No. 09-499

IN THE
Supreme Court of the United States

PEOPLE OF BIKINI, BY AND THROUGH THE KILI/BIKINI/EJIT LOCAL AND GOVERNMENT COUNCIL,
Petitioners,
v.
UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

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According to the government's opposition and the Federal Circuit's decision, the Bill of Rights' command – "nor shall private property be taken for public use without just compensation," U.S. Const. Amend. V – is just a suggestion. It takes nothing more than a wave of the legislative wand for Congress to erase that individual right *and* to push this Court and the rest of the judiciary aside, absolutely debarring any court, state or federal, from providing any judicial review of that constitutional expunction. Given the Federal Circuit's broad purview over Fifth Amendment Takings Clause claims, adoption of that extraordinary proposition as the constitutional law of the land would merit this Court's review in its own right. *See Bartlett v. Bowen*, 816 F.2d 695, 704 (D.C. Cir. 1987) ("[I]n the entire history of the United States, the Supreme Court has never once held that Congress may foreclose all judicial review of the constitutionality of a congressional enactment."). But the fact that the Federal Circuit predicated its ruling on statutory text that lacks the clarity this Court's and other circuits' precedents demand requires this Court's review to restore uniformity in Fifth Amendment law and to ensure that courts do not, as a matter of statutory construction, instigate erosions of constitutional rights that Congress never intended.

1. Neither the Federal Circuit nor the government has suggested that the less than one-half of one percent of compensation that was provided here before the Nuclear Claims Tribunal process collapsed satisfies the Fifth Amendment's demand of "just compensation." Nor does the

government deny the profound constitutional implications of the court of appeals' holding that Congress can foreclose any and all judicial review of the petitioners' constitutional claim for just compensation. But neither the Federal Circuit nor the government ever comes to grips with the fact that nothing in the Compact Act compels that constitutionally troubling result, or that reading the text as doing so squarely conflicts with this Court's precedent.

Like the court of appeals, the government's argument (Opp. 9-10) stresses the language that withdrew jurisdiction in the first instance and channeled claims into the Tribunal. But this Court could not have been clearer in the *Regional Rail Reorganization Act Cases* (*Blanchette v. Connecticut Gen. Ins. Corp.*), 419 U.S. 102 (1974), that language that is sufficient to withdraw a Tucker Act remedy in the first instance is *not* sufficient to foreclose a Tucker Act remedy for any "constitutional shortfall" in that alternative remedial process, *id*. at 136, 148. And the language that Congress used here is not materially different from statutory language that this Court and other courts of appeals have held is not sufficient to completely foreclose all judicial review of a Takings Clause claim. *See* Pet. 10, 13 (citing cases); *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 325 (8th Cir. 1989) ("legislative silence" on interaction between statute and Tucker Act preserved Tucker Act jurisdiction); *Feinberg v. FDIC*, 522 F.2d 1335, 1341-1342 (D.C. Cir. 1975) (jurisdiction remains even though statute says that "[n]o court shall have jurisdiction to * * * review, modify, suspend, terminate, or set aside" orders under the statute); *Neely v. United States*, 546 F.2d

1059, 1064 (3d Cir. 1976) (Tucker Act jurisdiction preserved where "there is no evidence of legislative concern on the matter one way or the other").

The government's effort to distinguish *INS v. St. Cyr*, 533 U.S. 289 (2001), actually proves petitioners' point. The government argues (Opp. 12 n.7) that the immigration law at issue in *St. Cyr* only precluded Administrative Procedure Act review, and not habeas corpus review. True – but that is only because this Court applied the very rule of statutory construction that the Federal Circuit cast aside here (Pet. App. 8a) and rejected the argument advanced by the government in *St. Cyr* that the sweeping language of the immigration law's bar on judicial review was sufficient to foreclose review of even constitutionally protected habeas corpus claims. *Compare St. Cyr*, 533 U.S. at 313 (provision does not "speak[] with sufficient clarity to bar jurisdiction"), *with* U.S. Pet. Reply Br., *St. Cyr, supra*, at 2 n.1 ("Because Section 1252(a)(2)(C) says that 'no court' shall have jurisdiction, that Section independently bars district court review in this case * * * '[n]otwithstanding' * * * 28 U.S.C. § 2241's provision for habeas corpus review."); *and* U.S. Pet. Br., *St. Cyr, supra*, at 25 ("The sharp line the court of appeals perceived between 'judicial review' and 'habeas corpus' in the immigration context simply does not exist.").

The government thus simply repeats here the same statutory approach rejected by this Court in *St. Cyr*. The only difference is that it worked this time. But that is because of the Federal Circuit's erroneous determination that completely foreclosing review of constitutional claims does not occasion any need for "caution" or "follow[ing] the careful course of the

Blanchette case." Pet. App. 8a. Given the Federal Circuit's jurisdictional dominance over federal Takings Clause claims, that direct conflict with this Court's precedent and the approaches of other circuits is precisely what warrants further review.

2. The government's insistence that these claims were disposed of by a "settlement" begs both questions presented. First, the argument simply assumes away the first question presented about what, in adopting the Compact Act and Section 177 Agreement, Congress intended would happen to constitutional claims if the Tribunal process collapsed before just compensation was paid.

Second, there is no dispute that the individual U.S. citizens and dependents whose constitutional claims are at stake never individually settled or waived their constitutional claims. The government's entire argument thus directly raises, rather than avoids, the second question presented: whether the federal government can, by legislation or agreements with third parties, completely extinguish individual constitutional claims against itself. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party.").

That is not, as the government mistakenly argues (Opp. 16), a question of espousal. Espousal is a question of the Marshall Islands' power and authority. But this dispute is all about the United States' power – or not – to extricate itself unilaterally from the Fifth Amendment's command of just compensation and the claims of its own citizens and dependents against itself. The question,

in other words, is whether the United States government has the power in the first instance to legislatively contract itself out of the Takings Clause. Since there was no settlement or contract with the individual persons whom the Fifth Amendment protects, which governmental entity the United States contracted with is beside the point.

Indeed, this Court recognized in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), that, when the federal government uses the private property rights of individual citizens to effectuate governmental policy, the fact that the United States struck a deal with another government is "no jurisdictional obstacle" to a Fifth Amendment takings claim pursued under the Tucker Act, *id*. at 689-690. As Justice Powell explained, "[t]he Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id*. at 691 (Powell, J., concurring & dissenting in part).[1]

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[1] The contrast between this case and the Iran Claims Tribunal underscores the profound constitutional deficiencies in the United States and Federal Circuit's positions. In *Dames & Moore*, the United States required the government of Iran to maintain a balance of $500 million in the Tribunal's account until all awards were paid. U.S. Br., *Dames & Moore*, at 7 (No. 80-2078). Here, by contrast, the United States insists that forcing the petitioners to divert their claims to a "manifestly inadequate" Tribunal that has virtually gone out of business without paying anything remotely approaching just compensation is perfectly acceptable to the Fifth Amendment, and there is absolutely nothing the federal judiciary can do about it. Former Attorney General Dick Thornburgh, *et al*., *The Nuclear Claims Tribunal of the Republic of the Marshall Islands* 3 (Jan. 2003).

Nor is *United States v. Pink*, 315 U.S. 203 (1942), of any help to the government. *Pink* involved the President's resolution of *non-constitutional* claims against a foreign government. It says nothing about Congress's ability to legislate or contract the *United States government* out of *constitutional* claims by *United States citizens and dependents* against the *United States government*. *See Medellin v. Texas*, 552 U.S. 491, 495 (2008) (*Pink* "involve[d] a narrow set of circumstances: the making of executive agreements to settle civil claims between American citizens and foreign governments or foreign nationals.").[2]

The government's invocation of *Lynch v. United States*, 292 U.S. 571 (1934), fares no better. That case did not hold that Congress can strip all federal courts of jurisdiction over Takings Clause claims and thereby arrogate to itself the unreviewable authority to conclusively determine just compensation. Quite the opposite, in *Lynch*, this Court held that a statute that canceled insurance contracts did not limit Tucker Act jurisdiction. *Id.* at 583 ("Congress did not aim at the remedy."). To the extent the decision broadly implied that Congress could withdraw

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[2] Analogizing the Tribunal to the Foreign Claims Settlement Commission, Opp. at 14, is off base. That Commission is a federal agency that considers claims by U.S. citizens against foreign governments and allocates funds obtained in settlements between the United States and foreign governments. *Dames & Moore*, 453 U.S. at 680. Those are not constitutional claims against the United States, and there is no reason to think that those citizens would ever have had any opportunity to seek recovery from the foreign governments directly. Hence, any limitation on the funds available from the Foreign Claims Commission does not effect a deprivation of a preexisting property interest.

jurisdiction over constitutional claims, *id.* at 581-582, that language was dicta because *Lynch* involved contract, not constitutional Takings Clause claims. *Id.* at 582. And even that dicta has long since been repudiated. "The just compensation clause may not be evaded or impaired by any form of legislation." *Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 368 (1936). *See First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 315 (1987) (Just Compensation Clause is "self-executing"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (recognizing the "constitutional exception to the doctrine of sovereign immunity"); *Regional Railroad Reorganization Act Cases,* 419 U.S. at 135, 151 n.39.[3]

In any event, while the United States no doubt agrees with the Federal Circuit's decision on the merits, the issue at this stage is whether that court's

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[3] Contrary to the government's argument (Opp. 23), this Court long recognized, even prior to enactment of the Tucker Act, that there must be some judicial remedy when private property is taken for public use and just compensation is not paid. *See United States v. Great Falls Manufacturing Company*, 112 U.S. 645, 656 (1884) (When the United States has "taken the property of the claimant for public use," it is "under an obligation, imposed by the Constitution, to make compensation," and "[t]he law will imply a promise to make the required compensation" when such a taking occurs."); *United States v. Lee*, 106 U.S. 196, 220 (1882) (sovereign immunity defense unavailing because "it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation"); see also Pet. 18-19. *Langford v. United States*, 101 U.S. 341 (1880), is inapt because it involved the government's use of property under a claim of title and thus involved a tort or quiet title claim, not a taking, *id.* at 344.

expansion of *Pink* and *Lynch* to empower the Executive Branch to cut off both constitutional claims against itself, and the judiciary's ability to review that action, are sufficiently important questions to merit this Court's review. *See Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327 (1893) ("It does not rest with [Congress] 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."). Given the impact of that ruling on the law of the preeminent circuit for Takings Clause claims and the sheer size and number of constitutional claims at issue in this case, the questions presented are of vital importance to the law and have the type of broad impact on numerous individuals that warrant this Court's review. *Cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996).

3. Finally, this case is solely about jurisdiction over the constitutional claims of individuals, not the merits of the government's vision of the deal it struck with the Marshall Islands. The issue thus is not whether the Court should "undo" an alleged settlement (Opp. 13), but the much more foundational question of whether this Court and the lower federal courts have any authority to stand, as they always have, as the ultimate backstop for the enforcement of constitutional rights that the government has attempted to escape.

In that regard, it is important to note that the Solicitor General's express position today is that Congress paid not the individuals whose land was taken, but the Marshall Islands – a territorial government under its dominion and control – less

than $46 million to dispose of "$5 *billion* in damages" sought by all affected Marshall Islanders, not just petitioners. Opp. 14 (emphasis added; quoting H.R. Rep. No. 99-188, pt. 1, at 8 (1985)).[4] That is what the United States insists it has the unchecked and unreviewable power to do, thereby reducing petitioners' individual Fifth Amendment rights to nothing more than domestic policy bargaining chips in the government's dealings with a federal territory.

Furthermore, it confesses much about the legal fragility of the United States' position that it portrayed the Section 177 Agreement quite differently to this Court and to the Federal Circuit in the wake of its adoption, persuading the Federal Circuit that the law was meant to provide "in perpetuity, a means to address past, present and future consequences" of the government's nuclear testing program, *People of Enewetak v. United States*, 864 F.2d 134, 136 (Fed. Cir. 1988). *See also* U.S. Br. in Opp. to Pet. for Cert., *People of Enewetak v. United States* (88-1466), at 11 ("[T]he Fund will operate in perpetuity to compensate any claims that have arisen or may arise from the testing program.").[5] The government likewise told this

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[4] To be sure, the government cites the $150 million payment (*ibid.*), but forgets to explain that only $45.75 million of that was set aside to fund the Tribunal's awards. The remainder was provided for other purposes, such as funding the Tribunal's operations. Pet. App. 123a-124a.

[5] *See also* U.S. C.A. Br., *People of Enewetak v. United States* (No. 88-1206 *et al.*) at 34, 38, 45 (advising Court of Appeals in 1988 that the $45.75 million payment was "cornerstone funding," and a "base investment" for a compensation scheme designed to provide "continuous funding" and a "comprehensive, long-term compensation plan" that was "structured to operate permanently").

Court in 1988 that it could provide just compensation either "through a judicial Tucker Act remedy * * * [or] some other equivalent remedy," *id.* at 12. It notably did not ague that it was free to provide *neither* and simply walk away from the Fifth Amendment because it had legislated itself right out of the Constitution's limits on governmental power.[6]

The central problem with all of the government's arguments is that nowhere in its brief in opposition or in any other brief filed in this case has it explained how, if the Fifth Amendment reserves rights in individuals and thereby withholds that very power from the federal government, the federal government has the power to legislate or contract those rights away without those individuals' consent. Contrary to the government's central supposition, whom it contracts with – whether the Marshall Islands, other federal territories like the District of Columbia or Guam, States, or even foreign nations – does not change the Constitution's answer. The Fifth Amendment withholds that power. If the Nation's foreign or domestic political ends are served

[6] The government's effort to portray petitioners as citizens of a foreign government challenging a foreign policy decision is both misguided and disappointing. The Compact requires the Marshall Islands to "consult" with the United States in conducting its foreign affairs, empowers the United States to act on the Marshall Islands' behalf in foreign relations, and vests the United States with supervisory control and veto power over defense and security matters. Pub. L. No. 108-188, pt. 3, §§ 123,, 311, 313, 315 117 Stat. 2797, 2820-2822 (2004). No fewer than 27 times, the U.S. Code expressly defines the Marshall Islands as a "State." Petitioners include United States citizens and individuals who have served or are serving as members of the United States Armed Forces, including in Iraq. *See* 10 U.S.C. § 503.

by taking individual property, the Constitution says the price for that public use is just compensation. If Congress can escape that command simply by passing a law or contracting with another governmental entity, as the Federal Circuit held, then the Fifth Amendment has become an empty promise not just for petitioners, but for any and all private property owners.

CONCLUSION

For the foregoing reasons and for those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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