No. 08-1361

In the Supreme Court of the United States

SWISHER INTERNATIONAL, INC., PETITIONER

v.

THOMAS J. VILSACK, SECRETARY OF AGRICULTURE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Fair and Equitable Tobacco Reform Act of 2004, which imposes monetary assessments on current tobacco manufacturers and tobacco product importers to finance the phase-out of federal tobacco quota and price-support programs, violates the Due Process Clause or the Just Compensation Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 550 F.3d 1046. The order of the district court (Pet. App. 33a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 3, 2008. On February 17, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including May 2, 2009, and the petition was filed on May 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Until 2004, tobacco farmers were for decades subject to a comprehensive system of federal production quotas and price controls. Under the Agricultural Ad-

justment Act of 1938, the Department of Agriculture assigned quotas and allotments limiting the amount of tobacco that farmers could bring to market without penalty. See 7 U.S.C. 1311 *et seq.* (2000) (repealed 2004). Subsequent legislation added a system of price supports that guaranteed a minimum price to tobacco farmers for their crops. See 7 U.S.C. 1445 to 1445-2 (2000) (repealed 2004).

Congress ultimately concluded, however, that the quota and price-support systems had outlived their purpose. As one court explained, "tobacco quotas and price supports often worked at cross-purposes. Artificially high prices dampened demand for domestic tobacco and led to reduced quotas. Along with many other factors, this contributed to a worsening financial situation among the members of the tobacco farming community." *State* v. *Philip Morris USA Inc.*, 618 S.E.2d 219, 220 (N.C. 2005). Congress became concerned that tobacco farmers and their rural communities were facing economic disaster, threatening the long-term viability of the United States tobacco industry. See generally *The Necessity of a Tobacco Quota Buyout: Why It Is Crucial to Rural Communities and the U.S. Tobacco Industry: Hearing Before the Subcomm. on Production & Price Competitiveness of the Senate Comm. on Agriculture, Nutrition & Forestry*, 108th Cong., 2d Sess. 2 (2004).

Congress responded by enacting the Fair and Equitable Tobacco Reform Act of 2004 (FETRA), Pub. L. No. 108-357, Tit. VI, 118 Stat. 1522, which repealed the tobacco quota and price-support programs. See FETRA §§ 611-612, 118 Stat. 1522-1524. Congress did not, however, simply terminate decades of government market controls overnight. Rather, to minimize disruption to

the tobacco industry and facilitate the transition to a free-market system, Congress created a ten-year Tobacco Transition Payment Program. Under that transitional program, the Commodity Credit Corporation (CCC), a government corporation, makes payments to owners of farms that had an established marketing quota at the time of FETRA's enactment and to persons who were engaged in the production of tobacco in 2002, 2003, or 2004. 7 U.S.C. 518a(a), 518b(a) and (d)(3), 518e.

To reimburse the CCC for these transitional support payments, Congress created the Tobacco Trust Fund, which is administered by the Secretary of Agriculture and funded by quarterly assessments on current manufacturers and importers of tobacco products. 7 U.S.C. 518d(b), 518e(a). FETRA provides:

> The Secretary, acting through the [CCC], shall impose quarterly assessments during each of fiscal years 2005 through 2014, calculated in accordance with this section, on each tobacco product manufacturer and tobacco product importer that sells tobacco products in domestic commerce in the United States during that fiscal year.

7 U.S.C. 518d(b)(1). The statute further specifies that the quarterly assessment for each manufacturer or importer shall be based on the class of tobacco product it sells (cigarettes, cigars, chewing tobacco, etc.), in proportion to the company's domestic market share for products of that class, as defined in the statute. Pet. App. 3a-4a; see 7 U.S.C. 518d(c) and (f); see also 7 C.F.R. Pt. 1463, Subpt. A.

2. Petitioner is a domestic manufacturer of small and large cigars and other tobacco products. Pet. App. 34a. In the first year of the transitional payment pro-

gram, petitioner was required to pay approximately $11 million into the Tobacco Trust Fund based on petitioner's share of the domestic tobacco market. *Id.* at 4a. Petitioner claims that its total obligation to the trust fund will exceed $100 million over the ten-year life of the transitional program. *Ibid.*

Petitioner brought this action against the Secretary in the United States District Court for the Middle District of Florida.[1] Petitioner sought relief from its payment obligations, claiming that the assessments authorized by Congress unlawfully take petitioner's property without just compensation and violate principles of substantive due process and equal protection.

The district court granted summary judgment to the government with regard to each of plaintiff's constitutional challenges. Pet. App. 33a-70a. First, the district court rejected petitioner's taking claim because, with narrow exceptions not present here, "a government-imposed payment of money cannot result in a compensable taking." *Id.* at 53a (quoting *Commonwealth Edison Co.* v. *United States*, 46 Fed. Cl. 29, 41 (2000), aff'd, 271 F.3d 1327 (Fed. Cir. 2001), cert. denied, 535 U.S. 1096 (2002)). Second, the court rejected petitioner's substantive due process claim, holding that even if petitioner were correct that FETRA operated retrospectively—which the court did not decide—Congress had acted rationally and in furtherance of a legitimate legislative goal in establishing a transitional payment program financed by assessments on current tobacco manufacturers and importers. *Id.* at 60a-62a. The court also rejected petitioner's claim that the assessment scheme

[1] Petitioner invoked FETRA's judicial-review provision, 7 U.S.C. 518d(j)(1), as the basis for suing in the district court rather than the Court of Federal Claims.

lacked a rational basis and therefore violated the equal protection component of the Due Process Clause. *Id.* at 62a-69a.

3. The court of appeals affirmed. Pet. App. 1a-23a.

a. The court of appeals first explained that the Just Compensation Clause "is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest." Pet. App. 14a. The court rejected petitioner's reliance on the plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), in which four Justices concluded that the severe retroactive liability imposed under the Coal Act constituted an unconstitutional taking without just compensation under the circumstances of that case. See *id.* at 537-538. As the court explained, five Justices in *Eastern Enterprises* expressly concluded that "the Takings Clause does *not* apply where there is a mere general liability * * * and where the challenge seeks to invalidate the statute rather than merely seek[] compensation for an otherwise proper taking." Pet. App. 16a (emphasis added) (citing *Eastern Enterprises*, 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting)). Because the assessments under FETRA represent nothing more than a congressionally imposed, general monetary obligation to the government, the court concluded, "it would be inappropriate in this case to apply a takings analysis." *Ibid.*

In any event, the court of appeals stressed, the assessments that petitioner is required to pay under FETRA are wholly unlike the liability at issue in *Eastern Enterprises*, which was a "retroactive obligation 'of unprecedented scope.'" Pet. App. 17a (quoting *Eastern Enterprises*, 524 U.S. at 549 (plurality opinion)). In-

deed, the court stated, a "crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon [petitioner] * * * is not retroactive." *Ibid.* FETRA monetary assessments are imposed only on current participants in the domestic tobacco market, the court explained, and only in proportion to their current market share. *Id.* at 18a. Because this case involves none of the retroactive effect that was the linchpin of the plurality's takings analysis in *Eastern Enterprises*, the court stated that it "strongly suspect[ed] that [it] would reach the same result," and reject petitioner's taking claim, even under "the takings analysis described in Justice O'Connor's [plurality] opinion" in *Eastern Enterprises*. *Id.* at 20a n.12.

b. The court of appeals next held that the FETRA assessments do not violate principles of substantive due process. "Stripped of its argument that the Act is retroactive," the court concluded, "[petitioner's] due process challenge is readily disposed of as being wholly without merit." Pet. App. 18a. The court observed that "[t]he legitimate legislative purpose" in eliminating federal market quotas and price supports for tobacco is "apparent." *Id.* at 19a. Moreover, the court reasoned, Congress rationally chose to finance this program by imposing an assessment on current tobacco manufacturers and importers—the entities most likely to benefit from deregulation of tobacco farming and the corresponding reduction in prices for raw tobacco. *Ibid.* Finally, the court concluded that the methodology specified by Congress for calculating assessments under FETRA does

not violate petitioner's equal protection rights. *Id.* at 21a-22a.[2]

c. Judge Cox concurred in part and in the judgment. Pet. App. 23a. He joined the court's rejection of petitioner's due process and equal protection claims, and he agreed that FETRA "does not violate the Takings Clause." *Ibid.*

ARGUMENT

The court of appeals correctly held that FETRA does not violate the Due Process Clause or the Just Compensation Clause of the Fifth Amendment. That conclusion does not conflict with any decision of this Court or any other court of appeals. As the courts below recognized, FETRA imposes an ordinary requirement to pay money (*i.e.*, a tax) on current participants in a regulated industry, in proportion to their participation in the industry, to fund a federal program that Congress deemed essential to the health of that industry. That scheme reflects an entirely rational legislative judgment and imposes no retroactive liability of the kind at issue in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), on which petitioner relies. Furthermore, although petitioner identifies a minor degree of disagreement among the circuits concerning the proper interpretation of this Court's decision in *Eastern Enterprises*, this case does not impli-

[2] The court also rejected petitioner's equal protection challenge to the methodology specified by Congress for calculating assessments under FETRA. Pet. App. 21a-22a. Petitioner does not renew that challenge here. In addition, although petitioner initially brought a claim under the Administrative Procedure Act to challenge the Department of Agriculture's regulations implementing FETRA, it abandoned that claim in the district court. *Id.* at 46a.

cate that disagreement. Further review is not warranted.

A. The Decision Below Is Correct

1. The court of appeals correctly held that FETRA is rationally related to legitimate government ends and does not violate substantive due process. FETRA repealed a decades-old system of quotas and price supports that Congress concluded had not only outlived its purpose, but also posed a threat to the long-term viability of the entire domestic tobacco industry. At the same time, Congress recognized that it could not simply terminate federal market controls overnight: thousands of tobacco farmers had organized their operations for decades based on the existence of those controls, and Congress rationally concluded that a temporary, transitional program of support payments was warranted to avoid needless hardship and permit farmers to adjust to the rigors of the free market. See 7 U.S.C. 518 *et seq.*; 150 Cong. Rec. H8716-H8718 (daily ed. Oct. 7, 2004) (statements of Reps. Burr, McIntyre, and Lewis of Ky.). Petitioner acknowledges that that program rested on a "rational and legitimate" purpose. Pet. 23.

To finance the program, Congress imposed a temporary monetary assessment—in effect, a tax with a sunset provision—on all tobacco manufacturers and importers who sell products in the domestic market in any given year during the ten-year transition period. The assessments are levied only on current participants in the domestic tobacco market, see 7 U.S.C. 518d(b)(1) (authorizing annual assessments on each company "that sells tobacco products in domestic commerce in the United States during that fiscal year"), and only in proportion

to each participant's domestic market share during the year in question, see 7 U.S.C. 518d(e) and (f).

Congress's decision to require tobacco manufacturers and importers to finance the deregulation of tobacco farming reflects its recognition that it was those companies—*i.e.*, those for whom raw tobacco is a principal input—that stood to benefit from the elimination of market quotas and price supports and the corresponding decrease in the price of tobacco. Pet. App. 19a; accord, *e.g.*, *State* v. *Philip Morris USA Inc.*, 618 S.E.2d 219, 223 (N.C. 2005). Indeed, as the court of appeals observed, "tobacco manufacturers and importers currently engaged in the domestic market are entities that are not only likely to benefit from the deregulation, but also are entities best suited to pass such increased costs [*i.e.*, the FETRA assessments] along to the ultimate consumers." Pet. App. 19a. Moreover, given that all tobacco products compete with each other for consumer dollars, it was reasonable for Congress to spread the burden over all participants in the domestic tobacco market in proportion to their share of the market.

Although petitioner contended below that FETRA should be struck down "because it imposes retroactive liability," Pet. App. 17a; see, *e.g.*, Pet. C.A. Br. 28, petitioner now reverses course and criticizes the court of appeals for a "talismanic focus on 'retroactivity.'" Pet. 10. Instead, petitioner now appears to suggest (Pet. 10, 20, 21) that applying the assessment to its operations violates a "proportionality" principle that petitioner asserts is implicit in the Due Process Clause, on the theory that there is only a "tenuous" connection between its operations and the former tobacco-quota system. But petitioner has acknowledged that it participated in that quota system. See, *e.g.*, Pet. App. 43a & n.10. Petitioner

suggests that its tobacco needs were different, but Congress was not constitutionally required to distinguish between, *e.g.*, air-cured tobacco and other types of tobacco (see Pet. 5). Cf., *e.g.*, *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 272, (1979) ("When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern."). And in any event, Congress could rationally conclude that the market for tobacco, generally, is sufficiently interconnected that petitioner may well benefit from the end of price supports. See Pet. App. 44a. Furthermore, the assessment does not impose disproportionate liability on cigar manufacturers like petitioner, but takes account of their relatively small share of "gross domestic volume." 7 U.S.C. 518d(c)(1)(B) and (2). Unlike the plaintiff in *Eastern Enterprises*, petitioner has not withdrawn from the industry or terminated any nexus with the domestic tobacco market; if it did, it would no longer be subject to an assessment. See 7 U.S.C. 518d(e) and (f). There is, in short, no merit to petitioner's contention (Pet. 21) that the application of the assessment to companies like it is so irrational as to be "worse than 'retroactive.'"

The court of appeals thus correctly held that FETRA does not violate the Fifth Amendment guarantee of due process. "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Congress concluded that it was necessary for the health of the entire tobacco industry to wean tobacco farmers

from federal price controls, and for that purpose imposed a temporary tax on the entities that participate in the active market for tobacco products and also are categorically most likely to benefit from the deregulation of tobacco farming. Pet. App. 19a. That is plainly a rational means of accomplishing a concededly legitimate end, and petitioner identifies no valid basis on which to set aside Congress's legislative judgment.

2. a. Petitioner contends that the court of appeals erred in declining to analyze FETRA's assessments under the Just Compensation Clause. But the mere imposition of an obligation to pay money, without more, does not trigger analysis under the Just Compensation Clause. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 & n.9 (1989) (rejecting per se takings analysis and holding that assessment on awards by an international tribunal "does not qualify as a 'taking'"). Most recently, five Justices adhered to that position in *Eastern Enterprises*. See 524 U.S. at 540 (Kennedy, J., concurring in the judgment and dissenting in part) ("an obligation to perform an act, the payment of benefits," is not a "taking"); *id.* at 554 (Breyer, J., dissenting) ("an ordinary liability to pay money" does not give rise to a taking).

As this Court recognized in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), a contrary rule would subject a broad variety of everyday economic legislation—such as taxes, minimum wage laws, and new legal causes of action—to takings analysis. *Id.* at 222-223. Congress has imposed myriad taxes, fees, and assessments in pursuance of its constitutional authority to "lay and collect Taxes, Duties, Imposts and Excises," U.S. Const. Art. I, § 8, Cl. 1, and this Court has never suggested that those exactions are subject to challenge under the Just Compensation Clause merely because

they require the payment of money to the government, or because money collected in taxes from one citizen is expended to benefit another. See *Connolly*, 475 U.S. at 223 ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."); accord *id.* at 228 (O'Connor, J., concurring).

The court of appeals thus correctly concluded that "takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest." Pet. App. 14a. Accord, *e.g.*, *Commonwealth Edison Co.* v. *United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc) ("[T]he mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment."), cert. denied, 535 U.S. 1096 (2002); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 659 (3d Cir.), cert. denied, 528 U.S. 963 (1999); *Parella* v. *Retirement Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999); *Swisher Int'l, Inc.* v. *United States*, 178 F. Supp. 2d 1354, 1362 (Ct. Int'l Trade 2001), aff'd, 315 F.3d 1332 (Fed. Cir.), cert. denied, 539 U.S. 942 (2003).

The FETRA assessment scheme that petitioner challenges, like any other federal tax or fee, involves just such an ordinary obligation to pay money to the government. Pet. App. 12a. Indeed, as petitioner appears to recognize (Pet. 23), Congress could have funded the Tobacco Transition Payment Program through an increase in the federal excise tax for tobacco products.[3] That

[3] Petitioner's suggestion that an increase in the excise tax would have been generated political opposition, Pet. 23, has no bearing on

Congress elected to fund the program through a monetary assessment on manufactures and importers that is paid into a special statutory trust fund, rather than an excise tax paid into the general Treasury, does not transform otherwise permissible revenue legislation into an unconstitutional taking. Cf. *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550, 562-563 (2005).

Petitioner identifies no decision of this Court invalidating such a scheme under the Just Compensation Clause. Petitioner relies principally on Justice O'Connor's plurality opinion in *Eastern Enterprises*, which concluded that the "disproportionate and severely retroactive" liability imposed by the Coal Act on a corporation that was no longer involved in the industry constituted an impermissible taking. 524 U.S. at 536; see generally *id.* at 522-538 (plurality opinion). But as the court of appeals recognized, five Justices in *Eastern Enterprises* concluded that the monetary assessment scheme in that case was *not* properly analyzed under the Just Compensation Clause. Pet. App. 16a; see 524 U.S. at 541 (Kennedy, J., concurring in the judgment and dissenting in part) ("Until today * * * one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."); *id.* at 554 (Breyer, J., dissenting) (explaining that takings analysis was inappropriate because the suit involved "not an in-

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whether FETRA constitutes an uncompensated taking. Nor is it clear why petitioner believes that FETRA's monetary assessments "circumvent[ed] the orderly lawmaking process." Pet. 22. The assessment system is set out clearly in the statute, which originated in the House of Representatives, passed both Houses of Congress, and was signed by the President. No more orderly lawmaking process was required.

terest in physical or intellectual property, but an ordinary liability to pay money").

This Court's decision in *Norwood* v. *Baker*, 172 U.S. 269 (1898), on which petitioner also relies (Pet. 14), is inapposite. In that case, the village of Norwood condemned a strip from the middle of Baker's lot, paid her compensation of $2000, but then assessed her (ostensibly as the owner of the land abutting the condemned strip) $2218 to recover the costs of the condemnation. See 172 U.S. at 274-277. There was no doubt that property (real property, not money) had been taken; the issue was whether the village could circumvent its obligation *to pay compensation* for that taking by assessing the owner for a sum exceeding the condemnation value, "irrespective of any peculiar benefits accruing to the owner from such improvement." *Id.* at 279.[4]

At most, petitioner can point to a handful of decisions in which this Court found that the imposition of monetary liability was not a taking, after applying the three-factor inquiry often used to determine whether a regulation amounts to a regulatory taking. See *Connolly*, 475 U.S. at 224-227; see also *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-646 (1993); cf. *Bowen* v. *Gilliard*, 483 U.S. 587,

[4] Nor would Justice Scalia's dissenting opinion in *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), help petitioner even if Justice Scalia's view had commanded a majority of the Court. Contrary to petitioner's reading (see Pet. 19), Justice Scalia affirmatively stated that the city could tax landlords and distribute the proceeds to pay rent for needy tenants—a structure directly analogous to the one at issue here. 485 U.S. at 22. Justice Scalia objected to achieving the same end through a price control; he did not opine that the Just Compensation Clause requires all taxes to be broad-based. In any event, the Court did not consider the Just Compensation Clause challenge in that case. See *id.* at 15 (majority opinion).

606-609 (1987) (finding no taking where a federal statute required, as a condition of eligibility for welfare benefits, that any entitlement to child-support payments be prospectively reassigned from the beneficiary child to the custodial parent for the benefit of the entire household). But those decisions do *not* establish the rule that petitioner seeks—that a general monetary assessment, standing alone, may be blocked as an uncompensated taking.

b. As the court below recognized, Pet. App. 13a n.6, this Court has analyzed a requirement to pay money under takings principles only when the government has invaded a discrete, identifiable property interest, such as a legal right to collect interest payments. *E.g.*, *Phillips* v. *Washington Legal Found.*, 524 U.S. 156 (1998) (interest income generated by funds in a specific, consolidated lawyers' trust account); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980) (interest generated from specific, consolidated interpleader account); see *Eastern Enterprises*, 524 U.S. at 555 (Breyer, J., dissenting).

Petitioner objects that the distinction drawn in this Court's decisions between ordinary monetary liabilities and the invasion of discrete property interests is unsound because money is fungible. Pet. 15 n.7. But as the Court recognized in *Connolly*, extending the Just Compensation Clause to encompass any legal obligation to pay money would "prove too much." 475 U.S. at 222-223. The gravamen of the Just Compensation Clause is property, not monetary liability. See *Eastern Enterprises*, 524 U.S. at 541, 544 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-556 (Breyer, J., dissenting). FETRA does not invade any discrete property interest of petitioner's, but merely

requires the payment of money to the government. The statute "is indifferent as to how the regulated entity elects to comply or the property it uses to do so." *Id.* at 540 (Kennedy, J., concurring in the judgment and dissenting in part). The court of appeals correctly held that such an obligation does not implicate the Just Compensation Clause.

3. In any event, petitioner's claim would fail even under the terms of the plurality opinion in *Eastern Enterprises*, as the court of appeals recognized. Pet. App. 20a n.12. FETRA's assessment scheme involves nothing like the "severe, disproportionate, and extremely retroactive" liability that the plurality in *Eastern Enterprises* stressed in finding that the Coal Act effected an unconstitutional taking. 524 U.S. at 538. Eastern Enterprises was allocated millions of dollars in liability based on conduct that had terminated decades before the enactment of the legislation. See *id.* at 530-531. That extraordinary retroactive effect was essential to the plurality's reasoning under the Just Compensation Clause, as well as to Justice Kennedy's conclusion that the Act violated fundamental principles of due process. Compare, *e.g.*, *id.* at 528-529 (analyzing the Coal Act as a taking because it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience"), with *id.* at 529 (Kennedy, J., concurring in the judgment and dissenting in part) (reasoning that "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity").

FETRA implicates none of the same concerns. The annual assessments are levied only on current partici-

pants in the domestic tobacco market, see 7 U.S.C. 518d(b)(1), and only in proportion to their market share during the year in question, 7 U.S.C. 518d(e) and (f). As the court of appeals recognized, "[t]he crucial difference between the instant case and *Eastern Enterprises* is that the obligation imposed upon [petitioner] in the instant case is not retroactive." Pet. App. 17a. If petitioner ceased manufacturing tobacco products tomorrow, it would have no further obligation to the trust fund; by the same token, if a new manufacturer entered the domestic tobacco market tomorrow, it would be required to pay the FETRA assessment "as a cost of doing business in the industry." *Id.* at 18a. Because petitioner's obligations under FETRA are based solely on its present participation in the domestic tobacco industry, the concerns that animated the plurality's takings analysis in *Eastern Enterprises* are not present here. And petitioner does not seriously contend otherwise, having abandoned its previous assertions that FETRA is "retroactive." See p. 9, *supra*.

B. The Decision Below Does Not Implicate The Minor Disagreement Among The Circuits Concerning The Precedential Effect Of *Eastern Enterprises*

Petitioner wrongly contends that this Court's review is warranted because the circuits are split over the precedential effect of this Court's decision in *Eastern Enterprises*. The minor disagreement that petitioner identifies is not implicated by the decision below, which is correct regardless of which opinion in *Eastern Enterprises* controls. Further review is not warranted.

In addition to the Eleventh Circuit's decision below, three circuits have held that, because no single rationale commanded the assent of a majority of the Court, *East-*

ern Enterprises does not provide a controlling rule that applies beyond the specific facts of that case. *United States* v. *Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003), cert. denied, 540 U.S. 1103 (2004); *United States* v. *Dico, Inc.*, 266 F.3d 864, 880 (8th Cir. 2001), cert. denied, 535 U.S. 1095 (2002); see *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1254 (D.C. Cir. 1998) (concluding that no taking claim was presented and that *Eastern Enterprises* did not establish a precedential substantive due process holding); see also *Franklin County Convention Facilities Auth.* v. *American Premier Underwriters, Inc.*, 240 F.3d 534, 552 & n.6 (6th Cir. 2001) (explaining that "*Eastern Enterprises* left unresolved whether a takings analysis applies in a case such as this," and rejecting the taking claim under the analysis of Justice O'Connor's opinion).[5] In contrast, three circuits have held that Justice Kennedy's concurrence in *Eastern Enterprises*, combined with Justice Breyer's dissenting opinion for four Justices, provides binding authority for the proposition that general monetary assessments are not cognizable under the Just Compensation Clause. *Commonwealth Edison Co.*, 271 F.3d at 1338-1339; *Unity Real Estate Co.*, 178 F.3d at 659; *Parella*, 173 F.3d at 58.

This case, however, does not implicate that disagreement: as already noted, see pp. 16-17, *supra*, *none* of the opinions in *Eastern Enterprises* articulated a rule that would allow petitioner to prevail here. The linchpin

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[5] Petitioner mistakenly contends (Pet. 12) that the Ninth Circuit has also so held, citing *Chevron USA, Inc.* v. *Bronster*, 363 F.3d 846, 852 (9th Cir. 2004), rev'd *sub nom. Lingle* v. *Chevron USA, Inc.*, 544 U.S. 528 (2005). The court of appeals in that case in fact concluded that the meaning of *Eastern Enterprises* was irrelevant to the regulatory-taking claim before the court. See *id.* at 851.

of both the plurality opinion and the concurrence in *Eastern Enterprises* was the extraordinary retroactivity of the liability imposed. And as petitioner now appears to recognize, FETRA imposes no such retroactive burden, either generally or as applied to petitioner. See p. 9, *supra*. Accordingly, the outcome here would be the same irrespective of which opinion in *Eastern Enterprises*, if any, has the status of a precedential holding of the Court. See Pet. App. 20a n.12 ("[W]e strongly suspect that we would reach the same result should we undertake the takings analysis described in Justice O'Connor's opinion."). This case accordingly does not provide a suitable vehicle for resolving the disagreement that petitioner identifies.

Indeed, petitioner fails to identify any decision of this Court or any court of appeals that is inconsistent with the decision below. The only decision that petitioner cites in which a court of appeals invalidated a monetary assessment under the Just Compensation Clause is *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412, 420 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001) (*USF&G*). That case, however, involved the taking of "an identifiable property interest or fund," namely, a "specific fund of benefits." *Ibid.* That feature of *USF&G* brings it within the framework of such "identifiable fund" cases as *Webb's Fabulous Pharmacies*, which have no application here. See pp. 15-16, *supra*. *USF&G* also involved severely retroactive monetary assessments similar to those in *Eastern Enterprises*, and wholly unlike anything at issue in this case. See *USF&G*, 226 F.3d at 420 ("Act 188 as applied to plaintiffs' pre-enactment contracts retroactively imposes a heavy economic burden on those who could not reasonably anticipate the liability."). Petitioner identifies no

case in which this Court or any court of appeals has invalidated, as a violation of due process or the Just Compensation Clause, a monetary assessment imposed on *current* participants in a regulated industry in direct proportion to their participation, and we are aware of none. This Court's review accordingly is not warranted.

Equally unpersuasive is petitioner's contention (Pet. 13-14) that the decision below conflicts with various state court opinions suggesting that Just Compensation Clause analysis might be applied to monetary assessments imposed to offset the impact of land development. Unlike the FETRA assessments, the monetary assessments in those cases were inextricably tied to land-use regulations, and thus implicated traditional property interests in real estate. Moreover, the state courts in those cases regarded the assessments at issue not as ordinary monetary liabilities to the government, but rather as conditions imposed on the development of real property, and accordingly analyzed them under this Court's decisions in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). See *Town of Flower Mound* v. *Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 624 (Tex. 2004); *Home Builders Ass'n* v. *City of Beavercreek*, 729 N.E.2d 349, 354-356 (Ohio 2000); *Northern Ill. Home Builders Ass'n* v. *County of Du Page*, 649 N.E.2d 384, 388-389 (Ill. 1995). Such decisions have no bearing on the decision below and therefore do not furnish a reason for the Court to review the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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