

No. 24- 153

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IN THE  
**Supreme Court of the United States**

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JAMES W. TINDALL,

*Petitioner,*

*v.*

UNITED STATES,

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**

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JAMES W. TINDALL,  
JD, LL.M (TAX), CPA  
*Petitioner Pro Se*  
4674 Jefferson Township Place  
Marietta, GA 30066  
(770) 337-2746  
theslayor@yahoo.com

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116922



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

- 1.) Whether the lower courts' orders allowing Respondent to take, possess and use Petitioner's property for the public good without paying compensation for that use are manifestly unjust and are far departures from the accepted and usual course of judicial proceedings, when the lower courts ignored the clear grant of subject matter jurisdiction found in 28 U.S.C. §1491(a)(1) that includes claims based on the U.S. Constitution and a contract with the United States, when they ignored this Court's longstanding guidance on considering a motion to dismiss and when they improperly shifted the burden of proof for Respondent's defenses to Petitioner?
  
- 2.) Whether the Due Process and Takings Clause is self-executing (i.e., a cause of action arising directly under the U.S. Constitution) or requires a statute to justify its enforcement, when Respondent exercised its power of eminent domain and took possession of Petitioner's property and the lower courts concluded that they lacked subject matter jurisdiction over Petitioner's claim for compensation, despite Petitioner clearly raising the Due Process and Takings Clause issues in Petitioner's complaint? Although the Supreme Court of the United States ("this Court") specifically identified this issue as not being addressed in *Devillier, et al. v. Texas*, 601 U.S. 293 (2024), the current dispute presents that issue with a very straightforward and clean set of facts, where Petitioner's sole avenue for pursuing his compensation claims against Respondent is in federal court.

- 3.) Whether the lower courts properly concluded that a vague and undefined 'national security' exception to the Takings Clause exists (despite the clear historical context of the Takings Clause being a direct response to Britain's compelled use of private property owned by the colonials) sufficient to override Respondent's constitutional obligation to pay just compensation for Respondent's multi-year possession, control and use of Petitioner's property to sanction Russia for its invasion of Ukraine (i.e., forcing Petitioner to bear that public burden which should be borne by the public as a whole)?
- 4.) Whether the lower courts properly expanded the narrow 'illegal possession' exception to the Takings Clause to include Respondent's illegal failure to pay for the taking and use of Petitioner's property, when that expansion completely negates the Takings Clause, because every violation of the Takings Clause involves the failure to pay just compensation?
- 5.) Whether the lower courts properly expanded the scope of the 'mere silence' defense to Petitioner's breach of contract claim to include Respondent's overt acts confirming Respondent's acceptance despite the longstanding judicial precedents that overt acts indicate the acceptance of an offer, when Petitioner's offer required acceptance by conduct, Petitioner's offer was accepted by Respondent's conduct and Respondent failed to remain 'merely silent' in the face of Petitioner's offer?

## **PARTIES TO THE PROCEEDING**

Petitioner James W. Tindall was the Plaintiff in the proceeding before the United States Court of Federal Claims (“the lower court) and the Appellant before the United States Court of Appeals for the Federal Circuit (“Court of Appeals” or “appellate court”).

Respondent United States was the Defendant in the proceeding before the United States Court of Federal Claims and the Appellee before the United States Court of Appeals for the Federal Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

James W. Tindall petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

### OPINIONS BELOW

The Court of Appeals' opinion is reported as a non-precedential disposition by the United States Court of Appeals for the Federal Circuit at Case # 2024-1143 and is reproduced at App. 1–8.

The United States Court of Federal Claims' order dismissing Petitioner's complaint for failure to state a claim and for lack of subject matter jurisdiction is reproduced at App. 39–52.

The Court of Appeals' denial of Petitioner's motion for panel rehearing and rehearing *en banc* is reproduced at App. 72–73.

### JURISDICTION

The Court of Appeals entered judgment on March 6, 2024. (App. 1–8).

The Court of Appeals denied a timely petition for panel rehearing and rehearing *en banc* on May 14, 2024. (App. 72–73).

Therefore, this Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTES INVOLVED

This petition concerns 28 U.S.C. §1491(a)(1), which specifically states that:

*“[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”* [highlights added]

Copies of the statutory provision are included in the Appendix.

1. 28 U.S.C. §1491(a)(1). (App. 75).

## INTRODUCTION AND STATEMENT OF THE CASE

The over-arching issue in this dispute is straightforward:

**Should Respondent be allowed to possess and use Petitioner’s property for several years without paying Petitioner for the use of Petitioner’s property?**

The obvious answer to this question is: Of course, Respondent should pay for its multi-year possession and use of Petitioner’s property.

Unfortunately, the lower courts never addressed that over-arching issue, because they incorrectly concluded that they lacked subject matter jurisdiction to review Petitioner's constitutional claims and breach of contract claim, despite the clear language of 28 U.S.C. §1491(a)(1).

Thus, the actual issue on appeal is:

**Should Petitioner be denied judicial review for Respondent's continuing and ongoing multi-year possession and use of Petitioner's property when Respondent refuses to pay Petitioner for the use of Petitioner's property?**

Or does the lower court have subject matter jurisdiction to review Respondent's multi-year possession, control and use of Petitioner's property under 28 U.S.C. §1491(a)(1) for Respondent's breach of contract and willful violation of the Due Process and Takings Clause of the 5<sup>th</sup> Amendment to the U.S. Constitution?

Quite simply, this dispute relates to Respondent's taking and continued possession of Petitioner's property (that Respondent has used to wage economic war on Russia for its invasion of Ukraine) and Respondent's utter refusal to pay Petitioner for Respondent's use of Petitioner's property to achieve that public good. (App. 12 and 63-64).

Prior to President Biden signing the Executive Order authorizing the taking of Petitioner's property, Petitioner submitted an offer letter to Respondent offering Respondent the use of Petitioner's property, identifying the price to be paid by Respondent for the use



of Petitioner's property and specifically identifying the method of acceptance – Petitioner's offer could be accepted by Respondent's act of taking Petitioner's property. (App. 18, 53–54 and 65–67).

On May 25, 2022, Respondent took possession of Petitioner's property, transferred Petitioner's property from Petitioner's brokerage account to an account controlled by Respondent and has used Petitioner's property ever since to wage war against Russia without paying Petitioner for the use of Petitioner's property. (App. 13, 20–21, 54 and 67).

Petitioner filed suit to force Respondent to pay Petitioner for Respondent's possession and use of Petitioner's property and alleged two (2) alternative legal theories for compensation. The first legal theory is for Respondent's breach of the contract between the parties. The second legal theory is for Respondent's violations of Petitioner's constitutional rights under the Due Process and Takings Clause of the U.S. Constitution. (App. 63–64).

As affirmed by the appellate court, the Court of Federal Claims granted Respondent's Motion to Dismiss for the following reasons:

- 1.) Petitioner failed to state a claim under 28 U.S.C. §1491(a)(1) (App. 4);
- 2.) The Due Process Clause is not 'money-mandating' and requires a statutory grant of jurisdiction before Due Process violations are reviewable (App. 4–5);

- 3.) Respondent was 'merely silent' in the face of Petitioner's offer (App. 5-6);
- 4.) Petitioner failed to allege that Respondent's possession was 'legal' (App. 6-7);
- 5.) Petitioner failed to identify how this dispute is factually different from *Paradissiotis v. U.S.*, 304 F.3d 1271 (Fed. Cir. 2002) ("*Paradissiotis*") (App. 7); and
- 6.) There is a 'national security' defense to claims for compensation pursuant to the Takings Clause (App. 7).

In order to reach those conclusions, however, the lower courts made the following fundamental errors:

- (i) The lower courts ignored the clear language of 28 U.S.C. §1491(a)(1) (App. 15);
- (ii) The lower courts ignored the clear language of the 5<sup>th</sup> Amendment (App. 22);
- (iii) The lower courts ignored this Court's precedents for considering a Rule 12(b)(6) motion to dismiss (i.e., all factual discrepancies must be resolved in the non-moving party's favor);
- (iv) The lower courts shifted the burden of proof on Respondent's alleged defenses to Petitioner;

- (v) The lower courts created a new ‘national security’ exception to the Takings Clause that ignores the historical context of the 5<sup>th</sup> Amendment and the guiding principle thereunder recently reaffirmed by this court in *Tyler v. Hennepin*, 598 U.S. 631 (2023) (citing to *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960)(where this court clearly stated that “*The Takings Clause “was designed to bar the Government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole”*”) (App. 31–33);
- (vi) The lower courts expanded the ‘illegal possession’ defense to the Takings Clause such that the new, broadened exception now entirely negates that constitutional amendment (App. 23–31);
- (vii) The lower courts willfully ignored Respondent’s overt acts that conflicted with Respondent’s allegations that it remained ‘merely silent’ in the face of Petitioner’s offer (App. 20–21); and
- (viii) The lower courts willfully ignored Petitioner’s analysis of the fundamental factual differences between the current dispute and *Paradissiotis v. U.S.*, 304 F.3d 1271 (Fed. Cir. 2002) such that the incorrect legal conclusion in that case should not even be applied to the current dispute (App. 37–38).

## **Background Facts**

On April 26, 2022, Petitioner received an email from his brokerage firm alerting him to Respondent's desire to use Petitioner's property as part of Respondent's economic retaliation against Russia for its invasion of Ukraine. (App. 64–65).

By letter, dated April 27, 2022, and addressed to President Biden, Mr. Klain, Mrs. Yellen and Mr. Garland, Petitioner identified the constitutional violations should Respondent pursue its strategy of taking Petitioner's property without paying compensation. At the same time, Petitioner submitted an offer to Respondent for the use of Petitioner's property and identified two payment alternatives. In that offer letter, Petitioner also notified Respondent of the value of Petitioner's constitutional rights. (App. 65–66).

At no point in that offer did Petitioner identify “remaining silent” as a method of accepting Petitioner's offer.

### **Respondent Takes Possession of Petitioner's Property**

On May 25, 2022, pursuant to an Executive Order signed by President Biden, Respondent took possession of Petitioner's property and has possessed, controlled and used Petitioner's property continuously since that date, while denying the same to Petitioner. (App. 67–68).

On May 25, 2022, Petitioner received an email from his brokerage firm notifying him that Respondent had

taken possession and asserted dominion and control over Petitioner's property, which stated

*"As of 25 May 2022, federal law requires us to place Sberbank shares into an escrow account from which only OFAC-authorized transactions may be made. ... Clients will be unable to access Sberbank shares without permission from OFAC. Within 10 business days, the Sberbank shares in your Schwab account will be assigned an escrow CUSIP number, and the share value will appear as "N/A.""* (App. 67–68).

Thus, it is an irrefutable fact that as of May 25, 2022, Respondent's Office of Foreign Assets Control ("Respondent's OFAC") took possession of and began using Petitioner's property, while denying the same to Petitioner.

Since May 25, 2022, Respondent has actively used Petitioner's property to wage economic war against Russia.

### **Respondent Refuses to Pay for the Possession and Use of Petitioner's Property**

Since May 25, 2022, Respondent has consistently refused to pay Petitioner for Respondent's possession and use of Petitioner's property, despite numerous demand letters by Petitioner requesting payment. (App. 68–69).

Beginning on June 10, 2022, through August 14, 2022, Petitioner repeatedly reached out to Respondent

and reminded them of their contractual obligations and past-due payments. (App. 69).

To date, Respondent has not made any payments pursuant to the terms of the contract for Respondent's continuing use of Petitioner's property, nor has Respondent bothered to respond to its ever-increasing liability for said possession and use of Petitioner's property.

To date, Respondent continues to violate Petitioner's constitutional rights under the Due Process and Takings Clause of the U.S. Constitution by taking, possessing and using Petitioner's property without paying just compensation for that use and without providing any pre- or post-deprivation due process.

### **Petitioner's Complaint Before the Lower Court**

In Petitioner's Complaint, filed in the United States Court of Federal Claims on May 19, 2023, Petitioner identified two (2) alternative legal theories for recovery from Respondent – "*defendant's willful breach of the actual contract between the parties for defendant's ongoing use of plaintiff's property*" and "*defendant's unconstitutional taking of plaintiff's property ... and defendant's willful violations of plaintiff's due process rights under the Fifth Amendment to the US Constitution*". (App. 63–71).

### **Respondent's Motion to Dismiss**

On July 21, 2023, instead of filing its Answer with the lower court, Respondent filed its Motion to Dismiss for Failure to State a Claim and Lack of Subject Matter Jurisdiction.

In that motion, Respondent asserted that Petitioner failed to satisfy the basic elements of a contract and that Petitioner only suffered a loss of value relative to frozen foreign assets.

### **Rule 12(b)(6) Standard Identified**

In Petitioner's Response to the Motion to Dismiss, filed on July 25, 2023, Petitioner stated that consistent with *Conley v. Gibson*, 335 U.S. 41, 48 (1957) and *Bell Atlantic Corp v. Twombly*, 550 U.S. 540, 556-557 (2007), a Rule 12(b)(6) motion requires the lower courts to liberally construe the complaint, assume all facts stated therein are true and draw all reasonable inferences in favor of Petitioner. (App. 55 – 57).

### **Four Elements of a Contract**

In its Response to the Motion to Dismiss, Petitioner also identified the four (4) elements of a contract (i.e., offer, acceptance, exchange of mutual consideration and performance) and then addressed each element with supporting facts. (App. 57–59).

### **Petitioner's Offer**

Petitioner's letters, dated April 27, 2022, and May 13, 2022, are clearly offer letters, identifying the offer, the property interest being offered and the price to be paid. **Offer made.** (App. 58).

## **Respondent's Acceptance**

On May 25, 2022, Respondent took possession of Petitioner's property. Contrary to the narrative in Respondent's Motion to Dismiss, it was not Respondent's 'mere silence' that triggered Respondent's acceptance of Petitioner's offer. In fact, by its own terms, Petitioner's offer was to be accepted by Respondent's overt act of taking Petitioner's property. Respondent's 'mere silence' in the face of the offer letter did not trigger the acceptance, but rather Respondent's overt acts of taking Petitioner's property and using Petitioner's property triggered acceptance of Petitioner's offer. (App. 58).

In Petitioner's Informal Reply Brief filed with the appellate court, dated December 26, 2023, Petitioner specifically identified the series of overt acts by Respondent confirming its acceptance of Petitioner's offer. **First**, President Biden accepted Petitioner's offer by signing his name to the executive order authorizing the taking of Petitioner's property for use in Respondent's economic war against Russia. **Second**, President Biden ordered Respondent's OFAC to take possession of Petitioner's property. **Third**, Respondent's OFAC took possession of Petitioner's property and transferred it from Petitioner's investment account to an escrow account controlled and managed by Respondent's OFAC. **Fourth**, every day since Respondent took possession of Petitioner's property, Respondent has used Petitioner's property as part of Respondent's economic war against Russia. Each of these four acts described above are overt acts by Respondent and more than 'mere silence' – taken together, they overwhelmingly confirm Respondent's acceptance of Petitioner's offer by Respondent's conduct and the



numerous overt acts of taking and using Petitioner's property. **Offer accepted.** (App. 20 – 21).

### **Mutual Consideration**

Mutual consideration is the exchange of promises – Petitioner promised to allow Respondent the use of Petitioner's property and Respondent promised to pay for that use of Petitioner's property. **Promises exchanged.** (App. 58–59).

### **Petitioner's Performance**

On May 25, 2022, Respondent took possession of and began using Petitioner's property, confirming that Petitioner has performed consistent with Petitioner's promise to allow Respondent the use of Petitioner's property. **Performance occurred.** (App. 59).

Thus, Petitioner identified and addressed each element of a contract in its pleadings as required to state a claim.

### **Lower Court Dismisses Petitioner's Claims**

On September 12, 2023, the lower court granted Respondent's Motion to Dismiss for failure to state a claim and lack of subject matter jurisdiction, concluding that Petitioner's complaint failed to state a claim for Respondent's breach of contract, because Respondent remained 'merely silent' in the face of Petitioner's offer (despite Respondent's overt acts indicating acceptance). (App. 46–47).

In that order, the lower court concluded that Petitioner’s complaint failed to state a claim for Respondent’s unconstitutional takings violations, because Respondent’s possession of Petitioner’s property was ‘unlawful’, despite Respondent or the lower court failing to identify who acted ‘unlawfully’ and how they acted ‘unlawfully’. (App. 47–49).

In that order, the lower court concluded that Petitioner’s complaint failed to state a claim for Respondent’s due process violations, because the Due Process Clause is not a ‘money-mandating’ provision. (App. 46).

### **Appellate Court Affirms Lower Court’s Order of Dismissal**

On March 6, 2024, the appellate court affirmed the lower court’s order of dismissal. (App. 1–7).

### **REASONS FOR GRANTING THE PETITION**

First, 28 U.S.C. §1491(a)(1) identifies the scope of the lower court’s subject matter jurisdiction as:

*“[t]he United States Court of Federal Claims **shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.**” [highlights added]*

Petitioner's complaint clearly identified claims that fall within this specific grant of jurisdiction – claims founded upon the U.S. Constitution and a contract with the United States.

Second, when considering a Rule 12(b)(6) motion, the courts are obligated to liberally construe the complaint, assume all facts stated therein are true and draw all reasonable inferences in favor of Petitioner. Instead, the lower courts repeatedly ignored statements in Petitioner's pleadings while misstating other statements from Petitioner's pleadings. For example, the appellate court stated that Petitioner failed to address *Paradissiotis v. U.S.*, 304 F.3d 1271 (Fed. Cir. 2002), despite Petitioner dedicating two (2) paragraphs to the inapplicability of that case to Petitioner's facts in Petitioner's Informal Brief filed with the appellate court on November 22, 2023 (which also addressed why the holding in that case is no longer consistent with this Court's most recent views of the Takings Clause).

Third, the lower courts improperly shifted the burden of proof for Respondent's defenses from Respondent to Petitioner. For example, Respondent raised the 'illegal possession' defense to Petitioner's Takings claim, but failed to identify any relevant facts to that naked allegation – Who acted illegally? How was the possession illegal? What actions did Respondent's Department of Justice take against those individuals? The lower courts merely accepted Respondent's fact-free assertion of this defense without any factual support in the record.

Fourth, the lower courts improperly concluded that the Due Process Clause is not subject to its jurisdiction,

because it is not self-executing (i.e., judicial review requires a ‘money-mandating’ statute to be reviewable). As a simple matter, our Declaration of Independence and the U.S. Constitution recognize the existence of certain “unalienable rights” and self-evident truths that pre-exist Respondent’s creation. Because these rights pre-exist Respondent’s creation, the process for remedying violations of those rights must also pre-exist Respondent’s creation. This linkage is a self-evident and fundamental first principle. The rights pre-exist and the related ability to seek remedy for the violation of those rights pre-exist Respondent’s creation. As such, there is no need for a ‘money-mandating’ statute to create the remedy for a constitutional violation. Said differently, the founding fathers would not have identified limitations on the newly-created entity that were subject to that newly-created entity’s whims about enforcement of those limitations – Yet, this is exactly the situation that the lower courts propose exists.

Fifth, the lower courts vaguely refer to a ‘national security’ exception to the Takings Clause as a defense to Petitioner’s claims, but fail to articulate that principle, fail to identify its constitutional basis and fail to define the test for applying it. Rather, the lower courts merely state an unsupported legal conclusion that is contrary to the historical context of the 5<sup>th</sup> Amendment. Quite simply, the 5<sup>th</sup> Amendment clearly states that “*No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.*” There are no exceptions identified in the U.S. Constitution to the Due Process and Takings Clause. None. Although ‘national security’ is a public good sufficient to trigger the proper exercise

of Respondent's power of eminent domain, once a taking occurs pursuant to the exercise of the Respondent's power of eminent domain, the Takings Clause applies to require Respondent to pay just compensation for the property that it has taken to achieve that public good, consistent with the holding of this Court in *Tyler v. Hennepin*, 598 U.S. 631 (2023).

Sixth, the lower courts expanded the narrow 'illegal possession' exception to the Takings Clause to include Respondent's illegal failure to pay as a defense to the Takings Clause. As a simple matter, this unsupported expansion of that limited exception swallows the entire Takings Clause, because every violation of the Takings Clause involves the failure to pay just compensation by Respondent. Thus, if the 'illegal possession' exception is expanded to include Respondent's illegal failure to pay for the taking and use of property (which occurs in every violation of the Takings Clause), then the exception swallows the rule in every case. No Takings Clause claim would ever survive the application of that expanded exception, effectively negating the Takings Clause. Such an interpretation is untenable.

Finally, the lower courts accepted Respondent's naked and unsupported allegation that it remained 'merely silent' in response to Petitioner's offer despite Petitioner identifying all of Respondent's overt acts indicating its acceptance of Petitioner's offer that contradict the possible application of that defense. **First**, President Biden accepted Petitioner's offer by signing his name to the executive order authorizing the taking of Petitioner's property for use in Respondent's economic war against Russia. **Second**, President Biden ordered Respondent's OFAC to take possession of Petitioner's property. **Third**,

Respondent's OFAC took possession of Petitioner's property and transferred it from Petitioner's brokerage account to an escrow account controlled and managed by Respondent's OFAC. **Fourth**, every day since Respondent took possession of Petitioner's property, Respondent has used Petitioner's property as part of Respondent's economic war against Russia. Each of these four acts described above are overt acts by Respondent and more than 'mere silence' – taken together, they overwhelmingly confirm Respondent's acceptance of Petitioner's offer by Respondent's conduct and the numerous overt acts of taking and using Petitioner's property.

Thus, this Court should grant review to:

- (1) determine if the lower courts' orders allowing Respondent to take and use Petitioner's property for the public good without compensation is manifestly unjust and exhibit far departures from the accepted and usual course of judicial proceedings when the lower courts ignored the clear grant of subject matter jurisdiction found in 28 U.S.C. §1491(a)(1)[that includes claims based on the U.S. Constitution or a contract with the United States], when they ignored this Court's longstanding guidance on considering a motion to dismiss and when they improperly shifted the burden of proof for Respondent's defenses to Petitioner;
- (2) determine if constitutional provisions are self-executing or require a statute to allow review when they are violated (i.e., the issue specifically identified by this Court as not being addressed in *Devillier, et al. v. Texas*, 601 U.S. 293 (2024));

- (3) determine if a ‘national security’ exception to the Takings Clause exists and, if so, determine what the scope of that extra-constitutional exception is and how it might be constitutionally applied consistent with the 5<sup>th</sup> Amendment;
- (4) determine if the lower courts properly expanded the narrow ‘illegal possession’ exception to the Takings Clause to include the illegal failure to pay for a taking, when that expansion would completely negate the Takings Clause; and
- (5) determine if the lower courts properly expanded the scope of the ‘mere silence’ defense to include Respondent’s overt acts, despite the longstanding judicial precedents that overt acts indicate the acceptance of an offer.

**I. Petitioner Has Stated a Claim Sufficient to Withstand a Rule 12(b)(6) Motion to Dismiss**

Both lower courts concluded that Petitioner failed to state a claim and that the lower court lacked subject matter jurisdiction over Petitioner’s claims.

**A. The Lower Courts’ Conclusion Ignored the Specific Grant of Subject Matter Jurisdiction in 28 U.S.C. §1491(a)(1)**

28 U.S.C. §1491(a)(1) defines the lower court’s subject matter jurisdiction as:

*“[t]he United States Court of Federal Claims shall have jurisdiction to render judgment*

*upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” [highlights added]*

Fed. R. Civ. P. 8(d)(2) and (3) state that

*“a party may set out 2 or more statements of a claim ... **alternatively** or hypothetically, either in a single count ... . **If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.** ... A party may state as many separate claims ... as it has, **regardless of consistency.**”*

Petitioner raised three (3) claims in its complaint and each of them is specifically identified in 28 U.S.C. §1491(a)(1):

- 1) Respondent’s breach of contract for Respondent’s use of Petitioner’s property without compensation; and
- 2) Respondent’s unconstitutional takings of Petitioner’s property without just compensation; and
- 3) Respondent’s unconstitutional violations of Petitioner’s due process rights.

Petitioner identified each element for each of the three (3) claims and addressed them in its complaint, its informal brief and its informal reply brief.



Petitioner has identified the offer, the acceptance, the exchange of consideration and Petitioner's performance – clearly establishing all the elements for a breach of contract claim.

Petitioner has identified Respondent's possession and use of Petitioner's property and Respondent's refusal to pay any compensation for that possession and use – clearly establishing all the elements for an unconstitutional Takings claim.

Petitioner has alleged the absence of any due process and Respondent has been unable to identify any due process that occurred prior to, during or after Respondent's acts of taking Petitioner's property and using it – clearly establishing all the elements for an unconstitutional Due Process claim.

Thus, Petitioner has indeed stated a claim consistent with the lower court's grant of subject matter jurisdiction – the lower courts' contrary conclusion is contradicted by the facts and the clear language of 28 U.S.C. §1491(a)(1).

**B. The Lower Courts' Conclusion Ignored This Court's Judicial Precedents For Considering a Rule 12(b)(6) Motion to Dismiss**

In *Conley v. Gibson*, 335 U.S. 41, 48 (1957) and *Bell Atlantic Corp v. Twombly*, 550 U.S. 540, 570 (2007), this Court held that a Rule 12(b)(6) motion to dismiss should be granted only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief.

**This Court explained that a Rule 12(b)(6) motion to dismiss merely tests the legal sufficiency of a complaint, requiring a court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the plaintiff.**

Unfortunately, the lower courts ignored that clear guidance by this Court. The lower courts repeatedly ignored Petitioner's factual statements in the pleadings and resolved conflicting factual allegations in favor of the moving party.

For example, Petitioner repeatedly described Respondent's possession of Petitioner's property and that the possession was necessarily 'legal' (App. 27-28), because Respondent's possession satisfied the legal elements of both the breach of contract claim (satisfying the acceptance element and the performance element) and the Takings claim (satisfying the taking element). At the same time, nowhere in the record are any facts supporting Respondent's 'illegal possession' of Petitioner's property, which should necessarily include a few basic facts – Who was in the illegal possession of Petitioner's property? How was the Petitioner's property illegally possessed? How were those individuals in the 'illegal possession' of Petitioner's property being prosecuted by Respondent's Department of Justice for violations of 18 U.S.C. §§241 and 242?

Despite Petitioner's repeated factual description of Respondent's legal possession and the absence of any facts supporting Respondent's asserted 'illegal possession' defense, both lower courts concluded that Petitioner failed to allege the legal possession by Respondent

and hypothesized that if Respondent's possession were somehow 'illegal', then that would be an exception to the Takings claim.

In direct conflict with this baseless conclusion by the lower courts, however, is the lower court's own statement that "*Here, the United States actions taken pursuant to an executive order serve a substantial national security interest*" (App. 50), which is a clear identification of the legal basis for Respondent's taking of Petitioner's property – Respondent's exercise of its power of eminent domain. That the lower courts' orders are not even consistent within themselves preclude them from satisfying the principles of Rule 12(b)(6) for resolving factual discrepancies in the non-moving party's favor. (App. 28).

As another example, Petitioner repeatedly listed Respondent's overt acts in taking Petitioner's property (e.g., President Biden signed an Executive Order, Respondent's OFAC transferred Petitioner's property from his brokerage account to a different account controlled by Respondent's OFAC and Respondent has used Petitioner's property to wage economic war against Russia for over two (2) years). (App. 20–21, 54, and 67–68).

Despite these overt acts being repeatedly identified by Petitioner, both lower courts concluded that Respondent remained 'merely silent' in the face of Petitioner's offer. **Perversely, the lower courts concluded that somehow Respondent ended up possessing, controlling and using Petitioner's property for the public good for over two (2) years without any overt acts on Respondent's part.**

It is logically impossible for the lower courts to have properly applied the principles identified by this Court for considering a Rule 12(b)(6) motion to dismiss when the lower courts resolved these conflicting factual allegations against the non-moving party and contrary to the only documents in the record before the lower courts.

**C. The Lower Courts' Conclusion Improperly Shifted the Burden of Proof for Respondent's Defenses to Petitioner**

In its Rule 12(b)(6) Motion to Dismiss, Respondent raised the 'mere silence' defense to Petitioner's breach of contract claim and raised the 'illegal possession' defense to Petitioner's Takings Clause claim.

As the party raising those defenses, Respondent has the burden of proof to support those defenses. Strangely, the lower courts accepted the merest allegations of these defenses by Respondent and then shifted the burden to Petitioner to disprove them.

For example, Respondent identified no facts supporting its 'illegal possession' defense to Petitioner's Takings claim and the appellate court stated that Petitioner's Complaint "*does not "concede the validity of the government action" and, absent concession, fails to state a claim*". (App. 6). Even ignoring the fact that Petitioner repeatedly described Respondent's legal possession (App. 27-28), there is no factual support in the record for Respondent's 'illegal possession' defense. Despite this complete absence from the record of any factual support for Respondent's 'illegal possession' defense, the appellate court improperly

shifts the burden of proof on Respondent's 'illegal possession' defense from Respondent to Petitioner.

As another example, after the appellate court correctly identified the two requirements for the 'mere silence' defense (i.e., the offer indicates that the offer can be accepted by remaining silent and the offeree remained silent) (App. 5-6), the appellate court ignored the absence of facts supporting those two elements (because Respondent offered none) and concluded that despite Petitioner's offer making no reference whatsoever to 'mere silence' being an acceptable method of accepting the offer and despite Petitioner identifying numerous overt acts identified by Respondent indicating acceptance of the offer (App. 20-21, 54, and 67-68), Petitioner had not overcome Respondent's alleged defense.

Quite simply, both lower courts accepted Respondent's mere allegations of defenses without any support in the record and then shifted the burden to Petitioner to rebut those defenses. Absent any supporting facts in the record (much less the compelling facts necessary to support a Rule 12(b)(6) motion to dismiss), the lower courts' willingness to accept Respondent's naked defense allegations violates the traditional burden of proof rules.

## **II. Constitutional Rights Are Self-Executing**

Both lower courts concluded that Petitioner's Due Process claim should be dismissed, because Due Process claims are not "money-mandating" pursuant to a statutory grant of jurisdiction.

## A. Constitutional Rights Predate Respondent's Existence

In *Unshakeable Foundations* (2001), Chapter 1, page 19, Norman Geisler and Peter Bocchino describe *First Principles* as

*“Aristotle showed how every science begins with **certain obvious truths** he referred to as first principles, explaining how these **first principles form the foundations** upon which all knowledge rests. First principles are the **fundamental truths** from which inferences are made and on which conclusions are based. **They are self-evident**, and they can be thought of as both the underlying and the governing principles of a worldview.”*

Our founding fathers summarized our nation's *First Principles* in the Declaration of Independence (which predates the U.S. Constitution by several years), which clearly states

*“We hold these **truths to be self-evident**, that all men are created equal, that **they are endowed by their Creator with certain unalienable Rights**, that among these are Life, Liberty and the pursuit of Happiness. -- **That to secure these rights, Governments are instituted among Men**, deriving their just powers from the consent of the governed...”*

Those two sentences are some of the most powerful sentences in mankind's history and establish several important and irrefutable points.

First, constitutional rights are not created by the U.S. Constitution, but rather "*certain unalienable Rights*" are created by our Creator and are merely identified in the U.S. Constitution, as amended.

Second, constitutional rights predate Respondent's existence.

Third, constitutional rights are not dependent on Respondent, but rather, Respondent was created to secure these pre-existing rights.

Given our nation's *First Principles* and the three (3) irrefutable points that logically follow, the conclusion by the lower courts that they lack subject matter jurisdiction over Petitioner's Due Process claim is without merit.

The 5<sup>th</sup> Amendment clearly identifies Petitioner's Due Process rights, which are described as

***"No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."***

There are no exceptions identified in the U.S. Constitution to the Due Process Clause. None.

Petitioner's Due Process rights existed before Respondent's creation. Therefore, it is self-evident that Petitioner's related ability to defend his Due Process rights also existed before Respondent's creation – the right and the ability to defend that right are fundamentally intertwined and both predate Respondent's existence.

Moreover, Respondent was created to secure Petitioner's Due Process rights, which means that Respondent is subject to those pre-existing self-evident truths and is tasked with defending them, instead of violating them, as it has in this case.

Quite simply, the lower courts' conclusion that Due Process rights can only be enforced if Respondent has created a right to enforcement is fundamentally at odds with the irrefutable points that Petitioner's rights predate Respondent's existence, that Petitioner's ability to enforce those rights predate Respondent's existence and that Respondent has an affirmative obligation to defend those same pre-existing rights.

**Finally, if the lower courts' conclusion were correct, then Respondent could merely pass a statute precluding the enforcement of any of its constitutional violations and nullify the U.S. Constitution overnight. For the U.S. Constitution to have any substance and effect, the rights and limitations described therein must be self-executing and not dependent on the party's consent against whom they are being enforced.**



**B. The Appellate Court Ignored the ‘Fair Interpretation’ Test To Determine if a Claim is ‘Money-Mandating’**

Even if this Court concludes that constitutional rights are not self-executing, however, the lower courts still failed to apply the ‘Fair Interpretation’ test described by this Court in *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, at 1328 (2020), which specifically stated that

***“To determine whether a statutory claim falls within the Tucker Act’s immunity waiver, we typically employ a “fair interpretation” test. A statute creates a “right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it ‘can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.’”***  
***United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L. Ed. 2d 40 (2003) (quoting *Mitchell*, 463 U.S. at 217, 103 S. Ct. 2961); see also *Navajo Nation*, 556 U.S. at 290, 129 S. Ct. 1547 (“The other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages”). Satisfying this rubric is generally both necessary and sufficient to permit a Tucker Act suit for damages in the Court of Federal Claims. *White Mountain Apache*, 537 U.S. at 472–473, 123 S. Ct. 1126.”**

Thus, when considering if a statute or constitutional provision is ‘money-mandating’, the reviewing court must

apply the 'Fair Interpretation' test. Despite this issue being raised by Petitioner (App. 34–36), the appellate court failed to even mention the 'Fair Interpretation' test in its opinion, much less apply it.

**As any parent of a 4-year old can attest, any rule prohibiting conduct that lacks consequences for the prohibited conduct will never achieve its stated goal of minimizing the prohibited conduct.**

The constitutional requirement of due process is clearly articulated in the 5<sup>th</sup> Amendment and absent any consequences to Respondent for its failure to comply with the due process requirements of the U.S. Constitution, Respondent will violate the U.S. Constitution with impunity (as it has in this case). Thus, any 'fair interpretation' of the U.S. Constitution must conclude that some consequences must apply to Respondent when it violates those constitutional prohibitions. Because there are no criminal consequences for Respondent's constitutional violations, civil consequences (e.g., fines and penalties) are the only possible remaining consequences under the 'Fair Interpretation' test. **The contrary conclusion would convert the U.S. Constitution from a document of limited powers, defined rights and specific prohibitions into a list of mere suggestions, hopes and fairy dust.**

### **III. There is No 'National Security' Defense to the Takings Clause**

Both lower courts concluded that Petitioner's Taking Clause claim should be dismissed, because of a vague and undefined 'national security' defense, even as the lower court clearly distanced itself from such a defense

when it stated *“This Opinion does not endorse the notion that any invocation of “national security” is sufficient to overwhelm the Fifth Amendment’s takings clause.”*” (App. 50, footnote 2).

**A. The 5<sup>th</sup> Amendment Identifies No Defenses to a Takings Violation**

Contrary to the vague and undefined ‘national security’ defense espoused by the lower courts, the 5<sup>th</sup> Amendment very clearly states that

*“No person shall ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.”*

The 5<sup>th</sup> Amendment makes no mention of any exception to the Takings Clause, much less an exception for ‘national security’. There are no undefined or subject-to-interpretation terms in the text of the 5<sup>th</sup> Amendment that might hint at any exception to the Takings Clause for ‘national security’. As such, the lower courts’ attempt to create a new, yet vague and undefined, sometimes-applicable, but never-described ‘national security’ defense to the Takings Clause is without merit and should be strongly rejected.

**B. The Historical Context of the U.S. Constitution Refutes the Existence of a ‘National Security’ Defense to the Taking Clause**

Contrary to the vague and undefined ‘national security’ defense that the lower courts summarily applied,

the historical context for the 5<sup>th</sup> Amendment contradicts the lower courts' conclusion that such a defense exists.

The entire basis for the 5<sup>th</sup> Amendment's prohibition against takings without just compensation can be traced back to the 18<sup>th</sup> century when the British housed their soldiers in the colonists' homes and forced the colonists to care for the British soldiers without compensation. Thus, the historical context for the 5<sup>th</sup> Amendment's prohibition is the taking of property without compensation for 'national security' by the British Empire – which is exactly what Respondent has done with Petitioner's property in this dispute.

Although the invocation of 'national security' permits Respondent's mere possession of Petitioner's property as a legally-sufficient exercise of Respondent's power of eminent domain, the invocation of 'national security' does not override the constitutional mandate of the 5<sup>th</sup> Amendment that Respondent pay just compensation when it takes and uses Petitioner's property for the public good.

In its most recent term, in *Tyler v. Hennepin*, 598 U.S. 631 (2023), this Court clearly stated that

*“The Takings Clause “was designed to bar the Government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.””*

The lower courts' erroneous application of a 'national security' defense to the Takings Clause ignores this clearly stated principle underlying the Takings Clause. If

Respondent chooses to take and use Petitioner's property for a public good (i.e., to wage economic war on Russia), then the 5<sup>th</sup> Amendment clearly requires Respondent to pay just compensation for the use of Petitioner's property to achieve that public good. There is no constitutionally-permissible exception to the requirement to pay just compensation when Respondent's taking is for 'national security'. As such, the lower courts' attempt to create a new, but vague and undefined, sometimes-applicable, but never-described 'national security' defense to the Takings Clause is without merit and should be strongly rejected.

**C. Petitioner Addressed *Paradissiotis v. U.S.*, 304 F.3d 1271 (Fed. Cir. 2002) – Factually Dissimilar and Contradicted by This Court's Recent Holdings**

The appellate court stated that Petitioner "*Petitioner does not provide any legal support for why Paradissiotis does not govern here*". (App. 7).

Contrary to that statement by the appellate court, Petitioner addressed the key differences in the legally-dispositive facts between the current dispute and *Paradissiotis* that would preclude *Paradissiotis* from applying to the current dispute. (App. 37–38). Moreover, Petitioner also identified the more recent holding of this Court that overruled the legal conclusion in *Paradissiotis*. (App. 37–38).

**i. The Facts in *Paradissiotis* are Radically Dissimilar**

In *Paradissiotis*, that plaintiff was seeking compensation for the loss of value related to his stock options that were still in that plaintiff's possession, while Petitioner in the current dispute is seeking compensation for Respondent's direct taking of Petitioner's property where Respondent has possessed Petitioner's property since May 25, 2022, and continues to use Petitioner's property.

Specifically, in the current dispute, Petitioner has never requested compensation for a decline in value of the property taken by Respondent, but instead has repeatedly requested payment for Respondent's possession and use of Petitioner's property under a purchase approach or a lease approach. (App. 65). In the current dispute, Respondent's OFAC took possession of Petitioner's property on May 25, 2022, transferred Petitioner's property from his brokerage account to an account controlled by Respondent's OFAC and has used Petitioner's property to wage economic war on Russia every day since that time. (App. 67-68). None of these legally-dispositive facts are found in *Paradissiotis*.

Thus, in *Paradissiotis*, there was a question as to whether a taking even occurred, because that plaintiff was still in possession and control of his property while suffering a decline in value from Respondent's actions.<sup>1</sup>

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1. Please note that Petitioner is not raising or addressing the issue of whether a decline in value is sufficient to trigger the requirement under the 5<sup>th</sup> Amendment for just compensation to be paid, because Petitioner did not merely experience a decline in value,

Just the opposite occurred in the current dispute – Petitioner is not in possession and control of Petitioner’s property and has not been since May 25, 2022. Respondent continues to possess and use Petitioner’s property, while denying Petitioner the same, triggering the requirement for Respondent to pay just compensation under the Takings Clause of the 5<sup>th</sup> Amendment.

**ii. *Tyler v. Hennepin*, 598 U.S. 631 (2023) Overruled the Legal Conclusion in *Paradissiotis***

The appellate court’s decision in *Paradissiotis* predates the recent decision by this Court in *Tyler v. Hennepin*, 598 U.S. 631 (2023)(citing *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960) that clearly stated that

*“The Takings Clause “was designed to bar the Government from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.””*

The appellate court’s conclusion in *Paradissiotis* ignored this fundamental principle of the Takings Clause and allowed the burden of the public good to be borne by that plaintiff alone. Similarly, the appellate court’s order in the current dispute would require Petitioner alone to bear the burden of the public good (i.e., ‘national security’) which *“in all fairness and justice, should be borne by the public as a whole”*.

If Respondent chooses to use Petitioner’s property for

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but rather a wholesale taking of Petitioner’s property by Respondent.

a public good (i.e., waging economic war on Russia), then the 5<sup>th</sup> Amendment and this Court's judicial precedent clearly require Respondent to pay just compensation for the use of Petitioner's property that Respondent is using to achieve that public good.

In any event, notwithstanding the appellate court's statement to the contrary, Petitioner directly addressed the inapplicability of *Paradissiotis* – both factually and legally.

#### **IV. The 'Illegal Possession' Defense (as applied) Negates the Takings Clause of the 5<sup>th</sup> Amendment in Every Instance**

Both lower courts concluded that Petitioner's Taking Clause claim should be dismissed because Respondent's possession of Petitioner's property was 'illegal' (i.e., both lower courts accepted Respondent's naked and unsupported allegation that this defense applied) without Respondent identifying who was illegally possessing Petitioner's property or how that possession was illegal. (App. 6–7, 12 and 48–49).

More importantly, Petitioner's actual position is and has always been that Respondent's possession without payment was illegal – which it is, under either a breach of contract theory or a Takings Clause violation theory. (App. 9, 24, 27–28, 57).

But recharacterizing Respondent's illegal refusal to pay for the use of Petitioner's property (which is a legal element of all three (3) claims) as Respondent's illegal possession of Petitioner's property (which is a narrow



defense to the Takings Clause claim) is merely lazy thinking by the lower courts and reflects a very superficial reading of Petitioner's Complaint and subsequent pleadings by Petitioner before the lower courts.

Quite simply, Respondent's possession of Petitioner's property is legal under all of Petitioner's theories of recovery, because Respondent's possession of Petitioner's property satisfies elements of each claim.

Respondent's refusal to pay for its possession and use of Petitioner's property, however, triggers Respondent's liability to pay compensation to Petitioner for Respondent's possession and use of Petitioner's property. The lower courts' conclusion that Respondent's failure to pay is a sufficient defense to Respondent's failure to pay (as required by the contract between the parties or the 5<sup>th</sup> Amendment) is not supported by logic or any judicial precedents.

**A. Respondent's Possession of Petitioner's Property Satisfies Necessary Elements of Petitioner's Breach of Contract Claim**

Respondent's possession of Petitioner's property satisfies the acceptance element and the performance element of Petitioner's breach of contract claim.

Respondent's taking and possession of Petitioner's property confirms Respondent's acceptance of Petitioner's offer. At the same time, Respondent's use of Petitioner's property confirms Petitioner's performance of his promise to allow Respondent to use Petitioner's property. Thus, Petitioner's breach of contract claim relies on Respondent's

possession to satisfy two (2) of the required elements for that claim – hardly a case where Petitioner is alleging ‘illegal possession’ by Respondent. Quite the contrary – Petitioner’s breach of contract claim requires the legal possession by Respondent.

To the contrary, it is Respondent’s refusal to pay for Respondent’s possession and use of Petitioner’s property that triggers the breach of contract and converts Respondent’s legal possession into an illegal and actionable failure to pay for the legal possession of Petitioner’s property.

**B. Respondent’s Possession of Petitioner’s Property Satisfies a Necessary Element of Petitioner’s Takings Clause Claim**

Respondent’s possession of Petitioner’s property satisfies the taking requirement of the Takings Clause claim.

Respondent’s exercise of its power of eminent domain to take Petitioner’s property is clearly legal (the lower court having already identified the acceptable legal basis for that taking, i.e., national security) (App. 50, footnote 2). Respondent’s possession of Petitioner’s property is a necessary element for a Takings Clause claim.

It is Respondent’s refusal to pay just compensation for Respondent’s possession and use of Petitioner’s property that converts Respondent’s legal possession into an illegal and actionable failure to pay just compensation for the legal possession of Petitioner’s property under the

Takings Clause.

**C. Respondent's Possession of Petitioner's Property Satisfies a Necessary Element of Petitioner's Due Process Clause Claim**

Respondent's possession of Petitioner's property satisfies the exercise of sovereign power requirement required by the Due Process Clause.

Respondent's exercise of its power of eminent domain to take Petitioner's property is clearly legal (the lower court having already identified the acceptable legal basis for that taking, i.e., the public good of 'national security') (App. 50, footnote 2). Respondent's possession of Petitioner's property is a necessary element for a Due Process claim.

It is the complete absence of any process surrounding Respondent's taking of Petitioner's property and Respondent's utter refusal to pay for that possession and use that converts Respondent's legal possession into an illegal and actionable failure to provide Due Process to that taking.

Finally, the lower courts' conclusion that there is no judicial remedy available to correct these violations further confirms the sheer absence of any due process surrounding Respondent's taking and use of Petitioner's property. No due process was provided by the executive branch before, during or after it took Petitioner's property and now the judicial branch concludes that it cannot provide any post-deprivation due process either – both are

a gross affront to the Due Process Clause's requirement that applies to every branch of the federal government when the federal government is exercising its sovereign powers (e.g., the power of eminent domain).

**D. Respondent's Own Conduct Contradicts Its Naked Assertion of the 'Illegal Possession' Defense**

Despite asserting that its possession of Petitioner's property was 'illegal', Respondent has done nothing to support that defense.

Response has not identified the person(s) who are in the 'illegal possession' of Petitioner's property, has not identified how those unknown person(s) acted 'illegally' and is not investigating or prosecuting anyone for that 'illegal possession' under 18 U.S.C. §§241 and 242.

Respondent's own failure to prosecute anyone for the illegal possession of Petitioner's property under 18 U.S.C. §§241 and 242 confirms that Respondent also thinks its possession of Petitioner's property is legal.

**V. The 'Mere Silence' Defense Does Not Apply When Respondent's Overt Acts Indicate Acceptance of Petitioner's Offer**

Both lower courts concluded that Petitioner's breach of contract claim should be dismissed because Respondent remained 'merely silent' in the face of Petitioner's offer to allow Respondent to use Petitioner's property. (App. 5 and 47).

The lower courts' conclusion is directly contradicted by the documented facts in the record.

It was not Respondent's silence that triggered Respondent's acceptance of Petitioner's offer. In fact, by its own terms, Petitioner's offer was accepted by Respondent's overt act of taking Petitioner's property. Respondent's mere silence in the face of the offer letter did not trigger acceptance, but rather Respondent's overt act taking and using Petitioner's property was the act of acceptance. In the face of an offer by Petitioner to allow Respondent the use of Petitioner's property, Respondent's act of using Petitioner's property is a clear acceptance of Petitioner's offer. (App. 13, 18–21, 54, 56–58 and 68).

**First**, President Biden accepted Petitioner's offer by signing his name to the executive order authorizing the taking of Petitioner's property for use in Respondent's economic war against Russia. (App. 20). Signing an executive order is an overt act and is more than 'mere silence'.

**Second**, President Biden ordered Respondent's OFAC to take possession of Petitioner's property. (App. 21). Ordering someone to do something is an overt act and is more than 'mere silence'.

**Third**, Respondent's OFAC took possession of Petitioner's property and transferred it from Petitioner's brokerage account to an escrow account controlled and managed by Respondent's OFAC. (App. 21). Taking possession of someone's property and transferring it to a different account is an overt act and is more than 'mere silence'.

**Fourth**, every day since Respondent took possession of Petitioner's property, Respondent has used Petitioner's property as part of Respondent's economic war against Russia. (App. 21). Waging war is an overt act and is more than 'mere silence'.

**Thus**, Respondent confirmed its acceptance of Petitioner's offer by its conduct and numerous overt acts of taking and using Petitioner's property. Respondent's own active and ongoing conduct precludes the defense of 'mere silence' from possibly applying to the current dispute. In the face of Petitioner's offer to allow Respondent to use Petitioner's property, Respondent's numerous overt acts of taking and using Petitioner's property is a clear acceptance of the offer by Respondent's conduct, which created an implied contract between the parties that the lower court has jurisdiction to review pursuant to 28 U.S.C. §1491(a)(1).

### **CONCLUSION - RELIEF SOUGHT**

For the reasons set forth above, the order by the United States Court of Appeals for the Federal Circuit, dated March 6, 2024, affirming the United States Court of Federal Claim's order granting dismissal, dated September 12, 2023, ignored the clear statutory grant of subject matter jurisdiction in 28 U.S.C. §1491(a)(1), ignored this Court's longstanding guidance on considering a motion to dismiss, improperly shifted the burden of proof for Respondent's defenses to Petitioner, ignored the self-executing nature of constitutional rights, improperly created a 'national security' defense to the Takings Clause, improperly expanded the narrow 'illegal possession' defense to the Takings Clause (effectively negating the

entire Takings Clause) and improperly expanded the 'mere silence' defense to apply despite numerous overt acts indicating acceptance of a contract – all of which are manifestly unjust and far departures from the accepted and usual course of judicial proceedings, particularly when resolving questions involving the U.S. Constitution.

As such, this Court should grant this petition for a writ of certiorari to allow this Court to review the lower courts' significant revisions to the U.S. Constitution, to review the self-executing nature of the U.S. Constitution, to review the lower courts' refusal to follow this Court's recent holding in *Tyler v. Hennepin*, 598 U.S. 631 (2023), and to review the lower courts' departures from longstanding rules governing judicial proceedings resulting in a manifest miscarriage of injustice.

Alternatively, this Court should vacate the orders by the lower courts and remand this case back to the United States Court of Federal Claims with the admonishment that the United States Court of Federal Claims properly consider Petitioner's claims in light of the specific language of 28 U.S.C. §1491(a)(1), properly reconsider its conclusions in light of this Court's recent view of the Takings Clause (as expressed in *Tyler v. Hennepin*, 598 U.S. 631 (2023)), properly apply the standards of Fed. R. Civ. Proc. 12(b)(6), Fed. R. Civ. Proc. 8(a)(1) – (3) and the burdens of proof and properly consider and properly apply the clear language of the 5<sup>th</sup> Amendment to Petitioner's claims.

Respectfully submitted this the 8<sup>th</sup> day of August, 2024,

JAMES W. TINDALL,

JD, LLM (TAX), CPA

*Petitioner Pro Se*

4674 Jefferson Township Place

Marietta, GA 30066

(770) 337-2746

theslayor@yahoo.com