No. 11-122

# In the Supreme Court of the United States

INNOVAIR AVIATION LIMITED, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Court of Federal Claims should have declined to entertain petitioner's Tucker Act suit for just compensation for an alleged taking of property, which arose out of a district-court-approved transfer of a licensing agreement in forfeiture proceedings undertaken pursuant to the Controlled Substances Act, 21 U.S.C. 881 *et seq.*, when petitioner had a full and fair opportunity to litigate the propriety and terms of the transfer in the forfeiture proceeding.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 632 F.3d 1336. Opinions of the Court of Federal Claims (Pet. App. 21a-29a, 30a-54a, 55a-75a) are reported at 58 Fed. Cl. 560, 72 Fed. Cl. 415, and 83 Fed. Cl. 498. Additional opinions of the Court of Federal Claims are reported at 51 Fed. Cl. 569 and 83 Fed. Cl. 105.

## JURISDICTION

The judgment of the court of appeals was entered on January 25, 2011. A petition for rehearing was denied on April 29, 2011 (Pet. App. 78a-79a). The petition for a writ of certiorari was filed on July 28, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. In 1988, Bryan Carmichael and Barry Wilson formed two corporations with Warren Basler and his family (the Basler Group) to convert old DC-3 piston aircraft into BT-67 turboprop planes. Petitioner, a Hong Kong corporation, was established to perform all foreign sales and conversions, except for those covered by the Foreign Military Sales Act (FMSA). Basler Turbo Conversions, Inc. (BTC) was established to perform all domestic sales and conversions, as well as those made under the FMSA. Carmichael and Wilson owned 51% of petitioner and 49% of BTC. The Basler Group owned 51% of BTC and 49% of petitioner. Pet. App. 3a, 31a-33a.

In 1988, petitioner and BTC executed a Technology License Agreement (TLA) in which petitioner agreed to pay BTC $1,675,000 in exchange for the exclusive right to market, manufacture, sell, and use the proprietary conversion technology owned by BTC for foreign sales of BT-67s. Petitioner paid BTC $300,000 by July 1988 and the remaining $1,375,000 by April 1989. In December 1988, petitioner and BTC contracted to sell six BT-67s to Air Colombia, which had presented itself as a legitimate cargo carrier. Pet. App. 4a.

2. a. The United States concluded that Air Colombia was under the control of a drug cartel and that the money Air Colombia had used to pay for four planes was traceable to drug proceeds. In August 1990, the government seized four of the Air Colombia BT-67s pursuant to 21 U.S.C. 881 (1988), a provision of the Controlled Substances Act (CSA) that authorized the seizure and forfeiture of controlled substances and other property and proceeds associated with their manufacture and distribution. Three months after the seizure, pursuant

to 21 U.S.C. 881(j) (1988), the government initiated an *in rem* forfeiture proceeding against the four planes in the United States District Court for the District of Arizona. Pet. App. 5a.

In July 1991, the controller of Basler Flight Services, another company owned by the Basler Group, informed the government that petitioner had used part of the Air Colombia proceeds to pay BTC for its interest in the TLA. The government seized the TLA and, shortly thereafter, added the TLA to the *in rem* forfeiture action in the district court. Pet. App. 5a-6a.[1]

b. In August 1991, petitioner offered to post a substitute *res* bond of $1,250,000 to secure the release of the TLA pending resolution of the *in rem* forfeiture proceeding. Petitioner later withdrew its substitute *res* bond offer in the Arizona litigation because of an adverse ruling it had received in a related contract dispute with BTC in the United States District Court for the Eastern District of Wisconsin. Pet. App. 6a.

In December 1991, the government and BTC stipulated to a substitute *res* bond that, upon judicial approval, would have the effect of transferring rights under the TLA to BTC and of extinguishing the rights of all other claimants (including petitioner). BTC agreed to post a $1,375,000 bond. BTC also agreed to finish the conversion of one of the four Air Colombia aircraft that had been seized. The government and BTC submitted the bond agreement to the Arizona district court for approval. Pet. App. 6a-7a.

Petitioner objected to the substitute *res* bond on eight different grounds, including its contentions that

[1] The district court later held that the government had probable cause for the seizure and noted that petitioner had not contended otherwise. C.A. App. 216.

BTC would damage the value of the TLA because it lacked international marketing experience, and that BTC could intrude on petitioner's exclusive territory (the international market for BT-67s). Pet. App. 7a. Petitioner did not contend that the amount of the bond was too low, however; to the contrary, it argued that the bond amount was artificially *inflated*. *Ibid.* Although petitioner argued that approval of the bond could expose the government to damage claims if petitioner were later found to be entitled to the TLA, C.A. App. 100, petitioner did not object to the clause in the substitute *res* bond that would extinguish petitioner's rights under the TLA, Pet. App. 16a. The district court approved the substitute *res* bond, and the TLA was turned over to BTC. *Id.* at 7a. The district court later concluded that petitioner lacked standing to challenge the forfeiture of the TLA and granted summary judgment for the government. *Id.* at 7a-8a.

c. Petitioner appealed the district court's ruling that it lacked standing to challenge the forfeiture of the TLA, but it did not appeal the approval of the substitute *res* bond and the consequent extinguishment of its rights in the TLA. Pet. App. 8a, 17a. The United States Court of Appeals for the Ninth Circuit held that petitioner had standing to contest the forfeiture and that petitioner had lacked any knowledge "of any improper source for Air Colombia's funds." *United States* v. *Basler Turbo-67 Conversion DC-3 Aircraft (1)*, No. 94-16876, 1996 WL 88075, at *1-*3 (Feb. 29, 1996). The court also noted that, although the approval of the substitute *res* bond had terminated petitioner's interest in the TLA, petitioner was still entitled to assert an interest in the bond that had been substituted for the TLA as the *res* at issue in the forfeiture proceeding. *Id.* at *2.

On remand, the district court held that—notwithstanding the validity of the government's original seizure of the TLA—the TLA could not be forfeited under the CSA because petitioner's lack of knowledge about the tainted nature of Air Colombia's funds made it an innocent owner. Pet. App. 8a; see 21 U.S.C. 881(a)(4)(C) and (6) (1988) (providing that proceeds and means of transportation are not forfeitable under the CSA "to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without" the owner's knowledge or consent).[2] The district court accordingly considered the amount of compensation to which petitioner was entitled for the seizure of the TLA. Petitioner contended that its interest in the TLA (and one seized plane) was worth more than $30 million. C.A. App. 147. The district court concluded that the value of petitioner's interest in the TLA had been $1,939,310, and it awarded that amount, plus prejudgment interest, to petitioner. Pet. App. 9a.

Both sides appealed. Petitioner contended that the district court had undervalued its interest in the TLA, and the government argued that the district court lacked jurisdiction to enter an award greater than the value of the *res* at issue (which was, at that point, the $1,375,000 substitute bond). Pet. 11. The Ninth Circuit held that, under the terms of its earlier remand, "the district court's jurisdiction was limited to awarding the substitute res plus pre-judgment interest actually or constructively earned on the substitute res." *United*

[2] The Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, § 2(a) and (c), 114 Stat. 202, 206-207, 210, repealed the innocent-owner provisions previously contained in Section 881(a)(4)(C) and (6), and replaced them with a version that is now codified at 18 U.S.C. 983(d).

*States* v. *Basler Turbo-67 Conversion DC-3 Aircraft*, Nos. 99-15369 and 00-15090, 2000 WL 1770611, *1 (Nov. 30, 2000).

On remand, the district court entered judgment with respect to the TLA in favor of petitioner for $1,783,879.25. Petitioner did not pursue any further appeal. Pet. App. 9a.

d. In September 1993, while the forfeiture proceedings were pending in Arizona, petitioner and BTC settled all of their claims against each other arising out of the Wisconsin court litigation. Their agreement required BTC to pay petitioner $2,750,000 in exchange for the rights under the TLA that petitioner had relinquished. Pet. App. 10a.

3. a. Meanwhile, petitioner had filed the complaint that is the subject of the current petition. In July 1996, petitioner initiated this action in the United States Court of Federal Claims (CFC). Pet. App. 10a. As relevant here, petitioner invoked the CFC's jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), alleging that the government's seizure and transfer of the TLA to BTC had been an unlawful taking. Pet. App. 23a. The CFC initially stayed proceedings, pending determinations in the Arizona district court about petitioner's interest in the TLA. *Ibid.*

The government moved to dismiss petitioner's CFC complaint, contending that federal district courts possess exclusive jurisdiction over forfeiture matters under the CSA and that the CFC lacked jurisdiction to entertain petitioner's constitutional claims. Pet. App. 24a. That argument was based in part on the Federal Circuit's earlier decision in *Vereda, Ltda.* v. *United States*, 271 F.3d 1367 (2001), which had held that a CSA forfeiture may not be challenged under the Tucker Act "be-

cause the relevant statutes provide for a comprehensive administrative and judicial system to review the *in rem* administrative forfeiture of property seized pursuant to 21 U.S.C. § 881." *Id.* at 1375.

The CFC rejected the government's argument, holding that it possessed jurisdiction to consider petitioner's takings claim. The court explained that petitioner had not raised a "substantive challenge to the Government's July 16, 1991 seizure of the TLA," but had instead alleged that a taking occurred when the Arizona district court "approved the release of the TLA pursuant to the substitute *res* bond." Pet. App. 26a. The CFC also found *Vereda* distinguishable because the Arizona district court had ultimately held that petitioner's property could not be forfeited under the CSA. *Id.* at 27a. The CFC concluded that, if petitioner could ultimately establish a taking, the court could award compensation for "the difference, if any, between the substitute *res* bond amount and the fair market value of the TLA" at the time when the substitute *res* bond was approved and petitioner's rights in the TLA were extinguished. *Id.* at 27a-29a.

b. On August 31, 2006, the CFC decided the parties' cross-motions for summary judgment on liability. Pet. App. 30a-54a. The CFC held that a per se compensable taking under the Fifth Amendment had occurred when the Arizona district court had granted the government's motion to transfer the TLA to BTC pursuant to the substitute *res* bond agreement. *Id.* at 47a, 52a. The court later held a two-week trial to determine the amount of just compensation. *Id.* at 58a.

On August 22, 2008, the CFC issued its order addressing just compensation. Pet. App. 55a-75a. Based on evidence about the market for BT-67s between 1992

and 1998, the court concluded that petitioner would have made seven sales per year if it had been able to continue exercising its rights under the TLA. *Id.* at 71a. The court calculated the projected cash flow on the basis of gross profits per unit, less expenses. *Id.* at 72a. The court discounted the total amount to the date of the taking, and subtracted the $1,375,000 that petitioner had previously received from the Arizona district court. *Id.* at 72-74a. On September 30, 2009, the CFC entered an order in favor of petitioner for $6,122,468, plus $9,978,273 in prejudgment interest, for a total of $16,100,741. *Id.* at 12a-13a, 76a-77a.

4. The court of appeals reversed. Pet. App. 1-20a. The court held that the CFC lacked jurisdiction to consider petitioner's takings claim because "the CSA's comprehensive statutory scheme vested in the Arizona [District] Court exclusive jurisdiction to approve the substitute *res* bond, which necessarily included the extinguishing clause." *Id.* at 16a. The court further observed that petitioner "had the opportunity to object to the substitute *res* bond and did object on numerous grounds," but that petitioner "did not object to the clause * * * that extinguished all of the rights of other claimants." *Ibid.* The court concluded that "any potential relief for [petitioner] should have been brought through the Arizona Court, where [petitioner] could have objected to the extinguishing clause and then appealed if the objection was overruled." *Id.* at 16a-17a.

The court of appeals noted that the CFC "does not have jurisdiction to review the decision of district courts." Pet. App. 17a (quoting *Vereda*, 271 F.3d at 1375) (in turn quoting *Joshua* v. *United States*, 17 F.3d 378, 380 (Fed. Cir. 1994)). The court explained that, under the circumstances of this case, consideration of

petitioner's takings claim "necessarily involves a collateral attack on the Arizona Court's approval of the substitute *res* bond, which encompassed determining whether the amount [of the bond] was the fair value of the TLA." *Id.* at 17-18a. The court of appeals also noted that petitioner had "previously argued in its objection to the substitute *res* bond at the Arizona Court that the bond amount was 'artificially inflated,'" and it concluded that petitioner "cannot now complain that the TLA was undervalued by the Arizona Court." *Id.* at 19a.

5. Petitioner sought rehearing en banc, contending that the court of appeals' decisions in *Vereda* and in this case conflicted with this Court's decisions in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), and *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). After requesting and receiving a response from the government, the court of appeals denied the petition for rehearing. Pet. App. 78a-79a.

**ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. The Federal Circuit's decision in this case, which rests on the sound understanding that the plaintiff in a CFC Tucker Act suit may not collaterally attack the prior ruling of another federal court, is unlikely to affect the disposition of any significant number of future controversies. Further review is not warranted.

1. The court of appeals correctly held that the CFC should not have entertained petitioner's takings claim because it amounted to a collateral attack on the final decision of the federal district court in the prior CSA forfeiture proceeding. That proceeding afforded peti-

tioner an adequate opportunity to challenge the action (*i.e.*, the district court's approval of a substitute *res* bond in the amount of $1,375,000, and its simultaneous extinguishment of petitioner's continued interest in the TLA) that allegedly effected an uncompensated taking.

a. The government's *in rem* civil forfeiture proceeding against the TLA was initiated pursuant to 21 U.S.C. 881 (1988), the provision of the CSA governing forfeitures of drug-related property. See Pet. App. 5a-6a. Under 21 U.S.C. 881(d) (1988), that suit was also governed by forfeiture practices under the customs laws "insofar as applicable and not inconsistent with the provisions [of the CSA]." That meant, *inter alia*, that seized property could be released to a person claiming an interest in the property who "offer[ed] to pay the value" of the property as appraised. 19 U.S.C. 1614. Under Supplemental Rule E(5) of the Rules of Civil Procedure, moreover, property could be released pursuant to a bond. Fed. R. Civ. P. Supp. R. E(5)(c). In 1992, pursuant to those provisions, the Arizona district court approved the substitution of a bond for the TLA. Pet. App. 6a-8a. As the court below explained, "the Arizona Court's approval of the substitute *res* bond necessarily included a finding that the bond amount was the fair value of the TLA." *Id.* at 18a.

Congress has vested jurisdiction over forfeiture proceedings in district courts, not the CFC. Section 1355 of Title 28 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or *forfeiture*, pecuniary or otherwise, incurred under any Act of Congress, except matters

> within the jurisdiction of the Court of International Trade under section 1582 of this title.

28 U.S.C. 1355(a) (emphasis added). As this Court repeatedly explained in applying Section 1355's statutory predecessors, "the jurisdiction is exclusive in the District Court of all actions to recover for a penalty or forfeiture." *Helwig* v. *United States*, 188 U.S. 605, 610 (1903) (discussing Rev. Stat. § 563(3) (1878)); see also *Lees* v. *United States*, 150 U.S. 476, 478 (1893) ("From the earliest history of the government the jurisdiction over actions to recover penalties and forfeitures has been placed in the District Court. * * * While in the Revised Statutes the word 'exclusive' was omitted, the language was not otherwise substantively changed."); *United States* v. *Mooney*, 116 U.S. 104, 105 (1885) (rejecting argument that federal circuit courts had jurisdiction "concurrent with the [d]istrict [c]ourts, of all suits for penalties and forfeitures under the customs laws of the United States," notwithstanding statute that gave circuit courts jurisdiction over civil suits for more than $500 "arising under the Constitution or laws of the United States").

Although the current version of Section 1355 describes district courts' jurisdiction over actions to enforce or recover forfeitures as being "exclusive of the courts *of the States*," 28 U.S.C. 1355(a) (emphasis added), the italicized language derived from a statutory provision different from the one that was at issue in *Helwig*, *Lees*, and *Mooney*. The combination of the two provisions into the one that now appears at Section 1355(a) did not alter the settled understanding that the district courts' jurisdiction over forfeiture actions was exclusive among federal courts. Section 24(9) of the 1911 codification of the Judicial Code vested district

courts with original jurisdiction over, *inter alia*, "all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." Act of Mar. 3, 1911, ch. 231, § 24(9), 36 Stat. 1092. Section 256(2) of the same law separately identified such jurisdiction as one of the categories of jurisdiction that was "exclusive of the courts of the several States." *Id.* § 256(2), 36 Stat. 1160-1161.

The section of the 1911 Judicial Code that defined the jurisdiction of the district courts made clear, however, that the Court of Claims was not authorized to exercise jurisdiction over forfeiture actions. It did so by setting out in a separate paragraph the categories of district-court jurisdiction that were "[c]oncurrent with the Court of Claims." § 24(20), 36 Stat. 1093 (vesting concurrent jurisdiction over, *inter alia*, "all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress"). Because district-court jurisdiction over forfeiture actions was not included in that paragraph, it was evidently not intended to be shared with the Court of Claims.

In its 1948 revision of the Judicial Code, Congress created 28 U.S.C. 1355 (1952) by combining the provisions that had been Sections 24(9) and 256(2) of the 1911 Code. As this Court has repeatedly recognized, the 1948 codification is presumed not to have "worked a change in the underlying substantive law" in the absence of a clear expression of Congress's intention to do so. *Keene Corp.* v. *United States*, 508 U.S. 200, 209 (1993) (citing cases). Because there was no such expression in Section 1355, that provision's reference to this category of district-court jurisdiction as being exclusive of *state* courts did not disturb the long-standing prem-

ise—reflected in decisions such as *Helwig*, *Lees*, and *Mooney*—that the district courts' jurisdiction was also "exclusive" as to other federal courts.

b. Critical issues in petitioner's takings suit—whether the CSA permitted the court-approved substitution of the $1,375,000 bond for the TLA, and how much compensation petitioner should receive in return for a deprivation of its interest in the TLA—fell within Congress's exclusive grant of jurisdiction to district courts over actions to enforce and recover forfeitures. Indeed, petitioner does not dispute the court of appeals' conclusion (Pet. App. 16a-19a) that petitioner *could* have taken action in the district-court forfeiture proceeding to protect its interests in the value of TLA. Instead, petitioner asserts (Pet. 21-22) that it adequately exhausted its statutory remedies under the CSA by appearing in the forfeiture proceeding and "obtain[ing] the only available * * * compensation it was allowed in that forum."

That argument is misconceived. To be sure, as the Ninth Circuit in the forfeiture case correctly held, petitioner's recovery at the *conclusion* of that suit was limited to the substitute *res* bond plus prejudgment interest. During the forfeiture proceedings, however, petitioner could have challenged "the Arizona Court's approval of the substitute *res* bond, which necessarily encompassed determining whether the amount was the fair value of the TLA." Pet. App. 17a-18a. Petitioner thus could have argued (either to the district court or on appeal to the Ninth Circuit) that the amount of the proposed substitute bond was too low rather than "artificially inflated." *Id.* at 19a.[3] Petitioner also could have

[3] Petitioner could have contended that the bond posted by BTC did not constitute adequate security for the value of the TLA under

challenged the provision of the substitute *res* bond that stated that judicial approval of the bond would extinguish petitioner's rights under the TLA.

Within the forfeiture case, the district court's holding that petitioner was an "innocent owner" ordinarily would have resulted in the return of the seized property to petitioner. See Pet. App. 23a. Because the TLA had been transferred to BTC, that remedy was unavailable, and petitioner received the substitute *res* bond instead. See *id.* at 24a. Use of the bond in that manner was scarcely an unforeseeable occurrence; serving as the new *res* in the forfeiture proceeding was the very purpose for which the bond was posted. And as the Federal Circuit recognized, "the Arizona Court's approval of the substitute *res* bond necessarily included a finding that the bond amount was the fair value of the TLA." *Id.* at 18a.

As the court of appeals correctly held, petitioner "cannot now complain that the TLA was undervalued by the Arizona court," when it could have contested that valuation in the district court or on appeal to the Ninth Circuit. Pet. App. 19a. Indeed, petitioner concedes that a claimant must first "exhaust" an available statutory procedure "as a precondition to a Tucker Act claim." Pet. 21 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984)). Whether or not such an exhaustion requirement is properly characterized as jurisdictional, the CFC could not appropriately entertain petitioner's collateral challenge to the Arizona district court's valuation of the TLA when petitioner had a full and fair op-

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19 U.S.C. 1606 and 1614. Petitioner could also have sought a stay, mandamus, or interlocutory appeal of the order authorizing disposition of the TLA and substitution of the bond as the *res* underlying the forfeiture proceeding.

portunity to litigate the valuation issue in the forfeiture case.

Under petitioner's theory, the CFC would have potentially vast (but heretofore unexercised) jurisdiction to review decisions of other federal courts. Any party to a lawsuit against the United States who was dissatisfied with a judicial decision that deprived the party of property or reduced its value could collaterally attack that decision in the CFC by claiming that some other statutory regime had failed to deliver full compensation. Petitioner's approach would allow the CFC to adjudicate such a claim even if the plaintiff had failed diligently to protect its rights in the prior proceeding.

c. Petitioner's suit is especially inappropriate because petitioner attempts to bootstrap a statutory defense in the forfeiture case into a constitutional claim under the Tucker Act. Petitioner contends (Pet. 24) that its "claim does not arise under a federal statute," but instead "arises under the Fifth Amendment's taking clause." In fact, however, the only basis for petitioner's claim that the forfeiture of the TLA was unauthorized is that the CSA provided property owners with an opportunity to oppose forfeitures when they did not know of or consent to the unlawful acts or omissions that otherwise made the property forfeitable. See 21 U.S.C. 881(a)(4)(C) and (6) (1988).

Although Congress has recognized an "innocent owner" defense to a forfeiture action under the CSA, this Court has repeatedly refused to hold that such a defense is constitutionally required. To the contrary, as the Court explained in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the

owner did not know that it was to be put to such use." *Id.* at 446. See also, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) ("[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."); *Van Oster* v. *Kansas*, 272 U.S. 465, 466-468 (1926). Thus, even if the CFC were otherwise entitled to reject the district court's valuation of the TLA, and to hold that the actual value of the property was substantially greater, petitioner's inability to collect the full value at the conclusion of the forfeiture case would not give rise to an injury of constitutional dimension.[4]

Treatment of the "innocent owner" defense as the predicate for a takings claim is problematic in another respect as well. Although the CFC appeared to view petitioner's "innocent owner" status as integral to its

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[4] Even assuming that the CFC was authorized to entertain petitioner's claim of an uncompensated taking, petitioner has not established that the initial seizure of the TLA and the subsequent substitution of the *res* bond effected a taking of private property for public use. In *Bennis*, the Court held that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." 516 U.S. at 452-453. This case involves the same power—civil forfeiture—that was held not to constitute a taking in *Bennis*. Although the district court ultimately held that the TLA was *not* forfeitable under the CSA in light of the statute's innocent-owner defense, that does not mean that the government was exercising its power of eminent domain. Nor does it mean that the action that caused petitioner's alleged injury (*i.e.*, the initial seizure of the TLA followed by the substitution of a *res* bond) was statutorily unauthorized. The district court's later determination that the substitute bond was worth less than petitioner's interest in the TLA does not establish that the government failed to act "lawfully" (*id.* at 452) in the process of seizing the TLA in the first instance and then stipulating to the substitute bond (which was then approved by the court).

takings claim, see Pet. App. 27a, 45a, the court did not determine independently whether petitioner was in fact an "innocent owner," but instead treated as "binding" the Ninth Circuit's resolution of that question in the prior forfeiture proceeding, see *id.* at 45a. Against that backdrop, the CFC's willingness to second-guess the district court's valuation of the TLA in the process of approving the substitute *res* bond was particularly inappropriate.

2. Petitioner contends that the CFC may always exercise Tucker Act jurisdiction "'to cover any constitutional shortfall' in the event the statutory compensation provisions themselves did not cover the full distance." Pet. 16 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 155 (1974) (the *Regional Rail Cases*)). Petitioner argues (Pet. 15-19) that the decision below conflicts with decisions in which this Court and other courts of appeals have concluded, in various statutory contexts, that the availability of relief under other laws did not impliedly divest the CFC of Tucker Act jurisdiction. Petitioner's reliance on those decisions is misplaced. None of the cases on which petitioner relies involved a statute, like Section 1355(a), that vested another federal court with exclusive jurisdiction over a particular category of disputes. And none of those decisions allowed a takings plaintiff to relitigate in the CFC a question that the plaintiff had previously been given a full and fair opportunity to litigate in another federal court.

a. Petitioner relies in part on the *Regional Rail Cases*, in which the Court examined "whether Congress has in the [Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 *et seq.* (Rail Act),] withdrawn the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit

involving the Rail Act 'founded . . . upon the Constitution.'" 419 U.S. at 126 (emphasis omitted). The Court examined the Rail Act, its relationship to other laws, and its legislative history, but found no unambiguous expression of Congress's intent to withdraw Tucker Act jurisdiction. *Id.* at 127-133. It therefore held that a Tucker Act remedy for just compensation was not barred by the Rail Act. *Id.* at 133-136.

The unusual statutory framework at issue in the *Regional Rail Cases*, however, was critically different from the one that Congress has established in the CSA. In the Rail Act, Congress had prescribed "a carefully structured method for planning and implementing a reorganization scheme" for several major railroads that would, by design, require several conveyances to be made quickly. *Regional Rail Cases*, 419 U.S. at 144. Congress anticipated that the consideration given to the railroads under the Rail Act "would provide the minimum compensation required by the Constitution," but Congress "wished to provide no more" than that. *Id.* at 148. "[T]he central scheme of the Rail Act," however, was to "defer[] decision of any controversies over the terms of the transfer of rail properties until after the transfer ha[d] occurred." *Id.* at 142. Even then, judicial review would be strictly limited and "would be hasty and made without adequate information." *Id.* at 145 & n.31; see *id.* at 156 ("If judicial review of the terms of the transfer was required before the conveyance could occur, the conveyance might well come too late to resolve the rail transportation crisis."). Moreover, the statute "*require[d]*" the conveyances to be made without any assurance that the new company established by the Rail Act would have "adequate resources" to compensate

fully those whose property was taken in the process of establishing that company. *Id.* at 155.

It was in those circumstances—*i.e.*, where the need for expedition and coordinated action prevented a full opportunity for resolving disputes under the mechanisms of the Rail Act itself, and where there was no assurance that those mechanisms would provide constitutionally adequate compensation—that the Court concluded that "the Tucker Act will be available as the jurisdictional basis for a [subsequent] suit in the Court of Claims for a cash award to cover any constitutional shortfall." *Regional Rail Cases*, 419 U.S. at 148. The Court thus held that a potential Tucker Act remedy was available because the Rail Act had created the possibility of inadequate compensation without providing any mechanism of its own for litigating and resolving any alleged inadequacies.

In that regard, however, the CSA differs significantly from the statutory scheme at issue in the *Regional Rail Cases*. Unlike the entities seeking to enjoin enforcement of the Rail Act, petitioner *was* able to participate in a proceeding in which it could seek to protect the full value of its interests in the TLA. A substitute *res* bond was posted in the forfeiture case to enable claimants to continue litigating whether the seized property could be forfeited, with the expectation that the party ultimately found to be entitled to the TLA would receive adequate compensation for its interest in the TLA by receiving the substitute *res* in lieu of the TLA itself. The district court's acceptance of the proposed bond amount "necessarily included a finding that the bond amount was the fair value of the TLA," Pet. App. 18a, and petitioner could have argued in the forfeiture case that the bond was insufficient if petitioner believed

the TLA was worth more. Petitioner's failure to take full advantage of the proceeding provided for in the CSA—or its dissatisfaction with the results of that proceeding—does not justify giving it a second bite at the apple through a Tucker Act suit.

b. Petitioner further contends (Pet. 16-17) that the decision below conflicts with this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, *supra*. In *Monsanto*, the plaintiff sought to enjoin, as an unconstitutional taking without just compensation, certain provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq*. Those provisions authorized the Environmental Protection Agency (EPA) to disclose to the public certain data submitted by an applicant for registration of a pesticide, or to consider data submitted by one applicant while evaluating the registration application of a subsequent applicant. See 467 U.S. at 992-993, 998-999. Although the Court recognized that the consideration or public disclosure of an applicant's data could constitute a taking of private property that would trigger a right to compensation, *id*. at 1014-1016, it held that the Tucker Act and FIFRA could "coexist" because FIFRA could be read "as implementing an exhaustion requirement as a precondition to a Tucker Act claim." *Id*. at 1018. Petitioner analogizes that exhaustion requirement to its litigating history, contending that petitioner may now bring a takings claim under the Tucker Act because it "had to—and did—prevail in the CSA forfeiture proceeding to maintain its property interest in the TLA." Pet. 21.

Because the Court in *Monsanto* did not condone any procedure through which the CFC could revisit another federal court's valuation of allegedly taken property, petitioner's analogy fails. With respect to claims associ-

ated with disclosure of data to the general public, the Court in *Monsanto* noted that "FIFRA provide[d] for no compensation whatsoever." 467 U.S. at 1018. In data-disclosure cases, there was consequently no FIFRA compensation procedure to exhaust. In deciding a subsequent takings suit, the CFC therefore would not have been called upon to revisit any determination previously made by another adjudicator.

The situation was slightly, but not materially, different with respect to claims associated with EPA's use of data from one registration applicant when evaluating another applicant's submission. In those cases, FIFRA prescribed that the two applicants could either "agree" upon compensation or, failing such agreement, submit to "a binding arbitration proceeding" that would not be "subject to judicial review, absent fraud or misrepresentation." *Monsanto*, 467 U.S. at 994-995. The Court held that any finding of a taking of Monsanto's data under the data-consideration provisions "would be premature" because the Court could not "preclude the possibility that the arbitration award will be sufficient to provide Monsanto with just compensation." *Id.* at 1013 & n.16. The Court in *Monsanto* therefore contemplated the prospect that, if a FIFRA arbitration proceeding produced a constitutionally inadequate award, a Tucker Act remedy might be available to make up for the shortfall in compensation.

The parties to a FIFRA arbitration proceeding, however, would be the two applicants, not the property owner and the government. In that context, moreover, the CFC would be reviewing the decision of an arbitrator, not of another federal court. *Monsanto* therefore does not support petitioner's contention that a Tucker Act suit in the CFC may be used to mount a collateral

attack on the district court's valuation of property in a prior CSA forfeiture proceeding.

c. Petitioner's reliance (Pet. 17-18) on *Preseault* v. *Interstate Commerce Commission*, 494 U.S. 1 (1990), is similarly misplaced. The plaintiffs in *Preseault* argued that the National Trails System Act Amendments of 1983 (Trails Act Amendments), Pub. L. No. 98-11, 97 Stat. 48, were unconstitutional because the Trails Act Amendments took private property without providing any just-compensation mechanism. See 494 U.S. at 8-10. In rejecting that challenge, the Court explained that the Fifth Amendment does not prohibit all takings, but only uncompensated takings, and that any takings of property the Trails Act Amendments might effect would therefore be constitutional so long as just compensation was available. See *id.* at 11. The Court further explained that just compensation under the Tucker Act presumptively remains available for any taking another law might cause unless Congress has evinced an "unambiguous intention to withdraw the Tucker Act remedy." *Id.* at 12 (quoting *Monsanto*, 467 U.S. at 1019). The Court examined the text and history of the Trails Act Amendments and found no unambiguous withdrawal of Tucker Act jurisdiction. *Id.* at 12-16.

*Preseault* reaffirms that, when enforcement of a federal statutory directive will result in a taking of private property, the proper course ordinarily is to enforce the statute, on the understanding that a Tucker Act just-compensation remedy remains available in the CFC, rather than to set the statute aside. The Court in *Preseault* was required to choose between those two alternatives, however, only because the Trails Act Amendments did not establish any alternative mechanism for compensating landowners whose property had

been taken. By contrast, the substitute *res* bond mechanism employed in the forfeiture case involving petitioner was intended to ensure that the fair value of the TLA could be paid to any party that was ultimately found to be entitled to the property. Nothing in *Preseault* suggests that the CFC in a Tucker Act suit may entertain a collateral attack on findings made by another federal court in a case within its jurisdiction. To allow such a collateral attack would be especially inappropriate in light of Congress's decision to vest district courts with exclusive jurisdiction over federal forfeiture proceedings.

d. Petitioner also contends that the decision below conflicts with cases from two other courts of appeals. Pet. 18-19 (citing *Talley* v. *United States Dep't of Agric.*, 595 F.3d 754 (7th Cir. 2010), aff'd by an equally divided court, No. 09-2123, 2010 WL 5887796 (7th Cir. Oct. 1, 2010); *Bay View, Inc.* v. *Ahtna, Inc.*, 105 F.3d 1281 (9th Cir. 1997)). Neither of those cases, however, involved 28 U.S.C. 1355 or the CSA, and their general statements about implicit repeals of the Tucker Act are inapposite here.

In *Bay View*, the court was presented with a situation like those in *Preseault* and *Monstanto*, where a party sought to have a federal statute invalidated before it had ever pursued a Tucker Act claim. See 105 F.3d at 1283, 1285-1286. Unlike here, moreover, there was no prior proceeding authorized under a separate statute for suit in a separate court, under which the claimants could have sought to protect the value of their property. *Bay View* does not suggest that the finding of another federal court, made in a controversy within its jurisdiction, can be collaterally attacked in a CFC takings suit.

In *Talley*, the court did not address a Fifth Amendment takings claim at all, but rather a claim against the government for money damages under the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.* See 595 F.3d at 758-759. The plaintiff invoked the Tucker Act for its waiver of sovereign immunity rather than as a grant of subject-matter jurisdiction. *Id.* at 763. To the extent the court in *Talley* concluded that the FCRA had not withdrawn the CFC's jurisdiction under the Tucker Act, its rationale was two-fold.

First, the Seventh Circuit held that the FCRA, by authorizing suits to be brought "in any appropriate United States district court * * * *or* in any other court of competent jurisdiction," made clear that its grant of jurisdiction to district courts was not "exclusive." *Talley*, 595 F.3d at 759 (quoting 15 U.S.C. 1681p) (emphasis added). Second, the court concluded that the provision granting jurisdiction over suits to enforce the FCRA trumped the amount-in-controversy limit that the Tucker Act generally imposes on district court jurisdiction. *Id.* at 759-760; see *id.* at 761 (noting that the court had concluded "that the Fair Credit Reporting Act permits suits against federal agencies to proceed in district court without regard to the amount in controversy"); 28 U.S.C. 1346(a)(2) (generally imposing a $10,000 limit on district courts' concurrent jurisdiction over claims against the United States founded on, *inter alia*, an Act of Congress).

Neither of the *Talley* court's two rationales is relevant here, because there is no question that the district court had jurisdiction over the original forfeiture proceeding against the TLA, and because 28 U.S.C. 1355(a)—unlike Section 1681p—does provide a basis for concluding that such jurisdiction is exclusive to district

courts. In any event, the plaintiff in *Talley* did not seek to use the Tucker Act to supplement or revisit the results of an earlier proceeding.

3. Finally, although the Federal Circuit has exclusive jurisdiction over takings claims against the federal government (Pet. 26), petitioner identifies no reason to believe that the question presented is one of broad and continuing significance. In petitioner's view, the court of appeals' purported error with respect to alleged takings arising in forfeiture actions under the CSA was present in *Vereda* (Pet. 19 n.4), but that decision is already ten years old. Petitioner acknowledges (*ibid.*) that *Vereda*'s reasoning has not affected the court of appeals' approach to analyzing the effects of other federal statutes on Tucker Act jurisdiction. Petitioner also recognizes that, since the forfeiture proceeding against the TLA was initiated, Congress has provided "expanded" (Pet. 7 n.2) protections to innocent owners in forfeiture proceedings. See 18 U.S.C. 983(d); see also note 2, *supra*.

Most importantly, petitioner identifies no prior cases in which a plaintiff in a CFC takings suit attempted to re-litigate an issue that it had previously been given a full and fair opportunity to litigate before another federal court. There is consequently no reason to believe that the court of appeals' analysis in this case, which focused on the impropriety of petitioner's attempted collateral attack on the district court's prior approval of the substitute *res* bond, will affect the disposition of any significant number of future suits.

**CONCLUSION**

The petition for writ of certiorari should be denied.

Respectfully submitted.

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