No. _____

IN THE
# Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES, *Petitioner*,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE, *Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Wisconsin**

# PETITION FOR WRIT OF CERTIORARI

MICHAEL M. BERGER*
*Counsel of Record
GIDEON KANNER
MANATT, PHELPS & PHILLIPS
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000
mmberger@manatt.com

HUGH R. BRAUN
GODFREY, BRAUN & FRAZIER
735 N. Water Street
Sixteenth Floor
Milwaukee, WI 53202
(414) 278-8500

*Counsel for Petitioner,*
*City of Milwaukee Post No. 2874,*
*Veterans of Foreign Wars*
*of the United States*

Blank Page

## QUESTIONS PRESENTED

When the Milwaukee Redevelopment Authority took by eminent domain the 11-story downtown building that housed the offices of Post 2874 of the Veterans of Foreign Wars (VFW) as a long-term lessee, the Wisconsin Supreme Court held 4 to 3 that—as a matter of law—the VFW was not entitled to present *any evidence* of value, nor entitled to recover *any compensation whatever* for its concededly valuable long-term leasehold.

The questions presented are:

1. Does it violate the 5th and 14th Amendments for Wisconsin—like some jurisdictions, but in conflict with others and with this Court's repeated insistence that the appropriate question in an eminent domain proceeding is "what has the owner lost, not what has the taker gained"—to apply its "undivided fee rule" in such circumstances?

2. Did the court below violate VFW's constitutional right to due process of law by precluding it, as the owner of a valuable interest in property being taken through eminent domain, from introducing *any* evidence of the value of its leasehold property?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption

- City of Milwaukee Post No. 2874, Veterans of Foreign Wars of the United States was the Plaintiff in the trial court, Appellant in the Wisconsin Court of Appeals, and the Respondent in the Wisconsin Supreme Court;

- Redevelopment Authority of the City of Milwaukee was the Defendant in the trial court, Respondent in the Wisconsin Court of Appeals, and the Petitioner in the Wisconsin Supreme Court.

Petitioner is a non-profit entity existing pursuant to an Act of the 74th Congress of the United States and recognized by Wis. Stat. § 188.11. The VFW files its tax returns pursuant to Internal Revenue Code §501(c)(19).

## TABLE OF CONTENTS

**TABLE OF CONTENTS**
**(continued)**

**Page**

## TABLE OF APPENDICES

## TABLE OF AUTHORITIES

**Page**

**CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**



**CONSTITUTION**



**STATUTES**



**OTHER AUTHORITIES**

## PETITION FOR A WRIT OF CERTIORARI

City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States (hereafter either "Veterans of Foreign Wars" or "VFW") petitions for a Writ of Certiorari to review a final judgment of the Supreme Court of Wisconsin.

## OPINIONS BELOW

The Circuit Court for Milwaukee County entered judgment that the Redevelopment Authority was not constitutionally required—as a matter of law—to pay the Veterans of Foreign Wars *any* compensation for the eminent domain acquisition of its 99-year leasehold (with more than 60 years left to run, and an option for another 99) in a building being taken for redevelopment. (App. D.) The Court of Appeals reversed in an opinion published at 746 N.W.2d 536, ordering a trial that included valuation of VFW's leasehold. (App. B.) The Wisconsin Supreme Court reversed the Court of Appeals in an opinion published at 768 N.W.2d 749 by a vote of 4-3, reinstating the $0 trial court judgment. (App. A.) Two of the four-Justice majority filed a separate concurring opinion to state that they felt bound to "follow Wisconsin's precedent" although they would have preferred to reach a different result. (The majority opinion is at App. 1, the concurrence

at App. 50, and the dissent at App. 52.) The Supreme Court thereafter denied the VFW's Motion for Reconsideration. (App. D.)

## JURISDICTION

The Wisconsin Supreme Court entered judgment on July 17, 2009. The VFW's timely Motion for Reconsideration was denied by a split vote on November 4, 2009. The time to file this Petition was extended to April 2, 2010. (No. 09A681.)

This Court has jurisdiction under 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISIONS

U.S. Constitution, 5th Amendment: "...nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment: "...nor shall any State deprive any person of life, liberty, or property without due process of law."

## INTRODUCTION

> "The most disturbing element of this case is that the majority approves the unprecedented proposition that *no compensation is just compensation* for

> the taking of valuable property." (App. 76; dissenting opinion; emphasis added.)

The opinion that so disturbed the three dissenting Justices (and led two of the majority four to separately concur solely to express their distaste for the result and their belief that their concurrences were compelled by "Wisconsin's precedent") allowed the Respondent Milwaukee Redevelopment Authority to confiscate a long-term, low-rent leasehold (with a value exceeding one million dollars [see App. 101, 106) under which the Veterans of Foreign Wars occupied the ground floor of an eleven-story building in downtown Milwaukee.

This case deals with an anomalous eminent domain valuation concept known as the "undivided fee rule" (sometimes, the "unencumbered fee" or, as in Wisconsin, the "unit" rule). It is invoked when more than one party owns an interest in property being condemned. Though its doctrinal basis is obscure, the undivided fee rule holds that the court must value the fee simple interest in the property *as if owned by one person*, even though that is contrary to fact, and then *divide that amount* among the owners of the various interests. The rule thus assumes not only fictitious single ownership of the subject property, but that its value as so determined is

a limiting condition on compensation payable to the owners of all interests in it.

The undivided fee rule is concededly artificial. The obvious problem with it is that it ignores property interests (e.g., leaseholds)[1] whose owners are entitled to just compensation, and forces an appraiser to indulge in the fiction that the building is empty when in fact it is productively occupied—i.e., to value an imaginary building rather than the real one being taken.

The question is whether valuation by this fictional technique satisfies the 5th and 14th Amendments' guarantee that those whose property is commandeered for public use will receive just compensation, usually defined as fair market value. The result below speaks eloquently. The Veterans of Foreign Wars received $0 as compensation for a long-term lease, a lease that the majority opinion had to concede had value, even though application of

[1] Under Wisconsin law, one with a lease for more than a year is a "joint owner" of the real property. (*Maxey v. Redevelopment Auth.*, 288 N.W.2d 794, 387-388 [Wis. 1980].) Under federal law, a leasehold is a property interest compensable in eminent domain and must be valued to provide tenants with just compensation. (See *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303 [1976].)

the undivided fee rule forbade the VFW from presenting *any evidence* as to that value or receiving *any compensation* from the Redevelopment Authority for its taking.

This holding is contrary to the rule laid down by this Court, speaking through Justice Holmes, in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910), that the determination of just compensation must focus on the owner's loss, not on the taker's gain—a rule the Court has consistently followed.[2]

The court below held otherwise. In so doing, however, that court highlighted the fact that state courts are in conflict about how to apply the *Boston Chamber* rule. Indeed, the opinion below demonstrated—by lengthy citation to the conflicting cases from around the country—the need for this Court to grant certiorari, analyze the issue, and resolve the conflict. (App. 25-28, nn. 31-32.)

---

[2] As the Court confirmed in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235-236 (2003), the 5th Amendment's just compensation guarantee requires compensation "measured by the property owner's loss rather than the government's gain," a conclusion "supported by consistent and unambiguous holdings in our cases." States are free to provide *more* protection than the U.S. Constitution, but they cannot provide less. (*Kelo v. City of New London*, 545 U.S. 469, 489 [2005].)

## STATEMENT OF THE CASE

The proceedings below were somewhat complex, beginning with administrative valuation followed by various trial court proceedings and multiple appeals, culminating in the decision brought here for review.[3]

Notwithstanding all of the procedural matters below, the essential facts and issues are straightforward. The Veterans of Foreign Wars was a tenant under a 99-year lease that was less than half finished, with a renewal option for another 99 years. The rent was $1 per year. The reason for those terms is that the VFW was the owner of the land before 1961, when it transferred title to a developer who constructed an eleven-story hotel on the property, with the VFW as the full ground floor tenant. *The VFW thus paid the rent for 198 years in advance with its title transfer.*

VFW's tenancy had existed on the same terms through three different building owners. The final one (the Maharishi Vedic University) never occupied the building during the seven years of its ownership and allowed the parts not occupied by VFW to fall into disrepair.

---

[3] Earlier, unpublished, interim appellate decisions are at 2002 WL 207129; 2003 WL 22232032; 2006 WL 327920; and 2007 WL 610900.

Although the owner sought occupancy permits, the city refused to grant any.[4] Eventually, a sister City agency declared the building uninhabitable and ordered the Redevelopment Authority to demolish it.

Based on prices paid for properties its own appraiser viewed as comparable, the Redevelopment Authority awarded $440,000 for all interests in the property and an adjoining parking lot owned by the landlord. The Circuit Court allocated $300,000 of that to the VFW. The VFW appealed the amount of compensation as inadequate.

Early in the trial court proceedings, VFW made a formal "Motion to Resolve Constitutional Issue" (App. F), urging that use of the unit rule as it was sought to be applied here would violate both the state just compensation guarantee and the 5th and 14th Amendments to the U.S. Constitution. The trial court ordered the unit rule used. The issue was raised and briefed in each court

---

[4] The record shows that in spite of Maharishi's several attempts to obtain a certificate of occupancy, the city consistently denied it. *None of this involved the VFW in any way.* VFW was not responsible for the condition of the remainder of the building nor, as a tenant, did it have either the duty or authority to repair it.

below, with the Court of Appeals expressly holding that use of the unit (or undivided fee) rule on these facts violated both the state constitution and the 5th and 14th Amendments to the U.S. Constitution. (App. 94-97.) Both sides briefed federal law in the Wisconsin Supreme Court and that court relied heavily on this Court's decisions—with one notable exception: it refused to follow *Boston Chamber*—dismissing it as "not persuasive" (App. 41), and laying down a legal holding directly contrary to it. (App. 49-50.)

When the case was tried under the undivided fee rule, the jury was ordered to value only the fee simple title, on the fictitious assumption that there was no tenant—which was contrary to fact. *The VFW was not allowed to present any evidence of the value of its leasehold*, so the jury was kept ignorant of its existence.[5] Because of the condition of the building on the 2001 date of value, and the cost to demolish it to make the land ready for redevelopment, the jury concluded that the Maharishi's fee simple title was worth $0. As a consequence, the VFW's share of that $0 was said to be $0. The VFW was ordered to give back the $300,000 it had been paid plus $87,348 in costs and interest. This was

[5] The testimony noted at App. 13 was *not* presented to the jury.

required by rigid application of the undivided fee rule, even though, in the Court of Appeals' words, "it is undisputed that the leasehold interest is of great monetary value." (App. 94.) In an earlier, interim appellate opinion, that court concluded that "[i]t is undisputed that ... VFW's...lease value...exceeded eight million dollars." (App. 101.)

While denying any compensation in this eminent domain proceeding, the Wisconsin Supreme Court made the startling suggestion that the remedy for the *government's* taking of the leasehold was a suit against the *landlord.* (In fact, the VFW had brought such a suit which Wisconsin courts dismissed.)

Because of the lack of doctrinal underpinnings for the "undivided fee rule" and the harsh consequences it can produce, courts—both state and federal—are in conflict and disarray over when, how, or even whether to apply the undivided fee rule. Some—like the Wisconsin Supreme Court here—apply it rigidly;[6] others say the rule is contrary to basic

---

[6] We acknowledge that the court below said it would consider deviating from the rule in "rare and exceptional" circumstances. (App. 30.) If the facts in this case—where a long-term tenant receives $0 as "just" compensation—do not fit that description, it is hard to imagine facts that would.

concepts of just compensation law and refuse to apply it at all; still others use it as a rule of convenience for condemnors, but depart from it when necessary to provide just compensation to the owner of each interest being taken. (Cases discussed *post*, pp. 11-17.)

*Boston Chamber* is jurisprudentially identical to this case, except for which party sought to invoke the undivided fee rule to manipulate valuation. There, this Court held that cases like this contain two questions—one permissible and one not: "[T]he question is What has the owner lost? not What has the taker gained?" (*Boston Chamber*, 217 U.S. at 195.) Here, the taker gained a building that may have been worthless because of the cleanup and tear down costs, while the VFW lost a leasehold with great value. Rigid application of the undivided fee rule, as here, *requires* courts to answer the wrong question and measure compensation by what the taker gained, thereby ignoring the owner's loss.

This Petition raises the important question of the essential criteria for defining just compensation in eminent domain cases, and asks this Court to resolve an ongoing conflict among the lower courts about the proper application of its precedents in determining those criteria.

## REASONS FOR GRANTING THE WRIT

### I.

### THERE IS CONFLICT IN THE LOWER COURTS OVER APPLICATION OF THE "UNDIVIDED FEE RULE" IN EMINENT DOMAIN.

The goal of eminent domain proceedings is to provide a "fair" manner of transferring private property into public ownership[7] by putting property owners "...in as good a position pecuniarily as if the property had not been taken."[8] This precept is intended to provide the owners with "...the full and perfect equivalent in money of the property taken."[9]

When property is subject to a lease, the state courts have created a cacophony of approaches. One—applied here by Wisconsin—requires results like the payment of $0 for a valuable leasehold interest that has more than a century-and-a-half yet to run, on the premise that all property interests are owned by one

---

[7] *U.S. v. Fuller*, 409 U.S. 488, 490 (1973); *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

[8] *Seaboard Air Line R. Co. v. U.S.*, 261 U.S. 299, 306 (1923).

[9] *U.S. v. Miller*, 317 U.S. 369, 373 (1943).

person, when the contrary is incontestably true. (*Post*, p. 14, n. 15.) That would be held unconstitutional elsewhere. (*Post*, p. 15, n. 16.)

The 14th Amendment provides a baseline of constitutional protection for all citizens. However, as long as the state courts are in conflict over basic 5th Amendment valuation precepts, there is no such baseline protection. The enforcement of the 5th Amendment's just compensation guarantee cannot be made to depend, for example, on whether one's case is tried in Wisconsin (where the undivided fee rule is rigidly applied) or on the other side of the Mississippi River in Iowa (where the rule has been rejected). (Compare the case at bench with *City of Des Moines v. Housby-Mack, Inc.*, 687 N.W.2d 551, 553 [Iowa 2004].) Similar conundrums apply at the Kansas/Nebraska and Pennsylvania/New Jersey borders.[10]

The majority opinion below acknowledges this conflict of authority, citing numerous cases

---

[10] Compare *Moore v. Kansas Turnpike Auth.*, 317 P.2d 384, 390 (Kan. 1957) with *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300, 307-308 (Neb. 1946) and *New Jersey Sports & Exposition Auth. v. Borough of East Rutherford*, 348 A.2d 825, 829-830 (N.J. App. 1975) with *Garella v. Redevelopment Auth.*, 196 A.2d 344, 348 (Pa. 1964).

from each group. (App. 25-28, nn. 31-32.)

## A.

## Some Courts Apply The Undivided Fee Rule Rigidly.

The undivided fee rule works satisfactorily in routine cases.[11] That is, if the lease is at or near the market rate for leases in the area, then the value of what is taken will approximate the fee value of the property.[12] However, if the lease rate is favorable to the tenant, then the lease has a "bonus" value to the tenant equal to the difference between the market rent and the rent actually being paid.[13] Conversely, if the lease rate is higher than the market, then the value of the landlord's interest would be greater than the value of the property, absent the productive lease.[14]

---

[11] As the standard national text notes, this "was *formerly* one of the most firmly established principles of eminent domain, and it is still the law in the *usual* case...." (4 Nichols, The Law of Eminent Domain, § 12.05[1]; emphasis added.)

[12] *New Haven Unified School Dist. v. Taco Bell Corp.*, 30 Cal.Rptr.2d 469, 471 (Cal. App. 1994)

[13] *Alamo*, 424 U.S. at 304.

[14] *DOT v. Drury Displays*, 764 N.E.2d 166, 170 (Ill. 2002).

One group of states, typified by the Wisconsin decision here, applies the undivided fee rule regardless of the circumstances.[15] The

---

[15] *Harco Drug, Inc. v. Notsla, Inc.*, 382 So.2d 1, 6 (Ala. 1980); *National Advertising Co. v. State*, 611 So.2d 566, 569 (Fla. 1993); *City & County of Honolulu v. Market Place, Ltd.*, 517 P.2d 7, 14 (Haw. 1973); *City of Chicago v. Anthony*, 554 N.E.2d 1381, 1384 (Ill. 1990); *State v. Montgomery Circuit Court*, 157 N.E.2d 577, 578 (Ind. 1959); *Moore v. Kansas Turnpike Auth.*, 317 P.2d 384, 390 (Kan. 1957)(conceding that it is *contra* to *Boston Chamber*); *Commonwealth v. Sherrod*, 367 S.W.2d 844, 848 (Ky. 1963); *State v. D&J Realty Co.*, 229 So.2d 344, 347 (La. 1969); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911); *Michigan State Highway Dept. v. Woodman*, 115 N.W.2d 90, 92-93 (Mich. 1962); *County of Hennepin v. Holt*, 207 N.W.2d 723, 727 (Minn. 1973); *Lennep v. Mississippi State Highway Commn.*, 347 So.2d 341, 343 (Miss. 1977); *New Jersey Sports & Exposition Auth. v. Borough of East Rutherford*, 348 A.2d 825, 829-830 (N.J. App. 1975); *Arlen of Nanuet, Inc. v. State*, 258 N.E.2d 890, 893 (N.Y. 1970); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964); *State v. Mehta*, 180 P.2d 1214, 1220 (Okla. 2008); *City of Greenwood v. Psomas*, 155 S.E.2d 310, 313 (S.C. 1967); *State v. Brown*, 531 P.2d 1294, 1295 (Utah 1975); *State v. Cooper*, 162 S.E.2d 281, 284-285 (W.Va. 1968); *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 768 N.E.2d 749, 759 (Wis. 2009).

Wisconsin Supreme Court actually held that application of the rule on these facts "*protects* the interests of both the public and *the property owners in the instant case*" (App. 30; emphasis added) even though its rigid application left the VFW evicted from its Post facilities without *any* compensation for the taking of its long-term leasehold. Just how confiscation protects the interest of the owner/lessee, the court below did not explain.

## B.

## Some Courts Refuse To Apply The Undivided Fee Rule, Holding That It Violates The Just Compensation Mandate Of The 5th and 14th Amendments.

Another group of states never applies the undivided fee rule.[16] They reason that the just compensation guarantee applies to the owner of

---

[16] *Arkansas State Highway Commn. v. Fox*, 322 S.W.2d 287, 289 (Ark. 1959); *U.S. v. Seagren*, 50 F.2d 333, 335 (U.S. App. D.C. 1931); *Wilson v. Fleming*, 31 N.W.2d 393, 401-402 (Iowa 1948); *City of Des Moines v. Housby-Mack, Inc.*, 687 N.W.2d 551, 553 (Iowa 2004); *City of Baltimore v. Latrobe*, 61 A. 203, 206 (Md. 1905); *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300, 311-312 (Neb. 1946); *Garella v. Redevelopment Auth.*, 196 A.2d 344, 348 (Pa. 1964).

each property interest being condemned. (*E.g.*, *Platte Valley*, 23 N.W.2d at 311-312.) As the undivided fee rule disregards the property interests being condemned and, instead, values only a fictitious fee simple estate (as if owned by a single entity), these courts hold that the undivided fee rule cannot provide the necessary constitutional protection to all owners whose property interests are taken.

Indeed, the theory of these courts is borne out by this Court's settled jurisprudence. As shown above, *Boston Chamber* refused to value divided interests as though they were consolidated in one owner, as that would defy reality as well as the 5th Amendment.

### C.

### Still Other Courts Use The Undivided Fee Rule As A Rule Of Convenience For Condemnors, But Depart From It When Necessary To Provide Just Compensation To All Parties Whose Property Interests Are Taken.

A third group recognizes that, although the undivided fee rule may provide a rule of convenience in many cases, it cannot be applied when doing so would deny just compensation to

the owner of a property interest being condemned.[17]

## II.

## THE UNDIVIDED FEE RULE IS OF QUESTIONABLE PARENTAGE AND IS CONTRARY TO THIS COURT'S MODERN JURISPRUDENCE.

The origins and validity of the undivided fee rule are as obscure as they are dubious. The standard, national eminent domain text describes the rule as a "remnant" from which

[17] *Alaska State Housing Auth. v. DuPont*, 439 P.2d 427, 431 (Alas. 1968); *People ex rel. Dept. of Pub. Wks. v. Lynbar, Inc.*, 253 Cal.App.2d 870, 879 (Cal.App. 1967); *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930); *State v. Hy-Grade Auto Court*, 546 P.2d 1050, 1053-1054 (Mont. 1976); *State v. Cowan*, 103 P.3d 1, 4 (Nev. 2004); *Gallatin Housing Auth. v. Chambers*, 362 S.W.2d 270, 275-276 (Tenn. App. 1962); *State v. Ware*, 86 S.W.3d 817, 824 (Tex. App. 2002); *State v. Burk*, 265 P.2d 783, 801 (Ore. 1954); *State v. Spencer*, 583 P.2d 1201, 1205 (Wash. 1978); *U.S. v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948)(L. Hand, J.); *U.S. v. 6.45 Acres*, 409 F.3d 139, 147-148 (3d Cir. 2005)(rule not "to be applied rigidly"); *U.S. v. 499.472 Acres*, 701 F.2d 545, 549 (5th Cir. 1983); *Nebraska v. U.S.*, 164 F.2d 866, 868-869 (8th Cir. 1947)("rule is not...autocratically absolute"); *U.S. v. Corbin*, 423 F.2d 821, 828 (10th Cir. 1970).

some states are "receding." (8A, Nichols, The Law of Eminent Domain § G23.04[1], n. 9.)

## A.

## The Apparent Basis Of The Undivided Fee Rule Is A Corruption Of The Concept Of *In Rem* Jurisdiction.

The undivided fee rule apparently had its origins in the idea that eminent domain proceedings are *in rem* and thus are only concerned with the property, not its owners. (8A, Nichols, The Law of Eminent Domain § G23.04[1], n. 9.) This is a misuse of the *in rem* concept, which deals with the mode by which a court obtains jurisdiction. (See *Shaffer v. Heitner*, 433 U.S. 186, 198-199 [1977]; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 [1950].) To label a lawsuit as one *in rem* or *in personam* also goes to the effect of the judgment (whether binding on the parties or on the world). (See *A.W. Duckett & Co. v. U.S.*, 266 U.S. 149, 151 [1924].) But it has nothing to do with the parties' constitutional rights—either substantive or procedural.

Facile and uncritical *in rem* assertions disregard two vital things. In a total taking, as here, the condemnor acquires not just some abstract "fee simple title," but also each and every property interest in the taken property. (*A.W. Duckett*, 266 U.S. at 151 [quoted *post*, p.

29].) It follows that it must pay just compensation for what each condemnee loses. The court below simply ignored two essential questions: (1) what does the "fee simple" title consist of, and (2) does the determination of just compensation require compensation for what the taker gained or what the owners lost? The answers are found in *U.S. v. General Motors, Inc.*, 323 U.S. 373, 377-378 (1945):

> "The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. *In point of fact, the construction given the phrase has been the latter....*[The owner's] interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. *The constitutional provision is addressed to every sort of*

*interest the citizen may possess.*" (Emphasis added.)[18]

It is basic that owners of leaseholds, the same as owners of any other property interest, are entitled to just compensation when their leaseholds are taken by eminent domain. (*A.W. Duckett*, 266 U.S. at 151; *General Motors*, 323 U.S. at 377-378.)

Calling an eminent domain case an action *in rem* does not authorize either the condemnor or the courts to ignore the existence of valuable property—like the VFW's leasehold—as if that undeniably compensable interest somehow ceased to exist. The label affixed does not extinguish the parties' property interests in the taken property nor their right to receive just compensation when their property interest is taken for public use, nor to present evidence going to the merits of the valuation controversy. This error lies at the root of the

---

[18] In takings cases, the Court has regularly used the property professors' analogy of property to a bundle of sticks or rights, where the taking of any stick from the bundle requires compensation. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [1979]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 [1982]; *Hodel v. Irving*, 481 U.S. 704, 716 [1987].)

holding below, which thus denied the VFW due process of law as well as just compensation.

In the seminal case of *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 325 (1893), the Court noted the *in rem* nature of eminent domain proceedings (in the sense that compensation is for the property taken), but then went on to stress that the "property" being taken consisted not only of the land and improvements, but also of the right to productive use. Thus, the condemnor was required to pay just compensation for the owner's lucrative franchise to operate locks and dams as well as for its tangible property because "such franchise was as much a vested right of property as the ownership of the tangible property...[,] subject to the limitations imposed by the Fifth Amendment...." (*Id.* at 345.)

Once a court has jurisdiction, its decisions affect the personal rights of property owners, as well as the property itself:

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." (*Shaffer*, 433 U.S. at 212.)

Thus, calling an eminent domain case a proceeding *in rem* provides no jurisprudential

basis for the undivided fee rule: "[I]n *Mullane* we held that Fourteenth Amendment rights cannot depend on the classification of an action as in rem or in personam...." (*Shaffer,* 433 U.S. at 206.)[19] It cannot be used as the springboard for disregarding the constitutional mandate of compensation to all owners of all property interests in the condemned property.

## B.

## For At Least A Century, This Court's Decisions Have Shown The Absence Of A Constitutional Basis For The Undivided Fee Rule.

This Court's decisions have eroded, if not eliminated, the idea that eminent domain cases deal only with inanimate property, and not with the people who own it. *Boston Chamber* was clear: "The Constitution deals with people, not with tracts of land..." (217 U.S. at 195), thereby succinctly expressing the basis for refusing to apply the undivided fee rule.

Thus, the issue—as directly framed in *Boston Chamber*, is "What has the owner lost?" There, the answer was that the owners lost

---

[19] "[T]his Court has adhered unwaiveringly to the principle announced in *Mullane*." (*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 [1983].)

nothing.[20] Here, the VFW lost everything—it was evicted and the building it occupied under a long-term, low-cost lease was razed. Then it was awarded $0 for its leasehold—and ordered to repay the Redevelopment Authority's initial $300,000 award *based on its own appraisal.*

The court below cited the decision in *Brown v. Legal Foundation* for the proposition that "compensation for a net loss of zero is zero." (App. 45 [quoting *Brown*, 538 U.S. at 240, n. 11].) But that quote from *Brown* in fact strengthens the VFW's case and shows the need for this Court's review. Dealing with lawyers' trust funds so small they could not generate sufficient income to cover their operating cost, *Brown* truly was a case with a "net loss of zero." Not so here, where the existence of substantial value in VFW's long-term leasehold is not questioned.

The Court has reiterated the *Boston Chamber* rule without deviation. (*U.S. v. General Motors*, 323 U.S. 373, 378 [1945]["The courts have held that the deprivation of the former owner rather than the accretion of a

---

[20] The *Boston Chamber* owners sought to use the undivided fee rule in order to have the Court disregard an economically negative attribute of the property, and thereby permit them to receive more than their actual interests were worth.

right or interest to the sovereign constitutes the taking"]; *Brown*, 538 U.S. at 235-236 ["the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain"]; *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 13 [1949][quoting *Boston Chamber*]; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 [1999][same].) When the Court concluded that the 5th Amendment "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. U.S.*, 364 U.S. 40, 49 [1960]), it emphasized that the public is required to bear public burdens, but also that the 5th and 14th Amendments' protection was intended for "people," not merely for dirt and bricks. (See also *Bauman v. Ross*, 167 U.S. 548, 574 [1897]["the rights of private owners are secured" through the 5th Amendment].)

Notwithstanding this Court's consistent statements, the lower courts remain—to this day, as the decision below shows—in conflict over use and application of those precedents in eminent domain valuation, particularly when applied to the undivided fee rule. Yet all of them purport to apply the same provisions of the 5th and 14th Amendments. Respectfully, that makes no sense.

Applied in a context like this, the undivided fee rule flies in the face of this bedrock precept—measuring compensation only in terms of what the taker gained while wholly ignoring the leasehold owner's loss.

The analysis noted above is appropriate for any part of the Bill of Rights, as all those amendments secure individual rights. The interrelatedness of all of those rights forms the foundation of the Court's Bill of Rights jurisprudence:

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citations to Locke, Blackstone and others.]" (*Lynch v. Household Fin. Co.*, 405 U.S. 538, 551 [1972].)

This case is the proverbial "Exhibit A" for all that is wrong about rote application of the undivided fee rule. According to the jury (that was prevented from hearing any evidence of the value of VFW's lease), fee simple title to this property was worth $0 due to the high cost of demolition and site clearance.[21] But, as the Court of Appeals put it, "it is undisputed that [VFW's] leasehold interest is of great monetary value" (App. 94), indeed, "exceed[ing] eight million dollars." (App. 101). Even while ruling against VFW, the Wisconsin Supreme Court agreed that its leasehold was valuable. (App. 14, n. 10.) By collecting and highlighting multiple conflicting decisions from other state courts (App. 25-28, nn. 31, 32), the court below virtually asked this Court to review its decision and use this case to provide a consistent application of the 5th and 14th Amendments.

---

[21] Of course, had the building's owner wanted to demolish it, it could not just evict the VFW; it would have had to pay VFW for its leasehold. It is difficult to see why, when the government steps into the landlord's shoes, the result should be any different—particularly since the Constitution *mandates* the payment of just compensation for the taking of leaseholds.

## III.

## THE UNDIVIDED FEE RULE VIOLATES DUE PROCESS WHEN IT PROHIBITS PROPERTY OWNERS FROM PRESENTING *ANY* EVIDENCE OF THE VALUE OF THEIR PROPERTY BEING TAKEN BY EMINENT DOMAIN.

In an eminent domain action the parties, however they are labeled, have a constitutional right to present evidence going to the merits. (*Walker*, 352 U.S. at 117; *Schroeder*, 371 U.S. at 213-214.) As this Court summarized, "it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." (*Bragg v. Weaver*, 251 U.S. 57, 59 [1919].)[22]

The *in rem* characterization of an eminent domain case does not trump the substantive constitutional mandate that just compensation be paid to the owner of a

[22] The Court has repeatedly opined on the requirement of notice and a meaningful opportunity to be heard in eminent domain litigation. (E.g., *Mullane*, 339 U.S. at 314; *Walker*, 352 U.S. at 117; *Shaffer*, 433 U.S. at 206; *Schroeder*, 371 U.S. at 213-214; see *Brody v. Village of Port Chester*, 345 F.3d 103, 112 [2d Cir. 2003].) Without the ability for all parties to present evidence, that right is meaningless.

leasehold in the taken property, nor does it authorize denial of due process by forbidding the owner of a concededly valid leasehold in the taken property to present any valuation evidence. To say otherwise would eviscerate these bedrock constitutional guarantees.

Here, however, the court below held, in violation of VFW's right to procedural due process, that it was not entitled to present *any evidence of the value* of its leasehold *at any time in the jury trial valuation proceeding.* The testimony noted by the court below (App. 13) came in a different part of the proceedings, outside the jury's presence. The VFW was in court solely because the Redevelopment Authority chose to acquire the property in which it owned a leasehold, and in an action whose sole purpose was to value all interests in the subject property so that all interests could be transferred to the Redevelopment Authority. Yet it was not allowed to present any evidence of the value of its leasehold. Why? The court below, despite the length of its opinion, never explained, asserting that inasmuch as a condemnor acquires the fee simple title, it need only pay the value of the undivided fee simple title it acquired (App. 32).

But as briefed *ante*, and contrary to the court below and the other defenders of the undivided fee rule, it is the deprivation of the

property rights of the owners, not the accrual of any right, title or interest to the taker, that constitutes the taking for which compensation must be paid. Thus, in *Del Monte Dunes*, 526 U.S. 687, this Court upheld an award of just compensation to an owner of the taken land even though the defendant city acquired no interest in it. It was loss of the right of use for which the owner received compensation.

VFW's leasehold was fully compensable. The Court emphasized the point in another opinion by Justice Holmes written after *Boston Chamber*:

> "Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist....In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun....Judgment reversed with directions to award proper compensation to the appellant [tenant]." (*A.W. Duckett*, 266 U.S. at 151.)

In *Boston Chamber*, it was the property owners who wanted to apply the undivided fee rule because they thought that the property would have greater value if considered as a

unitary ownership, regardless of the actual state of title. But the Court rightly would not allow it because that would divert the constitutional inquiry away from what the owners actually lost: "We regard it as entirely plain that the [owners] were not entitled, as a matter of law, to have damages estimated *as if the land was the sole property of one owner....*" (217 U.S. at 195; emphasis added.)

Even-handed justice requires that it should make no difference which party seeks to invoke the rule. Neither party should be able to have a court apply a fictional gloss to the 5th Amendment which advantages one side or the other in what is supposed to be an impartial inquiry into value. The constitutional bedrock is that those whose property is condemned must be compensated—and compensation must be based on the reality of title, not a fictionalized version that favors one side. Any "rule" permitting a major component of the property's value to be taken *without any compensation at all* mocks the idea of justice that is embodied in the constitutional mandate of just compensation.

## CONCLUSION

In concluding this Petition, we are unable to improve on the way this Court phrased the governing principle: "The political ethics

reflected in the Fifth Amendment reject confiscation as a measure of justice." (*U.S. v. Cors*, 337 U.S. 325, 332 [1949].) And yet, outright confiscation of its concededly valuable leasehold was the fate of the Veterans of Foreign Wars in this case. That courts—both state and federal—are in disarray on this important point of eminent domain valuation law makes the case for certiorari compelling.

VFW prays that the writ issue.

Respectfully submitted,

MICHAEL M. BERGER*
**Counsel of Record*
GIDEON KANNER
MANATT, PHELPS & PHILLIPS
11355 West Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4000
mmberger@manatt.com

*Counsel for Petitioner*
*Veterans of Foreign Wars*

Blank Page