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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Predictably, the Brief in Opposition (BIO) filed by Respondent Dormitory Authority of the State of New York (DASNY) attempts to evade certiorari by insisting that decisions below involve factbound applications of settled law.[1] That assertion is incorrect. This case turns on legal rulings by the New York courts, not factual findings. DASNY argues that the New York courts valued the property according to its "highest and best use" (BIO 1), but it acknowledges that, in determining *what qualified as the highest and best use*, the courts held:

(1) that development potential may be excluded, even if reasonably probable, unless the property owner can show that development will come "to fruition in the near term," BIO 2;

(2) a claim for damages resulting from deliberate governmental interference that delays development and suppresses the property's value at the time of the taking over what it would otherwise have been, "is inappropriate in a condemnation proceeding," and must be pursued (if at all) as a "breach of contract claim" in a separate proceeding, BIO 2-3;

(3) a court in a condemnation proceeding may restrict evidence of value and "preclude[] the

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[1] The BIO contains numerous factual misstatements that are not material to certiorari, although they undermine DASNY's credibility. For example, DASNY refers to a $49.5 million prior purchase price (BIO 4) but ignores that the sale was not arms-length. Pet. 7 n.3. Similarly, DASNY disparages River Center's development efforts, without acknowledging the concrete achievements outlined in Pet. 7-8 n.4.

admission of offers and expert testimony, except by appraisers, to show the property's value." BIO 3.

The question is whether these legal rulings comport with the Just Compensation Clause of the Fifth Amendment. Resolution of that constitutional question does not depend on any fact found by the New York courts.

DASNY maintains the case lacks nationwide significance. BIO 22. But the fundamental importance of the questions presented is underscored not only by the Petition but also by the *amici* briefs in support of certiorari filed by the Center for Constitutional Jurisprudence, Owners' Counsel of America, Real Estate Board of New York, Inc. (REBNY), International Council of Shopping Centers, National Multi Housing Council, and Real Estate Roundtable.

The Fifth Amendment's Takings Clause will be eviscerated if the government is able to water down the Just Compensation guarantee to the point of meaninglessness. Property rights require vigilant enforcement of both the Takings and Just Compensation Clauses, and the instant petition provides a perfect vehicle for the reinvigoration of the latter.

ARGUMENT

I. THE QUESTIONS ARE PROPERLY PRESENTED.

A. The Federal Questions Were Presented Below.

DASNY maintains that "[t]he citations Petitioner references consist mainly of pages of its own briefs and affirmations where the words 'just compensation' are mentioned. *The Fifth Amendment questions and federal case law Petitioner raises for this Court's review are not found*." BIO 13-14 (emphasis added). That statement mischaracterizes the record. The Appendix to the Petition for Certiorari, Pet. App. 43a-58s, which DASNY ignores, contains numerous references to the Fifth Amendment and decisions of this Court articulating the constitutional requirement under the Fifth Amendment. *E.g.*, *id.* at 44a ("Both the United States Constitution (5th Amendment) and the New York State Constitution (Article I, Section 7) provide that 'nor shall private property be taken for public use without just compensation.'"); *id.* at 43a ("The Constitutional requirement of just compensation mandates that the property owner be indemnified so that he or she may be put in the same monetary position as if a taking had not occurred. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973)."); *id.* ("Compensation should be the full and perfect equivalent in money of the property taken. *United States v. Miller*, 317 U.S. 369, 373 (1943)"); *id.* at 46a & 47a n.3 (discussing *United States v. New River Collieries Co.*, 262 U.S. 341, 343).

River Center raised the Questions Presented in connection with the Fifth Amendment arguments to the courts below. For example, River Center repeatedly argued that it was entitled to compensation for the development potential of the site and its development efforts. *E.g.* Pet. App. 43a ("the owner of a parcel condemned while in the midst of development – even before the first spade of earth is turned – is entitled to be paid as part of his just compensation some additional sum above the raw land value"). River Center also argued that it was entitled to interference damages. *E.g.*, *id.* at 45a ("Where, however, the condemnor intentionally takes action to hold down the value of the property ultimately taken, the courts will award the condemnee compensation taking into consideration where the condemnee would have been at the time of the taking, but for such action."); *id.* at 56a ("The Federal and New York Constitutions protect property owners from governmental takings by requiring the payment of just compensation. U.S. Constitution, 5th Amend.; N.Y. Constitution, Art. I, §7. Such protections are needed particularly when government agencies reduce the value of property they seize so that it may be acquired more cheaply."). River Center also cited federal authority in connection with its objections to the exclusion of valuation evidence. *Id.* at 51a ("Particularly in eminent domain matters implicating the constitutional principle of just compensation, courts should proceed cautiously before excluding evidence of value. *United States v. 14.38 Acres of Land*, 80

F.3d 1074 (5th Cir.1996); *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 (3d Cir.1990).").[2]

These references far exceed the requirements of this Court. As one of the authorities cited by DASNY explains:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Street v. New York, 394 U.S. 576, 584 (1969) (quoting *People of State of New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). *See also Eddings v. Oklahoma*, 455 U.S. 104, 113-14 n.9 (1982) (federal question deemed presented despite general language, because "[o]ur jurisdiction does not depend on citation to book and verse"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 n.9 (1981) (federal question properly raised below where party expressly cited to decisions of this Court in support of its argument); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (generalized "due process" arguments

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[2] DASNY contends, without citation, that "briefs are not part of the record of New York state court proceedings." BIO 13. In this case, however, the parties negotiated what items would be submitted with the full record, and all the materials contained in the Appendix to the Petition were included in the record that was before the New York courts.

addressed to "the Florida Constitution and its Federal counterpart" held sufficient for taking claim); *Taylor v. Kentucky*, 436 U.S. 478, 482 n.10 (1978) (objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles").

The cases cited by DASNY are inapposite because they involve situations where a "petitioner 'did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases.'" BIO 14 (quoting *Howell v. Mississippi*, 543 U.S. 440, 443 (2005)). The instant case is different.

Moreover, under the "mere enlargement" doctrine, which DASNY does not address, River Center – having squarely raised the Fifth Amendment issue below – is not confined to the precise form of words it used in the state courts. This Court's "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

B. The Decision Is Not Based On An "Adequate and Independent" State-Law Ground.

DASNY's reliance on *Michigan v. Long*, 463 U.S. 1032 (1983), BIO 15-16, is misplaced. This is not a case where an adequate and independent state-law ground might render a decision of the federal issue unnecessary. Here, River Center pressed claims

under both the New York and the federal Constitutions, and the New York courts rejected both claims. This Court's review of the federal issue is sufficient to reverse the judgment. A state court cannot insulate its decision from federal review by denying a state-law claim along with a federal claim as well. Further, *Michigan v. Long* established a presumption in favor of Supreme Court review unless the state court indicates, "clearly and expressly" by "a plain statement in its judgment or opinion," that its decision rests solely on state law. 463 U.S. at 1041. The New York decision contains no such "plain statement."

II. THE QUESTIONS PRESENTED WARRANT THIS COURT'S REVIEW.

1. This Court should grant review to decide whether the Fifth Amendment requires just compensation for development value. DASNY simultaneously argues (i) that the New York courts *considered* the development potential of the property as part of its "highest and best use," BIO 16-17, and (ii) that the courts were *not required to consider* the development potential because "the development was speculative and was far from fruition." BIO 18.

The inconsistency arises from DASNY's attempt to dodge the trial court's holding that a project must be in "existence" before the site's full development potential could be considered, Pet. App. 17a, and the Appellate Division's holding that compensation for lost development potential is not required unless the property owner can show that development will come "to fruition in the near future." *Id.* at 2a-3a.

The New York approach conflicts directly with *McCandless v. United States*, 298 U.S. 342, 345 (1936) (and progeny), which DASNY does not even cite, much less distinguish. The question is not whether River Center was compensated for its out-of-pocket development costs. BIO 18. The question is whether "just compensation" must reflect the value represented by the development potential of a site, even if the owner cannot show that development will actually come to fruition in the near future. On that issue, the New York approach announced in this case is different from the Fifth Amendment standard established by this Court and followed by numerous other jurisdictions. Pet. 16-20.

2. This Court should grant review to decide whether a property owner may recover damages resulting from governmental interference with a development project as part of the award of just compensation. DASNY contends that such damages are "inappropriate in a condemnation proceeding," and must be pursued (if at all) as a "breach of contract claim" in a separate proceeding. BIO 2-3, 18-19.

But this approach conflicts with core principles of the Fifth Amendment, with prior decisions of this Court, and with precedent outside New York. Pet. 21-25. DASNY attempts to relegate *United States v. Reynolds*, 397 U.S. 14 (1970), *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961), and related cases to a different doctrinal pigeonhole – the "scope of the project rule." BIO 19. But these decisions may not be so confined. They reflect the understanding that permitting government to lower the value of property by its own acts "would not lead

to the 'just compensation' that the Constitution requires." *United States v. Reynolds*, 397 U.S. 14, 16 (1970). In the same way, here the government deliberately depreciated the value of property and then took advantage of the depressed value when the property was condemned.

For similar reasons, DASNY fails in its efforts to distinguish "condemnation blight" and inverse condemnation cases, where the right to just compensation is triggered by actions other than formal condemnation. BIO 20-21. These cases, regardless of the label, recognize that "when the condemner acts unreasonably . . . either by excessively delaying eminent domain action or *by other oppressive conduct*, our constitutional concern over property rights requires that the owner be compensated." *Klopper v. City of Whittier*, 500 P.2d 1345, 1355 (Cal. 1972) (emphasis added). New York has created an exception to this rule where another cause of action exists.

DASNY states that interference with development is irrelevant to just compensation because it would not affect "what a willing purchaser would pay a willing seller." BIO 18-19. That is manifestly untrue. As River Center contended below, "the property would have been farther along the development path, except that DASNY, in conjunction with the City University of New York and the State of New York deliberately impeded development." Pet. App. 50a. Absent interference, the project would have been more valuable – i.e., would have received a greater price from a willing buyer – yet the New York courts held that such a claim was not cognizable in a just compensation

proceeding. *Id.* at 4a, 25a-29a. DASNY acknowledges that just compensation is appropriate where "the affirmative acts of government depressed the value of the properties as of the date of condemnation." BIO 20. That is exactly what happened in this case. Ironically, DASNY seeks to minimize River Center's development value (BIO 2) by citing some of the very tasks that would have been accomplished but for the State's intentional interference. Pet 7-8 n.4.

DASNY contends that "Petitioner never placed before the trial court any valuation of its development in the hypothetical state it might have been in had no delay occurred in the rezoning," BIO 20, but DASNY fails to mention that River Center lacked that opportunity because the trial court dismissed the claim for interference damages. Pet. App. 25a-29a. The court told River Center that it would "not have the opportunity to show where [it] would have been in this development stage." *Id.* at 27a.

DASNY suggests breach of contract damages in the Court of Claims action as an alternative to just compensation. BIO 18. But DASNY ignores that the Court of Claims action is not an adequate substitute. Pet. 24 n.7. Moreover, the New York approach conflicts with decisions in other jurisdictions, which have not required claimants to pursue separate actions to recover interference damages. This Court's review is necessary to address the conflict.

3. This Court should grant review to decide whether the Fifth Amendment prevents a court from

disregarding market-based evidence of property value, such as testimony by the owner, financing proposals, and offers to lease. The evidentiary rulings in this case were categorical, not discretionary. The courts applied a state rule to preclude all evidence of value except the testimony of real estate appraisers. Pet. App. 30a-36a; *see also* BIO 26 (acknowledging that under New York law "expert testimony regarding the value of property is limited to the testimony of appraisers"). The trial court ruled that "an offer is not admissible to show market value," Pet. App. 38a, and the Appellate Division reiterated that "offers of such nature are inadmissible on the issue of value." *Id.* at 3a-4a.

DASNY contends that rules of evidence are matters of state law, BIO 23, but it does not deny that a state court may not use rules of evidence to vitiate a federal constitutional right. Pet. 26 (citing *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006)). The Fifth Amendment is implicated when a state court uses rules of evidence arbitrarily to exclude elements of value and deny just compensation.

DASNY contends that the cases cited by River Center do not involve the Fifth Amendment (BIO 23), but in fact they recognize the need for courts to consider all relevant evidence in setting the constitutionally required amount of just compensation. *See United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1077 (5th Cir.1996)); *United States v. 68.94 Acres of Land, More or Less, Situate in Kent County, State of Delaware*, 918 F.2d 389, 393 (3rd Cir.1990).

DASNY maintains that Mr. Korff, as owner of the property, was permitted to testify as to a wide range of matters at trial, BIO 24, but it ignores the trial court rulings excluding his testimony as to value on the ground he was not an appraiser. Pet. App. 35a-36a.

DASNY argues that River Center failed to preserve on appeal an objection to the exclusion of an expert's testimony (Adamski), BIO 26-27, but in fact River Center's appellate brief included as a Question Presented whether the trial court erred by "refusing to admit evidence bearing on the value impact of such actions." Pet. App. 50a. The brief argued: "Supreme Court took the unprecedented view that only appraisers could testify about the Property's value. Other witnesses could not, even if they were experts or the property's owners." (App. Div. Br. 53.) Whether Adamski was mentioned by name is not dispositive.

DASNY maintains that another of the expert reports (Goodstein) potentially could have been excluded on other claimed state-law grounds, BIO 26, but in fact it was excluded on the ground that Goodstein was not an appraiser. Pet. App. 32a.

DASNY urges (BIO 27-28) this Court to adhere to *Sharp v. United States*, 191 U.S. 341 (1903), which excluded offers as evidence of value. But DASNY fails to acknowledge that in today's real estate market, such indications of interest are part of the very fabric of setting prices and values. Nor does DASNY acknowledge the split among the lower courts, many of which have recognized that *Sharp* should not be interpreted as barring reliable

assessments of value from arms-length third-party commercial sources. Pet. 28-29; REBNY Amicus Br. 3, 9-20. This Court's review is necessary to address the confusion and conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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