

In the
Supreme Court of the United States

FRANCISCAN ALLIANCE, INC.,
AND SCP 2010-C-36-018 LLC,

Petitioners,

v.

THE STATE OF INDIANA,

Respondent.

**On Petition for a Writ of Certiorari to the
Indiana Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Indiana undisputedly took the Petitioners property through eminent domain procedures to complete a road project. The completed project changed the Petitioners valuable commercial uses into far less valuable residential uses. A jury awarded Petitioners significant monetary damages based upon evidence arising from damages caused by the project as a whole. Ultimately, the Indiana Supreme Court reversed the award, voiding all just compensation holding that just compensation must arise from the loss of a particular property right as the Petitioners had no property right as to the project as a whole. The question presented is:

When the government undisputedly takes a real property right, is a landowner entitled to just compensation from the imposition of a project as a whole, or must just compensation solely be directly tied to the loss of specific property rights?

PARTIES TO THE PROCEEDINGS

Petitioners FRANCISCAN ALLIANCE, INC. (“Franciscan”) AND SCP 2010-C-36-018 LLC (“SCP”) were both condemnees in the trial court and Appellants in the Indiana Court of Appeals and Indiana Supreme Court.

Respondent is the STATE OF INDIANA. The State was the condemner in the trial court and Appellee before the Indiana Court of Appeals and Indiana Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Franciscan has no parent companies, but owns the following subsidiaries: Franciscan ACO, Inc., Franciscan Holding Corporation, Specialty Physicians of Illinois, LLC, Alverno Construction Company, LLC.

SCP has no subsidiaries but is owned by its sole Member OBSVC, Green, LLC, which is owned by its sole Member 9395 CH, LLC. 9395 CH, LLC is owned by the Randall Benderson 1993-1 Trust, the Shaun Benderson 2016 GST Trust, the Evan Benderson 2017 GST Trust, the Sara Benderson 2017 GST Trust, and the Ronald Benderson 1995 Trust.

No public company owns 10% or more of Franciscan or SCP, or of any parent or subsidiary.

LIST OF PROCEEDINGS

Indiana Supreme Court

No. 24S-PL-118

State of Indiana, *Appellant*, v. Franciscan Alliance, Inc. f/k/a Sisters of St. Francis Health Services, Inc.; The Market Place At State Road 37, LLC; SCP 2010-C36-018, LLC; et al., *Appellees*.

Date of Final Opinion: October 31, 2024

Court of Appeals of Indiana

No. 22A-PL-2969

State of Indiana, *Appellant*, v. Franciscan Alliance, Inc. f/k/a Sisters of St. Francis Health Services, Inc.; The Market Place At State Road 37, LLC; SCP 2010-C36-018, LLC; et al., *Appellees*.

Date of Final Opinion: November 28, 2023

Johnson County (Indiana) Superior Court Four

No. 41D04-1911-PL-000181

State of Indiana, *Plaintiff*, v. Franciscan Alliance, Inc., et al., *Defendants*.

Date of Final Verdict: June 23, 2022

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OPINIONS BELOW

The Indiana Supreme Court's opinion, dated October 31, 2024, is published and is reproduced in the Appendix ("App.") at App 1a-17a. The decision of the Indiana Court of Appeals is published and is reproduced at App.18a-28a.



JURISDICTION

The Indiana Supreme Court rendered its decision on October 31, 2024. App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).



CONSTITUTIONAL PROVISIONS INVOLVED

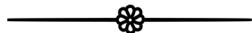
U.S. Const., amend. V

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV 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 . . .

The Fourteenth Amendment extends the Fifth Amendment's protections to the states.



STATEMENT OF THE CASE

This case presents a fundamental question at the heart of the Fifth Amendment's "just compensation" clause. Courts are struggling with the definition of "just compensation" in partial takings cases. It is doubtful that the framers of the constitution envisioned a definition of "just compensation" in the Takings Clause of the Fifth Amendment¹ that was more specific than: the private citizen should not bear a disproportionate burden of a project that benefits the public. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (purpose of the Takings Clause is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). Accord, *Kelo v. City of New London, Conn.*, 545 U.S. 469, 497 (2005) (the takings clause of the Fifth Amendment "prevents the public from loading upon one individual more than his just share of the burdens of government") (O'Connor, J., dissenting). This Court has elucidated another common-sense definition of "just compensation:" a citizen is "entitled to be put in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934).

¹ U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation.")

Many state and lower federal courts have continually narrowed the definition of “just compensation.” As a result, landowners do often bear a disproportionate burden of a public project. Landowners are worse off, pecuniarily, than if the government had never targeted them with its power of eminent domain. Although the problem of government undercompensating landowners is well known,² lower courts are allowing it to reach unfair and unconstitutional levels.

As this Court would acknowledge, there is a difference between rules determining when a taking occurs and rules for determining just compensation when it is undisputed that the government takes private property rights. Moreover, there are many actions a government can take that will devalue property that do not rise to the level of a taking and thus do not implicate the “just compensation” provision of the Takings Clause. See e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law”). Nevertheless, while government actions that devalue property may not themselves give rise to a taking, the actions may be compensable when the government has chosen to take private property for public use.

Too often, courts strip a jury’s consideration of what constitutes fair and just compensation by adopting arbitrary rules of law to redefine “just compensation.”

² Jarrett Dieterle, “*The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*,” FEDERALIST SOCIETY REVIEW, Vol. 17 Issue 3 (Nov. 2016).

Here, we know that the State’s public project substantially devalued private property because a jury awarded over \$2 million for what it believed was “just” compensation. App.29a-30a. Nevertheless, a state supreme court voided this verdict because it failed to appreciate the effect of a whole project contributing to the devaluation of real property as a necessary element within the rules of awarding “just compensation.” Lower courts across the nation, applying the Fifth Amendment’s just compensation clause, use inconsistent rationale and analysis to void jury just compensation awards. Those granted jury awards are based upon considerations of deleterious effects of a public project for which the property is taken, irrespective of whether those effects are specifically tied to the loss of a specific property right.

Here, the State of Indiana required the widening of a state road (SR 37), changing it into an interstate highway (Interstate 69) defined here as the “Project.” To complete the Project, the State acquired a strip of property that ran parallel to SR 37 to widen the road and to provide related highway infrastructure. App.3a. There is no dispute that the State had taken Petitioners’ SCP’s³ property rights. App.7a.

Before the Project, SCP’s property was on the corner of State Road 37 and Fairview Avenue with a CVS pharmacy operating on SCP’s parcel. Petitioner Franciscan Alliance’s parcel was vacant land, zoned commercial, and abutted SCP’s property along SR 37. As part of the Project, the State closed the intersection of SR 37 and Fairview Avenue, turning it into a dead

³ “SCP” includes both Petitioners, Franciscan Alliance, Inc., and SCP 2010-C-36-018 LLC unless otherwise stated.

end. App.3a. The dead end directly affected the properties.

Generally, when the government takes part of a property, but not all of it, the conventionally accepted method of measuring just compensation is to value the entire property before the taking and deduct from it the value of the remaining property after the taking. *United States v. 33.92356 Acres Of Land*, 585 F.3d 1, 9 (1st Cir. 2009). The result; supposedly approximate just compensation by capturing the loss in value both from the loss of the property rights taken and any devaluation of the property rights remaining after the taking.⁴

At a three-day jury trial, both Franciscan and SCP presented expert testimony that the Project eliminated the feasibility of the commercial use of their properties, including the CVS store. In other words, the Project had reduced the properties’ “highest and best use”⁵ from valuable commercial (their “before” taking value) to nearly worthless residential property abutting the new Interstate-69 (their “after” taking value).

The matter of just compensation was submitted to a jury. The jury awarded Franciscan \$680,000 in

⁴ Damages attributable to the devaluation of the remainder property are often called “severance damages.” *United States v. 760.807 Acres of Land, More or Less, Situate in City & Cnty. of Honolulu, State of Hawaii*, 731 F.2d 1443, 1447 (9th Cir. 1984).

⁵ Just compensation in eminent domain cases is typically “measured by the use that would bring the highest price—the highest and best’ use.” *United States v. 8.929 Acres of Land in Arlington Cnty., Virginia*, 36 F.4th 240, 253 (4th Cir. 2022) [cleaned up].

just compensation and SCP \$1.5 million. The State appealed. App.29a-30a.

On appeal, as it had before the trial court, the State argued that Petitioners' damage calculations were flawed because they included non-compensable damages attributable to the new traffic pattern created by the Project, so called "circuitry of travel" damages. True, because of the Project's intersection closure and dead end, northbound traffic must travel an additional one mile to reach the property, while southbound traffic must travel an additional three miles. App.20a. Petitioners both presented evidence consistent with the "before-after" rule, with the "before value" as if there were no project, and the "after value" after the Project's completion. The State's closure of the abutting intersection as a dead end was undisputedly part of the Project.

The Indiana Court of Appeals reversed the jury verdict vacating both awards in their entirety. The appellate court opined that although there had been an undisputed partial taking of Petitioners' properties, the jury could not award damages for consideration of the project as a whole. The court believed that because SCP and Franciscan had no property right in the "free flow of traffic" past their properties, they could not recover damages for loss of the intersection and the creation of the dead end despite the dead end being unequivocally part of the Project. *Franciscan All.*, 223 N.E.3d at 1152.

The Indiana Supreme Court would later affirm the appellate court's decision. The Indiana Supreme Court held that damages "are compensable in an eminent domain action only if they result directly from the taking of a property right." App.10a [emphasis

added]. The Indiana Supreme Court did not evaluate damages from the Project as a whole, instead holding that just compensation⁶ must be “tied to” the taking of a property right. *Franciscan All.*, 245 N.E.3d at 151.



REASONS FOR GRANTING THE PETITION

I. The Question of What “Just Compensation” Means Under the Fifth Amendment Warrants This Court’s Review.

A cornerstone of the Fifth Amendment’s just compensation clause is that when government exercises its eminent domain power to take private property, burdening the property owner for a public purpose, the private property owner is entitled to just compensation. Indeed, where there is an undisputed partial taking of private property, just compensation should include consideration by the trier of fact of any deleterious effects of a governmental public project for which the property is taken, irrespective of whether those effects are specifically tied to the loss of a specific property right.

In eminent domain proceedings, a citizen is compelled to defend his or her property rights because the government demands the taking of property to serve a public service. And, when the government does the taking the citizen suffers the loss of property and is entitled to just compensation and should be entitled

⁶ The Court used the word “damages,” which is a concept different than “just compensation” under the Fifth Amendment.

to all adverse effects of the government’s authoritative deprivation of property rights.

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).

The Indiana Supreme Court defined just compensation in eminent domain proceedings as limited to actions that directly result from the taking of a property right. *Franciscan All.*, 245 N.E.3d at 151. This rule, redefining what “just compensation” means, is not just problematic for its application in this case, but also in its potential application in every partial takings case hereafter.⁷ In other words, the Indiana rule is not isolated to a niche corner of Fifth Amendment jurisprudence, but instead will be used by lower courts and sister state courts frequently. Notably, the Indiana Supreme decision highlights the inconsistency among the State courts to the interpretation of just

⁷ Lower courts have wrestled with the issue of when severance damages attributable to the project are warranted before, but Indiana’s purportedly bright line rule takes this to a new and dangerous level.

compensation using conflicting and inconsistent legal principles.

Partial government takings of private property are common. If the government is allowed to limit its compensation argument only to that which is “directly” tied to the loss of a specific property right, without consideration of the effect of the whole project, the private property owner is *per se* unfairly burdened for the public good.

Assume the government takes the backyards of houses to build and expand a highway where none existed before. The taking of those lands will be compensated for. However, the highway now essentially abuts the homes creating noise and air pollution, even if the government builds a wall to lower the noise decibels. But, as evidence would show, it is the whole project that has devalued the private property. In this example, the new highway devalues the real property because the proximity of the new highway which is “directly” tied to the loss of a property right. But, the impact of the whole project, noise and air pollution included, should be considered. The straightforward application of the “before” and “after” rule would include evidence that shows the private property owner having suffered a greater burden to bear for the public good. But the additional burden of tying the loss in value to a specific property right followed by Indiana in *Franciscan All.* would fail to capture this devaluation and has further focused the inconsistencies existing in other state courts to determine just compensation.

II. The Underlying Issue of How to Measure Just Compensation for a Partial Taking, and Whether Just Compensation Must Be Directly Tied to a Specific Property Right, Shows a Conflict Between State Courts.

This case presents a significant conflict on how states measure just compensation for partial takings. When applying the Fifth Amendment's just compensation clause, some states adopt the position that, where the taking is an integral part of constructing the greater public project, the landowner is entitled to recover from all devaluations caused by the public project (irrespective of whether the devaluation is tied to a specific property right) as "just" compensation. The rationale; but for the taking, the public project could not be completed. But, not Indiana.

For example, the Supreme Court of Connecticut has said, "where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land." *Andrews v. Cox*, 129 Conn. 475, 482, 29 A.2d 587, 590 (Conn. 1942) (The "Andrews rule"). Here, Indiana State engineers testified that the acquisition area was a critical component of constructing the new road. The Indiana state appellate courts ignored this evidence as part of the impact of the project as a whole. In stark contrast to Indiana, Connecticut and Minnesota have specifically adopted and applied the *Andrews* rule. *City of Crookston v. Erickson*, 244 Minn. 321, 69 N.W.2d 909 (1955).

The resolution of whether severance damages must be “directly” tied to a lost property right is a vexing one, demonstrated by Utah, that initially rejected the *Andrews* rule in 2007, and then four years later overruling and adopting the *Andrews* rule. *Utah Dept. of Transp. v. Admiral Bev. Corp.*, 275 P.3d 208 (Utah 2011) ((overruling *Ivers v. Utah Dep’t of Transp.*, 154 P.3d 802 (Utah 2007)). *Admiral Beverage* is instructive for how the Indiana rule requiring a direct tie to impacted property rights goes awry, leaving condemnees undercompensated.

In *Admiral Beverage*, the state expanded an interstate, but it also raised the interstate 28 feet. The Admiral Beverage property was thus no longer visible from the interstate. The state argued the owner could not recover for loss of visibility because the owner had no “protectable property right” in “visibility.” *Admiral Beverage* specifically compared the right of visibility—or lack thereof—to the exact issue addressed by the Indiana Supreme Court in *Franciscan All.*, regarding the purported lack of a property right in a traffic pattern. *Admiral Beverage*, 275 P.3d at 215-16. *Admiral Beverage*, consistent with the underlying principle of what is “just,” declared its concern with how best to determine “just compensation” when a taking occurs and its impacts—not fixing rules to determine whether a taking occurs in the first place. 275 P.3d at 216. In holding that the owner was entitled to recover for loss of visibility, the court reasoned that the state could not have completed its project but for the condemnation.

The court also reasoned that, when Admiral Beverage bought its property, one of the attributes of its property value was its visibility. Similarly, when SCP bought its property, one of the attributes driving

its value was that it was on a corner, not a dead end. *Admiral Beverage* reasoned that if the state was not required to pay severance damages for the loss of visibility, the value of the visibility transferred to the state without payment: The court thus overruled its earlier decision in *Ivers v. Utah Dep’t of Transp.*, declaring that it would “overrule the part of that decision that prevents a landowner from recovering severance damages based on the fair market value of his property before and after the taking. In so doing, we restore our long-standing precedent allowing recovery for all damages that are caused by a taking.” *Admiral Bev.*, 275 P.3d at 220 (emphasis added).

As a result of the Indiana rule, the locational attributes of Petitioners’ properties (and commercial highest and best uses) have now similarly transferred to the State, without payment, on the same theory rejected by *Admiral Beverage*.⁸

Similarly, the Supreme Court of California has held that, where a taking is used to construct part of a public improvement, it is proper to consider damages caused by the project as a whole—even when those damages stem from aspects of the project not on the condemnee’s property, *e.g.*, turning an adjacent road from a throughway to a dead end. *People ex rel. Dep’t Pub. Wks. v. Ramos*, 1 Cal. 3d 261, 460 P.2d 992 (1969). In other words, when there is a taking, *Ramos* does

⁸ Utah’s neighbor, Colorado, took the opposite approach, finding loss of visibility to be a factor to be considered in severance damages before reversing course two years later, finding that it was not compensable because it is not tied to a “protectable right.” *Dep’t of Transp. of State v. Marilyn Hickey Ministries*, 159 P.3d 111, 112 (Colo. 2007) (reversing *Dep’t of Transp. of State v. Marilyn Hickey Ministries*, 129 P.3d 1068 (Colo. App. 2005)).

not require the condemnee to tie particular damages to the loss of specific property rights. The fact that there is a taking of a property right is sufficient alone to entitle the landowner to consider damages from the project as a whole. After all, if not for the taking, the government could not construct the public project.

In a case similar to *Ramos*, Kentucky's then court of last resort reached the opposite result. *Com., Dep't of Highways v. Williams*, 487 S.W.2d 290 (Ky. 1972). *Williams* involved a small condemnation of one-third acre for a highway from a large, 63-acre parcel suitable for lake resort use. The owner argued the use of the broader highway devalued the remaining property for lake resort use because of the noise and fumes associated with the highway. The jury had sided with the landowner. *Williams* overruled the jury's award and held that consideration of the noxious uses of the highway project as a whole could not be considered.

In Michigan, the State Supreme Court reversed the State's appellate court ruling that adopted the *Andrews* rule by finding the State's Uniform Condemnation Procedures Act's (UCPA) excluded compensation for "general effects" damages, and was nevertheless constitutional. *Michigan Dept. of Transp. v. Tomkins*, 749 N.W.2d 716 (Mich. 2008). While the appellate court found that where the taking is for an integral part of the project, the affected citizen may claim just compensation based on damages caused by the project as a whole, the Michigan Supreme Court disallowed the severance damages. The court held that the phrase "just compensation," *i.e.*, the same phrase used in the Fifth Amendment, was a "highly technical term of art" that did not allow "general effects" damages caused by operation of the completed public project. *Tomkins*, 749

N.W.2d at 732. The word “just” in “just compensation” belies the idea that the concept is “highly technical.” It is the opposite; it is a fairness any juror can understand.

As seen in *Tomkins*, certain states are narrowing the definition of “just compensation,” to exclude evidence of negative and direct impacts of a governmental project as a whole, placing the burden of public works upon selected private property owners for the “public good”—and vacating jury awards—to avoid governmental payouts.

Moreover, at least one federal court has entered the fray and has invited even more confusion. The Ninth Circuit has commented that the rationale disallowing severance damages for the general effects of the project stems from the idea that a private seller of the subject property could not recoup damages if his neighbor used the neighboring property in such a manner as to devalue the subject property, and thus the government’s burden is no greater. *United States v. 15.65 Acres of Land in Marin Cnty., State of Cal.*, 689 F.2d 1329, 1332 (9th Cir. 1982). This rationale ignores and denies the basic legal principles of property law regarding issues between private property owners.

First, landowners are protected from many noxious uses of their neighbors’ properties by laws such as zoning, restrictive covenants, and even common law nuisance. The government’s eminent domain power, meanwhile, trumps them all. The government can build a highway through land even where zoning or restrictive covenants would otherwise prevent it. The sovereign’s title is supreme. The government can impose burdens from public projects on neighboring landowners that private parties never could.

In any event, to qualify to claim severance damages from the project as a whole, the Ninth Circuit adopted a three-part test:

- (1) the land taken from the condemnee land-owner was indispensable to the . . . project;
- (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemner government's use of its adjoining land in the . . . project.

15.65 Acres, 689 F.2d at 1332. The formula, again, is a narrowing of the definition of "just" compensation and is circular in logic:

The element of indispensability assures that the government is being required to pay no more than a private buyer confronted with the same compulsion. In either event, indispensability affords the landowner the ability to demand payment for the injury to his remaining property, just as he is able to do so under the first rule stated above. Substantiality tends to assure the existence, in fact, of indispensability, and inseparability tends to assure that the injury to the land not taken does not arise from a use independent of the project with respect to which the property taken was indispensable.

Id.

The Ninth Circuit’s three-part “test,” however leaves much to be desired. First and foremost, it has no basis in the text or history of the Fifth Amendment. The Ninth Circuit seems to believe, as the Supreme Court of Michigan does, that “just compensation” is not designed to prevent a citizen from bearing too much of the burden of public works, but instead is a “term of art” that limits a constitutional right as much as it protects it.

This highly circumscribed version of “just compensation” is not just lacking in textual support, it is against it. As this Court has held, the word “just” in the Fifth Amendment evokes ideas of “fairness” and “equity.” *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950). Accord, *Armstrong*, 364 U.S. at 49. (Takings Clause invokes analysis of “fairness and justice”). After all, the framers could have simply written “compensation,” which would have contemplated basic payment. They did not, preferring the equity tinged “just compensation.”

What is “fair” and “equitable” compensation when a taking occurs is not determinable through inflexible and arbitrary judicial (or legislative) rules; a jury is well positioned to determine the sufficiency of evidence related to or regarding the award of “just” damages from governmental projects. See e.g., *Tomkins*, 749 N.W.2d at 732 (Weaver, J. dissenting, and commenting that statute that limits what is “just compensation” on a direct, partial taking was unconstitutional and “the proper process for determining the amount of just compensation is left to a trier of fact.”). A jury can decide what compensation returns a citizen to the same

pecuniary position as if the taking had not occurred—an inflexible rule of law cannot.⁹

Second, presumably condemned land is always indispensable to a public project otherwise the government has no cause to take it. The government has the power to plan its public projects as it sees fit, and absent fraud, the courts will not question that planning. Having so planned its project, the government cannot avoid just compensation by arguing it did not need the condemned property in the first place.

Third, the Ninth Circuit justifies “substantiality” by saying it is roughly the same thing as indispensability. They are not the same. There is no logical justification for allowing compensation for substantial destruction of property rights as opposed to “insubstantial” destruction of property rights. *See e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Our cases establish that even a minimal “permanent physical occupation of real property” requires compensation under the [Takings] Clause [of the Fifth Amendment]”). Furthermore, there is no clear dividing line between “substantial” or “insubstantial” takings. Which is which?

Finally, the “inseparable” element described by the Ninth Circuit ignores the real estate market and invites government abuse. A buyer in the real estate market does not care whether the devaluation is brought on by the use of the land taken or a “separate” use of the government’s land immediately adjoining the property. The devaluation exists because of the government’s

⁹ Should we trust a jury of taxpayers, who must indirectly pay the award for public projects, to determine what returns a citizen to his prior position? Or should we trust the state itself to tell us what is compensable and what not?

project, as a whole, even if the devaluation is driven more by operation of the project, then directly out of the taking area. *See e.g., Tomkins* 749 N.W.2d at 719 (value of land alone taken to construct overpass was agreed to be \$3,800, while owner claimed \$48,200 in severance damages due to “dust, dirt, noise, vibration, and smell” of the project as a whole—which was disallowed as a matter of law).

The government can also always argue that the severance damages claimed are able to be separated from operation of the project as a whole. The value of the property rights lost, alone, are determinable. In *Tomkins*, as an example, the government took approximately 5,880 square feet of the owner’s land. The owner had no property rights in any part of the highway other than the appropriated 5,880 square feet. The claimed severance damages of “dirt, smell” could not arise without the government’s use of adjoining lands (because you cannot construct a highway on 5,880 square feet), and thus the property owner could not tie his damages directly to a property right lost. Thus, the damages to the owner’s property rights—just \$3,800—are allegedly separate from operation of the highway—the project as a whole.

This case presents a question of exceptional importance to the application of the principles governing the Fifth Amendment’s just compensation clause among the states consistently. The Indiana rule, as do other states, invites a court to strike damages by imagining the operation of the public project as if it will not exist. But, the governmental project does exist and the impacts of the project of the whole to the private property are factors to any potential future purchaser. A private property owner should not shoulder

the public burden of a government project that adversely affects the value of private property in a manner far different than in the absence of a government project. The “just” in compensation, under the Fifth Amendment, includes all provable damages as a jury would determine.



CONCLUSION

The framers of the constitution did not write that “just compensation must be paid—unless it gets too expensive for the government.” Juries are awarding just compensation because evidence reveals the damages arising from a governmental project as a whole. State court inconsistencies in the application of what is “just compensation,” has resulted in confusion among the courts as to what is “just.” Some courts narrow the definition while others allow for evidence to juries to weigh, including evidence of losses not tied to the loss of a specific property right. In short, there is nothing under the Fifth Amendment that displaces evidence relevant to the meaning of “just compensation” nor to be recoverable, does an owner’s loss have to be tied to the loss of a specific property right.

Petitioner respectfully asks that the petition be granted.

Respectfully submitted,

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