NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

RONALD DECOSTER,

Petitioner,

V.

WAUSHARA COUNTY HIGHWAY DEPARTMENT AND
WAUSHARA COUNTY, WISCONSIN

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Are Petitioner's claims under the URA, the Fifth Amendment and 42 U.S.C. §1983 barred by the doctrine of claim preclusion and res judicata, despite the fact that Petitioner never was provided with notice of his right and an opportunity to request attorney fees and costs under the URA, and thus such were never addressed or ruled upon by the state court?

II. Does Petitioner have a right of action under 42 U.S.C. §1983, to enforce his rights under the URA and state law mandating its application, to obtain reasonable attorney fees and litigation costs, as the prevailing party in an inverse condemnation case, in a local government highway project receiving federal funding, which adversely affected his property rights?

LIST OF PARTIES

The caption identifies the only parties in this case: Petitioner Ronald DeCoster and Respondents Waushara County Highway Department and Waushara County, Wisconsin.

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Petitioner Ronald DeCoster respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit, which affirmed a District Court dismissal of Petitioner's claims for relief under the Uniform Relocation Assistance, Acquisition and Real Property Policies Act of 1970 (URA), 42 U.S.C. §4601 and 42 U.S.C. §1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of DeCoster's complaint seeking attorney fees pursuant to the Uniform Relocation Assistance, Acquisition and Real Property Policies Act of 1970 (URA), 42 U.S.C. §4601, *et seq.*, 49 C.F.R. §24.107, Wis. Stats. §32.19(3)(d). That opinion was reported at 908 F.3d 1093 and is reprinted in the appendix. (A-1). The order of the United States District Court for the Eastern District of Wisconsin dismissed DeCoster's complaint and found that the URA does not provide a private right of action, was not reported and is reprinted in the appendix. (A-4). To provide necessary context, DeCoster also provides the Wisconsin Court of Appeals' decision in *Waushara County v. DeCoster*, 2015 WI App 37, 363 Wis. 2d 654 (unpublished). (A-16).

JURISDICTIONAL GROUNDS

This petition arises from the United States Court of Appeals for the Seventh Circuit's November 15, 2018 decision affirming the district court's dismissal of DeCoster's complaint seeking attorney fees.

DeCoster filed a complaint asserting claims under the Uniform Relocation Assistance, Acquisition and Real Property Policies Act of 1970 (URA), 42 U.S.C. §4601, *et seq.*, 49 C.F.R. §24.107, Wis. Stats.

§32.19(3)(d), which recognizes the applicability of the URA, and 42 U.S.C. §§1983 and 1988. The United States District Court for the Eastern District of Wisconsin had jurisdiction pursuant to 28 U.S.C. §§1331 and 1343, plus pendant jurisdiction over the state law claim under 28 U.S.C. §1367.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions relevant to this appeal include the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §4655(a) and (b), 42 U.S.C. §4654(c), 49 C.F.R. §24.107, 42 U.S.C. §1983, and Wis. Stat. §32.19(3). All of these provisions are reprinted in the appendix.

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution reflects the determination of the Founding Fathers and the drafters of the Bill of Rights that people should not be deprived of their property without due process of law, nor shall private property be taken for public use without just compensation. These fundamental constitutional rights are applicable to the states by virtue of the Fourteenth Amendment and decisions of this Court.

In addition to the constitutional underpinnings of DeCoster's claims, Congress has also acknowledged and recognized the rights of

property owners and provided protections for them when their property is taken or adversely affected by federal projects, as well as state and local projects that receive federal funding. These protections and rights were established by the enactment known as the Uniform Relocation Assistance and Land Acquisition Policies Act of 1971 (URA). Congress recognized the adverse effects on property owners arising from federal or federally funded projects and that "relocation assistance policies must provide for fair, uniform, and equitable treatment of all affected persons." 42 U.S.C. §4621(a)(1)-(2).

The policy underlying the URA was to ensure that persons adversely affected by such projects not suffer disproportionate results and to minimize the hardship on them. 42 U.S.C. §4621(b). *See* URA, Pub. L. No. 91-646, §304(c), 84 Stat. 1906. As part of these nationally applicable statutory rights and protections, the URA requires reimbursement of litigation expenses and reasonable attorney fees to property owners like DeCoster, who prevail in inverse condemnation actions. 42 U.S.C. §4654(c) and 49 C.F.R. §24.107. This right applies to individual property owners by virtue of the URA and the fact of the receipt of federal funding for the state and local projects.

The Taking and Stipulation

DeCoster and his wife Nicole DeCoster own land located in Waushara County, Wisconsin. In 2009, the Wisconsin Department of Transportation (WisDOT) authorized a bridge reconstruction project over Alder Creek in Waushara County. It is undisputed that the Project received federal and state funding. The project called for demolishing a narrow and structurally deficient bridge and culvert, replacing it with a wider, modern bridge and culvert system. Part of the project work included construction on and affecting land owned by DeCoster, including displacement of a 300-foot long fence that was maintained, which was affixed to the land. DeCoster's land and fence were adversely affected and displaced by the project.

To complete the project, Waushara County issued a certification to WisDOT stating that all persons affected by the project had been notified and appropriate arrangements had been made, including obtaining authorization for its use of a right-of-way that affected DeCoster's property. The County issued this certification without providing DeCoster advance notice and due process, contrary to the process followed with other property owners who owned land adjacent to or affected by the project and contrary to the notice requirements of the URA. Waushara County and WisDOT never provided DeCoster with a pamphlet or any other notice explaining a property

owner's rights under the URA. DeCoster received no notice that the URA was applicable to this project.

In early 2010, Waushara County contacted DeCoster regarding its belief that his fence encroached upon the highway right-of-way. DeCoster disagreed with Waushara County's position, which led the County to file a lawsuit against both DeCoster and his wife, demanding that their fence be removed from the property that they owned that was being acquired and occupied without notice or consent or through condemnation proceedings. *Waushara County v. Ronald DeCoster et al.*, Waushara County Circuit Court Case No. 2010-CV-76.

DeCoster filed a counterclaim for inverse condemnation, which his later-retained counsel amended in 2011. After nearly three years of extensive and costly litigation, which DeCoster was unable to avoid due to the County's unmovable position, the County and DeCoster entered into a stipulation agreeing to settle the County's underlying claim and DeCoster's inverse condemnation claim. (A-29-A-33).

Pursuant to paragraph nos. 1 and 5 of the stipulation, DeCoster executed a quitclaim deed giving the County a portion of and rights to his property, in exchange for a payment of compensation for the parcels of land that was quitclaimed. (A-29; A-31). Pursuant to paragraph no. 4 of the stipulation, the County quitclaimed any easement rights for

highway right-of-way purposes to DeCoster. (A-28). Paragraph no. 6 of the stipulation called for, and was contingent upon, the County completing additional ditch installation work at some point in the future, and also gave DeCoster the ability to press future claims for additional takings in the event such drainage work was not completed. (A-31).

Paragraph no. 2 of the stipulation provided that the County's acquisition of part of DeCoster's property was a "taking" for purposes of determining litigation expenses under Wis. Stat. §32.28, "as if [DeCoster] had received a judgment as a condemnee" under that statute. (A-30). Paragraph no. 2 left open for decision by the Waushara County circuit court judge the issue of recovery of litigation expenses incurred by DeCoster that may be awardable under Wis. Stat. §32.28. (*Id.*).

The stipulation is silent about and did not address or notify him of the provisions or his rights under the URA or Wis. Stat. §32.19(3)(d). The Wisconsin statute mandates that a condemnor (Waushara County) "*shall, in addition to any payment* under pars. (a) to (c), *make any additional payment required to comply with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC 4601 to 4655, and any regulations adopted thereunder.*" Wis. Stat. §32.19(3)(d) (Emphasis added). The stipulation referenced the right to seek costs and litigation expenses under a different state eminent domain

statute, Wis. Stat. §32.28, but does not mention or address the applicability of the URA. (A-29; A-33).

The stipulation did not contain language affirmatively releasing Waushara County from any and all claims, past, present or future, whether known or unknown. (*Id.*). It certainly did not expressly release the County from any claims under the URA and section 32.19 for reimbursement of litigation expenses and reasonable attorney fees, which shall include additional payment that may be due under the URA, if the state court decided not to award DeCoster reasonable attorney fees and litigation costs incurred. (*Id.*).

When DeCoster sought reimbursement of his attorney fees and litigation expenses in the state court, pursuant to the stipulation, the County vigorously opposed the amount of fees requested and engaged in prolonged litigation over Petitioner's request for reimbursement of attorney fees incurred and litigation costs. Per the state court's order, the DeCosters submitted an itemization of litigation expenses and reasonable attorney fees actually incurred, for review and response by the County's counsel. The County took the position that the amounts sought were excessive. Because the parties could not agree upon an amount, the court set the matter for an evidentiary hearing and briefs were submitted. At no time during the evidentiary hearing, and in none of the briefs and submissions to the circuit court, did either party reference or address the URA,

its applicability and its requirements or its requirement of reimbursement of litigation expenses and reasonable attorney fees.

The Wisconsin Fee Litigation

The issue of attorney fees and costs was presented to the circuit court; however, that court never addressed the URA's requirement that reimbursement for litigation expenses and reasonable attorney fees must be made to a property owner who, like DeCoster, prevails in an inverse condemnation case, whether by judgment or settlement.

The DeCosters never were informed of or notified -- directly, through legal counsel or through the circuit court -- that agreeing to the stipulation superseded, precluded or constituted a waiver of their rights under the URA. They never were advised that signing the agreement could limit or extinguish their right to seek recovery of the full amount of their litigation expenses and reasonable attorney fees actually incurred. The DeCosters did not waive or forego their right to request and recover litigation expenses and attorney fees under the URA expressly in the stipulation and never intended to waive those rights.

When DeCoster sought to recover attorney fees and litigation expenses in the circuit court pursuant to the stipulation, Waushara County vigorously opposed the amount of fees requested and engaged in

prolonged litigation over DeCoster's request for reimbursement of attorney fees and litigation costs. Per the circuit court's order, DeCoster submitted an itemization of litigation expenses and reasonable attorney fees actually incurred, for review and response by the County's counsel. The County took the position that the amounts sought were excessive. Because the parties could not agree upon an amount, the court set the matter for briefing and an evidentiary hearing. At no time during the evidentiary hearing, and in none of the briefs and submissions to the circuit court, did either party reference or address the URA, its applicability and requirements, or, specifically, its requirement for reimbursement of litigation expenses and reasonable attorney fees.

At the 2013 hearing on DeCoster's reimbursement request, his attorneys testified as to the purpose and reasons for the fees and costs incurred, as they related to the County's acquisition of the land, the inverse condemnation and extensive litigation surrounding same, and the necessity and reasonableness of their litigation expenses and attorney fees claimed given the County's vigorous opposition. DeCoster also presented expert testimony on the reasonableness of the litigation expenses and attorney fees claimed. The expert testified that the claimed amount of $99,475.25 of billed attorney fees (through early 2013), $8,128.06 in costs, and $2,377.00 in client-paid costs, were reasonable and appropriate for the legal work undertaken in the

circuit court case, given the stance the County took in vigorously litigating the case. The expert opined that the reimbursement request was reasonable. The County called no experts and presented no evidence rebutting the testimony presented by DeCoster that the attorney fees were reasonable and actually incurred because of the proceedings or their calculation of fees under a lodestar analysis.

After considering the parties' briefs and arguments, which, again, did not refer to or address the URA or caselaw, the circuit court applied on Wis. Stat. §32.28, not the URA and not Wis. Stat. §32.19. The circuit court awarded DeCoster only $31,560.91 as reimbursement for litigation expenses, nowhere near the sum actually incurred.

DeCoster appealed the circuit court's decision to the Wisconsin Court of Appeals, which denied relief. That appeal was limited to application of the general eminent domain statute, Wis. Stat. §32.28, and did not address or consider the URA or Wis. Stat. §32.19. The Wisconsin Supreme Court subsequently denied DeCoster's petition for review.

The Federal Fee Litigation

After the state court appeals, DeCoster discovered the existence of the URA and saw it was applicable to the federally funded project that affected his land. He then sought relief in federal court, seeking adequate reimbursement of his litigation

expenses and reasonable attorney fees as required under the URA.

In granting Waushara County's motion for summary judgment, the district court determined that DeCoster did not have a right to reimbursement under the URA because the URA did not create a private right of action under 42 U.S.C. §1983 for citizens adversely affected by state action in derogation of their rights under federal law. *DeCoster v. Waushara County Highway Department and Waushara County, Wisconsin,* (Dkt. No. 17-C-1623, E.D. Wis. May 31, 2018. (A-4 to A-15). The district court relied on *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), which held that absent text and structure indicating a Congressional intent to create individual rights, no basis for a private suit exists. (A-10). *Gonzaga*, however, did not involve an interpretation of the URA, and the district court acknowledged that the Seventh Circuit had not yet addressed whether a private right of action exists to enforce rights granted under the URA. (*Id.*). The district court also relied on a Fifth Circuit decision and an unpublished Wisconsin Court of Appeals decision to support its conclusion that DeCoster had no private right of action. (A-9, A-11-A-12).

The district court further held that to the extent DeCoster sought relief under the URA in conjunction with his state claim under Wis. Stat. §32.19(3)(d), that claim is precluded by the state court judgment. The court determined DeCoster had no

right to seek relief under the URA through a federal court action after the final judgment in state court, even though the state court never was advised of, never considered, and never applied the URA in reaching its decision. (A-12-A-15).

The Seventh Circuit's Ruling

The Seventh Circuit did not address the merits of DeCoster's appeal vis-a-vis whether a private right of action exists under 42 U.S.C. §1983 to enforce the federal statutory right of a prevailing property owner in an inverse condemnation proceeding involving a federally funded state project, to be reimbursed for litigation expenses and reasonable attorney fees under the URA. Instead, the Seventh Circuit determined that DeCoster's federal action was barred by the doctrine of claim preclusion (also known as *res judicata* or merger and bar). Relying on the RESTATEMENT (SECOND) OF JUDGMENTS §27, the court held that the initial state court decision extinguished DeCoster's rights to any and all remedies against Waushara County, including remedies under the URA. The court reached that decision even though DeCoster received no notice of the existence of his rights and remedies under the URA and the URA were never raised, considered or addressed by any party or judicial body during the state court proceedings. (A-1-A-3).

REASONS FOR GRANTING THE WRIT

DeCoster's petition for a writ of certiorari should be granted as it meets the criteria for discretionary review under the following sections of U.S. Supreme Ct. Rule 10. The Seventh Circuit's decision is "in conflict with the decision of another United States court of appeals on the same important matter" and "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power…." Rule 10(a). In addition, the Seventh Circuit's opinion involves "an important question of federal law that has not been, but should be, settled by this Court…." Rule 10(c).

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE DENIAL OF DECOSTER'S RIGHT TO DUE PROCESS AND FAIR NOTICE.

The district court addressed both whether URA created a private right of action under section 1983 for citizens adversely affected by state action in derogation of their rights and the County's claim and issue preclusion arguments. The Seventh Circuit, however, focused solely on the County's claim preclusion argument in affirming the district court's ruling against petitioner.

As this Court discussed in *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008), the preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata." Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine,* 532 U.S. 742, 748 (2001). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.,* at 748-49.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). Res judicata should not apply in this case to bar DeCoster from seeking redress under federal law as he was not informed or otherwise made aware of the applicability of URA so that he could adequately assert and protect his rights in the state court

proceeding. As this Court stated in *Richards v. Jefferson County,* 517 U.S. 793, 799 (1996): "The right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

The notice requirement not only arises under DeCoster's right to constitutional due process and fundamental fairness, but also under the URA and its regulatory provisions. The URA and its regulations mandate when taking action in a federally financed project that affects the property of another, a governmental body must provide adequate notice to the property owner. This mandatory notice would necessarily include notice of the property owner's right to reimbursement of attorney fees and litigation costs for prevailing in or settling an inverse condemnation action, as petitioner did in the state court case. *See*, 49 C.F.R. §§24.5 and 24.107.

The problem in this case, which DeCoster contends requires an exception to strict application of the claim preclusion, res judicata and collateral estoppel, is that DeCoster never received any notice whatsoever from the County or during the state court proceedings as to the applicability of the URA and its fee and litigation cost reimbursement provisions. As a result, he did not have the information necessary for him to understand his rights or to exercise his right to

obtain reasonable attorney fees and litigation costs under the URA. The state court never knew or had before it a claim under the URA, never afforded an opportunity for DeCoster to be heard on the applicability and impact of the statute and 49 C.F.R. §24.107; therefore, its decision did not discuss that issue.

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his property." *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972). The *Fuentes* Court continued:

> The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

Id.

If a person has no notice as to the existence of a right in a specific situation, he or she certainly is not able to assert that right or exercise an opportunity to be heard on the application of that right. DeCoster should not be presumed to know the specifics and applicability of a civil statute like the URA. Thus, claim preclusion, res judicata or collateral estoppel should not bar DeCoster from asserting his statutory and constitutional rights, as he has done through this federal court action, once he became aware of the existence of such rights.

Neither the Seventh Circuit nor the district court considered the constitutional defect in the state court proceedings, *i.e.,* that DeCoster received no notice and the state court never had before it an application for fees and costs under the URA. The state court did not consider or make its fee award decision applying the federal law. Thus, DeCoster is in much the same no-notice situation as the trust beneficiaries were in *Mullane* and, like them, he should not be precluded by the doctrines of merger, bar, and/or res judicata from having his case reviewed by this honorable Court.

Similarly, this Court is not bound by res judicata considerations to deny *certiorari* review of the core issue in his case -- does DeCoster have a private right of action under 42 U.S.C. §1983 to seek enforcement of the attorney fees and litigation reimbursement provisions of the URA?

DeCoster is aware that, last Term, this Court had before it a petition for certiorari in *Long v. South Dakota*, 2017 S.D. 78, 904 N.W.2d 358, *cert. denied sub nom. Long v. S. Dakota,* 138 S. Ct. 1698, 200 L. Ed. 2d 953 (2018). The question presented in the certiorari petition in that case was "Are the Petitioners entitled, as successful inverse condemnation claimants, to attorney fees and costs under the URA from a federally assisted state transportation agency?" Long, however, is easily distinguishable because of the key differences between South Dakota and Wisconsin law.

In *Long*, the South Dakota Supreme Court, construed its state statute, S.D. Codified Laws §5-2-18. The court ruled that because the wording of that statute was permissive: the state and its subdivisions "may provide relocation benefits" in federally financed projects, and "may comply with all the acquisition policies" contained in the URA in such projects. Based on the permissive language of the statute, the South Dakota Supreme Court determined the payments were discretionary and not mandated by South Dakota law:

> SDCL 5–2–18 indicates that the State *may* provide relocation benefits and assistance and *may* comply with the URA's acquisition policies. We have "held that the word 'may' should be construed in a permissive sense unless the context and subject matter indicate

> a different intention . . . We hold that the plain language of this statute provides that compliance with the URA is permissive rather than mandatory."

Long, 2017 S.D. 78, ¶16, 904 N.W.2d at 364-365.

Unlike the South Dakota law applicable in *Long,* Wisconsin state law *requires* compliance with the URA and any regulations adopted thereunder, including the opportunity under 49 CFR §24.107 to obtain reasonable and adequate reimbursement for attorney fees and litigation expenses incurred in inverse condemnation cases involving projects receiving federal financial assistance. That mandate is codified at Wis. Stat. §32.19(3), which states, in pertinent part:

> (3) RELOCATION PAYMENTS. Any condemnor which proceeds with the acquisition of real and personal property for purposes of any project for which the
>
> power of condemnation may be exercised, or undertakes a program or project that causes a person to be a displaced person, shall make fair and reasonable relocation payments to displaced persons, business concerns and farm operations under this section. Payments shall be made as follows:

* * * * * *

> (d) *Federally financed projects.* Notwithstanding pars. (a) to (c), in the case of a program or project receiving federal financial assistance, a condemnor shall, in addition to any payment under pars. (a) to (c), make any additional payment required to comply with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 USC 4601 to 4655, and any regulations adopted thereunder.

The South Dakota Court in *Long* recognized and distinguished rulings on this salient point of law by several other state courts, where those states' statutes, just like Wisconsin's, use the operative word "shall" to mandate compliance with the URA by the state and its subdivisions in federally financed projects, rather than South Dakota's "may."

In *McCarran International Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110, 1128-29 (2006), the Nevada Supreme Court affirmed the lower court's determination that a property owner was entitled to an award of attorney fees and costs after prevailing on his claim of inverse condemnation for the taking of his airspace near the municipal airport. Unlike South

Dakota's statute, Nevada's statute, N.R.S. 342.105, refers to the URA, and mandates compliance with the Relocation Act.

In both *Bonanza, Inc. v. Carlson*, 269 Kan. 705, 9 P.3d 541 (2000), and *Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 215 P.3d 561 (2009), the Kansas Supreme Court affirmed an award of attorney fees to prevailing parties in their state inverse condemnation claims. Kansas, like Wisconsin, has adopted the URA by reference, using mandatory "shall" language requiring compliance with the URA, including making additional payments. Wis. Stats. §32.19(3)(d); *Bonanza*, 9 P.3d at 543.

As DeCoster pointed out to both the district court and Seventh Circuit, the Kansas court held in *Bonanza* that the Kansas statutes and Kansas regulations enacted by the Kansas Legislature comply with federal law and required the award sought by the landowners. Under the Kansas regulations, state agencies receiving federal financial assistance are required to reimburse owners for incidental expenses and litigation expenses as provided in the federal statute as a precondition for receiving federal monetary assistance. *Bonanza*, 9 P.3d 541 at 547.

The South Dakota Supreme Court's analysis in *Long* confirms the distinction between the permissive statutory language in South Dakota and the mandatory language in Nevada, Kansas and

Wisconsin. The denial of certiorari in *Long* is inapposite and does not preclude this Court from granting DeCoster's petition for certiorari to address both the circuit split and the important issue presented, *i.e.*, does a property owner have a private right of action under 42 U.S.C. §1983 to enforce his rights under the URA.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THAT LANDOWNERS LIKE DECOSTER HAVE A PRIVATE RIGHT OF ACTION UNDER 42 U.S.C. §1983 TO ENFORCE RIGHTS UNDER THE URA.

The Seventh Circuit did not reach the issue of whether DeCoster has a private right of action to enforce his URA rights under 42 U.S.C. §1983. DeCoster asks this Court to accept review to resolve a conflict in the circuits as to whether a private right of action exists.

The URA recognizes and establishes rights of individual property owners and provides protections for them when their property is taken or adversely affected by federal projects or state and local projects that receive federal funding. As part of these nationally applicable statutory rights and protections, the URA requires reimbursement of litigation expenses and reasonable attorney fees to property owners like DeCoster, who prevail in inverse

condemnation actions. 42 U.S.C. §4654(c) and 49 C.F.R. §24.107.

This provision of the URA reflects Congress's view that successful property owners "should be 'made whole'" for any taking, and that such persons are "not 'made whole' unless [they are] awarded litigation costs" that would otherwise reduce their recoveries. *See* Uniform Relocation Assistance and Land Acquisition Policies—1970, Hearings Before the House Comm. on Public Works on H.R. 14898, H.R. 14899, S. 1 and Related Bills, 91st Cong., 1st & 2d Sess. 322, 1108 (1969-1970).

The URA's litigation-expense provision in section 4654(c) reflects Congress's intent to try to make property owners whole when they are adversely affected by takings, and are successful in inverse condemnation actions arising from takings, as was DeCoster. Unlike many fee-shifting provisions, such as those addressed in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.,* 532 U.S. 598, 503, n.4 (2001), section 4654(c) applies not only when a court enters judgment for the takings or inverse condemnation plaintiff, but also when the government effects a settlement of such claims.

While most fee shifting provisions make awards discretionary, *see*, *e.g.*, 42 U.S.C. §1988(b) ("may allow" award) and 42 U.S.C. §2000e-5(k) (same), section 4654(c) is phrased in mandatory

terms, requiring that courts (when they enter a judgment awarding just compensation) and the Attorney General/government (when it settles a case without a court judgment) "shall determine and award" a sum to "reimburse [the takings] plaintiff" for his reasonable litigation expenses. This provision reflects a strong Congressional policy of establishing rights and preserving for property owners the whole amount awarded to them, as well as reimbursement for reasonable attorney fees and litigation expenses incurred. The intent was to "assure that the person whose property is taken is no worse off economically than before the property was taken." *URA Legislative History,* S.1, Senate Floor Remarks, Congressional Record, Senate, 115 Cong. Rec. 31533 (Oct. 27, 1969), Uniform Relocation Assistance and Land Acquisition Policies Act.

The URA and its requirements apply to state and local governmental units that receive federal funding for their highway and bridge construction and repair projects, by virtue of the federal statute and the state government's agreement to follow the URA's requirements as a condition for receiving the federal funding. Many states, including Wisconsin, have enacted state statutes recognizing this relationship and duty to comply with the requirements of the URA. Wisconsin state law requires compliance with the URA, and any regulations adopted thereunder, including the ability for a property owner under

section 4654(c) and 49 C.F.R. §24.107 to obtain reasonable reimbursement for attorney fees and litigation expenses incurred in inverse condemnation cases involving state and local projects receiving federal funding. Wis. Stats. §32.19(3)(d).

DeCoster's argument in support of this Court accepting certiorari review of the lower federal court decisions is that Waushara County, a local government unit of the State of Wisconsin, accepted federal money for the repair and construction of highways and bridges. By doing so, they agreed to comply with the URA. 42 U.S.C. §4655(a) 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.

Waushara County and the State of Wisconsin made such assurances to federal authorities but, in reality, did not comply with the requirements of the URA as to DeCoster. As discussed above, DeCoster received no notice of the applicability of the URA to the federally funded project affecting his property or of his rights under the URA to reimbursement of litigation expenses and reasonable attorney fees, contrary to the requirement of notice under federal law. 42 U.S.C. §4654(c); 49 C.F.R. §§24.5 and 24.107.

In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 712 (1999), this Court recognized that when the government takes property without initiating condemnation proceedings, it "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." (Quoting *United States v. Clarke,* 445 U.S. 253, 257 (1980)). Even when the government does not dispute its seizure of the property or its obligation to pay for it, the mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner "at a significant disadvantage." *Id.* (quoting *Clarke*, at 258). There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding, and section 4654(c) recognizes, at least implicitly, the added burden by providing for recovery of attorney fees in cases where the government seizes property without initiating condemnation proceedings but not in ordinary condemnation cases.

In *Del Monte Dunes*, this Court held that the property owners' section 1983 claims over the regulatory property taking were cognizable and the decision on those claims was best left to the jury. *Del Monte Dunes*, 526 U.S. at 722. In DeCoster's case, the hard-fought position taken by Waushara County in the inverse condemnation case resulted in years of discovery, motions and expensive litigation,

which expense continued even after the stipulation supposedly settling the case. The County fought vigorously (and successfully) to deny DeCoster adequate reimbursement for his litigation expenses and reasonable attorney fees at the state court level, deftly never raising or addressing the URA's applicability and requirement of adequate reimbursement. That conduct violated DeCoster's statutory rights under the URA as well as his constitutional right to due process, adequate notice and fair compensation under the Fifth Amendment.

In pertinent part, section 1983 provides that every person who, "under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects, or causes to be subjected, any citizen… to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable" to the injured party. A cause of action therefore exists under section 1983 to enforce DeCoster's federal statutory right under the URA to reimbursement for litigation expenses and reasonable attorney fees. Again, this reimbursement is mandated for property owners who prevail in an inverse condemnation case in a federally funded state or local project under section 4654(c), but was not recognized or enforced by any of the courts below.

The Third Circuit Court of Appeals has determined that a private cause of action exists against state officials for violations of the URA under 42 U.S.C. §1983. *Pietroniro v. Borough of Oceanport,* 764 F.2d 976, 980 (3d Cir. 1985*), cert. denied*, 474 U.S. 1020 (1985). The decision was rooted in the absence of a comprehensive enforcement scheme under the URA, which is necessary to guarantee state and local government compliance with the requirements of the Act. *Id.* The *Pietroniro* court noted that the URA was passed to supplement the usual remedy of condemnation for losses incurred as a result of federally funded projects, and is designed "[t]o minimize hardship and assure that individuals will not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole ...." *Id.*

In contrast, the Fifth Circuit held in *Delancey v. City of Austin*, 570 F.3d 590, 593 n.4 (5th Cir. 2009), took the opposite approach, a fact that Waushara County argued and the district court accepted: "[t]he URA does not provide for an express private right of action that would permit DeCoster to proceed against the County on a claim for litigation expenses. *See Delancey v. City of Austin*, 570 F.3d 590, 593 n.4 (5th Cir. 2009)." (A-9). The district court found that although the Seventh Circuit has not yet addressed whether the URA gives rise to a private right of action enforceable under section 1983, it opted for the Fifth Circuit's approach in *Delancey,* as that case was

decided subsequent to this Court's decision in *Gonzaga*. (A-11).

In *Gonzaga,* this Court held that a former university student could not bring a section 1983 suit for alleged violations of the Family Educational Rights and Privacy Act (FERPA) because that statute had an "aggregate focus" and did not contain rights-creating language targeting a specific, identifiable group of individuals. *Gonzaga*, however, did not preclude all section 1983 claims from being brought to enforce federal statutory rights.

Gonzaga does not preclude DeCoster's section 1983 claim, and the district court's ruling, affirmed by the Seventh Circuit, erroneously interprets this Court's rulings in *Gonzaga* and ignores this Court's recognition of the availability of section 1983 relief in *Del Monte Dunes.* This Court stated in *Gonzaga*, that "[s]ection 1983 provides a remedy only for the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States. Accordingly, it is *rights,* not the broader or vaguer benefits or interests, that may be enforced under the authority of that section." *Gonzaga,* 536 U.S. at 283 (emphasis in original).

Thus, to confer a personal right enforceable under section 1983, the federal statute must: "(1) be intended by Congress to benefit the plaintiff,

(2) not be vague and amorphous, and (3) impose an unambiguous binding obligation on the States." *See Blessing v. Freestone,* 520 U.S. 329, 340-41 (1997). In *Gonzaga,* this Court clarified that under the first prong of the analysis, it must be clear that Congress intended to create "rights" under the statute, and not merely "benefits." 536 U.S. at 283.

Under this analysis, the URA clearly and unambiguously does create an individual right of property owners, like DeCoster, who prevail in an inverse condemnation action in a federally funded project, to obtain reimbursement of litigation expenses and reasonable attorney fees incurred. Thus, DeCoster does have a remedy under section 1983 and is not precluded by this Court's ruling in *Gonzaga.*

The approach taken by the Third Circuit in *Pietroniro,* and also by the United States District Court for Utah in *Plumb v. Salt Lake Cty.*, No. 2:13-CV-1113 CW, 2016 WL 2888981 (D. Utah 2016), *appeal dismissed*, No. 17-4005, 2017 WL 3337110 (10th Cir. 2017), is the correct one under this Court's precedent, and under federal statutory and constitutional law. Attorney fees and litigation costs should be reimbursed when an inverse condemnation action falls within section 4654(c), because the individual property owner's right to same is recognized by the URA, which mandates payment of the amount of any final award, along with all costs,

expenses and reasonable attorney fees actually incurred. *Plumb,* 2016 WL 2888981, at *5–6 (citing *inter alia*, *Del Monte Dunes*).

Certiorari review should be accepted in DeCoster's case, as the criteria for acceptance under U.S. Supreme Court Rule 10 are met. The Seventh Circuit's decision conflicts with the Third Circuit's decision in *Pietroniro*, and therefore is "in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). In addition, the district court's ruling that *Gonzaga* precludes section 1983 action to enforce rights clearly established under the URA "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power…." *Id.* In addition, the Seventh Circuit's opinion, affirming that of the district court, as to whether a right of action to enforce clearly established individual rights under the URA exists or is precluded by this Court's *Gonzaga* decision involves "an important question of federal law that has not been, but should be, settled by this Court…." Rule 10(c).

CONCLUSION

For all of the foregoing reasons, DeCoster respectfully urges this Court to grant certiorari review and, ultimately, to reverse the Seventh Circuit's decision and remand to the District Court with instructions to reinstate DeCoster's complaint and to proceed with a determination of his right to attorney fees and litigation costs under the applicable federal law.

Dated this _____ day of February, 2019.

Respectfully submitted,

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By:

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