No. 17-1668

In the Supreme Court of the United States

NASHVILLE DOWNTOWN PLATINUM, LLC,
Petitioner,

v.

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Middle Division

BRIEF IN OPPOSITION

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INTRODUCTION

This eminent domain case presents no issues meriting review by the Court and would be the wrong vessel for the sweeping relief being sought by the Petitioner. The case was decided entirely under Tennessee law. The federal constitutional arguments now being advanced by the Petitioner were not timely raised in the state courts. The remaining claims of error relate either to evidentiary rulings under Tennessee law or the particular nuances of the Tennessee eminent domain statutes and their application. The application of these state laws constitutes independent and adequate grounds for the judgment below. The petition should, therefore, be denied.

STATEMENT OF JURISDICTION

Because the Petitioner failed to raise any federal questions in the Tennessee state trial court, this Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257. Supreme Court Rule 14.1(g)(i) requires a Petitioner to refer specifically to those portions of the state court record where the federal question sought to be review "was timely and properly raised . . . ." Although the Petition purports to do so on page 12, it does not cite to any portion of the record where the specific issues were timely raised. For the reasons discussed more fully below, the Court lacks jurisdiction over the federal questions now advanced by the Petitioner.

STATEMENT OF THE CASE

This case arises from acquisition of unimproved land in downtown Nashville for a convention center project. The Petitioner, which was the owner of the property in question, did not object to the taking. Thus, the only outstanding issue was the valuation of the property. The case was tried to the jury, which found that the property the Petitioner acquired on the open market for $43 per square foot at the end of 2007 was worth $63 a square foot as of the date of the acquisition in January 2010. The jury rejected the contention of the Petitioner's appraiser that the property had tripled in value during the Petitioner's brief period of ownership. The jury's verdict was approved by the trial court and by the Tennessee Court of Appeals. The Tennessee Supreme Court declined to review the case.

REASONS FOR DENYING THE PETITION

I. THERE IS NO BASIS FOR THIS COURT TO CONSIDER PLATINUM'S CHALLENGE TO TENNESSEE'S STANDARD FOR DETERMINING JUST COMPENSATION IN AN EMINENT DOMAIN CASE.

The Petitioner first asks the Court to review Tennessee's method for calculating just compensation, claiming that it violates the Fifth and Fourteenth Amendments to the United States Constitution. The Tennessee Court of Appeals rejected this challenge, because the Petitioner raised it for the first time on appeal. Pet.'s App. at 32a. Under Tenn. R. App. P. 3(e), "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."

The Court should not review the Petitioner's challenge to Tennessee's standard of determining just compensation, because the Tennessee Court of Appeals relied on an independent and adequate state law ground—state law waiver—to reject the challenge. Regardless, the issue does not merit this Court's review.

A. The state court's rejection of the Petitioner's constitutional challenge is not reviewable by this Court.

As noted in *Lee v. Kemna,* 534 U.S. 362, 375, 122 S. Ct. 877, 885, 151 L. Ed. 2d 820 (2002): "This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.' The rule applies with <u>equal force</u> whether the state-law ground is substantive or <u>procedural</u>." (Italics and brackets in original, underline added) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)).

Here, the Tennessee Court of Appeals' finding of waiver is an adequate and independent basis under state law to deny the Petitioner's claim for relief, and therefore, this case is not reviewable. As cogently stated by the United States Court of Appeals for the Eleventh Circuit:

> A state court's rejection of a federal constitutional claim on procedural grounds will only bar consideration of that claim on federal habeas if the state court's ruling rests on independent and adequate state grounds. *County Court of Ulster County v. Allen,* 442 U.S. 140, 148, 99 S.Ct. 2213, 2220, 60 L.Ed.2d 777 (1979); *Wainwright v. Sykes,* 433 U.S. at 87, 97 S.Ct. at 2506. A state court finding of waiver or procedural bar constitutes an independent and adequate state ground if certain conditions are fulfilled. First, under *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) the last state court rendering a judgment in the case must fulfill the "plain statement rule" of *Michigan v. Long,* 463 U.S. 1032, 1042 & n. 7, 103 S.Ct. 3469, 3477 & n. 7, 77 L.Ed.2d 1201 (1983) and "clearly and expressly" state that it is relying on waiver as a ground for rejecting the petitioner's claim. *Harris,* 489 U.S. at 263, 109 S.Ct. at 1043. Second, the procedural rule relied on by the state court must serve as an independent state law ground for denying relief, and may not be intertwined with an interpretation of federal law. *Caldwell v. Mississippi,* 472 U.S. 320, 328, 105 S.Ct. 2633, 2639, 86 L.Ed.2d 231 (1985); *Ake v. Oklahoma,* 470 U.S. 68, 75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985). Finally, the state's application of procedural bar must be adequate. That is, it must not be applied in an arbitrary or unprecedented fashion, such that it thwarts

> federal court review of those who, "in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP v. Alabama ex rel Patterson,* 357 U.S. 449, 457–58, 78 S.Ct. 1163, 1169, 2 L.Ed.2d 1488 (1958). Instead, a state court's procedural rule must be faithfully and regularly applied, *see Dugger v. Adams,* 489 U.S. 401, ——n. 6, 109 S.Ct. 1211, 1217 n. 6, 103 L.Ed.2d 435 (1989); *Johnson v. Mississippi,* 486 U.S. 578, 586, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988) and must not be manifestly unfair in its treatment of a petitioner's federal constitutional claim. *Spencer v. Kemp,* 781 F.2d 1458, 1470–71 (11th Cir.1986).

Card v. Dugger, 911 F.2d 1494, 1516-17 (11th Cir. 1990).

Here, the "plain statement rule" is satisfied. Relying on Tenn. R. App. P. 3(e), the Tennessee Court of Appeals clearly and expressly stated that, "even assuming a legitimate constitutional grievance did exist, we conclude that it is waived." Pet.'s App. at 32a. There is no dispute that the Petitioner did not raise this constitutional challenge at any time before the trial court, including in its motion for new trial.

The Tennessee Court of Appeals' finding of waiver serves as an independent state law ground for denying relief, because its finding is unrelated to federal law. In *Stewart v. Smith*, 536 U.S. 856, 122 S. Ct. 2578, 153 L. Ed. 2d 762 (2002), the Court considered whether an Arizona state trial court's denial of a petition for postconviction relief was independent of federal law and, therefore, nonreviewable. The state court found that the petitioner waived his argument by failing to comply with the Arizona Rules of Criminal Procedure, which required the argument to be raised earlier. *Id.*, 536 U.S. at 857, 122 S. Ct. at 2580.

The Court found that waiver determinations under that state procedural rule "are independent of federal law because they do not depend upon a federal constitutional ruling on the merits." *Id.*, 536 U.S. at 860, 122 S. Ct. at 2581. Because the state trial court's determination "did not require an examination of the merits of that claim, it was independent of federal law," and therefore, the merits of the claim were not reviewable in federal court. *Id.*, 536 U.S. at 861, 122 S. Ct. at 2582. *See also Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2013) ("Arizona's waiver rules are independent and adequate bases for denying relief").

Finally, the Tennessee Court of Appeals' application of the waiver rule set forth in Tenn. R. App. P. 3(e) is adequate. This Court has recognized that, "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." 534 U.S. at 376, 122 S. Ct. at 885 (quotation omitted). Rule 3(e) of the Tennessee Rules of Appellate procedure was enacted many years ago and has been consistently applied.

The Petitioner cannot argue that Tenn. R. App. P. 3(e) is manifestly unfair to a petitioner's federal constitutional rights. If the Petitioner wished to take issue with the standard for valuing its property, it was incumbent upon the Petitioner to draw the issue to the trial court's attention at the appropriate time—not "lie in wait" and see if it was dissatisfied with the outcome. Indeed, the rule essentially mirrors the federal law maxim that, in the absence of extraordinary circumstances (which the Petitioner has not shown), legal issues may not be raised for the first time on appeal. *See, e.g., Audette v. Town of Plymouth, MA*, 858 F.3d 13, 24 (1st Cir. 2017); *Peterson v. Islamic Republic of Iran*, 876 F.3d 63, 78 (2d Cir. 2017); *Curry v. Yachera*, 835 F.3d 373, 378 n.11 (3d Cir. 2016); *Campbell v. Boston Sci. Corp.*, 882 F.3d 70, 80 (4th Cir. 2018); *Green Tree Servicing, L.L.C. v. House*, 890 F.3d 493, 503 (5th Cir. 2018); *Kelly Servs., Inc. v. Creative Harbor, LLC*, 846 F.3d 857, 867 (6th Cir. 2017); *United States v. Faulkner*, 885 F.3d 488, 500 (7th Cir. 2018); *Halbrook v. Mallinckrodt, LLC*, 888 F.3d 971, 976 (8th Cir. 2018); *Franceschi v. Yee*, 887 F.3d 927, 940 n.6 (9th Cir. 2018); *Xyngular v. Schenkel*, 890 F.3d 868, 875 (10th Cir. 2018); *Griffith v. United States*, 871 F.3d 1321, 1329 n.8 (11th Cir. 2017).

In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3, 103 S. Ct. 2296, 2300 n.3, 76 L. Ed. 2d 497 (1983), the Court considered an appeal from an Alabama state court ruling but refused to consider a preemption argument that that was not raised in the trial court. The preemption argument was raised for the first time before the Alabama Supreme Court but was not addressed by that court. *Id.* Finding that "<u>we have no jurisdiction to consider this contention</u>," this Court noted that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." *Id.* (emphasis added); *see also Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989) (noting that the independent and adequate state ground "doctrine 'has been applied routinely to state court decisions forfeiting federal claims for violation of state procedural rules' ") (quotation omitted).

B. Petitioner's constitutional challenge does not merit review.

Even if the Tennessee Court of Appeals' decision were reviewable, the Petitioner has not shown that this Court should intervene. The Petitioner claims that it was entitled to be compensated for the taking of its property based only on its "highest and most profitable use" and that it was inappropriate for the jury to consider other potential uses of the property. The Petitioner, however, cannot show that the standard in Tennessee is different than the federal standard.

The Petitioner's argument that the federal constitution requires a landowner to be compensated on the basis of the land's highest and most profitable use is based solely on dictum from the United States Court of Appeals for the Third Circuit in *United States v. 68.94 Acres of Land*, 918 F.2d 389 (3d Cir. 1990). Therein, the court cited *Olson v. United States*, 292 U.S. 246, 255, 54 S. Ct. 704, 708-09, 78 L.Ed. 1236 (1934), for the following proposition: "The Supreme Court has interpreted the just compensation clause to require that condemnees receive the value of the highest and best use for which the property is adaptable in the reasonably near future from the vantage point of the date of taking." *68.94 Acres of Land*, 918 F.2d at 393.

The Third Circuit, however, did not accurately characterize the *Olson* Court's finding. The full context of the *Olson* Court's statement is as follows:

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum

> required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of <u>all the uses</u> for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is <u>to be considered, not necessarily as the measure of value</u>, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

Olson, 292 U.S. at 255, 54 S. Ct. at 708-09 (emphasis added; citations omitted).

This Court has never suggested that highest and most profitable use is the sole measure of value in an eminent domain case. As noted in *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10, 104 S. Ct. 2187, 2194, 81 L. Ed. 2d 1 (1984): " 'Just compensation,' we have held, means in most cases the fair market value of the property on the date it is appropriated. 'Under this standard, the owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking.' " (Quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511, 99 S. Ct. 1854, 1857, 60 L. Ed. 2d 345 (1979)). A willing buyer would not pay for land based solely on its highest and most productive use, but instead, pay fair market value taking into account all potential uses.

The Petitioner does not claim that the trial court refused to allow it to present evidence of the property's highest and best use. In fact, the Petitioner and the Petitioner's expert testified at length about the property's highest and most profitable use. The

Petitioner, instead, claims that the trial court should not have precluded it from "overemphasizing" any particular use—discretionary rulings that fully comported with state and federal law.

II. THERE IS NO BASIS FOR THIS COURT TO REVIEW THE STATE TRIAL COURT'S DISCRETIONARY EVIDENTIARY RULINGS.

The Petitioner also seeks to challenge a number of the trial court's discretionary evidentiary rulings under Tennessee law that largely relate to tangential matters that were not central to the jury's verdict. The Tennessee Court of Appeals correctly determined that the trial court did not abuse its discretion and that, in several instances, the Petitioner waived its right to appeal those rulings.

Noting that trial judges are afforded "wide latitude" in issuing evidentiary rulings, this Court has recognized its "traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S. Ct. 2142, 2146, 90 L. Ed. 2d 908 (1986). Thus, "we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability." *Id.*, 476 U.S. at 690, 106 S. Ct. at 2146; *see also Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991) (finding that state trial court evidentiary rulings generally are not a basis for habeas relief).

The Tennessee Court of Appeals' opinion is thorough and well-reasoned. For the reasons set forth in that opinion, the court appropriately interpreted the law in reaching its conclusions and determining that the trial court did not impair the Petitioner's right to due process. *See* Pet.'s App. at 9a-35a. The Tennessee Supreme Court concluded that this case does not merit further review, and this Court should make the same determination.

It is well established that this Court limits its review to cases "involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Rice v. Sioux City Mem'l Park Cemetery, Inc.,* 349 U.S. 70, 79, 75 S. Ct. 614, 620, 99 L.Ed. 897 (1955) (quoting *Layne & Bowler Corp. v. W. Well Works, Inc.,* 261 U.S. 387, 393, 43 S. Ct. 422 (1923)). The Petitioner has not shown that review of this case would be of any meaningful interest to anyone but itself.

CONCLUSION

For the foregoing reasons, the Court should deny the Petitioner's petition for a writ of certiorari.

Respectfully submitted,

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