

No. 17-967

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

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JAMES M. McMASTER and
MARY ELLEN McMASTER,

Petitioners,

v.

TOWNSHIP OF BENSLEM,

Respondent.

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

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**RESPONDENT, THE TOWNSHIP
OF BENSLEM'S, BRIEF CONTRA
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

On August 31, 2006, the Petitioners, James and Mary Ellen McMasters (“McMasters”) filed a Petition for Appointment of Viewers under Pennsylvania’s Eminent Domain Code alleging that Bensalem Township (“Township”) diverted storm water onto their property in 1988 or 1989, thereby constituting a *de facto* taking of the McMasters’ property. The McMasters filed an Amended Petition on April 15, 2014 to which the Township filed Preliminary Objections on May 5, 2014. On March 25, 2016, the trial court held that the McMasters could not prove a *de facto* taking and sustained the Township’s Preliminary Objections.

The McMasters filed an appeal of the trial court Order to the Pennsylvania Commonwealth Court (“Commonwealth Court”). After briefing and oral argument, on March 13, 2017 a unanimous panel of the Commonwealth Court issued an Opinion sustaining the trial court’s finding that the McMasters could not prove a *de facto* taking under the Eminent Domain Code. The facts of the case, as found by the Commonwealth Court, are as follows:

James M. McMaster and Mary Ellen McMaster (Property Owners) are the owners of 6001 Bensalem Boulevard, a residential property in Bensalem, Pennsylvania (the Property). The Property is approximately 6.25 acres in size and consists of three tax map parcels. . . . Husband Property Owner and his family have lived on the Property and used it continuously as a residence since 1986. . . .

Property Owners' house is on tax map parcel 2-85-67, the largest of the three parcels. . . . Tax map parcel 2-55-857, on the northwest side of the Property, and the northern part of tax map parcel 2-85-67 are heavily wooded and cannot be developed without a variance because they are in a flood plain.

On August 31, 2006, Property Owners filed a petition for appointment of viewers, alleging that the Township of Bensalem (Township) in 1988 or 1989 constructed a storm water system that redirected storm water from the west side of Bensalem Boulevard onto a significant portion of the Property and asserting that this constituted a *de facto* taking of the Property. . . . In 2010, while the case was inactive, the Township installed underground piping through the Property to carry the water discharged from the west side of Bensalem Boulevard to the Neshaminy Creek.

Husband Property Owner testified in his deposition that in the spring of 1989, he noticed that the area north of his house and lawn "was flooded with several feet of water" and that this flooding occurred again within a week or two. . . . Until the pipe installation in 2010, this flooding continued to occur whenever there were heavy rains or thunderstorms and the water would remain on the northern part of the Property for days or weeks. . . . Husband Property Owner testified that in 1990 the Township told him that the water came from a pipe that the Township installed in 1988 to solve a drainage problem on the west

side of Bensalem Boulevard. . . . The Township had thought that the pipe into which its new storm water pipe discharged ran along Bensalem Boulevard to a pipe that discharged into the Neshaminy Creek, but the pipe into which the Township redirected the storm water in fact discharged on the Property. . . . Husband Property Owner admitted that the Township's 2010 pipe installation solved the flooding caused by the Township's redirection of the storm water.

All of the flooding from the redirection of storm water was on the wooded northern part of the Property, tax map parcel 2-55-857 and the northern part of tax map parcel 2-85-67, and the Property Owners' house was not affected. . . . The water occasionally came onto the edge of the grass 80 to 100 feet north of the house, but did not significantly affect Property Owners' lawn or their ability to use their lawn. . . . Husband Property Owner testified that the flooding from the Township's redirection of storm water caused the loss of five large trees in the wooded area of the Property, which he estimated contains dozens and possibly over a hundred trees, most of which are small.

(Petition for Writ of Certiorari, App. 4a-8a)

On March 24, 2017 the McMasters filed an Application for Re-Argument to the Commonwealth Court, which Application was denied. The McMasters thereafter filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which Petition was

denied on October 3, 2017. The McMasters filed the instant Petition for Writ of Certiorari docketed on January 8, 2018.

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ARGUMENT

It is evident from the McMasters' Petition that the McMasters are unhappy with the Commonwealth Court's decision, but the McMasters offer no compelling reasons why this Honorable Court should reconsider the thoughtful and well-reasoned Opinion of the Commonwealth Court.

Rule 10 of the Rules of the Supreme Court of the United States offers three examples of such compelling reasons that this Court may grant certiorari, only one of which is relevant to this case:

- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10.

Rule 10 also indicates that certiorari will rarely be granted if the lower court accurately states the rule of law, even if it misapplies the facts. It is respectfully suggested that no reason exists to grant certiorari in this case. The Commonwealth Court accurately applied the law for *de facto* takings, did not decide a

question of federal law that has not been settled by this Court, and did not decide a question that conflicts with any decision of this Court including this Court's decision in *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 133 S.Ct. 511, 184 L.Ed.2d 417 (2012).

While all cases bring a unique set of facts to the Court for the Court's consideration, there is nothing particularly unique or unusual about this case either factually or legally, and it is certainly not a case of first impression. This case was simply the next in a long line of cases regarding *de facto* takings in Pennsylvania. As noted by the Commonwealth Court, the issue in the case was "not whether the Property Owners were damaged by the Township's redirection of storm water and whether they may seek recovery from the Township, but whether the harm to the Property constitutes a *de facto* taking and whether damages are recoverable in an eminent domain proceeding." (Petition for Writ of Certiorari, App. 10a) The trial court and a unanimous panel of the Commonwealth Court reviewed the largely undisputed facts of the case and simply determined that the facts did not rise to the level needed for a *de facto* taking. The Commonwealth Court chose not to reconsider that decision, and the Pennsylvania Supreme Court declined to review that decision as well. There has not been a single judge to hear this case that has agreed with the McMasters that a *de facto* taking occurred.

The McMasters suggest that the Commonwealth Court failed to follow this Court's precedent, namely

the *Arkansas* decision, and/or failed to consider provisions of the Pennsylvania Constitution. They specifically contend that the Commonwealth Court failed to recognize the protections of *Arkansas* and created exceptions to the constitutional protections of the Takings Clause. Respectfully, the McMasters' contentions are misguided. What the McMasters are really arguing is that because the state courts ruled against them the state courts must have misapprehended the facts and/or controlling authority, but even a cursory review of the Commonwealth Court's Opinion indicates such is not the case. The Commonwealth Court addressed *Arkansas* directly (see Petition for Writ of Certiorari, App. 13a-14a), and specifically explained why *Arkansas* does not support the McMasters' claim of a *de facto* taking under the Eminent Domain Code. In *Arkansas*, the government intentionally flooded 23,000 acres destroying 18 million board feet of timber. This Court held in *Arkansas* that government induced flooding temporary in duration can amount to a taking, but importantly did not rule that any government caused flooding is necessarily a taking. Just because a temporary flooding *may* entitle a landowner to compensation under *Arkansas* does not mean that compensation *must* be awarded in every circumstance. This Court wrote that "[a]lso relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. . . . So, too, are the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use." *Arkansas*, 133 S.Ct. at 522. The Commonwealth Court considered the character of

the McMasters' land and nature of the McMasters' use, as directed by *Arkansas*, and properly concluded there was no *de facto* taking. The Commonwealth Court acknowledged *Arkansas*'s holding but distinguished the facts in this case and ruled accordingly. There was no misstatement of law and no conflict with this Court's precedent.

Put most simply, the McMasters are unhappy with the Commonwealth Court's application of relevant law to the facts of this case but offer no compelling reason, other than their displeasure with the decision, as to why this Honorable Court should revisit that decision. *See* Sup. Ct. R. 10. It is clear from a review of both the trial court and Commonwealth Court Opinions that both tribunals carefully considered the relevant law and the facts of this case and appropriately determined that the McMasters cannot sustain their burden of proving a *de facto* taking. Therefore, this Court should deny the McMasters' Petition for Writ of Certiorari.

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CONCLUSION

Inasmuch as the Petition sets forth no compelling reason why this Court should review the state court decision, Bensalem Township respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted this 7th day of February,
2018.

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