No. 09-70

In the Supreme Court of the United States

MODERN, INC., ET AL., PETITIONERS

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

One of petitioner's five claims is a claim against the United States. That claim seeks to quiet title to alleged drainage easements across the St. Johns National Wildlife Refuge (the Refuge). The district court granted summary judgment to the United States on that claim because it determined that, even though petitioner has a common law easement for the natural flow of water across the Refuge, the United States has not interfered with that easement. The court of appeals affirmed.

The question presented regarding the quiet-title claim is whether the court of appeals erred in affirming the district court's grant of summary judgment to the United States because the district court failed to fully adjudicate the existence, location, and scope of petitioner's common law flowage easement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 308 Fed. Appx. 330. The opinion of the district court (Pet. App. 3-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2009. A petition for rehearing was denied on April 17, 2009 (Pet. App. 141-142). The petition for a writ of certiorari was filed on July 16, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Modern, Inc. (petitioner) is a corporation that owns a parcel of real property in Brevard County, Florida, which it acquired in 1991. Pet. App. 9.[1] That land lies within the floodplain of the St. Johns River. *Id.* at 4-5, 9. Due to natural topography, water on petitioner's property drains through the St. Johns National Wildlife Refuge (the Refuge), which is adjacent to petitioner's property. *Id.* at 5, 224.

The Refuge is owned and managed by the United States Fish and Wildlife Service (the Service). Pet. App. 7. The Service established the Refuge in 1971 to protect the now-extinct dusky seaside sparrow, and it continues to manage the Refuge as a habitat for birds and other wildlife. *Ibid.* The Service seeks to maintain the Refuge as naturally occurring wetlands, which requires allowing the natural flow of water through the Refuge. *Id.* at 7-8.

The remnants of a series of drainage ditches traverse the Refuge and petitioner's property. Pet. App. 7-9. This drainage system was created between 1911 and 1919 by the Titusville Fruit and Farm Lands Company, which originally owned a large tract of land containing both the parcel that later became the Refuge and the parcel that petitioner eventually purchased. *Id.* at 4-5. At the time the Service acquired the Refuge, it appeared that the ditches located on that land had not been maintained for some time. *Id.* at 7-8. The Service did not maintain the ditches after acquiring the land, thereby

[1] Another corporation, First Omni Service Corporation (First Omni), owns real property in the same area and originally joined petitioner in this action. Although the petition lists First Omni as a petitioner, Pet. ii, the petition does not present any separate facts or argument regarding First Omni.

allowing for the natural flow of water across the land. *Ibid.*

2. In the late 1980s, the Florida Department of Transportation (FDOT) widened a nearby road. Pet. App. 8. Because that construction project resulted in wetlands loss, FDOT was required to engage in mitigation to offset it. *Ibid.* St. Johns River Water Management District (St. Johns), the state agency responsible for water resource management in the area, issued FDOT a permit for a mitigation project. *Ibid.* The project was carried out by the Service within the Refuge. *Ibid.* The project involved filling in certain drainage ditches on the Refuge to begin trying to restore natural topography, and replacing culverts under Hacienda Road, which traverses the Refuge, with new culverts and riser structures in order to control the flow of water under that road and thereby maintain water levels within the Refuge. *Id.* at 8-9.

Petitioner subsequently claimed to observe increased flooding on its property and complained to St. Johns that alterations in the drainage system were causing the flooding. Pet. App. 10. Following negotiations with petitioner, St. Johns, FDOT, the Service, Brevard County, and others, Brevard County removed obstructions from several ditches, including ditches within the Refuge, and the Service removed all riser boards that had been added to the Hacienda Road culverts. *Ibid.* Apparently unsatisfied with those efforts, petitioner widened and deepened several obstructed drainage ditches, including some located inside the Refuge. *Id.* at 11. Petitioner did not obtain a permit from St. Johns or seek permission from the Service before taking those actions. *Ibid.* As a result of petitioner's actions, the widened ditches began moving "a tremendous volume of water" off peti-

tioner's property, which "lowered water levels across hundreds of acres of open water and wetlands, primarily on the Refuge." *Ibid.*

After noticing the effects that petitioner's unauthorized dredging had on the water level and wildlife of the Refuge, the Service notified St. Johns of that dredging. Pet. App. 11. In response, St. Johns issued an emergency order authorizing the Service to construct earthen weirs at the preexisting elevation of two ditches to counteract the effects of petitioner's excavations. *Id.* at 11-12. St. Johns also filed an administrative complaint against petitioner, alleging that it had improperly excavated portions of the two canals and proposing ways in which petitioner could effectively restore them to their pre-excavation depths. *Id.* at 12.

An administrative law judge (ALJ) upheld both the emergency order and the administrative complaint. Pet. App. 12. In particular, the ALJ determined that petitioner's dredging exceeded the scope of routine custodial maintenance and therefore required a permit. *Ibid.* The ALJ also held that petitioner was required to undertake one of the corrective actions identified by St. Johns. *Id.* at 12-13. St. Johns issued a final order adopting the ALJ's recommendation. *Id.* at 13. Petitioner appealed the final order to the state court of appeals, and the court affirmed that order. See *St. Johns River Water Mgmt. Dist.* v. *Modern, Inc.*, 784 So. 2d 464 (Fla. Dist. Ct. App. 2001).

3. Petitioner then filed suit against St. Johns and FDOT in state court. Pet. App. 13-14.[2] The court deter-

[2] Petitioner had previously filed a similar complaint in state court, but the case had been dismissed because petitioner failed to exhaust its administrative remedies. Pet. App. 13 n.11, 101-102.

mined that the United States was an indispensible party and had to be joined in the action. *Id.* at 14, 102. Once joined, the United States removed the case to federal district court. *Id.* at 14.

Petitioner filed a fourth amended complaint, asserting state-law inverse condemnation claims against St. Johns and FDOT (Counts 1-2)[3]; a claim for declaratory relief against St. Johns and FDOT to establish the existence and location of drainage easements (Count 3); a claim against the United States under the Quiet Title Act (QTA), 28 U.S.C. 2409a, to quiet title to its alleged drainage easements (Count 4)[4]; and a claim against St. Johns and FDOT seeking injunctive relief for trespass (Count 5). Pet. App. 14, 219-228. Petitioner's QTA claim against the United States alleged that petitioner has express, implied, and common law drainage easements on the Refuge. *Id.* at 224. Petitioner sought adjudication of the "existence, location, scope and extent" of those alleged easements and a determination that the

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[3] Petitioner expressly reserved any federal takings claims against St. Johns and FDOT pursuant to *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), and *Jennings* v. *Caddo Parish School Board*, 531 F.2d 1331, 1332 (5th Cir.), cert. denied, 429 U.S. 897 (1976). Pet. App. 218-219. Petitioner has not asserted any federal takings claim against the United States. In any event, such a claim would fail because the United States has not interfered with petitioner's claimed property interest (a common law flowage easement). *Id.* at 57-58, 80-81.

[4] Although the complaint named the Service as the defendant in the QTA claim, Pet. App. 224-226, only the United States may properly be named in such an action, see 28 U.S.C. 2409a(a). The Service therefore moved to substitute the United States for the Service as defendant, see 6:03-CV-718 Docket entry No. 380 (M.D. Fla. July 31, 2006), and the district court granted that motion, 6:03-CV-718 Docket entry (M.D. Fla. Aug. 2, 2006).

United States had "interfered with" those easements. *Id.* at 225.

Petitioner filed a motion for summary judgment, seeking a determination that it holds common law flowage easements and express and implied drainage easements running through the Refuge. 6:03-CV-718 Docket entry No. 289 (M.D. Fla. Apr. 12, 2006). The district court denied the motion. Pet. App. 61-96. As relevant here, the court agreed with petitioner that it holds a common law flowage easement, because under Florida law "an upper landowner continues to enjoy an easement across the lower tract for all naturally occurring surface water so long as the land remains in its natural state." *Id.* at 80-81. The court determined, however, that petitioner failed to show that the United States had interfered with the natural flow of water. *Id.* at 81. Indeed, the court explained, "the activities of which [petitioner] complains—principally the filling-in of drainage ditches—would restore the natural flow of surface water, not impede it." *Ibid.* The court further noted that Florida law permits "reasonable use" of surface waters and held that petitioner "has made no showing that the filling in of ditches or other activities that have allegedly led to flooding on [petitioner's] land was an unreasonable use" of the waters on the Refuge. *Ibid.*

The United States filed a motion to dismiss or, in the alternative, for summary judgment. 6:03-CV-718 Docket entry No. 215 (M.D. Fla. Jan. 18, 2006). The district court granted that motion with respect to petitioner's common law flowage easement claim. Pet. App. 42-60. The court again held that, under Florida law, petitioner has a common law flowage easement, but that petitioner failed to show that the United States had "interfere[d] with the *natural* flow of water" and there-

fore had not interfered with petitioner's common law flowage easement. *Id.* at 58. The court denied summary judgment with respect to petitioner's alleged express and implied easement claims. *Id.* at 49-56.

Petitioner filed a motion for rehearing and reconsideration, 6:03-CV-718 Docket entry No. 376 (M.D. Fla. July 31, 2006), which the court denied, *id.* No. 391 (Aug. 16, 2006). As relevant here, the court again rejected petitioner's contention that its common law flowage easement extended to restoration or maintenance of drainage ditches and canals within the Refuge. *Id.* No. 391, at 3-4.

The district court then conducted a three-week bench trial on all outstanding issues. Pet. App. 2, 14. The court concluded, based on all of the evidence at trial, that petitioner did not hold any express or implied drainage easements across the Refuge. *Id.* at 16-25. It also rejected petitioner's remaining claims against FDOT and St. Johns. *Id.* at 25-38.

4. In a brief unpublished, per curiam opinion, the court of appeals affirmed. Pet. App. 1-2. The court concluded that there was no "reversible error in the district court's * * * order, which was entered after a three-week bench trial and which grants final judgment in favor of [the United States, St. Johns, and FDOT]." *Id.* at 2.

ARGUMENT

Petitioner contends (Pet. 28-29) that the court of appeals erred in affirming the district court's grant of summary judgment to the United States on petitioner's Quiet Title Act claim because the district court failed to fully adjudicate the existence, location, and scope of petitioner's common law flowage easement. The court of

appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is unwarranted.

1. Petitioner's QTA claim does not warrant this Court's review. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals or of this Court with respect to that claim. Instead, petitioner raises a purely fact-bound challenge to the district court's rejection of its QTA claim. That challenge was not expressly addressed in the court of appeals' brief unpublished, per curiam opinion.

Significantly, petitioner does not contend that the courts below erred in holding that the United States did not interfere with petitioner's common law flowage easement. Instead, petitioner faults the district court for not defining its easement with greater specificity. Pet. 28-29. That type of case-specific challenge does not warrant this Court's review. That is especially true where, as here, the district court's decision rested on questions of Florida law regarding the scope of common law flowage easements. See *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (this Court typically does not review "the considered determination of questions of state law by the intermediate federal appellate courts").

2. The court of appeals' decision affirming the district court's rejection of petitioner's QTA claim is correct. The district court determined, based on Florida law, that the United States did not interfere with petitioner's common law flowage easement. Pet. App. 58, 80-81. Petitioner does not take issue with that holding.

Pet. 28.[5] Instead, in a one-paragraph argument, petitioner insists that the QTA required the district court to also address what petitioner characterizes as the "entirely separate question" of determining the "existence, location, scope and extent" of its easement. *Ibid.* By not addressing that distinct question, petitioner argues, the court of appeals "fail[ed] to fully adjudicate and effective[ly] reject[ed] * * * [petitioner's] common law flowage easement claim." Pet. 8.

The courts below adjudicated petitioner's QTA claim. The QTA permits the United States to be sued in a civil action "to adjudicate a *disputed title* to real property in which the United States claims an interest." 28 U.S.C. 2409a(a) (emphasis added). A QTA complaint must "set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States." 28 U.S.C. 2409a(d). As a waiver of sovereign immunity, the QTA must be strictly construed. See *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). Thus, to obtain an adjudication of title against the United States under the

[5] Although petitioner does not directly challenge the district court's summary judgment ruling on its QTA claim, it suggests that the courts below erred in their application of Florida law regarding flowage easements. See Pet. 10-15. Petitioner is mistaken. As the district court explained, although petitioner has an easement for the natural flow of water across the Refuge, it does not have any right to create or modify artificially created drainage ditches on the Refuge in order to increase drainage from its land. Pet. App. 80-81. Petitioner was required to show that the United States had unreasonably obstructed the natural flow of waters on its land, see, *e.g.*, *Westland Skating Ctr., Inc.* v. *Gus Machado Buick, Inc.*, 542 So. 2d 959, 961-962 (Fla. 1989), and the district court correctly held that petitioner failed to make that showing, see Pet. App. 80-81.

QTA, a plaintiff must identify a "dispute" over title by setting forth the particular property interest it claims to hold as well as the interest claimed by the United States.

Petitioner's complaint identified the disputed property interest as its common law flowage easement, and then alleged that the United States claimed that interest "[b]y virtue of the interference and disregard of [petitioner's] easement interests." Pet. App. 225. The only evidence of "interference and disregard" alleged by petitioner during this litigation was the Service's effort to restore and maintain the natural condition of the Refuge. Petitioner did not articulate "with particularity" any other action of the United States that would implicate a "right, title, or interest." 28 U.S.C. 2409a(d).

The district court fully considered and decided petitioner's claim. The United States did not dispute that, under Florida law, petitioner holds a common law flowage easement. Pet. App. 57, 81. The only question, then, was whether the United States had interfered with that interest. The district court determined that the United States had not interfered with petitioner's flowage easement. *Id.* at 15, 57-58, 80-81. As the court explained (*id.* at 57-58, 80-81), an "upper landowner" like petitioner "enjoys an easement across the lower tract for all *naturally* occurring surface water." *Westland Skating Ctr., Inc.* v. *Gus Machado Buick, Inc.*, 542 So. 2d 959, 963 (Fla. 1989) (emphasis added). The court determined that the activities of the United States did not interfere with that easement because they "restore[d] the natural flow of surface water" rather than "imped[ing] it." Pet. App. 80-81. Moreover, under Florida law, the term "natural flow" excludes man-made drainage ditches. See, *e.g.*, *Alderman* v. *Murphy*, 486

So. 2d 1334, 1337 (Fla. Dist. Ct. App. 1986) ("a ditch is by definition artificial, so that blockage of a ditch would not logically be blockage of a natural water course"). Thus, a common law flowage easement does not create a right to construct or alter drainage ditches on a lower landowner's property (here, the Refuge). See Pet. App. 57-58. The district court correctly relied on those characteristics of the common law flowage easement—along with its separate determinations, unchallenged here, that petitioner holds no express or implied drainage easements—to reject petitioner's QTA claim.

Once the court determined that no interference or disregard by the United States had taken place, there could be no disputed title and thus was no basis for a quiet title action. In particular, there was no basis in the QTA for a court to determine the exact boundaries and conditions of petitioner's common law flowage easement in the absence of "allegations that the United States has interfered with or denied the existence of any rights." *Washington County* v. *United States*, 903 F. Supp. 40, 42 (D. Utah 1995). Indeed, under such circumstances, no case or controversy exists for a federal court to adjudicate. See *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("basic" case or controversy "inquiry is whether the conflicting contentions of the parties * * * present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract" (internal quotation marks and citation omitted)). Other than alleged interference with its common law flowage easement, petitioner identifies no outstanding right to be adjudicated under the QTA. There is therefore no basis for this Court's review.

3. Petitioner asks this Court to grant certiorari to determine whether the district court worked a "judicial[] tak[ing]" of its property rights. Pet. 9. Petitioner compares this case to *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, cert. granted, No. 08-1151 (June 15, 2009), in which the Court is considering the question whether a Florida Supreme Court decision concerning the littoral property rights of upland owners under the State's common law effected a judicial taking of property requiring compensation under the Just Compensation Clause of the United States Constitution.

This case need not be held pending the Court's decision in *Stop the Beach Renourishment*. The court of appeals did not effect a judicial taking. It did not redefine any of petitioner's property rights under state law. The court's brief, unpublished opinion states that there is no reversible error in the district court's decision and does not opine on state law. Pet. App. 1-2. And the federal district court could not authoritatively redefine Florida's common law; that power lies with the state courts. See, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 755 (1975) (state courts "alone can define and interpret state law"). Further, petitioner's claim is not one for a judicial taking, because the action complained of was not that of a court; the gravamen of petitioner's claim has always been that St. Johns and the FDOT have effected a taking by requiring petitioner to have had a permit for its unauthorized dredging or to take action to reverse the effects of that dredging. That is a conventional takings claim based on legislative and executive action, not a judicial takings claim. Finally, petitioner does not appear to raise any federal question. The only takings claims raised in this litigation were

brought under state law; petitioner expressly reserved any claims under the federal Constitution. See Pet. App. 218-222. Because petitioner's alleged "judicial takings" claim appears to be based on the court of appeals' rejection of his state-law inverse condemnation claims, petitioner does not appear to allege a violation of the federal Constitution. And insofar as petitioner's claim against the United States is concerned, the district court applied settled principles of state law to determine that there was no interference with petitioner's common law flowage easement. See pp. 10-11, *supra*. There was therefore no sudden break from settled law of the type that would be required as a predicate for a judicial taking. The petition therefore should be denied with respect to petitioner's "judicial takings" claim as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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