

No. _____

**In the
Supreme Court of the United States**

—◆—
480.00 ACRES OF LAND and
GILBERT A. FORNATORA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

1. When it is alleged that the federal government has induced local authorities to increase regulation of property the United States then condemns, and the property owner seeks to have the regulation's effects disregarded in calculating just compensation under the "scope of the project" rule, must the owner show the federal government's sole motive or primary purpose was to depress land value, as held by the Second, Third, Fifth, and Eleventh Circuits, or merely demonstrate a nexus between the regulation and the condemnation, as held by district courts in the First and Fourth Circuits?
2. What standard governs due process claims under the Fifth Amendment, where a property owner alleges that the federal government has manipulated the Fed. R. Civ. P. 71.1 land commission process to artificially depress just compensation payments by denying an owner a meaningful opportunity to be heard?

LIST OF ALL PARTIES

Pursuant to Rule 14 (b), the following is the list of all parties to the proceeding in the Eleventh Circuit judgment Petitioners seek this Court to review:

480.00 Acres of Land

Laval Borque

Royal Borque

Falcon Realty, Inc.

Gilbert A. Fornatora

Francis Kirschner

Lane Development Corporation (a dissolved Florida corporation)

Ida Morin

Raymond Naud

North Star Realites, Inc., a Florida corporation

Frank Plattner

John Plattner

Domenick Simone

United States of America

**CORPORATE
DISCLOSURE STATEMENT**

There is no corporate entity that is party to this Petition.

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PETITION FOR WRIT OF CERTIORARI

Gilbert A. Fornatora, as owner of the 480.00 Acres of Land that are the subject of this case, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 557 F.3d 1297 (11th Cir. 2009), and is included as Appendix (App.) A. The land commission findings on just compensation, issued pursuant to Fed. R. Civ. P. 71.1, and the district court order adopting these findings, are unreported, but are included together as App. B.¹ The order of the Court of Appeals denying Petitioners' motion for rehearing and rehearing en banc, included as App. C, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 11, 2009. On May 27, 2009, the Court of Appeals issued an order denying Petitioners' motion for rehearing and rehearing en banc. On August 11, 2009, this Court issued an order granting Petitioners' motion to extend the time for filing this Petition until October 23, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

¹ Internal Revenue Service Form W-9 (attached to the district court order adopting the land commission findings) could not be reproduced and is available at: <http://www.irs.gov/pub/irs-pdf/fw9.pdf?portlet=3>.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS AT ISSUE**

The Fifth Amendment to the United States Constitution provides that “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. Const., amend. V.

Federal Rule of Civil Procedure 71.1, enacted pursuant to 28 U.S.C. § 2072, establishes procedures governing certain federal government takings of private property. Fed. R. Civ. P. 71.1. Its text is reproduced as App. D.

STATEMENT OF THE CASE

A. Introduction

This case arises from the federal government’s condemnation of Petitioner Gilbert Fornatora’s property. Years before the formal condemnation, in anticipation of taking the property as part of a large-scale project to expand a national park, the federal government successfully pressured local authorities to increase regulation of Fornatora’s land. The regulations depressed the value of the property, significantly reducing the amount of the government’s eventual payment of just compensation for the taking. When Fornatora’s case came before the federal land commission charged with determining just compensation, the government manipulated the

process to deny Fornatora a meaningful hearing as to the true value of his property.

This Petition raises the issue of the proper standard to govern the payment of just compensation in federal condemnation cases like Fornatora's, where the United States uses its considerable influence to push local authorities to increase regulation of property, and depress potential payments of just compensation, in advance of the federal taking of the land. Under this Court's "scope of the project" rule, increases or decreases in the property's value that result from the project itself may not be considered in determining just compensation. *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961).

There is a split among the federal courts as to the standard courts should use to evaluate whether a property owner can avail himself of the scope of the project rule. In district courts in the First and Fourth Circuits, owners must show only that there is a nexus between a property regulation and a condemnation action, or that the federal government "induced" local authorities to enact the regulation. In these courts, application of the scope of the project rule is not contingent on a showing of bad faith motive on behalf of the government. Rather, it is the impact on private property of the federal efforts to prevent development of property targeted for acquisition, regardless of motive, that is the focus of scope of the project analysis. *See United States v. Certain Lands in Truro*, 476 F. Supp. 1031, 1034-36 (D. Mass. 1979).

In four other circuits, including the Eleventh Circuit in this case, owners are not afforded the protection of the scope of the project rule unless they affirmatively prove the federal government's sole

motive or primary purpose in influencing the regulation was the suppression of property values in order to ultimately pay less compensation for targeted land. *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1308-11 (11th Cir. 2009) (*Fornatora*). This split between federal courts presents a significant disparity in the level of constitutional protection afforded property owners, and this Court should grant this Petition in order to address this conflict.

Moreover, this Court should grant the Petition to resolve the question of what constitutes a meaningful hearing, sufficient to protect a property owner's right to due process under the Fifth Amendment, in the context of the federal condemnation process established by Fed. R. Civ. P. 71.1. Because there are no clearly defined rules, the federal courts are issuing ad hoc determinations that vary even among decisions in the same circuit. *Fornatora*, 557 F.3d at 1314.

B. Factual & Procedural History

Fornatora acquired tracts of property in Dade County, Florida, in the 1950s and 1960s. *Id.* at 1299. In 1975, Dade County enacted a comprehensive plan that zoned this property at a density of one dwelling per five acres. *Id.* at 1300. Later that decade, the federal government became interested in restricting development in the area encompassing this property, in order to keep land vacant and available for acquisition to expand the adjacent Everglades National Park. *Id.*

This federal concern led the Department of the Interior to suggest that Dade County revisit its comprehensive plan; the federal government funded a study to facilitate this effort. *Id.* The scientific studies

commissioned for this study ultimately concluded that the existing density zoning adequately addressed the county's concerns about water quality, water supply, and flood control. *Id.* Despite these findings, the federally funded committee responsible for advising the county planners recommended that zoning be restricted to one dwelling per forty acres. *Id.* Dade County enacted this recommendation in 1981. *Id.*

In 1989, Congress authorized an expansion of Everglades National Park that included Fornatora's property. *Id.* Formal condemnation proceedings, however, did not begin until the late 1990s. *Id.* Once commenced, the federal district court for the Southern District of Florida appointed a land commission, pursuant to Fed. R. Civ. P. 71.1, to determine the just compensation due to Fornatora and the owners of the 2,700 other properties the government sought to condemn. *Id.*

The land commission process ensued for several years. On numerous occasions Fornatora objected to the district court's instructions to the land commission. One such objection involved an instruction on the scope of the project rule, where the court declined to advise the commission that project-influenced decreases in property values should be disregarded in determining just compensation. *Id.* at 1301-02. The district court overruled these objections, holding that unless Fornatora could prove that the government's "primary purpose" in influencing the county's 1981 zoning change was to depress property values in contemplation of taking the property, the scope of the project rule did not apply. *Id.* at 1301.

Responding to this ruling, Fornatora presented to the court several letters from federal agencies to Dade

County officials urging county planners to restrict development, in a “Federal-State effort” to preempt “numerous and piecemeal legal confrontations” with property owners. *Id.* at 1303. Despite this and similar evidence illustrating federal pressure related to future park expansion, the district court found no “primary purpose” to depress values, and thus held that the scope of the project rule did not apply to Fornatora’s property. *Id.*

Throughout this dispute over instructions, land commission proceedings were ongoing. Cognizant of court interpretations that Rule 71 commissions must aim for uniformity in compensation amounts across large projects, Fornatora requested a prompt trial before the commission. *Id.* at 1304-05. Fornatora’s stated concern was that if owners unrepresented by counsel and unaided by expert testimony had their property valued in repeated *pro se* cases early in the commission process, the resulting low amounts would be cited as precedent by the commission in later proceedings against represented parties like Fornatora. *Id.* at 1305-06.

On repeated occasions, Fornatora asserted to the district court that this manipulation was, in fact, taking place. Fornatora objected that the federal government had serially dismissed parcels from commission hearings upon any notice of appearance by owner’s counsel, only to re-institute these cases after an artificially low valuation pattern had been established in hearings involving unrepresented parties. *Id.* at 1313. Through a series of government delays, incurred over Fornatora’s objection and exacerbated by a reassignment of the case from one magistrate to another, Fornatora’s trial did not begin

until nearly four years after the originally scheduled trial date. *Id.* at 1306. When the land commission finally issued its recommendations, it used as its benchmark valuations derived from earlier cases involving unrepresented parties scheduled early in the process by the government, and disregarded new evidence relevant to valuation. *Id.* at 1306, 1315.

Before the district court adopted the commission's recommendations, Fornatora objected to the final report based on the scope of the project instruction as well as the alleged bias incurred as a result of the government's purposeful manipulation of the commission schedule. *Id.* at 1306. The district court rejected these arguments and adopted the commission's report. *Id.* Fornatora appealed to the Court of Appeals for the Eleventh Circuit.

C. Eleventh Circuit Opinion

In a case of first impression in the Eleventh Circuit, Fornatora argued that the district court's application of the primary purpose standard was improper based on similar factual settings, in other federal cases involving the scope of the project rule, that resulted in a broader "nexus" or "inducement" standard. *Id.* at 1307; *see* Part I *infra*.

The court cited as "valid" Fornatora's criticisms of the primary purpose rule, conceding that it gives governments the incentive to mask their true motives in enacting zoning restrictions behind "pretextual assertions of benign purpose." *Id.* at 1311. So too did the court recognize as valid Fornatora's argument that

[i]t is very unlikely that the Government would ever admit that its primary purpose or motive in passing an ordinance or regulation

was to depress value in anticipation of condemnation. . . . [T]he Government will be able to benefit by depressing land values as long as they also have *any* other purpose for zoning regulations

Id. Despite this recognition, the appeals court rejected Fornatora’s argument and instead upheld the primary purpose standard employed by the district court. *Id.* at 1310-11.

So too did the Eleventh Circuit reject Fornatora’s claim that government manipulation of the land commission process prevented Fornatora from receiving a meaningful hearing on his property value, thus violating his right to due process under the Fifth Amendment. *Id.* at 1313-14. Noting varying standards from analogous fact settings in other jurisdictions, the court found that the proceedings were sufficient to “facilitate justice” and did not deny Fornatora his constitutional rights. *Id.*

Fornatora’s motion for rehearing and rehearing en banc to the Eleventh Circuit was denied. *See* App. C. Fornatora timely asks this Court to review the decision below.

REASONS FOR GRANTING THE WRIT

I

THE FEDERAL COURTS ARE DIVIDED OVER THE CONTROLLING TEST IN SCOPE OF THE PROJECT CASES

In *Virginia Electric*, this Court summarized the rationale behind the scope of the project rule: “It

would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . (of the construction of a government project) and then to take advantage of this depression in the price which it must pay for the property' when eventually condemned." 365 U.S. 624, 636 (parenthetical and internal quotation in original) (citation omitted). While *Virginia Electric* and similar cases, see *United States v. Reynolds*, 397 U.S. 14, 15-18 (1970), succinctly establish the general purview of the rule, its application becomes more opaque in the federal circuits. A majority of scope of the project cases involve situations where the condemnation itself is the only relevant government action. *Reynolds*, 397 U.S. at 16-17. But in settings where the relationship between two government actions—for example, a property regulation and a distinct condemnation action—is at issue, the federal courts are divided over the rule's application.

A. Like the Eleventh Circuit, Three Circuits Apply a Sole Motive or Primary Purpose Standard in Scope of the Project Cases

1. Second Circuit

The Second Circuit addressed this issue in *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958). In *Meadow Brook*, the owner of land adjacent to an Air Force base sought to have his residential property rezoned as industrial. *Id.* at 43. The federal government, as owner of the base, opposed the rezoning before local authorities, even though the surrounding property also was industrially zoned. *Id.* at 44. Local authorities delayed a decision on the rezoning to consider the government's objections;

during this delay, and before a decision was reached, the federal government filed suit to condemn the property in order to expand the base. *Id.*

In federal court, the property owners argued that just compensation should account for the property's imminent rezoning to industrial—a more profitable classification—if not for the intervention of the federal government. *Id.* at 45. The court rejected this argument, holding that the owner failed to demonstrate that the government's "sole motive" in opposing the rezoning was to depress property values in advance of condemnation. *Id.* at 45. This test rejects application of the scope of the project rule even where the government has mingled actions designed to depress values with those typical of private, adjacent owners merely opposing a rezoning, since the "sole motive" standard requires the absence of any coincident government rationales for its actions. *Id.*

2. Third Circuit

The Third Circuit adopted the *Meadow Brook* approach, though not its precise rule, in *United States v. 27.93 Acres*, 924 F.2d 506, 511 (3d Cir. 1991). In that case, the federal government sought unsuccessfully to purchase private agricultural property on several occasions between 1985 and 1987. *Id.* at 508. In June of 1987 the government filed a complaint initiating condemnation proceedings for the property, though settlement negotiations continued between the government and the owners until December of 1988. *Id.* at 508-09.

As the condemnation and settlement negotiations advanced, the local government began plans for an "enterprise district" comprising all property within a

certain boundary, including the property targeted for condemnation, to be rezoned as commercial. *Id.* As part of this project, local authorities tentatively approved the owners' formal application for rezoning. *Id.* at 509. Soon thereafter, however, the local government reversed course and rejected the rezoning application, though the enterprise district plans moved forward. *Id.* Among the reasons given by local planners for the rejection was that the federal government had sent a letter opposing the application. *Id.*

In district court, the owners sought to have the court consider their property as commercial land in calculating just compensation. They argued this was proper in that the rezoning would have been finalized if not for the federal government's opposition, which they claimed was designed to reduce the payment of just compensation in the pending condemnation action. *Id.* at 510-11. The court rejected this contention, citing *Meadow Brook* in holding that the government's actions were "minimal and appropriate." *Id.* at 511. The court concluded that unless the owners could prove that the government's opposition was the "but for" cause of the rezoning denial, the scope of the project rule did not apply. *Id.* at 514.

This test contemplates a narrower application of the scope of the project rule than the standard promulgated by the Second Circuit in *Meadow Brook*. While proof of "sole motive" to depress value would avail owners of the scope of the project protections in the latter venue, under the Third Circuit's test even this would not be enough if some other factor could be pointed to as the proximate cause of the local government's actions.

3. Fifth Circuit

The Fifth Circuit has adopted a rule related to those of the Second and Third Circuits. In *United States v. Land*, property owners applied to the Army Corps of Engineers in 1975 for a development permit. 213 F.3d 830, 832 (5th Cir. 2000). Three years earlier, Congress had authorized a study of the feasibility of creating a national park in the same Louisiana region as this private land. *Id.* at 831. Soon after the creation of the national park in 1979, the Corps finally denied the permit application, citing, among other reasons, potentially harmful effects development might have on the new park. *Id.* at 832.

After years of litigation surrounding the denial of the permit and state environmental disputes, the federal government initiated proceedings to condemn the property. *Id.* at 833. On the question of valuation, the owners argued that just compensation should be based on the value of the property had the development permit been granted. *Id.* The owners alleged no bad faith motive, on the government's part, in the denial of the development permit. *Id.* at 836. Rather, they argued only that the government should be liable for the eventual effect of the denial on their property values. The district court agreed with the owners under the scope of the project rule, and the government appealed. *Id.* at 835-36.

On appeal, the Fifth Circuit reversed the lower court. It held that because there was no allegation that the government's "primary purpose" in denying the permit was to depress property values in advance of condemnation, the scope of the project rule did not apply. *Id.* While the Fifth Circuit cited *Meadow Brook* in applying this "primary purpose" standard, its test,

in actuality, allows for a broader application of the scope of the project rule than does *Meadow Brook's* “sole motive” test (or the Third Circuit’s “but for” reasoning, which is more restrictive than both the Second and Fifth Circuit tests). These three circuit cases and the Eleventh Circuit’s decision in the present case together demonstrate a split with courts applying a “nexus” or “inducement” standard to invoke the scope of the project rule, *see below*. Yet so too do they illustrate a “split within a split” resulting from four related, yet plainly distinct, standards.

B. District Courts in the First and Fourth Circuits Have Applied a “Nexus” or “Inducement” Standard

Federal district courts for the Districts of Maryland and Massachusetts also have addressed this particular scope of the project issue. In both of these cases, courts were confronted with situations where, as in the present case, the federal government was alleged to have taken proactive steps to *increase* the regulation of property, and not merely influence local authorities to maintain the status quo by opposing zoning changes or permit applications, as in the cases cited above. That both of these courts found it appropriate to apply the scope of the project rule in such settings led Petitioners to note this factual distinction to the Eleventh Circuit in the present case, without avail. *Fornatora*, 557 F.3d at 1309-11.

1. *United States v. 222.0 Acres of Land*

In *United States v. 222.0 Acres of Land* the Secretary of the Interior sought to condemn property on the Maryland shore. 324 F. Supp. 1170, 1175 (D.

Md. 1971). The federal government, in anticipation of the taking, pressured the State of Maryland to prevent development of the property, in part to further the valid purposes of protecting the public's safety and welfare. The Interior Secretary, however, writing to Maryland's governor, also asserted that development of the property prior to the federal condemnation "would result in a monetary windfall to present property owners." *Id.* He wrote further that "such action would be looked upon with disfavor by the Congress and by the general public," and that prohibiting development would "avoid unnecessary inflation and speculation in land values" ahead of the government's eminent domain action. *Id.* Bowing to this pressure, the State of Maryland in turn pressured local authorities to institute a moratorium on any building permits, along with other development restrictions. *Id.* at 1175-76.

After the federal government condemned the property, the question of just compensation came before the court. In considering the amount to be paid to the property owners, the court dismissed government claims that the pressuring of Maryland officials was merely "incident to ownership," and rejected government assertions that the depression in value should be ignored because the induced restrictions also benefitted the public's safety and welfare. *Id.* at 1180.

Tracking this Court's language in *Virginia Electric*, the court held that "[i]t would be unfair to permit the condemning agency to depress property values, directly or indirectly, by interfering with the property owners' rights to use their land, and then take advantage of such depression to reduce the price which

it must pay for the property.” *Id.* The court thus concluded that the actions of the federal government made the scope of the project rule available to the property owners, even though the devaluing regulations were merely “induced” by the Secretary of the Interior. *Id.* This proof of inducement was enough; no showing of primary purpose or sole motive was required.

2. *United States v. Certain Lands in Truro*

In *United States v. Certain Lands in Truro*, the federal government sought to establish a national seashore area on Cape Cod. 476 F. Supp. at 1032. Soon after the congressional act establishing the national seashore, and anticipating that the government would need to take private property via eminent domain to complete the project, the Department of the Interior suggested to local Cape Cod officials that certain land use restrictions be instituted. *Id.* at 1034. The federal government asserted that these restrictions, which essentially prohibited all development, were in the public interest of scenic preservation. *Id.*

The property owner alleged, however, that another purpose for the regulations was the depression of land values in anticipation of the eminent domain project. *Id.* at 1035. In determining just compensation, the district court for the District of Massachusetts conceded that the zoning regulations were by themselves valid exercises of the government’s police power. However, the court also found that because the zoning changes were “motivated” and “induced” by the federal government, the scope of the project rule applied, and depression in land values

owing to the regulation could not be considered in ascertaining just compensation. *Id.* at 1035-36. Invoking the language of the Fifth Amendment to emphasize the need for fairness in takings cases, the court held that a failure to account for the realities of the federal government's coercion "would be to shut ones [sic] eyes and ears to what really went on." *Id.* at 1035. The court summarized its analysis by holding that "the federal government cannot disavow the nexus which exists between its actions and the adoption of the Truro zoning provision." *Id.* at 1035.

Neither the *222 Acres* opinion nor the *Truro* decision has ever been cabined, let alone repudiated, by the appellate courts in their respective circuits. The result is a definitive split between courts in these circuits and those of the Second, Third, Fifth, and Eleventh Circuits as to the standard to apply in these scope of the project cases. Moreover, the courts in the latter circuits, as noted above, themselves lack agreement as to the proper test that governs these cases. This Court should grant this Petition to resolve these divisions.

II

THERE IS NO UNIFORM STANDARD GOVERNING DUE PROCESS CLAIMS IN LARGE-SCALE FEDERAL EMINENT DOMAIN ACTIONS

There have been several federal court opinions addressing property owners' claims that their due process rights were violated by the government's actions in large-scale eminent domain actions, including those controlled by the Rule 71.1 land commission process. Viewed in concert, there appears

to be no actual governing standard that spans these cases. Instead, the decisions are a patchwork of ad hoc evaluations that demonstrate conflict between the circuits, and even within some federal circuits themselves, over what constitutes due process in land commission cases.

A. Second Circuit

A decade before the enactment of Rule 71.1, the Second Circuit addressed the question of due process in the context of land commissions. In *Phillips v. United States*, the federal government condemned private property for land on which to build an airplane manufacturing plant. 148 F.2d 714, 715 (2d Cir. 1945). The district court designated a land commission to determine just compensation for the property. *Id.*

When the owners were dissatisfied with the amount of compensation, and the process used to determine it, they appealed to the Second Circuit. Among their allegations was that they were denied the right to examine an appraisal used by a government expert to testify as to market values. *Id.* at 717. The owners claimed that this failure violated their right to due process. *Id.* at 716. The Second Circuit rejected the due process claim, writing that the commission possessed “no magic formula for the determination of real estate values,” and that the courts may “only check the general processes on which the result rests, to see that they do not indicate such arbitrariness or capriciousness as would make the trial and its result a violation of due process.” *Id.*

B. Fourth Circuit

In *United States v. Werner*, the Fourth Circuit considered a property owner’s motion to disqualify a

land commissioner on the grounds he was predisposed toward issuing government-friendly rulings. 916 F.2d 175 (4th Cir. 1990). In holding that disqualification was necessary to protect the owner's due process right to a full and fair hearing, the court wrote that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 178 (citation omitted). There is nothing in the opinion to specify whether the *Werner* court was promulgating a "probability of unfairness" rule to apply to all land commission cases, or if this test was uniquely designed for the disqualification context.

C. Eighth Circuit

In *United States v. 75.13 Acres*, the federal government condemned tracts of private property for construction of a flood control project. 693 F.2d 813, 815 (8th Cir. 1982). The district court empaneled a land commission pursuant to Rule 71.1. *Id.* Two landowners appealed the resulting just compensation awards to the Eighth Circuit, objecting to the court's instructions to the commission, and that the testimony of government appraisers and the commissioners' emphasis on uniformity, as evidenced by the same three commissioners hearing all related cases, had violated the owners' due process rights. *Id.* at 816-17.

Though the court held that land commissions must "consider cases on the basis of their individual facts," the Eighth Circuit rejected all of the owners' arguments. *Id.* It held that the very purpose of the land commission process was to achieve uniformity, so the seating of the same individuals to hear evidence on

all of the properties was appropriate. *Id.* The court neither cited nor applied any identifiable due process tests in its analysis, instead concluding that the process and results comported with Rule 71.1's language and purpose. *Id.*

D. Eleventh Circuit

In the decision below, the Eleventh Circuit found that Fornatora's evidence of government manipulation of the commission process was not sufficient to sustain his due process claim. The court reached this decision not by applying any particular due process test, such as the arbitrary and capricious standard cited by the Second Circuit in *Phillips*, but instead by undertaking a holistic analysis of the commission's findings to support its conclusion. *Fornatora*, 557 F.3d at 1313-1316. This approach to the due process question conflicts not only with the holdings of other federal circuits, but also with other Eleventh Circuit decisions.

1. *Gwathmey v. United States*

In *Gwathmey v. United States*, the predecessor to the Eleventh Circuit examined due process claims in the context of large-scale eminent domain actions. The Fifth Circuit reviewed a district court case involving the question of just compensation owed to owners of more than 200 tracts of land in Florida. *Gwathmey*, 215 F.2d 148, 151 (5th Cir. 1954).

Though the proceedings in *Gwathmey* were initiated prior to the enactment of Rule 71.1, the valuation mechanism was similar to that of the present case.² The court's due process analysis focused on the

² Rule 71.1 was enacted after the condemnations began, but prior
(continued...)

manner in which the valuation trial proceeded, beginning with the principle that “[t]o insure impartial judgment the trial should be conducted in a manner that will enable the jury to understand and comprehend those facts . . . as to the approximate worth fairly determined of each owner’s tract or tracts, including all elements which reasonably contribute to its current market value.” *Id.* at 153.

The court in *Gwathmey* was most concerned about the failure of the lower court to permit the property owners to present relevant evidence of value, or even to cross-examine government witnesses testifying as to value. *Id.* at 154. “Government witnesses repeatedly testified as to comparable sales, physical conditions and other value factors” without any allowed rebuttal, and the “result was that the Government was able repeatedly to restate and emphasize certain of its evidence.” *Id.* Where cross-examination was permitted, at times it was “allowed so long after direct examination that it was totally ineffective.” *Id.*

The *Gwathmey* court acknowledged that the principles that would underlie the land commission process—efficiency and uniformity of result—were valid considerations. But in ultimately finding the trial violated the owners’ right to due process, the court declined to subsume due process rights in service of these aims. The court held that while “the law permits including in a single expropriation proceeding several separate properties and owners . . . this does not

² (...continued)

to the issuing of the *Gwathmey* opinion. Likely accounting for the new rule, the court explicitly applies its holding to “other agenc[ies] charged with the determination of values” in federal eminent domain cases. 215 F.2d at 153.

warrant any diminution in the duty to afford each of such individuals fair and reasonable opportunity” to present “all material facts” relevant to the value of their properties. *Id.* at 153. The court, “look[ing] realistically at all what took place here,” *id.*, held that the process denied the owners “the same full and fair treatment which would be given a single owner,” *id.* at 157, and that this failure “prevented the landowners from obtaining a fair determination of values,” *id.*

2. *United States v. 320.0 Acres*

In *United States v. 320.0 Acres*, the Fifth Circuit addressed due process concerns stemming from the condemnation of property taken, like Fornatora’s, for Everglades National Park. 605 F.2d 762 (5th Cir. 1979). The court began its inquiry by noting that despite the efficiency benefits of large-scale eminent domain hearings, the ultimate concern must still be the protection of owners’ constitutional rights. *Id.* at 770.

The court expressed its displeasure with the valuation proceeding by referring to it as a “trial” in quotation marks. *Id.* at 770. The court noted that in many cases, “the owner had neither retained counsel nor requested a jury trial,” resulting in a process that “consisted of a Government appraiser taking the stand and reading his estimate of fair market value for a number of tracts, followed by the entry of judgment in the amount of the appraised sum for each tract on the list.” *Id.* As in the present case, the court was confronted with a spate of such hearings for unrepresented owners at the outset of proceedings, only then followed by hearings involving owners aided by counsel and expert witnesses. *Id.*

As a result, the appeals court concluded that both the lower court and the federal government—the latter of which “did not shoulder [its] responsibility for facilitating justice in these unusual circumstances, but instead assumed the distinctly adversarial role more appropriate to the conventional one-on-one litigation”—had behaved such that “the landowners before us on appeal were not afforded the due process guaranteed them by the Fifth Amendment.” *Id.* As in this present case, the court articulated no particular due process standard beyond its focus on the facilitation of justice.

3. *United States v. 5.00 Acres*

In *United States v. 5.00 Acres*, the Eleventh Circuit wrote of its paramount concern for protecting the due process rights of property owners: “Because the protection of a jury is not afforded, the courts must be particularly vigilant to ensure that every precaution is taken to safeguard the rights of individual landowners.” 673 F.2d 1244, 1247 (11th Cir. 1982). While Rule 71.1 was designed to promote efficiency and “achieve some uniformity of result” in cases involving “large areas [of land] held by many small landowners,” *id.*, the *5.00 Acres* court nevertheless demanded vigilance and “every” precautionary safeguard for individual landowners.

After articulating this concern, the *5.00 Acres* court held that the evidence of bias presented by the owners in that case was insufficient, describing the owners’ reliance on the volume of *pro se* trials as a mere “recitation of numbers.” *Id.* at n.2. Under these circumstances, the appeals court held that the lower court did not fail to afford individual owners the

“particular vigilan[ce]” required in land commission cases. *Id.*

In *Boddie v. Connecticut*, this Court held that “at a minimum . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” 401 U.S. 371, 377 (1971). This Court should grant the Petition to resolve the federal circuit split, outlined above, over what this prescription tangibly means for the constitutional rights of owners of property subject to the land commission process.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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Respectfully submitted,

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