No. 14-0917
No. 15-0020

Supreme Court of Texas

Highway 205 Farms, Ltd., and
Maurice E. Moore, Jr.,
Petitioners,
v.
City of Dallas,
Respondent,

and

In re Highway 205 Farms, Ltd., and
Maurice E. Moore, Jr.,
Relators.

Brief as Friends of the Court Supporting Petitioners-Relators
of
National Federation of Independent Business and
NFIB Small Business Legal Center

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Trinity Valley Community College District

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Interest

The National Federation of Independent Business is the nation's leading small-business association. Twenty-four thousand of NFIB's 350,000 members are in Texas. NFIB's membership is a reflection of American small business, ranging from sole proprietorships to enterprises that employ hundreds. The typical NFIB member employs 10 people and reports gross sales of about $500,000 a year.

NFIB's mission since its founding in 1943 has been to promote and protect its members' rights to own, operate, and grow their businesses. It advocates for its members' interests in Washington, D.C., and all 50 state capitols. It is a non-profit, non-partisan organization.

The NFIB Small Business Legal Center is a non-profit, public-interest law firm affiliated with NFIB. It furnishes legal resources to small businesses and acts as their voice in the nation's courts on issues affecting them. In that role, it frequently files briefs as a friend of the court to describe how issues under consideration will affect the nation's small businesses. Among these issues are property rights, particularly rights affected by eminent-domain proceedings — entrepreneurs and other small-business owners invest substantial personal assets into acquiring real property to found and expand their enterprises.

The Fifth Court's decision troubles small-business property owners because eminent-domain proceedings cloud the title to property, making it difficult to sell — and in some cases to use. The decision

suggests that a landowner has no remedy if the proceeding stalls at the administrative stage. If there is no such remedy, then the inability to clear its clouded title suggests that eminent-domain proceedings lack due process. Further, the decision encourages condemnors to dilly-dally once they have filed a condemnation petition, encouraging lengthy impairments of landowners' property rights that coerce them to settle for sub-market compensation.

Issue Presented

Does a trial judge have the power to dismiss a condemnation proceeding for want of prosecution while the case is in its administrative phase?

Introduction and Summary of Argument

This case concerns the limits that the due course of law imposes on a foot-dragging condemnor: Can a trial court dismiss an eminent-domain case when the condemnor doesn't prosecute its claim to the property in a timely manner? The Court should grant review[1] so it can clarify the process due to a landowner whose title is clouded by a condemnation petition.

Eminent domain is an awesome power. It entitles the State, her political subdivisions, and the private entities to whom she has conferred that power to seize property from a blameless owner. That process necessarily requires establishing a value for the property to ensure that the condemnor is paying "adequate compensation" for it in accord with the "due course of the law of the land." TEX. CONST. art. I, §§ 17(a), 19; U.S. CONST. amends. V, XIV § 1. Texas has chosen to make that a two-stage judicial process — a condemnation petition filed with the court opens a case, which passes first through an administrative phase and then, if necessary, a trial phase.

Here, the Fifth Court of Appeals held that a trial court has no authority to dismiss an eminent-domain case "while the case [is] in the

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[1] Highway 205 Farms has filed both a petition for review and a petition for a writ of mandamus. For simplicity's sake, we refer to "granting review" rather than "granting review of the petition and considering the merits of the petition for writ of mandamus."

administrative stage[.]" *City of Dallas v. Highway 205 Farms, Ltd.*, No. 05-13-00951-CV, 2014 WL 3587403, at *3 (Tex. App. – Dallas July 22, 2014, pet. filed). This holding extended earlier decisions that courts have ministerial powers during the administrative stage of a condemnation. This extension was error: Courts are not stripped of authority to dismiss a petition for condemnation when the condemnor has neglected to pursue the condemnation.

Condemnation proceedings assume the shape of an ordinary civil case after a landowner objects to an administrative valuation. A judge's authority *in* the administrative phase of a condemnation court is limited to issuing certain ministerial orders to facilitate that stage. But a judge's authority *during* the administrative phase of a case isn't circumscribed. That authority is the same as in any other civil case, and the judge retains the inherent, common-law authority to govern proceedings before the judge's court. Whether a condemnation is in the "administrative" phase or the "trial" phase, it is still a proceeding pending before a court. In the absence of statutory language to the contrary, the court maintains the authority to dismiss that proceeding for want of prosecution — even during the administrative stage — when the condemnor stalls.

Argument

A. The Court should grant review to clarify whether a court loses its inherent authority to manage its proceedings during the administrative phase of a condemnation case.

1. Courts have power, both inherent and explicit, to dismiss a case for want of prosecution.

Our Anglo-American legal tradition has long recognized the inherent authority of a judge to manage proceedings in that judge's court. This Court has recognized that scheduling cases so that they are disposed of expeditiously is more than a judge's prerogative — it is a judge's duty. *Clanton v. Clark*, 639 S.W.2d 929, 931 (Tex. 1982). *See also In re Herewearеagain, Inc.*, 383 S.W.3d 703, 709 (Tex. App. – Houston [14th Dist.] 2012, orig. proceeding); *see generally* Amy Coney Barnett, *Procedural Common Law*, 94 VA. L. REV. 813, 842 (2008) ("[I]nherent powers are those so closely intertwined with a court's identity and its business of deciding cases that a court possesses them in its own right, even in the absence of enabling legislation."). This inherent authority includes the authority to adopt rules governing proceedings in a court — and, in this Court, to adopt rules governing practice throughout Texas. *See Ashford v. Goodwin*, 131 S.W. 535, 496–97 (Tex. 1910), citing *Pendley v. Berry*, 65 S.W. 32, 33 (Tex. 1901). Even if Texans and their Legislature hadn't conferred upon the Court the explicit power to adopt civil-procedure rules, *see, e.g.,* TEX. CONST. art. V, § 31, the Court nonetheless would have enjoyed that power.

The purpose of the Rules of Civil Procedure that the Court adopted — and the reason that courts by their very nature enjoy the power to manage their dockets — is to achieve a "just, fair[, and] equitable" outcome "with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable[.]" TEX. R. CIV. P. 1. Consistent with this goal, the Court adopted Rule 165, which makes explicit a court's power to manage its docket by dismissing a case for want of prosecution. TEX. R. CIV. P. 165. This promotes justice, fairness, and equity by encouraging expedition and dispatch: A party that drags its feet in moving its case forward is subject to having that case dismissed, enabling the defendant, and the court, to move on to matters that some plaintiff thinks are important enough to be pursued.

Languishing cases are a burden on the courts, which must manage them, and on defendants, who never know when a drowsing claimant will emerge from hibernation. The burden is greater in a languishing condemnation case, where the court must also manage the appointment of independent commissioners and the defendants suffer from a cloud upon the title to their property. And the burden is the same whether that languishment occurs during the administrative phase or the trial phase of a condemnation. The Court should accept review to affirm that, absent a statutory prohibition, judges retain the authority

to dismiss a condemnation case for want of prosecution — at either stage.

2. The intermediate courts don't even agree whether the administrative phase is part of a judicial proceeding.

a. The Fourth and Fifth Courts of Appeal are in direct conflict.

The Court should grant review to resolve the split of authority on the nature of the administrative phase of a condemnation case. There is friction between the Fifth Court's decision here and the Fourth Court's decision in *City of Laredo v. Montano*, 415 S.W.3d 1 (Tex. App. – San Antonio 2012), *rev'd in part on other grounds*, 414 S.W.3d 731 (Tex. 2013).

A ruling in a condemnation proceeding that there is no right to condemn the property entitles the landowner to recover attorneys' fees. TEX. PROP. CODE § 21.019(c). The *Montano* condemnation petition was dismissed after the condemnor lost a jury trial. The condemnor argued on appeal that the Montanos weren't entitled to fees they incurred during the administrative phase. The Fourth Court rejected that argument. "[T]he appointment of the special commissioners is a separate phase of the judicial proceeding," but it is still part of a judicial proceeding: the commissioners "are appointed by the trial court only after the condemnation petition is filed." 415 S.W.3d at 4. The Property Code doesn't exclude the administrative phase of the

case from the "condemnation proceeding," so fees incurred during that phase are recoverable. *Id.*, citing *McLennan & Hill Counties Tehuacana Water Ctl. Dist. No. 1. v. Hennig*, 469 S.W.2d 590, 592–93 (Tex. Civ. App. – Waco 1971, no writ).

The *Montano* court recognized that the administrative phase was still part of a "judicial proceeding," a proceeding over which a judge has authority. But the Fifth Court's opinion is directly in conflict. Rather than recognizing the administrative phase as part of an overall judicial proceeding — simply one step in a case that begins with a petition to a court — it held that "[t]he administrative phase is *completely separate from any judicial proceeding* that may later take place." *Highway 205 Farms*, 2014 WL 3587403 at *2 (emphasis added).

b. The conflict stems from their interpretation of one of the Court's opinions.

Part of the appellate courts' confusion grows out of the Court's description of the condemnation process in *Amason v. Natural Gas Pipeline Co.* thirty years ago. 682 S.W.2d 240 (Tex. 1984). The Court there referred to condemnation cases as consisting of an "administrative proceeding, and then, if necessary, a judicial proceeding." *Id.* at 241. But the Court clarified its meaning later in the same paragraph, noting that the "initial proceedings are administrative in nature" and that an objection to the commissioners' award "converts [the proceeding] into a normal pending cause in the court[.]" *Id.* at 242. That is, there is a

single proceeding; an objection to an award simply the end of the administrative procedures set forth in the Property Code and the beginning of the civil-trial procedures set forth for normal pending cases. This single-proceeding description fits more naturally with the process described in the Property Code: filing a petition starts a lawsuit, which then proceeds through two phases. But this hasn't stopped the intermediate courts from leaning on the first, incomplete description of the condemnation process.

c. The conflict also results from an improper reading of the procedures described in the Property Code.

The Property Code's specification of particular jurisdiction and particular procedures for condemnation cases has been read, properly, as furnishing a trial-court judge with only limited powers over the administrative phase of a condemnation. *See Pearson v. State*, 315 S.W.2d 935, 937–38 (Tex. 1958) (citing predecessor statutes). This is because the Property Code imposes different duties on different arms of a court — one arm, the judge; the other arm, the special commissioners appointed by the judge — once a condemning authority files a condemnation petition with that court. *See* TEX. PROP. CODE § 21.012. For example, the trial judge must:

- Appoint special commissioners to assess the landowners' damages, *id.* at § 21.014;

- Direct the clerk to notify the parties of the commissioners' decision, *id.* at § 21.049; and

- Render judgment on the commissioners' findings if no party files a timely appeal, *id.* at § 21.061.

Compare this with the commissioners, who are to:

- Swear to act impartially, *id.* at § 21.014;

- "[P]romptly schedule a hearing for the parties at the earliest practical time," *id.* at § 21.015(a);

- Send notice of that hearing, *id.* at § 21.015(b);

- Hold that hearing, *id.*;

- Admit appropriate evidence, *id.* at § 21.041;

- Assess damages according to particular methods, *id.* at §§ 21.042–21.043; and

- Issue a written statement of their decision and the accrued costs, *id.* at § 21.048.

Other than the requirement that they take an oath, hold a hearing, and render a written decision, the commissioners' powers are discretionary — determining when to set the hearing, what to hear, whether evidence is appropriate, and what the damages are. A judge can't control the timing of the commissioners' hearings; that power is vested in the commissioners. *See Gulf Energy Pipeline Co. v. Garcia*, 884 S.W.2d 821, 823 (Tex. App. – San Antonio 1994, orig. proceeding). Nor can the judge reject the commissioners' award; the Property Code man-

dates that the judge render judgment upon it. *See In re Energy Transfer Fuel, L.P.*, 250 S.W. 178, 181 (Tex. App. – Tyler 2008, orig. proceeding). The judge's only role within the administrative proceedings that make up the first phase of the case is to do what the Property Code requires to facilitate that process — the judge's role during the administrative phase, that is, is ministerial.

The Fifth Court here went even further. It read the Property Code's grant of administrative-phase authority to commissioners in conjunction with the Court's language in *Amason*. It concluded from this that a condemnation is not two phases in a single proceeding, but two separate proceedings subject to two different authorities. As the Fifth Court reads the law, judges don't have ministerial powers during the administrative phase — judges have ministerial powers, *and no others*, during the administrative phase. *Highway 205 Farms*, 2014 WL 3587403 at *3.

d. The conflict also results from courts' ignoring the necessary implications of the Property Code.

And this isn't all: The Property Code itself assumes that the trial judge retains judicial authority. For one, objections to the commissioners' award must be filed "with the court that has jurisdiction over the proceeding." TEX. PROP. CODE § 21.018(a). That is, in the single proceeding created by the filing of a condemnation petition, the court already has jurisdiction over the dispute that it has referred for admin-

istrative proceedings. If the court already *has* jurisdiction, the Fifth Court's holding that the trial judge *did not have* jurisdiction, *Highway 205 Farms*, 2014 WL 3587403 at *3, cannot be right.

Two, the Property Code places no limits on a judge's power to dismiss a case. It says simply that a judge can "hear[] and grant[] a motion to dismiss a condemnation proceeding" filed by a property owner, without regard to the phase of the case. TEX. PROP. CODE § 21.019(c). And a judge *must* hear a condemnor's motion to dismiss, a mandate imposed without regard to phase of the case. *Id.* at § 21.019(a).

Three, the Code necessarily recognizes that motions to dismiss can be made during the administrative phase. Condemnors, in some circumstances, cannot move to dismiss "after the special commissioners have made an award…." *Id.* So the motion can't be brought during the trial phase — but if the judge, per the Fifth Court, has no power to dismiss during the administrative phase, then there is *no phase* in which a motion to dismiss can be filed. If there is no time when moving to dismiss would be proper, there is no reason to mandate a hearing.

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This Fifth Court's reading is unnatural. It results from confused readings of the Court's opinions, the Property Code's procedures, and the Property Code's necessary implications. The Court should grant

review to clarify that the Property Code's commitment of particular administrative powers to special commissioners does not divest judges of their common-law authority over proceedings pending in their courts.

B. The due course of the law demands that landowners have an avenue for relief from stalled condemnations.

The petition concerns the procedural posture of a case, but it's not a case about civil procedure. It is about the extent to which State actors can impair landowners' rights to enjoy and dispose of their land. The Fifth Court's opinion does not announce a neutral rule designed to assist in the fair resolution of cases. No; it impairs the rights of a specific class of litigants in a specific class of cases. If a judge has no authority to dismiss a condemnation case during its administrative phase, there is no remedy against a condemnor who has clouded title to a property and who refuses to proceed to clear the cloud.

1. Condemnation proceedings immediately impair values.

A condemnation case begins when a condemnor files a petition with a court. TEX. PROP. CODE § 21.012. That petition automatically clouds the landowner's title. The petition announces to the world that the condemnor is claiming the right to erase all other claims to title in the property. The landowner must now fight simply to establish that he has the right to continue ownership.

The landowner's ability to sell, rent, develop, use, or otherwise dispose of his property is immediately impaired by the condemnor's petition. (The existence of this impairment is made certain when the condemnor — as the city did here — records a *lis pendens*, placing the cloud into the recorded chain of title.) The State, or an entity empowered by it, is claiming the right to seize the land and do with the land as it will. It is only the rarest prospective buyer, tenant, or investor who would risk capital on such a property — and any plans that the landowner had are threatened, too. *See* Julius L. Sackman, *et al.*, eds., NICHOLS ON EMINENT DOMAIN 12-415 (rev. 3d ed. 1985) (actual or threatened condemnation depresses real-estate values because the threat of a taking "hang[s] like a sword of Damocles over the heads of the land owner…"). The price the landowner can obtain will necessarily be depressed, too: The price must take into account the (very high) risk that the property will be seized and the private parties' plans scuttled. There is almost no chance of anything but a sub-market price. The condemnation petition itself might as well be an involuntary lien. *Cf. Countrywide Home Loans, Inc. v. Howard*, 240 S.W.3d 1, 5 (Tex. App. – Austin 2007, pet. denied), citing *FDIC v. Walker*, 815 F. Supp. 987, 990 (N.D. Tex. 1993).

2. The Fifth Court's opinion leaves landowners no process to clear that cloud.

At its core, due process requires that when State action affects someone, the State must afford that person a right to be heard — and to be heard when it matters in a way that matters. *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In the condemnation context, the due course of laws requires that landowners be able to seek relief from the State's imposition upon them at a time when relieving the imposition matters. But if other courts follow the Fifth Court's guidance, the opportunity for meaningful relief is subject to the whim of the same State that is seizing the landowner's property. Simply by refusing to proceed with a condemnation action that is still in the administrative phase, the State can suspend the landowner in perpetual limbo — and there is nothing the landowner can do about it.

Due process demands that landowners have an avenue for relief if the condemnation process stalls. This case gives the Court the opportunity to clarify that those demands are met by the properly read Property Code and Rules of Civil Procedure. The inherent authority of a court includes, the Rules of Civil Procedure permit, and the Property Code does not deny the power of a judge to dismiss a case that the petitioning party ignores. To read the law otherwise — to read it as the Fifth Court does — would be to deny the due course of the laws to a landowner whose land the State wishes to seize.

3. The Court should grant review to clarify that relief is available.

The question here isn't about a court's power over an administrative proceeding; it is about a court's power to govern its cases. Nothing in the Property Code limits that inherent power or conditions it upon a case being at a particular stage. The Court should accept review to clarify that judges retain the power to govern the cases pending in their courts, whatever that case's "phase."

This isn't to say that judges have "general jurisdiction" during a condemnation case's administrative phase. Their power over the administrative process itself is only ministerial. This comports with general principles of administrative law. Agencies have discretion to operate within the areas committed to them; a court can order an agency to exercise its discretion, but it can't direct the exercise of that discretion. *See, e.g., Mitz v. Tex. State Bd. of Veterinary Med. Examrs.,* 278 S.W.3d 17, 22 (Tex. App. – Austin 2008, pet. dism'd) (discussing primary and exclusive jurisdiction); *Crouch v. Stanley*, 390 S.W.2d 795, 799 (Tex. Civ. App. – Eastland 1965, writ ref'd n.r.e.) (jurisdiction of district court to order state official to perform ministerial act). This suggests another way the Court could clarify that a landowner has a right to review.

Texas's trial judges have jurisdiction to issue writs of mandamus to compel ministerial acts. TEX. GOVT. CODE §§ 24.011 (district courts), 25.004(a) (statutory county courts), 26.051 (constitutional

county court). Special commissioners have the duty to schedule and hear the administrative phase of a condemnation hearing as soon as practicable; once they have heard the parties, they have a duty to issue a written award. TEX. PROP. CODE §§ 21.015(a)–(b), 21.048. These duties are mandatory, not discretionary; the special commissioners must perform them simply because they are special commissioners. That is: Those duties are ministerial, and the trial judge would have mandamus jurisdiction to compel the commissioners to schedule, hold, and issue a written award from a hearing.

But the Fifth Court's opinion calls even that power into doubt. Its opinion was that the trial judge had no jurisdiction — none whatsoever — over the proceeding as long as it was in the administrative phase. Specifically, that court didn't believe that the trial judge had "authority to oversee an ongoing administrative proceeding." *Highway 205 Farms*, 2014 WL at *2. But ordering the commissioners to do something, even if isn't ordering them to come to a particular result, is still oversight. And the Fifth Court's opinion denies the trial judge that oversight power.

The Court should accept review — to reaffirm that trial judges have jurisdiction to dismiss stale cases from their dockets, yes, but also to reaffirm that trial judges have the power to compel ministerial acts of officials within their jurisdiction. Either way (or, better yet, both

ways), landowners will be assured that there is a way to remove the condemnation cloud from their title.

C. The Fifth Court's opinion creates perverse incentives.

Under the Fifth Court's opinion, there is no way to force the special commissioners or the condemnor into gear if they choose to idle. This is inconsistent with the Property Code and the U.S. and Texas Constitutions. Property can't be seized through condemnation unless the landowner is given just compensation. U.S. CONST. amend. V, XIV § 1; TEX. CONST. art. I, § 17(a). The Property Code facilitates these requirements — but not if the Fifth Court's opinion stands.

Condemnors must pay "the full and perfect equivalent" of the property they seize. *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 326 (1893); TEX. PROP. CODE § 21.042; *County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004). The Fifth Court's opinion, however, creates incentives for condemnors to sit on their condemnation cases. The longer the property's value is impaired by the pending condemnation, the longer the landowner must suffer from that impairment, and the more likely he is to be pressured into a settlement — in particular, a settlement at less than market value.

Of course, not all condemnors — perhaps not even most — will abuse the Fifth Court's holding this way. But men aren't angels; we have established constitutional and statutory protections to guard against abuses of power. THE FEDERALIST No. 51. Government ac-

tors are under constant pressure from constituents to hold down spending; private actors are under constant pressure to increase profits. Depressing the price paid for condemned property is a politically and economically rational maneuver — and the incentive to cause those depressions is but one reason for the federal and state Takings Clauses. The Fifth Court's holding invites just those abuses.

The Court should grant review to purge that perverse incentive from Texas's decisional law.

Conclusion

The Court should grant review.

Respectfully submitted,

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