UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re: Michael Sammons v. _____

No. _____

ENTRY OF APPEARANCE

(INSTRUCTIONS: Counsel should refer to Federal Circuit Rule 47.3. Counsel must immediately file an updated Entry of Appearance if representation changes, including a change in contact information. Electronic filers must also report a change in contact information to the PACER Service Center. Pro se petitioners and appellants should read paragraphs 1 and 18 of the Guide for Pro Se Petitioners and Appellants. File this form with the clerk within 14 days of the date of docketing and serve a copy of it on the principal attorney for each party.)

Please enter my appearance (select one):

☒ Pro Se ☐ As counsel for: Michael Sammons
Name of party

I am, or the party I represent is (select one):

☒ Petitioner ☐ Respondent ☐ Amicus curiae ☐ Cross Appellant

☐ Appellant ☐ Appellee ☐ Intervenor

As amicus curiae or intervenor, this party supports (select one):

☐ Petitioner or appellant ☐ Respondent or appellee

Name: Michael Sammons
Law Firm:
Address: 15706 Seekers St
City, State and Zip: San Antonio, TX 78255
Telephone: 210-858-6199
Fax #:
E-mail address: michaelsammons@yahoo.com

Statement to be completed by counsel only (select one):

☐ I am the principal attorney for this party in this case and will accept all service for the party. I agree to inform all other counsel in this case of the matters served upon me.

☐ I am replacing _____ as the principal attorney who will/will not remain on the case. [Government attorneys only.]

☐ I am not the principal attorney for this party in this case.

Date admitted to Federal Circuit bar (counsel only): _____

This is my first appearance before the United States Court of Appeals for the Federal Circuit (counsel only): ☐ Yes ☐ No

☐ A courtroom accessible to the handicapped is required if oral argument is scheduled.

Date 10/18/2016 Signature of pro se or counsel Michael Sammons

cc: _____

Reset Fields

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re: Michael Sammons **Case No. _____**

Arising from the following Federal Court of Claims cases:

Cacciapelle v. U.S., No. 13-466C
Fairholme Funds v. U.S., No. 13-465C

CERTIFICATE OF INTEREST

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

1. There are no real parties in interest associated with Michael Sammons.
2. There are no parent corporations or any publicly held companies that have any financial interest in any asset owned by Michael Sammons.

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

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re: Michael Sammons **Case No. _____**

Arising from the following Court of Federal Claims cases:

Cacciapelle v. U.S., No. 13-466C
Fairholme Funds v. U.S., No. 13-465C

Petition for Writ of Advisory Mandamus to the United States Court of Federal Claims

Michael Sammons, pro se, petitions this Honorable Court for a "writ of advisory mandamus" directed to the United States Court of Federal Claims. 28 U.S.C. §1651(a)("All Writs Act").

Advisory mandamus is appropriate for resolving issues that are "novel, of great public importance, and likely to recur." United States v. Horn, 29 F.3d 754, 769 (1st Cir. 1994). In re Atl. Pipe Corp., 304 F.3d 135, 140 (1st Cir 2002); see also In re Mass. Trial Court, 218 F.3d at 15 n.4 (1st Cir 2000); In re The Justices of the Supreme Court of P.R., 695 F.2d 17, 25 (1st Cir. 1982) (recognizing advisory mandamus as appropriate when "[t]he issue presented is novel in this circuit, it is important, and . . . may well recur before further appellate review is possible").

"When advisory mandamus is in play, a demonstration of irreparable harm (and "palpable error") is not necessary." In re Atl. Pipe Corp., *supra* at 139.

Advisory mandamus has its roots in the Supreme Court's acknowledgment that federal courts of appeal have "the power to review . . . basic, undecided question[s]." Schlagenhauf v. Holder, 379 U.S. 104, 110 (1964); see also Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv. L. Rev. 595, 596 (1972) (describing Schlagenhauf as holding that "in certain prescribed circumstances, the courts of appeals could properly decide 'novel and important' questions of law brought to them on petitions for mandamus").

ISSUE: **Whether the non-Article III "legislative" United States Court of Federal Claims presiding over constitutional takings cases violates Article III and Stern v. Marshall, 131 S. Ct. 2594 (2011).**

The Issue is "Novel"

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)(emphasis added).

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).**

The Issue is Important

"[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 ...'" Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986)(emphasis added).

Article III of the Fifth Amendment to the U.S. Constitution is an "important" issue. No less important is ensuring that the Court of Federal Claims is not illegally presiding over numerous fifth amendment takings cases, on literally a *daily* basis, without the "constitutional authority" to do so as required by Stern V. Marshall, 131 S. Ct. 2594 (2011).

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."

The Issue Will Certainly Recur Before Appellate Review is Possible

Petitioner Michael Sammons is an as yet unnamed class-member of several pending constitutional takings cases consolidated/coordinated before Judge Sweeney of the Court of Federal Claims.

The consolidated or "coordinated" cases are Cacciapelle v. U.S., No. 13-466C, American European Ins. Co. v. U.S., No. 13-496C, Dennis v. U.S., No. 13-542C, Fisher v. U.S., 13-608C, Shipmon v. U.S., No. 13-672C, Fairholme Funds v. U.S., No. 13-465C, Arrowood Indemnity Co. v. U.S., No. 13-698C. All involve the same facts and law, and all allege the identical August, 2012, constitutional takings claim against the United States.

Although Sammons was denied leave to intervene[1] into the consolidated/coordinated takings cases, which denial is on appeal in Fairholme Funds v. United States, No. 17-1015, Sammons, as an unnamed class member, intends to intervene on appeal to raise the Article III issue. However, the consolidated/coordinated cases have been going on for over three years – ***no answer has even been filed yet by the United States*** – so it is unlikely to reach this Court on appeal for 3-4 more years.

According to the court clerk, approximately 20-25 "constitutional takings" cases are filed before the Court of Federal Claims each year. Therefore, by the time Sammons can raise the Article III issue on appeal from these consolidated /coordinated cases, ***over 50 constitutional takings cases will have been illegally presided over by the Court of Federal Claims.***

[1] Judge Sweeney found that Sammons had standing to intervene but that his motion was untimely (even no answer had even been filed yet) and his interests were adequately represented by class counsel (all of which refuse, under threat of Rule 11 sanctions, to raise the Article III issue) – Sammons appealed (a procedural error – failure to include in his case caption all the coordinated cases - will probably cause that appeal to be dismissed). See lower court Order, filed September 30, 2016, attached to Informal Appellant's Brief in No. 17-1015. Judge Sweeney also made clear that if Sammons – or any attorney in any of the consolidated/coordinated cases – *ever* files any pleading raising the Article III challenge to her jurisdiction such attorney would face Rule 11 sanctions. Order, *supra*, at 1. To Judge Sweeney, who did not feel it necessary to even read Stern v. Marshall, the Article III issue was "frivolous," "vexatious," "ill-conceived," "specious," and "vacuous." However "ill-conceived" the Supreme Court's logic was in Stern v. Marshall, *supra*, which simply cannot be distinguished from these cases, it is the law of the land.

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).[2]

So the legal principle behind allowing Article I legislative courts is actually simple: a legislative or Article I court should *only* decide cases and controversies which the legislature itself has the authority to resolve. Rights created by the legislature are subject to control by the legislature, whether

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[2] The parties below have not "waived" the Article III issue. 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 in the absence of a true Article III alternative. In addition, the right to an Article III court cannot be "knowingly and intelligently" waived without knowing such right exists.

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, Congress 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 happens to create. 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.[3]

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 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.

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

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. 2);
(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 being the *only* available option for adjudicating 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 these constitutional takings cases?

"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.

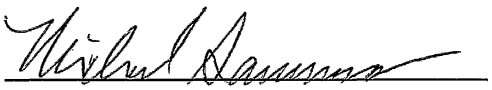
RELIEF SOUGHT

WHEREFORE, **a writ of advisory mandamus should issue** to prevent the Court of Federal Claims from continuing, on a *daily* basis, from illegally presiding over constitutional takings cases, pursuant to Stern v. Marshall, *supra*.

In the future, any such case brought pursuant to the Takings Clause of the Fifth Amendment should be transferred to a U.S. District Court with appropriate venue selected by the filing plaintiff(s). 28 U.S.C. § 1631 (if a court determines "that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed."). To the extent such a transfer would be in violation of the Tucker Act, such act

must be deemed unconstitutional "as applied" to such constitutional takings cases.

Respectfully submitted,



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Certificate of Service

A true copy of this Petition has been delivered to all parties of the related cases Cacciapelle v. U.S., No. 13-466C and Fairholme Funds v. U.S., No. 13-465C and the Clerk of the Court of Federal Claims.

Michael Sammons

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)**.

The Issue is Important

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