UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CASE NO. 15-5100

ANTHONY PISZEL,

Plaintiff-Appellant,

vs.

UNITED STATES,

Defendant-Appellee

MOTION TO FILE INFORMAL BRIEF OF AMICUS CURIAE BY MICHAEL SAMMONS IN SUPPORT OF PLAINTIFF-APPELLANT AND THE NATION AND URGING REHEARING *EN BANC*

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CERTIFICATE OF INTEREST

Pursuant to FRAP, Rule 26.1 and Federal Circuit Rule 47.4, amicus curiae Michael Sammons certifies the following:

1. There are no real parties in interest associated with amicus Michael Sammons.
2. There are no parent corporations or any publicly held companies that have any financial interest in any asset owned by the amicus.
3. The amicus did not appear in the trial court.

I, Michael Sammons, as amicus, certify under penalty of perjury that the above is true and correct.

Michael Sammons 10/17/2016

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MOTION FOR LEAVE TO FILE AN INFORMAL BRIEF OF AMICUS CURIAE

Amicus Michael Sammons respectfully moves the Court, pursuant to FRAP, Rule 29(a), for leave to file the brief submitted herewith, as amicus curiae in support of Plaintiff-Appellant Anthony Piszel, as well as in support of the public's interest in vindicating Article III of the U.S. Constitution.

No party to this appeal has agreed to such filing. Amicus does not know whether any party will file a response to this motion.

Amicus Michael Sammons seeks to vindicate the authority of Article III to the Fifth Amendment to the U.S. Constitution which requires that only Article III judges preside over constitutional takings cases. Stern v. Marshall, 131 S. Ct. 2594 (2011).

The Supreme Court's decision in Stern v. Marshall, *supra*, a case deciding an identical Article III question, requires that this Court consider, via amicus, whether the Article I Court of Federal Claims, which denied relief to the Plaintiff-Appellant on his Fifth Amendment takings claim, had the "constitutional authority" under Article III to have presided over the case below.

This brief meets the requirements of FRAP, Rule 29. An amicus brief is appropriate at least "when the amicus has unique ... perspective that can help the court beyond the help that the lawyers for the parties are able to provide."

National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 617 (7th Cir 2000). As the Third Circuit has noted, "even when a party is very well represented, an amicus may provide important assistance to the court." Neonatology Associates, PA v. Cmsr.of Internal Revenue, 293 F.3d 128, 132 (3rd Cir 2002).

Amicus has the duty to bring to the Court's attention that the decision below is *void* for want of constitutional authority based upon the Supreme Court principles pronounced in Stern v. Marshall, *supra*.

Amicus also has the duty to remind the Court that the Supreme Court has stated that "[E]very federal appellate court has a ***special obligation*** to `satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it.'" Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (quoting Mitchell v. Maurer, 293 U.S. 237, 244 (1934)). Accord Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, (1998) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, *and then of the court from which the record comes* (emphasis added)."

The parties below did not waive the required Article III jurisdiction, not only because no one was aware any alternative Article III court was available,

but also because such constitutional jurisdiction cannot be waived "by accident." See Informal Brief at n.1, attached.

Accordingly, amicus presents "considerations of ... law or policy" that are not otherwise being presented by the parties. National Organization for Women, 223 F.3d at 617.

WHEREFORE, amicus respectfully moves that the Court grant leave to file the Informal Brief of Amicus Curiae submitted herewith.

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Certificate of Service

I certify that a true copy of this motion was delivered to all parties of record in this case.

Michael Sammons 10/17/2016

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ANTHONY PISZEL v. THE UNITED STATES

Case No. 15-5100

INFORMAL BRIEF OF AMICUS

Read the Guide for Pro Se Petitioners and Appellants before completing this form. Attach a copy of the final decision or order of the trial court. Answer the following questions as best you can. Your answers should refer to the decision or order you are appealing where possible. Use extra sheets if needed.

1. Have you ever had another case in this court? ☒ Yes ☐ No If yes, state the name and number of each case.

Fairholme Funds v. United States, No. 17-1015

2. Did the trial court incorrectly decide or fail to take into account any facts? ☐ Yes ☒ No If yes, what facts? (Refer to paragraph 7 of the Guide.)

3. Did the trial court apply the wrong law? ☐ Yes ☒ No If yes, what law should be applied?

4. Did the trial court fail to consider important grounds for relief? ☐ Yes ☒ No If yes, what grounds?

5. Are there other reasons why the trial court's decision was wrong? ☒ Yes ☐ No If yes, what reasons?

Stern v. Marshall, 131 S. Ct. 2594 (2011)

Reset Fields

6. What action do you want the court to take in this case?

Vacate and remand

7. Do you believe argument will aid the court? ☐ Yes ☒ No If yes, submit a separate notice to the court requesting oral argument and include the reasons why argument will aid the court. (Refer to paragraph 15 of the Guide.)

8. Do you intend to represent yourself? ☒ Yes ☐ No If you have not filed an Entry of Appearance, indicate your full name, address, telephone number and e-mail address.

Entry of Appearance attached

9. I certify that a copy of this brief and any attachments were sent to: all parties of record, the attorney for appellee, at the following address: email address on Notices of Appearance. (Address is found on the Entry of Appearance served on you by the attorney for the appellee. If you do not send a copy of this brief to the appellee, the court will not file the brief.)

10/17/2016

Date

Appellant's signature

In addition to mailing a copy to the attorney for the appellee, mail three copies of this informal brief and attachments to:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

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INFORMAL BRIEF OF AMICUS (#5 continued)

ISSUES RAISED BY AMICUS:

Whether the panel failed to execute its "special obligation" under Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) to confirm the jurisdiction of both this Court and the lower court *before* reaching the merits.

Whether a non-Article III "legislative" judge presiding over a constitutional takings case against the United States violates Article III and Stern v. Marshall, 131 S. Ct. 2594 (2011).

PREFACE

"[E]very federal appellate court has a **special obligation** to `satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' **even though the parties are prepared to concede it.**'" Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (quoting Mitchell v. Maurer, 293 U.S. 237, 244 (1934))(emphasis added).

Surprisingly, while this Court has frequently held that the Article I Court of Federal Claims has "statutory authority" under the Tucker Act to hear constitutional takings cases, this Court has *never* actually considered the separate question of whether that court has the "*constitutional authority*" under Article III to hear such cases.

"We conclude that, although the (Article I) Court had the statutory authority to enter judgment on Vickie's (common law) claim, it lacked the constitutional authority to do so." Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011).

FACTS

The case below clearly presented a Fifth Amendment constitutional takings claim against the United States.

THIS COURT HAS NEVER CONSIDERED WHETHER ARTICLE III AND STERN V. MARSHALL ALLOW A COURT OF FEDERAL CLAIMS ARTICLE I JUDGE TO DECIDE CONSTITUTIONAL TAKINGS CASES

This Court has repeatedly (and correctly) held that the Tucker Act, 28 USC §1491(a)(1), provides *exclusive* "statutory jurisdiction" for the Court of Federal Claims to hear takings cases against the United States exceeding $10,000. McGuire v. United States, 707 F.3d 1351, 1356 (Fed. Cir. 2013) ("jurisdiction proper (under) Tucker Act"); John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir. 2006)("Tucker Act provides jurisdiction ..."); Morris v. United States, 392 F.3d 1372, 1375 (Fed. Cir. 2004)("Tucker Act provides ... jurisdiction).

But "*statutory*" authority is not the same as "*constitutional*" authority. History is replete with examples of the Government enacting and enforcing

statutes later deemed unconstitutional, in whole or *as applied*. None of these Federal Circuit "Tucker Act" takings cases even mentions Article III.

This Court appears to have always assumed that jurisdiction was proper based *solely* upon its statutory source, the Tucker Act, without assessing the Act's constitutionality (at least "a*s applied"* to constitutional takings claims). Again, "statutory authority" and "constitutional authority" are two *separate* issues – and a court must have *both* to properly have jurisdiction over a particular case. **"We conclude that, although the (Article I) Court had the statutory authority to enter judgment on Vickie's (common law) claim, it lacked the constitutional authority to do so."** **Stern v. Marshall, 131 S. Ct. 2594, 2601 (2011).**

It bears repeating, this Court has *never* addressed – in fact the issue has never been raised in *any* court – whether the Tucker Act is itself constitutional *under Article III* of the U.S. Constitution "*as applied*" to *constitutional takings cases*. As will be discussed in detail below, allowing an Article I or "legislative" judge to decide constitutional takings cases cannot possibly be squared with Stern or its Article III predecessors.

HOW CONSTITUTIONAL TAKINGS CASES CAME TO THE COURT OF FEDERAL CLAIMS

Congress did not create the Court of Federal Claims as an Article III court, but explicitly created it as a "legislative court" pursuant to Article I.

Article III of the Constitution, which created an independent judiciary, is an essential prong of the separation of powers doctrine, "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." Stern v. Marshall, 131 S. Ct. at 2608:

> "The basic concept of separation of powers ... that flows from the scheme of a tripartite government adopted in the Constitution, the judicial Power of the United States ... can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto."

It is the protections of lifetime tenure and the Compensation Clause that safeguards the independence of Article III judges:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support ... In the general course of human nature, a power over a man's subsistence amounts to a power over his will." The Federalist No. 79, at 1 (Alexander Hamilton, 1788).

Neither protection applies to Article I or "legislative" judges. Thus the judges who serve on the Court of Federal Claims are exactly what Congress intended: Article I judges, unprotected by the guarantees of independence afforded Article III judges, and therefore susceptible to influence by the other branches.

This is not to say that Congress can never create Article I courts and judges. Such courts have been approved by the U.S. Supreme Court since 1828, when Justice Marshall first approved such legislative courts in the non-state territories. Subsequent approval was afforded Article I military courts, Article I Indian Territory courts, and most recently for District of Columbia Article I courts.

The rationale behind *all* these "legislative" courts created under Article I was simply that the cases heard "involve a constitutional grant of power that has been historically understood as giving (Congress) extraordinary control over the precise subject matter at issue." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 66 (1982).[1]

So the legal principle behind allowing Article I legislative courts is actually simple: a legislative or Article I court *only* decides cases and

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[1] The parties below have not "waived" the Article III issue. A similar argument was rejected by the Supreme Court in Northern Pipeline because Article III serves the separate structural interest in "safeguarding the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction [to non-Article III judges] for the purpose of emasculating constitutional courts," an interest which cannot be waived, at least not for true constitutional claims. Waiver cannot be found here for several additional reasons: (1) as in Northern Pipeline, Plaintiffs had no Article III alternative – there was no "considered Article I choice" as there is *no* Article III alternative court available due to the restrictions of the Tucker Act; (2) no "public rights exception" applies because the claim at issue was not created by either state or federal legislatures – but rather arises directly under the Constitution; (3) the right to an Article III court cannot be intelligently waived without knowing such right exists; and (4) the question whether Congress has exceeded its authority in designating a constitutional issue for non-Article III adjudication cannot be waived – see Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986).

controversies which the legislature itself has the authority to resolve. Rights created by the legislature are subject to control by the legislature, whether through itself or legislative courts or any other entity or agency it creates. As Justice Brennan explained in his plurality opinion in Northern Pipeline, "it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated – including the assignment to an adjunct of some functions historically performed by judges." 458 U.S. at 80.

But Congress did *not* create the Takings Clause of the U.S. Constitution, and Congress has no "extraordinary control" over it, Northern Pipeline, 458 U.S. at 66, and in fact, has absolutely *no* control over it, nor authority to suspend, regulate, or otherwise undermine its guarantees. "Congress has nothing to do with it." Stern, 131 S. Ct. at 2614. Congress can no more require such a constitutional case be heard in only an Article I legislative court, than it could decree that all *constitutional* claims shall be heard *only* by Congress itself or by some other legislative entity or agency it creates. The U.S. Constitution itself designates takings cases as solely a matter of judicial inquiry. "Congress has nothing to do with it." *id.*

The Supreme Court long ago rejected the idea that constitutional takings claims are the province of the legislature. As explained in Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893):

> "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."

The United States would argue that it is the waiver of sovereign immunity granted by Congress which justifies Article I courts. If Congress has the authority whether to allow a lawsuit to even be filed, it follows that it should be able to dictate the standards and terms for such hearing. With virtually all cases before the Court of Federal Claims this argument prevails; however, constitutional takings claims do *not* require a waiver of sovereign immunity. See Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 302-303 (1923)("just compensation is provided for by the Constitution and the right to it cannot be taken away by statute"). See also Jacobs v. United States, 290 U.S. 13 (1933):

> "That right was guaranteed by the Constitution. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary."

Thus no waiver of sovereign immunity is needed or relevant to a constitutional takings case, due to what has been termed the "self-executing" nature of the Takings Clause. United States v. Clarke, 445 U.S. 253, 257 (1980).

"These Fifth Amendment (takings) cases are tied to the language, purpose, and *self-executing* aspects of that constitutional provision, and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States." United States v. Testan, 424 U.S. 392, 400-401 (1976)(emphasis added). The Tucker Act has nothing to do with it.

That the Takings Clause trumps sovereign immunity can no longer be seriously contested in the wake of First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). In that case the United States, as amicus, argued that the "Constitution did not work a surrender of the immunity of the States, and the Constitution likewise did not withhold this essential attribute of sovereignty from the United States." The Supreme Court rejected that argument, noting that all its cases "make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." First English, 482 U.S. at 316 n.9.

On a side note, the United States might also argue that the Court of Federal Claims, though not an Article III court, may nevertheless decide constitutional takings cases as an "adjunct" of the Federal Circuit, a true

Article III court, and also perhaps because the Federal Circuit reviews the lower Article I court's decisions. But clearly the Court of Federal Claims is no more an "adjunct" of the Federal Circuit, than all district courts are adjuncts of the circuit courts of appeals.

But such an extended analysis in this case is unnecessary – this Court need look no further than the recent Supreme Court analysis in Stern. The Supreme Court in that case considered whether a bankruptcy judge, an Article I judge indistinguishable from an Article I Court of Federal Claims judge, could consider a tortious interference common law counterclaim.[2]

The Stern Court began by rejecting any notion that a right created by legislation was involved, noting that it is "not a matter that can be pursued only by the grace of the other branches," or "one that historically could have been determined exclusively by those branches," but instead was one that "does not depend on the will of congress; Congress has nothing to do with it." 131 S. Ct. at 2614. The Supreme Court went on to explain:

> "We deal here not with an agency but with a court, with substantive jurisdiction reaching any area of the *corpus juris*. This is not a situation in which Congress devised an "expert and inexpensive method" for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task. The "experts" in the federal system at resolving

[2] It should go without saying that a constitutional takings claim has *at least* the gravamen of a common law tort claim.

> common law claims such as [the one at issue] are the Article III courts, and it is with those courts that the claim must stay." 131 S. Ct. at 2615

And since the bankruptcy courts have power to enter final judgments, as does the Court of Federal Claims, the Supreme Court concluded they were not permissible adjuncts of higher Article III appeal courts. 131 S. Ct. at 2618-19.

And even in the dissent in Stern, every factor advanced in dissent is readily distinguishable and militates against the Court of Federal Claims considering constitutional takings cases. The key points of Justice Beyer's dissent, none of which applies to a constitutional takings case, were:

(1) "the nature of the claim" (constitutional takings claims are the very epitome of a claim requiring Article III protection);
(2) "appointment by Article III judges" (not applicable)
(3) "control exercised by Article III judges" (none);
(4) "the parties have consented" (not applicable - see *infra* n. 1);
(5) "nature and importance of legislative purpose" ("Congress has nothing to do with it.")

Relevant History of the Court of Federal Claims

The previous discussion demonstrates that none of the rationales that the Supreme Court has relied upon to justify Congress removing various legal claims from Article III judges apply to constitutional takings claims.

Prior to 1982, all takings claims against the United States were heard by Article III judges, because the old Court of Claims *was* an Article III court. But in

1982, Congress created the Court of Federal Claims, with Article I judges, and the Court of Appeals for the Federal Circuit, with Article III judges.

Indeed, Congress did not *intend* to deprive citizens of their constitutional right to have "cases and controversies in the constitutional sense" heard by Article III judges. A Senate report captures Congress' thoughts *at the time* about why it departed from the requirements of Article III:

> "The court will be established under Article I of the Constitution of the United States. Because 28 USC §2509 of existing law gives the trial judges of the Court of (Federal) Claims jurisdiction to hear congressional reference cases, which are ***not 'cases and controversies' in the constitutional sense***, and because the cases heard ... are in many ways essentially similar to the ***limited jurisdiction cases*** considered by the tax court, judges of the (Federal) Claims Court are made Article I judges rather than Article III judges." S. REP. No. 97-275, at 13 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 23. (emphasis added)

For whatever reason, Congress simply failed to realize that, contrary to its intent, "cases and controversies in the constitutional sense" *would* be heard in the new non-Article III Court of Federal Claims.

CONCLUSION

This Appeals Court has *never* considered whether non-Article III judges of the Court of Federal Claims deciding constitutional takings claims against the United States is consistent with Stern and its predecessors. This Article III constitutional issue of first impression has simply *never* been briefed, or even *raised*, previously in this Court (or *any* Court).

The Supreme Court has ***never*** held that the constitutional protections guaranteed under the Takings Clause of the Fifth Amendment deserve any less than the complete and independent protection of Article III judges.

As this very Court explained in zealously (and properly) defending the importance of the Article III Compensation Clause in protecting its own compensation:

> "This Court has an obligation of zealous preservation of the fundamentals of the nation. The question is not how much strain the system can tolerate; our obligation is to deter potential inroads at their inception, for history shows the vulnerability of democratic institutions. The judiciary, weakest of the three branches of government, must protect its independence and not place its will within the reach of political whim." Beer v. US, 696 F.3d 1174, 1186 (Fed. Cir. 2012)

The public deserves no less a zealous defense of its constitutional right to have constitutional takings cases heard by Article III judges as the Constitution itself guarantees. Constitutional takings cases *must* be decided by Article III judges, not by some branch of Congress or some legislative court or agency or any other entity Congress happens to create. "Congress has nothing to do with it."

Based upon *any* possible reading of the Supreme Court case of Stern, *including* the dissent, not *one* U.S. Supreme Court Justice would condone a "legislative" non-Article III judge deciding constitutional takings cases.

The Takings Clause of the Fifth Amendment to the U.S. Constitution deserves the defense of a truly independent Article III judiciary: the Supreme Court has *never* held otherwise, and would not do so now. *If the Supreme Court required Article III judges for a common law tort claim in Stern, how could it possibly require less than an Article III judge in this constitutional takings case?*

"The 'experts' in the federal system at resolving [inalienable rights, whether common law or constitutional] such as [the one at issue] are the Article III courts, and it is with those courts that the claim must stay." Stern v. Marshall ,131 S. Ct. at 2615.

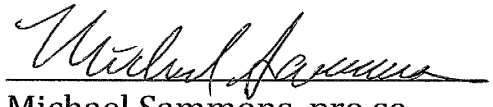
RELIEF SOUGHT

This Court only has appellate jurisdiction, not original jurisdiction. 28 USC §1295(a)(3). If a judgment is *void*, an appellate court acquires jurisdiction *only* to determine the invalidity of the order or judgment appealed. United States v. Corrick, 298 U.S. 435, 440 (1936) ("While the District Court lacked jurisdiction, we have jurisdiction on appeal, *not of the merits*, but merely for the purpose of correcting the error of the lower court in entertaining the suit.")(emphasis added); Allen v. Meyer, 755 F.3d 866, 867 (9th Cir 2014)(same); Gold v. Local 7 United Food & Commercial Workers Union, 159 F.3d 1307, 1310 (10th Cir.1998)(same); Griffin v. Lee, 621 F. 3d 380 (5th Cir 2010)(same).

Therefore, the only question this Court should address *en banc* is whether or not the Court of Federal Claims Article I trial judge, who unquestionably possessed "statutory authority," also possessed the necessary "*constitutional authority*" under Article III of the Constitution to preside over the case below. Under the recent Supreme Court decision in Stern v. Marshall, *supra*, the answer is simply, "No."

WHEREFORE, rehearing *en banc* is essential to fulfill this Court's "**special obligation**" under **Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)** to determine whether the Court of Federal Claims has the "constitutional authority" under **Stern v. Marshall, 131 S. Ct. 2594 (2011)** to have presided over this, or any other, constitutional takings claim.

Respectfully submitted,



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