No. 24-_____

In the Supreme Court of the United States

CBS MN PROPERTIES, LLC,

Petitioner,

v.

THE COUNTY OF HENNEPIN,

Respondent.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A county unquestionably used real property that denied access to private property and allowed the private property owner to restore the denied access at the owner's own expense, without county reimbursement. Although at trial a jury awarded substantial damages, the appellate court would eventually reduce damage to zero. The questions presented are:

1. When the government undisputedly takes a real property right, does a court have an independent duty to ensure that just compensation is more than $0?

2. Where there is a temporary taking of property rights, is it required under the Fifth Amendment to measure just compensation using the rental value of the property for the time it is taken?

PARTIES TO THE PROCEEDINGS

Petitioner

CBS MN Properties, LLC ("CBS"). CBS was the condemnee in the trial court, and the cross-appellant before the Minnesota Court of Appeals.

Respondent

Hennepin County is a government entity under the laws of Minnesota (the "County"). The County was the condemner in the trial court and cross-appellant before the Minnesota Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

CBS MN Properties, LLC, is a limited liability company wholly owned by DRR LLC. It does not have a subsidiary. No public company owns 10% or more of the petitioner or its parent company.

LIST OF PROCEEDINGS

Minnesota Supreme Court

No. A23-0859

CBS Properties MN v. County of Hennepin

Date of Final Order: June 26, 2024

Minnesota Court of Appeals

No. A23-0859

CBS Properties MN, Appellant *v.*
County of Hennepin, Appellee

Date of Final Opinion: March 25, 2024

Hennepin County District Court, Fourth Judicial District

No. 27-CV-20-10355

CBS Properties MN, Plaintiff *v.*
County of Hennepin, Respondent

Date of Final Opinion: May 3, 2023

Hennepin County District Court, Fourth Judicial District

No. 27-CV-17-2453

Orono Station LLC, Orono Station West LLC and CBS MN Properties LLC, Petitioners, *v.*
The County of Hennepin, Respondent.

Date of Final Opinion: August 9, 2018

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Court of Appeals. The Minnesota Supreme Court denied review.

OPINIONS BELOW

The denial of review by the Minnesota Supreme Court, dated June 26, 2024, is not published and is reproduced in the Appendix ("App.") at App 1a. The decision of the Minnesota Court of Appeals is not published and is reproduced at App.3a-21a. The post-trial decision of the District Court of Hennepin County is not reported and is reproduced at App.22a-32a. The jury's verdict is reproduced at App.62a. The findings of fact and conclusions of law from the Mandamus trial are reproduced at App.33a-61a.

JURISDICTION

The Minnesota Supreme Court denied review of the Minnesota Court of Appeals' decision on June 26, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V

> The Fifth Amendment of the Constitution states that private property shall not be taken for public use without just compensation paid. The Fourteenth Amendment extends the Fifth Amendment's protections to the states.

STATEMENT OF THE CASE

It should never happen that the government takes a property right via its power of eminent domain and the owner receives $0 in compensation. But state courts are allowing it to happen when the government unquestionably takes real property. Although the problem of government undercompensating landowners is well known,[1] state courts are allowing it to reach unconscionable and unconstitutional levels. This Court has never suggested that a state court may grant $0 for a governmental taking of real property. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

Even in the context of depriving a person of other constitutional rights, if a right has been violated, nominal damage can be awarded even if for only $1.00. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S.Ct.

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[1] Jarrett Dieterle, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners,* FEDERALIST SOCIETY REVIEW, Vol. 17 Issue 3 (Nov. 2016).

792, 800 (2021) (Because every violation of a right imports damage, nominal damage can redress a complete violation of constitutional rights even if the person cannot or chooses not to quantify that harm in economic terms.). The absence of any compensation—$0—for a taking, is not within the constitutional framework and principles of "just compensation" regardless of any formulaic valuation of the real property.

In 2017, Petitioner, CBS MN Properties, LLC ("CBS"), sued Hennepin County, a governmental political subdivision of the State of Minnesota, (the "County") on the theory of "inverse condemnation" seeking a writ of mandamus. An inverse condemnation claim arises "when the government takes [a landowner's] property without paying for it." *Knick v. Twp. of Scott, Pennsylvania*, 588 U.S. 180, 185 (2019). CBS alleged that the County had committed *two* takings: (1) for a temporary easement when the County used CBS's property for road construction; and (2) that because of the road construction, the County created an unsafe grade to enter CBS's property, thus depriving CBS of its property right of reasonably suitable and convenient access to the roadways.[2] CBS prevailed at trial for both takings.

The trial court found that the County had taken the temporary construction easement and "permanently" taken CBS's access by re-grading the County's right-of-way such that the slope entering the CBS property was unreasonable and outside of industry standards.

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[2] Reasonable access from property onto the public roadways is a property right. *Martin v. United States*, 270 F.2d 65, 68 (4th Cir. 1959); *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978).

App.48a-49a. The trial court further found that CBS had proved that these takings had devalued its property. *Id.* On August 9, 2018, the trial court ordered the County to commence proceedings to determine just compensation for these two takings. The date of taking was April 3, 2017. The County did not appeal the court's factual findings of a taking.

The County complied with the mandate of the prior trial and commenced a new suit to determine just compensation for the takings. Before trial started and over four years after the initial taking, in October 2021, the County decided to grant CBS a permit to reconstruct the County's right-of-way to cure CBS's deficient access at CBS's own expense. The "permanent" taking of CBS's access property right thus became temporary because CBS now had the right to fix its impaired access, albeit at a cost.

The CBS property was zoned commercial but vacant. At trial, CBS presented evidence, which the trial court admitted, that calculated just compensation for the rental value of the land for commercial use for the time it was unusable with access taken. This equaled $387,000. CBS also presented admitted evidence that the cost to restore CBS's access to its pre-taking, functional condition was $165,053.57.

The County's position at trial was that the taken, unreasonable access was just fine, and CBS should be compensated $0 for this taking. The County also argued that compensation for CBS's loss of access had to compare the value of CBS's property before the taking with the value of CBS's property after the taking. This method, of course, assumes restored access after the taking, thus resulting in $0 of compensation.

The jury rejected the County's $0 argument, and awarded CBS $262,000 for its loss of access, plus $165,053.57 to restore the access to its pre-taking condition.[3] The trial court, *sua sponte*, reduced the verdict to $165,053.57 on the theory that CBS was only entitled to the lesser of the rental damage or the cost of restoring access. The County then moved for judgment as a matter of law and remittitur, arguing that the jury had relied on "improper" evidence for CBS's loss of access because it was based on a rental calculation. The County further argued that the portion of the verdict for restoring CBS's access was excessive.

CBS moved for judgment as a matter of law to reverse the trial court's *sua sponte* removal of $262,000 in damage, arguing CBS was entitled to damage for the time the taking was in place plus the cost of restoring its property to the pre-taking condition. The trial court denied the County's motion regarding the jury's supposed improper reliance on rental damage evidence, but granted the remittitur request, reducing the cost of restoration damage to $130,000. The trial court also denied CBS's motion. App.22a-32a. Both parties appealed.

On appeal, the Minnesota Court of Appeals held that, despite the loss of access being temporary, CBS's use of rental value evidence was legally improper. The Court of Appeals thus held that the jury had no evidence to rely on to support its verdict for $262,000.

But the Court of Appeals did not stop there, nor did it remand the matter for further disposition. Instead, it held that, because CBS's rental value

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[3] The jury also awarded CBS $11,300 for the temporary construction easement. This taking is not at issue. App.62a-63a.

evidence was improper, and the jury had nothing to rely on, CBS's just compensation for this taking should be $0. App 18a-19a. The Court of Appeals also held that because the evidence for losing access was now $0, there was no evidence showing that the cost of restoration was less than the damage for loss of access. So, the Court of Appeals struck the $130,000 award too, leaving the total compensation for loss of access at $0. When faced with the result of a taking resulting in $0 of just compensation, the Court of Appeals shrugged and said it was CBS's burden of proof to prove its damage. App.19a n. 6.

The Minnesota Supreme Court denied review on June 26, 2024.

REASONS FOR GRANTING THE PETITION

I. THE QUESTIONS PRESENTED WARRANT THIS COURT'S REVIEW.

A. The Court Should Hold That the Fifth Amendment Imposes an Affirmative Constitutional Mandate on Courts to Give Just and Fair Compensation When the Government Takes Property Rights.

This case presents questions of nationwide importance regarding the collision between governmental takings and court obligations to ensure "just compensation" is awarded regardless of any evidentiary

burden on the real property owner regarding "value."[4] Granting $0 to a property owner when an unquestionable taking has occurred is not "just," particularly when this Court has acknowledged that even nominal damages are warranted when the government violates constitutional rights. Although governments are obligated to pay just compensation, there is a corresponding obligation of the court to ensure just compensation is awarded when the government takes property.

The Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Although this Court has adopted rules to specify what equates to just compensation,[5] it has never specified whether a court has any affirmative duty to ensure just compensation is paid. Indeed, long ago, this Court opined such an affirmative duty. But the Minnesota courts have deviated from that duty and do not ensure compensation when the government unquestionably takes private property. As this Court opined, it is contrary to constitutional principles to deny compensation when property is taken:

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[4] If an incorrect method of valuation is determined or evidentiary issue exposed, remand for further proceedings would be appropriate to ensure the obligation of the court is met.

[5] *See e.g.*, *United States v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Ctys., Pa.*, 441 U.S. 506, 512–13 (1979) (just compensation is typically market value of property taken, but may depart from this standard where justice requires).

> [A] a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897).

A citizen in an eminent domain case does not ask the courts' intervention to resolve a private dispute. Instead, the citizen is dragged into the courthouse merely because he owns property the government wants to take or has taken.

The government's power of eminent domain has been called the most "drastic source of interference with property rights . . . " James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 6 (3d. ed. 2008). The Texas Supreme Court described private property rights as "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions." *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). The Supreme Court of Florida has described eminent domain as one of the "most harsh [sic] proceedings known to the law." *Pinellas County v. Carlson*, 242 So.2d 714, 716 (Fla. 1970).

Perhaps because of this harshness of a governmental taking and associated proceedings, the state of New York has recognized that, irrespective of the evidentiary burden on the landowner (which is the same as in Minnesota), the government has an "independent obligation" to pay just compensation when it takes property. *Chase Manhattan Bank, N.A. v. State*, 103 A.D.2d 211, 221, 479 N.Y.S.2d 983, 990 (2d Dep't 1984). Similarly, New York has held there is a constitutional mandate for the *court* to give just and fair compensation for property taken:

> A condemnation proceeding is not a private litigation. *There is a constitutional mandate upon the court* to give just and fair compensation for any property taken. This means "just" to the claimant and just to the people who are required to pay for it. The rule is abundantly clear that property must be appraised at its highest and best use and paid for accordingly. Where we find it is not . . . we must remit for retrial upon the proper theory.

Yaphank Dev. Co., Inc. v. Cnty. of Suffolk, 609 N.Y.S.2d 346 (N.Y. App. Div. 2d Dept. 1994) (emphasis added).

This Court has similarly called the payment of just compensation a constitutional "mandate." *Libr. of Cong. v. Shaw*, 478 U.S. 310, 317 n.5 (1986). The Federal and Eighth Circuits have used similar "mandatory" language. *Brown v. United States*, 73 F.3d 1100, 1104, 1107 (Fed. Cir. 1996) (no matter how minute the taking, the Constitution mandates compensation); *United States v. 428.02 Acres of Land, More or Less, Situate in Newton & Searcy Ctys., Ark.*,

687 F.2d 266, 269 (8th Cir. 1982) ("When the trial judge effectively precludes all evidence of sales, or contracts for sale, of property that is comparable to the property being condemned, the ultimate goal of just compensation may be defeated.").

This Court has also held that a state's taking of private property without just compensation violates the Fourteenth Amendment. *Chicago, B. & Q.R. Co.,* 166 U.S., 166 U.S. at 239.; *see also Tyler v. Hennepin County*, 598 U.S. 631, 143 S.Ct. 1369, 215 L.Ed.2d 564, 570–575, 577 (2023) (County's retention, after tax sale, of excess value of taxpayer's home over amount of tax debt violated Fifth Amendment's Takings Clause, which is applicable to states through Fourteenth Amendment). But neither this Court, nor the federal circuits have gone as far as New York to impose an affirmative obligation on the states and their courts to ensure just compensation is paid when unquestionably a taking has occurred. Now is the time.

Justice Story established long ago that "whenever there is a clear violation of a right, it is not necessary in an action of this sort to show actual damage; that every violation imports damage; and if no other be proved, the plaintiff is entitled to a verdict for nominal damage." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 509 (C.C.D. Me. 1838). Here lies the seed of a court's obligation that when an individual is deprived of a constitutional right, the party is *entitled* to, at the very minimum, a verdict of nominal damage. This Court has opined that "[n]ominal damage are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damage. They are instead the damage awarded by default until the plaintiff establishes entitlement to some other form of damages, such

as compensatory or statutory damage." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S.Ct. 792, 800 (2021). And, this Court has opined that $1.00 is sufficient for nominal damage:

> [W]e believe that the denial of procedural due process should be actionable for nominal damage without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions from school were justified, respondents nevertheless will be entitled to recover nominal damage not to exceed one dollar from petitioners.

Carey v. Piphus, 435 U.S. 247, 266–67 (1978). *See also*, *e.g.*, *Norwood v. Bain*, 143 F.3d 843, 856 (4th Cir. 1998), *reh'g en banc granted, opinion vacated* (July 9, 1998), *on reh'g en banc*, 166 F.3d 243 (4th Cir. 1999) (reversing district court refusal to even award nominal damage for a constitutional violation).

This Court has never established that an award of zero dollars ($0.00) is sufficient to militate a conclusion that a constitutional violation has occurred. Even if a jury has determined damage as "zero," as compensation for a government taking in the first instance, it is then the *court's* obligation to ensure some sort of just compensation is awarded even if only $1.00.[6] An award of zero dollars ($0) is not an option.

Another provision of the same Fifth Amendment at issue here provides that the right against self-incrimination is not protected unless the state takes

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[6] A retrial on proper evidence and instruction is likely more appropriate.

the affirmative step of telling the accused of this right. *Miranda v. Arizona*, 384 U.S. 436 (1966). In other words, the Fifth Amendment may require obligations of the states to ensure compliance with constitutional mandates without the obligations being specifically stated in the Amendment.

Similarly, the Sixth Amendment provides that a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI. It does not explicitly impose any obligation on the states or their courts to actually *provide* said counsel. Nevertheless, this Court held that the states have an independent obligation to provide counsel for the indigent accused. *Gideon v. Wainwright*, 372 U.S. 335 (1963). In other words, where a state does not adhere to its affirmative obligations to tell the accused of his rights or appoint counsel, the Fifth and Sixth Amendments' mandates are unfulfilled, and the prosecution is unconstitutional.

Both *Miranda* and *Gideon* show that the Constitution may include affirmative obligations of the states and courts to ensure compliance with constitutional mandates. True, both *Miranda* and *Gideon* involve the deprivation of liberty rather than property. But a mandate is still a mandate. If the constitutional "mandate" of just compensation means anything, the courts themselves must mandate that just compensation is actually paid. A court cannot simply shrug its shoulders and impose or affirm a ruling that gives an affected landowner $0 for a taking.[7]

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[7] The ruling in this case is particularly egregious considering the Court of Appeals essentially excluded the landowner's evidence *ex post facto* on appeal and then did not remand for a new trial.

B. The Underlying Issue of How to Measure Just Compensation for a Temporary Taking Shows a Conflict Between State Courts of Last Resort and the Federal Circuits.

This case presents a significant conflict on how states and the federal circuits measure just compensation for temporary takings. This Court has long held that temporary takings of property rights are still takings, even though limited in duration. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). "The duration of an appropriation . . . bears only on the amount of compensation." *Id.* at 153, 2074 (cleaned up). Regarding the amount of compensation, the South Dakota Supreme Court has noted the "unsettled nature of temporary takings law . . . [and] the wide divergence in the various damage measures . . . ." *SDDS, Inc. v. State*, 650 N.W.2d 1, 14 (S.D. 2002).

In this case, despite the temporary taking, the Minnesota Court of Appeals held that just compensation must be measured using the "before and after" rule. In other words, the damages are measured by "the difference between the market value of the entire tract immediately before the taking and the market value of what is left after the taking." *State by Comm'r of Transportation v. Elbert*, 942 N.W.2d 182, 188 (Minn. 2020). The Minnesota Supreme Court has held the same. *See id.* ("In partial taking cases, including those involving temporary easements, damages are calculated using the 'before and after' rule"). This contrasts with a rental calculation of damage, which measures just compensation by the rental value of the property for the time the property is taken.

This "rental" method of calculating just compensation has been approved of by several state courts, the Federal Circuit, and the Fourth Circuit. *Otay Mesa Property, L.P. v. U.S.*, 670 F.3d 1358 (Fed. Cir. 2012); *Bass Enterprises Prod. Co. v. United States*, 133 F.3d 893 (Fed. Cir. 1998); *Banisadr Bldg. Joint Venture*, 65 F.3d 374 (4th Cir. 1995); *Yuba Natural Resources, Inc. v. U.S.*, 821 F.2d 638 (Fed. Cir. 1987); *McCurdy v. State*, 10 N.Y.3d 234, 885 N.E.2d 185 (2008); *Akers v. City of Oak Grove*, 246 S.W.3d 916 (Mo. 2008); *City of Mission Hills v. Sexton*, 284 Kan. 414, 160 P.3d 812 (2007); *Fowler Irrevocable Trust 1992-1 v. City of Boulder*, 17 P.3d 797 (Colo. 2001); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *City of Los Angeles v. Ricards*, 10 Cal.3d 385, 515 P.2d 585 (1973).

The First Circuit, meanwhile, does not seem to have a preference between the "before and after" or the rental method. *Portland Nat. Gas Transmission Sys. v. 19.2 Acres of Land*, 318 F.3d 279, 285 (1st Cir. 2003). Similarly, South Dakota has allowed application of the appropriate method to be fact specific. *SDDS, Inc.*.650 N.W.2d at 14. Arizona also has used a "fact specific" method, suggesting a jury is free to choose upon proper instruction. *Corrigan v. City of Scottsdale*, 149 Ariz. 538, 543, 720 P.2d 513, 518 (1986).

This Court has even approved of a flexible approach of just compensation for temporary takings, approving, but not mandating, the rental method of value (or any particular method of valuation). *Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). *Kimball* noted, however, that if the "before and after" method were truly the only method of valuation, "there might frequently be situations in which the

owner would receive no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy." *Kimball*, 338 U.S. at 7, 69 S.Ct. at 1438. State courts are allowing the "before and after" to be applied in just such a manner as to deprive the owner of all compensation.

Minnesota has jettisoned a flexible approach to just compensation in favor of a strict "before and after" method that, in some circumstances, will result in $0 in just compensation (just as this case produced). This Court has ruled, unequivocally, that temporary takings are compensable under the Fifth Amendment. *Cedar Point Nursery*, 594 U.S. at 153. States cannot adopt hardline rules for measuring damages in temporary takings that ignore federal constitutional rights and deny all compensation whatsoever.

CONCLUSION

Courts have an independent obligation to see that just compensation is paid irrespective of the adversarial process. The Constitution mandates the payment of just compensation where there is a government taking and that mandate is not satisfied unless there is payment. Zero dollars is not just compensation. A state court cannot shrug its shoulders and award a landowner $0 when the government takes property rights, even if that court blames the landowner for a failure of proof (in this case, a failure caused by the court by excluding evidence after trial was over). A state cannot take the position that, even though it has taken property rights, it owes nothing.

Petitioner respectfully asks that the petition be granted.

Respectfully submitted,

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