No. SCWC-18-0000876

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, by its Attorney General, Respondent/Plaintiff-Appellee, vs. DON HOWARD WILLIAMS, JR., TRUSTEE OF THE WILLIAMS OPPORTUNITY TRUST, Petitioner/Defendant-Appellant,	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS ICA SDO: Apr. 15, 2024 ICA Judgment: May 9, 2024 2CC131000724 Circuit Court of the Second Circuit Hon. Rhonda Loo Judgment: Oct. 10, 2018 ***(caption continued on next page)***

APPLICATION FOR A WRIT OF CERTIORARI

APPENDIX 1

CERTIFICATE OF SERVICE

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and

CITY BANK, a Hawaii corporation, now known as Central Pacific Bank, a Hawaii corporation; AMERUS LIFE INSURANCE COMPANY, an Iowa corporation; JOHN DOES 1-100; MARY ROES 1-100; DOE PARTNERSHIPS 1-100; DOE TRUSTS 1-100; DOE ENTITIES 1-100; DOE ESTATES 1-100; and DOE CORPORATIONS 1-100,

Respondent/Defendants.

DON HOWARD WILLIAMS, JR., TRUSTEE OF THE WILLIAMS OPPORTUNITY TRUST,

Petitioner/Appellant/
Defendant-Counterclaimant,

vs.

STATE OF HAWAII,

Respondent/Appellee/
Plaintiff-Counterclaim Defendant.

No. SCWC-18-0000876

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, by its Attorney General, Respondent/Plaintiff-Appellee, vs. DON HOWARD WILLIAMS, JR., TRUSTEE OF THE WILLIAMS OPPORTUNITY TRUST, Petitioner/Defendant-Appellant, and CITY BANK, a Hawaii corporation, now known as Central Pacific Bank, a Hawaii corporation; AMERUS LIFE INSURANCE COMPANY, an Iowa corporation; JOHN DOES 1-100; MARY ROES 1-100; DOE PARTNERSHIPS 1-100; DOE TRUSTS 1-100; DOE ENTITIES 1-100; DOE ESTATES 1-100; and DOE CORPORATIONS 1-100, Defendants.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS ICA SDO: Apr. 15, 2024 ICA Judgment: May 9, 2024 2CC131000724 Circuit Court of the Second Circuit Hon. Rhonda Loo Judgment: Oct. 10, 2018
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> "[T]he owner shall be put in as good position pecuniarily as he would have been if his property had not been taken."
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> *City & Cnty. of Honolulu v. Bd. of Water Supply*, 36 Haw. 348, 250 (Terr. 1943) (quoting *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923))

This case is about the evidentiary rule essential to determination of constitutional just compensation in eminent domain actions.

Eminent domain is an exercise of the sovereign's power to accomplish what no market participant can do: deprive an owner of his or her private property at a price at which, by definition, he or she is not willing to sell. It is just about the furthest thing from a market sale because its forcible character is the antithesis of an arm's-length, voluntary transaction. This makes an actual free-market valuation impossible. And this case is extraordinary: it does not involve an uncontroversial taking for, say, a highway widening or a wastewater pipe—but the State employing its sovereign power to get out of a lease it doesn't like, and then asserting Williams is not entitled to be fully compensated for what he has lost.

Recognizing the oppressive nature and non-free-market nature of eminent domain, both the Fifth Amendment (which sets the floor for state condemnation law pursuant to the Fourteenth Amendment), and the Hawaii Constitution condition takings on compensation that is "just."

I. Just Compensation: The Hypothetical Fair Market Price of an Involuntary Transaction

A fundamental principle of American constitutional law is that just compensation requires tasking the jury with determining what value an arm's-length, voluntary sale would likely assign to what is in reality a forced, involuntary deprivation. As this Court put it, an owner is constitutionally entitled to "be put in as good a position pecuniarily as he would have been *if his property had not been taken*." *Id*. (emphasis added). Although the trier of fact is charged with determining what is by definition a hypothetical, the fair market value standard governing just compensation is designed to ensure fairness to all parties. The owner should at least not be *worse* off because of the involuntary nature of eminent domain. And the public is obligated to pay only for the value the free market would likely assign to the property—and no more. To ensure the jury adheres to this principle, courts have applied two evidentiary rules, both based on Fifth Amendment principles.

II. Compensation Rule 1: Liberal Admission of Evidence of How Free-Market Buyers Value the Property Interests Being Taken

The first fundamental evidentiary rule is that the jury is to consider valuation of the property at its "highest and best use," which includes all uses to which the property might reasonably be put on the date of valuation, even where that use is not actually being made at the time of the taking.[1] If evidence could support a finding that the free market considers a future use reasonably likely—meaning that an arm's-length buyer would be willing to pay a higher price if property might yield a more valuable use down the road—the usual liberal rules of admissibility in eminent domain cases apply.[2] The parties have a lot of leeway when introducing such evidence, and the function of a trial court is not to impose any particular valuation theory, but as the ICA correctly concluded here, to allow the jury to review *all* evidence that can be said to be relevant to the fair market value of the property if that evidence otherwise meets admissions standards for expert or lay evidence. *See* SDO at 10-11. Simplifying it here is the fact that the property's actual use at the time of the taking was the State was contractually obligated to continue leasing it for another decade-plus under an established triple net lease (where the lessee bears all costs of taxes, insurance, and maintenance).

Thus, the ICA correctly held that Williams is entitled to introduce testimony on remand that on the date of the summons, the highest and best use of his land was its actual use: held as a divided estate, by continuing to lease it to the State, long-term.[3] A hypothetical free-market buyer who could not force acquisition by eminent domain would value Williams's interests as the cost of stepping into his shoes as a lessor highly likely to continue to receive a regular cash flow for 11-plus years, triple net, from a lessee with a secure bond rating unlikely to default. Moreover, because Williams possessed the reversionary interest, a free-market purchaser would factor

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[1] The Legislature has fixed the date of summons as the date of valuation. Haw. Rev. Stat. § 101-24; *City and Cnty of Honolulu v. Chun*, 54 Haw. 287, 288, 506 P.2d 770, 771 (1973).

[2] The rules of admissibility are considered "liberally" in eminent domain in favor of the property owner. *See*, *e.g., City and Cnty. of Honolulu v. Market Place, Ltd*., 55 Haw. 226, 242, 517 P.2d 7, 19 (1973) (liberal admission rules in eminent domain). Any non-speculative evidence that will aid the jury in determining fair market value on the date of valuation is admissible. *City and Cnty. of Honolulu v. International Air Service Co*., 63 Haw. 322, 628 P.2d 192 (1981). *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (jury's role in regulatory takings cases).

[3] Making it even more straightforward was that this was also the State's approach, until its late-hour about-face where it retained a second appraiser who lowered the State's valuation, terminated its first appraiser, and even more shockingly repudiated its earlier open-court representations to the circuit court.

into valuation the fact that when the lease ended, the buyer would obtain possession of the last remaining undeveloped parcel in South Maui's Maalaea area, zoned M-1 Light Industrial (meaning that the buyer could make all less-intense uses as a matter of right, such as commercial, retail, multi-family, industrial, office, or even hotel with a variance).[4]

The ICA got it exactly right when it rejected the circuit court's exclusion of this evidence.

III. Compensation Rule 2: Exclusion of the Eminent Domain Project's Influence on Value

But the ICA did not complete the circle. It left unaddressed the closely-related—and perhaps more critical—evidentiary rule in eminent domain, which, like the first, is designed to ensure the jury's valuation is based only on what a free and fair market would set as an arm's-length acquisition price. In contrast to the highest and best use rule which allows a wide range of evidence to be admitted as long as it is based on the hypothetical free market, the second rule is one of categorical *inadmissibility*: under the "project influence" rule, the finder of fact is absolutely barred from considering evidence of the property's value as influenced or affected by the eminent domain action. *United States v. Miller*, 317 U.S. 369, 375 (1943); *Nichols on Eminent Domain* § 12B.17[1] (rev. 3d ed. 1999). Put another way, the effect of the condemnation itself on the property's hypothetical market value can never be presented to a jury.

The circuit court denied Williams's request to prohibit the State from eliciting such testimony from its valuation expert (the State's second appraiser's opinion valued the property only as a fee simple interest, notwithstanding the fact a purchaser could not obtain the fee simple interest *except by exercising eminent domain*). As Williams phrased it to the to the circuit court, "[y]ou value the property as if the condemnation hasn't occurred. You don't value the property in its condemned state." ICA Dkt 11 at 410.

As a Fifth Amendment requirement, the project influence rule has long governed Hawaii eminent domain actions. But this Court has never been presented with a clear opportunity to enunciate the rule under either the U.S. or Hawaii Constitutions. And unlike many other states

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[4] The widely accepted method of estimating what value the free market would assign to such an interest in income-producing property is known as the "capitalization of income" approach, *see City and Cnty. of Honolulu v. Bishop Trust Co*., 48 Haw. 444, 404 P.2d 373 (1965), which is exactly what Williams was prepared to introduce until prohibited by the circuit court on the literal eve of trial. *See also Cnty. of Los Angeles v. American Sav. & Loan Assn*., 102 Cal. Rptr. 439, 441 (Cal. Ct. App. 1972) (Just compensation is "1) The present worth of the future net income which the lessor is to receive for the life of the lease. This is the discounted value of the income stream. 2) The present worth of the value of the improvements at the expiration of the lease. 3) The present worth of the land at the expiration of the lease. The discounted value—called the reversion.") (footnote omitted).

and the federal government,[5] Hawaii has never codified the project influence rule.[6] This case is a stark example of how, for lack of local guidance and clear rules, the State and a lower court can badly misunderstand and fail to apply this fundamental rule, resulting in the specter of condemnation without *just* compensation hovering over an 80-year-old property owner for more than a decade. Hawaii owners whose properties are pressed into public service should not live under the cloud of undercompensation a day longer than necessary, yet this lawsuit has been pending since 2013—and is not done yet. *Cf*. Haw. Rev. Stat. § 101-9 (eminent domain "actions shall be quickly heard and determined"). This Court has long recognized that when depriving an owner of private property, "every form and particular required by [the eminent domain code] must be complied with." *In re Widening of Fort St*., 6 Haw. 638, 646-647 (Kingdom 1887) (failure to strictly adhere to statutory limitations on eminent domain violates due process). The present case is an

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[5] *See*, *e.g*., 42 U.S.C. § 4651(3) ("Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property."); Cal. Gov. Code § 7267.2(a)(1) ("A decrease or increase in the fair market value of real property to be acquired prior to the date of valuation caused by the public improvement for which the property is acquired, or by the likelihood that the property would be acquired for the improvement, other than that due to physical deterioration within the reasonable control of the owner or occupant, shall be disregarded in determining the compensation for the property."); Maine Rev. Stat. § 154-A ("Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining just compensation for the property."); Miss. Code § 43-37-3 ("Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which the property is acquired or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property."); Va. Code § 25.1-417 ("Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property.").

[6] Chapter 101 does not contain any similar requirement. Section 101-23 ("Damages assessed, how.") provides only that "[i]n fixing the compensation or damages to be paid for the condemnation of any property, the value of the property sought to be condemned with all improvements thereon shall be assessed, and if any of the improvements are separately owned, the value thereof shall be separately assessed." The statute does not provide any legislative confirmation that the effects of the condemnation itself on market value must be excluded. This statute's last substantive update was in 1955. *Id*. ("L 1896, c 45, §13; am L 1919, c 63, §2; RL 1925, §821; RL 1935, §63; RL 1945, §314; am L 1947, c 200, §1(c); am L 1953, c 269, §1; RL 1955, §8-21; HRS §101-23; am L 1990, c 34, §9."). 1990's Act 34 only updated a statutory cite in the text.

opportunity to reaffirm that strict adherence to *constitutional* requirements is even more essential.[7]

In this case of first impression, this Court should ensure that Hawaii's eminent domain proceedings conform to the minimum requirements of the constitutions. If Williams's "property had not been taken," *Bd. of Water Supply*, 36 Haw. at 250 (quoting *Seaboard Air Line*, 261 U.S. at 304), a market purchaser would not be able to obtain ownership of the fee simple estate as the State has here, because free-market actors don't have eminent domain power. Therefore, just compensation must be determined only by valuing Williams's property interests at the time of the taking, *and not as being condemned*.

This Court should accept certiorari and remand the case to also expressly prohibit the State from introducing evidence of the property in its condemned condition.

QUESTION PRESENTED

> May a jury determining just compensation consider evidence of the influence of the condemnation on the fair market value of property being taken?

ANSWER

> No, the Fifth Amendment's and the Hawaii Constitution's Just Compensation Clauses prohibit the introduction or consideration of evidence of the effects of the eminent domain action on the fair market value of the property.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

I. The State Instituted a Condemnation Lawsuit to Acquire Williams's Property Interests

In 2013, the State instituted a condemnation lawsuit to forcibly acquire Williams' interests in a one-acre vacant lot in Maalaea, Maui, which the State was already leasing from Williams pursuant to a thirty-year long-term lease. As the lessee, the State already had possession and exclusive use. At the time of the State's complaint, more than ten years remained on the

[7] The present case also demonstrates only too well a failure to "turn square corners" when forcibly depriving an owner of his fundamental constitutional right to possess and use private property. As the U.S. Supreme Court recently recognized, "[i]f men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). This is especially critical in eminent domain, where a property owner/defendant has few ways to stop a taking, meaning that strict adherence to the constitutional requirements of just compensation is the sole guarantor of justice. *See*, *e.g.*, *F.M.C. Stores Co. v. Borough of Morris Plains*, 495 A.2d 1313, 1317–18 (N.J. 1985) ("[I]n the condemnation field, government has an overriding obligation to deal forthrightly and fairly with property owners.").

State's lease. The State's taking by eminent domain of Williams's right as the lessor to receive rent, and his right to recover the property at the end of the lease, would, upon condemnation, extinguish those interests by the common law doctrine of merger.[8] Upon entry of the final order of condemnation, the State would own all interests in the land (fee simple). *See*, *e.g.*, *Restatement (First) of Property* § 507 cmt. a (1944) (illustrating extinguishment of an easement by the state through eminent domain). The trial was to be focused on the amount of just compensation under the Fifth Amendment and Hawaii's Just Compensation Clause which the State would be obligated to provide to Williams for seizing his private property interests.

The State eventually asserted that pursuant to the "undivided fee rule," the just compensation it was obligated to provide could *never* include the value the free market would assign to Williams's rights to receive rent and his reversionary interest as lessor, but instead was limited to the valuation of the State's resulting fee simple estate.[9] The State asserted that because its condemnation action terminated the lease, Williams lost his property interests, and thus the valuation could only be based on the fee simple estate the State would obtain upon entry of the final order of condemnation.

II. The ICA Correctly Remanded to Allow the Jury to Consider the Actual State of Ownership, But Should Have Also Barred the State From Introducing Evidence of the Influence of the Condemnation Action

Although the circuit court bought this unconstitutional theory and barred Williams from introducing evidence of the market value of the interests he owned on the date of the summons, the ICA correctly rejected it: "a condemnee 'is permitted to 'advance any *reasonable argument for a probable future use*' when calculating just compensation for a taking." SDO at 11 (empha-

[8] The general rule is that property is not actually "condemned," and title is not transferred from the condemnee (Williams) to the condemnor (the State), until there's been a final determination of just compensation, entry of a final judgment, and actual payment of the entire amount by the condemnor. Then (and only then) is property "condemned" when the circuit court enters a final order of condemnation (which is recorded in the Bureau of Conveyances), even though we often describe an eminent domain action as a "condemnation," and refer to the complaint as "condemning" the defendant's property. *See* Haw. Rev. Stat. § 101-26. Even where a condemnor obtains immediate possession, the owner is not deprived of title until the final order of condemnation.

[9] We say "eventually" because as the Opening Brief details, the State initially—and for a majority of the circuit court litigation—agreed that just compensation would be determined by the market value of the property in its highest and best use (leasing it to the State), meaning Williams was free to introduce evidence of the market value of the property as leased to a long-term tenant with ten years remaining on a lease in which the lessee is very unlikely to default. Only on the eve of trial did the State change its tune and argue instead that the jury could *only* determine just compensation based on the State's resulting fee simple title, and Williams was therefore precluded from introducing evidence that a free-market buyer would very likely value the land as income-generating property.

sis added) (quoting *City & Cnty. of Honolulu ex rel. Honolulu Auth. for Rapid Transp. v. Victoria Ward, Ltd.*, 153 Haw. 462, 488, 541 P.3d 1225, 1251 (2023)). The ICA correctly held that evidence of highest and best use—as income-generating property, a use which had been made of the property for more than two decades—is admissible. The ICA remanded the case with instructions to allow Williams to introduce evidence of the value the market would assign to Williams's right to receive rent, and his reversionary interest as the lessor.

But the ICA's order was silent on the project influence rule, and the SDO only vacated the circuit court's judgment and remanded "for further proceedings *consistent with this [SDO]*." SDO at 12 (emphasis added). Consequently, although Williams was freed from being compelled to value the fee simple estate alone as the State insisted, the ICA's silence also presumably left the State free on remand to maintain its theory and introduce evidence of valuation of the unencumbered fee simple. The ICA should have also held that the U.S. and Hawaii Constitutions require exclusion of evidence of the value of the property *as condemned*, and expressly prohibited the State from introducing evidence of the effects of the eminent domain action on Williams's property interests.

REASONS FOR ACCEPTING THE APPLICATION

I. Just Compensation Always Excludes the Effects of the Condemnation Itself

The constitutional principle that the impact of the condemnation itself on the subject property's value cannot figure into the fair market value of property being taken can go by various names—"project influence," "scope of the project," "project enhancement," or "condemnation blight." But the rule is uniform nationwide: just compensation is determined without reference to the fact that the property is being condemned (the project).[10] "This principle promotes fairness in valuing property by preventing a windfall to the property owner based on speculative potential *enhancements* in value while, at the same time, protecting the property owner from the injustice of assessing against it a *diminution* in the property's value *caused by the same project for which it is being taken*." *Fowler*, 53 P.3d at 728 (emphasis added).

The rationale supporting this rule is that the hypothetical free market which the just compensation inquiry measures (which involves *voluntary* transactions) and the resulting "fair mar-

[10] *See*, *e.g.*, *City of Boulder v. Fowler Irrevocable Trust 1992-1*, 53 P.3d 725, 727-728 (Colo. App. 2002) ("Under the principle referred to by the parties and the trial court in this case as the 'project influence rule,' just compensation cannot include any enhancement or reduction in value that arises from the very project for which the property is being acquired.") (citing *Nichols on Eminent Domain* § 12B.17[1] (rev. 3d ed. 1999)).

ket value" standard cannot account the fact that the "buyer" (here, the State) possesses the power of eminent domain and has forced an *involuntary* acquisition. As one court put it, "[t]he intent of the project influence rule is to ensure that a condemned property is valued as if the project never occurred. It seeks to factor out any increase or diminution in the value of the property caused by the project." *Matter of City of New York (Fifth Amended Brooklyn Ctr. Urban Renewal Area, Phase 2)*, 980 N.Y.S.2d 275, 275 (N.Y. Sup. Ct. 2013) (citing *Miller*, 317 U.S. at 375).

This rule is also compelled by the constitutional principle that property being condemned is not measured by what the taker gained, but only by what the owner lost: "[s]ince the owner is to receive no more than indemnity for his loss, the property's special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 782 (5th Cir. 1979) (quoting *Miller*, 317 U.S. at 375). This is a universal rule under the Fifth Amendment, and *Miller* remains the seminal controlling case. There, the owner claimed the government's eminent domain project (which involved a series of takings of various other parcels) enhanced the value of his property. The Supreme Court disagreed and held that the determination of just compensation never accounts for the fact the property was part of an eminent domain project.[11]

The trier of fact can never consider any evidence of influence on value that may be attributable to the project itself.[12] This rule governs both increases in value due to a taking, and as

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[11] *See also Gomez v. Kanawha Cnty. Comm'n*, 787 S.E.2d 904, 919 (W. Va. 2016) ("We hold that, under the project influence rule any increase or decrease in value to the condemned land directly attributable to the project for which the land is taken must be disregarded in determining the market value of the land."); *Harris Cnty. Flood Control Dist. v. Taub*, 502 S.W.3d 320, 336 (Tex. App. 2016) ("Because an impending condemnation can inflate or deflate property values, the project-influence rule has evolved to eliminate the project's effect when determining the amount that a willing buyer would pay, and a willing seller would accept, for the subject property under market conditions."); *Housing & Redev. Auth. v. Minneapolis Metro. Co*., 141 N.W.2d 130, 136 (Minn. 1966) ("Neither an owner nor a condemnor is permitted to gain by any increase or decrease in value of the land taken due to the impact upon land values generated by an area redevelopment project for which the tracts included are acquired."); *Deustche Bank Nat'l Trust Co. v. Shelzi*, 2016 Mass. Super. LEXIS 313, at *12 (Mass. Super. Aug. 31, 2016) ("Under certain circumstances, however, the property's value may have increased prior to the taking, due to the announcement of or the property's proximity to a public improvement project. … As a result, the Supreme Court developed the 'scope of the project rule,' also referred to as the 'project influence rule,' which disregards from the just compensation calculation such increases in value.") (citing *Miller*, 317 U.S. at 369); *Doug Garber Constr., Inc. v. King*, 388 P.3d 78, 82 (Kan. 2017) ("The Project Influence Rule excludes certain factors from the fair market value calculation in an eminent domain proceeding. Generally stated, the enhancement or depressing of value due to anticipated improvements by the project for which condemnation is sought is excluded in determining fair market value.").

[12] The project influence rule is a categorical constitutional rule of inadmissibility and cannot be cured by a limiting instruction. *Cf. Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction.") (citation omitted).

here, decreases. Here, the State's "project" is a single-parcel taking, and only way a buyer could end up with the fee simple estate is by exercising eminent domain. This Court should hold that on remand, the State is barred by the U.S. Constitution and the Hawaii Constitution from introducing evidence of the property as condemned.

II. The Condemnor Compensates For the Property As It Finds It

This rule is also based on the principle that a condemnor takes property in the condition in which it finds it. There is no better example of this principle than the U.S. Supreme Court's decision in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910). There, the city condemned land and a building for a public street. *Id*. at 193. The Chamber of Commerce owned the fee interest in the land and the building. An adjacent property possessed an easement for light and air over the Chamber's property. *Id*. Being burdened by that easement severely depressed the market value of the Chamber's land. But the Chamber and the neighbor had agreed that in the event of condemnation, the court should calculate compensation without considering the easement's negative effect on market value of the Chamber's land.

The city condemned a portion of the Chamber's property. It asserted that the just compensation it owed was not constrained by any private contract between the Chamber and its neighbor, who had agreed the property would be valued as if it were *not* encumbered by the light and air easement. The city, however, argued the property must be valued in its encumbered condition, since a buyer in the real estate market could only acquire the property burdened by the air and light easement. The Supreme Court agreed with the city, holding that the value of the property "as it stood at the time" of the taking is the measure of the just compensation. *Id*. at 194. The Court concluded:

> [T]he mere mode of occupation does not necessarily limit the right of an owner's recovery. *But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole*. It merely requires that an owner of property taken should be paid for what is taken from him.

Id. at 195 (emphasis added). So "the question is what the owner lost, not what the taker gained." *Id*.

The record here is uncontested that at the time of the condemnation, Williams was entitled by virtue of the existing thirty-year lease to receive 11 years and two months of rent at $350,000 per year, triple net, from a lessee very unlikely to default. And to get back ready-to-develop land when the State's lease ended. The free real estate market would consider these facts

when determining an arm's-length purchase price: a buyer of Williams's interests would pay a premium to step into his shoes as the lessor. *See*, *e.g.*, *Utah Dep't of Trans. v. Kmart Corp*., 428 P.3d 1118, 1128 (Utah 2018) ("[A] condemnation does not trigger a re-allocation of property rights among owners of the condemned property; it merely requires each property owner to give the condemnor his or her property right in exchange for the fair market value of that right.").[13]

Valuing the property being condemned in a way that ignores the "state of title" on the date of summons (which includes Williams' interest in the lease) violates the Fifth Amendment's Just Compensation Clause, and article I, section 20 of the Hawaii Constitution. Doing so would violate the constitutions' driving principle that just compensation is measured by "the full and perfect equivalent for the property taken." *Monongahela Nav. Co. v. United States,* 148 U.S. 312, 326 (1893); *Bd. of Water Supply*, 36 Haw. at 350. Here, the "mode of [Williams'] ownership" at the time of the summons was that he owned land encumbered by a long-term lease with the State, and the right to recover possession at the end of that lease. As the U.S. Supreme Court put it, no rule "requires a parcel of land to be valued as an unencumbered whole when it is not held as an encumbered whole." *Boston Chamber*, 217 U.S. at 195. Indeed, the Fifth Amendment requires valuation of the encumbered land.

III. The Condemnation Clause Could Not Alter the Constitutional Requirement To Exclude Valuation of the Property as Condemned

But the State asserted that even if the constitutions bar evidence of the condemnation's influence on the property's valuation, Williams had by agreement abandoned his rights in the lease's "condemnation clause." "A 'condemnation clause' is a provision indicating that on the taking by eminent domain of the whole or part of the premises leased, the lease must come to an end. Under such a lease *the tenant* has no estate or interest in the property remaining after the taking to sustain a claim for compensation." *Nichols on Eminent Domain* § 12D.01[3][e] (emphasis added). The clause in the State/Williams lease says exactly that:

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[13] *See also People* ex rel. *Dep't of Public Works v. Lynbar, Inc*., 62 Cal. Rptr. 320 (Cal. Ct. App. 1967) (Nearly 18 years remained on above-market lease; the court held that what must be valued is what involuntary sellers must sell, not the interest the condemnor seeks to acquire. In the open market, the existence of a lease would be considered by buyers and sellers, and thus must be considered in eminent domain, and property encumbered by a lease must be valued "together with all of its compensable attributes, . . . as the condemnor finds it, including without limitation thereby, the state of its title, and in this case, the Tidewater leasehold."); *City of Overland Park v. Jenkins Revocable Trust*, 949 P.2d 1115, 1120 (Kan. 1997) ("The lessor is entitled to compensation for injuries to his reversion, and the lessee for injuries to his leasehold interests.") (quoting 29A C.J.S., *Eminent Domain* § 190 (2007)).

> Section 81. Condemnation. In the event during the term of this lease, the Premises or any part thereof shall be taken or condemned by any authority having the power of eminent domain, *then and in such event, this lease shall cease and terminate as of the date Lessee is required to vacate the Premises*, and any rent reserved shall be apportioned and paid up to that date. *All compensation and damages payable for or on account of the Premises, except for improvements constructed or owned by the Lessee, shall be payable to and be the sole property of the Lessor*. Lessee shall be reasonably compensated for all improvements constructed or owned by the Lessee. The Lessee shall not be entitled to any claim against the Lessor for condemnation of, or indemnity for, the leasehold interest of the Lessee.

ICA Op. Br. App. 1, at 12-13 (emphasis added).

The State, however, asserted this provision meant that because its condemnation terminated its lease, Williams agreed that he no longer had any property interest the State was obligated to compensate. True, the lease terminated—*as all tenancies do by operation of law where, as here, a condemnation action results in the condemnor owning the fee simple*.[14] But importantly, condemnation clauses such as these are not designed to—and indeed cannot—affect the amount of compensation owed by the condemnor to the lessor. Thus, not only does the State's interpretation of this provision violate the constitutional project influence rule since the only reason the lease terminated is the State's condemnation, doing so is counterfactual and illogical.

Because all lesser estates terminate by law when a condemnor acquires the fee, the only effect of the condemnation clause here is to allocate the entirety of the State's just compensation payment to Williams as the lessor (see the second italicized sentence in the condemnation clause quoted above). *See Nichols on Eminent Domain* § 12D.01[3][e] (condemnation clauses eliminate *tenant's* standing to claim part of the compensation award). Here, it should go without saying that State (the *condemnor*) would have no standing to claim to any part of the compensation it was obligated to provide to the condemnees. Indeed, it would be ridiculous for the State to have asserted such a claim (even in the absence of the condemnation clause), on the grounds that it was the lessee; it could not have an obligation to provide just compensation *to itself*, after all.[15]

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[14] This is the universal common law rule which does not depend on a contractual condemnation clause. *See Nichols on Eminent Domain* § 12D.01[3][1][iii] ("Leases are terminated when all the leased property is taken.") (citing *Restatement (Second) of Property* § 8.1(1) (1976).

[15] But the State claimed below that in *Terr. of Hawaii v. Arneson*, 44 Haw. 343, 346, 354 P.2d 981, 984 (1960), this Court held that a condemnation clause nearly exactly like the one here contractually terminated its obligation to provide just compensation to Williams as the lessor. Not so. The Court only reached the unremarkable conclusion that *"[t]he lessee's* interest in the property taken ceased as of the date of the taking." *Id*. (emphasis added). As it did here. *Arneson* did not validate a condemnation clause being interpreted as a forfeiture of the right of *a lessor* such as

(*footnote continued on next page*)

In sum, the condemnation clause in the State's lease is simply irrelevant to the calculation of compensation. It does not—and indeed cannot—supersede the fundamental constitutional requirement that the effects of the condemnation on the taken property's value can never be presented to a jury.

CONCLUSION

As its largest landowner, the State dominates Hawaii real estate. It not only participates in the market, but by exercising its regulatory power, can shape the market. Most critically, the State has an option available to no other: it can *avoid* market constraints entirely by exercising eminent domain. This case is the most flagrant of examples: the State deployed its sovereign power to avoid contractual obligations it freely agreed to but now doesn't like, while at the same time it seeks to avoid the usual consequences of a breach of contract claim *and* disclaim fundamental constitutional rules of just compensation. The only justice available to Williams lies in constitutional just compensation rules being faithfully applied by the courts.

This Court should accept certiorari and hold that on remand, the circuit court must exclude evidence of any changes in the fair market value resulting from the condemnation action itself.

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Respectfully submitted.

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Williams to be justly compensated for the taking of the property interests he owned on the date of the State's taking. Nor could it.