No. _____

In The

Supreme Court of the United States

MOSES WATTS, SR. & RUBY WATTS,

Petitioners,

v.

ENTERGY ARKANSAS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Court Of Appeals, Division IV

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law by an *ex parte* Circuit Court order enabling an electric utility to seize, without service of notice and without a preliminary hearing, a .95-acre high-power transmission easement across their property.

2. Whether it was a denial of due process for a state's judicial authority to permit a utility operating under the state's eminent domain power to manipulate a delay of service of condemnation process so as to facilitate its *ex parte* seizure of an elderly couple's private property.

3. Whether the Arkansas Court of Appeals denied equal protection of the laws to Petitioners by refusing to adhere to that Court's own admonitions against *ex parte* decision making by upholding the entry of an *ex parte* judgment ordering the seizure of a substantial easement across Petitioners' homestead in the absence of any proof of compelling or exigent circumstances warranting same.

4. Whether petitioners, proceeding *pro se,* were denied due process of law by the Circuit Court's failure *sua sponte* to set aside a jury's award of a mere $1,995 in damages for the utility's *ex parte* seizure of a .95-acre swath of their property, effectively cleaving the remnant acreage from their homestead and awarding nothing in severance damages or for the strip-cutting of timber on the seized parcel.

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CITATION TO OPINION BELOW

The opinion of the Arkansas Court of Appeals is *Entergy v. Moses and Ruby Watts*, 561 S.W.3d 774, 2018 Ark. App. 539 (2018) and is found at App. 1-9 herein. The Supreme Court of Arkansas order denying the Petition for Review was a single page, one-line transmittal by the Clerk in Supreme Court No. CV-18-955 and is found at App. 19 herein.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. The decision of the Supreme Court of Arkansas was issued on January 17, 2019. This Petition, being filed within 90 days thereof, is timely. Rule 13, Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution: ". . . nor shall any state deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

Petitioners Moses Watts and Ruby Watts, nee Clark, are African-American senior residents of rural Jefferson County, Arkansas, who in 2013 acquired title from Ms. Watts' recently deceased brother's estate to a 17.53 acre wooded acreage that had been in her family for more than 50 years and on which petitioners planned to build their home. This lot became the subject of a condemnation complaint ("Application") which respondent filed on June 1, 2015. Eight days later, on June 9th, with no service of the Application or other notification of the lawsuit to petitioners having been made, respondent submitted to the Jefferson County Circuit Court *ex parte* a pre-drafted Immediate Order of Possession empowering it to seize .95 acre of petitioners' homestead, raze the trees and erect a high-powered transmission line. Deposited with the Circuit Clerk was a check for $1,995, an amount opined in an affidavit by one Ferstl, respondent's appraiser, to be "just compensation" for the taking. On June 27, 2017, petitioners were served with summons and copies of the "Application" and the *ex parte* seizure Order by respondent's server with the firm "Covert Connection." Proceeding *pro se*, petitioners filed a Motion for Dismissal of the Application and Rescission of the Order on the grounds that they had received no notice of the pendency of the action before the Order was signed, the same being delivered to them at the same time as the service of the complaint, giving them no time to object to the same or seek a preliminary hearing, which

constituted a denial of their right to due process under the XIV Amendment. The Motion was denied.

Petitioners proceeded *pro se*, except for a short interval with an attorney who abruptly withdrew for no stated reason on June 7, 2017 just days before the scheduled trial. The court granted a short continuance for them to seek other counsel, which they were unable to do, again appearing *pro se* at trial which was held on August 22, 2017 at the conclusion of which a jury awarded them damages of $1,995, the "just compensation" opined by respondent's appraiser, the said Ferstl. Petitioners presented no expert testimony and the court ruled that Ms. Watts, who was acting as the couple's *pro se* attorney, could not testify concerning the property's value or her and her husband's home building plans since she was not expressly named as a grantee on the deed. Nothing was awarded for the clear-cutting of the trees or for the severance of the southern remnant of their property by the power line.

Petitioners continued their search for an attorney, eventually engaging the undersigned who undertook to appeal the case to the Arkansas Court of Appeals on the central issue of denial of due process by the entry of an *ex parte* order of seizure without service of process or otherwise and without a preliminary hearing, and the patent inadequacy of $1,995 as just compensation for the taking, with nothing for severance or forest damage. The appeal was denied on November 7, 2018, the court holding that due process of law does not require service of a condemnation complaint or other notice to property owners before the entry of an *ex parte*

judgment against them seizing their property and that no preliminary hearing on the matter was required. The only required hearing, the Court of Appeals ruled, is on the question of compensation for the easement itself, the 10-day statutory requirement for which was met. The court held that petitioners presented no evidence of severance damage to the remaining property, to which respondent's appraiser found none since, he said, the principal use of the property was for timber growth which would not be adversely affected by the power line. The court noted that the only feasible home site found on the property by Mr. Ferstl was on the northern portion bordering Princeton Pike, which the witness claimed would not be impacted by the power line. The court held that tree damage within the easement itself was not compensable under Arkansas law. There was no reconciliation by the court of its previous criticisms of *ex parte* decision making, an anomaly stressed by petitioners.

A Petition for Review to the Supreme Court of Arkansas was denied by that court on January 17, 2019 in an unsigned single line opinion transmitted by the Clerk. Petitioners hereby appeal from that ruling as well as from the November 17, 2018 decision of the Arkansas Court of Appeals upon which it is based.

REASON TO GRANT THE WRIT AND ARGUMENT

It is contrary to the spirit and purpose of the XIV Amendment to permit public utilities wielding the enormous state power of eminent domain to circumvent normal judicial process to seize a citizen's private property without notice to the citizen and giving him or her an opportunity to object and be heard. Whether or not the facts of the case require a full evidentiary hearing may be determined at the discretion of the forum court. It is well known by counsel practicing in this area – as indeed in most areas of property law dealing with the exercise of government authority – that disputes are more readily resolved in the early stages of such proceedings.

Under Arkansas law, the owner of property condemned for a *highway* easement can challenge the taking in advance. ACA § 27-67-313 provides that, "any defendant desiring to raise *any question* with respect to the validity of taking shall do so by filing a motion to strike the declaration of taking and dismiss the suit." [Emphasis supplied] See also Brill, Law of Damages, Arkansas Practice, Eminent Domain, 2004, p. 346 ("the owner may seek a hearing to challenge the amount of estimated compensation . . . "), citing *Adams v. Arkansas State Highway Commission*, 235 Ark. 808, 363 S.W. 2d 134 (1962). Of course, petitioners knew nothing of the respondent's motion here, until almost three weeks had elapsed since the order granting it was signed by the court so they did not mount a challenge to the taking or the $1,995 lowball estimate.

Some courts require the inclusion of a provision in *ex parte* orders order granting the adversary party a reasonable time to file a motion challenging it before it takes effect, but appellee's order here had no such language. Delayed service of process was undoubtedly one reason for the General Assembly making direct notice mandatory in damage assessment petitions, "giving the landowner at least ten (10) days notice by certified mail . . . of the time and place where the petition will be heard." ACA § 18-15-504. While this statute is directed at petitions for final assessment of damages, petitioners respectfully submit that it should equally apply to the initial seizure deposit as well, since that is often, as here, the amount ultimately awarded and the moment when many defendants, as here, are unrepresented by counsel. Thus there is a blatant inconsistency in the Court of Appeals acknowledgment of the applicability of the XIV Amendment requirement of due process and equal protection, the central tenet of appellants' appeal (and which the Court agrees requires "a right to notice and an opportunity to be heard before a person may be deprived of a significant property interest") and the historical application of those requirements, which the Court then blithely dismisses with the unsupported premise that they need not be followed "in advance of the taking" provided the homeowners were afforded a jury trial on the question of **how much** they should be paid for the property after it was taken – but with no recourse to contest the taking, itself. Nor does the Court address appellants' premise that preliminary hearings upon due notice in such matters often result in negotiated compromise.

Appellee knows that it has to serve landowners such as the Watts with its eminent domain "applications." But it also knows that as soon as they are served they may object, just as did the Watts. A salient fact emerging from the Circuit Court file in this matter is appellee's studious avoidance of providing notice to appellants until the very last minute. The Court's attention is drawn to the first page of appellee's "Application" complaint. This pleading was filed at 2:01 PM the first day of June 2015. The Summons was issued the same day by the Circuit Clerk. Next, the Order which appellee had prepared for Judge Wyatt's signature was signed by him on June 9th. Yet appellants were not served until June 27th, almost a month after the case was filed and 18 days after the Order was signed. All of these activities are taking place at very short distances from each other – indeed except for the Watts home, some 15 miles out Princeton Pike, in the same small courthouse.

The Arkansas Court of Appeals has strongly cautioned concerning the overuse of *ex parte* orders, particularly where the parties are readily identifiable and have already been in contact with each other. In its decision in *Jones v. Jones*, 51 Ark. App. 24, 907 S.W.2d 745 (1995), that court observed:

> "*[E]x parte* decision making is contrary to the basic premise of our judicial system that an adversarial presentation of a controversy will result in a better reasoned, and hopefully correct decision. While divining the truth can be difficult in adversarial proceedings, it is even

> more difficult when a judge has an *ex parte* petition and affidavits suddenly thrust upon him. 51 Ark. App. at 28-29.

See also Professor Marshall Prettyman, "The Persistent Problem of *Ex Parte* Orders, etc.," Arkansas Law Notes 2003, p. 81. The Order of Possession declaring appellee's taking of the property effectively precluded appellants from contesting its interim seizure at trial. The only issue they were permitted to address was the money value of their homestead before and after the taking which, given the exigencies of proceeding *pro se*, they were unable to address with admissible testimony that could contend with that of the practiced Ferstl. As critical examples, an independent appraiser could well have evaluated the lost value of the acreage lost by the effective severance of the bottom of the property by the high-voltage line, as well as the residual effect of the strip cut trace of forest on adjoining acreage. In this regard, it is obvious from the photographs available that trees were felled beyond the confines of the easement granted.

The verdict and judgment limited to the Entergy-appraised amount of $1,995 with nothing added for the severance of the southernmost acreage or the extended strip cut swath of trees across the property was manifestly insufficient. The Court *sua sponte* should have set aside that award, either sending it back to the same jury or ordering a new trial on damages.

CONCLUSION

Appellants were denied procedural and substantive due process of law by having their property seized *ex parte* by appellee without notice and without at least having been able to request a preliminary hearing on the manner and location of the taking and on alternatives that would have avoided a separation of the remaining parcels. The award of a mere $1,995 in damages, with nothing for severance harm or for the overlapped strip cutting of an acre of their homestead was error. Certiorari should be granted and, upon plenary argument, the decision of the Arkansas Court of Appeals and that of the Arkansas Supreme Court affirming it vacated.

Respectfully submitted,

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