No. 24-926

IN THE

Supreme Court of the United States

JOHN R. STENSRUD, *et al.*,

Petitioners,

v.

ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT

REPLY BRIEF

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STATEMENT

In the opposition brief ("Opp. Brf.") of respondent, condemnor Rochester Genesee Regional Transportation Authority ("RGRTA"), two misstatements in particular stick out, and are corrected in this reply brief.

1. This case presents new issues that differ from those in United States Supreme Court Docket No. 24-150. There, the issue was whether res judicata precluded our federal action, based on the state court judgment. Here, by contrast, the issue is whether RGRTA's (and the lower courts') failures to follow federal law should now be reversed by this Court, and remanded for a new trial, in which the state court judge is finally allowed to consider the only expert valuation evidence in this case that comports with federal law: namely, the Income Capitalization of our expert, Ralph Eisenmann.

2. Contrary to RGRTA's representations, the issue in state court is not that Mr. Eisenmann was not called as a witness; rather, it is that his expert Income Capitalization – which methodology is required by federal law – was erroneously and unconstitutionally excluded from evidence in the state court trial.

REPLY

A. Even If the State Courts' Interpretation of 22 N.Y.C.R.R. §202.61(e) Were Correct – And It Most Certainly Is Not – Certiorari Should Still Be Granted Because That State Regulation Would Run Afoul of Both Federal Law, and Just Compensation, As Required By the United States Constitution. As It Is, Though, That Regulation Is Not Itself Unconstitutional – The Lower Courts Applied It Unconstitutionally.

We agree with RGRTA that the state regulation's purpose is to prevent surprises at trial. But that is not what happened below. Rather, the lower courts interpreted the regulation to preclude all expert evidence that is not in the form of a real property appraisal – and that is grave error with profound constitutional consequences, because it precluded the only expert evidence in this case that comports with the approaches to value recognized under and mandated by federal law and the United States Constitution: Income Capitalization and Cost Approaches.

RGRTA would have this Court believe that this petition simply "recycle[s]" points from our prior application: United States Supreme Court docket, No. 24-150. (Opp. Brf. p. 5). This is entirely false: the issue there was whether res judicata barred our federal action based on the state court judgment.

In striking contrast here, a key issue now before this Court is whether a state regulation can be construed to violate federal law and indeed, the Fifth Amendment's constitutional mandate of just compensation.

The answer is obviously no, but more to the point, RGRTA intentionally disregarded federal law by not using Jurisdictional Exceptions to the state regulation. Indeed, as detailed in our Petition, to the extent that a state eminent domain regulation differs from federal law, both the Uniform Standards for Professional Appraisal Practice ("USPAP") and the Uniform Appraisal Standards for Federal Land Acquisitions (the "Yellow Book") require Jurisdictional Exceptions, in federal takings, so that federal law can be applied, as it must be. Moreover, RGRTA's defects and omissions were intentional.

RGRTA thus committed nonfeasance – by failing to invoke the required Jurisdictional Exceptions, and malfeasance – because it did so knowingly. We hope to correct this not only through this case, but also system-wide, finally bringing to light the longstanding impact each of these various shortcomings wreaks in both the state and federal justice systems, across the country.

RGRTA was required to conduct Yellow Book appraisals for all properties acquired in federal takings, whether they were single-family, income properties, commercial apartments or other commercial buildings. Even after it was explicitly informed of this requirement, RGRTA still chose not to comply. Nor is this the only case in which RGRTA has committed such egregious nonfeasance and malfeasance. Freedom of Information Law requests revealed a pattern whereby RGRTA never follows federal requirements in takings where they are required to do so because they accepted federal funds for the projects.

Indeed, RGRTA has failed to use any Jurisdictional Exception – not one – in the past 25 years, revealing that it always fails, as a matter of standard

operating procedure, to comply with federal law. To cite just one example, RGRTA habitually fails to comply with the federal mandate that all appraisals certify that they comport with Yellow Book requirements. Had proper audits of these appraisals been done as required by the Yellow Book, federal Inspectors General would have uncovered these critical failures during the past quarter-century, but this evidently did not occur, as the review appraisers in these takings also failed to certify that they followed the Yellow Book.

Nor was Income Capitalization the only required methodology that RGRTA failed to employ. It also failed even to conduct the Cost Approach to value, which was mandated by the Yellow Book given the recency and extent of improvements. Indeed, the subject property's value in the excluded Eisenmann Report was $943,000 under the Cost Approach, and $1,765,000.00 using Income Capitalization.

RGRTA's conduct in this case – enabled by critical errors by its appraisers and in the lower courts – also contravened other key, Yellow Book principles, including that condemnees should not be subjected to protracted litigation, in order to secure just compensation, and that condemnors – and courts – should not "redline."

In summary, the law laid down by this Court remains as true today as it was then:

> We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the

> State in which the court sits. They do not, and could not, affect questions of substantive right,—such as the measure of compensation,—grounded upon the Constitution of the United States.

U.S. v. Miller, 317 U.S. 369, 379-80 (1943).

B. RGRTA Miscasts The Issue Regarding Mr. Eisenmann's Expert Testimony: It Is Not Simply That He Did Not Testify; It Is That His Income Capitalization Was Wrongly Excluded from Trial, Which Error By the Lower Courts Violates Federal Law, and Has Grave Constitutional Consequences.

At the very least, we ought to be able to agree on the clearly undisputed points in this record. While the Appellate Division, Fourth Department did indeed allow Mr. Eisenmann to testify, it did so in a way that sharply circumscribed the scope of his testimony. Indeed, the Appellate Division only allowed, "[t]o the extent that [we] are able to qualify him as an expert at trial," that Mr. Eisenmann could "testify in support of the valuation methods employed by [the Stensruds'] appraiser [Mr. Rynne] and to critique those methods used by [RGRTA]." RGRTA v. Stensrud, 173 A.D.3d 1699, 1700-01 (4th Dep't 2019).

In other words, the lower, state courts allowed Mr. Eisenmann (once qualified as an expert) to opine on Mr. Rynne's appraisal and RGRTA's appraisal – neither of which complied with the Yellow Book or the Fifth Amendment mandate of just compensation.

Once again, RGRTA fails even to present the issue correctly – wrongly suggesting that we somehow inexplicably failed to call Mr. Eisenmann as a witness at the state court trial, as if that is all that would have been required to admit his Income Capitalization and Cost analyses into evidence. (Opp. Brf. p. 8).

This is obviously not true, as RGRTA moved, successfully, at the very inception of this case, to exclude Mr. Eisenmann's report from evidence. RGRTA and the lower courts were then required to invoke the Jurisdictional Exceptions to the state regulation, so as to allow the Stensruds to present critical evidence – that is explicitly required by federal law – regarding their property's value, using Yellow Book principles, including valuing their property in its highest and best use, using appropriate methodology.

The state regulation reads, in full:

> Upon trial, all parties shall be limited in their affirmative proof of value to matters set forth in their respective appraisal reports. Any party who fails to file an appraisal report as required by this section shall be precluded from offering any appraisal testimony on value.

22 N.Y.C.R.R. §202.61(e).

The first sentence is at issue, here. Neither the regulation nor the statute defines "appraisal reports," but it is clear that "appraisal" could be replaced with "valuation" or "expert." There is no requirement that a valuation expert be a real property appraiser.

Moreover, federal law does define appraisal reports, and requires that they comply with Yellow Book standards, which RGRTA intentionally did not do, here. And again, to the extent that the state regulation differed from federal requirements, RGRTA's appraisers were required – but failed – to invoke the Jurisdictional Exceptions necessary to allow the application of federal valuation principles and methods.

The cases on which RGRTA relies do not support its argument to the contrary. In In re Application of Metropolitan Transportation Authority, 159 A.D.3d 518, 518 (1st Dep't 2018), for example, "[c]laimant's appraisal report failed to show that the damage to its property was caused by condemnor's temporary easements," and in Village of Haverstraw v. Ray River Co., Inc., 191 A.D.3d 994, 997 (2d Dep't 2021), the Appellate Division affirmed the trial court's exclusion from evidence of a letter of intent "because, among other things, neither of the parties' appraisers relied upon it in formulating their appraisal" – both citing §202.61(e).

Likewise, in In re Eagle Creek Land Resources, LLC, 149 A.D.3d 1324, 1329-30 (3d Dep't 2017), the regulation properly prevented an appraiser from testifying at trial so as to contradict his appraisal report, and in In re Town of Guilderland, 267 A.D.2d 837, 838 (3d Dep't 1999), the Court stated:

> The appraisal report is not in itself evidence; its function is to enable adequate and intelligent preparation of the issues for trial and to limit expert testimony at trial. It is not intended as a substitute for evidence.

Town of Guilderland, 267 A.D.2d at 838 (internal citations omitted).

These decisions cited by RGRTA clearly differ from the case at bar, where there were no surprises, omissions, or other defects in the Stensruds' expert valuation proof – it simply came in the form of a finance expert rather than a real property appraiser, which is entirely permissible.

RGRTA also fails to distinguish OCG Ltd. Partnership v. Board of Assessment Review of Town of Owego, 79 A.D.3d 1224 (3d Dep't 2010). As we noted in our Petition at page 15, OCG involved an assessment, rather than eminent domain. This is wholly immaterial, as each involves the valuation of real property. Further, the Court states explicitly in OCG that:

> expert witnesses who are not real estate appraisers are not categorically excluded from offering their opinion on property valuations. In fact, experts who are not appraisers may be preferable for certain appraisal methods.

OCG, 79 A.D.3d at 1226 (internal citations omitted).

The Appellate Division makes no distinction between assessment and condemnation law because, obviously, both are property valuation cases. It is also significant that the business accountant who appraised the property in OCG – unlike Mr. Eisenmann – had a number of issues with his appraisal (OCG, 79 A.D.3d at 1225-27), yet the Court still recognized the

probative value of his expert opinion, holding that it should be admitted, subject to impeachment at trial.

This is exactly what should have happened with Mr. Eisenmann's report. Indeed, as noted, the case for admitting Mr. Eisenmann's report is much stronger than the report that the Appellate Division approved in OCG. (OCG, 79 A.D.3d at 1225-27).

As it is, the cost of protracted litigation is part of the ongoing injuries that RGRTA inflicted on the Stensruds. Neither federal nor state condemnation law contemplates that condemnees should be subjected to a decade of litigation, including interest paid on debt, lost income, and massive legal costs, to name just a few of the ongoing damages caused by RGRTA's repeated, persistent refusals to follow federal law. RGRTA's conclusory claim that the Stensruds have been paid "just compensation" simply denies their injuries, and seeks to neutralize/minimize the Stensruds' ongoing damages.

CONCLUSION

This case never should have reached this point. From the very beginning, RGRTA set upon a course to avoid the requirements of federal law – deliberately, through malfeasance as well as nonfeasance. Despite knowing that a Yellow Book appraisal was mandated, and that it was required to certify that its appraisal conformed to federal standards, RGRTA simply refused to do so – not just in our case, but also in all of the appraisals that it contracted, in all the other cases, over the past quarter-century, despite accepting millions of dollars in federal funds for such projects.

As the ultimate guarantor of federal law and protector of rights under the United States Constitution, this Court should reverse, and remand for a new trial, with an evidentiary record that complies with federal, constitutional requirements.

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Respectfully submitted,

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