

Supreme Court, U.S.  
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**In The  
Supreme Court of the United States**

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KIMCO OF EVANSVILLE, INC.  
N/K/A KCH ACQUISITION, INC.,  
THE FRANKLIN LIFE INSURANCE COMPANY  
AND  
VANDERBURGH COUNTY, INDIANA,  
*Petitioners,*

v.

STATE OF INDIANA,  
*Respondent.*

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On Petition for Writ of Certiorari to the  
Indiana Supreme Court

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

The Indiana Supreme Court invoked principles of law which govern inverse condemnation cases, and, contrary to settled federal law, applied those principles to Petitioner's case to set aside a \$2,300,000 jury award for just compensation to Petitioner in a physical taking, partial condemnation case, wherein the jury followed the federal courts' settled law in granting the award. In doing so, did the Indiana Court's decision conflict with the holdings of the federal courts that are in effect for 113 years, which establish the proper measure of just compensation in partial condemnation cases; thus violating Petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution?

Is the Indiana Supreme Court's decision a form of "judicial taking" or "judicial legislation" in overruling established federal courts' holdings by its categorizing a physical, partial condemnation case as an inverse condemnation case and further by defining Fifth Amendment's "just compensation" clause inconsistent with and contrary to federal courts' undeviating decisions that establish the proper measure of damages to be used in partial condemnation cases, and by suddenly and arbitrarily overturning established federal case law serving as precedents for over 100 years and by depriving Petitioner of trial by jury; thereby committing a violation of the Fifth and Seventh and Fourteenth Amendments to the United States Constitution?

Is the Indiana Supreme Court's decision substituting itself as the trier of the facts to overrule the jury verdict where Petitioner has a right to trial by jury under Indiana law and the Seventh Amendment of the United States Constitution and the case was tried before a jury as demanded by Petitioner, and the jury found in favor of Petitioner, a violation by the Indiana Court of the Seventh Amendment to the United States Constitution?

## **PARTIES TO THE PROCEEDING**

### **Petitioner**

Kimco of Evansville, Inc. n/k/a  
KCH Acquisition, Inc. is the sole Petitioner  
and is not a publicly traded corporation.  
Kimco Realty Corporation is the parent company of  
Petitioner  
and is a publicly traded corporation.

### **Respondent**

State of Indiana

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## PETITION FOR WRIT OF CERTIORARI

Kimco of Evansville, Inc. n/k/a KCH Acquisition, Inc. respectfully petitions for a writ of certiorari to review judgment of the Supreme Court of Indiana.

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### OPINIONS BELOW

The unpublished Order of Indiana Supreme Court, *State of Indiana v. Kimco of Evansville, Inc.*, entered May 13, 2009 is attached as Appendix A-1.

The Opinion of Indiana Supreme Court, *State of Indiana v. Kimco of Evansville, et.al.*, 902 N.E.2d 206, entered March 4, 2009, is attached as Appendix A-3.

The Opinion of Court of Appeals of Indiana, *State of Indiana v. Kimco of Evansville, Inc.* 881 N.E.2d 987, entered October 31, 2007 is attached as Appendix A-26.

## **JURISDICTION**

This Court has jurisdiction to review the Opinion of Indiana Supreme Court on a Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1257. The Indiana Supreme Court's Order denying Petitioner's Motion for Rehearing was entered May 13, 2009. This Petitioner's Motion for Writ of Certiorari is timely filed within 90 days from that date. Sup.Ct.R.13.

This case presents "an important question of federal law that has not been, but should be, settled by this Court". See Sup.Ct.R.10(c).

A second basis for certiorari review under Supreme Court Rule 10 is that there is a conflict among states which interpret their Constitutions differently as to the meaning of "just compensation" than Indiana Supreme Court interprets "just compensation", consistent with federal courts' decisions; whereas the Indiana Court's decision is inconsistent with federal courts' decisions and conflicts with federal courts' decisions of the meaning of "just compensation", as it relates to the right of a property owner to severance damages to the remaining property arising in partial condemnation, impairment of access cases in direct physical takings; and a further basis for jurisdiction in that the Indiana Court committed a "judicial taking" or "judicial legislation" by overruling established federal law on that subject.

A third basis for certiorari review is that the Indiana Court by substituting itself as finder of the facts and overruling a jury verdict in favor of Petitioner violates the Petitioner's right to a jury trial under the Seventh Amendment to the United States Constitution.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS**

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment of the United States Constitution provides:

In suits at common law, where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved, and no

fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The Fourteenth Amendment of the United States Constitution provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case involves partial condemnation of Petitioner's shopping center resulting in impairment of ingress/egress access of the shopping center. The decision of the Supreme Court of Indiana entirely depriving Petitioner of a jury award for severance damages conflicts with settled law of federal cases as to Petitioner's right to severance damages.

Kimco owns Plaza East Shopping Center ("Plaza East") in Evansville, Indiana, at the intersection of Lloyd Expressway (runs east-west) and Green River Road (runs north-south). Plaza East has no ingress or egress along Lloyd Expressway. At the intersection, Lloyd Expressway is elevated above ground. Drivers exit Lloyd Expressway before reaching Green River Road via a service road. Plaza East has two entrances on Green River Road. Both are in existence after the taking. (See drawing of the property, before and after the taking, App. A-47)

Before the taking, Plaza East's main entrance was the southern entrance on Green River Road ("Southern Entrance"), allowing access to the *center* of Plaza East's parking lot. It is three lanes. Before installation of a median on the center of Green River Road by the State, shoppers could enter from, and exit to, both directions (north or south) on Green River Road. The Southern Entrance was controlled by a traffic light, which the State eliminated when the State constructed the median.

Plaza East's secondary entrance is the northern entrance on Green River Road ("Northern Entrance") immediately next to the sidewalk in front of a line of retail stores. This Northern Entrance is only two lanes; narrower than the Southern Entrance. This two lane feature which cannot be made into three lanes because of the State's appropriation is one of the most significant damaging facts of this case. Before the taking, the Northern Entrance allowed only "right-in/right-out" access for travelers going north to enter the shopping center, or when exiting to go northbound on Green River Road. There was a concrete island at the Northern Entrance. It separated incoming and exiting traffic. After the taking, the State's design changed that. The State allowed left turns in and left turns out, in addition to right in/right out, at this two-lane Northern Entrance, and further, as part of the State's design to make the Northern Entrance the shopping center's new main entrance, the concrete island at the Northern Entrance was removed by the State. This new design clogs up and severely impairs Plaza East's access. That fact was not controverted by State's evidence at the trial.

Before the taking, the Southern Entrance permitted vehicles to exit the shopping center in either direction (north or south) controlled by a traffic light. This was changed by the State building the median on Green River Road to extend up to and to end just before the Northern Entrance. Thus, after the taking, left turns out from that Northern

Entrance were permitted for exiting vehicles to go south on Green River Road and to permit left turns in for entering vehicles from southbound traffic on Green River Road. This was the State's design to make the Northern Entrance a substitute main entrance in place of the Southern Entrance for the purpose of mitigating the damage award.

Because of volume of speeding traffic on Green River Road and because the Northern Entrance is only two lanes, the Northern Entrance became congested and dysfunctional and exiting vehicles became "stacked" immediately in front of the stores, causing long waits, making it difficult for pedestrians to navigate the parking lot, and difficult and unsafe for shoppers attempting to enter or depart, and requiring changes be made by Petitioner to traffic and parking patterns and roadways inside the shopping center.

At trial, Petitioner's traffic expert provided lengthy and detailed testimony based on nationally recognized testing methods and personal observations (not contested or contradicted by the State) that the Northern Entrance being located in front of a line of retail stores and, most importantly, being only two lanes, it is not safe, suitable or adequate to function as an in/out access from or to four directions. Presenting it as a new 4-way entrance after the taking allegedly to replace the 3-lane former main entrance (that is, the Southern Entrance) actually disabled its use. It became dangerous, caused stacking on the roadway in the

shopping center lane adjacent to and in front of the row of retail stores, and caused unacceptable delays for drivers trying to leave, among other detriments. Drivers entering north and south, and drivers attempting to leave and turn south, all needed to use the one and only lane for that purpose.

All the foregoing, among other consequences of the State's design and construction, constitutes influences and factors in appraising the depreciation in value of the remaining shopping center after the taking, bearing on Petitioner's right to severance damages as part of "just compensation" in this partial condemnation case, as consistently so held by federal courts.

On June 23, 2000, the State filed a complaint to appropriate land from Plaza East's frontage along Green River Road to use the appropriated land as an acceleration/merge lane for drivers coming off Lloyd Expressway and turning right to go north on Green River Road, as part of its road construction project.

The State also appropriated an additional .048 acres of Plaza East's land for construction easements to park vehicles, equipment and materials, encompassing both the Southern and Northern Entrances of Plaza East, which lasted 4-1/2 years.

Most significantly, the State permanently froze all ingress and egress associated with Plaza East along Green River Road, therefore, permanently preventing any change to the Northern

and Southern Entrances by (in the State's complaint's language) effecting "permanent extinguishment of all rights and easements of ingress and egress to and from Green River Road". By this appropriation, the State precluded widening of both Entrances. Taking away Petitioner's right to widen the Northern Entrance making it nonfunctional is especially a crucial fact of this case.

When construction was completed in 2004, shoppers traveling southbound on Green River Road could only enter Plaza East through the Northern Entrance. The State constructed the median in the center of Green River Road to extend almost the entire length of Petitioner's shopping center fronting on Green River Road, but the median ended just before reaching the Northern Entrance. Shoppers traveling northbound on Green River Road could enter Plaza East via its Southern Entrance, but only by crossing a solid white line which the State painted in the road to separate the new acceleration/merge lane (built on Petitioner's property which the State appropriated for that purpose) and to demark it from the travel lanes going north. Shoppers intending to enter Plaza East could enter (right turn) into the Northern Entrance from the new acceleration/merge lane where they meet up with the new troubles by needing to enter one lane used for both in-coming and out-going vehicles.

After completion of the project, not only did tenant occupancy decline by 40%, but existing

tenants renegotiated existing leases. One store tenant (for example) renegotiated its lease rent for approximately \$90,000 per year rent; compared to the previous \$150,000 per year rent. The State did not contest that evidence.

Before the taking by the State, Plaza East was considered a Class B community shopping center, worth \$7,300,000. After the taking, Plaza East's highest and best use was depreciated to a Class C Shopping Center having a value of approximately \$5,000,000, according to the testimony of Petitioner's appraiser. The State's appraiser came close to that figure also.

It is common knowledge, and Petitioner's both factual and expert testimony at the trial, bore out that convenient and safe entry and exits from shopping center parking lots is an essential element to its value, second only to the site location of the property itself, if not in fact equal in importance.

These factors and influences may or may not be property rights, but are important considerations in appraising the after-taking decline in value of the remaining shopping center, as severance damages, as part of "just compensation" under the Fifth Amendment to the United States Constitution as per the holdings of the federal courts for over 100 years. This is one of the unconstitutional characteristics of the Indiana Supreme Court's decision: in that it violated the Fifth Amendment by conflicting with the federal courts' decisions in that the Indiana

Court denied Petitioner as a matter of law the right to severance damages.

Petitioner's brief submitted on its motion for rehearing to the Indiana Supreme Court after that Court's adverse decision reversing a unanimous decision of the Court of Appeals of Indiana in favor of Petitioner raised objection to the decision on the ground of violation of the United States Constitution.

### **SUMMARY OF ARGUMENT**

The State took a portion of Petitioner's land from Petitioner's shopping center and designed and constructed changes to the roadway and took away (by its own words) Petitioner's access and easement rights, all of which directly, adversely affected the fair market value of the remainder of Petitioner's shopping center following the taking, and the Supreme Court of Indiana employed a measure of damages contrary to the Fifth Amendment and contrary to the "undeviatingly followed" decisions of federal courts (the quoted phrase is the court's phrase in *United States v. Grizzard*, 219 U.S. 180), including the United States Supreme Court interpreting the Fifth Amendment to require as measurement of "just compensation" severance damages to the remaining property after the taking.

The Indiana Court additionally deprived Petitioner of its right in this case to have the issue of "just compensation" decided by a jury which is in

violation of the Seventh Amendment of the United States Constitution.

A number of the issues raised in this Petition have never been formally addressed by this Court, although occasional language on those issues by this Court dealt with them, and this Court has applied an approach to those issues in a variety of other contexts. Other issues, such as the proper measure of determining damages in partial condemnation cases have been settled law in federal courts for 113 years, which the Indiana Supreme Court purports to overrule. This Court should address all these issues.

## **REASONS FOR GRANTING THE WRIT**

On important questions of condemnation law and procedure, the Indiana Supreme Court issued a decision that is in conflict with the Fifth Amendment, the Seventh Amendment and the Fourteenth Amendment and in conflict with federal law decisions.

**I. WHETHER A STATE COURT CAN ISSUE A DECISION THAT CREATES A DIFFERENT, MORE DETRIMENTAL MEASURE OF JUST COMPENSATION TO AN OWNER IN A PARTIAL CONDEMNATION CASE THAN THE MEASURE FEDERAL COURTS APPLY PURSUANT TO THE FIFTH AMENDMENT.**

**This is a Compelling Case For Granting Writ of Certiorari**

This case presents compelling reasons to grant a writ of certiorari. The Indiana Supreme Court's opinion states: "We have held that the state and federal takings clauses are textually indistinguishable and are to be analyzed identically." *Kimco v. State of Indiana*, 902 N.E.2d at 210,211,212. Then, the opinion goes on to cite United States Supreme Court regulatory takings or inverse condemnation cases as controlling Petitioner's partial condemnation case, namely,

*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40, 125 S.Ct. 2074 (2005); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104,124,98 S.Ct. 2646 (1978). This analogy is unwarranted and contrary to federal cases. *Bauman v. Ross*, 167 U.S. 568, 17 S. Ct. 966, 42 L. Ed. 270 (1897). *United States v. Grizzard*, 219 U.S. 180, 31 S. Ct. 162, 55 L. Ed. 165 (1910). If the Indiana Supreme Court decision is not overruled, that concept will stand as a beacon to all states, counties and cities, nationwide, to treat every actual taking, partial condemnation case which involves impairment of ingress/egress access and entails severance damages to be an inverse condemnation or regulatory taking case.

Therefore, unless and until the United States Supreme Court makes a pronouncement on the issues presented by this case, namely, that state courts must hew to the federal courts' decisions as to what "just compensation" means in the Fifth Amendment when applied to partial condemnation cases involving impairment of access suffered by the remaining property, the Indiana Supreme Court's interpretation of the "just compensation" clause of the Fifth Amendment of the United States Constitution will continue in the forefront. In the meanwhile, in addition to injustices piling up, future cases in which state courts utilize such concept will likely produce multitudes of litigation and appellate reviews.

Petitioner asserts the Indiana Supreme Court erroneously relied on an improper rule of law

conflicting with federal cases by which it erased a \$2,300,000 jury award of just compensation to Petitioner. This contravenes the Fifth and Fourteenth Amendments. Petitioner asserts the error is not that the Indiana Court misapplied a properly stated rule of law (see Sup.Ct.R.10.), but instead applied an improper law, unconstitutional law and conflicts with law of federal courts' cases established over 100 years ago, thereby violating the Fifth and Fourteenth Amendments.

**The Damages Included in "Just Compensation" Required by the Fifth and Fourteenth Amendments as Declared by Federal Courts That the Indiana Court Overruled**

The Fifth Amendment requiring just compensation to be paid for taking of private property, and the Fourteenth Amendment applying the Fifth Amendment protections to citizens of each state, includes severance damages due to harm related to the appropriation of a portion of an owner's property when the case, as here, is a partial condemnation case. *United States v. Miller*, 317 U.S. 369, 376, 69 S. Ct. 276, 281, 87 L. Ed. 336 (1943); *United States v. Grizzard*, 219 U.S. 180, 31 S. Ct. 162, 163, 5 L. Ed. 165 (1911). Especially so in a case where the property appropriated is used by the State for a purpose that directly, particularly and uniquely causes harm to the owner's remaining property.

In this case, the State's taking Plaza East's land abutting Green River Road for use as the

acceleration/merge lane, bordered on one side by a solid white line painted thereon and running immediately past adjacent Southern Entrance, and the appropriation of all Petitioner's rights to widen the redesigned use of the Northern Entrance, thereby precluding Petitioner's ability to ameliorate the impairment to its access ingress/egress by adding a third lane; all the foregoing is related to the consequential harm impacted on Plaza East's remaining property, thereby directly causing the after-taking value of this remaining retail shopping center to be diminished. As held by federal courts, "just compensation" mandates payment by the State for severance damages to the remainder.

### **The Indiana Court's Conflict With Federal Cases**

The Indiana Supreme Court entirely dismissed any severance damages, calling such damages irrelevant, because the Court defines it as "traffic flow", stating Petitioner has no protection or rights with regard to traffic flow. This arbitrary collectivism reasoning the Indiana Court employed to circumvent, by invented analysis, Petitioner's severance damages. The federal cases reject this sort of rationalization. *Hughes v. Washington*, 339 U.S. 290(1967).

The proper measure of damage to Plaza East, as in all partial condemnation cases, undeviatingly followed and declared by the federal courts, is the difference in market value before the taking

compared to the market value after the taking. *United States v. Grizzard*, 219 U.S. 180, 31 S. Ct. 162, 163, 5 L. Ed. 165, 31 L.R.A. (N.S.) 1135 (1911); *United States v. Chicago, B.&Q.R.Co.*, 90 F.2d 161. (Ct. of App., Seventh Circuit 1937). *United States v. 101.88 Acres of Land*, 616 F. 2d 762 at 767-768 (5<sup>th</sup> Cir. 1980). In appraising the after-taking value, all factors and all influences affecting the remaining property that a willing buyer would consider in arriving at a fair price must be taken into account.

These factors and influences are not necessarily “property rights”, which the Indiana Supreme Court’s decision made such an allegedly pivotal concept in its analysis. Whether they are property rights or not is not relevant. The Indiana Court in order to rationalize its vacating entirely the \$2,300,000 jury verdict denotes those factors and influences as not property rights; and not being property cannot be condemned; and in that manner denies severance damages by saying nothing was owing for their injurious effects on the value of the remaining property. However, the federal mandated measurement of partial condemnation “just compensation” views those factors and influences as some of many factors bearing on determining after-taking value, whether they are property rights or not, and may be considered in determining after-taking value. *United States v. Olson*, 292 U.S. 246 (1934); *United States v. 158.24 Acres of Land*, 515 F. 2d 230 (5<sup>th</sup> Cir. 1975); *United States v. 33.5 Acres of Land*, 789 F. 2d 1396, 1398 (9<sup>th</sup> Cir. 1986).

They are influences and factors affecting the remainder of the property, and necessarily include, among other possible things: difficulty of ingress and egress; the effect of the state's design of the project; the construction of an acceleration/merge lane running adjacent to the property and past the Southern Entrance immediately up to the Northern Entrance; inability (due to State's taking property's rights of easements and access) of Petitioner ever to widen the Northern Entrance; rendering virtually non-functional the service of the Northern Entrance; the stacking of lines of cars in front of the row of retail shops; necessity of redesigning the interior traffic patterns of the shopping center to deal with the stacking and the difficulty and danger in entering or leaving by the Northern Entrance.

In allowing realistic influences to be considered, to determine impaired value of the remaining property, as a further example how inclusive is the list, the federal courts have explained that proof may be shown of adverse effects on the potential future uses to which the remaining property reasonably could have been put, since potential use affects market value. *United States v. Olson*, 292 U.S. 246, 245, 54 S. Ct. 704, 78 L. Ed. 1236 (1934).

Add to the foregoing the 4-1/2 years of State's construction equipment being stored on the shopping center, and the use of the Entrances by State vehicles and equipment in the construction project, as influences and factors affecting the value of the

remaining property in the eyes of a prospective buyer.

These are influences and factors that a buyer or an appraiser will consider in arriving at a purchase price or a market value, for the property following the taking. These are the factors and influences federal courts declare are part of severance damages. See, *United States v. Buhler*, 305 F. 2d 319 (5<sup>th</sup> Cir. 1962) in which the property owner did not meet the burden of proving that the influences and factors would diminish the market value of the remaining property, but the Court concedes they are relevant and could be considered as affecting the market value of the remainder if in fact it were so. The case contains a good discussion on the subject. In the *Buhler* case, a partial condemnation case, the influences and factors bearing on market value contended for was airport noise and operations. How much more significant is loss of access, which the Indiana Court in this case completely dismisses, compared to airport noise, which the *Buhler* court said can be considered.

All these factors and influences were testified to by Petitioner's witnesses at the trial and not denied by the State. Indeed, the Indiana Supreme Court recites them in its Opinion. The Court relegated these influences and factors into a category it calls collectively "traffic flow", and employs that reasoning to enable itself to deny damages to Petitioner, because no right has been taken from Petitioner; and the court follows that by applying an

analysis of federal inverse condemnation cases, asserting the principles of inverse condemnation to be applicable to those critical factors and influences just mentioned above, all contrary to holdings of the federal courts. (App. A-11)

“Just compensation” must mean the same for all citizens. Each state cannot be permitted to adopt its own definition when it contravenes the Fifth Amendment. Federal courts apply the method required by the Fifth Amendment, the “before and after” market value taking method, to calculate just compensation. That method is binding on the states through the force of the Fourteenth Amendment.

**The United States Constitution Rules Apply,  
Not the State’s rules, as to Measurement of  
“Just Compensation”**

Surely, this Court cannot permit states to invent more draconian method of calculating just compensation against a citizen than the federal courts allow by interpreting the Fifth Amendment’s meaning of and method of measurement of “just compensation”. There must be one rule for all.

Generally, as to many rules used by the states with regard to condemnation cases, the states’ local rules are followed by the federal courts. However, these relate to procedure. They do not, and could not, affect questions of substantive right, such as the measure of compensation, grounded upon the Constitution of the United States. The foregoing

words were words as spoken by the Supreme Court of the United States in *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276 at page 283, citing *Brown v. United States*, 263 U.S. 78, 86, 44 S. Ct. 92, 95, 68 L. Ed. 171 and *Chappell v. United States*, 160 U.S. 499, 512, 513, 16 S. Ct. 397, 401, 49 L. Ed. 510.

**The “Before-and-After” Rule Consistently Declared by the Federal Courts is the Measure of “Just Compensation to be Used in Partial Condemnation Cases Which the Indiana Court Denied**

As early as the nineteenth century, the United States Supreme Court made clear that just compensation in partial taking cases must include compensation for loss in value to any property not taken. In *Bauman v. Ross*, 167 US 548,574 (1897) it stated, “when the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.” Over the years, this has come to be known as the “before-and-after” rule, requiring that the property’s market value before the taking be compared with its market value afterward; and if the value be less, the difference serves as the amount of just compensation. Fair market value is found by evaluating all the factors and possibilities that would affect the price a willing buyer would offer to a willing seller for the property.

In *United States v. Grizzard*, 219 U.S. at page 185, 31 S. Ct. at page 164, the court declared that:

to say an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice. See also, *West Virginia Pulp & Paper Company v. United States*, 200 F. 2d 100 (4<sup>th</sup> Cir. 1952); *United States v. Pope & Talbot, Inc.*, 293 F. 2d 822 (9<sup>th</sup> Cir. 1961); *United States v. 91.90 Acres of Land*, 586 F. 2d 79, 3 Fed. Evid. Serv. 1249 (8<sup>th</sup> Cir. 1978).

**There is No Relationship Between Liability in Inverse Condemnation Cases and the Measure of Damages Which Federal Courts Have Declared Applicable in Partial Condemnation Cases, as Proposed by the Indiana Court**

The State, in an attempt to erase the jury's just compensation award to Petitioner, argues that consequential damages are "damnum absque injuria", and therefore need not be taken into account to be included in just compensation awards when damages are such as the effects of roadway design and construction. The Indiana Supreme Court endorsed that argument by holding that adverse factors and influences consisting in what the Court denotes with arbitrary collectivism as "traffic flow" in partial condemnations are not property rights for which the State need compensate Petitioner, because the very high threshold of proof of damages to the remaining property applicable to inverse condemnation (virtual destruction of the

entire economic value of the property) is not proved. The Indiana Court decision applies inverse condemnation principles to this case.

This proposition is invalid because it confuses a rule of *liability* in inverse condemnation cases with a principle of *just compensation* in direct condemnation cases. It is critical to recognize the distinction. Inverse condemnation cases allege that some governmental activity has resulted in a taking of property. There is not physical taking, as in partial condemnation. The causes in inverse cases are more remote. For the government to be liable for a taking in an inverse condemnation case, the property owner must initiate the legal action and must show that the government activity has damaged the property to such a degree that the property's economic value has effectively been destroyed. *Lingle*, 544 U.S. 528 (2005). Only when that *liability* is established by the owner does the owner have a right to compensation. This is the test the Indiana Court holding thrusts on Petitioner, and the Indiana Court holds that only meeting that burden would sustain the \$2,300,000 jury verdict in this partial condemnation case.

In direct condemnation, there is no question the condemning agency takes land. In that instance, *liability* is admitted. The only issue is compensation, which constitutionally must place the property owner in as good a position as it would have been in had the taking never occurred. *Kemp v. United States*, 65 Fed. Cl. 818 (Fed. Cl. 2005). These

differences between the rules of *liability* in inverse condemnation cases and the rules of *compensation* in direct condemnation cases are recognized by the federal courts. This difference is recited in a leading condemnation treatise, stating that the most important limitation on this concept turns upon whether the damage claim is an element of a "severance damage" case in the severance damage context; and that any diminution in value to the remainder parcel is compensable if it is attributable to the taking. *Nichols on Eminent Domain*, Section 6.08(2) (rev.ed.1993).

As found by the jury, the damage to Plaza East is specific, unique, particular and direct, not shared in common by the public at large; and the land and property interests which the State physically took and appropriated is used by the State in manner causing harm to the Plaza East remaining property. Any attempt to employ an analogy to inverse condemnation conflicts with the established meaning of constitutional "just compensation" that requires property owners to be compensated for the adverse difference in a property's value before and after the taking, and runs headlong collision into the requirement that just compensation must take into account all factors and influences relevant to market value.

## **II. THE INDIANA SUPREME COURT DECISION CONSTITUTES AN INSTANCE OF "JUDICIAL TAKING" OR "JUDICIAL LEGISLATION" BY IMPOSING A DIFFERENT**

**AND MORE ONEROUS OR LIMITED  
CALCULATION OF "JUST COMPENSATION"  
CONFLICTING WITH ESTABLISHED  
FEDERAL LAW AND TO FURTHER ITS  
"JUDICIAL TAKING" NULLIFIES THE JURY  
VERDICT TO MAKE ITSELF THE SOLE  
TRIER OF THE FACTS.**

**The Flaws in the Indiana Supreme Court's  
Opinion That Conflict With Federal Cases**

The concept pronounced by the majority of the Indiana Supreme Court to justify its decision is the flow of traffic. This "traffic flow" shibboleth is employed to categorize this case as an inverse condemnation case.

Petitioner submits that traffic flow is clearly different and distinguishable from impact on the ingress and egress to one's property. Road improvements may in some cases improve the value of a remaining shopping center by promoting speedier reachability to it by distant shoppers, and so, the word "access" in a broad sense could mean the ability to arrive at or travel to the property via the roads. That kind of access is not the focus in this case. In the context of Petitioner's claim, a different focus is applicable. The meaning of access is: having arrived at the shopping center, are customers and other visitors safely and conveniently able to get in through the entranceways? And once in, can they depart safely and conveniently? The fact that they are there, as stressed by the Indiana Supreme Court,

is not a real-life view of this case. The question is, are the entry points usable and functionable? That is the significant fact of access that a willing buyer would weigh as directly bearing on the price he would pay for the remaining property.

The Indiana Court ignores all the State's injurious design and construction by its taking land to use for an acceleration/merge lane, and taking of access and easements rights of Petitioner, and conceptually wrapping it within its concept of traffic flow, declaring as a matter of law that Petitioner's proof does not prove virtual destruction of all value, which is the proof necessary in an inverse condemnation case, thus immunizing the State from responsibility to pay any amount of just compensation to Petitioner severance damages. The decision by the majority Indiana Court nullifies the jury verdict, which found after-taking decline in value of the remainder. This is a violation of Petitioner's Fifth and Seventh and Fourteenth Amendment rights.

Moreover, the Indiana Court substitutes itself as the finder of facts, and deprives Petitioner of its right to a jury after Petitioner demanded a jury trial to be the fact-finder and the case was tried before a jury. This usurpation by the Indiana Court in itself violates Petitioner's constitutional right and contradicts declarations opposing such practice by federal courts. See *City of Monterrey v. Del Monte Dunes Monterrey Ltd.*, 526 U.S. 687, 691 (1991), Justice Scalia's concurring opinion; *United States v.*

*Reynolds*, 397 U.S. 14, 16 (1970) in which the federal court stated there is no right to trial by jury in condemnation cases, but if allowed and demanded, the jury should find the facts.

Allowing the Indiana Court's decision to stand, if not overruled by the United States Supreme Court with all its constitutional flaws, will constitute to the nation, and to every state, city and county, a signal to follow its lead. Every median or roadway case, even those involving actual takings as in this case, as a matter of law, per se, becomes a traffic flow inverse condemnation case in the concept of the Indiana Supreme Court. Every road improvement case would ignore as a matter of law any evidence of State actions affecting ingress or egress of one's property, because it is labeled as a traffic flow case, contradicting the federal cases that require severance damages.

**This is Not a Regulatory Taking Case and Not an Inverse Condemnation Case, as Held by the Indiana Supreme Court in Conflict with Federal Law**

The Indiana Supreme Court creates a dichotomy between compensation for Petitioner's land taken and separately isolates the adverse impact the State's design and construction of the road improvements imposes on the remainder of the shopping center in order to erase Petitioner's severance damage.

The United States Court of Appeals, in *United States v. 91.90 Acres of Land*, 586 F.2d 79,86 (8<sup>th</sup> Cir. 1978) expressed the settled law of an owner's entitlement to severance damage appertaining to partial takings cases. The Circuit Court states that where the government condemns only a part of a single holding, just compensation is to be measured by the difference between the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of the remaining portion immediately after the partial taking, and that where the partial taking not only deprives the owner of the property actually taken, but also diminishes the value of the property remaining to the owner, this diminution is often called "severance damages".

In this case, the trial court denied State's motion to set aside the \$2,300,000 verdict. The Indiana Appeals Court unanimously affirmed the verdict. On appeal to Indiana Supreme Court, three judges, with two dissenters, reversed. The majority's theory is that the road improvements should be separated from the taking, relegating the case to an inverse condemnation case. This is not the test required by the Fifth Amendment as decided by the federal courts.

It should be particularly noted that the proposition that the federal law requiring that severance damages is applicable is reinforced when the part of the tract taken by the State is a direct cause of the impairment of an entranceway to the

center (as acceleration/merge lane), and when the State's redesign of the traffic turning movements at the Northern Entrance forces the Plaza East's Northern Entrance, although inadequate for the purpose, to serve as the substituted, new main entrance to the shopping center, creating insufferable congestion and unsafe conditions.

As the severance damage is the method federal courts use in the partial condemnation cases, surely, United States Supreme Court should not allow a different, more severe – even to say, draconian – measure of just compensation to be applied by the states. The Fourteenth Amendment, in conjunction with the Fifth Amendment, prohibits such an unequal result.

The United States Supreme Court has the opportunity in this case to make a declaration applicable to all the states, confirming and establishing a minimum national standard that will constitute and satisfy the “just compensation” mandated by the Fifth Amendment that applies to partial condemnation cases.

Petitioner submits that the Fifth Amendment to the Constitution cannot be interpreted to permit each state to invent its own measure and method of calculating “just compensation” if it conflicts with the Fifth Amendment as interpreted by the federal courts; one state saying it is one thing and another state saying it is something different and each violating the Fifth Amendment in its own way; one

state inventing its own measure, different from the federal constitution, employing self-conceived or self-preferred reasons to deny just compensation awards, which violate the established federal standard. *United States v. Miller*, 317 U.S. 369 (1943).

Petitioner submits that the Indiana Supreme Court's decision, for the reasons set forth in this Petition, is unconstitutional and violates Petitioner's rights under the Fifth and Seventh and Fourteenth Amendments of the United States Constitution.

**The Indiana Supreme Court's Opinion Raises an Important Question of Federal Law That Has Not Been Settled by This Court**

A. Several Justices of This Court Have Opined on the Issue of Judicial Takings in Concurring Opinions and Dissents

The most obvious prohibited takings occurs when a government appropriates or invades private property. *Kelo v. City of New London Conn.*, 545 U.S. 469 (2005); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or when it regulates property to the extent it takes for constitutional purposes. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 525, 538-541 (2006).

These takings of property most often arise from legislative or administrative acts. The question remains whether decisions of state courts, such as the action of the Indiana Court in this case, can give

rise to similar government liability, called the doctrine of “judicial takings”. This has been asked of the United States Supreme Court before. This Court denied a petition for writ of certiorari filed by the owners of beachfront property in Oregon, *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332 (1994). There *Stevens* alleged the Oregon Supreme Court’s application of the doctrine of customary use effected a taking of private property, without “just compensation”, in violation of the Fifth and Fourteenth Amendments.

Justice Scalia, joined by Justice O’Connor, dissented, referring to this Court’s opinion in *Lucas*, 505 U.S. 1008, that certain principles inherent in the right to security in private property are so fundamental as to require payment when they are abrogated by state action. *Stevens*, 114 S. Ct. at 1334 (Scalia, J., dissenting). Justice Scalia stated, “No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation.” *Id.*

There are opinions of this Court that reflect Justice Scalia’s view of the validity of the judicial takings doctrine. Justice Stewart’s concurrence in *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) is a good example.

B. In Several Contexts, This Court Has Recognized State Court Departures From Established Law Can Violate Fundamental Rights

In another case, for example, *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), this Court considered a Florida Supreme Court decision which upheld as constitutional a state statute permitting counties to seize interest accruing on an interpleader fund paid by private citizens and maintained by county courts. *Id.* At 155-56. This Court's opinion focused not as much on the Florida statute, as on the Florida Supreme Court's opinion interpreting that statute, finding the Florida court's holding unconstitutional, and that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principle as 'public money' because it is held temporarily by the court." *Id.* At 164. This Court concluded with a statement precisely on point for the present case: "a State, by *ipse dixit*, may not transform private property into public property without compensation..." *Id.* So, in Petitioner's case, the Indiana Court cannot by *ipse dixit* transform all the adverse factors and harmful influences bearing on fair market value of Petitioner's remaining shopping center into ignorable, immunizing "traffic flow".

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court confronted a state court decision that departed significantly from established jurisprudence governing a basic right. The South Carolina Supreme Court applied an entirely new construction of a criminal trespass statute to uphold

the convictions of two trespassers. *Id.* At 362. This interpretation was such a departure from settled law that this Court held it amounted to violation of the petitioners' due process rights, stating "If a state legislature is barred from passing such a law, it must follow that a State Supreme Court is barred by the due process clause of the United States Constitution from achieving precisely the same result by judicial construction." *Id.* At 353-54.

## CONCLUSION

The State took a portion of Petitioner's land from Petitioner's shopping center and designed and constructed changes to the roadway and took away (by its own words) Petitioner's access and easement rights; all of which directly, adversely and uniquely affected the fair market value of the remainder of Petitioner's shopping center following the taking; and the Supreme Court of Indiana employed an analysis of measure of damages contrary to the Fifth Amendment of the United States Constitution and contrary to the "undeviatingly followed" decisions of federal courts including the United States Supreme Court. (The quoted phrase is from *United States v. Grizzard*, 219 U.S. 180.)

The Indiana Court additionally deprived Petitioner of its right in this case to have the issue of "just compensation" decided by a jury whose verdict the Indiana Supreme Court overrules by making itself the trier of the facts in violation of Petitioner's right to trial by jury under the Seventh Amendment of the United States Constitution.

The Petition for Writ of Certiorari should be granted.

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