No. _____

In the Supreme Court of the United States

PBS COALS, INC. AND
PENN POCAHONTAS COAL, CO., PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION, RESPONDENT

OPINION OF PENNSYLVANIA SUPREME COURT
DECIDED: JANUARY 20, 2021
APPLICATION FOR REARGUMENT
DENIED: MARCH 11, 2021

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Issue 1: **When a State Agency permanently physically occupies a right-of-way and thereby completely blocks physical access to a subsurface owner's recognized, taxable real estate interest in coal, has a compensable taking occurred under the Fifth and Fourteenth Amendments to the U.S. Constitution?**

Suggested Answer: Yes.

Issue 2: **When a permanent physical occupation of land that causes a complete denial of access to a recognized real estate interest has occurred, can a court apply an ad hoc factual inquiry in its takings analysis instead of following a per se physical takings analysis and thereby add a requirement that a mining permit must exist or must be likely to be issued in order for a taking to occur?**

Suggested Answer: No.

Issue 3: **Does the explicit disparate, negative treatment of subsurface estate owners when compared to surface estate owners constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?**

Suggested Answer: Yes.

PARTIES TO THE PROCEEDING

Petitioners PBS Coals, Inc. ("PBS"), and Penn Pocahontas Coal, Co. ("Penn Pocahontas") were the Appellees in the case below.

Respondent Commonwealth of Pennsylvania Department of Transportation ("PennDOT") was the Appellant in the case below.

CORPORATE DISCLOSURE STATEMENT

Petitioner PBS is a wholly owned subsidiary of Mincorp, Inc., which is wholly owned by Mincorp Acquisition Corp, which is wholly owned by Wilson Creek Holdings, which is wholly owned by Corsa Coal Corp, a publicly traded company.

Petitioner Penn Pocahontas has no parent corporations and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

In the Supreme Court of Pennsylvania:
PBS Coals, Inc. v. Dep't of Transportation,
244 A.3d 386 (Pa. 2021), reconsideration denied (Mar. 11, 2021).

In the Commonwealth Court of Pennsylvania:
PBS Coals, Inc. v. Dep't of Transportation,
206 A.3d 1201 (Pa. Commw. Ct.), appeal granted in part, 218 A.3d 373 (Pa. 2019), and rev'd, 244 A.3d 386 (Pa. 2021), reconsideration denied (Mar. 11, 2021).

In the Court of Common Pleas of Somerset County, Pennsylvania:

Case No. 98 Civil 2015, *PBS Coals, Inc. and Penn Pocahontas Coal, Co., Plaintiffs/Condemnees v. Commonwealth of Pennsylvania Department of Transportation, Defendant/Condemnor*.

Final Order Entered: January 19, 2018.

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JURISDICTION

The Supreme Court of Pennsylvania entered its final judgment on January 20, 2021. App. 26a-81a. On January 29, 2021, Petitioners filed timely Applications for Reargument. App. 2a-25a. On March 11, 2021, the Supreme Court of Pennsylvania denied Petitioners' Applications for Reargument. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) to review the final judgment of the highest court of Pennsylvania, and pursuant to Order of this Court dated March 19, 2021, (ORDER LIST: 589 U.S.), Petitioners have timely filed this petition within 150 days from the date of the Supreme Court of Pennsylvania's denial of Application for Reargument.

Constitutional Provisions

United States Constitution, Amendment V ". . . nor shall private property be taken for public use, without Just Compensation"

United States Constitution, Amendment XIV, Section 1 – No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Pennsylvania Constitution, Pa. Const. Art 1 §10 ". . . Nor shall private property be taken and applied to

public use, without authority of law and without just compensation being first made and secured."

Statutes

The Pennsylvania Eminent Domain Code, including 26 Pa. C.S.A. Sections 502(c) and 714, which derives its source from the Fifth Amendment to the United States Constitution and the Pennsylvania Constitution

26 Pa.C.S.A. §502(c)(2)

26 Pa.C.S.A. §504

52 Pa.C.S.A. §1501 et seq

53 Pa.C.S.A. §8819

61 Pa. Code §91.169

STATEMENT OF THE CASE

This case involves a 73 acre coal property (identified by PennDOT as "Parcel 55") which contains approximately one million tons of valuable metallurgical quality coal, all of which is mineable by the surface mining method. *See* App. 171a-172a. The coal is owned by the Petitioners-Appellants together with a surface leasehold interest which includes the right to surface mine the coal and a right-of-way ("the Right-of Way") through adjacent parcels, known as "Parcel 54" and "Parcel 50" that connected Parcel 55 to a state highway known as the "Garrett Shortcut" through adjacent Parcel 50. *See* App. 165a ¶87. Prior to the actions of PennDOT which are the subject of this proceeding, Parcel 55 had no public road frontage; however, in addition to the Right-of-Way, PBS had access from Parcel 55 to Garrett Shortcut directly through Parcel 50, the surface of which was owned by Penn Pocahontas. *See* App. 127a-128a, 133a ¶2, 165a ¶88. In 2010, PennDOT condemned and obtained by Deed in Lieu of Condemnation a strip of land running north-south through the entire lengths of Parcels 54 and 50 for a limited access highway, Route 219, which severed the Right-of-Way through Parcel 54 and the other access to Garrett Shortcut through Penn Pocahontas' Parcel 50. *See* App. 135a ¶6, 165a ¶88. PennDOT then began construction of the new limited access highway. *See* App. 165a ¶89 - 166a ¶90. The Appellants, as a result of PennDOT's permanent occupation of the Right-of-Way and Parcel 50, lost all access to the 73 acre coal tract, Parcel 55. PBS Coals, Inc. v. Dep't of Transportation, 206 A.3d 1201, 1217 (Pa. Commw. Ct.), appeal granted in part, 218 A.3d 373 (Pa. 2019), and rev'd, 244 A.3d 373 (Pa. 2019), and

rev'd, 244 A.3d 386 (Pa. 2021), reconsideration denied (Mar. 11, 2021).(App. 82a-126a).

Penn Pocahontas purchased the coal underlying Parcel 55 in 1971 with the intent to surface mine the coal. *See* App. 171a-172a. and 150a ¶1. However, in 1981, Penn Pocahontas discontinued its mining operations and instead commenced leasing its various coal properties to other mining companies which in turn would mine the coal underlying those properties and pay resulting royalties to Penn Pocahontas. *See* App. 150a¶2-3 . PBS acquired the lease necessary to mine the coal underlying Parcel 55 from Penn Pocahontas (*see* App. 151a ¶¶5-6); whereupon, pursuant to Pennsylvania law, PBS, as lessee of the coal to exhaustion, became the owner of the coal estate while Penn Pocahontas retained the right to receive any resulting royalties. *See* Shuster v. Pa. Turnpike Commission, 149 A.2d 447 (Pa. 1959).

PBS leased the surface estate from the owner of the surface, including the Right-of-Way, in 2006. *See* App. 151a ¶4-6.

On June 14, 2010, the owners of the surface of Parcel 54 conveyed a fee simple interest in a portion of the surface of Parcel 54 to PennDOT by Deed in Lieu of Condemnation, which conveyance severed the Right of Way previously enjoyed by PBS over Parcel 54, and prevented Parcel 54 from being used as a means of access to Parcel 55 from Garrett Shortcut. *See* App.127a-128a; 153a ¶15 -154a ¶16; 192a ¶9-194a ¶20.

On September 28, 2010, PennDOT condemned a fee simple interest in a portion of the surface and coal to the depth of 100 feet below the surface on Parcel 50, which caused the severance of Parcel 50 and prevented Parcel 50 from being used as a means of access to

Parcel 55 from Garrett Shortcut either by the previously existing Right of Way PBS held or by the direct access Parcel 50 previously enjoyed by virtue of abutting Parcel 55 prior to condemnation. *See* App. 135a ¶6; 154a ¶16.

PBS had not yet submitted a surface mining permit application to the Pennsylvania DEP for Parcel 55 when PennDOT informed PBS that PennDOT was going to build the roadway.

Pursuant to Pennsylvania Law, a State Mining Commission ("SMC") was appointed, which had as its sole purpose to determine the amount and value of the coal required for support under the new highway (52 Pa. C.S.A. § 1501; App. 216a-218a); however, the SMC did not have jurisdiction to determine the value of any coal which was isolated by reason of the new limited access highway. Rather, the value of isolated coal is the province of a Board of Viewers under the Pennsylvania Eminent Domain Code ("Pa. Code") 26 Pa.C.S.A. § 504 (App. 213a-214a). The SMC was comprised of a representative of DEP, the Pennsylvania PUC, PennDOT, the President Judge of Somerset County, Pennsylvania, and a mining engineer selected by PBS and Penn Pocahontas. *See* App. 200a-201a and 52 Pa. C.S.A. § 1501 (App. 216a-218a). The SMC heard extensive testimony and unanimously held at Somerset County No. 65 Misc. 2014 that the support coal underlying nearby parcels including Parcel 54(which parcels contained the same two seams of coal as were on adjacent Parcel 55) was legally mineable, determining that it was more likely than not that Petitioners could obtain a surface mining permit. *See* App. 204a. The SMC then determined that the support coal underlying the parcels in that case was very valuable and set damages, after considering

permittability issues, at $3.53 Million to PBS and $500,000 to Penn Pocahontas. *See* App. 204a-206a. In addition, PennDOT instituted *de jure* condemnation proceedings for the isolated coal underlying various of the other coal properties in the near vicinity of Parcel 55 and in which the new highway was to be constructed. These cases are still pending in the Somerset County Court system and are docketed at 147 Civil 2015 (Parcel 50), 145 Civil 2015 (Parcel 54), 146 Civil 2015 (Parcel 56), 260 Civil 2015 (Parcel 58), and 748 Civil 2014 (Parcel 59).

Because the coal estate contained in Parcel 55 was not subject to either the *de jure* condemnation proceedings or the SMC proceedings, PBS and Penn Pocahontas commenced the instant action in the Court of Common Pleas of Somerset County, Pennsylvania, pursuant to the Pa. Code alleging an inverse or *de facto* taking of their coal interests in Parcel 55, which *de facto* taking resulted from PennDOT's severing the Right-of-Way, and the severance of the rights they had to use Parcel 50 as a means of access from Parcel 55 to Garrett Shortcut, because the PennDOT actions constituted a permanent occupation of the land which resulted in the denial of access from Parcel 55 to the public road; i.e., Garrett Shortcut. *See* App. 189a-199a. PennDOT filed preliminary objections, denying that a taking had occurred.

Under Pennsylvania law, the determination of whether or not an inverse or *de facto* taking has occurred is decided at a preliminary objections hearing. *See* 26 Pa.C.S.A,§502(c)(2) (App. 212a) and 26 Pa.C.S.A,§504(d) (App. 214a). The Trial Court insisted, prior to this hearing, and over the objections of Petitioners, that the issue of whether a permit to mine the coal existed or was reasonably likely to be

issued at the time of the taking would be included as part of the hearing on the determination of whether a *de facto* taking had occurred. Petitioners had requested unsuccessfully that the Court limit the evidentiary hearing on PennDOT's preliminary objections to exclude such testimony on the basis that the issue of whether a permit would be granted for the mining of the coal went to the value of the coal which was to be determined at a subsequent Board of Viewers hearing. *See* App. 186a-188a.

At the hearing, PBS elicited testimony and placed into evidence documents which established that PBS leased the coal estate from Penn Pocahontas, and PBS leased the surface estate from the surface owners, Patricia M. Hankinson, et al., which included the Right-of-Way through Parcels 54 and 50. *See* App. 151a ¶5-6; 153a 15¶- 154a ¶16; 165a ¶¶87-166a ¶90. Penn Pocahontas elicited testimony which established that Penn Pocahontas owned the coal estate on Parcel 55, and the surface and coal estates on adjacent Parcel 50, which included adequate road frontage for a coal mine haul road, and that Parcel 50 was available for PBS to use to directly access adjacent Parcel 55. *See* App. 127a-128a; 165a ¶88. PBS and Penn Pocahontas also elicited testimony that the new limited access Route 219 cut off all access from Parcel 55 to a public road. *See* App. 153a ¶15- 154a ¶16 and 165a ¶88- 166a ¶90.

Testimony at the hearing concerning permitting revealed that a surface coal mining permit had not yet been applied for regarding Parcel 55, and that a coal mining permit in Pennsylvania is not an all-or-nothing proposition. The permit applicant and the Pennsylvania Department of Environmental Protection ("DEP") work together over time to address

the issues, modify mining plans and modify permit applications to resolve environmental concerns. *See* App. 182a-184a; 159a ¶51 – 162a ¶69.

As DEP District Mining Manager, Daniel Sammarco, testified, the process begins with a preapplication and then a field review, followed by a comment letter from DEP which can take up to a year of back and forth before a permit application is filed. *See* App. 182a-184a. Potential issues of concern such as the existence of streams and wetlands can be dealt with in a number of ways to satisfy environmental concerns. *See* App. 159a ¶51 – 161a ¶66.

Both experts for the Petitioners testified that in their professional opinion, the permit issuance was reasonably certain. *See* App. 161a ¶67 - 162a ¶68. Between these experts, more than 82 mining permits had been applied for over the years, all had been issued and none had been denied. *See* App. 172a; 178a-181a. In addition, the nearby A Seam Deep Mine with a surface mine component had successfully been permitted by the same mining company, PBS, in 2013 after application was filed in 2010. *See* App. 164a ¶81. Furthermore, immediately adjacent to Parcel 55, the Black Mountain A Seam Mine with a large surface component had been permitted, mined, closed, and reclaimed with no adverse environmental water issues. *See* App. 179a. DEP's Sammarco testified that both the issuance of the A Seam mine permit and the successful closure and completion of the Black Mountain Mine near Parcel 55 would be evidence that would support the issuance of a mining permit for Parcel 55. *See* App. 184a. Several miles South of Parcel 55, an older generation 1970s surface mine by PBS had created environmental water issues, which PBS' experts testified would not occur under modern mining

methods, and they specified how each environmental issue would be addressed. *See* App.174a-177a.

Following the conclusion of the hearing, the Court issued a Memorandum, Finding of Facts and Conclusions of Law and Order wherein the Court found that before PennDOT's actions, the Right-of-Way existed, and access to and from Parcel 55 also existed over Parcel 50. *See* App. 165a ¶¶87-88. The Court further determined that Parcel 55 had become landlocked by actions of PennDOT on September 28, 2010, by the severance of the Right-of-Way and the access over Parcel 50. App. 165a-166a ¶89. The Court also found that the physical existence of the new limited access highway precluded the removal of coal from the property in an easterly direction to the public road. *See* App. 165a ¶89-166a ¶90. But the Trial Court held (later reversed by the Commonwealth Court) that other access existed over another parcel of land to the north of parcel 55, known as Parcel 59, by virtue of a coal lease between PBS and that landowner, Jean Shaffer ("Shaffer Lease").[1]

The trial judge found as a fact that: "PennDOT did not offer any testimony or reports to the effect (prior to the PennDOT actions) that the coal reserves underlying Parcel 55 could not be mined or permitted by DEP." *See* App. 164a ¶82. In addition, the Court stated that in order for a *de facto* taking to be established, the condemnee must meet a heavy burden

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[1] This "other access" holding was later reversed by the Pennsylvania Commonwealth Court which determined that the Shaffer Lease did not provide "other access" through Parcel 59. The Pennsylvania Supreme Court did not accept this issue on appeal, and, therefore, the Commonwealth Court's holding that no other access to Parcel 55 existed remains standing. PBS Coals, Inc. v. Dep't of Transportation, 244 A.3d 386, 397 at n.7 (Pa. 2021), reconsideration denied (Mar. 11, 2021). (App. 45a n.7)

of proving the existence of exceptional circumstances which have substantially deprived it of the beneficial use and enjoyment of its property, which proof of use the Trial Court held included the proof of the reasonable certainty that the property could be permitted at the time of the taking for the removal of coal. The court found that this heavy burden had not been established, but rather the ability to obtain a surface mining permit was, in the Court's view, speculative and uncertain. Therefore, the Court sustained PennDOT's Preliminary Objections and dismissed the Petition, holding that no taking had occurred.

PBS and Penn Pocahontas, in accordance with Pennsylvania procedural law, filed a "Concise Statement of Errors Complained of on this Appeal" wherein the Appellants pointed out that the Court erred in considering the likelihood of issuance of a surface mine permit as part of the determination of whether a taking had occurred, together with other errors. *See* App. 143a-144a ¶27. The Trial Court, in accordance with Pennsylvania Appellate Rules, issued a Pa. R.A.P. 1925 Opinion and Order denying errors in its conclusions. *See* App. 127a-131a. The Petitioners then took an appeal to the Pennsylvania Commonwealth Court.

In the appeal to the Commonwealth Court, PBS and Penn Pocahontas raised as one of their three issues the Trial Court's error in including the ability to obtain a surface mining permit in the determination of whether a taking had occurred. PBS and Penn Pocahontas also asserted that the Trial Court erred in determining that they had an alternate access to Parcel 55 through Parcel 59 after their existing access ways were severed by PennDOT.

The Commonwealth Court, after briefing by the parties and oral argument, issued an Opinion and Order reversing the Trial Court and holding that access to Parcel 55 did not exist through Parcel 59 and that the actions of PennDOT resulted in PBS' and Penn Pocahontas' loss of access to Parcel 55 and resulted in the property becoming landlocked. PBS Coals, Inc. v. Dep't of Transportation, 206 A.3d 1201 (Pa. Commw. Ct.), appeal granted in part, 218 A.3d 373 (Pa. 2019), and rev'd, 244 A.3d 386 (Pa. 2021), reconsideration denied (Mar. 11, 2021). (App. 82a-125a)

The Commonwealth Court held that the Trial Court erred to the extent it required the coal companies to demonstrate that the coal was reasonably likely to be permitted in order to determine whether a taking had occurred, and held that the permittability issue is to be determined in the damages/valuation stage of the case. *Id.* at 1224. (App. 124a)

PennDOT filed a Petition for Allocatur with the Pennsylvania Supreme Court, asking the Pennsylvania Supreme Court to review the Opinion and Order of the Pennsylvania Commonwealth Court. The Pennsylvania Supreme Court refused Allocatur on the issue of whether access existed to Parcel 55 through Parcel 59, thereby leaving in place the portion of the Commonwealth Court's Opinion and Order which determined that the actions of PennDOT caused Parcel 55 to become landlocked, with no access to a public road. (*See* footnote 1 above).

The Pennsylvania Supreme Court granted Allocatur and agreed to hear, among other issues, the question of whether the Commonwealth Court erred in determining that the coal companies had been substantially deprived of the beneficial use and enjoyment of their coal estate as a direct and

immediate consequence of PennDOT's actions which cut off all access to the coal estate.

After briefing, but without granting oral argument, the Supreme Court issued its decision on January 20, 2021. The Court acknowledged that in *de facto* taking cases it drew upon the U.S. Supreme Court's decisions to determine whether a taking had occurred. 244 A.3d at 398. (App. 48a)

The Court paid lip service to the U.S. Supreme Court's principles by including the quotation from the Arkansas Game & Fish case: "True, we have drawn some bright lines, notably, the rule that a physical occupation of property authorized by the government is a taking." 244 A.3d at 398-99 (quoting Arkansas Game & Fish, 568 U.S. 23, 31–32, (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)). (App. 48a) However, the Pennsylvania Supreme Court then held that, despite the permanent physical occupation and severance of the Right-of-Way and the severance of Parcel 50 which together provided sole access to Parcel 55, there was no taking because the Trial Court had determined that the Petitioners had not proven that a mining permit was reasonably likely to be issued for the property. After their Petition for Reargument was denied, the Appellants filed the present Petition requesting this Honorable Court to review the Pennsylvania Supreme Court's erroneous decision.

Although this Court has decided many physical takings cases, Petitioners are unaware of any case deciding the impact on the legal rights of subsurface owners when a state agency permanently occupies the right-of-way and only means of access of the subsurface owners to their property and, in doing so, denies all

access to both its subsurface estate and its leasehold right of access to the surface estate.

ARGUMENT FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Parcel 55 case

Issue 1: When a State Agency permanently physically occupies a right-of-way and thereby completely blocks physical access to a subsurface owner's recognized, taxable real estate interest in coal, has a compensable taking occurred under the Fifth and Fourteenth Amendments to the U.S. Constitution?

Suggested Answer: Yes.

Petitioners owned a valuable coal estate underlying Parcel 55 and Petitioners had access to this estate via the existing Right-of-Way (Parcels 54 and 50) and also over an adjacent property. PennDOT subsequently condemned and otherwise acquired a strip of ground running North-South through the entire length of the property which was subject to the Right-of-Way and the adjacent property (Parcel 50), which together blocked all access between Parcel 55 and the only available public road (Garrett Shortcut), and PennDOT thereafter permanently occupied the servient property which had provided access to Parcel 55 when it built the limited access highway. The highway permanently physically blocked and denied Petitioners' access to their coal estate. This physical occupation and permanent denial of access should constitute a compensable taking under the Fifth Amendment. However, the Supreme Court of

Pennsylvania ignored legal precedent and denied Petitioners this constitutional protection.

Contrary to the Supreme Court of Pennsylvania's opinion, the United States Supreme Court, in a long and consistent line of decisions, has held that when government physically takes property, no matter how small, even if the government physically invades only an easement in property, it must nonetheless pay just compensation (the "per se Rule"). See United States v. Welch, 217 U.S. 333 (1910), Kaiser Aetna v. United States, 444 U.S. 164 (1979), United States v. Causby, 328 U.S. 256 (1946), Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982), and Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021). As this Court explained in its most recent statement on the subject, in Cedar Point Nursery v. Hassid,

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where

> governments are always eager to do so for them. Murr v. Wisconsin, 582 U.S. ____, _____, 137 S.CT. 1933, 1943, 198 L.ED.2d 497 (2017)."

141 S. Ct. 2063, 2071 (2021)

In Loretto v. Teleprompter Manhattan CATV Corp, this Court stated the following: "[W]e have long considered physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause . . . . When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426. The Court in the Loretto case explained further: "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Id.* at 436. In Kaiser Aetna v. United States, the Supreme Court held that "Even if the government physically invades only an easement in property, it must nonetheless pay just compensation." 444 U.S. at 180. Even as far back as 1910, this Court in United States v. Welch, 217 U.S. 333 (1910), held that "A private right-of-way is an easement and is land," the permanent physical occupation of which can constitute the basis for a taking. 217 U.S. at 339. In the Welch case, the government permanently occupied, with water from a new dam, a strip of land through which the Plaintiffs owned a right-of-way, that was the only practical outlet from the Plaintiff's farm to the County road. The Supreme Court held that where the right-of-way has been permanently cut off, a taking has occurred and "a recovery for the taking of land by permanent occupation allows it for a right-of-way taken in the same manner; and the value of the

easement cannot be ascertained without reference to the dominant estate to which it was attached." *Id.* at 339. In the instant case, the dominant estate of which the Right-of-Way was a part, is the surface leasehold interest and the coal estate underlying Parcel 55. The coal property of Parcel 55, under Pennsylvania law, is a separate estate in land from the surface estate and is subject to real estate taxes like a surface estate.[2] Under the U.S. Supreme Court's precedents, PennDOT's construction of a limited access highway on and across the Right-of-Way to the Parcel 55 coal property constituted a taking for which compensation is required under the United States Constitution.

In Cedar Point Nursery v. Hassid, this Court explained:

> "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). The Court's physical takings jurisprudence is "as old as the Republic." *Id*., at 322, 122 S.Ct. 1465. The

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[2] Smith v. Glen Alden Coal Co., 32 A.2d 227, 234-235 (Pa. 1943), "It is well recognized in Pennsylvania that there may be three estates in land, namely, coal, surface, and right of support, so that one person may own the coal, another the surface, and the third the right of support."

When the coal estate is owned separate from the surface estate, the coal estate is separately assessed and taxed under Pennsylvania law. See 53 Pa.C.S.A. § 8819 (Separate assessment of coal and surface.) (App. 219a) See also 61 Pa. Code § 91.169 (Conveyances of coal, oil, natural gas or minerals.) (App. 220a)

> government commits a physical taking when it uses its power of eminent domain to formally condemn property. See United States v. General Motors Corp., 323 U.S. 373, 374-375, 65 S.Ct. 357, 89 L.Ed. 311 (1945); United States ex rel. TVA v. Powelson, 319 U.S. 266, 270-271, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943). The same is true when the government physically takes possession of property without acquiring title to it. See United States v Pewee Coal Co., 341 U.S. 114, 115-117, 71 S.Ct. 670, 95 L.Ed. 809 (1951) (plurality opinion). And the government likewise effects a physical taking when it occupies property – say, by recurring flooding as a result of building a dam. See United States v. Cress, 243 U.S. 316, 327-328, 37 S.Ct. 380, 61 L.Ed. 746 (1917). These sorts of physical appropriations constitute the "clearest sort of taking," Palazzolo v. Rhode Island, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), and we assess them using a simple, *per se* rule: The government must pay for what it takes. See Tahoe-Sierra, 535 U.S. at 322, 122 S.Ct. 1465."

141 S. Ct. at 2071.

Consistent with the Supreme Court's analysis and holding in Cedar Point Nursery v. Hassid, *supra.*, when PennDOT permanently physically occupied the Right-of-Way portion of the coal property, and thereby cut off all access to the balance of the coal property,

PennDOT's actions constituted a *per se* taking for which the State Government must pay. The Pennsylvania Supreme Court's decision, which ignores the physical taking of PBS' Right-of-Way by the government, is in direct conflict with the established precedent of the United States Supreme Court. Therefore, certiorari should be granted, and the decision of the Pennsylvania Supreme Court reversed.

Issue 2: When a permanent physical occupation of land that causes a complete denial of access to a recognized real estate interest has occurred, can a court apply an ad hoc factual inquiry in its takings analysis instead of following a per se physical takings analysis and thereby add a requirement that a mining permit must exist or must be likely to be issued in order for a taking to occur?

Suggested Answer: No.

In the case at hand, the Supreme Court of Pennsylvania left undisturbed the Commonwealth Court's holding that PennDOT's actions resulted in a physical occupation that caused a complete physical denial of access to Petitioners' recognized real estate interest. However, the Pennsylvania Supreme Court erroneously failed to follow this Court's *per se* rule applicable to physical takings. Instead, the Pennsylvania Supreme Court explicitly engaged in a self-described ad hoc, factual inquiry in this case in stating *inter alia* the following:

> The use of property by surface rights owners and subsurface rights owners are

> distinct. The takings analysis, and its fact-intensive nature, properly permits courts to account for those distinctions. The de facto takings jurisprudence "is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances."

244 A.3d at 408 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002)). (App. 70a)

While the Pennsylvania Supreme Court cited the Tahoe-Sierra case as its authority for this ad hoc approach, it ignored the very point made by the U.S. Supreme Court in Tahoe-Sierra:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by

> 'essentially ad hoc, factual inquiries' Penn Central, 438 U.S., at 124, 98 S.Ct. 2646, designed to allow 'careful examination and weighing of all the relevant circumstances.' Palazzolo, 533 U.S., at 636, 121 S.Ct. 2448.

535 U.S. at 321-322.

The Pennsylvania Supreme Court, erroneously applying a regulatory taking analysis, determined that unless a permit has been issued to mine a coal property at the time of the exclusion by the government of all preexisting access to the property, or the mining permit was reasonably likely to have been issued at that time, then there has been no taking of the coal property, including the Right-of-Way, under the Fifth Amendment to the United States Constitution. The Pa Supreme Ct. based its decision on the "beneficial use and enjoyment of the property" element of a takings test, citing In re Borough of Blakely, 25 A.3d 458 (Pa Commw 2011), opining that since PBS was not yet mining the property, "the highway is only theoretically preventing the coal companies from using their coal estate." 244 A.3d at 406. (App. 66a) However, the Court misapprehended the fact that in Blakely, the landowner had not lost all access to his property because of the government's action, whereas in the instant case, all access to Petitioners' property has been lost. *See* 25 A.3d at 466.

The Pennsylvania Supreme Court held that if the coal owner did not have, nor was reasonably likely to obtain, the permit to mine the coal at the time of the government action which permanently physically occupied and took the Right-of-Way and completely isolated the coal property, then "the government took

nothing". 244 A.3d at 408. (App. 71a) This is contrary to the United States Supreme Court precedent that an interest in land is worthy of constitutional protection under the Fifth Amendment from government physical taking of that property interest despite the fact that it was being put to no use at the time of the governmental action in question. See Mississippi & Rum River Boom Co. v. Patterson, 98 U.S. 403 (1878), wherein the Court pointed out that "Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life." *Id. at* 408.

The Pennsylvania Supreme Court did acknowledge the Mississippi & Rum River Boom Co. case. However, the Court diverged from the principles set forth in the Mississippi & Rum River Boom Co. case by requiring PBS and Penn Pocahontas to prove their present use of the property as measured by the reasonable likelihood of obtaining a mining permit[3], and present interference with that use by PennDOT's physical occupation of the Right-of-Way and Parcel 50, in order for a *de facto* taking to occur. In so holding, the Pennsylvania Supreme Court ignored the permanent physical occupation by PennDOT of the Petitioners' interests in land, (i.e.) PennDOT's per se taking, and

[3] As set forth heretofore in the Statement of the Case, both PBS and Penn Pocahontas submitted substantial evidence of a reasonable likelihood of obtaining a mining permit, and the Trial Judge found in part that: "PennDOT did not offer any testimony or reports to the effect (prior to PennDOT actions) that the coal reserves underlying Parcel 55 could not be mined or permitted by DEP." *See* App. 164a ¶82. However, the Trial Court took the position that the evidence submitted by the Petitioners was inadequate.

instead applied a regulatory taking case ad hoc analysis to deny Petitioners their rights to just compensation under the Fifth Amendment.

The permitting requirement added by the Trial Court and later adopted by the Pennsylvania Supreme Court is not a small hurdle, but rather is onerous; particularly when coupled with the heavy burden of proving the existence of exceptional circumstances required for a landowner to prove that a *de facto* taking occurred. *See* 244 A.3d at 397 (App. 45a). *See also* App. 166a ¶¶91-92. As the trial testimony makes clear and the trial court found as a fact, DEP, the State agency which issues mining permits, will never agree that it will issue a mining permit until a permit application has been filed and fully reviewed by DEP. *See* App. 162a ¶69. DEP, through its district mining manager who is in charge of determining whether or not a permit is to be issued to mine the property, testified that DEP could never indicate whether or not a mining permit would be issued for any property, including this property, unless the permit application had been prepared, submitted, and thoroughly reviewed by DEP and was then placed on the DEP's district manager's desk for determination. *See* App. 183a-184a and 162a ¶69. Thus, it would be an unduly heavy burden to impose upon a petitioner in a *de facto* takings case to require that petitioner prove that it would be reasonably likely that DEP would have issued a permit to mine the coal in order for a taking to have occurred. Furthermore, it would be fruitless for a petitioner, including PBS, to have filed an application for a permit to mine this property after PennDOT had physically occupied and cut off all access to the property because proof of access by a permit applicant is a requirement in order to obtain a mining permit. See App. 162a ¶¶72-74.

But the failure to have a mining permit or to have filed a mining permit application did not make the coal estate owned by applicants nonexistent or worthless. The coal estate in this case was far from worthless at the time of the taking. The coal underlying the surface of the property is a high grade of coal known as low volatility metallurgical coal (coal used in making steel). *See* App. 204a.

Furthermore, the determination of when the coal estate property will be surface mined is a function of market, engineering, and other mining commitments. *See* 244 A.3d at 394 n.5 (App. 36a-37a n.5).

PBS' obvious expectation was to mine the coal estate after applying for and obtaining a surface mining permit; however, this expectation was destroyed when PennDOT by its actions permanently interfered with all means of access to Parcel 55 from a public road.

The coal mine permitting process is not an all or nothing proposition. As both the representative of the regulator DEP and the permitting experts for PBS testified, there is give and take, flexibility, in the permitting process, including size, location and method of mining that are part of the permitting process. *See* App. 159a ¶51 – 162a ¶69. In close proximity to Parcel 55, PBS, in 2010, applied for and later received a mining permit from DEP to mine the same A seam that would have been mined on Parcel 55, but for PennDOT's action of physically occupying and cutting off all access. *See* App. 164a ¶81. The A seam deep mine involved surface mining 4 acres of the same overburden and coal as involved in this case. *See* App. 172a -175a. PBS successfully negotiated with DEP for the A seam deep mine permit and would have done the

same to obtain a mining permit for this property, if PennDOT had not cut off all access.

In actuality, the size, location, method of mining, the condition of the overburden above the coal, and the coal quality are the primary factors which determine the likelihood of permit issuance, the saleable tonnage of coal realized, the cost of mining, and ultimately the value of the coal property. *See as example* App. 200a-206a. However, none of these factors determine whether there is a taking when the government deprives the coal owner of physical access to the coal estate in the first place. The Trial Court and the Pennsylvania Supreme Court artificially took a very subjective value related process and then converted that process into a required element for a *de facto* taking determination. Clearly this analysis does not belong at the taking determination stage in a case involving a physical occupation and a complete denial of access. Rather, it is a matter to be considered by the finder of facts in the damages stage of the proceeding. Consistent with Petitioners' position in this Petition, the State Mining Commission, after determining what coal was needed for support of this same new 219 limited access highway, on adjacent and nearby properties, then conducted the damages part of the proceeding, and held that a surface mining permit was more likely than not to be issued and awarded significant damages to PBS and PPC for the valuable taken support coal. *See* App. 200a-206a.

This Court faced a similar issue recently in Cedar Point Nursery v. Hassid, and concluded that it constituted a valuation matter, explaining:

> "Our cases establish that "compensation is mandated when a leasehold is taken and the government occupies property for its own

> purposes, even though that use is temporary." Tahoe-Sierra, 535 U.S. at 322, 122 S.Ct. 1465 (citing General Motors Corp., 323 U.S. 373, 65 S.Ct. 357; United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946)). The duration of an appropriation – just like the size of an appropriation, see Loretto, 458 U.S. at 436-437, 102 S.Ct. 3164 – bears only on the amount of compensation. See United States v. Dow. 357 U.S. 17, 26, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). For example, after finding a taking by physical invasion, the Court in Causby remanded the case to the lower court to determine "whether the easement taken was temporary or permanent," in order to fix the compensation due. 328 U.S. at 267-268, 66 S.Ct. 1062."

141 S. Ct. at 2074.

Despite PennDOT's physical taking of PBS' Right-of-Way portion of its coal property and of Penn Pocahontas' Parcel 50 strip of land, thus blocking all access to the coal property, and despite the valuable nature of the mineral resource, the Pennsylvania Supreme Court held that PBS and Penn Pocahontas must still meet the heavy burden of proving that a mining permit would have been reasonably likely to be issued at the time of the taking in order for PBS' and Penn Pocahontas' property to be worthy of protection by the Fifth Amendment to the United States Constitution or by Pennsylvania law. The Pennsylvania Supreme Court, like the trial court, violated the per se rule established by the United States Supreme Court in its interpretation of the Fifth

Amendment of the United States Constitution, as applied to the States through the Fourteenth Amendment, that a permanent, physical occupation of property by the State is a taking for which the owner is entitled to just compensation. Therefore, certiorari should be granted, and the decision of the Pennsylvania Supreme Court reversed.

Issue 3: Does the explicit disparate, negative treatment of subsurface estate owners when compared to surface estate owners constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Suggested Answer: Yes.

PennDOT physically and permanently occupied the Right-of-Way and Penn Pocahontas' Parcel 50 so as to cut off all access to Parcel 55 but PennDOT claimed, and the Trial Court and the Pennsylvania Supreme Court affirmed PennDOT's position, that the owners of the coal property and its Right-of-Way and Parcel 50 had no right to compensation. The Pennsylvania Supreme Court reversed the Commonwealth Court which had held that the State action of permanently cutting off all access to the coal property constituted a per se taking, and that the issue of likelihood of obtaining a mining permit was a value issue to be decided later in the valuation part of the case.

The Pennsylvania Supreme Court determined that a sufficient distinction existed between an owner of the surface estate and the owner of the underlying coal estate, which justified disparate treatment of the

coal owner. 244 A.3d at 408 (App. 70a). In its opinion, the Pa Supreme Court stated that the distinction is that "surface owners enjoy a broad array of uses, whereas here the Coal companies can enjoy their coal estate in only one way: mining coal". (244 A.3d at 407)(App. 68a). The Court argues that since PBS was not mining the coal at the time of the taking, and since the trial court concluded that Petitioners did not submit sufficient evidence to satisfy the difficult, heavy burden of proof necessary to establish that a mining permit could reasonably likely be obtained at the time of the taking, PBS' right of access was irrelevant. PennDOT, the Trial Court and the Pennsylvania Supreme Court misapprehended the following key point: The action, i.e. permanent occupation of part of Appellant's property and deprivation of all access to that property, that prevented all use of the coal property now and in the future had nothing to do with the type of estate in property affected but rather was the physical taking of access. The taking determination in a physical taking case in which the action of placing a highway on the only means of access to a coal owner's property that results in preventing all use of the coal property now and in the future should have nothing to do with the type or value of the estate affected. A physical taking is a taking for which compensation is required to be paid under the Fifth Amendment. *See* 141 S. Ct. at 2074.

The Pennsylvania Supreme Court and the trial court treated coal owners, PBS and Penn Pocahontas, far differently and worse than a surface owner is treated under the United States Constitution. If this 73 acre coal property was instead a 73 acre surface property (although this coal property did include the lease of the surface estate for surface mining), even if

not in use at the time of taking and even though no building permits or other permits had been issued for the surface property, the Pennsylvania Supreme Court, following the precedent of the United States Supreme Court, including Mississippi & Rum River Boom Co. v. Patterson, *supra*, would have held that PennDOT's permanent physical occupation of the surface owner's Right-of-Way, which cut off all access to a public road from the property, was a taking. But here, because it is a coal estate with a surface mining lease, the Pennsylvania Supreme Court treated PBS and Penn Pocahontas Coal Company as second class citizens and held that the "government took nothing," further stating that "As things stand, the coal estate sits idle and may not be mined; therefore Highway 219 has not resulted in any deprivation to the Coal Companies whatsoever." 244 A.3d at 406. (App. 66a)

The Commonwealth Court in the case below recognized the unfairly disparate treatment of the coal owners:

> Under the trial court and PennDOT's logic, the owners of a coal estate would never be able to demonstrate a *de facto* taking, at the preliminary objections stage, unless they were able to prove that they were likely to obtain a mining permit. However, such a result would place a higher burden of proof on owners of coal estates than owners of surface properties and would effectively relegate owners of coal estates to second class property owner status. This is because, for *de facto* taking cases, coal estate owners would not be able to prove that they suffered a substantial deprivation in the use and

> enjoyment of their property, at the preliminary objections stage, unless they could establish that DEP would issue a mining permit; unlike surface property owners who do not face any similar requirement to demonstrate a de facto taking at the preliminary objections stage, even if their property is relatively valueless or useless.

206 A.3d at 1223. (App. 123a-124a)

The Equal Protection Clause is applicable in this case because PennDOT's action in destroying all access to Appellant's property without paying just compensation was based upon the government's assertion that no taking had occurred because Appellants had not applied for nor were reasonably likely to procure a mining permit for the coal estate as of the date of the taking. This additional burden of proving that a mining permit was reasonably likely to be issued for the coal estate, imposed upon the coal property owners as a prerequisite to finding a taking, while there is no similar additional burden placed on surface owners, sets up an impermissible classification system for coal property owners.

The physical occupation of Appellants' coal properties by PennDOT and the Pennsylvania Supreme Court's interpretation of the Pennsylvania Law unequally against the class of coal owners to justify a "no taking" finding substantially infringes upon the fundamental Fifth Amendment right of the coal owner to just compensation. Property Rights are Fundamental Rights protected by the Fifth Amendment. *See generally* Gideon v. Wainwright, 372 U.S. 335, 341–42, (1963). When protection of a

Fundamental Right is asserted under the Equal Protection Clause, courts must apply strict scrutiny in reviewing the government's action. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) To satisfy the strict scrutiny test the "government action must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020) (internal quotations and citations omitted).

Under equal protection analysis this Court should examine this government action and the PA Supreme Court's classification scheme, which infringes upon a fundamental right of coal estate owners, using a standard of strict scrutiny to determine if the classification is supported by sufficient justification.

Furthermore, even under the lesser "rational basis" standard, there is no valid government interest served by classifying coal property owners separate from surface property owners. The decision of the Pennsylvania Supreme Court sets forth no rational justification for making coal owners a separate class subject to additional Fifth Amendment taking requirements.

Justice Holmes pointed out in Pennsylvania Coal Co v. Mahon, 260 U.S. 393 (1922), that such unfair treatment would not be acceptable under the United States Constitution. He wrote,

> The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support we see no more authority for supplying the latter without compensation than there was for taking the

> right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. [Citing: Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008.]

260 U.S. at 415.

While in the Pa. Coal Co v. Mahon case, Justice Holmes was dealing with the estate in land in Pennsylvania known as the right of surface support and with a regulatory taking of that right of support by a new statute, whereas in the present case we are dealing with another recognized estate in land in Pennsylvania known as the coal estate and an even clearer "per se" type of taking, namely the permanent physical occupation of part of the property, the same Just Compensation principles apply in both cases. Subsurface property rights are as worthy of equal protection as surface rights. PennDOT built a limited access highway on and through the Right-of-Way and through other access across Parcel 50 to Parcel 55, cutting off access to Petitioners' coal estate and PennDOT did not even compensate PBS and Penn Pocahontas for that taking.

The Pennsylvania Supreme Court's refusal to acknowledge this taking and PennDOT's failure to compensate the owners for that taking is contrary to the Fifth Amendment, which is applicable to the States

by the Fourteenth Amendment to the United States Constitution, and is a violation of the Fourteenth Amendment Equal Protection Clause.

If this erroneous decision is allowed to stand, PennDOT and other government agencies with the power of condemnation hereafter can be expected to argue that their permanent occupation, in part or in whole of a coal property, is the "taking of nothing" if the coal estate was not previously permitted to be mined or the landowners could not prove that they would have been reasonably likely to be successful in obtaining a permit to mine as of the date of taking.

The coal landowner is at an unfair disadvantage because he/she can only have any chance of proving the likelihood of having obtained a permit if he/she incurs the expense to prepare and apply for a mining permit. If the Pennsylvania Supreme Court decision is allowed to stand, then the expense must be incurred by the landowner even though he/she knows that the permit will not be granted because the landowner has no access to the coal by reason of the Government's actions which destroyed the coal owner's right of access.

PBS/Penn Pocahontas are members of a class of owners (owners of coal and other mineral estates) whose property interests are being treated differently from the class of owners (surface owners) without sufficient justification for such different classification which should not be permitted under the Equal Protection Clause of the Fourteenth Amendment. The class includes all coal and other mineral property owners whose right of access to the minerals has been taken by governmental action, and even broader, all coal and other mineral property owners who have had any part of their mineral estate permanently occupied

by a governmental agency or other entity which has the power of condemnation.

It is critical that the United States Supreme Court hear this matter to ensure the constitutional protection of coal and other mineral rights landowners to the same extent as the constitutional protection of the owners of surface rights in land. This appears to be a matter of first impression.

Respectfully submitted,

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