U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

November 30, 2018

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Rose Mary Knick v. Township of Scott, Pennsylvania et al., No. 17-647

Dear Mr. Harris:

By order dated November 2, the Court directed the parties and the Solicitor General to file letter briefs "addressing petitioner's alternative argument for vacatur, discussed at pages 12-15 and 40-42 of the transcript of oral argument and in footnote 14 of petitioner's brief on the merits." 11/2/18 Order 1. In those passages, petitioner suggests that, even if 42 U.S.C. 1983 requires the plaintiff to allege a completed violation of the Takings Clause, a municipality violates the Takings Clause whenever it regulates in a manner that takes private property for a public use without admitting a taking has occurred, regardless of whether reasonable, certain, and adequate procedures exist for a property owner to obtain just compensation for that taking. The Court should not hold that the Takings Clause is violated any time the government fails to admit that its conduct has effected a taking within the meaning of the Fifth Amendment.

"As its text makes plain," the Takings Clause "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted). This Court has repeatedly held that a government's taking of property for public use satisfies that condition as long as just compensation is available through a reasonable, certain, and adequate mechanism that existed at the time of the taking. That principle has never depended on whether the government has admitted or contested the existence of a taking in such proceedings. And requiring the government to determine in advance whether its conduct has effected a taking, at the risk of violating the Fifth Amendment and invalidating the government action, would undermine numerous federal regulatory programs and be practically unworkable.

At the same time, however, a property owner in such circumstances should still be able to vindicate her right to just compensation in federal court. Whether or not the government admits a taking has occurred, the property owner is "deprived" of her right to just compensation, within the proper meaning of Section 1983, until the compensation is paid. And, in any event, a property

owner's state inverse-condemnation action may still raise a substantial federal issue that should be resolved in federal court under 28 U.S.C. 1331.

A. When The Property Owner May Obtain Just Compensation Through Reasonable Post-Taking Procedures, A Taking For Public Use Does Not Violate The Takings Clause, Regardless Of Whether The Government Admits A Taking Has Occurred

The parties do not dispute that, as a general matter, the government does not violate the Takings Clause when it takes property for a public use as long as, at the time of taking, a "reasonable, certain and adequate" mechanism exists through which the property owner may obtain just compensation. *Williamson Cnty, Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (quoting *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)). As the government's brief explains, this well-settled principle is consistent with the text and original understanding of the Fifth Amendment, is reflected in this Court's precedents dating back nearly 130 years, and has been extensively relied on by Congress and the Executive Branch in adopting and implementing numerous federal regulatory schemes. See U.S. Amicus Br. 8-16. This principle does not depend on the government's admitting at the time of its action or in subsequent litigation that its conduct has taken property, as long as adequate procedures ensure that, *if* property is taken, just compensation is paid.

1. a. At oral argument, Justice Gorsuch observed that, when the Court first recognized this principle in *Cherokee Nation*, the statute at issue "acknowledged a duty to pay." Oral Arg. Tr. 40; see *Cherokee Nation*, 135 U.S. at 643 (quoting provision that "full compensation shall be made" to the owner of any property taken under the Act by construction of the railroad) (citation omitted). But the Court's subsequent cases make clear that such an express acknowledgement is not required to comply with the Takings Clause. Rather, it is sufficient for the government to provide a mechanism by which a property owner may assert a claim of taking against the government, and thereby "impliedly promise[] to pay" any compensation that might be due. *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940).

For example, shortly after *Cherokee Nation*, in *Williams* v. *Parker*, 188 U.S. 491 (1903), the Court upheld a Massachusetts statute imposing a height restriction in certain portions of the City of Boston, which the Massachusetts Supreme Judicial Court had "treated * * * as a condemnation" and "a taking for the public use." *Id.* at 504. The Court held that the statute made "adequate provision for compensation" by allowing a property owner to seek compensation from the City for any taking, even though the City had not sought the condemnation and therefore would not be estopped from "deny[ing] its liability" in those proceedings. *Id.* at 503; see *id.* at 504 ("[I]n view of [the ruling by the Massachusetts Supreme Judicial Court] it would be going too far to hold that it is essential that there be a judgment establishing the liability of the city before it can be affirmed that adequate provision for compensation has been made.").

Similarly, in *Hays* v. *Port of Seattle*, 251 U.S. 233 (1920), the Court upheld the constitutionality of a Washington statute that transferred title from the State of Washington to the Port of Seattle, despite the asserted property interests of a contractor who had been hired to excavate portions of the property in exchange for a lien. *Id.* at 238. Although the challenged statute did not recognize that any taking had occurred or provide for compensation, the Court

explained that, "[a]ssuming [the contractor] had property rights and that they were taken" by the Act, separate provisions of Washington law provided "an adequate provision for assured payment of any compensation due" by permitting "any person having a claim against the State to begin an action thereon." *Ibid.*

Then, in *Yearsley*, the Court held that the Secretary of War validly authorized a contractor to build dikes in the Missouri River, even though the Secretary disputed that the action effected any taking of private land. See 309 U.S. at 21-22. The Court observed that, "if the authorized action * * * d[id] constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government ha[d] impliedly promised to pay that compensation and ha[d] afforded a remedy for its recovery by a suit in the Court of Claims" under the Tucker Act. *Id.* at 21. The Court reasoned that the Tucker Act procedures are "as comprehensive as the requirement of the Constitution," despite the fact that the government contended that "there ha[d] been no taking" and undoubtedly would contest liability before the Court of Claims. *Id.* at 22; see *id.* at 22-23 (refusing to review the court of appeals' determination that no taking had occurred).

This Court has employed similar reasoning in numerous cases in which the Court has upheld the validity of federal statutes or executive action alleged to have taken property, without any acknowledgement by Congress or the Executive Branch that the alleged taking had occurred. See *Presault* v. *ICC*, 494 U.S. 1, 14-15 (1990) (National Trails System Act Amendments of 1983); *Ruckelhaus* v. *Monsanto*, 467 U.S. 986, 1018-1019 (1984) (Federal Insecticide, Fungicide, and Rodenticide Act); *Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981) (Executive Order); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 149 (1974) (Regional Rail Reorganization Act of 1973); *Hurley* v. *Kincaid*, 285 U.S. 95, 104-105 (1932) (Mississippi River Flood Control Act). As this Court has explained, "the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy." *Regional Rail Reorganization Act Cases*, 419 U.S. at 149 n.36. And "so long as compensation is available for those whose property is in fact taken, the government action is not unconstitutional." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985).

b. Under these principles, a municipality does not violate the Takings Clause when it adopts a regulatory measure that may constitute a taking of property for a public use, even if it denies that such a taking has occurred, as long as the property owner may still establish the existence of a taking and obtain just compensation through a reasonable, certain, and adequate state inverse-condemnation suit. When compensation is available in this manner, the municipality's action is lawful, and the inverse-condemnation action is a means to recover the compensation that is due if the action is found to constitute a taking. The availability of such an action is reasonably understood, like the Tucker Act, as an "implied[] promise[] to pay" any compensation that is due, and therefore provides all that the Takings Clause requires. *Yearsley*, 309 U.S. at 21.

Such a suit is logically, legally, and constitutionally distinct from an action for damages for *wrongful* conduct, which is a cause of action sounding in *tort*. History illustrates that distinction. See *City of Monterey* v. *Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 715-717 (1999) (plurality opinion) (discussing this history). Historically, a property owner who believed that there was an invasion of his property rights that was unlawful because no compensation was

made available "brought an ordinary common law action of trespass * * * against whomever might be held liable at common law for the occupation or asportation of his property." Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 64-65 (1999) (Brauneis). If the defendant sought to justify his acts by pointing to legislation authorizing them, the plaintiff would contend that the legislation either was void "because it authorized acts that worked a taking of private property, but provided no just compensation," or would be void if so interpreted. *Id.* at 65; see, *e.g.*, *Sinnickson* v. *Johnson*, 17 N.J.L. 129, 144 (N.J. Sup. Ct. 1839); *Thacher* v. *Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501, 502 (1836); *Callender* v. *Marsh*, 18 Mass. 418, 437-438 (1823); *Perry v. Wilson*, 7 Mass. 393, 395 (1811). If the plaintiff prevailed, the court "declared the legislation void" or interpreted the legislation not to authorize the action, and the plaintiff was awarded retrospective damages for the wrongful conduct and sometimes an injunction for the return of his property or similar relief—not just compensation, which the legislature had not authorized. Brauneis 65, 97-98; see *Stevens* v. *Proprietors of Middlesex Canal*, 12 Mass. 466, 468 (1815) ("[I]f the legislature should * * * authorize any * * * destruction or diminution of private property, without affording, at the same time, means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law, against those who should cause the injury, for his damages.").

Toward the end of the 19th century, however, in lieu of an ordinary common law tort action to seek damages and injunctive relief for an unlawful trespass, state courts began recognizing inverse-condemnation actions to directly enforce the right to just compensation itself. See Brauneis 109-115; *e.g.*, *Householder* v. *City of Kansas*, 83 Mo. 488, 495 (1884); *Johnson* v. *City of Parkerburg*, 16 W. Va. 402, 426 (1880). "[A]ided by the growing sense that an owner's action under a just compensation provision was distinct from a common law trespass action," courts in these suits awarded not ordinary trespass damages for past harm and an injunction to prevent future harm, but "permanent damages"—*i.e.*, the full just compensation that the Constitution requires. Brauneis 133; see *City of Denver v. Bayer*, 2 P. 6, 15 (Colo. 1883) ("Unlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit; in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent."); *City of Atlanta v. Green*, 67 Ga. 386, 389 (1881) ("Any damage to property for public use must receive its compensation."); cf. *Ruckelhaus*, 467 U.S. at 1016 ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted).

Modern inverse-condemnation actions under state law—whether based on statute or the common law—continue to serve the same purpose today. The phrase "inverse condemnation" today is simply "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); see, *e.g.*, N.C. Gen. Stat. Ann. § 40A-51(a) (2017) ("If property has been taken by an act or omission of a condemnor * * * and no complaint containing a declaration of taking has been filed the owner of the property[] may initiate an action to seek compensation for the taking."); 26 Pa. Cons. Stat. Ann. § 502(c) (West 2009) ("An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of

viewers substantially in the form provided [for condemnation proceedings]."); *Hawkins* v. *City of Greenville*, 594 S.E.2d 557, 562 (S.C. Ct. App. 2004) ("Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency."); *Commonwealth, Natural Res. & Envtl. Prot. Cabinet* v. *Stearns Coal & Lumber Co.*, 678 S.W.2d 378, 381 (Ky. 1984) ("Inverse condemnation is the term applied to a suit against a government to recover the fair market value of property which has in effect been taken and appropriated by the activities of the government when no eminent domain proceedings are used."). When such proceedings provide a reasonable mechanism to obtain the full measure of just compensation for any property that is in fact taken, they are, like the Tucker Act, "as comprehensive as the requirement of the Constitution," *Yearsley*, 309 U.S. at 22, whether or not the government admits at the outset that any taking has occurred.

2. Adopting a rule that the government violates the Takings Clause whenever it does not admit to a taking, even when it implicitly promises to pay compensation for any taking that has occurred, would significantly undermine Congress's and the Executive Branch's reliance on this Court's longstanding contrary precedent and would be unworkable in practice. Congress has repeatedly relied on this Court's recognition of the Tucker Act as an adequate mechanism for obtaining compensation to avoid "the possibility that the application of a regulatory program [that] may in some instances result in [a] taking" will invalidate the program without expressly acknowledging that such takings may occur. *Riverside Bayview Homes*, 474 U.S. at 128; see U.S. Amicus Br. 15-16; p. 3, *supra*. And Executive Branch officials similarly rely on the availability of Tucker Act procedures to faithfully implement Congress's directives, even when they cannot determine whether a taking will occur, without fear of violating their oaths to uphold the Constitution or subjecting their action to invalidation or injunction. *Ibid.*

As a matter of policy, Congress has required, where possible, that if a federal agency determines that an interest in real property should be acquired by the exercise of the power of eminent domain, it should be done through "formal condemnation proceedings." 42 U.S.C. 4651(8); see 42 U.S.C. 4602(a). But there is a "nearly infinite variety of ways in which government actions or regulations can affect property interests," and "no magic formula" to determine "in every case, whether a given government interference with property is a taking." *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012). As this Court has observed, "[t]his area of the law has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.'" *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (quoting *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). Outside the context of certain physical invasions, it would therefore be impractical for the federal government to always determine in advance whether carrying out a congressionally authorized program in a given case would effect a taking and to institute formal condemnation proceedings. Given the adequate procedures provided by the Tucker Act for obtaining compensation, there is no sound basis for placing federal officials in such an impossible position. For that reason, the Court should not undermine its unbroken precedent that, even where the government disputes that a taking has occurred, "so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional." *Riverside Bayview Homes*, 474 U.S. at 128.

B. A Property Owner Should Nevertheless Be Able To Enforce Her Right To Just Compensation In Federal Court Against A Municipality Regardless Of Whether The Municipality Admits A Taking Has Occurred

Although a local government does not violate the Takings Clause any time it does not admit in advance that a taking has occurred, a property owner in such a case should be able to vindicate her right to just compensation in federal court. See U.S. Amicus Br. 17-34. A property owner's ability to do so similarly should not turn on whether the government admits that a taking has occurred.

1. First, there is no sound basis for making a property owner's ability to enforce her right to just compensation under Section 1983 depend on whether the municipality disputes whether a taking has occurred. Section 1983 provides a cause of action to a person "subject[] * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. 1983. Although the government does not violate the Takings Clause when it does not provide contemporaneous compensation for the taking of property but provides a reasonable, certain, and adequate mechanism to obtain compensation, the property owner is quite literally "depriv[ed] of a[] right[] * * * secured by the Constitution," until the property owner actually receives the compensation guaranteed by the Takings Clause, and should therefore be able to bring an action under Section 1983 in federal court to vindicate that right. 42 U.S.C. 1983; see U.S. Amicus Br. 28-34.

The right that the Fifth Amendment secures is a right to "compensation." U.S. Const., Amend. V; see *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 315 (1987) ("[I]t is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."). That right vests immediately upon the taking of the property, which is why property owners are entitled to interest from the moment the taking occurs until they are paid just compensation. *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933) ("The owner is not limited to the value of the property at the time of the taking; 'he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.'") (citation omitted). Consequently, the property owner is also "deprive[d]" of her right to just compensation from the moment of the taking until she has been paid. And that is true regardless whether a local government admits or denies that it has taken property. In either case, the property owner is "depriv[ed]" of her Fifth Amendment right, 42 U.S.C. 1983, within the meaning of Section 1983, until the compensation is obtained.

2. Similarly, whether a state inverse-condemnation action arises under Section 1331 will not depend entirely on whether the municipality admits that a taking has occurred. Under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), a cause of action created by state law may nevertheless support federal-question jurisdiction under Section 1331 when it "implicate[s] significant federal issues." *Id.* at 312. A federal court has jurisdiction over a state-law cause of action if "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013). As the government's

brief explains, a state inverse-condemnation action that is based on the Fifth Amendment as such will ordinarily satisfy these requirements. See U.S. Amicus Br. 19-27.

In the typical inverse-condemnation case, the government will dispute that a taking has occurred and that question will then be the substantial federal question that creates federal-question jurisdiction. See, *e.g.*, *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 164 (1997); U.S. Amicus Br. 24. If the municipality does not dispute that a taking has occurred, that undisputed question cannot be the basis for federal-question jurisdiction. See *Gunn*, 568 U.S. at 258 (requiring that a federal issue be "actually disputed").

But whether a taking has occurred is not the only "substantial" federal question that may arise in an inverse-condemnation action. Constitutional questions concerning the extent of any taking or how "just compensation" should properly be measured will also present federal questions. Factual questions concerning the fair-market value of the taken property typically would not be "substantial in the relevant sense," because the resolution of such questions will rarely be "importan[t] * * * to the federal system as a whole," *Gunn*, 568 U.S. at 260; cf. *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 701 (2006) (concluding that a "factbound and situation-specific" question of reimbursement did not present a substantial federal question under *Grable*). But other questions that arise could be substantial federal questions that rightly belong in federal court. See, *e.g.*, *Horne v. Department of Agric.*, 135 S. Ct. 2419, 2432 (2015) (considering whether the "enforcement of quality standards can constitute just compensation for a specific physical taking"); *United States* v. *50 Acres of Land*, 469 U.S. 24, 26 (1984) (considering "whether a public condemnee is entitled to compensation measured by the cost of acquiring a substitute facility if it has a duty to replace the condemned facility"); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 (1973) (considering how to measure just compensation for the taking of a leasehold with no right to renewal). There is no reason to categorically exclude such cases from federal court solely because the municipality does not dispute the takings question.

I would appreciate it if you would circulate this letter to the Members of the Court.

Sincerely,

Noel J. Francisco
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cc: See Attached Service List

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