Nos. 01-5070,-5083, -5084

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
BRUBAKER AMUSEMENT CO., INC.
PAVLIC VENDING SERVICE, INC. and
AUTOMATED SERVICES, INC.
Plaintiffs-Appellants

v.

UNITED STATES
Defendant-Appellee.

BRIEF OF THE AMERICAN CANCER SOCIETY, THE AMERICAN LUNG ASSOCIATION, AND THE NATIONAL CENTER FOR TOBACCO-FREE KIDS IN SUPPORT OF DEFENDANT-APPELLEE UNITED STATES SEEKING AFFIRMANCE OF THE JUDGMENTS BELOW

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August 2, 2001

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Brubaker Amusement Co., Inc.
Pavlic Vending Service, Inc., and
Automated Services, Inc.

v. United States

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CERTIFICATE OF INTEREST

Counsel for *amici curiae* certifies the following:

1. The full name of every part or amicus represented by me is: the American Cancer Society, the American Lung Association, and the National Center for Tobacco-Free Kids.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: None

3. All of the parent corporations and publicly held companies that own 10 percent or more of the stock of the party or *amicus* represented by me is: None.

4. The names of all law firms and the partners and associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: Matt Myers, formerly a partner with the firm of Asbill Junkin & Myers, and now the president of *amicus* National Center for Tobacco-Free Kids, represented the *amici* in the proceedings before the Food and Drug Administration that led to the promulgation of the vending machine regulation and the rest of the 1996 tobacco rule.

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August 2nd, 2001

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John Echeverria, "Takings and Errors," 51 Alabama Law Review 1047, 1069-71 (2000)

The American Cancer Society, the American Lung Association, and the National Center for Tobacco-Free Kids ("*amici*") respectfully submit this brief *amicus curiae* and urge the Court to affirm the judgments below rejecting these taking claims and to clarify that takings claims cannot be based on unauthorized or invalid government actions. [1]

Statement of Interest

The *amici* organizations represent over seven million volunteers and include the leading organizations in the nation working to reduce the death toll from tobacco use every day in every state and community in the nation. The *amici* supported the regulation issued by the U.S. Food and Drug Administration (FDA) that would have restricted the placement of vending machines that sell cigarettes or smokeless tobacco products to adult-only venues, and argued before the U.S. Supreme Court in favor of FDA's authority to issue that regulation and its entire 1996 tobacco rule. In Brown & Williamson Tobacco Corp v. FDA, 529 U.S. 120, 161 (2000), the Court recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." Nonetheless, the Court also determined that Congress has not yet provided FDA with adequate authority to protect public health by issuing the vending machine regulation or the broader tobacco rule.

The *amici* submit this brief because they oppose the proposition that these plaintiffs, any of the other vending machine companies in the several hundred parallel lawsuits, or any other members of the tobacco industry, are entitled to pursue a claim for "just compensation" under the Taking Clause based on the FDA regulation or any other part of the 1996 FDA tobacco rule -- especially after the Supreme Court has invalidated the regulation and rule as being issued without adequate authority and because the regulation at issue was never implemented. Allowing these claims to proceed would open the doors to innumerable other claims for compensation under the Taking Clause based on well-intentioned government regulations that have been found to be unauthorized or invalid. These claims and the threat of new ones would have a chilling effect on future efforts by the FDA and other federal, state, or local government agencies to attempt to develop regulations either to reduce the terrible toll from tobacco use on our society or otherwise to protect and promote the public health.

Summary of Argument and Introduction

As the Brief for the United States demonstrates, there are several independent reasons why these taking claims should be rejected. First, the claims fail because they are based on a regulation that has been found to be unauthorized, and an unauthorized administrative action cannot support a claim under the Taking Clause. See Brief for the United States, at 17 -24.

Second, the taking claims in this case also fail because the FDA vending machine regulation was immediately stayed by judicial order and never went into effect. See id. at 31 – 37.

Finally, and most importantly for ongoing efforts to address the public health catastrophe created by the marketing of tobacco products, the United States' brief demonstrates that the FDA regulation would not have resulted in a taking even if it had been fully implemented as a valid and authorized government action. See id. at 37 - 55. As explained by the United States, it is well established that the federal government (and state and local governments) has broad authority to regulate the use of commercial personal property to protect the public health without obligation to pay "just compensation" under the Takings Clause and no government public health regulation of the kind at issue here or in the FDA tobacco rule can constitute a taking under existing law.

The *amici* fully support each of these arguments and have nothing to add to the Government's presentation of them at this time. Instead, the *amici* present an additional threshold basis for rejecting the taking claims of these plaintiffs and any others seeing compensation based on the 1996 FDA rule. Takings claims require a government taking for "public use," but a government action that is legally invalid (either because it was not authorized by existing law or for some other reason) cannot support a finding of a taking for public use. Even if a government action is authorized, it does not support a taking claim unless it also is (or can be presumed to be) a legally valid action that serves a public use. The court should reject the argument being advanced by the appellants, see Brief for Appellants at 12, that a determination that a government action is invalid (but authorized) is not a bar to a claim for compensation under the Taking Clause, a position which has no support either in Supreme Court precedent or the decisions of this Court.

In Brown & Williamson, the Supreme Court stated that Congress "has precluded the FDA's jurisdiction to regulate tobacco products." 529 U.S. at 133. This statement not only establishes that the FDA lacked authority to issue the regulation, but it also means the regulation was legally invalid. Because the regulation was legally invalid it could not serve a "public use," and for this independent reason these taking claims should be rejected. Adopting this basis for rejecting the plaintiffs' claims would eliminate confusion over the issue of whether or under what circumstances invalid government actions can support takings claims and would provide clear guidance for courts considering takings claims based on the FDA rule or on any other government action that has been legally invalidated. Such a ruling would also remove the threat to government treasuries from new taking claims based on good-faith government actions subsequently found to be invalid – a threat that could hinder reasonable efforts by government agencies to utilize their authority to attempt to prevent and reduce tobacco harms, otherwise promote or protect the public health, or pursue other important public goals. [2]

ARGUMENT

I. A Government Action Must be Legally Valid to Support a Finding of a Taking for "Public Use."

Precedent . The U.S. Supreme Court has frequently articulated the requirement that a government action must be (or must be assumed to be) legally valid in order to support a claim for compensation under the Taking Clause. The Court in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987), stated:

Consideration of the compensation question must begin with direct reference to the language of the Fifth Amendment which provides in relevant part that 'private property [shall not] be taken for public use, without just compensation.' As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se,* but

rather to secure compensation in the event of *otherwise proper* interference amounting to a taking.

482 U.S. at 314-15 (emphasis added). As the Court's language indicates, a government action that is not "otherwise proper" – that is, a regulation which, apart from the alleged taking, is legally invalid – cannot support a claim under the Taking Clause.

Other modern Supreme Court regulatory takings decisions confirm that a government action must be legally valid to support a taking claim. See United States v. Central Eureka Mining Co., 357 U.S. 155, 167 n.12 (1958) ("Ordinarily the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (observing that "[p]rior cases in this Court have cast doubt on the right to recover in the Court of Claims on account of properties unlawfully taken by government officials for public use as these properties were alleged to have been"). See also San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981), in which Justice Brennan, in his highly influential dissenting opinion, distinguished a lawful regulation "from the different case... where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no '*public use*." Id. at 656 n.23 (emphasis added.)

The recent Supreme Court case of Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), provides a detailed discussion of the requirement that a taking claim must be based on a legally valid government action. The case involved both due process and takings challenges to the Coal Industry Retiree Health Benefit Act. Four Justices, led by Justice O'Connor, concluded that the Coal Act effected a taking under the Fifth Amendment, and found it unnecessary to address the due process claim. Justice Kennedy, who cast the decisive vote in favor of the plaintiff, rejected the taking claim but concluded that the Act violated the Due Process Clause. Four Justices concluded that the Coal Act neither violated the Due Process Clause nor effected a taking.

The significant point, for present purposes, is that a majority of the Court agreed that plaintiff's assertion that the Act was an arbitrary and unreasonable measure in violation of the Due Process Clause precluded a finding of a taking. Justice Breyer, speaking for himself and three other dissenting justices, stated that the Taking Clause did "not apply" because the clause refers "to the taking of 'private property... for public use without just compensation.'" Id. at 554. "As this language suggests," he said, specifically referring to the term "public use," "at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government activity, but with providing compensation for *legitimate* government action that takes 'private property' to serve the 'public good.'" Id. (emphasis added).

Justice Kennedy endorsed this analysis and stated that the case ultimately raised a question about the "legitimacy" of the Coal Act and therefore did not involve a viable taking claim. Id. at 545. To support this conclusion, he quoted the excerpt from First English quoted above (a taking must be based on an "otherwise proper" government action). According to Kennedy, the Court had to first resolve the question of the Act's legitimacy under the Due Process Clause, "reserving takings analysis for cases where the government action is *otherwise permissible*." Id. at 546 (emphasis added). Unless the government action is "legitimate" and "permissible," Kennedy said, it cannot support a claim for compensation under the Taking Clause. In other words, the Due Process claim *negated* a necessary precondition for a viable taking claim, that is, that the taking be for a "public use."

Eastern Enterprises involved an attempt to pair a due process claim with a taking claim. But nothing in Eastern Enterprises suggests that the conclusion that the plaintiff failed to meet the requirements that the government action be "legitimate" and "permissible" turned on the specific basis for the argument that the action was legally invalid. A government action which is substantively invalid on any basis (apart from the alleged taking) cannot support a taking claim. [3]

The analysis in the Supreme Court's modern regulatory taking cases is largely consistent with longstanding Court precedent on the issue. See Tempel v. United States, 248 U.S. 121, 130 (1918) (concluding that a challenge to government appropriation of property based on an "unfounded" claim of right was not a valid claim for compensation under the Tucker Act); Langford v. United States, 101 U.S. 341, 345 (1879) (stating that the government was not liable for a taking based on "an unlawful act, done in violation of the legal rights of someone"); United States v. Lynah, 188 U.S. 445, 479 (1903) (Brown, J., concurring) ("[I]f property were seized or taken by officers of the government without authority of law, ... there could be no recovery"); but cf. Great Falls Manufacturing Co. v. Attorney General, 124 U.S. 581, 596 (1888) ("[E]ven if it be true that some part of the land occupied by the Government is not within the survey and map, still the United States are under an obligation imposed by the Constitution to make just compensation for all that has been taken and is retained for the proposed dam"). [4]

Basic Takings Principles

Apart from its support in precedent, the requirement that a taking claim be based on a legally valid government action is supported by basic principles underlying takings jurisprudence. First, the requirement is supported by the Supreme Court's longstanding understanding of the term "public use." In Berman v. Parker, 348 U.S. 26 (1954) and Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), the Court defined the term "public use" as basically coextensive with legitimate police power authority.

The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. Berman , 348 U.S. at 32. Under this reading, when the legislature authorizes some action for a public purpose, so long as it does not violate some constitutional provision, it will be deemed an action for a "public use." It logically follows that an action that contravenes some provision of the Constitution (other than the Taking Clause), is contrary to statute, or is inconsistent with a rule issued by an authorized agency, cannot be a taking for a "public use."

Second, the requirement of a legally valid government action is consistent with the established remedy for an actual taking. The Taking Clause prescribes the payment of "just compensation," which has been interpreted to mean the fair market value of the property, as measured, for example, based on a hypothetical purchase price or rental value. The Taking Clause does not limit recovery to actual damages when they are less than the fair market value, nor provide for payment of damages above fair market value when they exceed fair market value. The Taking Clause's "fair market" standard indicates that a taking involves an actual transfer of a property interest from the owner to the government, either on a permanent or a temporary basis, which requires the payment of money by the government to the owner in exchange. Cf. United States v. Great Falls Manufacturing Co., 112 U.S. 645, 656-57 (1884) (analogizing a taking claim to a contract remedy). Given this understanding of the Taking Clause, the public cannot properly be required to pay compensation for property it has no legal right to receive.

Finally, the requirement of a legally valid action is consistent with the principle articulated in Armstrong v. United States, 364 U.S. 40, 49 (1960), that the Taking Clause "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." As the Supreme Court said in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), a taking occurs when there is "a heightened risk that private property is being pressed into some form of *public service* under the guise of mitigating serious public harm." Id. at 1018 (emphasis added.) However, when a regulatory restriction is legally invalid, the government action, by definition, provides no "public service." A legally invalid government action provides no lawful "public" benefit for which the taxpayer can be compelled, in all fairness and justice, to pay "compensation" under the Taking Clause.

As discussed, apart from the requirement that a compensable taking be for a "public use," an action by an administrative agency cannot effect a taking if it is unauthorized and outside the agency's jurisdiction. This separate rule can be explained in terms of general agency theory; while the principal can be held liable based on an action within the general scope of the agent's authority, the agent cannot bind the principal when he acts completely outside the scope of his authority. The authority requirement can also be explained as a kind of "state action requirement;" unless the government has acted there can by no government taking. See Hooe v. United States, 218 U.S. 322, 335 (1910) (stating that an unauthorized act by a government official "is not the act of the Government"). An action which does not effect a taking because it is unauthorized also does not effect a taking because it does not serve a "public use." On the other hand, even if an action is not unauthorized, it may still be legally invalid and therefore not support a finding of a taking for a public use. The requirements that the government action be authorized and valid are independent prerequisites for a compensable taking. See Rith Energy, Inc. v. United States, 247 F.3d 1355, 1366 (Fed. Cir., 2001) *application for rehearing pending on other grounds* (a taking claimant is "required to litigate its takings claim on the assumption that the administrative action was *both* authorized and lawful") (emphasis added).

Practical Application

In practice, the legal validity of the government action will rarely be an issue in a taking case. Thus, in general, a taking claim should be permitted to go forward on the premise that the action is legally valid (as well as authorized). There will sometimes exist one or more potential grounds for challenging a government action, but, in the absence of an actual legal challenge, the issue of legal invalidity will remain only an abstract possibility. In that situation as well the claimant should be permitted to go forward with the taking claim on the premise that the action is legally valid (and authorized). This approach is mandated by common sense, for otherwise a taking claimant would have to take on the virtually impossible burden of proving that every potential challenge to the action's legal validity would fail in order to proceed with the taking claim.

On the other hand, a taking claimant cannot proceed with a taking claim while simultaneously alleging that the action is legally invalid, because the allegation of invalidity contradicts the claim that there has been a taking for a public use. In that situation, the taking claim must be rejected, or at least reserved until the claimant has lost his challenge to the action's legal validity. See Eastern Enterprises, supra.

Similarly, if the government believes that the action was legally invalid, the government should be permitted to raise legal invalidity as a defense to a taking claim. See Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986), cert. denied, 479 U.S. 1053 (1987) ("In defending, the government may deny the authority and in that way authority could become an issue in a Tucker Act case.") [5]

Finally, when the taking claimant itself -- or some third party -- has actually proceeded with a challenge to the action's legal validity and won, that success precludes a subsequent taking claim. The judicial determination that an action is not legally valid conclusively establishes that the action was not for a public use.

In this case, the tobacco industry has successfully challenged the FDA's authority over tobacco products and its authority to issue the vending machine regulation in particular. The Court reached the binding conclusion that "it is plain that Congress has not given the FDA the authority that it seeks to exercise here." 529 U.S. at ___. That conclusion establishes not only that Congress did not grant FDA the authority to act, but also, at a minimum, that the regulation was not legally valid. Brown & Williamson precludes these plaintiffs from claiming that the vending machine regulation was a legally valid action serving a "public use" within the meaning of the Taking Clause.

II. The Federal Circuit's Del Rio Decision Establishes Only a Narrow Exception to the Rule that a Taking Claim Must Be Based on a Legally Valid Action.

The decisions of this court and the court of federal claims generally follow the Supreme Court precedent indicating that legal validity of the government action is a precondition for a taking claim. See, e.g., Florida Rock Indus., Inc. v. United States, supra, 791 F.2d at 899 (quoting Armijo v. United States, 663 F.2d 90, 93 (Ct. Cl. 1981)) (stating that "the characteristic feature [of takings compensation suits] is the defendant's use of *rightful* property, contract, or regulatory rights to control and prevent exercise of ownership rights") (emphasis in original); Rith Energy, Inc. v. United States, supra, 247 F.3d at 1366; Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 408 n. 9 (1994) ("Illegal government actions do not result in takings.")

The court's decision in Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998), indicates that, at least in certain circumstances, a question about the legal validity of the government action will not bar a taking claim. Upon careful analysis, however, it is apparent that Del Rio establishes a narrow exception to the general rule. The holding in Del Rio is consistent with the principle that, in general, a government action must be (or must be presumed to be) legally valid (and authorized) to support a taking claim.

Del Rio involved a taking claim brought by firms which had acquired subsurface mineral leases from the Department of the Interior. They alleged that the government effected a taking by denying them access to the lease area absent permission from the several Indian tribes that owned the surface estate. Department officials took the position that they were required to grant the Indians an effective veto over exploitation of the leases by the Tribal Consent Act, which was enacted prior to the issuance of the leases and which generally barred access across tribal lands without tribal consent. The taking claimants challenged the Department's position and argued that they were entitled to access the leases without having to comply with the Act. As the court explained, the issue of the validity of this legal ruling "was a necessary part" of the claimant's case. Id. at 1360. If the government was correct that the Act required the leaseholders to obtain the Indians' consent, then the leaseholds were encumbered with this restriction from the time they were issued, and the plaintiffs could not claim a deprivation of any property interest.

In these circumstances, the court ruled, the claimants were not required to pursue a separate legal action, in some forum other than the court of claims, in order to resolve the issue of the scope of the property interest that was the predicate for their taking claim. Nor did the assertion that the Department had erred in its legal interpretation of the scope of the claimants' lease rights bar their taking claim at the threshold. As the court said, "the fact that the existence of a property interest may turn on the construction of a statute does not take this case outside the scope of the Tucker Act." Id. at 1364 See also id. ("[T]he fact that the Court of Federal Claims may have to resolve a dispute about the scope of the private party's property interest has not been regarded as fatal to the plaintiff's Tucker Act complaint.") Thus, Del Rio dealt with the issue of whether a question about the legal validity of the government action bars a taking claim in a rather narrow context: where the legal issue involves the question of whether the taking claimant has a property interest to support a taking claim in the first place.

Del Rio does not address how a question about the legal validity of a government action affects a taking claim when the legal issue is *independent* of the taking issue itself. As the court observed, the claimants in Del Rio "did not seek to overturn the government action on the ground that it was contrary to some statute, regulation, or constitutional provision (other than the takings clause)." Id. at 1363. Nor, the court said, was it "essential" to the claimant's case that the Department acted "unlawfully" when it eventually canceled the leases. Id. Thus, the holding in Del Rio is confined to the situation where an alleged legal error is a "necessary part" of the claimant's taking claim.

While certain language in Del Rio can be read more broadly, there is no reason to read Del Rio as contradicting the general rule that the government action must be legally valid, or at least must be presumed to be valid, in order to support a taking claim. The actual holding in Del Rio does not require such a dramatic conclusion. And such a reading of Del Rio would set up an unnecessary conflict with Supreme Court authority and other rulings of this court discussed above.

This interpretation of Del Rio is supported by the court's *subsequent* decision in Rith Energy, Inc. v. United States, supra. In that case, the claimant had foregone an opportunity to challenge the denial of a mining permit as contrary to the federal Surface Mining Control and Reclamation Act. The court said that in these circumstances the claimant was required to litigate the case "on the assumption that the administrative action was both authorized and lawful" and, using slightly different language, "assuming the lawfulness" of OSM's actions. 247 F.3d at 1366. If the issue whether the government acted lawfully were irrelevant in a regulatory taking case, there would have been no reason for the Rith court's statement that the action had to be "assumed" to be lawful. Rith supports the conclusion that, in general, the government action must be legally valid, or at least must be presumed to be so, for a claim under the Taking Clause to go forward.

In this case, the narrow Del Rio exception does not apply because the issue of FDA's lack of authority is not a "necessary part" of the plaintiffs' taking claims. Thus, as the court indicated it Rith, this case must be litigated on the basis that the FDA action was, apart the taking issue, legally valid or at least presumptively valid. The Supreme Court's decision in Brown & Williamson obviously precludes such a presumption, and in fact conclusively establishes that the regulation was not legally valid, and therefore precludes these taking claims.

The Del Rio Court discussed several other cases which can be read to support the proposition that the legal invalidity of a government action should not affect the viability of a taking claim. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and Ramirez de Arellano v. Weinberger, 724 F.2d 143, 151 (D.C. Cir. 1983), rev'd, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985). However, upon analysis, these decisions, both of which predate some of the leading Supreme Court authorities on this issue discussed above, do not support a general rule that the legal invalidity of an administrative action (so long as the action is *infra vires*) should be irrelevant in a takings suit.

Larson was not a taking case at all but rather a suit for injunctive and declaratory relief based on alleged breach of contract by a government official. The issue was whether the suit was barred by the doctrine of sovereign immunity. The Court ruled that suit was barred, reasoning that a complete lack of statutory authority or some constitutional violation might avoid a sovereign immunity defense, but a mere allegation of illegal action did not. But the Court did not apply this reasoning in the context of a taking case, much less explore its relevance to the requirement in the Taking Clause that the action be for "public use." In sum, Larson does not speak directly to the issue of whether a legally invalid government action can or cannot support a claim for compensation under the Taking Clause.

Arellano was not a taking case either but rather an action for injunctive and declaratory relief arising from alleged violations of the Due Process Clause and the Alien Tort Statute. The case arose from construction of a large U.S. military facility in Honduras over the objections of the owner of the site of the facility. The primary question in the case was whether the plaintiff was entitled to an injunction requiring the operation to cease, an issue that turned in large part on the foreign affairs implications of the proposed injunction. In addition, the D.C. Circuit addressed whether a grant of equitable relief might be inappropriate because the plaintiff could obtain legal relief by pursuing a taking claim in the court of federal claims. A divided three-judge panel concluded that alternative legal relief under the Taking Clause likely would be available. However, the D.C. Circuit, sitting *en banc*, vacated that decision, based in part on its conclusion that a

taking claim likely would not succeed. (Eventually, the U.S. Supreme Court vacated the *en banc* decision as well, on unrelated grounds).

For several reasons, the panel opinion does not represent an authoritative or persuasive precedent. First, as discussed, the opinion was vacated by the D.C. Circuit *en banc* and the full court reached the opposite conclusion from the panel on the question of whether the plaintiff likely had a viable taking claim. It is correct, see Del Rio, 146 F.3d at 1362, that the full court stated that "[n]ot all illegal acts of government officials" necessarily preclude a finding of a taking. But this statement is a far cry from the more sweeping rule proposed in the panel opinion. The holding in Del Rio is sufficient by itself to confirm that "not all" allegations that an agency has acted illegally will preclude a taking claim. But, for the reasons discussed, the holding in Del Rio does not support the far broader conclusion, which the panel apparently embraced in Arellano, that the legal invalidity of an administrative action (as opposed to lack of authority) should *never* bar a taking claim. Finally, whatever the meaning of the *en banc* decision, that decision was vacated as well.

Second, the panel's opinion and discussion of precedent is not persuasive. The panel cited Larson as authority for what it called a "well established" rule of takings law; for the reasons discussed, this goes beyond what can sensibly be gleaned from Larson. In addition, citing Hooe v. United States, 218 U.S. 322 (1910), the panel posited that, so long as a government official "is acting within the normal scope of his duties," a taking claim will ordinarily lie "unless Congress has expressed a positive intent to prevent the taking or to exclude governmental liability." 724 F.2d at 150. It is difficult to understand the logical basis for this proposed rule, for, at least in legal terms, if an agency has acted "contrary to law," the action is neither more nor less illegal than if Congress has prohibited the action in *haec verba.* Finally, the panel pointed out that in various cases the courts have inferred government authority to take the specific action resulting in a taking from more general grants of authority. But this line of cases does not demonstrate that valid legal authority (determined or at least presumed) is not a necessary precondition for a taking suit, much less that a taking claim can go forward in the face of an explicit determination (like in this case) that the government action was, in fact, not legally valid.

In sum, neither Del Rio, nor the various decisions it discusses contradict that general rule that the legal invalidity of the government action (at least when the legal issue is not related to the merits of the taking claim itself) precludes a finding of a taking for public use.

III. An Expansive Theory of "Invalid Takings" Would Improperly Undermine Congress' Responsibility to Determine Whether to Waive Sovereign Immunity.

A final consideration supporting the requirement of a valid government action is that an expansive theory of takings liability based on legally invalid government actions would undermine Congress' determinations about whether and on what terms to waive the sovereign immunity of the United States.

In general, the United States is protected from liability by the doctrine of sovereign immunity. This doctrine applies to all types of claims, including claims under the Taking Clause. See Webster v. Doe, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (collecting cases). As a result of the Tucker Act, however, the United States has waived its immunity to the full extent that government actions are deemed to be compensable takings under the Taking Clause. The upshot of this broad waiver of immunity is that a judicial determination that a claim lies under the Taking Clause simultaneously decides the question of whether the United States is immune from suit.

By contrast, the scope of the United States' liability based on tort or under the Due Process Clause is more restricted. The Federal Tort Claims Act waives sovereign immunity for suits

based on actions by government officials that would support tort liability if the actor were a private party. However, the waiver is subject to important exceptions, including the so-called discretionary function exception. See 28 U.S.C. 2680(a), (h). Similarly, a claim for monetary relief under the Due Process Clause is impeded by the fact that Congress has chosen not to create a statutory right of action, analogous to 42 U.S.C. 1983, for monetary relief against the federal government based on constitutional violations. In addition, a Bivens-type action would have to overcome good faith immunity defenses.

All of these impediments, which Congress has created or at least perpetuated, can be undermined by the simple step of transmuting what has traditionally been viewed as a tort issue or a Due Process issue into a takings issue as well. If an action is viewed as raising a tort issue or a claim under the Due Process Clause, but not a taking, the government will be able to raise the various defenses discussed above. However, if the action is viewed as raising a taking claim as well, the defenses will not apply to the taking claim.

In Board Machine, Inc. v. United States, 49 Fed. Cl. 325 (2001), appeal pending (No. 01-5122), another case involving a taking claim based on the FDA regulation, the court of federal claims argued for a narrow interpretation of the lack of authority defense in order to avoid the impediments to suing the government for unauthorized actions based on alternative legal theories. In the view of *amici*, the court reached the right result in Board Machine by concluding that the taking claim had to be rejected based on Brown & Williamson. However, the court defined the lack of authority defense too narrowly and improperly ignored that the legal invalidity of the FDA regulation provides an independent basis for a rejecting the taking claim. The court's reasoning does not support a narrow interpretation of the lack of authority defense or justify rejecting that invalidity defense.

The court stated that "it seems wise to define as narrowly as possible the ambit of unauthorized acts, so as to minimize those situations in which a citizen's property is taken by an ostensible government act and no compensation is available." Id. at 331. The court also stated that the need to interpret the Taking Clause so as to permit recovery is more "pressing" when "no other viable avenue of recovery seems available." Id.

The *amici* submit that this approach to the interpretation of the Taking Clause, which essentially turns on the judiciary's policy judgments about the appropriate level of public liability for different government actions, is both unwise and inappropriate. In Board Machine, the court reasoned that an expansive reading of the Taking Clause was "wise" in part, "[b]ecause in a democracy it is important that law and citizens' expectations of justice come together as much as possible." Id. While this goal regarding the law and citizens' expectations is unobjectionable as a general statement of values or preferences, it is not consistent with the limited role of the courts under our system of government for the courts to attempt to redefine the law to match the judiciary's impressions of "citizens' expectations."

Equally important, an approach to interpretation of the Taking Clause designed in part to avoid congressionally-created or -sanctioned immunities from suit intrudes upon the legislative function. It is the responsibility of Congress, not the courts, to decide whether and on what terms to waive sovereign immunity. The courts cannot properly interpret the Taking Clause with the goal of undermining Congress' judgments that liability should not exist under certain circumstances. If anything, the courts should lean in the opposite direction, and should interpret the Taking Clause so as to reinforce Congress' judgments about when sovereign immunity should be waived. Confirming that taking claims cannot be based on government regulations that are determined to be legally invalid would do just that. This conclusion would also be consistent with the longstanding rules that waivers of sovereign immunity need to be explicitly articulated by the legislative branch and should be narrowly construed by the courts.

CONCLUSION

For the foregoing reasons, the court should affirm the judgments below rejecting these taking claims.

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July 26, 2001

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Federal Circuit Rules 29(c) and 32(a)(7) that the Brief of *Amici Curiae* the American Cancer Society, the American Lung Association, and the National Center for Tobacco-Free Kids in support of defendant-appellee contains 6965 words.

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PROOF OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of *amici curiae* the American Cancer Society, the American Lung Association, and the National Center for Tobacco-Free Kids in support of defendant-appellee United States has been served by United States first-class mail, postage prepaid, upon:

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Footnotes:

[1] The arguments in this brief are also relevant to issues raised in the case of B& G Enterprise, Ltd. v. United States, No 01-5080, which the court is treating as a companion case to this case, as well as in other similar cases arising from the FDA rule. See Statement of Related Cases filed by the United States.

[2] For example, FDA retains authority to regulate tobacco products for which the manufacturer makes explicit health claims, see Brown & Williamson, 529 U.S. at __, and the *amici* and others are encouraging Congress to grant FDA new authority to regulate regular tobacco products and their marketing in order to reduce the enormous harm they cause. Should FDA issue any tobacco-related regulations based on its surviving authority or on any newly granted authority, the past behavior of the major cigarette companies and other members of the tobacco industry indicates that they would aggressively pursue any and all legal challenges. These challenges might result in some of the regulations being found to be legally invalid, even if authorized. If FDA believed that any such regulations, issued in good faith, that were found to be invalid could provide the basis for possible taking claims, FDA might be much less likely to issue the regulations or might only issue them in a much weaker form. The chilling effect of such potential takings claims on state and local governments would likely be even greater.

[3] The Supreme Court's subsequent decision in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), does not contradict the reasoning of the majority in Eastern Enterprises. Del Monte Dunes involved a taking claim based on the theory that the government action "failed to substantially advance a legitimate public purpose," a type of taking claim that is arguably in tension with the view that a taking claim presupposes a legally valid government action. But the Court did not actually endorse this problematic takings test, observing instead that the plaintiff had simply waived any objection to the validity of the test. See id. at 704. Moreover, a majority of the justices wrote or joined in opinions explicitly reserving the question whether the "substantially advance" test is actually a legitimate taking test. See id. at 732, n. 2 (Scalia, J., concurring in part) and id. at 754, n. 12 (Souter, J., dissenting). Second, Justice Kennedy (in a portion of his opinion joined by only three other justices) characterized the taking claim as sounding "in tort," id. at 714, a characterization which also arguably is in tension with the conclusion that only a legally valid government action can support a taking claim. However, he used this characterization in the context of evaluating whether the plaintiff was entitled to a jury trial under the Seventh Amendment, and on the understanding that the plaintiff was "denied not only its property but also just compensation or even an adequate forum for seeking it." Id. See generally John Echeverria, "Takings and Errors," 51 Alabama Law Review 1047, 1069-71 (2000) .

[4] Numerous lower court decisions recognize that only legally valid government actions can support takings claims. See, e.g., A. A. Profiles, Inc. v. City of Fort Lauderdale, 253 F.3d 576, 583 n. 7 (11th Cir. 2001) ("If a local government's 'police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare' there can be no 'public use' of a landowner's property and, correspondingly, no Fifth Amendment taking. Compensation for losses due to invalid uses of the police power could still be available, however, under the Fourteenth Amendment's due process clause."); Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach, 2001 WL 639180, at 38 (S.C. 2001) ("[A]lthough

a property owner who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking"). As discussed in section II, this court has generally embraced this view as well.

[5] In Osprey Pacific Corp. v. United States, 41 Fed. Cl. 150, 156 (Ct.Cls. 1998), the court adopted the opposite view, stating that "It is hardly a defense for the government to say it was wrong." However, it is illogical to conclude, when a government official has erred or misapplied the law, and therefore was not acting to advance some lawful public purpose, that the taxpayer should be financially liable. Moreover, the court acknowledged that a claimant should be required to select between the remedies of equitable relief and a claim for compensation, a position that, at bottom, is inconsistent with the theory that the legal invalidity of the government action should not affect an owner's right to pursue a taking claim.