

No. 11-922

In the
Supreme Court of the United States

RIVER CENTER, LLC,

Petitioner,

v.

DORMITORY AUTHORITY OF THE STATE OF
NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Supreme
Court of New York Court, Appellate Division

**MOTION FOR LEAVE TO FILE AND BRIEF OF
AMICUS CURIAE CENTER FOR
CONSTITUTIONAL JURISPRUDENCE IN
SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO
FILE BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONER**

Amicus Center for Constitutional Jurisprudence has received consent to file this amicus brief from Petitioner but Respondent has declined consent thus necessitating this motion.

Amicus believes that the petition in this case raises important and unresolved issues regarding the Compensation Clause of the Fifth Amendment. The meaning of “just compensation” was not debated during debates on the Constitution and apparently invoked little in the way of controversy. Early cases, however, confirm that the requirement to pay just compensation involved more than mere cost of bare land. The Founders viewed private property as the key to both liberty and prosperity. Thus, just compensation must include compensation for the income producing capacity of the property.

Amicus has as its mission, and brings its particular expertise to support, the restoration of the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for the right to own and use property. These rights are protected from usurpation by the requirement that government pay “just compensation” for a taking. The decision of the state court below departs from these principles and creates a conflict with the decisions of the Circuit Courts of Appeals.

WHEREFORE, the Center for Constitutional Jurisprudence seeks leave to file the accompanying brief amicus curiae in support of petitioner.

DATED: February, 2012.

Respectfully submitted,

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QUESTION PRESENTED

Does just compensation under the Fifth Amendment for a taking by eminent domain include the value of land uses that the condemning agency illegally sought to delay and frustrate?

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**IDENTITY AND
INTEREST OF AMICUS CURIAE**

Amicus, Center for Constitutional Jurisprudence¹ is the public interest arm of the Claremont Institute. The mission of the Claremont Institute and the Center are to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the protections for private property – considered by the Founders to be the cornerstone of individual liberty. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 2606 (2010) and *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), as well as pending matters including *Harmon v. Kimmel*, No. 11-496 (2011) and *Kitsap Alliance of Property Owners v. Central Puget Sound Growth Management Hearings Board*, No. 11-457 (2011). The Center is vitally interested in the role of the Just Compensation

¹ Pursuant to this Court’s Rule 37.2(a), counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae’s intention to file this brief. Letters evidencing consent to file this brief of all but one respondent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Clause as a means of protecting rights in private party, and thus individual liberty.

SUMMARY OF ARGUMENT

In *Penn Central Transportation Authority v. New York*, 438 U.S. 104 (1978), New York City claimed that it could not be held liable for a taking since the property owner retained “valuable” development rights it could transfer to another property. *Id.* at 122. In this case, the Dormitory Authority of the State of New York argues that those development rights really are not all that valuable. This lack of value stems from the fact that the owner of the development rights did not have all of the permits in hand or financing in place to begin construction. Yet, this delay in obtaining permits for the project was due to the illegal efforts of the Authority to delay and obstruct the project. The state courts rewarded this illegal action to suppress the value of the property. In the Authority’s eminent domain action, the property owner was awarded half of the true value of the property and development rights that were condemned. The state courts refused to consider the full value of the development rights since the property owner had not yet been able to obtain construction permits and lease commitments. In sum, the award fails the requirement of just compensation.

The lower court decision creates a split between New York and several Circuit Courts of Appeals. More importantly, however, the case offers the Court the opportunity to clarify the requirements of the Just Compensation Clause. The requirement to pay just compensation was how the Founders chose to protect individual rights in private property. Those

rights were considered the foundation for all of our individual liberties.

REASONS FOR GRANTING REVIEW

I. THE STATE COURT'S DECISION CREATES A SPLIT OF AUTHORITY BETWEEN NEW YORK AND SEVERAL CIRCUIT COURTS OF APPEALS

As set out in the appendix accompanying the Petition for Writ of Certiorari, the New York courts concluded that delays in obtaining the necessary zoning approvals to commence development were the result of illegal actions by respondent. Pet. at 28a. The lower court refused to consider the Authority's misdeeds in setting compensation, however, because it did not believe that a "willing purchaser would be looking to buy a lawsuit." *Id.* Such an analysis conflicts with the decisions of this Court and several Circuit Courts of Appeals.

This Court has noted that just compensation includes not only the value of the land as it is currently being used, but also the value for the "highest and most profitable use for which the property is adaptable." *Olson v. United States*, 292 U.S. 246, 255 (1934). This requires consideration of what price the property would command in the market. Market value will include the value for available uses. *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878). The goal in this calculation is to return to the owner the "full and exact equivalent" of what was taken. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893).

Difficulty in calculating the market price for a potential use of property arises when there is an

allegation that the government agency has in some manner interfered in the market, as was the case in this action. The New York courts did not consider the affect on the market of that interference. Instead, they ruled that the owner's claims regarding the highest and best use of the property could not be credited since the claimed use was not "imminent." Pet. at 15a. By this, the lower court meant that the highest and best use could not be considered for a project unless building plans had been filed, financing had been obtained, a construction manager had been hired, and agreements for demolition secured. *Id.* Thus, under the New York rule as announced in this case, the state need not pay compensation for the highest and best use if it was successful in delaying the property owner's plans for construction by interfering with the rezoning of the property.

This approach conflicts with the holdings of the Second, Third, Fifth, and Eleventh Circuits of the United State Court of Appeals. Each of these courts has looked at cases where there are allegations that government has interfered in some way with the rezoning of the property, thus depressing the value. Those courts have ruled that where the government action was taken with the purpose to depress land values in advance of a taking, the valuation must disregard the disputed zoning restriction.

In *United States v. Meadow Brook Club*, 259 F.2d 41 (2nd Cir. 1958), the Second Circuit noted that the valuation under the Just Compensation Clause must include not only the currently permitted uses, but also those uses that would be permitted under a zoning change that is "reasonably possible."

Id. at 45. In making that determination, the Second Circuit ruled that the court must disregard the government's opposition to rezoning where the sole motive in resisting the change "was to depress the market value of the property which it then intended to condemn." *Id.*

The rule in *Meadow Brook* has been recognized in the Third, Fifth, and Eleventh Circuits. *United States v. 27.93 Acres of Land*, 924, F.2d, 506, 511 (3rd Cir. 1991); *United States v. Land*, 213 F.3d 830, 835 (5th Cir. 2000); *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1307 (11th Cir. 2009).

The Eleventh Circuit recently explained this rule as an aspect of the "scope of the project doctrine." *United States v. 480.00 Acres of Land*, 557 F.3d at 1307. That doctrine requires the fact-finder to disregard the impact of government actions, within the scope of the project, on the value of the property. Thus, if the government agency has taken action to depress the value of the property, value is determined as if those actions had not taken place. *Id.* In the case of legal restrictions on more valuable uses, those restrictions are also disregarded if the restrictions were put in place or maintained in order to depress the value of the project in advance of the taking. *Id.* at 1313.

The rule in the Second, Third, Fifth, and Eleventh Circuits prevents the government from reaping the benefit of depressed land values that it caused. New York, in this case, has taken a different tact. The court below acknowledged that Dormitory Authority interfered with the rezoning application for this project, thus delaying the progress of the proposed development. Departing from the rule in

the Second, Third, Fifth, and Eleventh Circuits, however, the New York court ruled that the Dormitory Authority could take advantage of the depressed land values that it caused. This Court should grant review to resolve this split of authority.

II. THE JUST COMPENSATION CLAUSE WAS DESIGNED TO PROTECT INDIVIDUAL RIGHTS IN PRIVATE PROPERTY, CONSIDERED THE FOUNDATION OF LIBERTY

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. Declaration of Independence ¶2, 1 Stat. 1 (1776). The Fifth Amendment seeks to capture a part of this principle in its announcement that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. Amend. V. The importance of the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.

Of course, the importance of individual rights in property predated the American Constitution. Blackstone noted that property is an “absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.” Blackstone, 1 Commentaries on the Laws of England 135 (Univ. of Chicago Press 1979) (1765)

The founding generation also relied on the writings of John Locke who noted that private

property was natural, inseparable from liberty in general and actually preceded state's political authority. John Locke, *Second Treatise of Government*, (Indianapolis: Hackett Publishing Company, 1980) 111; James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). Locke argued that government was formed to protect as "life, liberty, and estates" and Thomas Jefferson merely substituted 'estates' with 'pursuit of happiness' in the Declaration. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

Alexander Hamilton, building on these concepts, noted the central role of property rights in the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams, "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the*

Leading Principles of the Federal Constitution 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together.

The Just Compensation Clause is a critical part of the protections of individual rights in property. Though the state has the power to compel the transfer of private property when necessary for a public use, it is required to pay for that property in the same manner as any private individual. Montesquieu, *Spirit of the Laws*, Book 26, Chapter 15 (1748), reprinted in 5 *The Founders' Constitution* 311 (Univ. Chicago Press 1987); *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 316 (2 Dal. 304) (1795). As Justice Story noted, all of our individual rights would become "utterly useless if the government possessed and uncontrollable power over the private fortune of every citizen." Joseph Story, *Commentaries on the Constitution*, Book 3, §1790 (1891) (William S. Hein Co., vol. 2 at 570 (1994)). The Constitution protects against that tyranny by the requirement of Just Compensation.

In this case, however, New York seeks to exercise the tyrannical power feared by Justice Story and Montesquieu. The state has used its power to interfere in a development project for the purpose of depressing the value of the property to be taken in eminent domain. The New York courts have ruled that the state can now profit from its delay and interference. This ruling contravenes the purpose of the Just Compensation Clause. Review should be granted in order to protect the individual liberties in property.

CONCLUSION

Development rights cannot be considered “valuable” when government seeks to avoid the impact of its regulations on private property (*Penn Central*, 438 U.S. at 120-21) and merely speculative when those rights are taken by eminent domain. The state cannot profit by its illegal actions to depress land value or delay a project. The New York decision to the contrary creates a split with the decisions of several Circuit Courts of Appeals and is contrary to the original meaning of the Just Compensation Clause. This Court should grant review to resolve these issues.

DATED: February, 2012.

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