

Nos. 07-372 and 07-389

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**In the Supreme Court of the United States**

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WEEKS MARINE, INC.

*v.*

FISHERMAN'S HARVEST, INC., ET AL.

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NICOLON CORPORATION, ET AL.,

*v.*

FISHERMAN'S HARVEST, INC., ET AL.

---

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

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**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

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PAUL D. CLEMENT  
*Solicitor General  
Counsel of Record*

JEFFREY S. BUCHOLTZ  
*Acting Assistant Attorney  
General*

JEANNE E. DAVIDSON  
PATRICIA M. MCCARTHY  
DAVID D'ALESSANDRIS  
*Attorneys*

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

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### **QUESTION PRESENTED**

Whether the court of appeals correctly reversed and remanded the district court's transfer order based upon its conclusion that 28 U.S.C. 1497 does not create exclusive jurisdiction in the Court of Federal Claims for oyster growers' claims against private contractors, and that 28 U.S.C. 1404(a) does not permit a district court to transfer such claims to the Court of Federal Claims.

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**In the Supreme Court of the United States**

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No. 07-372

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*v.*

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**BRIEF FOR THE FEDERAL RESPONDENT  
IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-23)<sup>1</sup> is reported at 490 F.3d 1371. The order of the district court (Pet. App. 24-31) is reported at 401 F. Supp. 2d 745.

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<sup>1</sup> Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition in No. 07-372.

**JURISDICTION**

The judgment of the court of appeals was entered on June 21, 2007. The petition for a writ of certiorari in No. 07-372 was filed on September 17, 2007. The petition for a writ of certiorari in No. 07-389 was filed on September 18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Respondents Fisherman's Harvest, Inc., C. Joe Nelson, Jr., Doris Mae Nelson, Vanessa Jo Nelson Vallejo, Vickie Jo Nelson Salazar, Childress Seafood, Inc., W.F. Childress, and Alton Lee Kelly (collectively, the oyster growers) assert that they are the owners or beneficial owners of oyster leases in Galveston Bay and Trinity Bay, Texas, as well as businesses engaged in harvesting, processing, and selling oysters in Smith Point, Texas. Pet. App. 3. The oyster growers assert that their oyster leases and businesses were damaged by a dredging project initiated by the United States Army Corps of Engineers (Corps), and performed by Weeks Marine, Inc. (Weeks Marine), with petitioners Nicolon Corporation, Post, Buckley, Schuh & Jernigan, Inc., Bertucci Contracting Corp., Luhr Bros., Inc., and Bradley Industrial Textiles, Inc. (collectively, Nicolon), as contractors, subcontractors, or suppliers. *Ibid.*

2. The oyster growers filed suit against petitioners in the United States District Court for the Southern District of Texas alleging federal question and diversity jurisdiction. Pet. App. 2-4. The oyster growers alleged that negligence on the part of petitioners in the design and implementation of the dredging project resulted in the discharge of silt, sediment, and toxic materials onto their oyster leases. *Id.* at 3. Weeks Marine subsequent-

ly filed a third-party complaint against the Corps alleging a contractual right to contribution and indemnification. The Corps filed a motion to dismiss Weeks Marine's complaint for lack of jurisdiction on the ground that the Court of Federal Claims has exclusive jurisdiction over the third-party claim under 28 U.S.C. 1491 and 1497. In response, Weeks Marine filed a motion to transfer the entire action to the Court of Federal Claims based on 28 U.S.C. 1631, which permits transfer for want of jurisdiction, and 28 U.S.C. 1404(a), which permits transfer for change of venue. Pet. App. 4-5.

3. The district court transferred the entire case to the Court of Federal Claims. Pet. App. 24-31. The court first concluded that 28 U.S.C. 1497 provides an exclusive grant of jurisdiction to the Court of Federal Claims over oyster growers' claims against the government, and thus that the district court lacked jurisdiction over Weeks Marine's third-party complaint. Pet. App. 29. It then concluded that transfer to the Court of Federal Claims, rather than dismissal for lack of jurisdiction, was permissible and in the interests of justice under 28 U.S.C. 1631. Pet. App. 29-30. Finally, the court concluded that Section 1497 also grants the Court of Federal Claims jurisdiction over the oyster growers' claims against the private parties, and that "the interests of judicial economy and justice" would be served by transferring the case in its entirety to the latter court. *Id.* at 30. The oyster growers filed a motion to set aside the transfer order, which the district court denied. *Id.* at 32-35.

4. The oyster growers appealed, and the court of appeals reversed and remanded the oyster growers' claims

to the Southern District of Texas. Pet. App. 1-23.<sup>2</sup> The court of appeals held that the district court's transfer order was made pursuant to 28 U.S.C. 1631, and accordingly that it had jurisdiction under 28 U.S.C. 1292(d)(4)(A) to entertain the interlocutory appeal. The court of appeals then concluded that 28 U.S.C. 1497 does not vest exclusive jurisdiction in the Court of Federal Claims to entertain the oyster growers' claims against petitioners, and therefore that 28 U.S.C. 1631 could not provide a basis for transferring those claims. Pet. App. 15. The court further concluded that 28 U.S.C. 1404(a), which permits a district court to transfer a case to "any other district or division" for the convenience of the parties or in the interest of justice, does not provide a basis for transfer to the Court of Federal Claims because that court is not a "district or division." Pet. App. 16-17.

Judge Newman dissented. Pet. App. 18-23. She concluded that Section 1404(a) permits transfer to the Court of Federal Claims and maintained that "any ultimate liability to the oyster growers due to federally-ordered dredging is with the United States, a liability that can be assessed only by the Court of Federal Claims." *Id.* at 20. She asserted that the panel majority erred by "permitting, indeed requiring, duplicative litigation of the issue of dredging injury for which the United States would ultimately be liable." *Id.* at 22.

#### ARGUMENT

Petitioners contend that 28 U.S.C. 1497 provides the Court of Federal Claims with exclusive jurisdiction over all oyster growers' claims, that 28 U.S.C. 1404(a) per-

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<sup>2</sup> No party appealed from, and the court of appeals did not rule on, the transfer of Weeks Marine's third-party complaint against the Corps to the Court of Federal Claims. Pet. App. 5 n.3.

mits transfers to the Court of Federal Claims, and that the Federal Circuit lacked jurisdiction over the oyster growers' appeal of the transfer order. Because the Court of Federal Claims lacks jurisdiction to entertain tort claims between private individuals, the Federal Circuit correctly concluded that neither 28 U.S.C. 1631 nor 28 U.S.C. 1404(a) provided a valid basis for the transfer of the oyster growers' private party claims. The Federal Circuit properly exercised its jurisdiction under 28 U.S.C. 1292(d)(4)(A) to entertain the challenged appeal, and correctly resolved the questions presented. Accordingly, petitioners' claims do not warrant this Court's review.

1. Petitioners contend (Weeks Pet. 14-25; Nicolon Pet. 7-13)<sup>3</sup> that the district court properly transferred the oyster growers' claims under Section 1631 because 28 U.S.C. 1497 provides the Court of Federal Claims with exclusive jurisdiction over all oyster growers' claims—including those against private parties—that stem from a government dredging project. That interpretation of Section 1497 is neither consistent with the traditionally limited jurisdiction of the Court of Federal Claims nor compelled by any decisions of this Court. Accordingly, petitioners' claim lacks merit and does not warrant this Court's review.

a. As this Court has recognized, “if a statutory cause of action \* \* \* is not a ‘public right’ for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking ‘the essential attributes of the judicial power.’” *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989). Accordingly, the

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<sup>3</sup> “Weeks Pet.” refers to the petition in No. 07-372, and “Nicolon Pet.” refers to the petition in No. 07-389.

jurisdiction of the Court of Federal Claims—an Article I court—has traditionally been understood to be limited to claims against the United States. See 28 U.S.C. 1491(a)(1) (“The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States.”); *United States v. Sherwood*, 312 U.S. 584, 588 (1941) (“it has been uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States, and if the relief sought [in the Court of Claims] is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court”) (internal citations omitted).<sup>4</sup>

Against that constitutional and statutory backdrop, any reading of Section 1497 that would permit adjudication of private disputes by the Court of Federal Claims, particularly private disputes that are, like the oyster growers’ claims against petitioners, in the nature of common-law tort actions, see Pet. App. 3-4, would be contrary to this Court’s precedent and “raise[] serious constitutional doubts.” *Id.* at 14. Section 1497 does not explicitly address claims wholly between private parties, nor does it explicitly state that such claims lie within the exclusive jurisdiction of the Court of Federal Claims. In the absence of a clear mandate to that effect, there is no warrant for construing the statute in the manner pro-

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<sup>4</sup> Pursuant to the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, the trial function of the former Court of Claims was renamed the United States Claims Court. In 1992, the court was renamed the United States Court of Federal Claims. Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4516.

posed by petitioners. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (“It is \* \* \* incumbent upon us to read the statute to eliminate [serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress.”). Accordingly, the court of appeals properly rejected petitioners’ contention that Section 1497 confers jurisdiction on the Court of Federal Claims to adjudicate claims between private parties.

Because the claims at issue in the petitions arise between the oyster growers and the private contractors, they are not within the exclusive jurisdiction conferred by Section 1497.<sup>5</sup> Accordingly, those claims were not subject to transfer under 28 U.S.C. 1631, because there was no “want of jurisdiction” over those claims in the district court. *Ibid.*; see Pet. App. 10-15; *Fisherman’s Harvest, Inc. v. United States*, 74 Fed. Cl. 681, 685 (Fed. Cl. 2006). The court of appeals was therefore correct in concluding that Section 1631 did not authorize the transfer of the claims against petitioners.

b. Contrary to petitioners’ contentions (Weeks Pet. 14-18; Nicolon Pet. 7-8), nothing in the decisions of this Court compels a broader reading of the exclusive jurisdictional grant found in Section 1497. Petitioners rely primarily upon *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 229 U.S. 82 (1913), a pre-Section 1497 case in which an oyster grower brought a Fifth Amendment takings claim against a government contractor engaged in dredging a channel. In rejecting the claim that a properly performed dredging project constituted a taking of the oyster grower’s property, this Court con-

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<sup>5</sup> As the Federal Circuit noted, the oyster growers’ claims are not explicitly premised on Section 1497, but rather assert only common-law negligence theories of liability. Pet. App. 4 n.1.

cluded that oyster growers' property rights are subservient to the government's dominant right to control, improve, and regulate navigation. *Id.* at 87. The Court of Claims later characterized *Lewis* as "establishing the dominant title of the Government to the subsoil in all navigable waters for the purpose of regulating and improving navigation and holding that no compensation can be legally recovered for any injury to property on the subsoil of a navigable stream or bay." *Andrew Radel Oyster Co. v. United States*, 78 Ct. Cl. 816, 823-824 (Ct. Cl. 1934).

According to petitioners, because "there was no other forum or remedy for the claims of the oyster growers" prior to the enactment of 28 U.S.C. 1497, Congress must have intended Section 1497 to "provide[] for exclusive jurisdiction of all oyster grower claims in the Court of Federal Claims." Weeks Pet. 22. Petitioners fail to explain why the purported lack of a remedy for any claims prior to the enactment of Section 1497 would compel an interpretation of that statute as providing a remedy for all claims, particularly given petitioners' insistence that the remedy is available only in an Article I court. In any event, petitioners place far more weight on *Lewis* and *Andrew Radel* than those cases can bear. *Lewis* merely held that the property rights of oyster growers are subservient to the government's navigational servitude for purposes of a Fifth Amendment takings claim; the Court did not speak to the question whether, or to what extent, an oyster grower might have a tort remedy against contractors performing dredging operations. *Andrew Radel* involved a congressionally authorized claim for compensation brought in the Court of Claims against the United States, and did not address the scope of remedies potentially available from private

parties. Nothing in *Lewis* or *Andrew Radel* compels the reading of Section 1497 that petitioners urge.

3. Petitioners assert (Weeks Pet. 7-14; Nicolon Pet. 13-15) that the court of appeals erred in holding that 28 U.S.C. 1404(a) does not permit transfers to the Court of Federal Claims. That assertion lacks merit, as does petitioners' contention (Weeks Pet. 10-14; Nicolon Pet. 14-15) that the court of appeals' interpretation of Section 1404(a) conflicts with interpretations advanced by other courts. In any event, even if Section 1404(a) could permit some transfers to the Court of Federal Claims, petitioners' assertion would still fail, because the Court of Federal Claims is not a court in which the oyster growers' claims "might have been brought." 28 U.S.C. 1404(a). Accordingly, petitioners' contentions warrant no further review.

a. Section 1404(a) permits a district court to transfer a case to "any other district or division where it might have been brought" when transfer is "[f]or the convenience of the parties and witnesses or in the interest of justice." 28 U.S.C. 1404(a). The court of appeals correctly concluded that Section 1404(a) does not permit transfer to the Court of Federal Claims. Section 1404(d) defines "district court" as including the district courts of Guam, the Northern Mariana Islands, and the Virgin Islands, and defines "district" as including "the territorial jurisdiction of each such court." Moreover, Title 28 divides certain districts (but not the Court of Federal Claims) into "Division[s]" incorporating specified geographic areas. See, *e.g.*, 28 U.S.C. 81, 84, 90, 93, 94. Nowhere did Congress suggest that the Court of Federal Claims could be considered either a district or a division. Because the Court of Federal Claims is neither a district nor a division, the court of appeals correctly

concluded that it is outside the scope of 28 U.S.C. 1404(a).

Weeks Marine maintains (Weeks Pet. 9-10) that the court of appeals' reading of Section 1404(a) is inconsistent with the court's earlier decision in *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995). In *Quality Tooling*, the Federal Circuit reviewed the transfer of claims from the Court of Federal Claims to a district court pursuant to 28 U.S.C. 1452, which permits removal of claims related to a bankruptcy case pending in another court. 28 U.S.C. 1452(a). The Federal Circuit concluded that the case should be remanded to the district court "to consider whether as a matter of judicial economy and prudence the cause should be heard by it or by the Court of Federal Claims." 47 F.3d at 1578. There is no inconsistency between *Quality Tooling* and the decision below, however, because in *Quality Tooling* the district court's authority to transfer the case back to the Court of Federal Claims would have rested on 28 U.S.C. 1452(b), which, unlike Section 1404(a), does not limit remands to a "district or division," but rather permits remand to any court from which Section 1452(a) authorized the initial transfer. Because Section 1452(a) excludes only the United States Tax Court from its reach, the *Quality Tooling* court correctly concluded that the statute permits transfers to (and from) the Court of Federal Claims.

Petitioners also assert (Weeks Pet. 10-11; Nicolon Pet. 14-15) that the court of appeals' holding conflicts with *Hondros v. United States CSC*, 720 F.2d 278 (3d Cir. 1983). In *Hondros*, the Third Circuit concluded that it could transfer a claim within the exclusive jurisdiction of the Claims Court back to that court under 28 U.S.C. 1406(a), which permits transfer of a case, "if it be in the

interest of justice, \* \* \* to any district or division in which it could have been brought.” 720 F.2d at 299. In reaching that conclusion, however, the court explicitly relied upon the fact that, at the time, it was unaware of any statute permitting transfer to the Claims Court even for claims within that court’s exclusive jurisdiction. *Id.* at 299 n.41 (“We cannot conclude, however, that Congress intended to handcuff the federal courts by prohibiting them from transferring a case improperly filed in the district courts to the Claims Court when the interest of justice so require.”).<sup>6</sup> Because 28 U.S.C. 1631 fills whatever gap the Third Circuit perceived to exist in *Hondros*, the Federal Circuit correctly concluded that the concern animating that anomalous interpretation of “district or division” has ceased to exist. Pet. App. 16-17.<sup>7</sup>

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<sup>6</sup> The Third Circuit’s opinion rested on its belief that Congress had recently removed statutory authority to transfer cases within the exclusive jurisdiction of the Court of Claims when it repealed the subsection of 28 U.S.C. 1406 that formerly provided such authority. See *Hondros*, 720 F.2d at 299. As the court below explained, however, “the Third Circuit failed to recognize \* \* \* that Congress provided for such a scenario by enacting the provisions that became 28 U.S.C. § 1631 in the very same act that repealed” the portion of Section 1406 in question. Pet. App. 17.

<sup>7</sup> Although the court of appeals also stated in *Hondros* that 28 U.S.C. 1406(a) permitted the transfer of a case to the Court of Claims “without regard to whether the case is within the ‘exclusive jurisdiction’ of that court,” that statement was dictum, because the court had already found the claim in question to fall within the Court of Claims’ exclusive jurisdiction. 720 F.2d at 299. In any event, that interpretation of Section 1406(a) stemmed from the court’s mistaken belief that Congress manifested its intent to remove *all* barriers to Court of Claims transfers when it repealed the exclusive jurisdiction portion of Section 1406(a). *Id.* at 299 n.41. Because Congress in actuality only relocated (rather

b. Even if Section 1404(a) could be read to authorize transfers to the Court of Federal Claims, petitioners' challenge would still fail, because that court is not one in which the oyster growers' claims "might have been brought." 28 U.S.C. 1404(a). As has been demonstrated, 28 U.S.C. 1497 does not provide the Court of Federal Claims with jurisdiction over disputes between private parties. Because the oyster growers' common-law negligence claims against private parties are not within the jurisdiction of the Court of Federal Claims, that court is not one in which their action "might have been brought" under 28 U.S.C. 1404(a).

4. Finally, Weeks Marine's assertion (Weeks Pet. 25-29) that the court of appeals impermissibly exercised jurisdiction does not warrant this Court's review. The Federal Circuit concluded that the district court's transfer order was made pursuant to 28 U.S.C. 1631, because the district court explicitly relied on its lack of jurisdiction under Section 1497 to hear Weeks Marine's third-party complaint against the Corps. Pet. App. 28. Because 28 U.S.C. 1292(d)(4)(A) grants the Federal Circuit jurisdiction over appeals from orders "granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under [28 U.S.C.] 1631," there was nothing improper about the Federal Circuit's exercise of jurisdiction in this instance. Moreover, even if the Federal Circuit were mistaken in its characterization of the district court's order as being made pursuant to Section 1631 rather than Section 1404(a), that fact-bound determination would not warrant this Court's review.

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than repealing) the exclusivity requirement to 28 U.S.C. 1631, the Third Circuit's assessment of congressional intent was unfounded.

**CONCLUSION**

The petitions for a writ of certiorari should be denied.  
Respectfully submitted.

PAUL D. CLEMENT  
*Solicitor General*

JEFFREY S. BUCHOLTZ  
*Acting Assistant Attorney  
General*

JEANNE E. DAVIDSON  
PATRICIA M. MCCARTHY  
DAVID D'ALESSANDRIS  
*Attorneys*

DECEMBER 2007