No. 17-1168

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petitioners prevailed on their inverse condemnation claim against the Respondent under the South Dakota Constitution. South Dakota's takings clause is broader than its federal counterpart, and provides, "Private property shall not be taken for public use, or damaged, without just compensation." S.D. Const. Art. VI, § 13.

Having prevailed on their state inverse condemnation claim in state court, the Petitioners moved the trial court for an award of attorney fees and expenses, contending that SDCL § 5-2-18 incorporated by reference the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended by the Surface Transpiration and Uniform Relocation Assistance Act of 1987 (collectively "the URA"), as well as the federal regulations enacted thereunder.

The South Dakota Supreme Court, the final arbiter of all issues of South Dakota state law, held that compliance with the URA was discretionary under SDCL § 5-2-18. The South Dakota Supreme Court concluded that the Petitioners were not entitled to attorney fees and costs. As such, the question presented is:

1. 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 fees and litigation expenses under SDCL § 5-2-18.

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JURISDICTION

The Petitioners submit that this Court has jurisdiction under 28 U.S.C. § 1257(a). The Respondent disagrees with this contention, because the issue the Petitioners seek to appeal is one of state law that has already been adjudicated by the South Dakota Supreme Court.

STATEMENT OF THE CASE

The facts relevant to this appeal are provided in the South Dakota Supreme Court's decision attached as pages 1-19 of the Petitioner's Appendix. The Petitioners' real and personal properties were damaged in a flood after a heavy rainfall in July 2010. (Pt. App. 2.) The Petitioners' properties abutted South Dakota Highway 11, which was built by the South Dakota Department of Transportation in 1949. (*Id.* at 3.)

The Petitioners filed an inverse condemnation claim against the State contending that their properties were "damaged" for purposes of South Dakota's takings clause in article VI, § 13 of the South Dakota Constitution. (*Id.*) A court trial was held in February 2014 on the issue of liability. (*Id.*) The trial court concluded that the construction of Highway 11 and the culverts beneath it caused the flooding damage to the Petitioners' properties. (*Id.*) In December 2014, a jury trial was held on the issue of damages, and the jury awarded damages to each Petitioner in individual judgments. The State appealed the trial court's

judgment on liability, and the South Dakota Supreme Court affirmed. That decision is reported at *Long et al. v. South Dakota*, 904 N.W.2d 502 (S.D. 2018).

In August 2014, the Petitioners moved the trial court for an award of attorney fees and expenses on the basis that SDCL § 5-2-18 enacted the URA and the federal regulations implemented thereunder by reference. The trial court denied the motion based on *Rupert v. City of Rapid City*, 827 N.W.2d 55 (S.D. 2013), in which the South Dakota Supreme Court held that an award of attorney fees must be expressly authorized by statute. (Pt. App. 20.)

The Petitioners filed a separate appeal to the South Dakota Supreme Court, who affirmed the trial court's denial of attorney fees in its decision reported at *Long et al. v. South Dakota*, 904 N.W.2d 358 (S.D. 2018). The court held that the requested attorney fees were not authorized by the plain language of SDCL § 5-2-18.

SUMMARY OF THE ARGUMENT

The Petitioners presuppose that resolution of their potential appeal will be based on their rights under a federal statute, the URA, such that this Court would have jurisdiction under 28 U.S.C. § 1257. In reality, the Petitioners' arguments hinge instead on resolution of a state statute, SDCL § 5-2-18, the interpretation of which has already been established by the final arbiter of all issues of state law.

Even if compliance with the URA was mandatory, the URA does not authorize an award of attorney fees for a state inverse condemnation claim in state court. Instead, the URA applies only to federal condemnation actions for the acquisition of land in federal court.

Contrary to the Petitioners' assertions, no state courts have held that compliance with the URA is mandatory merely by means of the acceptance of federal dollars. Instead, the decisions cited by the Petitioners stand for the unremarkable proposition that attorney fees are available when expressly authorized by applicable state statutes.

ARGUMENT

A. Whether the Petitioners Were Entitled to Attorney Fees After Prevailing on an Inverse Condemnation Claim Arising Under the South Dakota Constitution Under SDCL § 5-2-18 is an Issue of State Law.

South Dakota follows the American Rule for purposes of awarding attorney fees. *Rupert v. City of Rapid City*, 827 N.W.2d 55, 67 (S.D. 2013). "Under the 'American Rule,' each party in an action bears its own attorney fees." *Id.* There are two exceptions to this rule. First, attorney fees may be awarded "when the parties enter into an agreement entitling the prevailing party to an award of attorney's fees." *Id.* No such agreement exists in this case. Second, attorney fees may be awarded if an award of attorney's fees is authorized by statute. *Id.*

The Petitioners minimize the importance of the South Dakota Supreme Court's holding in *Rupert*, but *Rupert* is instructive for two reasons. First, the court made it clear that "attorney fees may not be awarded pursuant to statute unless the statute *expressly authorizes* the award of attorney fees in such circumstances." *Rupert*, 827 N.W.2d at 69 (emphasis added). In other words, the power to assess attorney fees may not be implied or read into a statute as the Petitioners attempted to do. "This Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *In re Estate of O'Keefe*, 583 N.W.2d 138, 142 (S.D. 1998). Second, the court noted that awarding attorney fees against the State implicates sovereign immunity. *Rupert*, 827 N.W.2d at 68. "Abrogation of sovereign immunity by the Legislature must be express." *Id.*

The Petitioners argue that SDCL § 5-2-18 provided a basis for the trial court to conclude that they were entitled to attorney fees and costs. Accordingly, the issue for the trial court and for the South Dakota Supreme Court to decide was whether that statute expressly authorized an award of attorney fees against the State. SDCL § 5-2-18 provides:

> 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 (P.L. 91-646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17), and *may* comply with all the acquisition policies contained in said federal act.

(Emphasis added).

The Respondent argued that nothing in the statute expressly authorized attorney fees as required by *Rupert*, and the South Dakota Supreme Court agreed, holding that the statute was "clear and unambiguous," and that "the plain language of this statute provides that compliance with the URA is permissive rather than mandatory." *Long*, 904 N.W.2d at 364-65. The court also noted its earlier decision that there was no compelling reason to hold that the URA, "even when read in conjunction with SDCL 5-2-18, in any manner modifies our Constitution, statutes, or case law." *Id.* (quoting *Rapid City v. Baron*, 227 N.W.2d 617, 620 (S.D. 1975)). The court concluded that the trial court did not err in denying the Petitioners' motion for attorney fees and expenses as they were not authorized by the plain language of the statute. *Id.* at 367.

Accordingly, the South Dakota Supreme Court has established the interpretation of SDCL § 5-8-12, and that interpretation is not subject to review by this Court. "[T]he highest court of the state is the final

arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). *See also Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000) ("As a general rule, this Court defers to a state court's interpretation of a state statute."); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 226 n.9 (1980).

Because the Petitioners' appeal hinges on interpretation of SDCL § 5-2-18, which has already been decided by the South Dakota Supreme Court, and not any "right, title, privilege or immunity" under a federal statute as contemplated by 28 U.S.C. § 1257(a), this Court should deny the Petition for a Writ of Certiorari.

B. The URA Does Not Authorize Attorney Fee Awards for State Inverse Condemnation Claims in State Court.

Conceding that SDCL § 5-2-18 does not expressly authorize attorney fees, the Petitioners instead argue that the statute incorporated the URA and the federal regulations implemented thereunder. However, as noted above, SDCL § 5-2-18 only states that South Dakota and its agencies "may" comply with the acquisition policies contained in the URA. The South Dakota Supreme Court correctly held that this discretionary language means that the URA's application is permissive, not mandatory. Even if the URA was applicable to

this case, its terms do not provide any authority for attorney fees for successful state inverse condemnation claims in state courts.

The URA is codified at 42 U.S.C. §§ 4601 *et seq*. A comprehensive reading of the URA reveals that the primary intent of the act was to establish uniform policies and procedures to provide relocation benefits to a person displaced as a result of formal condemnation proceedings initiated by a federal agency. 42 U.S.C. § 4621(b). A "displaced person" is defined as "any person who moves from real property, or moves his personal property from real property" as a "direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance." 42 U.S.C. § 4601(6)(A). Such relocation benefits for a displaced person may include moving expenses (42 U.S.C. § 4622) and replacement housing (42 U.S.C. § 4623), among other benefits.

The most relevant provision of the URA is 42 U.S.C. § 4654(c), which provides:

> The court rendering judgment in a proceeding under section 1346(a)(2)[1] or 1491[2] of Title 28, awarding compensation for the taking of

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[1] 28 U.S.C. § 1491 confers jurisdiction upon the United States Court of Federal Claims upon "any claim against the United States founded either upon the Constitution, or any Act of Congress[.]"

[2] 28 U.S.C. § 1346(a)(2) confers jurisdiction upon federal district courts for civil actions against the United States "founded upon the Constitution, or any Act of Congress[.]"

> property by a Federal agency . . . 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 a proceeding.

A plain reading of section 4654(c) demonstrates that it only authorizes the award of attorney fees in federal courts for federal condemnation claims. "[S]ection 4654 provides authority for the award of attorney's fees and expenses in actions brought in either federal court or the Court of Federal Claims." *City of Austin v. Travis County Landfill Co.*, 25 S.W.3d 191, 207 (Tex. Ct. App. 1999) (rev'd on other grounds). "The Uniform Act contains no express authority for a similar award for state causes of action filed in state court." *Id.* "[T]he provisions of 42 U.S. C. 4654, entitling successful plaintiffs to litigation expenses, apply only to takings by a federal agency, not to an inverse condemnation action by a city redevelopment authority, nor to an award under a state condemnation." 8A Patrick J. Rohan & Melvan A. Reskin, NICHOLS ON EMINENT DOMAIN, § G.20.05[3] (3d ed. 2015).

The Petitioners accordingly contend that authority for attorney fees for a state inverse condemnation claim in state court is found in 49 C.F.R. § 24.107. (Petition at 8.) Section 24.104 provides that the owner of real property shall be reimbursed for reasonable

expenses, including attorney, appraisal, and engineering fees actually incurred because of a condemnation proceeding if "[t]he 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."

Of course, an enabling regulation cannot provide greater rights or remedies than authorized by its implementing statute. *See Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 96 (2002). Merely because section 24.107 lacks the limiting language of 42 U.S.C. § 4654(c) does not somehow expand the rights and remedies available under the URA. "At most, section 24.107 clarifies that section 4654 applies to governmental entities facing claims in federal court or the Court of Federal Claims." *City of Austin*, 25 S.W.3d at 207. "It does not provide statutory authority for state courts to award attorney's fees for successful inverse condemnation claims arising under state law." *Id.*

C. The Petitioners Cite No Authority Establishing the URA Itself is Sufficient Authority to Award Attorney Fees in State Court for State Inverse Condemnation Claims.

The Petitioners argue that every other "state highest court" has declared that the URA is a "mandatory federal act." (Petition at 11.) However, a closer reading of these cases reveals that these courts were simply enforcing statutes that expressly and unambiguously required those respective states to pay such attorney

fees. Notably, several of those cases involved federal takings claims, not state law claims.

The Petitioners posit that the "common theme of these holdings is that upon acceptance of federal money for transportation programs states must obey the URA uniformity requirements." (Petition at 11.) No such holding is found in these cases. Instead, what these cases have in common is conspicuously absent in South Dakota, namely, statutes and regulations expressly authoring attorney fees against the state and its agencies in inverse condemnation cases.

This discrepancy is most clearly demonstrated in *Bonanza, Inc. v. Carlson*, 9 P.3d 541 (Kan. 2000), a case relied upon heavily by the Petitioners before the trial court and South Dakota Supreme Court, and the predecessor to *Estate of Kirk-Patrick v. The City of Olathe*, 215 P.3d 561 (Kan. 2009) cited in the Petition. In *Bonanza*, the court explained that the landowners were "not arguing that § 4654 of the [URA] provides authority for Kansas to award litigation expense in inverse condemnation proceedings against a state agency taking property for a federally assisted project." 9 P.3d at 546-47. Instead, the plaintiffs relied on Kan. Stat. §§ 58-3501 *et seq.* and Kan. Admin. Reg. 13-16-1 which expressly authorized attorney fees to prevailing plaintiffs in inverse condemnation cases. *Id.* at 547. Unlike South Dakota, Kansas's statute provided that the State of Kansas, its agencies, and subdivisions "shall" comply with the URA's requirements. *Id.* at 544. Additionally, also unlike South Dakota, Kansas expressly adopted the entirety of the federal

regulations associated with the URA: "49 C.F.R. Part 24, as of March 2, 1989, and all amendments thereto, is adopted by reference." Kan. Admin. Reg. 36-16-1(a). As such, the Kansas Supreme Court did not hold that the URA itself provided to award such fees. Instead, it merely enforced Kansas's existing state statutes that expressly authorized the award – statutes and regulations that South Dakota does not have.

The other state court cases the Petitioners cited are similarly inapposite. As noted by the Nevada Supreme Court, Nevada has expressly adopted the URA's provisions at the state level. *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1129 (Nev. 2006). Under Nevada state law, Nevada state agencies and departments that are subject to the URA "*shall* . . . perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements." Nev. Rev. Stat. § 342.105(1). Like Nevada, West Virginia also expressly adopted the URA provisions at the state level. *W. Va. Dep't of Transp. v. Dodson Mobile Homes Sales & Servs.*, 624 S.E.2d 468, 472 (W. Va. 2005) (citing W.Va. Code §§ 54-3-1 to 54-3-5). West Virginia law provides that state agencies are "required" to adopt rules and regulations to implement the URA and make the URA's requirements applicable to such state agencies. W.Va. Code § 54-3-3. Like Kansas, Utah adopted the URA "wholesale" in its administrative code. *Robinson v. State*, 20 P.3d 396, 398 (Utah 2001); *see* Utah Admin. Code 933-1-1. Minnesota statute similarly mandates attorney fees in inverse condemnation cases. Minn. Stat. § 117.045; *see DeCook v.*

Rochester Int'l Airport Joint Zoning Bd., 811 N.W.2d 610 (Minn. 2012).

The Petitioners' federal authorities also fail to advance their argument for the obvious reason that those cases were federal condemnation actions in federal court. (Petition at 12.) The fact that the Petitioners brought a state inverse condemnation claim in state court is precisely the reason the URA does not provide authority for attorney fees in this case.

The Petitioners minimize the importance of the decisions from two intermediate state courts cited by the Respondent, apparently solely on the ground that they are not the highest court in their respective states. This criticism is meritless, particularly given those courts rejected arguments extremely similar to those ones the Petitioners have advanced. For example, in *City of Austin*, the plaintiff argued that even though Texas state law provided no authority for an award of attorney fees for inverse condemnation, such authority was provided by the URA. 25 S.W.3d at 208. The Texas Court of Appeals correctly rejected that argument, holding that the URA contained no express authority for attorney fees awards for state causes of action filed in state court. *Id.* A similar result was reached by the Missouri Court of Appeals where the court concluded that the URA did not replace the American Rule under Missouri law. *Randolph v. Mo. Hwys. & Transp. Comm'n*, 224 S.W.3d 615, 620 (Mo. Ct. Ap. 2007).

D. The Petitioners Lack Standing to Assert a Cause of Action Under 42 U.S.C. § 4655(a).

Ultimately, the crux of the Petitioners' arguments is that the State of South Dakota accepted federal dollars for the construction of highways, and, by doing so, it agreed to comply with the URA. Underlying this argument is 42 U.S.C. § 4655(a), which provides that the head of a Federal agency shall not approve any program or project with an acquiring agency under which federal financial assistance will be available unless he or she receives assurances that the property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of the URA.

As an initial matter, the South Dakota Supreme Court held that compliance with the URA, and any of the sections therein, is discretionary, not mandatory, and, as noted above, that court is the final arbiter on the issue. Moreover, section 4655 does not provide for a private cause of action. Instead, it governs the relationship between the acquiring agency and the federal agency from which it seeks federal funds. *City of Austin*, 25 S.W.3d at 208. "It does not create a landowner's cause of action for attorney's fees in the event the [acquiring agency] fails to comply with the land acquisition policies outlined in the statute." *Id.* (quoting *City of Buffalo v. Clement*, 45 A.D.2d 620, 624 (N.Y. App. Div. 1974)).

The Petitioners have asked this Court to "exercise its constitutional power to end South Dakota's failure to honor its written assurances" under the URA.

(Petition at 6.) In essence, they ask to step into the shoes of the United States government to compel South Dakota to comply with the URA. Whether an applicable federal agency believes that South Dakota failed to comply with the URA's acquisition procedures is unknown, and the Petitioners did not develop a record below on this issue nor what federal agency would have standing to object. *See Long*, 904 N.W.2d at 363 n.4. Given that the Respondent did not "acquire" land as contemplated by the URA, it is highly unlikely that any federal agency would take such a position.

More importantly, at least two federal courts of appeals that have faced the issue have held that the URA did not create a cause of action for legal relief under the Act. *See Roth v. U.S. Dept. of Transp.*, 572 F.2d 183, 184 (8th Cir. 1978); *Paramount Farms, Inc. v. Morton*, 527 F.2d 1301, 1306 (7th Cir. 1975). Even if a landowner had a cause of action for violations of the URA, these particular landowners are not entitled to step into the shoes of a federal agency for an alleged failure to honor "written assurances" by the Respondent or its agencies.

CONCLUSION

Whether the Petitioners were entitled to attorney fees and litigation expenses under SDCL § 5-2-18 after prevailing on a state inverse condemnation claim is an issue of state law that has already been adjudicated by the South Dakota Supreme Court. There is no reason

for this Court to entertain the Petitioners' appeal. The Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari.

Dated this 23rd day of March, 2018.

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