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December 21, 2018

Honorable Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

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

Dear Mr. Harris:

This letter replies to the supplemental briefs that petitioner and the Solicitor General filed on November 30, 2018, and the reply that petitioner filed on December 6, 2018. Those briefs address petitioner's forfeited argument that an inverse-condemnation proceeding in a state court cannot make "reasonable, certain, and adequate provision for obtaining compensation" for a taking of private property for public use under color of state law. *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U.S. 641, 659 (1890). Respondents and the Solicitor General have shown that this argument lacks merit, and petitioner offers no persuasive rebuttal.

As petitioner concedes, the Just Compensation Clause "does not forbid the Government to take land and pay for it later." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984). See, *e.g.*, Pet. Br. 38 n.14 (arguing that the government must "provide *or guarantee* compensation at the time of the property injury challenged as a taking" (emphasis added)); Pet. Supp. Reply Br. 1 (indicating that a taking effected without concurrent compensation is nonetheless constitutional if the government "acknowledges liability or pledges compensation at that time"). That is an appropriate concession, see Resp. Br. 24–25; U.S. Br. 8–16, but it also undermines the principal argument that petitioner presents in her supplemental briefs.

Petitioner chiefly argues that "an injured party need not pursue a state remedy to create an actionable Section 1983 claim." Pet. Supp. Br. 2. That argument conflates an Article III injury with a constitutional violation. To be sure, the two often co-occur. For example, "a police officer who's engaged in excessive force" injures a victim and commits "a Fourth Amendment violation" at the same time. Oral Arg. Tr. 42:20–22 (Gorsuch, J.). But certain Bill of Rights provisions sever the violation from the injury. See Resp. Br. 32–33. The Just

Compensation Clause is one of them. By allowing the government to take property and pay for it later, the Clause allows an official acting under color of state law to effect an injury—an as-yet-uncompensated impairment of a property interest—without actually or imminently "depriv[ing]" the owner "of any right[] … secured by the Constitution." 42 U.S.C. § 1983. To avert a violation of the Clause at the time of a taking, a State need only make "reasonable, certain, and adequate provision for obtaining compensation." *Cherokee Nation*, 135 U.S. at 659. The Clause then "secure[s]" the "right" of a person whose property was taken to obtain compensation via the reasonable, certain, and adequate state proceeding. 42 U.S.C. § 1983.

The crux of the matter is whether an inverse-condemnation proceeding like that in Pennsylvania is "reasonable, certain, and adequate." It is. Petitioner does not dispute that such a proceeding assures *certain* payment of *adequate* compensation once the State finds that property was taken. See Resp. Br. 26. Nor does she dispute that it is *reasonable* to ask a property owner to affirmatively seek just compensation from the State. Cf. Pet. Supp. Reply Br. 3 ("Takings Clause plaintiffs must use a state collection process … when a local government acknowledges its duty to compensate at the time of invading property."). But petitioner belatedly and wrongly argues that it is *unreasonable* to ask a person seeking money from the State to demonstrate her entitlement to compensation by proving that her property was "taken."[1]

Petitioner asserts that "[i]t is appropriate for local government to bear the minor burden of considering and declaring whether it is taking property." Pet. Supp. Br. 1 n.2. But her only support for that assertion is *Dolan v. City of Tigard*, 512 U.S. 374 (1994), which reaffirmed that "the burden properly rests on" *the property owner* "to prove" particularized injury from "generally applicable … regulations" like the one at issue here. *Id.* at 391 n.8. Pennsylvania's legislature has directed respondent Township of Scott "to secure the health, safety, and welfare of [its] citizens," 53 Pa. C.S. § 65607(1), by "mak[ing] rules and regulations regarding the location, operation and maintenance of cemeteries," *id.* § 66536(a). Petitioner's proposed burden-shifting would place the Township "in [the] impossible position," U.S. Supp. Br. 5, of withholding those regulations until it first investigated "a lot of suspected," J.A. 115, but unrecorded, "backyard burials" throughout its jurisdiction, Pet. Br. 3, many of which are "centuries-old," *ibid.*; and then performed a series of other onerous steps to guard against the possibility, however remote, of an uncompensated taking. See Resp. Supp. Br. 8.

[1] The parties agree that a genuine challenge to the reasonableness, certainty, or adequacy of a State's inverse-condemnation procedure would be a proper subject of a Section 1983 suit. See Resp. Br. 37. But petitioner did not preserve such a challenge. Cf. Pet. Supp. Br. 8 n.11 ("In many states" *other than Pennsylvania*, "the state inverse condemnation process is far more complicated and burdensome."). Even now, petitioner admits the Tucker Act remedy is a "reasonable post-taking method" to recover compensation. Pet. Supp. Reply Br. 4. Yet Pennsylvania's inverse-condemnation remedy is, if anything, *more* generous to landowners than what the Tucker Act affords. See Resp. Br. 10–11.

Petitioner shrugs off that burden, reasoning that "[a] local government can always invade property without pledging compensation or admitting liability" and simply "ignore" any "constitutional concerns." Pet. Supp. Reply Br. 2. But Township officials cannot adopt that cavalier attitude. They swear an oath to uphold the federal Constitution, see U.S. Const. Art. VI, § 3; 53 Pa. C.S. § 65501, and this Court "will not lightly assume" that any public official so "bound" will act to "infringe constitutionally protected liberties." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). At the same time, however, the Court should not reinterpret the Just Compensation Clause in a manner that would create strong incentives for public officials to engage in unconstitutional behavior.

This Court's Tucker Act jurisprudence does in fact "undercut [petitioner's] argument." Pet. Supp. Reply Br. 1. Like other "incorporated Bill of Rights protections," the right to recover just compensation through a reasonable, certain, and adequate process is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect … against federal encroachment." *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010) (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)). The Tucker Act is a "'reasonable, certain, and adequate' remedial scheme," *Horne v. Dep't of Agric.*, 569 U.S. 513, 526 (2013), notwithstanding that a person must prove that her property was "taken" before the government will pay compensation. Like the Pennsylvania Eminent Domain Code, the Tucker Act contemplates a "a simple suit for just compensation," rather than one seeking "damages for the unconstitutional denial of such compensation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999). See Resp. Br. 31–32. Compare 28 U.S.C. § 1491(a)(1) (conferring jurisdiction over claims "founded upon … the Constitution"), and *United States v. Causby*, 328 U.S. 256, 267 (1946) (noting that a claim is so founded "[i]f there is a taking" without concurrent compensation), with 42 U.S.C. § 1983 (authorizing only claims for "the deprivation of any rights … secured by the Constitution"). The Tucker Act remedy does not redress constitutional violations; by providing a sufficient compensatory mechanism, it ensures that no violation occurs. Pennsylvania's inverse-condemnation remedy serves the same function.

Petitioner also cites *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913), and *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166 (1871), for the proposition that a claim founded upon the Just Compensation Clause need not await state-court proceedings. Pet. Supp. Br. 4. But the property owners in those cases were able to allege *violations* of the Clause because, unlike the Pennsylvania General Assembly in this case, the state legislatures had not authorized state courts to entertain simple suits for just compensation. See *Home Tel.*, 227 U.S. at 281; *Pumpelly*, 80 U.S. at 176. Cf. *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 463–64 (1916) (cited at Pet. Supp. Br. 5) (allowing a federal claim to proceed in the first instance against an allegedly "insolvent" city that "intend[ed] to take [the plaintiff's] property and rights without compensation"). This Court has never per-

mitted a landowner like petitioner who declined the opportunity to file a reasonable, certain, and adequate inverse-condemnation suit in state court to press a claim under Section 1983.

Petitioner rehashes her complaint that a state-court judgment has preclusive effect in a later suit in federal court. Pet. Supp. Br. 9. Yet she never disputes that the Constitution preserves the discretion of a state legislature to empower a state court to decide on behalf of the State whether private property has been "taken" for public use. See Resp. Supp. Br. 2–5. If the judiciary is entrusted with that power—and even if it is not, see *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08 (1991)—preclusion rules may bar re-adjudication of the issue whether property was taken in a later suit alleging a violation of the Just Compensation Clause. But preclusion rules are subject to legislative revision. See Resp. Supp. Br. 4; *Lance v. Dennis*, 546 U.S. 459, 463 (2006) (explaining that the *Rooker-Feldman* doctrine, which prohibits "lower federal courts … from exercising appellate jurisdiction over final state-court judgments," owes its force to 28 U.S.C. § 1257); *Astoria*, 501 U.S. at 108 ("Courts do not … have free rein to impose rules of preclusion … when the interpretation of a statute is at hand."). Petitioner is thus wrong to argue that *Williamson County* prevents Congress from authorizing a lower federal court to conduct meaningful review of that constitutional issue, either in the first instance, see Resp. Supp. Br. 10, or after a state court has entered judgment.

In sum, "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." U.S. Supp. Br. 3.[2] Here, the Township adopted a cemetery regulation that, according to petitioner, "took" her land for public use; the Township denies that such a taking occurred; but petitioner may still establish the existence of a taking and recover compensation through a reasonable, certain, and adequate inverse-condemnation suit in the Lackawanna County Court of Common Pleas. Respondents thus cannot have deprived petitioner of any right secured by the Constitution, and the judgment below should be affirmed.

Respectfully submitted,

Teresa Ficken Sachs
Counsel for Respondents

[2] The Solicitor General presents irreconcilable positions on this score. He begins by arguing at length (and correctly) that "[t]he availability of [an inverse-condemnation] action is reasonably understood … as an 'implied[ ] promise[ ] to pay' any compensation that is due, and therefore *provides all that the Takings Clause requires*." U.S. Supp. Br. 3 (emphasis added). But later, when addressing Section 1983, the Solicitor General argues briefly (and incorrectly) that this same implied promise to pay any compensation that is due cannot "secure" a property owner's "Fifth Amendment right." *Id.* at 6.