No. 11-922

In The
Supreme Court of the United States

RIVER CENTER LLC,

Petitioner,

v.

THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of New York, Appellate Division, First Department

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37.2(b), Owners' Counsel of America (OCA) respectfully requests leave of the Court to file the attached brief amicus curiae in support of the Petitioner, River Center LLC.

OCA sought consent of the parties and provided counsel for each with more than ten days notice of OCA's intent to file this brief. Petitioner, and Respondents Blackacre Bridge Capital LLC and SWH Funding Corp., have consented to the filing of an amicus brief by OCA, but Respondent Dormitory Authority of the State of New York has withheld consent.

OCA files this brief to assist the Court in its review of the petition, and the important issues in Fifth Amendment Just Compensation law presented:

- An owner whose property is taken need not have *any* development plans – much less plans that will "come to fruition" in the immediate future – for a court to admit all evidence of a parcel's potential uses.

- The Fifth Amendment requires a court to consider evidence that a condemnor deliberately depressed the value of the property in anticipation of the taking.

- A property owner is always entitled to testify about his or her view of the value of the property.

OCA brings unique expertise to this task. OCA is a network of the most experienced eminent domain and property rights attorneys from across the country who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998). As the lawyers at the front lines of eminent domain law, OCA's members understand the importance of the issues presented by this petition, and how the rules adopted by the New York court, if allowed to stand, will undermine the check on the unbridled exercise of the eminent domain power that the Just Compensation Clause provides.

OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been and are involved in landmark property law cases in nearly every jurisdiction nationwide, including cases discussed in the petition at bar. Additionally, OCA members and their firms have been counsel for a party or amici in many of the eminent domain and takings cases this Court has considered in the past forty years, including *Kaiser Aetna v.*

United States, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Preseault v. ICC*, 494 U.S. 1 (1986); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008). Most recently, OCA filed an amicus brief in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010).

OCA members have also authored treatises, books, and law review articles on takings, property rights, eminent domain, and just compensation, including chapters in the seminal treatise NICHOLS ON EMINENT DOMAIN. *See*, *e.g.*, MICHAEL M. BERGER, TAKING SIDES ON TAKINGS ISSUES (Am. Bar Ass'n 2002) (chapter *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U.J.L. & POLICY 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just*

Compensation for Regulatory Taking of Property, 9 LOY. L.A.L. REV. 685 (1986); WILLIAM G. BLAKE, EMINENT DOMAIN – A STATE LAW COMPENDIUM (forthcoming Am. Bar Ass'n 2012) (editor); LESLIE A. FIELDS, COLORADO EMINENT DOMAIN PRACTICE (2008); JOHN HAMILTON, KANSAS REAL ESTATE PRACTICE AND PROCEDURE HANDBOOK (2009) (chapter on Eminent Domain Practice and Procedure); JOHN HAMILTON & DAVID M. RAPP, LAW AND PROCEDURE OF EMINENT DOMAIN IN THE 50 STATES (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL OF RTS. J. 679 (2005); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAW. 765 (1973); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 ALB. GOV'T L. REV. 154 (2011); Randall A. Smith, *Eminent Domain After* Kelo *and Katrina*, 53 LA. BAR J. 363 (2006); ROBERT H. THOMAS, EMINENT DOMAIN: A HANDBOOK ON CONDEMNATION LAW (Am. Bar Ass'n 2011) (chapters on Prelitigation Process, Flooding and Erosion); Robert H. Thomas, et al., *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 VT. L. REV. 437 (2010).

OCA believes that its members' long experience in advocating for the rights of property owners will provide an additional, valuable viewpoint on the issues presented by this petition. Specifically, OCA

supports Petitioner's arguments by highlighting the present lack of clear national standards for calculating just compensation.

For the foregoing reasons, the motion of OCA to file a brief amicus curiae should be granted.

FEBRUARY 2012.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment permits a state to deny compensation to an owner for loss of the reasonably probable development potential of a condemned development site taken through eminent domain proceedings, unless the property owner can show that development will come to fruition in the near future.

2. Whether, in awarding just compensation under the Fifth Amendment, a state may exclude damages resulting from deliberate governmental interference with a development project that delays development and suppresses the property's value at the time of the taking over what it would otherwise have been.

3. Whether the Fifth Amendment permits a court in a condemnation proceeding to restrict evidence of value to the testimony of appraisers and to exclude or ignore otherwise competent testimony of property value (a) from the property's owner, and (b) from third parties able to provide market-based evidence of value, such as financing proposals and offers to lease and buy.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Owners' Counsel of America (OCA) is a national network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty.[1] OCA lawyers have devoted their practices to representing property owners because they recognize the right to own and use property is "the guardian of every other right" and the basis of a free society. *See* JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998). OCA's members understand that "[t]he power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land." *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952), and without clearly established rules, "the potential for its abuse is boundless." *Southwestern Illinois Dev. Auth. v. National City Env'l, L.L.C.*, 710 N.E.2d 896, 904 (Ill. Ct. App. 1999), *aff'd*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880

[1] Amicus sought consent of the parties and provided counsel for each with more than ten days notice of its intent to file this brief. Petitioner, and Respondents Blackacre Bridge Capital LLC and SWH Funding Corp., have consented to the filing of an amicus brief, but Respondent Dormitory Authority of the State of New York has withheld consent. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

(2002). As the lawyers at the front lines of eminent domain law, OCA's members appreciate the importance of the issues presented by this petition, and how the rules adopted by the New York court, if allowed to stand, will undermine the check on the unbridled exercise of the eminent domain power that the Just Compensation Clause provides.

OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys are and have been involved in landmark property law cases in nearly every jurisdiction nationwide, including cases discussed in the petition at bar. Additionally, OCA members and their firms have been counsel for a party or amici in many of the eminent domain and takings cases this Court has considered in the past forty years. OCA members have also authored treatises, books, and law review articles on all aspects of takings, eminent domain, and compensation.[2] OCA believes that its members' long experience in protecting the rights of property

[2] The Motion for Leave to File Brief Amicus Curiae *supra*, contains partial lists of the cases in which OCA members have been involved, and scholarly works authored or edited by OCA members.

owners will provide an additional, valuable viewpoint on the issues presented by this petition.

ARGUMENT

I. JUST COMPENSATION JURISPRUDENCE DESERVES CLARITY

When this Court began selectively applying the Bill of Rights to the states under the Fourteenth Amendment, it started with the Just Compensation Clause. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235 (1897) ("It is proper now to inquire whether the due process of law enjoined by the Fourteenth Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State."). The questions posed by the petition in the case at bar deserve this Court's attention yet again, to emphasize the constraints the Just Compensation Clause places on the eminent domain power.

The Taking Clause provides that "nor shall private property be taken for public use without just compensation." U.S. CONST. AMEND. V. "The critical terms are 'property,' 'taken' and 'just compensation.'" *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). In the past half-century, this Court has clarified in what circumstances a valuable interest qualifies as "property" for purposes of the Takings Clause. *See*, *e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (interest generated by

money deposited in lawyers' trust accounts is property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on monies deposited in court is property); *Babbitt v. Youpee*, 519 U.S. 234 (1977) (the ability to transfer property by descent or devise is property).

This Court has also established the standards for when an exercise of the eminent domain power is "for public use." *See*, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (takings supported only by claims of economic development are not always violative of the Public Use Clause); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) ("public use" is coterminous with the police power); *Berman v. Parker*, 348 U.S. 26 (1954) (taking of non-blighted property as part of a larger redevelopment project is not inconsistent with the Public Use Clause).

However, guidance from this Court regarding the third part of the eminent domain equation – just compensation – has been largely absent. The last time this Court took up a just compensation case was nearly thirty years ago. *See United States v. 50 Acres of Land*, 469 U.S. 24 (1984). The lack of scrutiny in the interim is not because the law governing compensation in condemnation cases is well-settled, uniformly applied, and truly "just" (as the decision by the New York court below makes painfully clear). To the contrary, the long absence of this Court's attention has permitted some lower courts to wander in the jurisprudential wilderness, and apply compensation rules that differ from the rules established by this

Court and other courts, with no discernible reason for the difference; sometimes, as in the case at bar, with bizarre and inequitable results.

The compensation issue has not escaped the Court's attention entirely, however. In two recent oral arguments, the issue appeared to be of interest, even when the question was not presented by either petition. At the arguments in *Kelo v. City of New London,* 545 U.S. 469 (2005), a case involving the Public Use Clause, Justices Kennedy and Breyer raised the compensation issue:

> JUSTICE KENNEDY: In all of those cases, I think the economic feasibility or economic success test would have been easily met. I mean, what you're doing is trying to protect some economic value[.] But I think it's pretty clear that most economists would say this development wouldn't happen unless there is a foreseeable chance of success.
>
> Let me ask you this, and it's a little opposite of the particular question presented. Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person that what we ought to do is to adjust the measure of compensation, so that the owner – the condemnee – can receive some sort of premium for the development?
>
> MR. BULLOCK: There may be some scholarship about that. This Court has consistently held that the property owner is simply

> entitled to just compensation of the appraised value of the property. Of course, the property owner –
>
> JUSTICE KENNEDY: And you have to prescind the project when you fix the value.
>
> MR. BULLOCK: I'm sorry?
>
> JUSTICE KENNEDY: You have to prescind the project – you have to – you have to ignore the project when you determine the value. The value is a willing buyer and a willing seller, without reference to the project.
>
> MR. BULLOCK: Yes, that is right. And so they simply get the –
>
> JUSTICE KENNEDY: But what I am asking is if there has been any scholarship to indicate that maybe that compensation measure ought to be adjusted when A is losing property for the economic benefit of B.

Transcript, *Kelo v. City of New London*, No. 04-108, at 21-23 (Feb. 23, 2005). *See also id.* at 48 ("JUSTICE BREYER: So going back to Justice Kennedy's point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house? Or is he inevitably worse off?").

More recently, in the arguments in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010), Justice Kennedy asked:

> JUSTICE KENNEDY: Let me ask you this question on Florida valuation. Assume you

> prevail, there's a cause of action for a taking. You have a beachfront area, beachfront home, in which there's a hurricane and there's a loss of the beach and a sudden drop, so that it's now a 60-foot, a 60-foot drop. The State comes in and says the only way they can fix this is to extend the beach and make it a larger beach on what was formerly our submerged land, and it does that that, and it has the same rule.
>
> Under your view, is the State required to pay you for the loss of your right of contact to the beach, your littoral right, because there's let's say another 100 foot of new beach? Are they entitled to offset that against the enhanced value to your property by reason of the fact that they've saved it from further erosion and have given you a beach where there was none before?

Transcript, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, No. 08-11, at 19 (Dec. 2, 2009).

II. THE FIFTH AMENDMENT REQUIRES A COURT TO ADMIT ALL EVIDENCE OF VALUE

This case is an excellent opportunity for the Court to squarely address three issues in Just Compensation law: each of the rulings by the New York court fall below the floor established by the Fifth Amendment, and this case "presents an important phase of the law of eminent domain" warranting

review by this Court. *United States v. Petty Motor Co.*, 327 U.S. 372, 373 (1946).

A. Potential Development For Which Property Is Suitable Must Be Considered, Even If An Owner Has No Development Plans

One principle from which this Court "has not deviated is that just compensation 'is for the property, and not to the owner.'" *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (holding that attorneys' fees are not embraced within just compensation because value is based on the property, not the owner's loss) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893)). However, the court below held that in order to be admissible, the property owner must show the use it claimed is the highest and best use "must be established as reasonably probable and not a 'speculative or hypothetical arrangement *in the mind of the claimant*.'" Pet. App. 2a (emphasis added) (quoting *In re Shorefront High School, City of New York*, 250 N.E.2d 333, 334 (N.Y. 1969)). The court also required the property owner to show that it "*would bring the project to fruition* in the near future." Pet. App. 2a-3a (emphasis added).

In order to be "just," the compensation provided when the government exercises eminent domain and forces a private owner to surrender her property for the public good must be the "full and perfect equivalent for the property taken." *Monongahela Nav. Co.*, 148 U.S. at 326. In measuring compensation, the

Fifth Amendment requires a court to put the owner "in as good position pecuniarily as he would have occupied if his property had not been taken." *Id*. *See also United States v. 50 Acres of Land*, 469 U.S. 24, 25-26 (1984) ("The Fifth Amendment requires that the United States pay 'just compensation' – normally measured by the fair market value – whenever it takes private property for public use.") (footnote omitted). Compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future." *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878). "[M]ere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded." *Chicago, B. & Q. R. Co.*, 166 U.S. at 250 (citations omitted).

Thus, the central question and the guiding principle under the Just Compensation Clause is whether the market (a seller and a buyer) would consider relevant the proffered evidence of potential uses and all development potential. *See United States v. Miller*, 317 U.S. 369, 373-74 (1943) ("It is usually said that market value is what a willing buyer would pay in cash to a willing seller."); *Boston Edison Co. v. Mass. Water Res. Auth*., 947 N.E.2d 544, 552 (Mass. 2011) ("Because the determination of fair market value is based on what a reasonable buyer would believe the property to be worth, the highest and best use of the property is not limited to the present use of the property but includes potential uses of land that a reasonable buyer would consider significant in deciding how

much to pay."). This includes uses of land that may be restricted by law at the time of the taking; "[w]here potential uses are reasonably likely in the foreseeable future, we allow their consideration, but 'with discounts for the likelihood of their being realized and for their futurity.'" *Boston Edison*, 947 N.E.2d at 552 (quoting *Skyline Homes, Inc. v. Commonwealth*, 290 N.E.2d 160, 162 (Mass. 1972)). *See also Hietpas v. State*, 130 N.W.2d 248 (Wis. 1964) (property owner may introduce evidence that existing zoning regulations will be changed in the immediate future); *Sayers v. City of Mobile*, 165 So.2d 371 (Ala. 1964) (property owner is entitled to compensation on the basis of the highest and best use to which the property could be put).

Contrary to the New York court's ruling – which considered only a part of the property's development potential – the relevant inquiry is what is the highest and best use to which the property may be put in the reasonable future, and plans that the property owner may or may not have are not dispositive. Indeed, the *condemnor's* intended use may even be the highest and best use of the property. *See*, *e.g.*, *Monongahela Nav. Co.*, 148 U.S. at 328 (highest and best use of the property was as a lock and dam, the very purpose for which the government condemned the property). Two cases illustrate this established principle.

In *City of Bristol v. Tilcon Minerals, Inc.*, 931 A.2d 237 (Conn. 2007), the Connecticut Supreme Court held that the highest and best use of property was for residential development, even though the owner had no plans to develop the property in the

immediate future. In that case, the court concluded the compensation owed to the owner of property that was being used for mining purposes adjacent to a municipal landfill was as a residential subdivision. *Id*. at 244. Even though the land was zoned for residential purposes, the property owner had extended its mining permit for an additional two years before the taking and was using the property as a storage site. It "did not intend to develop or to market the property for single-family homes in the *immediate* future." *Id*. at 246-47 (emphasis original) (footnote omitted). The court examined other factors such as the zoning, access to the site, and whether utilities were available – and not the property owner's intent – to conclude that the property must be valued as a residential subdivision. *Id*. at 247.

Similarly, in *Brazos River Auth. v. Gilliam*, 429 S.W.2d 949 (Tex. Ct. App. 1968), the court held that land must be valued for use as a gravel operation, despite the fact that there was "no evidence that such would be conducted within the immediate future or within a reasonable time." *Id*. at 952 ("Plans to so mine the property or not within any particular period would have no effect upon the general rules applicable to condemnation cases.").

B. The Lower Courts Have Not Settled On A Standard For When Precondemnation Activities Influence Valuation

The lower courts have not settled on the standard to review a property owner's claim that the condemnor depressed the market value of property in anticipation of condemnation. The New York court in the case at bar discounted such a claim entirely. Other courts apply a "primary purpose" or "intent" standard under which a property owner must show that the primary purpose of regulation alleged to have depressed value was to accomplish that goal, and the entity that applied the value-depressing regulation was the same entity that took the property, or was acting in concert with the condemning authority. *See*, *e.g.*, *United States v. 480.00 Acres of Land*, 557 F.3d 1297 (11th Cir. 2009) (rejecting "nexus" test in holding that government did not leverage regulation to depress value), *cert. denied*, 130 S. Ct. 1069 (2010); *United States v. Land*, 213 F.3d 830 (5th Cir. 2000) (Corps of Engineers' denial of levee permit was not within the scope of the National Park System's eventual condemnation of the land); *United States v. 27.93 Acres of Land*, 924 F.2d 506 (3d Cir. 1991) (municipality's rezoning was not attributable to National Park Service); *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir. 1958) (rejecting a "sole motive" test to hold that the Air Force was not influencing value when it rezoned the property). Other courts utilize a "nexus" standard, and look to the circumstances of each case to determine linkage between regulatory

activity and property valuation. *See*, *e.g.*, *United States v. Truro*, 476 F. Supp. 1031 (D. Mass. 1979) (Congress motivated municipality to downzone property); *Assateague Island Condemnation Opinion No. 3*, 324 F. Supp. 1170 (D. Md. 1971) (local government adopted development moratorium at the urging of the Department of the Interior).

This Court should grant the petition to make clear that the Fifth Amendment requires courts to consider evidence the condemnor depressed the value of the property in anticipation of condemnation, and to set the appropriate standard of review. This rule is described by courts by a variety of labels including "inequitable precondemnation activities," "condemnation blight," and the "scope of the project rule." It also arises in a number of contexts. In cases where the government institutes an eminent domain action and subsequently dismisses or discontinues it, or where a condemnor announces a taking but delays actually instituting the action, some courts consider it a form of inverse condemnation. *See*, *e.g.*, *Foster v. City of Detroit*, 254 F. Supp. 655 (D. Mich. 1966). When it arises in eminent domain actions, some courts, this Court included, consider it within the "scope of the project rule" which requires a court to disregard any decrease (or increase) in value that is attributable to the project after the date the condemnor is committed to the project. *See Miller*, 317 U.S. at 375 (owners of property not originally part of a project are entitled to be compensated for any enhancement in value attributable to the project); *Jersey City Redevelopment*

Agency v. Kugler, 267 A.2d 64 (N.J. 1970) (court rejected agency's argument that it had a constitutional right to acquire the affected land at its blighted price).

Whatever label is attached, the rationale is the same and was explained best by the California Supreme Court in *Klopping v. City of Whittier*, 500 P.2d 1345 (Cal. 1972). In that case, the court recognized two substantive rules: (1) when a condemnor delays acquisition of the targeted property for an unreasonable length of time or otherwise acts unreasonably, and this causes serious economic harm to the property owner, the owner may recover just compensation; and (2) the condemnor may not use the depressed "fair market value" as the measure of compensation. Rather, the owner is entitled to the fair market value of her property as it would have been without the precondemnation activities. The court explained that "the constitutional standard of 'just compensation' remains the guide." *Id*. at 1349. Government remains free to plan to take property, but

> . . . it would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel located in that area. The length of time between the original announcement and the date of actual condemnation may be a relevant factor in determining whether recovery should be allowed for blight or for other oppressive acts

> by the public authority designed to depress market value.

Id. at 1350 n.1 (citations omitted). *See also* Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation?*, 48 NOTRE DAME LAWYER 765 (1973).

In *Klopping*, the city instituted condemnation proceedings to take land for a parking lot, but when it ran into problems selling its bonds, it dismissed the case. In the course of doing so, however, it expressly resolved that it would revive the condemnation when it got its financial house in order. *Klopping*, 500 P.2d at 1348. As a consequence, the properties became pariahs in the local market. One owner lost his commercial building by foreclosure when its tenants left and the rent stream dried up. The court held that these losses were recoverable. Other courts are in accord. *See*, *e.g*., *Luber v. Milwaukee County*, 177 N.W.2d 380 (Wis. 1970); *Lincoln Loan Co. v. State Highway Comm'n*, 545 P.2d 105 (Or. 1976); *Lange v. State*, 547 P.2d 282 (Wash. 1976); *Washington Market Enterprises v. City of Trenton*, 343 A.2d 408 (N.J. 1975).

C. The Fifth Amendment Protects A Property Owner's Right To Testify About Value

Finally, the Fifth Amendment requires that a property owner's and developer's testimony regarding the value of his or her property is admissible. The New York court dismissed this well-established rule,

holding that the property owner and developer was barred from testifying, and only appraisal testimony was admissible to show the property's value. This conclusion is contrary to nearly every court that has considered the issue. *See*, *e.g.*, *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984) (property owner may testify regarding value of his land, even if incompetent to testify about another's property); *Mississippi State Highway Comn'n v. Franklin County Timber Co., Inc*., 488 So.2d 782 (Miss. 1986) (co-owner and former owner could testify about value); *Langfeld v. State Dep't of Roads*, 328 N.W.2d 452 (Neb. 1982) (owner familiar with property is competent to testify as to value); *Johnson's Apco Oil Co., Inc. v. City of Lincoln*, 282 N.W.2d 592 (Neb. 1979) (owner who is shown to be familiar with property may testify without further foundation); *Acheson v. Shafter*, 490 P.2d 832 (Ariz. 1971) (owner may testify whether or not he qualifies as an expert). Although this Court has held that owners of *surrounding properties* may testify regarding value even when they are unfamiliar with any comparable sales, *Montana Ry. Co. v. Warren*, 137 U.S. 348, 354 (1890), it has never squarely affirmed that the testimony of property owners must also be admissible, and cannot be subject to the blanket exclusion the New York court applied.

Property owners understand the few protections they have available if they find themselves on the receiving end of an exercise of eminent domain, the "most awesome grant of power." *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985). Consequently, what rights they do possess

must be vigilantly safeguarded. This case presents the Court with an opportunity to confirm that property owners and developers have special knowledge of their property, and cannot be prohibited from testifying about its value simply because they may not qualify as "experts." *Cf. United States v. 329.73 Acres of Land*, 666 F.3d 281, 284 (5th Cir. 1981) ("Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land.") (citing *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966)).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

FEBRUARY 2012.

Respectfully submitted,

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