No. 09-09-499

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Between 1946 and 1958, the United States' nuclear testing program irradiated and partially vaporized the Bikini Atoll while the Atoll was under United States trusteeship and its people were U.S. dependents. In 1986, Congress created a Nuclear Claims Tribunal to adjudicate the Bikinians' Fifth Amendment Just Compensation Clause claims against the United States for the taking of their land, and correspondingly withdrew Tucker Act jurisdiction to adjudicate those claims. After the people of Bikini exhausted the Tribunal process, the Tribunal proved incapable of paying even 1% of the compensation owed.

The questions presented are:

1. Whether a statute withdrawing Tucker Act jurisdiction over Just Compensation Clause claims in favor of a newly created administrative process unambiguously expressed congressional intent to bar judicial review of those claims and subsequently arising claims after that administrative process failed to provide just compensation and became non-functional.

2. Whether Congress can legislate or contract itself out of its constitutional obligation to pay citizens and territorial dependents just compensation under the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, the People of Bikini, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 554 F.3d 996. The opinion of the Court of Federal Claims (App., *infra* 10a-107a) is reported at 77 Fed. Cl. 744.

JURISDICTION

The court of appeals entered its judgment on January 29, 2009. A petition for rehearing was denied on May 27, 2009. App., *infra*, 109a. On July 28, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 24, 2009, and, on September 14, 2009, the Chief Justice further extended the time for filing to and including October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 111a-132a.

STATEMENT OF THE CASE

1. Bikini Atoll is part of the Marshall Islands in the central Pacific Ocean. In 1947, the Islands became a Trust Territory administered by the United States. The United States extended to the Bikinians "all rights which are the normal constitutional rights

of citizens under the Constitution." C.A. App. A0974-975.

In 1946, the United States selected Bikini Atoll as a testing site for nuclear weapons and evacuated the Bikinians with promises to return them in a few months and to care for them in the interim. C.A. App. A0970. Between 1946 and 1958, the United States exploded twenty-three atomic and hydrogen bombs on Bikini Atoll, one of which vaporized three islands. App., *infra*, 14a-15a. During that same time, the displaced Bikinians endured "starvation conditions." *Id.* at 17a. The federal government returned the Bikinians to the Atoll in 1969, but evacuated them again nine years later after determining that radiation levels were far too high for human habitation and would remain so for decades to come. *Id.* at 19a. To this date, Bikini Atoll remains uninhabitable. C.A. App. A0973.

In 1981, the Bikinians that originally inhabited Bikini Atoll and their descendants – hundreds of whom are U.S. citizens – filed suit in the Court of Claims, seeking, *inter alia*, compensation under the Fifth Amendment for the taking of their land. The Claims Court held that the Bikinians could seek compensation under the Fifth Amendment and that their claims were timely. *See Juda v. United States*, 6 Cl. Ct. 441, 450-451, 458 (1984).

Two years later, the United States and the local government of the Marshall Islands, which was at that time subject to the United States' complete control and oversight as trust administrator, negotiated a Compact of Free Association that created out of the trusteeship the Republic of the Marshall Islands (RMI). App., *infra*, 112a. The Compact deemed the RMI self-governing in some

respects, but retained for the United States "full authority and responsibility for security and defense matters in or relating to the Marshall Islands." *Id.* at 116a. As part of that decision, Congress created through the "Section 177 Agreement" a Nuclear Claims Tribunal "to render final determination upon all claims past, present and future" of the Marshallese "related to the nuclear testing program." *Id.* at 126a; *see* 48 U.S.C. § 1921b(e)(2). The Agreement also provided $45.75 million (and any income produced from that fund) for the initial payment of compensation awards. App., *infra*, 123a. "[I]n conjunction with the establishment of [that] alternative tribunal to provide just compensation," *People of Enewetak v. United States*, 864 F.2d 134, 136 (1988), *cert. denied*, 491 U.S. 909 (1989), the Section 177 Agreement terminated all federal court litigation arising from the nuclear testing program in favor of claims proceedings before the Tribunal.

2. Following adoption of the Compact, the Court of Federal Claims dismissed the complaint on the ground that exhaustion of the Tribunal's proceedings was required first. *See Juda v. United States*, 13 Cl. Ct. 667 (1987). The court explained that the Agreement's "termination" of claims "applies to termination of proceedings, and not to extinguishment of the basic claims involved," *id.* at 686, noting that Congress had acknowledged its "obligation to compensate" and had simply "establishe[d] an alternative tribunal to provide such compensation," *id.* at 688. "As long as the obligations are recognized," the court explained, "Congress may direct fulfillment without the interposition of either a court or an administrative tribunal." *Id.* at 689. With respect to the Bikinians'

arguments that the Tribunal proceedings would not adequately protect their rights because it was inadequately funded by the United States, the court ruled that "[w]hether the compensation * * * is adequate is dependent upon the amount and type of compensation that ultimately is provided," and thus "[t]his alternative procedure for compensation cannot be challenged judicially until it has run its course." *Ibid.*

In a related appeal, the Federal Circuit agreed that judicial intervention was not appropriate "at this time" based on the "mere speculation that the alternative remedy may prove to be inadequate," and concluded that it need not address the adequacy of the Tribunal process "in advance of [its] exhaustion." *People of Enewetak*, 864 F.2d at 136, 137.

3. The Bikinians accordingly sought just compensation from the Tribunal. App., *infra*, 47a. In March 2001, the Tribunal ruled that the Bikinians were entitled to $563,315,500 in compensation, including $278,000,000 for the past and future loss of their land. *Id.* at 47a-50a. In 2002, the Tribunal paid 0.25% of the award, $1,491,809, explaining that "the Nuclear Claims Fund is insufficient to make more than a token payment." *Id.* at 50a; C.A. App. A0986. In February 2003, the Tribunal made a second payment of $787,370.40. C.A. App. A0987. The Tribunal announced in 2006 that it could neither adjudicate additional claims nor pay further compensation, and that it had only approximately $1 million remaining. App., *infra*, 4a; http://www.nuclearclaimstribunal.com/piawards.htm

4. In 2006, the Bikinians filed this action in the Court of Federal Claims seeking, as relevant here, compensation both for the taking of their land and

for the taking of their constitutional claims – their chose in action – in the Tribunal. The court dismissed the complaint, App., *infra,* 86a-92a, ruling that Congress had statutorily barred federal court jurisdiction over the taking of the Bikinians' claim before the Tribunal. The court further ruled that both claims were premature because Congress might eventually choose to provide funds, *id.* at 59a-60a, and that the claims for just compensation constituted political questions, *id.* at 92a-108a.

5. The court of appeals affirmed. App., *infra,* 1a-9a. The court held that Congress validly foreclosed all federal court jurisdiction over the Bikinians' just compensation claims regardless of the Tribunal's inability to provide just compensation. App., *infra,* 7a-8a. The court acknowledged that this Court, in *Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102 (1974), expressed "grave doubts" about whether congressional withdrawal of a Tucker Act remedy for a taking that was not compensated administratively "would be constitutional," but reasoned that it "d[id] not need to follow the careful course" outlined by Supreme Court precedent for finding a permanent withdrawal of Tucker Act jurisdiction because the withdrawal "does not present any statutory ambiguities." App., *infra,* 8a. The court concluded that, while "it [is] difficult to turn away from a case of constitutional dimension," the Bikinians' constitutional "wrong * * * is not within its power to adjudicate." *Id.* at 9a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit held that Congress can withdraw Tucker Act jurisdiction over Just Compensation Clause claims brought by United

States citizens and dependents and replace it with nothing – completely foreclosing the enforcement by any court of a self-executing constitutional right. The court of appeals reached that unprecedented holding by forsaking the framework for analysis of Tucker Act jurisdictional limitations prescribed again and again by this Court. More specifically, the court conflated the inquiry into whether Congress withdrew jurisdiction to adjudicate the claim in the first instance with whether Congress clearly and unambiguously forbade judicial recourse for the constitutional shortfall in compensation that arose after the Tribunal process collapsed and proved incapable of providing just compensation. Only explicit and unequivocal evidence should permit a court to attribute to Congress the deliberate intent to consign its citizens and dependents to a non-functioning administrative forum for vindication of their constitutional rights.

The Federal Circuit's decision that Congress can, in that manner, legislate itself out of its constitutional obligations under the Fifth Amendment's Just Compensation Clause also contravenes decisions from this Court and other courts of appeals repeatedly recognizing that the Clause is self-executing. The Fifth Amendment would be an empty protection indeed if Congress could avoid its command simply by passing a law declaring that it will pay whatever it chooses to pay and forbidding *all* courts to afford relief. Nor can Congress escape that constraint by framing its action as a "settlement," because that simply begs the foundational question of whether Congress has the constitutional power to settle unilaterally individual claims by United States citizens against the United

States government without the consent of those individuals. The Constitution forbids the Political Branches to help themselves right out of the Bill of Rights' commands.

I. The Federal Circuit's Decision Conflicts With This Court's And Other Circuits' Precedent Governing The Permanent Preclusion Of Jurisdiction Over Just Compensation Claims.

The Federal Circuit's decision cannot be reconciled with this Court's precedent repeatedly admonishing courts that only the most explicit and unequivocal congressional command could permanently and conclusively foreclose *any* judicial forum for a Just Compensation Clause claim, even after the administrative forum chosen by Congress has become non-functional.

1. Because of the serious constitutional concerns raised by a permanent withdrawal of jurisdiction for Just Compensation Clause claims, this Court has repeatedly held that only "an unambiguous intention to withdraw the Tucker Act remedy" will suffice, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984), and that congressional intent to do so must be "clear and unmistakable," *Preseault v. ICC*, 494 U.S. 1, 14 (1990).

In determining whether that high threshold has been met, this Court has instructed courts to analyze the withdrawal of jurisdiction in two steps. First, a court must consider whether there has been a statutory withdrawal of the Tucker Act as the ordinary, default remedy for an alleged taking. *Monsanto*, 467 U.S. at 1016. The court of appeals was correct that the statutory language in Section

177 on which it relied, App., *infra*, 131a, channeled into the Tribunal the Bikinians' claim that their land was taken without just compensation and withdrew Tucker Act jurisdiction to adjudicate that claim in the first instance.

But the court of appeals failed to address the critical – and analytically distinct – second inquiry, which is whether the language initially withdrawing jurisdiction also permanently foreclosed Tucker Act jurisdiction over any constitutional claims arising from deficiencies in that alternative process itself. Those are very different claims. And even when the Tucker Act has been expressly displaced as the initial forum for obtaining compensation, this Court has routinely held that Tucker Act jurisdiction remains available for the limited purpose of redressing any constitutional shortfall arising after the alternative remedial mechanism has been exhausted and has come up short.

What this Court has repeatedly held – and what the court of appeals here fundamentally disregarded – is that the same statutory language that is sufficient to withdraw the initial Tucker Act remedy is *not* alone sufficient to withdraw Tucker Act jurisdiction over a claim that the alternative forum itself failed to provide constitutionally adequate compensation. Such language "does not withdraw the possibility of a Tucker Act remedy, but merely requires that a claimant first seek satisfaction through the [alternative] statutory procedure." *Monsanto*, 467 U.S. at 1018.

Instead, a much more exacting statutory test for a permanent withdrawal of jurisdiction is necessary because a total prohibition on federal jurisdiction to review even a constitutional shortfall claim raises

"clearly grave" constitutional questions concerning Congress's ability to legislate itself out of the Fifth Amendment's Just Compensation Clause, *Blanchette*, 419 U.S. at 134, that the initial substitution of an alternative forum does not, *see Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

In *Blanchette*, for example, the Court considered whether Tucker Act jurisdiction was available for Just Compensation Clause claims arising from the Rail Act, which established a specialized scheme for judicial review of railroad claims, expressly directed that "[t]here shall be no review of the decision of the special court," and imposed a specific cap on payments by the United States. 419 U.S. at 109-110, 119 & nn.5 & 6. This Court held that the "Tucker Act remedy is not barred" and remains "available to provide just compensation" for any "constitutional shortfall" in remediation, *id.* at 136, 148. *See also, e.g.*, *Kirby Forest Industries v. United States*, 467 U.S. 16, 18 (1984) (where a specially designated commission's award fell short of the Constitution's measure of just compensation, that shortfall gave rise to a Just Compensation Clause claim in federal court); *Monsanto*, 467 U.S. at 1018 (Tucker Act jurisdiction remains to remedy "shortfall" in compensation from administrative scheme).

Thus, once exhaustion of the administrative remedy has taken place, as it has here, and once the constitutional insufficiency of that process is exposed, as it has been here, then only the clearest and most unequivocal evidence of a deliberate congressional determination "to *prevent* such [constitutional] recourse" will suffice. *Blanchette*, 419 U.S. at 126 (emphasis added). This Court has

consistently viewed seemingly categorical statutory language as preserving jurisdiction over such second-stage review. Even under statutes providing that "there shall be no review," *Blanchette*, 419 U.S. at 110, or "[n]otwithstanding any other provision of law, no court shall have jurisdiction," *INS v. St. Cyr*, 533 U.S. 290, 299-300 (2001), or individuals "shall forfeit the right to compensation," and "no official or court of the United States shall have power or jurisdiction to review" the administrative proceedings, *Monsanto*, 467 U.S. at 994 n.4, 1018, Tucker Act jurisdiction has always remained to remedy any constitutional shortfalls in compensation. *See also Dames & Moore v. Regan*, 453 U.S. 654, 666, 689 (1981) (Presidential order that claims "shall have no legal effect in any action now pending in any court" does not foreclose Tucker Act remedy for deficiency in tribunal's compensation).

That is precisely the relief the Bikinians seek. They seek not to avoid the Tribunal process – they dutifully exhausted it. They simply seek an adjudication of their claims that the Tribunal's payment of less than one-half of one percent of the compensation owed is not just compensation within the meaning of the Fifth Amendment. That is not a question on which Congress's chosen administrative forum can have the last word or even the job with which the Tribunal was tasked. "Just compensation is provided for by the Constitution and * * * [its] ascertainment is a judicial function." *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299, 304 (1923).

2. The court of appeals' conclusion that the same statutory text that channeled claims into the

Tribunal in the first instance also withdrew jurisdiction over the constitutional shortfall claim, App., *infra*, 8a, thus asked the wrong question. The question before the court under *Blanchette* was no longer whether the Tucker Act remedy had been displaced, but whether Congress affirmatively intended to "prevent" constitutionally mandated recourse if the Tribunal process itself failed. 419 U.S. at 126. Under this Court's precedent, the answer to that question is no.

First, the statutory text does not express any "clear and unmistakable congressional intent" to withdraw Tucker Act jurisdiction over constitutional claims arising out of the Tribunal process itself. *Preseault*, 494 U.S. at 14. The withdrawal of jurisdiction in Article XII of the Compact Act is limited to claims "based upon, arising out of, or in any way related to the nuclear testing program." The provision says nothing about constitutional claims that independently arise through the operation – or collapse – of the Tribunal process.

The withdrawal of jurisdiction moreover is expressly limited to "claims described in Article X and XI." App., *infra*, 130a. But "disputes arising from distributions" of adjudicated awards or the failure of the Tribunal to make the required distribution are governed by a different Article (Article IV). *Id.* at 125a-128a.

Furthermore, the Agreement's withdrawal of jurisdiction speaks only to "claims" that were "terminated" by the Agreement's creation of the Tribunal. App., *infra*, 130a. As a matter of ordinary usage, only existing claims can be "terminated." Thus, the plain text of the Compact Act indicates that Article XII is intended to ensure that all

existing claims pending in court at the time of the Agreement were "terminated" and channeled to the Tribunal as an initial matter. That language does not naturally describe claims arising from the deficiency of the Tribunal process itself.

Second, even if the language of the withdrawal provision could be stretched to cover constitutional claims arising from deficiencies in the Tribunal process itself, that interpretation "would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,'" this Court's precedent mandates that the alternative construction be adopted. *St. Cyr*, 533 U.S. at 299-300; *see Blanchette*, 419 U.S. at 134 (refusing to construe statute to permanently repeal Tucker Act because of "grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available" to remedy constitutional shortfalls).

Similarly, the "cardinal rule * * * that repeals by implication are disfavored," *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (citations omitted), and courts' corresponding duty to "regard each [statute] as effective" where they "are capable of co-existence," *J.E.M. Ag Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 143-144 (2001) (citations omitted), required the court of appeals to hold that Tucker Act jurisdiction was available for constitutional claims arising out of the Tribunal process itself. That is, in fact, how the D.C. Circuit in *Antolok v. United States*, 873 F.2d 369, 378 (D.C. Cir. 1989), the Federal Circuit in *Enewetak*, 864 F.2d at 136, and the trial court in *Juda*, 13 Cl. Ct. at 689, all read the exact same language, belying any suggestion that Congress expressed "clear and

unmistakable intent" to permanently withdraw Tucker Act jurisdiction.

Third, under this Court's precedent and that of the Third and Eighth Circuits, only specific discussion of the Tucker Act's availability and affirmative evidence that Congress fully intended "to prevent such [constitutional] recourse" will completely foreclose Tucker Act relief. *Blanchette*, 419 U.S. at 126; *see also, e.g.*, *Glosemeyer v. Missouri-Kansas-Texas R.R.*, 879 F.2d 316, 325 (8th Cir. 1989) (no withdrawal of jurisdiction where statutory text does not mention Tucker Act); *Neely v. United States*, 546 F.2d 1059, 1064 (3d Cir. 1976) (action under Tucker Act not repealed when Congress did not expressly address the issue).

Unlike the rule in the Third and Eighth Circuits, however, the Federal Circuit's decision disregarded that neither the Compact nor Section 177 "mentions the Tucker Act," *Preseault*, 494 U.S. at 12, discusses "the interaction between [those statutes] and the Tucker Act," *Monsanto*, 467 U.S. at 1017, or otherwise "deal[s] with the [Tucker Act] remedy," *Blanchette*, 419 U.S. at 136. Indeed, here, as in *Blanchette*, Congress's discussion of the interaction of the Compact Act with other laws, *see* 48 U.S.C. § 1905(h)(4) (Federal Tort Claims Act); *id.* § 1904(f)(3) (Magnuson Fishery Conservation and Management Act and Fishermen's Protective Act applicable to Marshall Islands); *id.* § 1905(f) (Foreign Agents Registration Act); *id.* § 1905(l) (National Historic Preservation Act), makes its silence with respect to the Tucker Act all the more telling and "plainly implies that Congress gave no thought to consideration of withdrawal of the Tucker Act

remedy" if the Tribunal process failed, *Blanchette*, 419 U.S. at 129.

Fourth, also like *Blanchette, Monsanto*, and *Preseault*, nothing in the legislative history of Section 177 evidences Congress's intent affirmatively to prevent a Tucker Act claim as a constitutional backstop to the Tribunal process. To the contrary, what little consideration the question received supports continued Tucker Act jurisdiction. *See* 131 Cong. Rec. H11787, 11838 (Dec. 11, 1985) (Rep. Seiberling) ("But a legacy of the unique relationship of the United States to the Marshall Islanders * * * will be the pending constitutional questions with respect to their rights, questions which cannot be foreclosed from court review.").

Importantly, the Compact Act and the Agreement were enacted after this Court's decisions in *Blanchette* and *Monsanto* established the high level of specificity needed to withdraw Tucker Act jurisdiction completely. Thus, the absence of textual or historical support for foreclosing all constitutional review further underscores that Congress did not intend the constitutionally suspect result imposed by the Federal Circuit here. *See Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993) (presuming congressional awareness of relevant Supreme Court decisions when drafting laws).

Fifth, with respect to the government's provision of a lump sum of money under the Compact and Section 177, the Federal Circuit got the analysis exactly backwards. Rather than support the termination of Tucker Act jurisdiction, as the court of appeals reasoned, App., *infra*, 7a-8a, such appropriations support continued Tucker Act review because Congress presumably was "so convinced that

the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims," *Blanchette*, 419 U.S. at 128; *see Preseault*, 494 U.S. at 15.

Finally, the Federal Circuit's severe truncation of this Court's rigorous standard for a permanent withdrawal of jurisdiction will have widespread and substantial implications beyond this case, given the Court of Federal Claims' specialized role in adjudicating Tucker Act claims and the Federal Circuit's corresponding role in reviewing those decisions. *See* 28 U.S.C. § 1295(a)(3) (Federal Circuit exclusive jurisdiction over appeals from Court of Federal Claims); 28 U.S.C. § 1491(a)(1) (Court of Federal Claims has exclusive jurisdiction under the Tucker Act over all Just Compensation Clause claims exceeding $10,000). Thus, this Court's review is necessary to bring the Federal Circuit's Tucker Act jurisprudence in line with this Court's precedent and the law of other circuits.

II. The Federal Circuit's Decision Conflicts With Decisions Of This Court And Other Circuits Holding That The Just Compensation Clause Is Self-Executing.

Putting aside that the Compact Act does not evidence the requisite "clear and unmistakable intent" to prevent Tucker Act jurisdiction over claims arising from the Tribunal's functional collapse, the court of appeals' constitutional holding equally warrants review. At bottom, the court held that Congress could legislate itself out of the Just Compensation Clause. *See, e.g.*, App., *infra*, 8a (Section 177 placed claims "outside the reach of

judicial remedy"). The practical and legal consequences of that holding are substantial and extend far beyond this case, particularly given the Federal Circuit's unique role in reviewing claims for just compensation. Compounding the need for this Court's review are the conflicts that decision creates with this Court's precedent and the rulings of its sister Circuits, all of which have faithfully enforced the Fifth Amendment's Just Compensation clause as self-executing.

A. The Federal Circuit's Ruling Contravenes This Court's Precedent.

This Court has repeatedly held that the Fifth Amendment's assurance of just compensation is uniquely "self-executing." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987); *see also, e.g.*, *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 654 (1981) (Just Compensation Clause has a "self-executing character"); *United States v. Clarke*, 445 U.S. 253, 257 (1980) (same). Because "the compensation remedy is required by the Constitution," *First English*, 482 U.S. at 317, Congress's "[s]tatutory recognition" "[is] not necessary," *Jacobs v. United States*, 290 U.S. 13, 16 (1933), nor is a congressional "promise to pay," *Seaboard*, 261 U.S. at 304.

The Federal Circuit's ruling that Congress could legislate itself out of its obligation to provide just compensation to U.S. citizens and dependents simply by forcing their claims into an administrative forum and then refusing to fund that forum's awards cannot be reconciled with that precedent. Indeed, the Federal Circuit quite straightforwardly held that the government escaped liability because it broke its

"promise to pay," *Seaboard*, 261 U.S. at 304. *Compare* App., *infra*, 114a (Section 177 of Compact Act promised to provide "just and adequate" compensation"); *id.* at 124a (promising that "[a]ll monetary awards made by the Claims Tribunal pursuant to Article IV of this Agreement" would be "paid in full"); *id.* at 118a (promising to "provide, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program"), *with* App., *infra*, 4a (less than 0.5% of the total award paid). The contrast between the positions the government took in 1988 and in 2008 underscores the point. *Compare* U.S. C.A. Br., *People of Bikini v. United States*, Nos. 88-1206 et al. (Fed. Cir.) (June 1988), at 33 ("Appellant's constitutional challenge proceeds from the presumption that an international Compact, to which two governments have committed themselves and their resources, will not provide the just remedy it promises. That presumption is wholly incorrect."); *id.* at 35 (noting the government's "continuing moral and humanitarian obligation on the part of the United States to compensate any victims—past, present or future—of the nuclear testing program"); *id.* at 34, 38 (same brief, stating that Section 177 Agreement provides "continuous funding" and a "comprehensive, long-term compensation plan"), *with* U.S. C.A. Br., *People of Bikini v. United States*, No. 2007-5175 (Fed. Cir.) (Apr. 4, 2008) at 25 (no constitutional issue posed, because Section 177 Agreement offers "monetary compensation" greater than "zero").

Because the Bikinians' suit "rest[s] upon the Fifth Amendment" itself, *Jacobs*, 290 U.S. at 16, "the right to it cannot be taken away by statute,"

Seaboard, 261 U.S. at 304. *See First English*, 482 U.S. at 316 ("[This] Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution."); *Baltimore & Ohio R.R. Co. v. United States*, 298 U.S. 349, 364-365 (1936) (foreclosing altogether "an investigation by judicial machinery * * * [is] in violation of the Constitution of the United States"). Thus, contrary to the court of appeals' assumption, the Just Compensation Clause is not subject to the type of complete congressional negation approved by the Federal Circuit here. That is why, long before the Tucker Act's passage, this Court recognized the private enforceability of the Just Compensation Clause. In *United States v. Lee*, 106 U.S. 196 (1882), for example, this Court held that courts must "give remedy to the citizen whose property has been * * * devoted to public use without just compensation," since "[i]n such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name," *id.* at 218-219. *See also id.* at 220 (Fifth Amendment rights "were intended to be enforced by the judiciary").

Similarly, in *United States v. Great Falls Manufacturing Company*, 112 U.S. 645 (1884), this Court held that, 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, *id.* at 656. *See also, e.g., Kohl v. United States*, 91 U.S. 367, 376 (1875); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C.D.

Pa. 1795) ("[T]he legislature * * * cannot constitutionally determine upon the amount of the compensation, or value of the land.").

Finally, the Federal Circuit attempted to qualify its holding by characterizing Congress's action as a "settlement." App., *infra*, 8a-9a. But there is no dispute that the government never reached a settlement with the individual claimants who are petitioners here. The whole settlement rationale propounded by the court of appeals thus begs the question presented: whether Congress has the constitutional power to release itself, without any judicial review, from claims by U.S. citizens against the U.S. government simply by adopting laws, whether statutes or compacts with local governments under the United States' dominion and control.

For similar reasons, the Federal Circuit's invocation (App., *infra,* 9a) of *United States v. Pink*, 315 U.S. 203 (1942), and the political question doctrine is misguided. *Pink* dealt with the President's resolution of 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 *U.S. Citizens and dependents* against the *United States government. See Medellin v. Texas*, 128 S. Ct. 1346, 1351-1352 (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."); *Dames & Moore*, 453 U.S. at 691 (Powell, J., concurring & dissenting in part) ("The 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."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

B. The Federal Circuit's Decision Conflicts With The Rulings Of Other Circuits.

Until now, every court of appeals to address the question – nine in total – has held that the Just Compensation Clause is "self-executing" and thus cannot be defeated by congressional design. For example, in sharp contrast to the Federal Circuit's decision here, the Second Circuit has made clear that "the exercise of Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment," and thus that, "while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to * * * take private property without just compensation." *Battaglia v. General Motors*, 169 F.2d 254, 257 (2d Cir. 1948).

Likewise, the Seventh Circuit has ruled that "[t]he just compensation requirement of the Takings Clause places takings in a class by themselves because, unlike other constitutional deprivations, the Takings Clause provides both the cause of action and the remedy." *Wisconsin Central Ltd. v. Public Serv. Comm'n of Wisc.*, 95 F.3d 1359, 1368 (7th Cir. 1996). *See also McKesson v. Islamic Republic of Iran*, 539 F.3d 485, 490 (D.C. Cir. 2008) ("cause of action" may be "infer[red]" from Just Compensation Clause); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 953-954 (9th Cir. 2008) (Just Compensation Clause is "self-executing"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 521 n.7 (6th Cir. 2004) (States have no power to deny a just compensation remedy because Just

Compensation Clause is "self-executing"); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1278 (11th Cir. 1998) (States must provide "means of redress" for deprivations of property because Just Compensation Clause is "self-executing"); *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997) (distinguishing suit brought under Just Compensation Clause, a "situation in which the Constitution itself authorizes suit against the federal government," from other suits against United States where jurisdiction exists "only if Congress has consented to suit") (citations omitted); *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (8th Cir. 1981) (Constitution "allow[s] suit for just compensation directly under the Fifth Amendment"); *Duarte v. United States*, 532 F.2d 850, 852 n.3 (2d Cir. 1976) (Due Process Clause not "self-executing," unlike the Just Compensation Clause); *Board of Comm'rs v. United States*, 100 F.2d 929, 934 (10th Cir. 1939) ("just compensation being provided for by the Constitution, such right cannot be taken away by statute, the ascertainment being a judicial function," and hence landowners have action against State for unlawful appropriation of funds).

The Federal Circuit's holding that Congress can take itself out of the Just Compensation Clause conflicts with those other Circuits' faithful enforcement of that Clause's self-executing character. Given the Federal Circuit's special role in adjudicating Just Compensation Clause claims, this Court's intervention is critical to bring uniformity to the law and to ensure that the vindication of constitutional rights does not vary based on jurisdictional geography.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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