

No. 22-52

In The
Supreme Court of the United States

ARIYAN, INCORPORATED, doing business
as Discount Corner, et al.,
Petitioners,

v.

SEWERAGE & WATER BOARD
OF NEW ORLEANS, et al.,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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AMENDED CORPORATE DISCLOSURE STATEMENT

Pursuant to S. Ct. R. 29.6, the Corporate Disclosure Statement included with the Petition is referenced here, with the following two amendments:

1. The American Insurance Company, an Ohio corporation, is a wholly owned subsidiary of Fireman's Fund Insurance Company, an Illinois corporation. Fireman's Fund Insurance Company is a wholly owned subsidiary of Allianz Global Risks US Insurance Company (AGR US). AGR US is a nongovernmental corporation, with its principal place of business in Chicago, Illinois. Allianz of America, Inc., is the parent corporation for AGR US and owns 80% of its voting stock. The remaining 20% of the AGR US voting stock is owned by AGCS International Holding B.V. Each of Allianz of America, Inc., and AGCS International Holding B.V. are wholly owned indirect subsidiaries of Allianz SE, a publicly traded company. Thus, Allianz SE indirectly owns 10% percent or more of the AGR US Stock.

2. The Fresh Market, Inc., a Delaware corporation, is a wholly owned subsidiary of The Fresh Market Intermediate Holdings, Inc., a Delaware corporation, which is a wholly owned subsidiary of The Fresh Market Holdings, Inc., a Delaware corporation. Cencosud S.A. is a Chilean publicly traded company which owns a 67% interest in The Fresh Market Holdings, Inc.

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners Ariyan, Inc., *et al.*, submit this supplemental brief pursuant to S. Ct. R. 15.8 to call the Court's attention to a new case, *In re Fin. Oversight & Mgm't Bd.*, No. 22-1119, 2022 WL 2800724 (1st Cir. July 18, 2022) (*FOMB*), which deepened the lower court split as to whether the Fifth Amendment's guarantee of just compensation for a taking is a self-executing, enforceable right. *See* Pet. for Writ of Cert. at 38, *et seq.*

That case involves what is “perhaps the largest and most consequential public bankruptcy in the nation’s history.” *FOMB*, 2022 WL 2800724, at *1. The Commonwealth’s petition sought relief for “sovereign debt . . . under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act,” which included sovereign debt to pay just compensation. *Id.* The court noted that “all parties agree that the Commonwealth . . . took private property from at least some of the takings claimants before petitioning for [bankruptcy].” *Id.* at *5. The creditors included one set of property owners who alleged they were owed just compensation for properties taken by the Commonwealth by eminent domain. *Id.* at *2. Another group of owners possessed inverse claims that in some cases were reduced to judgments or settlement agreements. *Id.*

The bankruptcy plan proposed to treat the just compensation claims as general unsecured debt, payable “at a pro-rata share of the overall recovery for general unsecured creditors.” *Id.* at *2. In other words, the property owners would be paid less than the full

amount of just compensation the Commonwealth was obligated to provide. The owners asserted that once their properties were taken, the Just Compensation Clause required full payment, and nothing—bankruptcy law included—may impair the constitutional requirement for full payment. *Id.* The Title III (district) court agreed, and “directed the Board to modify the plan of adjustment to provide for full payment of any valid eminent domain and inverse condemnation claims if the Board wished to make the plan confirmable.” *Id.*

The First Circuit affirmed, concluding that the “right to receive just compensation [is not] a mere monetary obligation that may be dispensed with by statute.” *Id.* at *6. The court held that bankruptcy laws that otherwise reduce a creditor’s claim cannot impair or limit the right of property owners to the full compensation to which they are entitled under the Fifth Amendment, *id.* at *5, holding explicitly:

Recognizing that the “right to full compensation arises at the time of the taking,” does not imply that the *subsequent denial of that compensation does not also raise Fifth Amendment concerns*. We decline to read *Knick* as changing the Fifth Amendment right to receive just compensation into a mere monetary obligation that may be dispensed with by statute.

Id. at *6 (emphasis added) (quoting *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2170 (2019)). The First Circuit

held that government may not “eliminate [its] obligation to pay just compensation and instead pay only reduced amounts based on a formula applicable to most unsecured creditors.” *FOMB*, 2022 WL 2800724, at *5. It concluded, “the Fifth Amendment itself expressly provides that just compensation *must be paid* whenever the government works a taking.” *Id.* at *8 n.8 (emphasis added).

By contrast, the Fifth Circuit held that Louisiana law grants the Sewerage Board the discretion to impair or otherwise limit Petitioners’ right to be paid compensation. *See* App.A-6. Thus, the court concluded, an allegation of unreasonable delay paying compensation did not raise Fifth Amendment concerns. *Id.* The First Circuit’s holding therefore presents a stark conflict with the Fifth Circuit’s conclusion below that a condemnor that “subsequently denies” compensation is never actionable under the Fifth Amendment. *See* App.A-10.

The First Circuit also rejected the argument that the only “property” possessed by the owners were unsecured claims or judgments. *FOMB*, 2022 WL 2099724, at *6. The Commonwealth asserted that compensation is “untethered from the substantive Takings Clause violation itself.” *Id.* But the First Circuit held:

[A]s we have explained, the issue on appeal here is not whether a taking has occurred—no one disputes that the government engaged in prepetition takings of some property—*the relevant*

question is whether the denial of just compensation for such a taking violates the Fifth Amendment. Thus, Kuehner and the other cases the Board cites are only relevant if we assume that claims for just compensation are the same as any contractual claim for payments due, which begs the very question raised by this appeal.

Id. at *7 (emphasis added) (citing *Kuehner v. Irving Tr. Co.*, 299 U.S. 445 (1937)).

The First Circuit also rejected an argument accepted by the Fifth Circuit that “nothing about a claim for just compensation makes it any different for bankruptcy purposes than a claim for money damages for any other kind of constitutional violation.” *FOMB*, 2022 WL 2800724, at *7. Relying on the “language and nature of the Takings Clause,” the First Circuit held that “compensation is different in kind from other monetary remedies.” *FOMB*, 2022 WL 2800724, at *7. Again, in contrast to the Fifth Circuit, *FOMB* concluded that “[s]imply put, the Fifth Amendment contemplates a ‘constitutional obligation to pay just compensation.’” *Id.* (quoting *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 315 (1987)).

Reduced to its nub, the issue we decide is rather simple. The Fifth Amendment provides that if the government takes private property, *it must pay just compensation*. Because the prior plan

proposed by the Board rejected any obligation by the Commonwealth to pay just compensation, the Title III court properly found that the debtor was prohibited by law from carrying out the plan as proposed

Id. at *9 (emphasis added).

In contrast, the Fifth Circuit held that just compensation judgments are not “something special.” App.A-7; App.A-2. Thus, Petitioners’ just compensation judgments merely represent the Sewerage Board’s “existing liability,” conceptually distinct from its recovery.” App.A-6 (relying on *Louisiana ex rel. Folsom v. City of New Orleans*, 109 U.S. 285, 295 (1883)).

The First Circuit recognized that part and parcel of the power to take property is the corresponding obligation to actually pay for it. Anything that interferes with that right—whether it is bankruptcy law as in *FOMB*, or as in the case at bench a state statute—must yield to the Just Compensation imperative. The First and Fifth Circuits are irrevocably in conflict, requiring resolution by this Court.

DATED: August 2022.

Respectfully submitted,

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