No. 01-1622

In the Supreme Court of the United States

NATIONAL COALITION TO SAVE OUR MALL, ET AL.,
PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR,
ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

ANDREW C. MERGEN
R. JUSTIN SMITH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Act of May 28, 2001, Pub. L. No. 107-11, 115 Stat. 19, which directs construction of a World War II memorial at the Rainbow Pool site on the National Mall and forecloses judicial review of challenges to its design, location, and construction, violates Article III of the Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

No. 01-1622

NATIONAL COALITION TO SAVE OUR MALL, ET AL.,
PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR,
ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 269 F.3d 1092. The opinion of the district court (Pet. App. 10a-31a) is reported at 161 F. Supp. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2001. A petition for rehearing was denied on February 6, 2002. The petition for a writ of certiorari was filed on May 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress enacted legislation authorizing the construction of a memorial to honor members of the Armed Forces who served in World War II and to commemorate the participation of the United States in that war. Act of May 25, 1993, Pub. L. No. 103-32, 107 Stat. 90. Congress assigned the American Battle Monuments Commission the responsibility to design and construct the memorial. *Ibid.* Congress subsequently enacted legislation authorizing that the memorial be built in "Area I," which encompasses the National Mall and adjoining areas. Act of Jan. 25, 1994, Pub. L. No. 103-422, 108 Stat. 4356.

The American Battle Monuments Commission, the National Capital Planning Commission, and the Commission of Fine Arts (all respondents) approved a site for the memorial at the Rainbow Pool, located between the Washington Monument and Lincoln Memorial. Those three entities subsequently approved a design concept for the memorial. The National Park Service (also a respondent) found that the plan would not have a significant impact on the environment. The Commission of Fine Arts and the National Capital Planning Commission approved the memorial's final design. C.A. Br. 2-4.

Petitioners filed suit in federal district court against respondents, challenging the decisions approving the design, location, and construction of the memorial as a violation of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), the National Capital Memorials and Commemorative Works Act, 40 U.S.C. 1001 *et seq.*, the National Historic Preservation Act, 16 U.S.C. 470f *et seq.*, and the Federal Advisory Committee Act, 5 U.S.C.

App. II, § 10(a). Petitioners sought to enjoin the construction of the memorial. Pet. App. 1a-2a.

While petitioners' suit was pending, Congress enacted the Act of May 28, 2001, Pub. L. No. 107-11, 115 Stat. 19 (Public Law 107-11). That Act directs the expeditious construction of the memorial at the Rainbow Pool site, and further provides that previous decisions approving the site, design, and construction of the memorial shall not be subject to judicial review. *Ibid.* The entire text of the Act is as follows:

> SECTION 1. APPROVAL OF WORLD WAR II MEMORIAL SITE AND DESIGN.
>
> Notwithstanding any other provision of law, the World War II memorial described in plans approved by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, and selected by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and in accordance with the special use permit issued by the Secretary of the Interior on January 23, 2001, and numbered NCR-NACC-5700-0103, shall be constructed expeditiously at the dedicated Rainbow Pool site in the District of Columbia in a manner consistent with such plans and permits, subject to design modifications, if any, approved in accordance with applicable laws and regulations.
>
> SEC. 2. APPLICATION OF COMMEMORATIVE WORKS ACT.
>
> Elements of the memorial design and construction not approved as of the date of enactment of this Act shall be considered and approved in accordance with

> the requirements of the Commemorative Works Act (40 U.S.C. 1001 *et seq.*).
>
> SEC. 3. JUDICIAL REVIEW.
>
> The decision to locate the memorial at the Rainbow Pool site in the District of Columbia and the actions by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, the actions by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and the issuance of the special use permit identified in section 1 shall not be subject to judicial review.

§§ 1-3, 115 Stat. 19. Through Public Law 107-11, Congress sought to ensure that "the completed memorial will be dedicated while Americans of the World War II generation are alive." S. Con. Res. 145, 106th Cong., 2d Sess. (2000).

Relying on Public Law 107-11, respondents moved to dismiss petitioners' complaint for lack of jurisdiction. Pet. App. 13a-14a. The district court granted the motion and dismissed petitioners' complaint. *Id.* at 10a-31a.

The court of appeals affirmed. See Pet. App. 1a-9a. The court held that Public Law 107-11 clearly precludes judicial review of the previous decisions approving the location, design, and construction of the memorial. *Id.* at 4a. The court rejected petitioners' contention that the Act's withdrawal of jurisdiction conflicts with *United States* v. *Klein*, 80 U.S. (22 Wall.) 128 (1871). The court reasoned that *Klein* does not disable Congress from changing the law in a way that affects a pending case. Pet. App. 6a-8a.

ARGUMENT

1. Petitioners contend (Pet. 8-10) that Public Law 107-11 conflicts with *United States* v. *Klein*, 80 U.S. (22 Wall.) 128 (1871), because it withdraws federal court jurisdiction over a pending case. That contention is without merit and does not warrant review.

Under the Constitution, Congress has broad power "to define and limit the jurisdiction of the inferior courts of the United States." *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That power includes the authority to withdraw jurisdiction previously given, and to subject pending cases to the new jurisdictional limitation. As this Court long ago explained, "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fail." *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Other decisions have applied that basic principle. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the rule that "when a law conferring jurisdiction is repealed without any reservations as to pending cases, all cases fall within the law"); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (holding that "[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inas-

much as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.").

Under those cases, Congress's withdrawal of federal court jurisdiction to review challenges to the decisions approving the location, design, and construction of the World War II memorial does not raise any constitutional issue under Article III. Instead, it falls well within Congress's recognized authority to withdraw jurisdiction from the lower federal courts and to direct the application of the new jurisdictional limitation to pending cases.

Moreover, in this case, Congress's power to limit the jurisdiction of the lower federal courts is augmented by its authority under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, to "make all needful Rules and Regulations respecting the * * * Property belonging to the United States." Under the Property Clause, Congress has plenary authority to control the use of public land. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 531-533 (1976). That authority necessarily encompasses the power to direct the construction of a World War II memorial at the Rainbow Pool site, to displace federal statutes that might otherwise serve as an obstacle to that directive, and to shield the previous decisions approving the location, design, and construction of the memorial from judicial review.

Furthermore, as the court of appeals observed (Pet. App. 7a-8a), the injunctive remedy sought by petitioners is particularly susceptible to displacement by Congress. For example, if petitioners had prevailed in the district court and obtained an injunction against the memorial's construction, Congress would have been free under *Miller* v. *French*, 530 U.S. 327, 348-350 (2000), and *Pennsylvania* v. *Wheeling & Belmont*

Bridge, 59 U.S. (18 How.) 421 (1855), to provide for the memorial's construction and to require a federal court to vacate any outstanding injunction preventing it. Through Public Law 107-11, Congress has taken the less intrusive step of foreclosing judicial review of objections to the memorial's construction in the first place.

Petitioners nonetheless contend (Pet. 8-10) that Public Law 107-11 conflicts with *Klein*. Petitioners' reliance on *Klein* is misplaced. In that case, Klein, the executor of an estate, sought to recover the value of property seized by the United States during the Civil War. The executor relied on a statute that authorized such a recovery upon proof that the decedent did not give aid and comfort to the enemy. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court had held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and that if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. This Court held that the statute "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (22 Wall.) at 147. The Court explained that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. The Court further concluded that Congress had exceeded its authority by changing the effect of a Presidential pardon that had previously been granted. *Id.* at 148.

Klein does not hold that Congress lacks authority to withdraw a court's jurisdiction and apply that jurisdictional limitation to a pending case. Rather, *Klein*

condemned a statutory withdrawal of jurisdiction that impermissibly invaded the President's pardon power and had as its predicate a rule of decision that required the courts to give an effect to a Presidential pardon that was contrary to the effect that this Court had already decided that such a pardon should have. Public Law 107-11 does not have any such defects. Moreover, "[w]hatever the precise scope of *Klein*, * * * later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). In Public Law 107-11, Congress amended applicable law, directing the construction of the memorial at the Rainbow Pool site "[n]otwithstanding any other provision of law," and foreclosing judicial review of certain objections to the memorial's construction. §§ 1, 3, 115 Stat. 19. *Klein* is therefore inapposite here.

2. Petitioners also contend (Pet. 11-14) that Public Law 107-11 does not withdraw jurisdiction to review challenges to the location, design, and construction of the memorial that are based on procedural laws, such as the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* That contention does not appear to fall within the question that petitioners have presented for review. See Pet. i. In any event, that contention is without merit and does not warrant review.

The text of Section 3 of Public Law 107-11 does not draw any distinction between procedural and substantive challenges. Instead, it categorically forecloses all judicial challenges to the previous decisions approving the design, location, and construction of the memorial. See § 3, 115 Stat. 19. Foreclosing procedural as well as substantive challenges also facilitates Congress's

directive in Section 1 that the memorial shall be constructed at the Rainbow Pool site "[n]otwithstanding *any* other provision of law." § 1, 115 Stat. 19 (emphasis added). Barring all challenges also furthers Congress's goal of seeking to ensure that the memorial will be constructed while Americans of the World War II generation are still alive. The court of appeals therefore correctly concluded that Public Law 107-11 forecloses judicial consideration of petitioners' challenges to the location, design, and construction of the memorial. Further review of that question is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

ANDREW C. MERGEN
R. JUSTIN SMITH
Attorneys

JULY 2002