

IN THE
Supreme Court of the United States

BAY POINT PROPERTIES, INC.,
f/k/a BP PROPERTIES, INC.,

Petitioner,

v.

MISSISSIPPI TRANSPORTATION COMMISSION AND
MISSISSIPPI DEPARTMENT OF TRANSPORTATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* AND BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, REASON FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, PROPERTY RIGHTS FOUNDATION OF AMERICA, AND PROFESSORS JAMES W. ELY, JR., SHELLEY ROSS SAXER AND ILYA SOMIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to this Court's Rule 37.2(b), these *amici* respectfully request leave to file this *amici curiae* brief in support of the petition for a writ of *certiorari* to the Supreme Court of Mississippi supporting Petitioner Bay Point Properties, Inc. These *amici* timely sent letters indicating their intent to file an *amicus* brief to all counsel of record pursuant to Rule 37.2(a). Bay Point granted consent for *amicus* participation, but by letter dated March 24, 2017, Respondents Mississippi Transportation Commission and Mississippi Department of Transportation withheld consent.

This brief will assist the Court in determining whether to grant *certiorari* because these *amici* are experts in the field of property rights and eminent domain and have extensive experience advising this and other courts in these matters.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief as *amici curiae*.

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QUESTIONS PRESENTED

1. When a state redefines an owner's established property interest does the Just Compensation Clause of the Fifth Amendment require the state to justly compensate the property owner?
2. Can a legislature limit a jury's ability to determine the "just compensation" an owner is due when the government takes the owner's property?

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INTEREST OF *AMICI CURIAE*¹

The *Cato Institute* was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

The *National Federation of Independent Business Small Business Legal Center* is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies – including free markets, individual liberty, and the rule of law.

Southeastern Legal Foundation, founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties,

1. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *amici curiae* provided counsel for all parties ten days' notice of the filing of this brief. The Petitioner consented to the filing of this brief. The Respondents did not consent.

limited government, and free enterprise in the courts of law and public opinion.

The *National Association of Reversionary Property Owners* is a non-profit educational foundation assisting property owners in the education and defense of their property rights.

The *Property Rights Foundation of America, Inc.*, founded in 1994, is a non-profit educational organization located in Stony Creek, New York, with participants in every state of the Union. The Foundation's varied *amicus* work includes support for the petition for *certiorari* in *Kelo v. New London*.

Professor James W. Ely, Jr., is a professor of property law and history. Professor Ely's scholarship includes *The Law of Easements and Licenses in Land* (with Jon W. Bruce), and *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). *Professor Shelley Ross Saxer* is Vice Dean and Laure Sudreau-Rippe endowed Professor of Law at Pepperdine University School of Law and is the co-author of the casebooks, *Land Use* and *Contemporary Property*. *Professor Ilya Somin* is Professor of Law at George Mason University. Among other works on property law, he authored *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*.

INTRODUCTION

The extraordinary power of eminent domain allows government to take private property. But the government may only take an owner's private property for public use, and the government must justly compensate the owner. This Court explained:

Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation. When the government repudiates this duty, whether by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution. In those circumstances the government's actions are not only unconstitutional but unlawful and tortious as well.

City of Monterey v. Del Monte Dunes,
526 U.S. 687, 716 (1999).

The majority of a divided Mississippi Supreme Court affirmed a scheme whereby the Mississippi Legislature granted the Mississippi Highway Commission authority to redefine, and thereby take, an owner's state-law right to their property and, in so doing, transform what was private property into public property without justly compensating the owner.

The Mississippi Legislature also compelled the jury to award the owner only nominal compensation by requiring the jury to value the property the state took from the owner pretending the property was already encumbered with an easement even though the jury found, as a matter of fact, the easement had terminated. In short, Mississippi took private property by redefining what was private property to be public property and then dictated what compensation the court and jury would pay the owner.

In *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327-28 (1893), this Court explained, “[t]he right of the legislature of a state by law to apply the property of the citizen to a public use, and then to constitute itself the judge of its own case, to determine what is the ‘just compensation’ it ought to pay therefore ... cannot for a moment be admitted or tolerated under our constitution.”

This Court should grant *certiorari* to vindicate this Court’s Fifth Amendment jurisprudence and overturn a scheme by which Mississippi and other states may redefine private property to be public property without honoring the constitutional obligation to justly compensate the owner.

STATEMENT OF THE CASE

Wallace C. Walker owned land in Harrison County, Mississippi. In 1952 the Mississippi State Highway Commission wanted to use a portion of Walker's land for a toll bridge for U.S. Highway 90.² App. 53. The Highway Commission invoked its eminent domain authority taking an easement across Walker's land. "It is necessary to take for public use the ... property ... of Wallace C. Walker, along U.S. Highway No. 90, being described as a strip of land ... known as Federal Aid Project Toll Project No. 1...."³

Between 1953 and 2005 the Highway Commission used this strip of land for a highway. The Highway Commission stopped using the land for a highway after Hurricane Katrina destroyed the bridge in 2005 and the Highway Commission relocated Highway 90. The present-day owner, Bay Point, purchased the land from Walker's estate in 1993.

Under Mississippi law and the terms of the original 1952 highway easement, Bay Point (as the owner of the fee estate) would have enjoyed exclusive possession of, and

2. In 1992 the Mississippi Department of Transportation was renamed the Mississippi Transportation Commission. See Miss. Code §65-1-3. We refer to both entities as the "Highway Commission." Mississippi vested both entities with the power of eminent domain. See Miss. Code §65-1-47; *Roberts v. State Highway Comm'n*, 309 So.2d 156, 161 (Miss. 1975).

3. Minutes of the Meeting of Highway Commission (Jan. 22, 1952), App. 53-55. The full text of the easement the Highway Commission obtained across Walker's land is included in the Appendix to this brief.

unencumbered title to, the land because the original 1952 easement terminated when the Highway Commission no longer used the strip of land for a highway.

After Hurricane Katrina, in 2005, the Highway Commission removed the highway and “repurposed” the land under the former highway roadbed for a public park, including a boat launch, concert lawn, children’s playground, pedestrian track, pavilions, and public restrooms.⁴

Bay Point sued the Highway Commission seeking compensation for that property the Highway Commission took for the park. The Highway Commission responded by arguing that, more than a decade *after* Walker originally granted the 1952 highway easement, Mississippi’s legislature adopted §65-1-123.⁵ The Highway Commission said §65-1-123 redefined the original 1952 easement by providing that no easement granted the Highway Commission would terminate unless and until the Highway Commission acceded to termination of the easement.

Bay Point’s claim was tried to a jury. The jury found the Highway Commission no longer used Bay Point’s land for highway purposes. The jury also found the Highway

4. See Henderson Point Community Park website, available at: <<http://bit.ly/2nbPSZF>> (last visited April 5, 2017).

5. Section 65-1-123 provides, “All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes.... In no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse[.]”

Commission's use of Bay Point's land for a public park was beyond the scope of the 1952 easement.

But, when the jury was asked to determine the compensation Bay Point is due, the trial court directed the jury to value the property pretending the terminated 1952 highway easement still encumbered Bay Point's land. App. 45, 51. The trial court instructed the jury to determine compensation under this assumption because the trial court believed §65-1-123 compelled the property be valued in this manner. Under this instruction the jury awarded Bay Point only a nominal amount of \$500.

Bay Point appealed and, in a 7-to-2 decision, the Mississippi Supreme Court affirmed. Justices Kitchen and King dissented because, *inter alia*, Mississippi's scheme violated the Just Compensation Clause of the United States Constitution.

SUMMARY OF ARGUMENT

The Fifth Amendment does not allow the government to redefine an owner's established state-law property interest without justly compensating the owner. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 23 (1990) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980), and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984)). See also *Stop the Beach Renourishment, Inc. v. Florida Dep't. of Env. Protection*, 560 U.S. 702, 715 (2010) ("If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.").

Second, a legislature cannot take an owner's land and also determine the compensation the owner is due. The determination of "just compensation" is exclusively a function of the judicial branch subject to the right to trial by jury. See *Del Monte Dunes*, 526 U.S. at 708-11; and *Monongahela*, at 148 U.S. at 327. For the legislature to determine the compensation an owner is due for property the state has taken is the legislature sitting as judge in its own case.

ARGUMENT**I. The Mississippi Supreme Court’s decision contravenes this Court’s Just Compensation Clause jurisprudence.****A. “The compensation must be a full and perfect equivalent for the property taken.”⁶**

The Framers drafted our Constitution embracing the Lockean view that “preservation of property [is] the end of government, and that for which men enter into society....” John Locke, *Second Treatise on Civil Government*, Ch. XI §138.⁷ Madison declared, “Government is instituted to protect property of every sort.... This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”⁸

6. *Monongahela*, 148 U.S. at 326.

7. Blackstone wrote, “The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisition, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature.” William Blackstone, *Commentaries on the Law of England*, Book I, §191-92.

Kent similarly observed the constitutional protection of property is a “principle in American constitutional jurisprudence, [that] is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law.” James Kent, *Commentaries on American Law*, Lecture XXXIV.

8. *The Complete Madison*, pp. 267-68 (Saul K. Padover, ed., 1953), published in *National Gazette* (March 29, 1792) (emphasis in original).

In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), this Court rightly observed, “[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights.... That rights in property are basic civil rights has long been recognized.”⁹

Writing for the Court, Chief Justice Roberts recently recalled:

[The Just Compensation Clause] protects “private property” without any distinction between different types. The principle reflected in the Clause goes back at least 800 years to Magna Carta ... Clause 28 of that charter forbade any “constable or other bailiff” from taking “corn or other provisions from any one without immediately tendering money therefor...” The colonists brought the principles of Magna Carta with them to the New World, including that charter’s protection against uncompensated takings of personal property.

Horne v. Department of Agriculture,
135 S.Ct. 2419, 2426 (2015).¹⁰

Government will always be tempted to take private property and will seek to avoid paying for what it has taken. But this is what the constitution forbids. The

9. Citations omitted.

10. Quoting Magna Carta, Cl. 28 (1215), in W. McKechnie, *Magna Carta, A Commentary on the Great Charter of King John* (2d ed. 1914), p. 329.

legitimacy of the government’s extraordinary power to take private property is premised upon the government’s “categorical” duty to justly compensate the owner. And a landowner has been justly compensated only when the government pays the owner an amount sufficient to put him in “as good position pecuniarily as he would have occupied if his property had not been taken.”¹¹

In *Monongahela*, the federal government acquired a privately-owned lock and dam. The parties disputed the value of that property the government took. The government argued that Congress determined the amount of compensation the owner was entitled to be paid when Congress passed the legislation authorizing the taking and appropriating a specific sum for compensation. This Court rejected the government’s argument and held the determination of “just compensation” is an exclusively judicial inquiry. This Court further held that private property may not be taken “unless a full and exact equivalent for it be returned to the owner.”¹² Only after the owner has been compensated for the “true value” of his property can “it be said that just compensation for the property has been made.”¹³

In *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923), this Court, citing *Monongahela*, held a landowner is “entitled [to] the full and perfect equivalent of the property taken.” Just compensation must put the

11. *United States v. Miller*, 317 U.S. 369, 373 (1943); see also *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

12. *Id.* at 326.

13. *Id.* at 337.

property owner “in as good position pecuniarily as he would have been if his property had not been taken.”¹⁴

B. “The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.”¹⁵

From the earliest days of its Fifth Amendment jurisprudence, this Court has declared that determining the just compensation an owner is due is the exclusive task of a court and jury - not the executive or legislative branch. In *Monongahela*, this Court explained that “[t]he right of the legislature of the state by law to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the ‘just compensation’ it ought to pay therefor ... cannot for a moment be admitted or tolerated under our constitution.”¹⁶

14. *Id.*; see also *Kirby Forest*, 467 U.S. at 10 (holding courts should “ensure that [the property owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation”); *Miller*, 317 U.S. at 373; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 52 (1928); *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923).

15. *New River Collieries*, 262 U.S. at 343-44.

16. *Monongahela*, 148 U.S. at 327-28. Ironically *Monongahela* quoted the Mississippi Supreme Court’s earlier opinion in *Isom v. Miss. Cent. R. Co.*, 36 Miss. 300 (1858). *Isom* holds the judiciary and a jury – not the legislature – determine the compensation an owner is owed when the government takes the owner’s property.

This Court continued:

[C]ongress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. *It does not rest with the public, taking the property through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation.* The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.¹⁷

In *Jacobs v. United States*, 290 U.S. 13, 17 (1933), this Court emphasized “the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such allowance was appropriate in order to make the compensation adequate.” See also *Seaboard*, 261 U.S. at 306 (“It is obvious that the owner’s right to just compensation cannot be made to depend upon state statutory provisions.”).

Mississippi’s statutory scheme by which the Highway Commission was authorized to redefine an owner’s existing state-law property interest by refusing to recognize an easement has terminated and then deny the owner just compensation by requiring the court and jury to determine compensation pretending the terminated

17. *Id.* at 327 (emphasis added).

easement still encumbered the owner's land violates the Just Compensation Clause.

II. The Mississippi Supreme Court erred when it held a state can redefine an owner's property by *ipse dixit* without compensating the owner.

The original 1952 easement granted the Highway Commission a right to use a strip of land for a highway. Attached app. 4a. When no longer used for that purpose, the original easement terminated, and the owner of the fee estate (Bay Point) regained unencumbered title to and possession of the land.

In *Marvin M. Brandt Rev. Tr. v. United States*, 134 S.Ct. 1257, 1265 (2014), this Court explained:

The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. An easement is a “nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” ... “Unlike most possessory estates, easements ... may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude.” ... In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.¹⁸

18. Quoting *Restatement (Third) of Property: Servitudes* §1.2(1), Comment *d*, §7.4, Comments *a*, *f* (1998), and citing *Smith v. Townsend*, 148 U.S. 490, 499 (1893).

But the Mississippi legislature redefined Bay Point’s established property interest when it authorized the Highway Commission to unilaterally refuse to recognize an easement has terminated. Mississippi’s redefinition of Bay Point’s property is a taking. “This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979). See also *Preseault*, 494 U.S. at 23, and *Stop the Beach Renourishment*, 560 U.S. at 713 (“States effect a taking if they recharacterize as public property what was previously private property.”) (citing *Webb’s*, 449 U.S. at 163-65).

Preseault involved a challenge to the constitutionality of section 8(d) of the National Trails System Act.¹⁹ Congress adopted section 8(d) to prevent unused railroad rights-of-way from “reverting” to the owner of the fee estate and allowing the land to be used for public recreation. This Court explained that a rail-to-trail conversion of a railroad easement “gives rise to a takings question ... because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests.” *Preseault*, 494 U.S. at 8.

In her concurrence in *Preseault* Justice O’Connor (joined by Justices Kennedy and Scalia) explained:

[A] sovereign, “by *ipse dixit*, may not transform private property into public property without

19. 16 U.S.C. 1247(d).

compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.”

494 U.S. at 23.

Justice O’Connor quoted this Court’s earlier decisions in *Webb’s*, 449 U.S. at 164, and *Monsanto*, 467 U.S. at 1012. See also *Stop the Beach*, 560 U.S. at 715 (“If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”).

Justice Brennan explained the Fifth Amendment guarantee of just compensation is self-executing:

As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and *the self-executing character of the constitutional provision with respect to compensation is triggered*. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a “taking” compensation *must* be awarded.

San Diego Gas & Elec. Co. v. San Diego,
450 U.S. 621, 654 (1981).²⁰

20. Brennan, J., dissenting on other grounds (emphasis added).

Justice Brennan's view in *San Diego Gas* was expressed in a dissent. But, in *First English Evangelical Lutheran v. Los Angeles*, 482 U.S. 304, 315-16 (1987), this Court affirmed Justice Brennan's observation that the Fifth Amendment is "self-executing." The Court held:

[A] landowner is entitled to bring an action in inverse condemnation as a result of the "self-executing character of the constitutional provision with respect to compensation".... As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, it has been established at least since *Jacobs [v. United States]*, 290 U.S. 13 (1933) that claims for just compensation are grounded in the Constitution itself. ... *Jacobs*, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

First English,
482 U.S. at 315-16.²¹

Even before *San Diego Gas* and *First English* the Court found, "the claim [for just compensation] traces back to the prohibition of the Fifth Amendment." *United States v. Dickinson*, 331 U.S. 745, 748 (1947). This is so because, as this Court explained, the "[Fifth Amendment] prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members

21. Numerous citations omitted.

of the public, a full and just equivalent shall be returned to him.” *Monongahela*, 148 U.S. at 325.

Thus, when the government takes an owner’s property the government has a “categorical duty” to justly compensate the owner. See *Arkansas Game & Fish Comm’n v. United States*, 133 S.Ct. 511, 518 (2012), and *Horne*, 135 S.Ct. at 2428.²²

The Mississippi Supreme Court ignored these holdings. Section 65-1-123, as affirmed by the Mississippi Supreme Court, allowed the Highway Commission to continue using Bay Point’s land for a new and different purpose (a public park) thereby effectively redefining the original highway easement Walker granted the Highway Commission in 1952.

As this Court explained in *Brandt* and as the jury found, the original 1952 easement terminated when the Highway Commission removed the highway from the land in 2005 and built a public park on the land, the original easement terminated. See Bruce & Ely, *Easements and*

22. “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Justice Holmes reminded us, “[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 416 (1922).

Licenses in Land §§10:8, 10:26. As the owner of the fee estate, Bay Point would have held unencumbered title to the land and enjoyed the exclusive right to possess its land. But §65-1-123 and the Highway Commission's refusal to recognize that the 1952 easement terminated (an action the Highway Commission took pursuant to §65-1-123) redefined the 1952 easement and allowed Mississippi to use Bay Point's land for a public park.

The Mississippi Supreme Court's decision, affirming the trial court's instruction that §65-1-123 required the jury to determine compensation pretending the terminated 1952 easement still encumbered Bay Point's land, redefines private property to be public property which in *Webb's*, *Monsanto*, *Preseault*, and *Stop the Beach* this Court said is a taking for which the Just Compensation Clause compelled the government to compensate the owner.

The dissenting justices explained:

The jury instruction ... allowed the [Highway Commission], an executive agency, to exercise power properly belonging to the judiciary. The majority's interpretation of the law permits the [Highway Commission] unilaterally to determine when an easement has terminated. ... [T]he facts support the legal conclusion that an easement has terminated by its own language, [yet] under the majority's interpretation, the [Highway Commission] may hold the easement indefinitely by refusing to release it on the minutes.

The Just Compensation Clause demands the government justly compensate an owner when a state does what Mississippi has done. If Walker had leased a building to the Highway Commission for a term of years and, at the end of the lease term, the Highway Commission refused to recognize the lease terminated and continued using the building, it would be an obvious taking. This situation is no different.

III. The Mississippi Supreme Court erred when it concluded the state legislature could limit a jury's determination of "just compensation."

A. The Just Compensation Clause requires the government to pay owners the full value of property the government takes.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. This Court directs that "[s]uch compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken." *Miller*, 317 U.S. at 373 (citing *Monongahela*, 148 U.S. at 326, *Seaboard*, 261 U.S. at 304, and *New River Collieries*, 262 U.S. at 343). "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

Justice Holmes famously said, "the question is, What has the owner lost? Not, What has the taker gained?" *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). See also *Jacobs*, 290 U.S. at 16-17.

“[C]ourts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the ‘value,’ the ‘market value’ and the ‘fair market value’ of what is taken.... It is usually said that market value is what a willing buyer would pay in cash to a willing seller.” *Miller*, 317 U.S. at 374.²³

“The Court therefore has employed the concept of fair market value to determine the condemnee’s loss. 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.” *564.54 Acres of Land*, 441 U.S. at 511 (citing *Miller*, 317 U.S. at 374; *City of New York v. Sage*, 239 U.S. 57, 61 (1915); and *United States v. Virginia Electric Co.*, 365 U.S. 624, 633; 632 (1961), among other cases).

23. Numerous citations omitted. See also *Brown v. Legal Found. of Washington*, 538 U.S. 216, 243 (2003) (Scalia J., dissenting) (“When a State has taken private property for a public use, the Fifth Amendment requires compensation in the amount of the market value of the property on the date it is appropriated.”) (citing *United States v. 50 Acres of Land*, 469 U.S. 24, 29, (1984) (holding that just compensation is the “market value of the property at the time of the taking”) (quoting *Olson v. United States*, 292 U.S. 246, 255, (1934); *Kirby Forest*, 467 U.S. at 10; *United States v. 564.54 Acres Land, More or Less, Situated in Monroe & Pike Counties*, 441 U.S. 506, 511, (1979); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474, (1973); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 130, (1950); and *New River Collieries*, 262 U.S. at 344.

B. Determining “just compensation” is a judicial, not a legislative, function.

Determining the compensation a landowner is due is an “inherently judicial” endeavor, not a matter for the legislative or executive branch. The Constitution declares that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. *Monongahela*, 148 U.S. at 327. *Monongahela* further held, “The right of the legislature of the state by law to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the ‘just compensation’ it ought to pay therefor ... cannot for a moment be admitted or tolerated under our constitution.” 148 U.S. at 327-28.

Mississippi’s Constitution, like the Seventh Amendment to the United States Constitution, guarantees the right of trial by jury. See Miss. Const. Art. 3, §31 (“The right of trial by jury shall remain inviolate...”). In *Galloway v. United States*, 319 U.S. 372, 398-99 (1943), Justice Black summarized the history animating adoption of the constitutional guarantees of right to trial by jury:²⁴

[I]n response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and

24. Justice Black’s statement was in an opinion dissenting on other grounds. See also *Solem v. Helm*, 463 U.S. 277, 286 (1983) (explaining the fundamental nature of the right to trial by jury and tracing the origin of this right to Magna Carta).

common law cases from legislative or judicial abridgment.... [Patrick] Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, 'Trial by jury is the best appendage of freedom.... We are told that we are to part with that trial by jury with which our ancestors secured their lives and property.... I hope we shall never be induced, by such arguments, to part with that excellent mode of trial.'

Since King John met the barons on the fields of Runnymede in 1215, the right to trial by jury has been accepted as a fundamental premise of Anglo-American jurisprudence. This Court observed:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob, 315 U.S. at 752-53.²⁵

Applied here, this means the jury, not the Mississippi legislature or Highway Commission, determines the

25. See also *United States v. Booker*, 543 U.S. 220, 239 (2005) (“[T]he right to a jury trial had been enshrined since the Magna Carta.”).

value of that property Mississippi took from Bay Point. The Mississippi scheme compelling the jury to value that property the Highway Commission took from Bay Point assuming the land is already encumbered with the easement is contrary to the principle that the judicial, not legislative branch, determines just compensation. Mississippi's statutory scheme, as applied here, invades and invalidates the jury's role in deciding just compensation. In essence the jury is told, "determine the just compensation the owner is due but, when determining that compensation for what the Highway Commission took, pretend the Highway Commission took what the owner did not possess."

C. Mississippi violated the Constitution and this Court's holdings when it held the Mississippi Legislature, not the court and jury, determine the compensation owners are due.

Section 65-1-123 compelled the jury to award only nominal compensation by requiring the jury to value the property the Highway Commission took from Bay Point assuming the false premise that the 1952 easement had not terminated. The jury correctly found the original 1952 easement had terminated and that a public park was not within the scope of the original easement. See App. 6-7.

The trial court, however, believed §65-1-123 compelled the conclusion that the Highway Commission could unilaterally nullify the termination of the 1952 easement and continue using Bay Point's land for a new and different purpose. Assuming this to be so, the trial court instructed the jury to value the property Mississippi took from Bay Point in the "before-taken" condition pretending the land was still encumbered by the original 1952 easement. App. 45-46.

To the extent the trial court's reading of §65-1-123 is a correct interpretation of this Mississippi statute (and we assume *arguendo* that it is), the Mississippi legislature has done exactly what this Court forbid in *Monongahela*. The Mississippi legislature took from the judicial branch and from the jury the ability to determine just compensation. By directing the jury to pretend the original 1952 highway easement had not terminated the jury only awarded nominal compensation of \$500 and not the full measure of compensation the Just Compensation Clause requires.

Mississippi may vest the Highway Commission with authority to redefine established property interests. But, when the Highway Commission exercises this authority by redefining the 1952 easement and building a park on Bay Point's land, the Highway Commission took Bay Point's property. The "just compensation" the Fifth Amendment requires is the full measure of what Bay Point lost – the value of the land unencumbered by any easement.

The constitutional violation occurs when Mississippi attempts to convert private property to a public use by redefining the owner's property interest and then denying the owner just compensation by directing the jury to determine compensation pretending the land is still encumbered by the 1952 easement. It is as if the legislature authorized the Highway Commission to condemn an easement for a highway and then required the jury to determine compensation pretending the owner's land was already encumbered with a highway easement.

CONCLUSION

This Court should grant Bay Point's petition because the Mississippi Supreme Court's decision contravenes this Court's Just Compensation Clause jurisprudence. By affirming a legislative scheme that allows a state to redefine private property to be public property without justly compensating the owner the Mississippi Supreme Court's decision undermines the Fifth Amendment.

Allowing Mississippi's scheme to stand will invite other states to adopt similar legislative schemes by which states may redefine private property to be public property and escape the constitutional obligation to justly compensate the owner.

Respectfully submitted,

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APPENDIX

**APPENDIX — JUDGMENT AND VERDICT IN
THE COUNTY COURT FOR THE COUNTY OF
HARRISON, APPROVED MAY 27, 1952**

STATE OF MISSISSIPPI
IN THE COUNTY COURT
COUNTY OF HARRISON

MISSISSIPPI STATE HIGHWAY COMMISSION,

Petitioner,

vs

WALLACE C. WALKER,

Defendant.

JUDGMENT AND VERDICT

In this case the claim of the Mississippi State Highway Commission (by J. P. Coleman, Attorney-General of Mississippi), to have condemned certain interest of the hereinafter named parties in the following described land, described in the application, to-wit:

Commencing at a point in the center of 4th Avenue in Henderson Point, Harrison County, Mississippi, which said point is 198.5 feet Southerly from the North line of Bayview Street, measured along the center line of 4th Avenue, which said point is the point of beginning of the land herein described; thence run North 5° 13' 35" East along the center line of a proposed highway project, known and designated as Toll Project #1, 46.3 feet; thence

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continue to run along said center line in a northwesterly direction on the circumference of a circle to the left with a radius of 1637.28, 152.3 feet to a point on the North line of Bayview street; thence ran North 84° 56' 30" West along the North line of Bayview Street 115.4 feet; thence run in a Northwesterly direction, parallel to and 115 feet from said center line, on the circumference of a circle to the left, with a radius of 1522.28 feet, 338.0 feet; thence run North 13° 12' 10" West parallel to and 115 feet from said center line, 382.1 feet to a point where the South line of 9th Street extended intersects the center line of Ponce de Leon Boulevard; thence run North 84° 56' 30" West along the South line of 9th Street extended, 40.3 feet to the Northeast corner of Lot 1, Block 1 of Pass Christian Isles; thence North 5° 3' 30" East, 114 feet; thence run in a Northwesterly direction, on the circumference of a circle to the left, with a radius of 802.35 feet, parallel with and 115 feet from said center line, 300 feet, more or less; thence North 84° 56' 30" West, 98 feet, more or less, to a point on the West side of Sandy Hook Drive; thence in a Northwesterly direction along the West side of Sandy Hook Drive, 104.7 feet; thence in a Northwesterly direction on the circumference of a circle to the left, with a radius of 802.35 feet, parallel to and 115 feet from said center line, 485 feet, more or less, thence North 83° 51' 10" West, parallel to and 115 feet from said center line, 73 feet, more or less, to the shore line of the Bay of St. Louis; thence in a Northwesterly direction along the shore line of the Bay of St. Louis, 124.4 feet to said center line; thence continue in a Northwesterly direction along the shore line of the Bay of St. Louis, 131.8 feet to a point that is 115 feet from said center line, measured at right angles thereto; thence South 83° 51' 10" East, 305 feet,

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more or less, to a point on the West margin of Sandy Hook Drive, which point is 89.6 feet from the Northeast corner of Lot 3, of Block 7 of said Pass Christian Isles, measured along the West line of Sandy Hook Drive; thence in a Northeasterly direction, 50.1 feet to a point on the East margin of Sandy Hook Drive, which point is 104.1 feet from the Southwest corner of Lot 7, Block 4 of said Pass Christian Isles, measured along the East margin of Sandy Hook Drive; thence Southeasterly along the East margin of Sandy Hook Drive and the West line of Lot 7, Block 4, 104.1 feet to the Southwest corner of said Lot 7, Block 4; thence in a Northeasterly direction along the North margin of Front Street and along a Southern line of Lot 7, Block 4, 116.6 feet to the Southeast corner of said Lot 7, Block 4; thence North $25^{\circ} 11' 30''$ West along the East line of said Lot 7, Block 4, 7.7 feet; thence South $83^{\circ} 51' 10''$ East, 15 feet, more or less, to the North margin of Front Street and the South line of Lot 6, Block 4; thence North $64^{\circ} 23' 30''$ East along the North margin of Front Street, 212.2 feet to the Southwest corner of Lot 15, of Block 5, which said point is on the East margin of Ponce de Leon Boulevard; thence South $25^{\circ} 11' 30''$ East along the East margin of Ponce de Leon Boulevard, 182.2 feet; thence South $83^{\circ} 51' 10''$ East, 130 feet, more or less, to the shore line of Bayou Boisdore; thence in a Southeasterly direction along the shore line of Bayou Boisdore, 720 feet, more or less; thence in a Southeasterly direction on the circumference of a circle to the right, with a radius of 1032.35 feet, parallel to and 115 feet from said center line, 20.4 feet; thence South $13^{\circ} 12' 10''$ East, parallel to and 115 feet from said center line, 452.7 feet; thence in a Southeasterly direction, on the circumference of a circle to the right with a radius of 1752.28 feet, 529.0 feet to a point

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on the South margin of Bayview Street; thence South 44° 41' 30" West, 101.9 feet to a point on the East margin of 4th Avenue; thence North 84° 56' 30" West, 50 feet to the center line of 4th Avenue and the point of beginning, and containing 11.26 acres, more or less, exclusive of present street and highway right of way, and being a part of Lots 3, 4 and 5, Block 7, Section B, and part of Lot 2, Block 7, Section A, and a part of Lots, 1,2 and 3, Block 3, Section A, and all of Lots 1, 2, 3, 4, 5, 11, 12, 13 and 14, and part of Lots 6, 7, 9 and 10, Block 2, Section A, and all of Lots 6, 7, 8, 9, 10, 11, and 12, and part of Lots 13, 14, 5, 4, 3, 2 and 1, Block 5, and that parcel of land between Lots 5 and 6, Block 5, designated as "Park" on said Subdivision map, and also a part of that Parcel of land South of Lot 1, Block 5, designated as "Park", of the Survey and Subdivision of Pass Christian Isles, Harrison County, and a part of Block 105 of the Survey and Subdivision of Henderson Point Heights, Harrison County, Mississippi.

The easement is condemned on the following conditions, reservations and limitations:

(a) A permanent easement is reserved in the defendant, secondary and subordinate only to petitioner's easement for all highway purposes, from a strip of land five (5) feet wide, measured Westerly from the High-water mark along the West side of Bayou Boisdore from Bayview Street to the North property line in Lot No. Thirteen, Block Five of Pass Christian Isles, so as to permit defendant to prohibit any use by the general public of bayou frontage in this area which would be detrimental to the residents in the adjoining area.

Appendix

The Court finds, on agreement of the parties, announced by their respective attorneys of record, that the petitioner and the defendant have agreed that the defendant, Wallace C. Walker, will be damaged by the taking of said land in the sum of Fifty Thousand Dollars (\$50,000) and said cause having been submitted to the Court (jury waived by both parties hereto), and the Court hereby finds the awards to the defendant, Wallace C. Walker, judgment against the petitioner in the sum of Fifty Thousand Dollars (\$50,000) for the aforesaid damages.

Now upon payment of said award, the petitioner may enter upon and take possession of said property and appropriate it to public use as prayed for in the application, and according to the terms of this judgment, let the petitioner pay the costs of Court, for which execution may issue.

Approved this 27 day of May, A. D., 1952.

/s/ _____

/s/ _____

/s/ _____
Attorneys for Petitioner

/s/ _____
Attorneys for Defendant
