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**In The
Supreme Court of the United States**

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KIMBERLEY ANN GUNNARSON and
GUNNARSON OUTDOOR ADVERTISING, INC.,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

—◆—

**On Petition For Writ Of Certiorari
To The Texas Supreme Court**

—◆—

PETITION FOR WRIT OF CERTIORARI

—◆—

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QUESTIONS PRESENTED

Does Chapter 21 of the Texas Property Code violate the Fifth Amendment to the United States Constitution by failing to require adequate compensation to a property owner whose property is taken for public use?

Does Texas violate the Fifth and Fourteenth Amendments of the United States Constitution by refusing to consider sign rental income of billboards located on real property taken under the principle of eminent domain?

Does Texas' refusal to recognize sign rental income from billboards on real property violate the Fourteenth Amendment to the United States Constitution, when other income producing properties, such as motel rental income or oil and gas revenue benefit from consideration of their income for purposes of valuation?

PARTIES AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the caption contains the list of all parties appearing here and before the Texas Supreme Court. Pursuant to Rule 29.6, petitioner states that Gunnarson Outdoor Advertising, Inc. is a Texas corporation with no parent corporation, and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kimberly Ann Gunnarson and Gunnarson Outdoor Advertising, Inc. respectfully petition for a writ of certiorari to review the judgment of the Texas Supreme Court in No. 20-0566; *Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc. v. The State of Texas*; In the Supreme Court of Texas.

**OPINIONS BELOW**

No. 20-0566; *Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc. v. The State of Texas*; In the Supreme Court of Texas—Petition Denied June 11, 2021; Motion for Rehearing Denied August 27, 2021.

No. 03-18-00738-CV; *Kimberley Ann Gunnarson and Gunnarson Outdoor Advertising, Inc. v. The State of Texas*; In the Third Court of Appeals at Austin, Texas—Judgment Rendered and Memorandum Opinion Issued February 26, 2020; Motion for Rehearing Denied April 17, 2020; Motion for Rehearing En Banc denied June 15, 2020.

No. 17-0108; *In re Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc.*; In the Supreme Court of Texas—Petition for Writ of Mandamus Denied December 8, 2017; Motion for Rehearing Denied February 9, 2018.

No. 03-17-00045-CV; *In re Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc.*; In the

Third Court of Appeals at Austin, Texas—Memorandum Opinion Denying Petition for Writ of Mandamus Issued February 2, 2017.

No. 15-0261-C; *The State of Texas v. Curtis Lyle Gunnarson, et al.*; Condemnation Proceeding Filed in the County Court at Law No. 2 of Hays County, Texas—Modified Order on State’s Cross Motion for Summary Judgment Entered November 14, 2018.

**CITATIONS OF THE OFFICIAL AND
UNOFFICIAL REPORTS OF THE OPINIONS
AND ORDERS ENTERED IN THE CASE BY
COURTS OR ADMINISTRATIVE AGENCIES**

Kimberley Ann Gunnarson, Individually and as Co-Trustee of the Trusts Created Pursuant to the Terms of the Last Will and Testament of Ivar Leonard Gunnarson, Deceased and Gunnarson Outdoor Advertising, Inc., v. The State of Texas, 03-18-00738-CV, 2020 WL 913050 (Tex. App.—Austin, February 26, 2020).

In re Gunnarson, No. 03-17-00045-CV, 2017 WL 474086, at *1 (Tex. App.—Austin Feb. 3, 2017, orig. proceeding [mand. denied]).

JURISDICTION

The Texas Supreme Court denied the petition for review on June 11, 2021, and subsequently denied the Motion for Rehearing on August 27, 2021. This Court

has jurisdiction pursuant to 28 U.S.C. § 1257(a). The issue has been fully tried, appealed to the Texas Third Court of Appeals, and appealed to the highest court in the State of Texas. All of Petitioners' state court rights have been exhausted and an issue of Constitutional interpretation and a conflict among the states remains to be resolved.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the United States Constitution ("Constitution"). The pertinent provisions are reproduced below:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.¹

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

¹ U.S. Const. amend. V.

State wherein they reside. 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.²

Chapter 21 of the Texas Property Code is also impacted by these Constitutional provisions, as the law in Texas does *not* require that the landowner be justly compensated when his or her property is taken under the powers of eminent domain.³

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STATEMENT OF THE CASE

Kimberley Ann Gunnarson (“Gunnarson”) owned a 0.413-acre parcel of land, across from a college football stadium in San Marcos, Texas. No one disputed that the highest and best use of the land was to erect billboards for rent by advertisers. Gunnarson continuously rented all surfaces on two boards for over ten (10) years at rates in excess of most other signs in the area, because of the proximity to a college football stadium and other unique conditions that increased the viewing of the advertising by consumers.

The Department of Transportation for the State of Texas filed suit to take Gunnarson’s property by

² U.S. Const. amend. XIV, § 1.

³ Tex. Prop. Code Ann. Chapter 21, *see* App. 46-101.

eminent domain pursuant to Chapter 21 of the Texas Property Code. The only question for determination was the value of the property at the time of the taking.

As in other areas of property appraisal, the three accepted methods of valuing billboards are Cost Approach, Sales Comparison Approach, and Income Capitalization Approach. However, in Texas, the income approach is not permitted to include or be based on the income stream from the billboards themselves, even though this is the accepted methodology in the industry and in other states for valuing billboards.

The State's trial expert testified at a hearing on expert challenges that he did not know the amount of sign revenue from the billboard signs. He did not consider the revenue from the signs in his valuation methodology or report, because the Texas Supreme Court has repeatedly prohibited the utilization of sign revenue in the income method of the valuation of billboards.

The trial court refused to allow valuations including or related to the income from the signs, and only considered the "values" of non-comparable properties, not even located in proximity to the property at issue.

Texas allows other revenue streams on real property, such as oil and gas revenue and rents from motel rooms, to be considered in the utilization of the income method of valuation, but distinguishes the revenues from billboards from other income sources to be considered in the income method of valuation.

Lower courts in Texas, as well as courts in states other than Texas, allow the utilization of revenue from billboard signs when valuing property using the income method of valuation. The State's trial expert testified that he had utilized income from utilization of real property, like rentals from motel occupancy, when valuing other real property being taken pursuant to the State's powers of eminent domain.

Absent resolution from this Court, property owners in Texas—unlike property owners in other states—will face continued uncertainty regarding recovery of just compensation when property is taken by eminent domain. Petitioners ask this Court to grant this petition and provide much-needed resolution of the current split among the states and the various federal circuit courts, which threatens to deprive some landowners of just compensation in public takings. As of the date of this petition, there is no clear answer to a question of critical importance to landowners and sovereigns regarding compensation for public takings.

Further, without action by this Court, property owners in Texas will continue to be subject to the loss of property under the Texas Property Code without a requirement that the taking authority pay just compensation, in violation of the Fifth Amendment.

This Petition seeks review of a state-court judgment, wherein the federal questions sought to be reviewed were raised in the trial court, the Texas Third Court of Appeals and the Texas Supreme Court.

Petitioners raised the federal questions in the trial court.⁴

- First Amended Answer filed September 2, 2015.⁵ Trial court granted summary judgment in favor of the State of Texas.

Pursuant to the United States Constitution, Amendment V. and the Texas Constitution, Article 1, Section 17, the taking of the Gunnarson Property by the State of Texas is a taking of private property by the State of Texas, which requires the State of Texas to pay to Gunnarson the fair market value of the Property immediately prior to the taking.

- Motion for Summary Judgement filed December 7, 2016.⁶ Trial court denied Petitioners' Motion for Summary Judgment.

. . . the State has no evidence of the amount of compensation that would be adequate for purposes of the United States and Texas Constitutions.

- Motion to Determine Law of the Case filed December 20, 2016.⁷ Trial court determined that the income from the billboards could not be included in property valuations.

⁴ No. 15-0261-C; *The State of Texas v. Curtis Lyle Gunnarson, et al.*; Condemnation Proceeding Filed in the County Court at Law No. 2 of Hays County, Texas.

⁵ CR Vol. 1 of 1, pp. 28-31 (First Amended Answer).

⁶ CR Vol. 1 of 1, pp. 394-607 (Gunnarson's MSJ).

⁷ 1st Supp. CR Vol. 1 of 1, pp. 31-34 (Gunnarson's Motion to Determine Law).

The central issue for the jury to determine in this case is the fair market value of Gunnarson's condemned property in order to comply with the constitutional obligations of the State in a condemnation proceeding.

Petitioners raised the federal questions in the mandamus proceeding before the Third Court of Appeals.⁸

- Petition for Writ of Mandamus filed January 20, 2017. Third Court of Appeals denied Mandamus.

This Petition challenges Judge Glickler's decisions. These decisions had the effect of violating Relators' constitutional rights by taking her property without adequate compensation and depriving her of the opportunity to present evidence at trial.

The trial court erred. The error is of such magnitude that Gunnarson's rights to due process have been compromised and the State's condemnation of her property is an unconstitutional taking without adequate compensation.

- Motion to Expedite filed January 20, 2017.

Relators have filed a Petition for Writ of Mandamus complaining about Respondent's orders which will deny Relators the opportunity to present their case to the jury and will deprive Relators of their right to adequate

⁸ No. 03-17-00045-CV; *In re Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc.*; In the Third Court of Appeals at Austin, Texas.

compensation for the Property taken by the State of Texas as required by the United States and Texas Constitutions.

Petitioners raised the federal questions in the mandamus proceeding before the Texas Supreme Court.⁹

- Petition for Writ of Mandamus to the Texas Supreme Court filed February 7, 2017. Texas Supreme Court denied Mandamus.

This Petition challenges Judge Glickler's decisions. These decisions had the effect of violating Relators' constitutional rights by taking her property without adequate compensation and depriving her of the opportunity to present evidence at trial.

The trial court erred. The error is of such magnitude that Gunnarson's rights to due process have been compromised and the State's condemnation of her property is an unconstitutional taking without adequate compensation.

- Motion for Emergency Stay filed February 7, 2017.

Relators have filed a Petition for Writ of Mandamus complaining about the Third Court of Appeals' denial of Relators' Petition for Writ of Mandamus related to Respondent's orders, which will deny Relators the opportunity to present their case to the jury and will deprive Relators of their right to adequate

⁹ No. 17-0108; *In re Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc.*; In the Supreme Court of Texas.

compensation for the Property taken by the State of Texas as required by the United States and Texas Constitutions.

The State has taken Relators' income-earning property and Relators have a constitutional right to be compensated, and to pursue all legal remedies available in securing that right.

- Reply to Response to Petition for Writ of Mandamus filed June 9, 2017.

The State does not appreciate that, if it is permitted to acquire property with a fair market value of \$1,600,000.00¹⁰ for \$190,814.00¹¹—or even \$750,000.00¹²—it will be a taking without compensation and a violation of Relators' constitutional rights. When property is condemned, the property owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken.”¹³

- Brief on the Merits filed July 21, 2017.

The trial court's error is of such magnitude that Gunnarson's rights to due process have been compromised and the State's condemnation of her Property is an unconstitutional taking without adequate compensation.

The State's argument does not appreciate that, if it is permitted to acquire property with a fair market value of \$1,600,000.00 for

¹⁰ See Finding of Fact No. 21, App. 32.

¹¹ See Finding of Fact No. 31, App. 34.

¹² See Finding of Fact No. 20, App. 32.

¹³ *Olson v. United States*, 292 U.S. 246, 255 (1934).

\$190,814.00—or even \$750,000.00—it will be a taking without compensation and a violation of Gunnarson’s constitutional rights.

The trial court’s misinterpretation of the prevailing cases related to valuation of billboard structures in condemnation and to the property-owner rule resulted in denying Gunnarson her constitutional rights of adequate compensation for her condemned property.

- Response to Second Motion for Extension of Time filed September 14, 2017.

The orders entered by the trial court had the effect of violating Relators’ constitutional rights by taking property without adequate compensation and depriving Relators of the opportunity to present relevant and admissible evidence [of the income from the billboards] at trial.

- Reply Brief in Support of Brief on the Merits filed October 5, 2017.

It would be unreasonable and unconstitutional to require a landowner to sell their property for less than that same Property earns in two years.

In order to satisfy the constitutional concerns associated with eminent domain, the State must fairly compensate the property owner for the rights taken by eminent domain. Under the Fifth Amendment “just compensation” means the full monetary equivalent of the property taken. The owner is to be put in the same position he would have occupied if his

property had not been taken. This concept is usually referred to as “fair market value” which is traditionally defined as: The price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.

The actions of the State juxtaposed against Gunnarson’s constitutional rights clearly show why the State’s approach to valuation of condemned property with billboard structures must be changed.

To avoid the unconstitutionality of its conduct, the State appears to argue that, since the State’s appraiser used one of the three appraisal methods sanctioned by Uniform Standards of Professional Appraisal Practice (“USPAP”), the value he determined, based on the cost approach, was consistent with other income-producing properties.

The trial court’s error is of such magnitude that Gunnarson’s rights to due process have been compromised and the State’s condemnation of her Property is an unconstitutional taking without adequate compensation.

With this case, this [c]ourt can bring consistency, fairness and guarantee the constitutional rights of citizens of this State whose property has been condemned through

eminent domain. This case presents the Court with the opportunity to end the confusion and artificial distinctions that exist among valuing income-producing property with different uses.

- Motion for Rehearing filed December 22, 2017.

This [c]ourt should have granted the Petition for Writ of Mandamus because the issue presented is significant to the jurisprudence of the State of Texas. The trial court's errors, resulting in a taking without just compensation, have deprived Gunnarson of her constitutional rights under the Texas and United States Constitutions.

It has long been the rule in Texas that the State's right of eminent domain is limited to those situations meeting *all* of the criteria, including payment of just compensation to the landowner. This fundamental principle is found in the Texas Constitution and was affirmed by the Texas Supreme Court as recently as 2015. This [c]ourt's denial of Gunnarson's Petition has rendered meaningless the promises in the Constitution, "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made"¹⁴ and is of such magnitude that Gunnarson's rights to due process have been compromised because the State's condemnation of her Property is an

¹⁴ Tex. Const. art. 1, § 17.

unconstitutional taking without adequate compensation. This right is also protected by the Fifth Amendment to the United States Constitution, which forbids the taking of private property for public use without just compensation. Under the Fifth Amendment, the term “taken” is construed broadly to mean the deprivation of the former owner rather than the accretion of a right or interest to the sovereign. Under the Fifth Amendment “just compensation” means the *full* monetary equivalent of the property taken. The owner is to be put in the same position as he would have occupied if his property had not been taken. Under this concept, the owner is entitled to the fair market value of the property at the time of the taking. This fair market value is normally to be ascertained from what a willing buyer would pay in cash to a willing seller.

There is no cogent justification for permitting the State under its powers of eminent domain to acquire real property that has a fair market value of \$1,600,000.00 for \$190,814.00. No consideration of these facts with the backdrop of the Texas and United States’ Constitution would result in the conclusion that Gunnarson’s constitutional rights were met or protected or that she had an adequate remedy by appeal. . . . Gunnarson’s constitutional rights, as well as the rights other property owners with billboard structures, should be of paramount importance to this [c]ourt as well as the desire to ensure that property owners are fairly compensated.” (citations omitted)

Petitioners raised the federal questions in their appeal to the Texas Third Court of Appeals.¹⁵ Texas Third Court of Appeals affirmed trial court’s rulings on matters raised herein.

- Notice of Appeal filed November 6, 2018.
 . . . the unconstitutionality of Chapter 21 of the Texas Property Code under the Fifth and Fourteenth Amendments to the United States Constitution.
- First Amended Notice of Appeal filed November 14, 2018.
 . . . the unconstitutionality of Chapter 21 of the Texas Property Code under the Fifth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, Article I-Section 17 of the Texas Constitution, and Article I-Section 19 of the Texas Constitution.
- Challenge to Constitutionality of a State Statute filed November 16, 2018.
 Appellants are challenging the constitutionality of Texas Property Code Chapter 21. Amendment V of the United States Constitution prohibits the taking of private property for public use without “just compensation.” Amendment XIV of the United States Constitution prohibits the government from depriving any person of their property without due

¹⁵ No. 03-18-00738-CV; *Kimberley Ann Gunnarson and Gunnarson Outdoor Advertising, Inc. v. The State of Texas*; In the Third Court of Appeals at Austin, Texas.

process of law. Article I, Section 17, of the Texas Constitution requires that no private property can be taken for public use without “adequate compensation” being made to the owner. Article I, Section 19, of the Texas Constitution prohibits the deprivation of a person’s property except by due process of law. Article I, Section 29, of the Texas Constitution dictates that any law contrary to the Texas Bill of Rights is void. In issues of condemnation, Chapter 21 of the Texas Property Code does not require the condemning authority to pay “just compensation” or “adequate compensation.” Texas Property Code Section 21.0112 and Texas Government Code Section 402.031 require that a landowner be provided with a Landowner’s Bill of Rights. The Landowner’s Bill of Rights promulgated by the Texas Attorney General refers to adequate compensation, and defines adequate compensation as including the market value of the property being taken. The Disclaimer to the Landowner’s Bill of Rights states that it is a summary of the applicable portions of Texas state law; however, neither Texas Property Code Chapter 21 nor Texas Government Code Section 402.031 refer to or require adequate compensation to the property owner. As it does not require that a property owner receive “just compensation” for the property taken, Chapter 21 of the Texas Property Code is in conflict with the United States Constitution. Further, as Chapter 21 of the Texas Property Code does not require that a property owner receive “adequate compensation” for the property taken, it is in

conflict with the Texas Constitution, and is void pursuant to Texas Constitution Article 1, Section 29.

- Appellants' Brief filed May 6, 2019.

Point of Error 1. The failure to require adequate compensation to the property owner renders Chapter 21 of the Texas Property Code and Section 402.031 of the Texas Government Code unconstitutional under both the Texas and United States Constitutions.

Point of Error 3. The trial court misinterpreted *Clear Channel* in applying it to the facts of this case.

- A. The trial court erred because Appellants were not seeking compensation for the loss of advertising business or the business profits, but rather the fair market value of the income producing property.
- B. The trial court erred in confusing "business income" with the income stream attributable to the specific income producing property, affecting its value.
- C. The trial court erred in valuing this property differently from other income producing properties where the improvements are owned by the fee simple owner.

Petitioners raised the federal questions in their appeal to the Texas Supreme Court.¹⁶ Texas Supreme Court denied Petition for Review.

- Petition for Review filed August 31, 2020.

Issue 1. Chapter 21 of the Texas Property Code is void as to all persons and for all purposes, as it unconstitutionally fails to require adequate compensation to the property owner, and the appellate court was required to address this issue without the constitutionality of the statute having been pleaded.

Issue 5. When the appellate court affirmed the trial court's misinterpretation of *Clear Channel* in applying it to the facts of this case, it created a conflict among the courts.

- a. Gunnarson was not seeking compensation for the loss of advertising business or the business profits, but rather the fair market value of the income producing property.
- b. The trial court confused "business income" with the income stream attributable to the specific income producing property, affecting its value.
- c. The trial court valued this property differently from other income producing

¹⁶ No. 20-0566; *Kimberley A. Gunnarson and Gunnarson Outdoor Advertising, Inc. v. The State of Texas*; In the Supreme Court of Texas.

properties where the improvements are owned by the fee simple owner.



ARGUMENT

28 U.S.C. § 1257(a) provides for an appeal to the United States Supreme Court when, “Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Petitioner is asking this Court to address the conflict among the states related to the determination of “just compensation” for billboards and billboard property condemned under the powers of eminent domain. Texas does not permit any consideration of the income commanded by the billboard due to its location, whereas other states permit this income method of appraisal of billboards.

This case directly raises the question of the importance of a consistent and fair method of the composition and calculation of “just compensation” in all public takings, regardless of the state in which the property being taken for a public purpose is located, to assure just compensation is paid to all citizens and that all are treated equally under the law.

Further, all landowners in Texas are deprived of their rights under the Fifth and Fourteenth Amendments to the U.S. Constitution as Chapter 21 of the Texas Property Code does not require a taking entity to pay just compensation to the landowner.

I. The states are divided over the question presented

A. Background

The exclusion of income from sign rental in utilization of the income method of valuation in Texas is different from valuation models used in nearly every other state. In *NICHOLS ON EMINENT DOMAIN*, the issue of use of sign rental income in the income method of valuation of land in eminent domain proceedings is addressed, and Nichols states:

Subsequent claims have been made only for consideration of the loss of income attributable to the signs and property involved in the condemnation. These claims have universally been allowed to go to the jury for its

consideration. This rule is no different than the rule regarding the valuation of income-producing property in condemnation cases generally. The income approach has long been recognized as a valid and acceptable appraisal methodology, provided that the anticipated net income (also referred to in the industry as “cash flow” or “EBITDA,” earnings before interest, taxes, depreciation, or amortization) is adjusted to present value, a process normally referred to as “capitalization” of the income.¹⁷

B. The conflict

The Texas Supreme Court’s decision in this case has created a conflict with other states over whether the income from sign revenue is appropriately disregarded when computing a landowners’ just compensation in a public taking. The method employed by the State of Texas prohibits that methodology in property valuation of billboards, but revenue is routinely utilized when calculating value utilizing the income method for other types of income-producing property.¹⁸

In the case below, the trial court’s holding (as affirmed by the Texas Supreme Court) is squarely at odds with courts in other states. This conflict among the states over the inclusion or exclusion of rental

¹⁷ 8A NICHOLS ON EMINENT DOMAIN, § G23.04[b].

¹⁸ *City of Cleveland v. Zimmerman*, 22 Ohio Misc. 19, 51 Ohio Op. 2d 50, 253 N.E.2d 327, 330 (Prob. Ct. 1969); *National Advertising Co. v. State Dept. of Transp.*, 116 Nev. 107, 114, 993 P.2d 62, 67 (2000).

income from billboard signs in the income method of valuation creates a situation in which the citizens of Texas get a different and diminished “just compensation” than citizens in Ohio and Nevada, and that is not “equal protection” under the law.

II. The Decision below misconstrues the Fifth and Fourteenth Amendments to the Constitution

The decision below endorsed the trial court’s contorted reading of the constitutional right of the petitioners to “just compensation” and “equal protection.”

The Constitution guarantees consistency among the states and various jurisdictions. However, that consistency is missing when one examines the valuation processes used in billboard property condemnation. In Texas condemnation cases, as shown in this case, “just compensation” is woefully inadequate as to billboard property because the courts refuse to permit valuation experts to use one of the accepted methods of valuation—the income method. But, as it concerns other income producing property, such as motels, the income method is accepted as an accurate measure of the value of the property for purposes of condemnation. This disparity is unconstitutional. Property owners in Texas are denied their constitutional rights when Texas is permitted to condemn their property and pay them just a fraction of its worth.

We respectfully request this Court grant this Petition and correct this injustice for the citizens of every state in this country.

III. Chapter 21 of the Texas Property Code violates the United States Constitution

A. Violation of the Fifth and Fourteenth Amendments

Petitioners do not complain that Chapter 21 of the Texas Property Code is unconstitutional only as it applies to their case, or to the property taken in the underlying matter. The statute states that “[e]xercise of the eminent domain authority in all cases is governed by Sections 21.012 through 21.016 of this code.”¹⁹ The conduct by a condemning party that is authorized and governed by these sections does not include a requirement that the condemning authority pay the landowner just or adequate compensation.²⁰ There is no requirement that the condemning authority offer—let alone pay—“fair market value.”²¹ As such, the statute authorizes all condemning authorities to take private property without paying just compensation—in violation of the property owners’ rights under both the United States Constitution and the Texas Constitution.

¹⁹ Tex. Prop. Code Ann. § 21.011; *see* App. 47.

²⁰ Tex. Prop. Code Ann. §§ 21.012-21.016; *see* App. 65-72.

²¹ Tex. Prop. Code Ann. § 21.011; *see* App. 47.

The Fifth Amendment “Takings Clause” is a mandatory provision which is unequivocal in its intent—that no person shall be deprived of their private property for public use without just compensation.²² In that same vein, the Texas Constitution’s Article I, Section 17, is also a mandatory provision that no private property can be taken for public use without “adequate compensation” being made to the owner.²³ In drafting Chapter 21, the Texas Legislature failed to require that these constitutional mandates be met. The condemning entity must simply make a bona fide offer that is equal to or higher than the amount of the written appraisal “of the value” of the property being acquired by the condemning entity.²⁴ Not “of the fair market value” or similar term that would meet constitutional requirements. There is no requirement in the statute that the condemning authority instruct the certified appraiser that they are to determine the “fair market value” of the property; in fact, in the instant case, the State’s instruction to their appraiser did not mention fair market value at all.²⁵ While some would assume that certified appraisers will be offering their opinion of the fair market value, and that assumption may be true for some appraisers, the Texas Supreme

²² U.S. Const. amend. V.

²³ Tex. Const. art. 1, § 17.

²⁴ Tex. Prop. Code Ann. § 21.0113; *see* App. 50-54.

²⁵ 1 C.R. at 348.

Court considers the statute as written, rather than as it operates in practice.²⁶

The State has argued that the inclusion of the term, “local market value” in a later section of Chapter 21,²⁷ regarding the special commissioners, renders the Code constitutional. The fact that the Texas Legislature chose to include this language as pertains to the special commissioners shows that the Texas Legislature was aware when the Code was drafted of the importance of this type of definition of value. The Texas Legislature did not, however, use any type of definition of value with respect to the duties owed by the condemning party to the landowner. The later use of the term does not implicitly apply that term elsewhere in the statute, “When the Legislature uses a word or phrase in one portion of a statute but excludes it from another, the term should not be implied where it has been excluded.”²⁸

Just this year, this Court again recognized and reaffirmed the mandatory language of the Takings Clause:

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

²⁶ *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).

²⁷ Tex. Prop. Code Ann. § 21.042(b); *see* App. 62.

²⁸ *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011).

compensation. The Court’s physical takings jurisprudence is “as old as the Republic.” The government commits a physical taking when it uses its power of eminent domain to formally condemn property. . . . The government must pay for what it takes.²⁹

As Chapter 21 of the Texas Property Code fails to impose this “clear and categorical obligation” on condemning entities, it is absolutely void as to all persons and for all purposes. As such, the appellate court was required to consider the constitutionality of the statute, whether or not it had been pleaded.³⁰

B. Chapter 21 of the Texas Property Code is in conflict with the Texas Constitution, and is void pursuant to Texas Constitution Article 1, Section 29

Texas Property Code Chapter 21 neither refers to nor requires payment of “just compensation” or “adequate compensation” to the property owner in a condemnation matter. Thus, this statute is in conflict with the United States and Texas Constitutions and is void pursuant to Texas Constitution Article 1, Section 29, which dictates that any law contrary to the Texas Bill of Rights is void:

²⁹ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021) *internal citations omitted*.

³⁰ *Houston Lighting & Power Co. v. Jenkins*, 5 S.W.2d 1030, 1032 (Tex. Civ. App.—Austin 1928, no writ), citing *Gulf Ref. Co. v. Bonin*, 242 S.W. 776, 779 (Tex. Civ. App.—Beaumont 1922, no writ).

Sec. 29. BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT AND INVIOLETE. To guard against transgressions of the high powers herein delegated, we declare that everything in this “Bill of Rights” is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void.³¹

C. Challenge to the constitutionality of a statute that is void cannot be waived

Petitioners do not believe that they failed to raise their challenge to the constitutionality of Chapter 21 of the Texas Property Code; however, a determination of whether or not the issue was waived is not necessary.

Even if it determined that Petitioners had not pleaded their constitutionality, the appellate court was required to consider the constitutionality of the statute. It has been the law in Texas for nearly 100 years that an appellate court is required to consider the constitutionality of a statute that is absolutely void as to all persons and for all purposes, whether such issue has been pleaded, and without assignment of error. As demonstrated herein, Chapter 21 of the Texas Property Code is absolutely void, and the court of appeals should have considered Petitioners’ issue on appeal. While Petitioners do not concede that the point was not

³¹ Tex. Const. art. 1, § 29.

raised at the trial court, it is not relevant to the issues before the Third Court of Appeals, the Texas Supreme Court, or this Court:

With reference to our duty to raise and consider the constitutionality of the statute involved without its unconstitutionality having been pleaded, and without assignment of error, the rule seems to be settled that where a statute is absolutely void—void as to all persons and for all purposes—and the record shows that such statute furnishes the only basis for the right asserted by one party to the suit and the judgment, and necessarily invades the right of the other party against whom judgment was rendered under provision of the void statute, such a statute must be considered as never having been enacted, and the judgment based thereon is absolutely void, and under such circumstances [*sic*] the question is one of fundamental error apparent of record and of which an appellate court must take cognizance without the constitutionality of the statute having been pleaded and without assignment of error.³²

Further, the Texas Supreme Court should have reviewed the trial court's ruling de novo "because a trial

³² *Houston Lighting & Power Co. v. Jenkins*, 5 S.W.2d 1030, 1032 (Tex. Civ. App.—Austin 1928, no writ), citing *Gulf Ref. Co. v. Bonin*, 242 S.W. 776, 779 (Tex. Civ. App.—Beaumont 1922, no writ).

court has no discretion in determining what the law is or applying the law to the facts.”³³



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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³³ *Ex parte E.H.*, 602 S.W.3d 486, 489 (Tex. 2020), citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).