No. _____

In The
Supreme Court of the United States

MARK AND MARILYNN LONG,
ARNIE AND SHIRLEY VAN VOORST,
TIM AND SARA DOYLE,
TIMOTHY AND JANE GRIFFITH, AND
MICHAEL AND KAREN TAYLOR,

Petitioners,

v.

STATE OF SOUTH DAKOTA,

Respondent.

On Petition For A Writ Of Certiorari To The South Dakota Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress, in 1970, established a uniform policy for compensation of legal costs as the result of unconstitutional takings of real estate. Congress required all federal agencies to pay a successful Plaintiff's legal costs when a citizen's constitutional property rights were vindicated in an inverse condemnation action.

South Dakota refuses to comply with the policy Congress established. This Petition requests this Court require South Dakota to comply with the federal policy and to force South Dakota to honor its commitments.

The Petitioners requested attorney fees and costs pursuant to the Uniform Relocation Assistance and Real Property Acquisition Act of 1970, 42 U.S.C. §§ 4601-4655 and 49 C.F.R. § 24.107(c) (URA). The Act requires the federal government and all state governments receiving federal grants of money to pay successful inverse condemnation plaintiffs costs of litigation. The South Dakota Supreme Court decided that the Relocation Act's requirements were not binding upon the State. The South Dakota holding is the only federal or state highest court decision that declares the Uniform Relocation Act's requirements as permissive. Thus, the question presented is:

1. Are the Petitioners entitled, as successful inverse condemnation claimants, to attorney fees and costs under the URA from a federally assisted state transportation agency?

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDING

The Petitioners are private persons whose homes were damaged by the South Dakota Department of Transportation as a result of a federally assisted construction project.

The Respondent is a State of the Union.

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Petitioners respectfully petition the Court to grant a writ of certiorari to review the judgment of the South Dakota Supreme Court.

OPINIONS BELOW

The South Dakota Supreme Court's opinion is reported as *Long, et al. v. State of South Dakota*, 2017 S.D. 78, 904 N.W.2d 358.

The companion successful inverse condemnation liability case for which fees are claimed is *Long, et al. v. State of South Dakota*, 2017 S.D. 79, 904 N.W.2d 502.

JURISDICTION

The jurisdiction of this Court is granted by 28 U.S.C. § 1257(a). The South Dakota Supreme Court entered its opinion on November 21, 2017 and issued its mandate on December 5, 2017.

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 4655(a) Notwithstanding any other law, the head of a federal agency shall not approve any program or project or any grant to. . . . an acquiring agency under which Federal financial assistance will be available to pay all or part of the

cost of any program or project . . . unless he receives satisfactory assurance from such acquiring agency that –

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

2. 42 U.S.C. § 4654(c) Claims against the United States. The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

3. 49 C.F.R. § 24.107 Certain Litigation Expenses:

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:

> (c) The Court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding. Source: 70 FR 612, Jan. 4, 2005, unless otherwise noted.

STATEMENT OF THE CASE

Despite the receipt of more than sixty-three percent of its highway funds from the federal government, the State of South Dakota refuses to honor its solemn assurance to follow the federal policies of the URA. The State Supreme Court held obedience to federal law is permissive, not mandatory.

The Petitioners successfully sued the State of South Dakota for flooding their personal residences. The State reconstructed a highway blocking a creek's natural drainage. The State's highway caused water to pond and damage landowners' property after a rain. The landowners filed an inverse condemnation action under the Fifth Amendment to the Federal Constitution and Article VI, Section 13 of the State Constitution. The trial judge found a taking and damaging under the State Constitution and a jury assessed damages. The liability judgment was appealed and affirmed. *Long, et al. v. State of South Dakota*, 2017 S.D. 79, 904 N.W.2d 502.

The Petitioners requested attorney fees and costs from the trial court after the successful inverse

condemnation case. The Petitioners informed the trial court that the South Dakota Department of Transportation was a federally assisted program. The State had given its written assurance to the United States that it would pay successful inverse condemnation plaintiff's attorney fees and costs. The Petitioners' request for attorney fees and costs was based upon the URA and specifically 49 C.F.R. § 24.107(c).

The circuit court denied the request on the basis of a recent South Dakota case, *Rupert v. City of Rapid City*, 2013 S.D. 13, 827 N.W.2d 55. The *Rupert* decision was based upon state law without reference to the URA.

The Petitioners appealed the trial court's denial. The South Dakota Supreme Court affirmed. The Supreme Court of South Dakota held 42 U.S.C. §§ 4654, 4655, and 49 C.F.R. § 24.107(c) are "permissive" and the State may ignore the requirements of the URA. The South Dakota holding is the only state's highest court to interpret the Uniform Relocation Act as permissive.

The Petitioners stated two legal issues to the South Dakota Supreme Court based upon South Dakota's duties under the URA:

> A. Did the Legislature intend to adopt the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646) by reference with the passage of 1972 Session Laws, Chapter

136 which is codified as SDCL § 5-2-18; and

B. Has South Dakota by legislation authorized trial courts to award Plaintiffs' litigation expenses for successful inverse condemnation claims?

The South Dakota Supreme Court did not answer the Petitioners' legal issues but recast the issue as:

> Whether a party who prevails on a claim of inverse condemnation arising under South Dakota Constitution Article VI §13 is entitled to recovery of attorney's fees and litigation expenses under SDCL § 5-2-18.

Long, et al. v. State of South Dakota, 2017 S.D. 78, ¶ 4, 904 N.W.2d 358, 360-361.

The Petitioners are citizens of the only state that refuses to perform its federal obligations in return for the grant of federal highway funds.

SUMMARY

The decision by the South Dakota Court is an exercise of misdirection and refusal to give federal legislation its rightful place. Congress did not make South Dakota an exception to the Uniform Relocation Act.

The State's executive officers have given the United States written assurances that the State of South Dakota and its departments will enforce the URA. If the State had not given the assurances

required by 42 U.S.C. § 4655, the State would not have received more than one billion dollars in federal highway funds since 2010. The assurances under 42 U.S.C. § 4655 require that the State pay inverse condemnation fees under 42 U.S.C. § 4654(c) and 49 C.F.R. § 24.107(c).

The South Dakota Court's logic is refuted by all of its sister states that have decided the issue. No federal case supports the notion that once federal assistance is accepted, compliance with the URA is permissive. South Dakota property owners alone are deprived of this federal benefit because the State refuses to keep its promises to Congress. The Petitioners' real estate, unfortunately, is located in the only state whose highest court does not protect their federal rights under the URA.

The Petitioners request this Honorable court exercise its constitutional power to end South Dakota's failure to honor its written assurances and its duty to enforce the law of the United States.

ARGUMENT

A. South Dakota Passed a Statute Permitting Its Agencies to Accept Federal Funds and Give Assurances Under the URA.

The URA mandates federally assisted programs follow the Act's provisions, including payment of litigation expenses in certain cases. The State of South

Dakota uniquely purports that the URA's provisions awarding attorney's fees to successful inverse condemnation claimants are permissive.

42 U.S.C. § 4655 states in part:

> (a) . . . the head of a Federal agency *shall not approve* any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, *unless he receives satisfactory assurances from such acquiring agency that* –
>
> (2) Property owners *will be paid* or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

42 U.S.C. § 4654(c) states:

> The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

The Code of Federal Regulations makes the State's duty to reimburse successful inverse condemnation claimants for their attorney's fees clear.

> 49 C.F.R. § 24.107(c) Certain Litigation Expenses:
>
> The owner of the real property *shall be reimbursed* for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:
>
> (c) The Court having jurisdiction *renders a judgment in favor of the owner in an inverse condemnation proceeding* or the Agency effects a settlement of such proceeding. Source: 70 FR 612, Jan. 4, 2005, unless otherwise noted.

The South Dakota Legislature passed an authorization statute in order to provide the assurances required by the 1971 URA.

> The 1972 Session Laws, Chapter 136 provided:
>
> Notwithstanding any other law, the state of South Dakota, its departments, agencies, instrumentalities or any political subdivisions are authorized to provide relocation benefits and assistance to persons, businesses, and farm operations displaced as the result of the acquisition of land or rehabilitation or demolition of structures in connection with federally-assisted projects to the same extent and for the same purposes as provided for in the Uniform Relocation Assistance and Real

> Property Acquisition Policies Act of 1970 (Pub. L. 91-646), and to comply with all the acquisition policies continued in said federal act. (SDCL § 5-2-18).

South Dakota updated SDCL § 5-2-18 in order to recognize the 1987 federal legislation amending the URA. South Dakota made certain wording changes to the act. The 1988 amendment resulted in the present codification of SDCL § 5-2-18:

> Relocation benefits and assistance in acquisition of property – Compliance with federal act. The State of South Dakota, its departments, agencies, instrumentalities, or any political subdivisions may provide relocation benefits and assistance to persons, businesses, and farm operations displaced as the result of the acquisition of land or rehabilitation or demolition of structures in connection with federally assisted projects to the same extent and for the same purposes as provided for in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17), and may comply with all the acquisition policies contained in said federal act.

The amendments to the state statute made it optional for state executives to receive federal funds. If the state does not accept federal transportation funds, the state need not comply with URA. The fact of the matter is the State of South Dakota used

the permissive grant of power to accept federal funds. Those federal funds attach the URA legal conditions or requirements. Sixty-three percent or more of all funds used by the South Dakota Department of Transportation is the result of a federal grant of funds carrying the conditions of the URA.

The South Dakota Supreme Court, like a shell game dealer, recast the Petitioners' legal questions on appeal and pulled out the "permissive" pea. The State's eminent domain public information brochure boldly and falsely claims it complies with the URA.

The portion of the URA which establishes "Real Property Acquisition Policies Act of 1970," 42 U.S.C. §§ 4651-4655, has not been considered by this Court. *Alexander v. U.S. Dept. of Housing and Urban Development*, 441 U.S. 39, 99 S.Ct. 1572, 60 L.Ed.2d 28 (1979) instructed that persons displaced as a result of the acquisition of real property had the benefits of the URA. The State in this case took the Petitioners' real property for temporary water storage behind a federally assisted highway project.

42 U.S.C. § 4654(c) is a mandatory declaration by Congress. South Dakota's Department of Transportation is a federally-assisted program and these petitioners have a federal right to be paid litigation costs following a successful inverse condemnation claim.

B. Every Other State Highest Court Has Declared that the URA is a Mandatory Federal Act.

The URA codified Pub. L. 91-646, January 2, 1971, 84 Stat. 1894, which provided:

> An Act to provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms by Federal and federally assisted programs and to establish uniform and equitable land acquisition policies for Federal and federally assisted programs.

State highest courts that have held that the URA is mandatory and not permissive are:

Nevada, *McCarran Intern. Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (Nev. 2006); Utah, *Robinson v. State*, 2001 UT 21, 20 P.3d 396 (Utah 2001); West Virginia, *West Virginia Dept. of Transportation Div. of Highways v. Dodson Mobile Homes Sales and Services, Inc.*, 624 S.E.2d 468 (W. Va. 2005); Kansas, *Estate of Kirk-Patrick v. The City of Olathe*, 289 Kan. 554, 215 P.3d 561 (Kan. 2009); and Minnesota, *DeCook v. Rochester Intern. Airport*, 811 N.W.2d 610 (Minn. 2012).

The common theme of these holdings is that upon acceptance of federal money for transportation programs states must obey the URA uniformity requirements. No state, except South Dakota, permits a federally assisted department of transportation to ignore its federal obligations.

C. Circuit Courts of Appeals Have Held that a Federally Assisted State Program Must Follow the Federal Policies of the URA.

The Eighth and Ninth Circuits have held that the URA is mandatory for federally assisted state agencies. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 609 F.2d 383, 385 (9th Cir. 1979) (stating Section 42 U.S.C. § 4654 applies to state agencies giving assurances under Section 42 U.S.C. § 4655) and *Tullock v. State Highway Commission of Missouri*, 507 F.2d 712 (8th Cir. 1974) (once Highway Commission gave assurances to Federal Highway Administration it could not "renege" by refusing its citizens federal benefits under the URA).

The District Court of Utah recently decided a case where Salt Lake County attempted to evade its obligations as a federally assisted agency. The Court held the successful inverse condemnation plaintiffs were "entitled to attorney fees and other costs specified under 42 U.S.C. § 4654(c)." *Plumb v. Salt Lake County*, 2016 WL 2888981 (N.D. Utah 2016).

CONCLUSION

The Petitioners request the Court issue a Writ of Certiorari to the South Dakota Supreme Court reversing its denial of attorney fees and costs to successful inverse condemnation plaintiffs as required by the URA and return the case for the calculations of benefits owed under the federal law.

Respectfully submitted this 19th day of February, 2018.

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