U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

December 21, 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:

In the government's November 30 letter brief in the above-captioned case, the government explained that, in its view, the Court should not hold that the Takings Clause is violated any time the government does not admit that its conduct has effected a taking of private property for a public use. In simultaneous letter briefs, respondents agreed, but petitioner did not. Petitioner contends that "when a local government invades property without condemning it or otherwise formally admitting that it is taking property and owes compensation, a Takings Clause violation arises." Pet. Supp. Br. 1 (footnote omitted). She argues that such a rule follows from the "traditional takings claim accrual standards" and this Court's cases holding that 42 U.S.C. 1983 does not require the exhaustion of state remedies. Pet. Supp. Br. 6; see *id.* at 1-7; see also Pet. Supp. Reply Br. 1-4.

The government agrees with much of what petitioner asserts in her supplemental filings. We acknowledge, of course, that a government may take property through regulatory measures short of formal condemnation. U.S. Amicus Br. 16. We agree that a property owner's Fifth Amendment right to just compensation vests at the moment such a taking occurs. *Id.* at 31. We agree that requiring a property owner to pursue a state inverse-condemnation action in state court before (or in lieu of) attempting to vindicate her federal constitutional right to just compensation in federal court is in significant tension with the general rule that exhaustion of state remedies is not a prerequisite to a Section 1983 suit. *Id.* at 32. And for that reason, among others, we agree that a property owner who alleges that a local government's conduct has taken her property, including petitioner herself, should be able to press her takings claim in federal court as soon as the taking occurs without first seeking compensation from a state court. *Id.* at 17-34.

The government parts ways with petitioner, however, in one critical respect—namely, whether a taking *violates* the Taking Clause if the government does not "formally admit[] that it is taking property." Pet. Supp. Br. 1. Such a rule would be inconsistent not only with *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), but with more than a hundred years of this Court's precedents. It is not supported by the text or history of the Fifth

Amendment. It would be unworkable in practice. And in light of the straightforward statutory arguments, the Court need not (and therefore should not) adopt such a constitutional rule to ensure that property owners, including petitioner, may vindicate their right to just compensation in federal courts. See U.S. Supp. Br. 6-7. Petitioner's arguments to the contrary lack merit.

1. Petitioner contends that, prior to *Williamson County*, "it was understood that an invasion of property occurring without the issuance of some formal compensatory guarantee * * * was immediately actionable in federal court as an unconstitutional taking." Pet. Supp. Br. 4 (emphasis omitted); see *id.* at 4-6. But the cases on which she relies establish only that the *right to compensation* vests immediately upon the taking of private property—not that a taking that triggers that right necessarily violates the Constitution if it is not accompanied by formal condemnation or other "formal[] admi[ssion]" of liability. *Id.* at 1.

a. In *United States* v. *Dickinson*, 331 U.S. 745 (1947), for example, the Court considered whether a property owner could bring a Tucker Act suit seeking compensation for the government's flooding of his land, including a portion of the submerged land that he later successfully restored. *Id.* at 751. The Court determined that the owner could seek compensation for the entire flooded area because the owner's reclamation did not "change[] the fact that the land was taken when it was taken and an obligation to pay for it then arose." *Ibid.* The Court did not hold that the government's decision "to bring about a taking by a continuing process of physical events," rather than "to condemn land," rendered the taking unconstitutional. *Id.* at 749.

Similarly, in *United States* v. *Dow*, 357 U.S. 17 (1958), the Court observed again that "the act of taking * * * gives rise to the claim for compensation and fixes the date as of which the land is to be valued." *Id.* at 22. But, as in *Dickinson*, the property owner was able to pursue that claim for compensation under the Tucker Act, and the Court did not suggest there was anything constitutionally problematic about that scheme. *Id.* at 21. The Court similarly made no such suggestion when it repeated the same observations in dicta in *United States* v. *Clarke*, 445 U.S. 253 (1980), and *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984). See *Clarke*, 445 U.S. at 258 ("[T]he usual rule is that the time of the invasion constitutes the act of taking, and '[i]t is that event which gives rise to the claim for compensation.'") (quoting *Dow*, 357 U.S. at 22) (second set of brackets in original); *Kirby Forest*, 467 U.S. at 5 (stating that when "the United States * * * physically enter[s] into possession" of privately owned land, "the owner has a right to bring an 'inverse condemnation' suit to recover the value of the land on the date of the intrusion by the Government") (citing *Dow*, 357 U.S. at 21-22).

Those decisions establish that the "obligation to pay" for a lawful taking arises at the time of the taking, *Dickinson*, 331 U.S. at 751—a proposition with which the government fully agrees. See U.S. Supp. Br. 6. That constitutional right to compensation is why a property owner whose property has been taken by the United States may bring a claim for compensation "founded * * * upon the Constitution" under the Tucker Act, 28 U.S.C. 1491(a)(1). It is also why the government believes that a property owner is "depriv[ed]" of a[] right * * * secured by the Constitution," within the meaning of 42 U.S.C. 1983, from the moment of the taking until just compensation is obtained. But the fact that a person has a constitutional right to compensation for a lawful taking does not establish that a constitutional violation occurs—as long as, at the time of the taking, just

compensation is available through a reasonable post-taking mechanism. See U.S. Amicus Br. 8-16; U.S. Supp. Br. 2-5.

b. Petitioner's remaining authorities also do not support her theory. *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872), was a diversity case asserting a state-law "trespass on the case" claim against a private company. *Id.* at 167. The Court held that the defendant could not rely on state statutes purportedly authorizing its actions because those statutes violated the Wisconsin Constitution's just-compensation clause. See *id.* at 176-181. But that was not because the State did not admit that a taking had occurred; it was because no "statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands." *Id.* at 176. The footnote in *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978), referred to the same type of common-law trespass suits. See *id.* at 687 n.47 (citing *Sumner* v. *Philadelphia*, 23 F. Cas. 392 (C.C. E.D. Pa. 1873) (No. 13,611)); *Sumner*, 23 F. Cas. at 392 ("This is an action on the case."); see generally U.S. Supp. Br. 3-4 (discussing similar common-law suits).

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 227 U.S. 278 (1913), is even further afield. That decision held that a state official may not escape liability for a federal constitutional violation by claiming that his conduct violated state law and thus was not state action. See *id.* at 288-289. The Court did not address when a Fifth Amendment violation occurs. *Cuyahoga River Power Co.* v. *City of Akron*, 240 U.S. 462 (1916), and *Mosher* v. *City of Phoenix*, 287 U.S. 29 (1932), are the same. See *Cuyahoga River*, 240 U.S. at 464 (concluding that actions purportedly performed under state law are "to be regarded as the action[s] of the State," and remanding to the district court to determine "[w]hether the plaintiff has any rights that the City is bound to respect") (citing *Home Telephone*); *Mosher*, 287 U.S. at 31-32 (same).

2. In fact, for more than a century, this Court has uniformly and repeatedly held that the government does not violate the Takings Clause when it provides just compensation for a taking of property for public use through a "reasonable, certain and adequate" post-taking mechanism—whether or not the government formally admits that a taking has occurred. U.S. Supp. Br. 2 (citations omitted); see *id.* at 2-3 (collecting authorities). Petitioner's attempt to distinguish those decisions is unpersuasive.

Petitioner contends (Supp. Reply Br. 2-3) that *Williams* v. *Parker*, 188 U.S. 491 (1903), is consistent with her rule because the state law there provided that "[a]ny person sustaining damage or loss in his property by reason" of the height limitation could recover those damages or loss from the City of Boston. *Id.* at 492 (citation omitted).* But the salient point is that the City itself "refuse[d] to pay any damages unless and until it is held liable therefor in another proceeding." *Id.* at 502. In that respect, the case mirrors this one, in which the State has provided a mechanism by which a property owner may seek compensation from a municipality for an alleged taking, but respondent the Township has refused to pay compensation until it is determined through the state inverse-condemnation procedures that a taking has occurred. Just as the statute in *Williams* made "adequate provision for compensation," despite the City's denial of liability, *id.* at 503, the

* Petitioner characterizes (Supp. Reply Br. 2) this provision as "*acknowledg[ing] that [the Act] caused a taking,*" but even in this Court, Massachusetts maintained that "[t]he act was passed under the police power * * * and compensation was unnecessary." *Williams*, 188 U.S. at 498.

Pennsylvania inverse-condemnation procedures make adequate provision here to avoid a constitutional violation.

Petitioner insists (Supp. Reply Br. 3) that *Hays* v. *Port of Seattle*, 251 U.S. 233 (1920), is not a takings case at all, but a "Contracts Clause case." But there were two questions in *Hays*. See *id.* at 234. Although the Court broadly described the second question as whether the law "depriv[ed] complainant of property without due process," the Court's holding makes clear that it was specifically addressing the requirements imposed on the State by the incorporation of the Takings Clause through the Due Process Clause: "Assuming [the plaintiff] had property rights and that they were *taken*, it clearly was done for a *public purpose*, and there was adequate provision for *compensation*." *Id.* at 238 (emphases added). That is precisely how the case has been understood since. See, *e.g.*, *Hurley* v. *Kincaid*, 285 U.S. 95, 104, 105 n.4 (1932) (citing *Hays* as a takings case); *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589, 597 n.7 (1931) (same); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 677 (1923) (same).

Finally, petitioner claims (Supp. Reply Br. 3-4) support from the Court's numerous cases recognizing that federal statutes that effect a taking do not violate the Takings Clause because any compensation due may be obtained through the Tucker Act. Petitioner rightly observes (*id.* at 3) that a Tucker Act claim generally "is viable as soon as [the] government invades a property interest without condemning it" or providing a separate "statutory compensation guarantee." But petitioner misconceives the nature of that claim when she asserts that the Tucker Act provides "a reasonable post-taking method for remedying an *unconstitutional* taking." *Id.* at 4 (emphasis added). When the government provides just compensation through a reasonable post-taking mechanism like the Tucker Act, the "action which constitutes the taking of property is within the constitutional power." *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940). That is why, for example, the Court does not narrowly construe federal law to avoid a taking "if compensation will in any event be available in those cases where a taking has occurred." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985); see *ibid.* ("Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty."). The government's "implied[] promise[] to pay" compensation, *Yearsley*, 309 U.S. at 21, renders constitutional federal statutes that "may in some instances result in the taking of individual pieces of property," *Riverside Bayview Homes*, 474 U.S. at 128—even when the United States denies liability and, as a result, the property owner must "prove a taking requiring compensation" in her Tucker Act suit, Pet. Supp. Reply Br. 2 n.2 (emphasis omitted). The same is true of state inverse-condemnation procedures that provide a reasonable mechanism for property owners to obtain just compensation for takings by local governments. See U.S. Supp. Br. 3-5.

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

Sincerely,

Noel J. Francisco
Solicitor General

cc: See Attached Service List

17-0647
KNICK, ROSE MARY
TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

JOHN MICHAEL BAKER
GREENE ESPEL, PLLP
222 SOUTH NINTH STREET
SUITE 2200
MINNEAPOLIS, MN 55402
612-3738344
JBAKER@GREENEESPEL.COM

MICHAEL M. BERGER
MANATT, PHELPS & PHILLIPS, LLP
11355 WEST OLYMPIC BLVD.
LOS ANGELES, CA 90064-1614
310-312-4185
MMBERGER@MANATT.COM

TIMOTHY S. BISHOP
MAYER BROWN LLP
71 SOUTH WACKER DRIVE
CHICAGO, IL 60606-4637
312-782-0600
TBISHOP@MAYERBROWN.COM

J. DAVID BREEMER
PACIFIC LEGAL FOUNDATION
930 G. STREET
SACRAMENTO , CA 95814
916-419-7111
JBREEMER@PACIFICLEGAL.ORG

ANTHONY THOMAS CASO
CENTER FOR CONSTITUTIONAL
JURISPRUDENCE
JOHN C. EASTMAN
ONE UNIVERSITY DRIVE
ORANGE, CA 92866
877-855-3330
CASE@CHAPMAN.EDU

JAMES L. HIRSEN
505 S. VILLA REAL DRIVE,
SUITE 208
ANAHEIM HILLS , CA 92807
714-283-8880
JAMES@JAMESSHIRSEN.COM

TIMOTHY SALO HOLLISTER
SHIPMAN & GOODWIN LLP
ONE AMERICAN ROW
HARTFORD, CT 06103-2819
860-251-5601
THOLLISTER@GOODWIN.COM

BRUCE LEROY INGRAM
VORYSM SATERM SEYMOUR AND PEASE,
LLP
52 E. GAY STREET
COLUMBUS, OH 43215
614-464-6480
BLINGRAM@VORYS.COM

DEBALA A. JANARDAN
NATIONAL ASSOCIATION OF HOME
BUILDERS
1201 15TH STREET, N.W.
WASHINGTON, DC 20005
202-266-8200
DJANARDAN@NAHB.ORG

SCOTT A. KELLER
SOLICITOR GENERAL
PO BOX 12548 (MC 059)
AUSTIN, TX 78711-2548
512-936-1700
SCOTT.KELLER@OAG.TEXAS.GOV
512-474-2697(Fax)

KATHRYN E. KOVACS
RUTGERS LAW SCHOOL
217 N. 5TH STREET
CAMDEN , NJ 08102
856-225-6771
KATHRYN.KOVACS@RUTGERS.EDU

MARK JOSEPH KOZLOWSKI
MARSHALL DENNEHEY WARNER COLEMAN
AND GOOGIN
50 GLENMAURA NATIONAL BOULEVARD
MOOSIC, PA 18507
570-496-4667
MJKOZLOWSKI@MDWCG.COM

TANYA D. MARSH
WAKE FOREST SCHOOL OF LAW
1834 WAKE FOREST ROAD
WINSTON-SALEM, NC 27109
336-758-6059
MARSHTD@WFU.EDU

JULIE NEPVEU
AARP FOUNDATION
601 E STREET, N.W.
WASHINGTON, DC 200049
202-434-2060
JNEPVEU@AARP.ORG

JOHN PAGLIARO
NEW ENGLAND LEGAL FOUNDATION
150 LINCOLN STREET
BOSTON, MA 02111
617-695-3660
JOHNPAGLIARO@NELFONLINE.ORG

R. S. RADFORD
THE RADFORD CENTER FOR LAW, HISTORY
& ECONOMICS
909 W. 8TH STREET
DAVIS, CA 95616
530-312-4908
RSRADFORD@GMAIL.COM

NICOLE U. RINKE
STATE OF CALIFORNIA DEPARTMENT OF
JUSTICE
1300 I STREET
SACRAMENTO, CA 94244
916-210-7797
NICOLE.RINKE@DOJ.CA.GOV

TERESA FOCLEM SACHS
MARSHALL DENNEHEY WARNER COLEMAN
& GOGGIN
2000 MARKET STREET,
SUITE 2300
PHILADELPHIA , PA 19103
215-575-2000
TFSACHS@MDWCG.COM

RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVE., NW
WASHINGTON, DC 20036
202-588-0302
RSAMP@WLF.ORG

ILYA SHAPIRO
CATO INSTITUTE
1000 MASS. AVE. N.W.
WASHINGTON, DC 20001
202-842-0200
ISHAPIRO@CATO.ORG

ROBERT H. THOMAS
DAMON,KEY, LEONG,KUPCHAK,HASTERT
1003 BISHOP STREET
SUITE 1600
HONOLULU, HI 96813-6452
808-531-8031
RHT@HAWAIILAYWER.COM

PAUL F. UTRECHT
UTRECHT & LENVIN, LLP
109 STEVENSON STREET,
FIFTH FLOOR
SAN FRANCISCO, CA 94105
415-357-0600

LORI HALSTEAD WINDHAM
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 NEW HAMPSHIRE AVE, NW
SUITE 700
WASHINGTON, DC 20036
202-349-7202
LWINDHAM@BECKETLAW.ORG

MATTHEW D. ZINN
SHUTE, MIHALY & WEINBERGER LLP
396 HAYES STREET
SAN FRANCISCO, CA 94102
415-552-7272
ZINN@SMWLAW.COM