutional rights as a condition of obtaining a discretionary government benefit. *See Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating a statute "requiring [a] corporation, as a condition subsequent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution"); *Frost Trucking v. R.R. Comm'n. of California*, 271 U.S. 583,

[9] *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) (Brandis J., concurring) (same); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 134 (1974) (rejecting an interpretation of the Rail Act that would deny takings claimants a judicial remedy, in part because of the "grave" constitutional problems that would arise); *see also* Douglas E. Edlin, *A Constitutional Right to Judicial Review: Access to Courts and Ouster Clauses in England and the United States*, 57 Am. J. Comp. L. 67, 92 (2002).

590, 593-94 (1926) (same); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512-13 (1996) (same). For example, government cannot condition an award of unemployment benefits, or a tax credit, on a requirement to waive First Amendment rights. *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963); *Speiser v. Randall*, 357 U.S. 513, 535-36 (1958). What is more, 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, 836-37 (1987); *Koontz v. St. Johns Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

Accordingly, the rule in *McGrath* is no longer good law and does not apply to a takings case. Nonetheless, the government argues that it may place "constitutional rights before the guillotine on either side of the equation" by requiring a landowner to choose between waiving the right to just compensation or the right to a jury trial. Luke A. Wake & Jarod M. Bona, *Legislative Exactions After Koontz v. St. Johns River Management District*, 27 Geo. Int'l Envtl. L. Rev. 539, 570 (2015) (suggesting that "the doctrine [of unconstitutional conditions] has special force in" in the context of a takings claim). But, in the words of Justice Sutherland, "[i]t is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost*, 271 U.S. at

594.[10]

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

1. Historically the Crown Could be Sued to Protect Property Rights

Given that modern precedent rejects the government's theory of an absolute power to condition access to federal courts on waiver of constitutional rights, the government is left with only one argument. Specifically, the United States may argue that this is not the sort of case that would have been heard in a court of law at the time of the Seventh Amendment because there was no right to sue the Crown in 1791. Kirst, 58 Tex. L. Rev. at 550-51, 60-61. In other words, the government's position rests on the assertion that the Crown was historically immune from suit.

The problem with that argument is that "[s]overeign immunity of the United States did not exist in 1791…" *Id.* at 551. The doctrine was created out of whole cloth in the nineteenth century. And legal historians have completely discredited the notion that the Crown could not be sued at the time of the Revolution. *Id.*

As explained by Professor Louis L. Jaffe, in his canonical works on the right of judicial review, English law developed "a variety of devices for getting relief

[10] Congress cannot require a landowner to accept less than the "full and perfect equivalent" of what has been taken as a condition of bringing an inverse condemnation claim. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893). So why then should Congress be presumed to have the power to condition access to courts on waiver of other constitutional rights in inverse condemnation cases?

against government" during the Middle Ages.[11] *Suits Against Governments and Officers*, 77 Harv. L. Rev. 1, 3 (1963). Specifically English subjects could protect their property rights by pursuing procedures for a petition of right, *monstrans de droit*, or traverse of office.[12] Kirst, 58 Tex. L. Rev. 563-64. This is because the King was, in fact, subject to the law. Pollock & Maitland, 181-82 (citing the Eleventh Century jurist, Henry Bracton, as saying: "[E]ven royal justice may fearlessly proclaim [that the King is below the law]."). And the law bound the king to consent to having petitions of right heard in the courts.[13] *See United States v.*

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[11] While the "King could not be sued *eo nominee*[,]" Jaffee explains that "this was largely an abstract idea without determinative impact on the subject's right to relief against governmental illegality." 77 Harv. L. Rev. at 2-8, 18-19. Moreover, the doctrine that the king was "subject to no man, [but] [was] subject to the law," may be explained in practical terms. *See* Pollock & Maitland, *The History Of English Law*, Vol. 1, 182 (2nd Ed., reprinted 1984). If a king would not willingly submit to the rule of law, there was little that could be done, short of rising-up in rebellion. Yet of course, that is precisely what happened at Runnymede: "[King] John ha[d] been breaking the law; therefore the law [had to] be defined and set in writing." *Id*. at 172 (explaining that, in many ways, Magna Carta was largely a restatement of English law and custom).

[12] "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, *supra* at 3.

[13] "[T]he requirement of consent was not based on a view that the King was above the law. '[T]he king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.' Indeed … the expression 'the King can do no wrong' originally meant precisely the contrary to what it later came to mean. '[I]t meant that the king must not, was not allowed, not entitled, to do wrong… It was on this basis that the King, though not suable in court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed petitions' let justice be done,' thus empowering his courts to proceed." Jaffe, 77 Harv. L. Rev. at 3-4.

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…"). Accordingly, a petition was "never refused, except in very extraordinary cases…" *Id*.

"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. 564. The petition would be filed with the Chancellor and would be endorsed by the King, who would appoint a special commission to investigate before the case would proceed "to be heard either on the common law side of Chancery or, if a jury trial were involved, in King's Bench." *Id*. And, importantly, this "remedy remained a viable part of the common law" at the time of the American Revolution. *Id*. at 567 (citing 3 William Blackstone, *Commentaries* *256-57). Moreover, while "[t]he original remedy for one who lost property to the King" was to file a petition of right, the law recognized other actions against the Crown. Kirst, 58 Tex. L. Rev. 565-66. Parliament enacted statutes in 1360 and 1362 enabling subjects to proceed in the common law side of Chancery by commencing *monstrans de droit* and traverse of office actions—neither of which required the King's endorsement or consent. 77 Harv. L. Rev. at 6; *see also* James E. Pfander, *Soverign 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) (explaining that jurors would determine whether the Crown had lawfully acquired possession of property). And that is to say nothing of the writ *of habeas corpus*, which could also be brought against Crown in 1791.[14] Grant, 91 Nw. U. L. Rev. at 199 ("[T]he writ of *habeas corpus* provides proof enough that governmental immunity has its limits, limits rooted in the Constitution.").

2. The Right to Trial by Jury Was Utilized as a Protection Against Unlawful or Despotic Deprivations of Property in the Colonial Era

The notion that a doctrine of sovereign immunity should allow Congress to negate the Seventh Amendment also requires a complete disregard for colonial history. 91 N.W. U. L. Rev. at 146 (arguing that the government's position is "not just wrong, but manifestly wrong."). Indeed, 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." Akil Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1183 (1991).

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[14] Notably, the Supreme Court rejected an assertion of sovereign immunity in *United States v. Lee*, 106 U.S. 196, 205-06, 218-19 (1882) (suggesting that the doctrine has no place in the American system: "If [the Fifth Amendment] is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government [in a *habeas corpus* action], what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?").

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. 91 N.W. 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 the jurisdiction of the admiralty courts to deny their common law right to a jury trial. *See* 91 N.W. 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). 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 N.W. U. L. Rev. at 150 (explaining that the abrogation of jury rights was one of the chief grievances listed in the Declaration of Independence). Accordingly, there is no legal or historical basis for allowing the United State to abrogate the Seventh Amendment by simply asserting sovereign immunity. *Cf.* Phillip Hamburger, *Is Administrative Law Lawful*? 152-55 (2015) (illustrating the supreme value that the revolutionary generation placed on maintaining the right to a full jury trial at common law—even for forfeiture proceedings, initiated during the exigencies of the Revolutionary War, against parties suspected of illegally trading with the British).

CONCLUSION

For the foregoing reasons this Court should reverse the judgment of the District Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,513 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.

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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2016, I electronically filed Amici Curiae Brief of the National Federation of Independent Business Small Business Legal Center; Cato Institute; and Southeastern Legal Foundation in Support of Plaintiffs-Appellants and this Certificate of Service using the ECF System which will send notification of such filing to all attorneys of record and I hereby certify that I have mailed the foregoing document to the non-ECF participants via United States Mail.

/s/ *Cathy Montana*
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