No. 16-1077

IN THE

Supreme Court of the United States

BAY POINT PROPERTIES, INC.,
F/K/A BP PROPERTIES, INC.,

Petitioner,

v.

MISSISSIPPI TRANSPORTATION COMMISSION AND
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Mississippi

Motion Of Virginia Institute for Public Policy and
Owners Counsel of America
For Leave To File Brief of Amici Curiae, and
Brief of Amici Curiae Supporting Petitioner

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MOTION FOR LEAVE TO FILE
BRIEF OF AMICI CURIAE

The Virginia Institute for Public Policy (VIPP) and Owners Counsel of America (OCA) respectfully request leave pursuant to Rule 37.2(b) to file the attached Brief of Amici Curiae supporting Petitioner. Counsel sought consent of the parties and provided counsel for each with more than ten days' notice of intent to file this brief. Petitioner has consented to the filing of an amicus brief, but Respondents Mississippi Transportation Commission and Mississippi Department of Transportation have withheld consent

VIPP and OCA submit this brief to assist the Court in its consideration of the case by examining how federal law should determine the baseline of protection provided to private property owners by virtue of the 5th and 14th Amendments. In this case, the Mississippi Supreme Court seeks to secure the power to re-define property in a manner that confiscates private property for state use without compensation, in conflict with the Just Compensation Clause and this Court's jurisprudence.

OCA brings unique experience to this charge as a network of the most experienced eminent domain and property rights attorneys from across the country seeking to preserve, defend, and advance the rights of private property owners. The freedom to own and use private property is "the

guardian of every other right" and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998).

VIPP commits itself to research, education, and policy recommendations to lay the intellectual foundation for a society dedicated to individual liberty. VIPP, as a think tank dedicated to protecting Constitutional freedoms, and OCA, a national association of property rights advocates, understand the importance of the issues presented by this petition and how the rule adopted by the Mississippi Supreme Court, if allowed to stand, undermines the primacy of federal law and permits state courts and legislatures to redefine and confiscate property rights without compensation.

OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained by its members. OCA leverages its members' combined knowledge and experience in the defense of private property ownership in an effort to make the right to own private property available and effective to all property owners nationwide. OCA member attorneys have litigated landmark cases in almost all fifty states and many have been counsel of record for a party or amicus in eminent domain and takings cases that this Court has considered in the past forty years. OCA members author treatises, books, and articles on takings including chapters in the seminal treatise Nichols on Eminent Domain. OCA's collective experience advocating for the rights of property owners and the VIPP's

perspective as a public policy research organization will provide valuable insight as to the serious consequences to the security of the fundamental right to own private property implicated by this case.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioner.[1]

The Virginia Institute for Public Policy is an independent, nonpartisan, education, and research organization committed to the goals of individual opportunity and economic growth. Through research, policy recommendations, and symposia, the Institute works to lay the intellectual foundation for a society dedicated to individual liberty, dynamic entrepreneurial capitalism, the rule of law, and constitutionally limited government.

Owners Counsel of America is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to defend, preserve, and advance the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property guards all other individual liberties and is the basis for a free society.

SUMMARY OF ARGUMENT

1. It is important for the Court to reassert the primacy of federal law as determining the baseline

[1] Counsel for the *amici curiae* authored this brief alone and no other person or entity other than the *amici curiae*, their members or counsel have made a monetary contribution to the preparation or submission of this brief.

protection provided to private property owners by the 5th and 14th Amendments. Although the issue should not be at large, a number of courts — as exemplified by the Mississippi Supreme Court — are seeking to secure for themselves the right and the power to redefine property in such a way as to confiscate private property for the use of the state.

2. This Court cannot permit state courts and legislatures to poach the power to redefine and thereby confiscate private property. Fundamental precepts of this Court's jurisprudence stand in the way. They are not called into play often, because few states have had the effrontery to seek to invade the federal prerogative, but the record below shows enough encroachment to warrant this Court's intervention as guardian of the 5th Amendment.

3. Indeed, this Court has plainly stated the precept at the heart of this case: "[A] State, by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." (*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 [1980].) The Mississippi decision runs afoul of this Court's authority.

ARGUMENT

I.

A STATE CANNOT CONSTITUTIONALLY "REDEFINE" PROPERTY IN A WAY THAT ELIMINATES THE TITLE THAT THE OWNER LEGITIMATELY UNDERSTOOD HAD BEEN ACQUIRED

It is a virtual truism that property interests are created by state law. (E.g., *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 [1998]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 [1984].) No one questions that here.

But that does not give states the power to run roughshod over private property rights by exercising sleight-of-hand in purporting to redefine existing rights. The U.S. Constitution in general, and the 5th and 14th Amendments in particular, stand as a bulwark providing protection against confiscation. (E.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 [1922]; *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 [1987] ["government action that works a taking of property rights *necessarily* implicates the constitutional obligation to pay just compensation"; emphasis added].)

That this solid foundation of protection for the rights of private property owners might cause some difficulties for government agencies is something that the Court has acknowledged and accepted:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations . . . . But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." (*First English*, 482 U.S. at 321.)

Indeed, two weeks after the Court published these words of clear governmental limitation, it added emphasis by holding compliance with the 5th Amendment's property clause to be "more than an exercise in cleverness and imagination." (*Nollan v. California Coastal Commn.*, 483 U.S. 825, 841 [1987].) So saying, the Court struck down action by a California agency that sought to evade the 5th Amendment by a "play on words." (*Id*. at 838.)

These concepts from 1987 — a year in which the Court decided more takings cases than any other [2]

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[2] In addition to *First English* and *Nollan*, the Court decided *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); and *United States v. Cherokee Nation*, 480 U.S. 700 (1987). The quotes above,

— show the need for this Court's continuing intervention to protect the rights of property owners. Left to their own designs, government agencies continue to seek to acquire property at no cost. This case illustrates one rather blunt exercise of such power: simply redefining property so that what once was private becomes *ex post facto* public. Even if the Mississippi Supreme Court believes that satisfies Mississippi law, it cannot satisfy the Constitutional strictures laid down by this Court. This Court's jurisprudence has steadily enforced the protections established by the 5th Amendment.[3]

Mississippi's actions bear strong resemblance to the Florida actions disallowed in *Webb's*. There, this Court struck down action treating privately-owned interpleaded funds as though they were public, saying that the government could not make such a private to public conversion "simply by recharacterizing the principal as 'public money' . . ." (*Webb's*, 449 U.S. at 164.)

So, too, here. Neither Florida's nor Mississippi's actions fit the Constitutional matrix, which has for

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coming at the end of a Term with such a heavy emphasis on takings law, plainly came after the Court gave much thought and deliberation to this field.

[3] All clauses of the 5th Amendment were designed to "limit the power of government . . . ." (Tonja Jacobi, Sonia Mittal & Barry R. Weingast, *Creating a Self-Stabilizing Constitution: The Role of the Takings Clause*, 109 Nw. U.L. Rev. 601, 616 [2015].)

years placed determinative focus on the beliefs and expectations of property owners. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [1979].) The expectations of the property owner at the time the property was acquired have been central to this Court's takings jurisprudence for nearly four decades. (*Penn Central*, 438 U.S. at 124.) Indeed, the *Penn Central* formulation has been referred to as the Court's "polestar" in Takings Clause analysis. (*Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326, n. 23 [2002].)

In sum, the property acquired by an individual is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire *when they obtain title* to property." (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 [1992]; emphasis added.)

Thus, the property that is Constitutionally vouchsafed is the property *as it existed when the owner acquired it*. And that is the central point of this case. When Petitioner acquired the property underlying the State's easement, it was clear as a matter of record that the easement was restricted to one purpose and one purpose only. As a matter of settled easement law, when that purpose ceased, full use and enjoyment of the property would be returned to the underlying fee owner. But Mississippi wanted something more. After Katrina destroyed its bridge and it rebuilt the bridge in a way that did not utilize the existing easement, it

simply sought to "redefine" the easement as not being restricted. But that cannot Constitutionally be done. Mississippi — no more than any other state — cannot "redefine" what has plainly been private property so that it automatically becomes public property, just because the State wishes that it were so. At least, it cannot do so, as Justice Holmes put it for the Court, "by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal*, 260 U.S. at 416.)

Guidance may also be found in *Hughes v. Washington*, 389 U.S. 290 (1967), particularly the concurring opinion of Justice Stewart. The issue there was the border of property on the coast that also constituted the boundary of the United States. The State sought a rule that would have made all accretions to the shore (i.e., to Mrs. Hughes' land) public land. Mrs. Hughes claimed they belonged to her. Justice Stewart examined the effect of a sudden change in the law coming from the state court system. His conclusion there bears emphasis here, as he noted that "to the extent that it constitutes a *sudden change* in state law, *unpredictable* in terms of the relevant precedents," the new state law would be entitled to no deference. "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of *asserting retroactively that the property it has taken never existed at all*." (*Id.* at 296-297; emphasis added.) In other words, a State cannot simply declare private property to be public and that is the end of the matter. The Constitution remains a bar.

Mississippi's effort to redefine property in order to obtain its use without compensation, cannot be squared with Constitutional precepts:

> "[A] State, by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." (*Webb's,* 449 U.S. at 164.)

II.

WHEN THE GOVERNMENT'S INTERESTS ARE FINANCIAL, ITS ACTIONS MUST BE VIEWED WITH SKEPTICISM

Underlying the Court's conclusion that Constitutional decisions necessarily impinge on the freedom and flexibility of government agencies (*First English*, 482 U.S. at 321) was undoubtedly the Court's repeated recognition that, when the governmental interest is financial (as in obtaining the use of the limited easement here for unlimited purposes and for almost no compensation), its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money . . . ."; *United States v. Winstar Corp.*, 518

U.S. 839, 896 [1996] ["statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties"]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceeding"].)

In *Nollan*, the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay. (483 U.S. at 841.) Particular care was said to be needed when government conditions approval of a project on an actual conveyance of property ". . . since in that context there is heightened risk that the purpose is avoidance of the compensation requirement . . . ." (483 U.S. at 841.)

Compensation, of course, permeates this case. It is present in the *ex post facto* redefinition of the easement to make it perpetually available to the State for any purpose it desired, and it is present in the valuation proceeding, when the statute was allowed to trump the 5th Amendment by radically restricting the compensation available. That not only turned the law of easements upside down, by continuing to restrict land that should have been unrestricted, but also placed an artificial lid on the available compensation, by virtually ordering the jury to return a verdict for peanuts instead of millions.

CONCLUSION

Mississippi's attempt to commandeer private property for public use shows the kind of governmental disregard for Constitutional precepts that cannot be countenanced. Indeed, it is based not on reality but on wordplay, on the use of a legislative pen to attempt to redefine an existing, vested property interest. As this Court has said, reality is a better guidepost than the fictional rewriting of history:

> "[I]n states bound together by a Constitution and subject to the 14th amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (*McDonald v. Mabee*, 243 U.S. 90, 91 [1917].)

Certiorari should be granted.

Respectfully Submitted,

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