No. 04-1252

In the Supreme Court of the United States

AMERICAN PELAGIC FISHING COMPANY, L.P.,
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 statutory revocation of federal permits that would have allowed petitioner's vessel to conduct fishing operations in the Exclusive Economic Zone surrounding the United States effected a taking of the vessel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 379 F.3d 1363. The opinion of the Court of Federal Claims addressing liability (Pet. App. 37a-70a) is reported at 49 Fed. Cl. 36. The opinion of the Court of Federal Claims addressing damages (Pet. App. 71a-116a) is reported at 55 Fed. Cl. 575.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2004. A petition for rehearing was denied on December 9, 2004 (Pet. App. 117a-118a). The petition for a writ of certiorari was filed on March 9, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "[U]ntil the 1960s, most nations with coastlines, including the United States, had declared jurisdiction over territorial seas of three miles and conservation zones of twelve miles." Pet. App. 24a. In 1976, however, Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), Pub. L. No. 94-265, 90 Stat. 331, 16 U.S.C. 1801 *et seq.*, which established a much more expansive "fishery conservation zone" around the United States. See Pet. App. 24a-25a. The Magnuson Act in its original form stated that "[t]he inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured." *Ibid.* (quoting 16 U.S.C. 1811 (1976)).

"Subsequently, in a presidential proclamation, President Reagan established the [Exclusive Economic Zone (EEZ)] and assumed sovereign rights for the United States over this two-hundred-mile zone." Pet. App. 25a. As amended in 1986, see Pub. L. No. 99-659, Tit. I, § 101(b), 100 Stat. 3706, the Magnuson Act currently provides that "the United States claims * * * sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C. 1811(a); see Pet. App. 25a-26a. The Magnuson Act generally prohibits foreign entities from fishing in the EEZ except pursuant to international fishery agreements, and it authorizes Regional Fishery Management Councils to establish fishery management plans that may include permit requirements for domestic fishermen. 16 U.S.C. 1821, 1824, 1852, 1853; see Pet. App. 27a.

2. In 1996, petitioner's predecessor-in-interest purchased and converted a large vessel, known as the *Atlantic Star*, to catch and process fish, including mackerel and herring. In April 1997, the National Marine Fisheries Service (NMFS) issued to petitioner the permits necessary for the *Atlantic Star* to fish for mackerel. One permit extended to December 31, 1997, and the other extended to April 30, 1998. Petitioner subsequently received an authorization letter, which extended to April 30, 1998, to fish for herring. Pet. App. 4a-5a, 38a-44a.

In both 1997 and 1998, Congress enacted appropriations laws that imposed size and power limitations on vessels conducting fishing operations in the EEZ. Those limitations were made permanent by statute in 1999 and were subsequently incorporated in NMFS regulations. The effect of the size and power restrictions was to cancel the *Atlantic Star*'s existing permits and to preclude the vessel from receiving a permit to fish in any area within the EEZ. At that time, no other vessel was affected by the statutory size and power limits. See Pet. App. 6a-7a, 45a-50a.

After the cancellation of its permits to operate within the EEZ, petitioner attempted to use the *Atlantic Star* in other waters, but its efforts were unprofitable. Petitioner did not attempt to reflag the vessel in order to obtain authorization to fish in a foreign fishery. The *Atlantic Star* was ultimately sold for a profit. Pet. App. 7a-8a; C.A. App. 2090-2091.

3. In March 1999, petitioner brought suit in the Court of Federal Claims (CFC). Petitioner alleged, *inter alia*, that the revocation of its existing NMFS permits and the statutory ban on its conduct of fishing operations within the EEZ effected a taking of its property, for which it was entitled to just compensation under the Fifth Amendment. Petitioner contended that the proper measure of compensa-

tion was the profit that the *Atlantic Star* would have earned through fishing operations if its permits had remained in effect during the 20-month period (November 1997-July 1999) between the enactment of the first appropriations law and petitioner's sale of the vessel. Pet. App. 8a, 70a.

The CFC ruled in petitioner's favor on the issue of liability, holding that petitioner had established a taking of its property. Pet. App. 37a-70a. While expressing "misgivings about the rationale for" the pertinent appropriations laws, the court "assumed that Congress had good and sufficient reasons for revoking only the *Atlantic Star*'s permits." *Id.* at 54a. The court also acknowledged that "[l]icenses or permits are traditionally treated as not protected by the Takings Clause because they are created by the government and can be cancelled by the government and normally are not transferable." *Id.* at 58a.

The CFC observed, however, that "[t]he *Atlantic Star*, *qua* ship, plainly constitutes property for Fifth Amendment purposes." Pet. App. 58a. Relying on this Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the court stated that "the Fifth Amendment contemplates that compensation is owed when government, by regulation, so completely destroys the beneficial uses of property that it is, in effect, idled." Pet. App. 58a. The CFC further held that one "stick in the bundle" of rights associated with petitioner's ownership of the vessel was "the right to use the *Atlantic Star* to fish, subject to regulation." *Id.* at 59a; see *id.* at 62a (concluding that petitioner "possessed a property interest in using its vessel to fish, albeit subject to the regulatory regime").

Having found that the statutory ban on the *Atlantic Star*'s conduct of fishing operations within the EEZ intruded upon petitioner's property interests, the court analyzed petitioner's takings claim under the framework de-

scribed in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) (*Penn Central*). See Pet. App. 63a-70a. The court concluded that the government "took [petitioner's] property interest in the use of its vessel to fish for Atlantic mackerel in the EEZ of the United States from the time the 1997 Appropriations Act was enacted until the time [petitioner] sold its vessel." *Id.* at 70a. In a subsequent decision on damages (*id.* at 71a-116a), the CFC held that petitioner was entitled to just compensation of approximately $37 million, which the court found to be the "fair rental value" of the *Atlantic Star* during the relevant time period. *Id.* at 116a.

4. The court of appeals reversed. Pet. App. 1a-36a.

a. On appeal, petitioner "reassert[ed] its contention that it had a legally cognizable property interest in its lawfully issued fishing permits and authorization letter." Pet. App. 15a. Relying on established Federal Circuit precedent, the court of appeals rejected that argument. *Id.* at 15a-18a. The court explained that petitioner never possessed "the authority to assign, sell, or transfer its permits and authorization letter," *id.* at 17a; that petitioner was never "granted exclusive privileges to fish for Atlantic mackerel and herring in the EEZ," *id.* at 17a-18a; and that, under the pertinent NMFS regulations, the government at all times retained the authority to rescind or modify the permits and authorization letter, see *id.* at 17a.

b. The court of appeals also rejected petitioner's contention that the challenged size and power restrictions "effected a taking of the use of the *Atlantic Star* for fishing in the Atlantic mackerel and herring fisheries in the EEZ." Pet. App. 18a; see *id.* at 18a-35a. The court framed the relevant question as whether "the right to fish for Atlantic mackerel and herring in the EEZ [was] a legally cognizable property interest such that it was a stick in the bundle of

property rights that [petitioner] acquired as the owner of the *Atlantic Star*." *Id.* at 22a.

In answering that question in the negative, the court of appeals noted this Court's recognition in *Lucas* of the government's potentially greater degree of control over personal property than over real property. See Pet. App. 23a. The court further explained that the United States' assertion of sovereign control over the EEZ in the Magnuson Act "was already in place by the time [petitioner] purchased the *Atlantic Star*" and "was an 'existing rule' or 'background principle[]' of federal law that inhered in [petitioner's] title to the vessel." *Id.* at 28a (quoting *Lucas*, 505 U.S. at 1029-1030); see *id.* at 30a (Magnuson Act "does not explicitly, or implicitly, preserve any potentially pre-existing common law right to fish in the EEZ."). The court of appeals concluded:

> [B]ecause the Magnuson Act assumed sovereignty for the United States over the management and conservation of the resources located in the EEZ, and specifically over fishery resources, [petitioner] did not have, as one of the sticks in the bundle of property rights that it acquired with title to the *Atlantic Star*, the right to fish for Atlantic mackerel and herring in the EEZ. [Petitioner] thus did not possess the property right that it asserts formed the basis for its takings claim. In the absence of that property right, its claim is fatally defective.

Id. at 35a (footnote omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The cases on which petitioner principally relies—in particular, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001)—involved restrictions on the development of real property that was owned by the takings plaintiffs. As the court of appeals in the instant case observed (Pet. App. 23a), however, this Court has made clear that the takings principles governing regulation of land cannot be applied mechanically to limitations on the use of tangible goods. The Court in *Lucas* explained:

> It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). In the case of land, however, we think the notion * * * that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

505 U.S. at 1027-1028 (citations and internal quotation marks omitted).

Thus, the Court in *Lucas* expressly distinguished, with respect to the circumstances under which regulatory action

will effect a taking, between real and personal property. Relying on "the State's traditionally high degree of control over commercial dealings," 505 U.S. at 1027, the Court made clear that the government may ordinarily regulate the use of personal property, without incurring an obligation to pay just compensation, even when the effect of the regulation is to deprive the property of all economic value. The Court specifically declined, however, to adopt a comparable rule with respect to land-use regulation. Insofar as petitioner alleges a conflict between the Federal Circuit's ruling in this case and prior decisions involving the regulation of real property, its claim is therefore without merit.

2. The United States did not appropriate the *Atlantic Star*, physically occupy the vessel, or insist that it be used in an activity beneficial to the government. Nor did the challenged appropriations laws restrict the vessel's freedom of movement anywhere on the world's oceans. Rather, petitioner's sole objection to those laws is that they rescinded the existing permits, and precluded the issuance of new permits, that would have allowed the *Atlantic Star* to conduct fishing operations in the EEZ.

Petitioner's complaint is thus with a regulatory scheme that governs private access to, and exploitation of the natural resources of, a geographic area over which the United States government exercises "sovereign rights and exclusive fishery management authority." 16 U.S.C. 1811(a). The court of appeals and the CFC both held that petitioner had no property right in the fishing permits themselves. See Pet. App. 15a-18a, 58a; see also *Conti* v. *United States*, 291 F.3d 1334, 1341 (Fed. Cir. 2002) (swordfishing permit "falls short of conferring a cognizable property interest"), cert. denied, 537 U.S. 1112 (2003). In this Court, petitioner expressly disavows any challenge to that holding. See Pet. 11 n.4. In arguing that the denial of permission to fish in

the EEZ effected a taking of the *Atlantic Star*, however, petitioner seeks to achieve essentially the same practical result as would be accomplished if the federal permits were treated for Just Compensation Clause purposes as petitioner's property.

In *United States* v. *Rands*, 389 U.S. 121 (1967), this Court considered the measure of compensation owed when the United States condemns privately-owned riparian land adjacent to a navigable river. The Court held that the United States was not required to pay compensation for the increment of the land's value that was attributable to the potential use of the parcel as a port site, because any use of the land as a port was always subject to the government's navigational servitude. See *id.* at 123-125. The Court explained that,

> if the owner of the fast lands can demand port site value as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. To require the United States to pay for this value would be to create private claims in the public domain.

Id. at 125 (ellipses and internal quotation marks omitted).

In *United States* v. *Fuller*, 409 U.S. 488 (1973), the Court reached a similar conclusion with respect to permits for grazing livestock on federal lands. The Court held that, when the government condemns land owned in fee simple by private parties, it need not compensate the owner for any incremental value added to the fee lands by the possibility of grazing stock, pursuant to a revocable permit, on adjacent federal property. See *id.* at 490-494. The Court explained that, at least as a general matter,

> the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain. If, as in *Rands*, the Government need not pay for value that it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright.

Id. at 492.

Petitioner's claim for compensation in this case cannot be reconciled with those precedents. The Court in *Rands* and *Fuller* held that, because the government would not be required to pay compensation if it effectively eliminated the use of riparian land as a port site, or revoked a permit for grazing stock on federal property, a fee owner of condemned land would not be entitled to compensation for any increment of value that was contingent on the government's favorable exercise of discretion in those regards. Petitioner nevertheless seeks compensation for the rental value that the *Atlantic Star* would have had if the vessel's permits to fish in the EEZ had remained in effect. As in *Rands* and *Fuller*, "[t]o require the United States to pay for this . . . value would be to create private claims in the public domain." *Rands*, 389 U.S. at 125 (quoting *United States* v. *Twin City Power Co.*, 350 U.S. 222, 228 (1956)).

Contrary to petitioners' suggestion (Pet. 16-17, 19), the court of appeals' decision does not hold or logically imply that the existence of a permitting scheme will invariably bar a claim under the Just Compensation Clause. Very different issues are raised when the government refuses to issue a permit for a landowner to develop or otherwise

make productive use of the takings plaintiff's *own* real property. See, *e.g.*, *Lucas*, 505 U.S. at 1019 (stating, as a general rule, that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, * * * he has suffered a taking"); *Penn Central*, 438 U.S. at 124-128. In the instant case, however, the sole restriction placed upon petitioner's use of the *Atlantic Star* was that petitioner was not permitted to use the vessel to exploit natural resources located within the "exclusive economic zone" of the United States as designated by Congress. Petitioner identifies no case in which a court has awarded compensation under the Fifth Amendment based on the denial or revocation of a permit to engage in profit-making activities on *federal land*, or in an analogous maritime area subject to the federal government's exclusive control.[1]

3. The appropriations laws at issue in this case did not deprive petitioner of "all economically beneficial or productive use" of the vessel. *Lucas*, 505 U.S. at 1015. Petitioner could have sought to reflag the *Atlantic Star* to fish in foreign and international waters, or it could have reoutfitted the vessel to serve in other commercial capacities. Indeed, petitioner used the *Atlantic Star* for research and fishing operations after the pertinent appropriations laws were enacted, see Pet. App. 7a-8a, and it sold the vessel for a

[1] As petitioner observes (Pet. 18 n.7), the federal government also exercises "sovereignty" even over privately-owned fee land within the territorial borders of the United States. The government's authority to regulate the use of such land without the payment of just compensation, however, is limited by historical understandings as to the prerogatives that typically accompany private ownership of real property. A private actor clearly has no comparable expectation of being allowed to exploit natural resources located on federal lands, or in a maritime region designated by Congress as the "exclusive economic zone" of the United States.

profit at the conclusion of the 20-month period for which just compensation was sought, see C.A. App. 2090-2091.

It may be assumed, *arguendo*, that, at least so long as the *Atlantic Star* operated under a United States flag, petitioner could have earned a profit on the vessel's operation only by using the vessel to fish in the EEZ. See Pet. 8. If that was so, however, it would mean that petitioner *chose* to acquire a physical asset that could profitably be used only within the "exclusive economic zone" of the United States, and only pursuant to a federal permit that, under the terms of the pre-existing regulatory scheme, was revocable at any time. Under those circumstances, petitioner's inability to earn a profit on the *Atlantic Star*'s operation is a patently insufficient basis for concluding that revocation of its EEZ fishing permits effected a taking of the vessel.

4. Petitioner contends (Pet. 5-6) that various pronouncements by federal officials encouraged the company to invest in the *Atlantic Star*. As noted, however, petitioner does not argue that NMFS's issuance of permits to fish in the EEZ conferred any property right upon the permit holder. Nor does petitioner contend that either the issuance of the permits, or any other federal action during the relevant period, constituted a binding *contractual* commitment to allow the *Atlantic Star* to conduct fishing operations in the "exclusive economic zone" of the United States. Just as the rights of riparian landowners are subject to the "dominant servitude" held by the United States, *Rands*, 389 U.S. at 123; see *id.* at 125 (noting "the constitutional power of Congress completely to regulate navigable streams to the total exclusion of private power companies or port owners"), petitioner's exploitation of natural resources within the EEZ was at all times "a matter of gov-

ernmental permission, rather than a property right," Pet. App. 29a.[2]

Petitioner also contends (*e.g.*, Pet. 2, 7) that it was singled out for unfavorable treatment and thereby treated unfairly vis-a-vis its competitors.[3] Petitioner further asserts (Pet. 24) that "the legislation lacked a nexus to any conceivable harm to the flourishing fish stocks at issue."[4]

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[2] Petitioner contends that the initial (1997) appropriations law "was unforeseeable under the existing [Magnuson Act] regulatory scheme." Pet. 2 (footnote omitted). The enactment of that law evidently did not take petitioner wholly by surprise, however, since petitioner purchased (and subsequently collected upon) a policy that insured the company against cancellation of its fishing permits. See Pet. App. 108a-109a.

[3] That claim is misconceived. Although no vessel other than the *Atlantic Star* was affected by the relevant appropriations provisions, see Pet. App. 7a, that is because the *Atlantic Star* was the only vessel in actual or contemplated operation in the Atlantic herring and mackerel fisheries that exceeded the statutory size and power limits. See 143 Cong. Rec. 19,489 (1997) (Sen. Snowe) (explaining that the *Atlantic Star* was "more than twice the size of any other vessel currently fishing in New England"). And while petitioner contends (Pet. 7) that it was singled out for exclusion from *other* United States fisheries, there is no evidence that petitioner wished to operate in such fisheries or could have earned a profit doing so. See Pet. App. 52a (CFC states that "[t]he profitability of the *Atlantic Star* depended upon its ability to fish for Atlantic mackerel").

[4] Petitioner suggests (Pet. 7) that the statutory size and power restrictions were explicitly motivated by economic protectionism, and were not defended as efforts to protect the health of the Atlantic herring and mackerel fisheries. The legislative record refutes that contention. In introducing the 1997 appropriations provision, Senator Snowe acknowledged that herring and mackerel stocks were "fairly abundant" at that time. 143 Cong. Rec. at 19,489. She observed, however, that the *Atlantic Star* was "more than twice the size of any other vessel currently fishing in New England," and that "[m]any concerns have been raised from Maine to New Jersey about the

That assertion, however, is not the basis for a takings claim, see *Lingle* v. *Chevron U.S.A. Inc.*, No. 04-163 (May 23, 2005), and petitioner does not challenge the relevant appropriations laws under the Due Process Clause of the Fifth Amendment or its equal protection component. It is therefore appropriate to "assume[]," as did the CFC, "that Congress had good and sufficient reasons" for crafting those laws in the manner that it did. Pet. App. 54a.

5. Contrary to petitioner's contention (Pet. 24-26), consideration of the factors identified by this Court in *Penn Central* as having "particular significance" in regulatory takings analysis—*i.e.*, the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action," 438 U.S. at 124—reinforces the Federal Circuit's conclusion that no taking occurred in this case. Petitioner's ultimate sale of the *Atlantic Star* at a profit refutes the contention

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potential impacts that this enormous vessel will have on the herring and mackerel stocks, and on the composition of the fisheries that have been developing in recent years through the hard work of many people in the region." *Ibid.* Senator Kerry, who co-sponsored the bill, similarly recognized the "current health of Atlantic herring and mackerel stocks" but warned that "[t]he challenge now is to prevent a flood of new or displaced boats from entering the herring fishery and overwhelming the harvesting capacity of the resource." *Id.* at 19,490. Senator Kerry further explained:

> [NMFS] estimates that herring stocks are now at levels that would support an expanded harvest level. However, New England's past has taught us that in an unregulated environment, this current healthy condition could rapidly be reversed. Given the present lack of a Federal fishery management plan for herring and questionable scientific information on the status of the stocks, the uncontrolled expansion of this fishery could have devastating consequences.

Ibid.

(Pet. 25) that "the economic impact [of the appropriations laws] on petitioner was devastating." Nor did the revocation of petitioner's fishing permits disappoint any legitimate "investment-backed expectations." *Ibid.* Well before petitioner purchased the *Atlantic Star*, Congress had asserted "sovereign rights and exclusive fishery management authority over all fish" within the EEZ, 16 U.S.C. 1811(a), and the regulatory scheme made clear that petitioner's permits were revocable at any time. Petitioner's purchase of insurance against the very regulatory action that formed the basis of its takings claim (see note 2, *supra*) further demonstrates that no substantial disruption of its legitimate expectations occurred.

Finally, there is no basis for petitioner's contention (Pet. 24-25) that the "character" of the challenged governmental action supports petitioner's takings claim. In discussing that factor, the Court in *Penn Central* observed that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124 (citation omitted). Far from effecting a "physical invasion" of petitioner's property, the appropriations laws at issue here restricted only a single use of the *Atlantic Star*, and they applied only within the "exclusive economic zone" of the United States. Contrary to petitioner's contention (Pet. 24), moreover, those laws did not operate retroactively in the sense of attaching onerous consequences to conduct undertaken before the laws' enactment. Rather, the appropriations laws simply precluded the *Atlantic Star* from fishing in the EEZ after the first of those laws took effect, based on the size and power of the vessel as then configured.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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