No. 06-639

IN THE

Supreme Court of the United States

DETROIT INTERNATIONAL BRIDGE COMPANY,
Petitioner,

v.

UNITED STATES,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

This case presents two important questions concerning the just compensation required by the Fifth Amendment. The first—whether Congress can constitutionally fix the interest-rate component of just compensation in all cases—raises fundamental separation-of-powers concerns. Contrary to the government's suggestion, the question is one that has genuinely divided the courts of appeals, and, as that division suggests, the question has recurring significance. The Sixth Circuit's determination that courts are powerless to look behind the statutory rate based on the facts of a particular case also conflicts with this Court's longstanding precedents, a point the Solicitor General does not address. For all these reasons, review by this Court is warranted.

The Sixth Circuit's resolution of the second question presented—whether the United States is entitled to avoid paying full compensation when the owner of the condemned property acquired it after the planned condemnation became public—conflicts with this Court's repeated holding that an owner's anticipation of a taking does not affect the compensation due. The rule endorsed by the court of appeals permits a government windfall in such circumstances, yielding incongruous compensation amounts depending on when the taken land last changed hands and threatening the security of ownership that the Just Compensation Clause is intended to protect.

I. WHETHER THE INTEREST RATE SPECIFIED BY CONGRESS IS MANDATORY WARRANTS THIS COURT'S REVIEW

1. Contrary to the government's contention, the conflict between the Sixth and Ninth Circuits over the binding character of the Declaration of Taking Act's (DTA) interest-rate formula is genuine.

The Solicitor General concedes that the district court "treated the [DTA] as conclusive." Opp. 10. And he acknowledges that, with little reasoning, the court of appeals "simply affirmed the judgment of the district court." Opp. 8. The United States nonetheless insists that "[t]he Sixth Circuit expressed no view about whether, or under what circumstances, a district court might ever be justified in using

a formula other than that specified in the DTA." Opp. 11. That characterization is inconsistent with what the Sixth Circuit said.

In describing the holding it affirmed, the Sixth Circuit referred to the "district court's adoption of the *statutorily required* rate." Pet. App. 15a (emphasis added). Nearly half of the Sixth Circuit's discussion of the interest-rate issue consists of an extended quotation from the district court's explanation of why, "[g]iven the mandatory language of the statute and the very clear legislative history, . . . applying any rate other than the statutory rate . . . would contravene the clear intent of Congress." *Id.* at 14a (internal quotation marks omitted). The passage quoted approvingly by the Sixth Circuit continues:

> The Court is unaware of any precedent or doctrine . . . that would permit the Court to ignore such a clear legislative mandate. The fact that determining just compensation is a judicial function does not render calculation of interest on that compensation a judicial function where Congress has clearly indicated its intention to fully occupy the field in this area.

Id. (internal quotation marks omitted). Far from expressing "no view" about when courts may deviate from the DTA's interest rate (Opp. 11), the Sixth Circuit plainly embraced the position adopted by the district court that the DTA rate is binding on the courts.

The government argues (Opp. 10-11) that the Sixth Circuit did not do so because, in its view, the district court identified an alternative ground, namely, that the DTA's rate provides what a reasonably prudent investor would earn. Even if one were to treat the Sixth Circuit's single reference to the " 'reasonably prudent investor' standard" (Pet. App. 15a) as approving the district court's analysis, that analysis does not alleviate the conflict between the Sixth Circuit's decision and the Ninth Circuit's holding in *United States* v. *50.50 Acres of Land*, 931 F.2d 1349 (9th Cir. 1991).

As the United States acknowledges, *50.50 Acres* flatly "rejected the government's contention that the statutory . . .

formula should be treated as binding." Opp. 9 (citing *50.50 Acres*, 931 F.2d at 1355-1356). The *50.50 Acres* court held that courts must be free to make an independent determination of whether the statutory rate would provide what " 'a reasonably prudent person investing funds so as to produce a reasonable return while maintaining safety of principal' would receive." 931 F.2d at 1355 (quoting *United States* v. *429.59 Acres of Land*, 612 F.2d 459, 465 (9th Cir. 1980)). The court stressed that the adequacy of the statutory rate must be assessed based on "the factual circumstances of the case" and "a variety of investment measures." *Id.*[1] It recognized that the DTA "attempts to create a variable interest rate reflective of market changes" but concluded that consideration was plainly inadequate to make the statutory rate constitutionally sufficient in all cases. *Id.* at 1356.

The district court's brief discussion of the constitutional sufficiency of the DTA's rate wholly ignored the case-specific considerations that *50.50 Acres* emphasizes. Having refused to hold a hearing, the court made no mention of the factual circumstances of this case, such as the extraordinarily extended delay (more than 20 years), the relative size of the ultimate valuation compared to the government's initial valuation (almost five times as great), and, in turn, the significance of the interest component to the amount the government ultimately paid (roughly 80 percent of the total). Nor did the district court address other interest rates available from creditworthy institutions.[2]

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[1] The government has previously acknowledged the Ninth Circuit's emphasis on the factual circumstances of the case. *See* Gov't Br., *United States* v. *191.07 Acres of Land*, No. 04-35131, 2005 WL 3190268, at *81 (9th Cir. Aug. 31, 2005) (relying on the statement in *50.50 Acres*, 931 F.2d at 1355, that "[u]nder [*United States* v. *Blankinship*, 543 F.2d 1272 (9th Cir. 1976)], the court must first determine if the statutory formula is constitutionally inadequate given the factual circumstances of the case").

[2] The government argues that at least one important factual circumstance, the duration of the government's delay in payment, is irrelevant to the interest rate that ought to apply. *See* Opp. 10 n.2. But it offers no authority for that view. Courts applying the DTA have often stressed the

Rather than determining whether, in light of the particular circumstances, the statutory rate ensured petitioner the just compensation to which it is constitutionally entitled, the district court's brief analysis simply identified two general considerations that, in its view, made the statutory rate adequate overall. The first—that the statutory rate "is not a fixed rate" but rather "is a fluctuating rate that tracks the upward and downward movement of market interest rates, generally" (Pet. App. 26a)—was exactly the characteristic that the *50.50 Acres* court determined was insufficient to render the statutory rate constitutionally adequate per se. The second—that investment "in U.S. Treasury securities is

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duration of the delay in determining the appropriate interest rate. *See United States* v. *Blankinship*, 543 F.2d 1272, 1276 (9th Cir. 1976) ("the trial court should have focused more on that type of marketable public debt security which constitutes a direct obligation of the United States Treasury having a duration approximating the period during which the deficiency was unpaid); *United States* v. *5.00 Acres of Land, More or Less, Situate in Orange County, Tex.*, 507 F. Supp. 589, 599 (E.D. Tex. 1981) (stating that "a rate of no greater than six percent . . . would contravene the [F]ifth [A]mendment" due to "the great disparity between the amount of estimated compensation deposited into the Registry of the Court by the Plaintiff and the significant delay between such deposit and the date of the judgment," and awarding interest on the per annum rate "applicable to three-year Treasury bonds" (footnote omitted)), *rev'd on other grounds*, 680 F.2d 388 (5th Cir. 1982). And in non-DTA takings cases, courts likewise have recognized the relevance of the length of the delay in payment. *See Tulare Lake Basin Water Storage Dist.* v. *United States*, 61 Fed. Cl. 624, 630 (2004) (declining to apply the DTA rate in a non-DTA case because the delay in payment had been substantial and the DTA's "52-week Treasury bill rate was not intended to account for long periods of delay in the payment of just compensation and . . . does not reflect the financial impact from the perspective of the property owner").

The government implies (Opp. 4) that some fault lies with petitioner for "reopening" the condemnation action after "petitioner and the government agreed to settle." What the government characterizes as the "reopening" was necessitated by the government's failure to comply with the terms of the settlement agreement, which DIBCO viewed as a breach of the agreement. Pet. App. 3a-4a. Before the court of appeals, the government did not suggest that any delay in resolving the condemnation question was due to petitioner or that petitioner's actions somehow absolve the government of providing just compensation for the taking.

safe because an investor will not lose the principal underlying the investment, as he would risk doing in the stock or bond market" (*id.*)—applies to any government bond, including low-yielding 30-day Treasury bills. As the Ninth Circuit's insistence on consideration of the factual circumstances makes clear, the general factors identified by the district court cannot determine the propriety of a particular rate in a given case as they do not distinguish among a wide array of potential investments.

The district court's analysis, then, neither reduces the Sixth Circuit's conflict with *50.50 Acres* nor suggests that the result in this case would have been the same if the *50.50 Acres* approach had been followed.

2. The Sixth Circuit's decision also conflicts with the uniform pre-1986 courts of appeals' decisions holding that the DTA's rate is not binding on the courts in all cases. The government attempts to distinguish the pre-1986 cases by contrasting the fluctuating rate incorporated into the DTA in 1986 with the prior fixed rate. Opp. 8-9, 11-12. But the pre-1986 decisions rejecting the mandatory character of the statutory interest rate did not turn on the courts' assessment of how frequently the statutory rate might approximate the return that would have been achieved by a reasonable and prudent investor and so provide the just compensation required. *See* Pet. 11-14. Those decisions turned simply on whether Congress had the constitutional authority to bar independent judicial assessment of just compensation. The *50.50 Acres* court recognized as much in affirming the relevance of those earlier decisions to its own analysis: "nothing in the new statute can change the Supreme Court's determination that just compensation 'is a judicial[,] not a legislative[,]' function." 931 F.2d at 1355-1356 (quoting *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 327 (1892)). The Solicitor General conspicuously fails to identify anything in the reasoning of those earlier decisions to challenge petitioner's characterization of them.

The government's suggestion (Opp. 12) that the pre- and post-1986 rates are constitutionally distinct because in the

new rate Congress was specifying the "methodology to be used" in the reasonably prudent investor standard is similarly flawed. Congress can determine the "reasonably prudent investor" standard—a proxy for just compensation in the interest arena—no more than it can determine just compensation itself. The point of precedents such as *Monongahela* is that Congress cannot limit "the scope of judicial authority" (Opp. 12) where those limits would deny just compensation.

3. Thus, as explained in the petition (at 14-17), the Sixth Circuit's decision also conflicts with this Court's long-standing precedents holding that the determination of just compensation is ultimately a judicial, not a legislative, function. The government makes no effort to square the Sixth Circuit's decision with those rulings.

4. The question is of recurring importance. The disagreement among the courts of appeals is one indication of that importance. Another is the regularity with which the United States relies on the DTA. In the last year alone, it has instituted at least 35 condemnations pursuant to the Act.[3] And courts in non-DTA takings cases look for guidance to the interest rate under the DTA in determining the applicable interest rate.[4] Thus, a decision by this Court clarifying that Congress may not predetermine the interest rate in every DTA case would have broad significance.

5. On the merits, the government defends Congress's one-size-fits-all one-year Treasury-bond rate by contending that "the constitutional requirement of just compensation" derives from "basic equitable principles of fairness" and that the DTA promotes fairness by promoting consistency. Opp. 12. This Court, however, has never accepted the notion that

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[3] This figure is based on a search on the LexisNexis Courtlink Service of all district court civil dockets in which the United States was plaintiff, the nature of suit was a land condemnation, and a docket entry contained the words "declaration" and "takings." The individual dockets were then examined to confirm that they were in fact DTA actions.

[4] *See, e.g.*, *Vaizburd* v. *United States*, 67 Fed. Cl. 499, 504 (2005); *NRG Co.* v. *United States*, 31 Fed. Cl. 659, 668-669 (1994).

the individual property owner's right to just compensation may be sacrificed in the name of consistency or administrability. It should not do so now. Indeed, this Court has long stressed that it has been "careful not to reduce the concept of 'just compensation' to a formula," *United States* v. *Cors*, 337 U.S. 325, 332 (1949). *See United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) ("Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."). It should not permit Congress to do so either.

II. WHETHER AWARENESS OF A PLANNED GOVERNMENT TAKING PRECLUDES VALUATION BASED ON COMBINED USE WARRANTS THIS COURT'S REVIEW

1. The United States (Opp. 13-15) contests the notion that in refusing to permit petitioner to introduce evidence of combined use, the district court relied principally on the fact that the government had made its condemnation plan public before petitioner acquired the land. The Solicitor General asserts that the district court had two alternate grounds for that holding: the perceived need to acquire an additional parcel to effectuate the combined use and the likelihood that the land taken would be used for a governmental purpose, namely, Customs inspections. The first, however, is not an independent ground for the district court's decision. The second was not ruled upon by the court of appeals and so is no bar to review by this Court of the question presented.

a. In order to constitute an alternate ground for the district court's determination, the perceived need to acquire an additional parcel to effectuate the combined use must have been an independently sufficient basis for the district court's conclusion. The opinions of both the district court and the court of appeals indicate that it was not. The government does not dispute that petitioner's awareness of its planned taking was the first factor relied upon by the district court. Nor does it suggest that the court anywhere indicated that any other factor, including the need for other

property purchases, alone would have led the district court to find no reasonable probability of combined use.[5] The Sixth Circuit acknowledged (Pet. App. 9a) that the district court weighed this factor, but it too said nothing to suggest that this factor was independently sufficient. To the contrary, the Sixth Circuit characterized the reasonable probability of combined use as a "close question," *id.* at 11a, suggesting that absent reliance on petitioner's knowledge of the taking, the court would have come out the other way.

b. The district court's conclusion that combined-use value could not be considered because the taken parcels would be used for Customs inspections was vigorously disputed on appeal but not addressed by the Sixth Circuit. As the Solicitor General has previously argued, alternate grounds decided by a district court but not ruled upon by a court of appeals do not bar review in this Court. In petitioning (successfully) for this Court's review of *Bean* v. *United States Bureau of Alcohol, Tobacco, & Firearms*, 253 F.3d 234 (5th Cir. 2001), for example, the United States responded to the very argument it now makes by correctly stating that "when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to such review." Gov't Reply Br. in Support of Cert., No. 01-704, 2002 WL 32101203, at *3 (Jan. 10, 2002). The government highlighted the Court's grants of certiorari in *Edelman* v. *Lynchburg College*, 535 U.S. 106 (2002), and *Ashcroft* v. *American Civil Liberties Union*, 535

[5] Petitioner disputed below whether the additional purchase was needed as a factual matter. *See* DIBCO C.A. Br. 9 (citing tr. 686-687). But even if it had been, *Olson* v. *United States*, 292 U.S. 246 (1934), suggests that fact would not preclude a combined-use valuation. *Olson* holds that the availability of combined-use valuation depends on whether there is a "reasonable possibility that the owner could use his tract together with the other[s] . . . for [particular] purposes *or that another could acquire all lands or easements necessary for that use*." *Id.* at 256-257 (emphasis added). *Olson* does not tie the availability of combined-use valuation to the identity of the combined user.

U.S. 564 (2002), two cases in which the courts of appeals did not address potential alternate grounds that had been decided by the district court. As these cases show, any alternate grounds relied upon by the district court but not addressed by the Sixth Circuit do not preclude this Court's review.

2. The government argues (Opp. 14) that petitioner is attributing a holding to the Sixth Circuit that its opinion does not expressly state. But the part of the district court's opinion concerning valuation theories that the Sixth Circuit quotes begins with the district court's discussion of petitioner's awareness of the pending taking. The Sixth Circuit lists the factors relied upon by the district court, finds no errors in its analysis, and agrees with the district court's conclusion on what it deems a "close question." Pet. App. 11a. In such circumstances, it is unclear how the Sixth Circuit's opinion can be read *not* to sanction the district court's conclusion that petitioner's awareness of the planned taking may factor into the combined-use analysis.

3. The government contends (Opp. 15 n.4) that, in any event, the Sixth Circuit's decision does not conflict with decisions of any other circuit or this Court. The United States is wrong about this Court's decisions. Indeed, it concedes (*id.*) that this Court has repeatedly held that "changes in property value attributable to the government's anticipated use of its condemnation power should generally be ignored in determining just compensation under the 'fair market value' standard."

The United States tries to distinguish these decisions (Opp. 15 n.4) on the ground that they address what it calls "the 'fair market value' standard," not valuation based on "potential use of that land in combination with other parcels." This is a false distinction. Combined-use analysis is a method of determining the just compensation due for taken property and thus is a particular application of what the government terms the "fair market value standard." That much is clear from this Court's seminal combined-use decision, *Olson* v. *United States*, 292 U.S. 246 (1934), a case the Solicitor General does not even acknowledge. *Olson* set

forth the fair market value standard, holding that "[j]ust compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined." *Id.* at 255. The Court explained (*id.* at 255-256):

> The sum required to be paid the owner . . . is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value.

The Court then held that "the fact that [the property] may be or is being acquired by eminent domain" is not "negative consideration of availability" for other uses. *Id.* at 256.

Olson thus demonstrates that combined-use analysis is one means to determine fair market value. It also supports petitioner's view that the planned condemnation may not play a role in determining the reasonableness of the proposed combined use, or the valuation of the land in turn. *See* Pet. 20-23. The government makes no attempt to justify why the planned condemnation ought to affect just compensation and permit a government windfall. Because the Sixth Circuit's decision conflicts with *Olson* and other decisions by this Court, and because it enables the United States to deprive property owners of the just compensation to which they are constitutionally entitled, review is warranted.

CONCLUSION

For the foregoing reasons, as well as those previously articulated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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