No. 11-922

In The
Supreme Court of the United States

RIVER CENTER, LLC,
Petitioner,
v.
THE DORMITORY AUTHORITY OF THE STATE OF NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New York, Appellate Division, First Department

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR REAL ESTATE BOARD OF NEW YORK, INC., INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL MULTI HOUSING COUNCIL, AND REAL ESTATE ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD A. EPSTEIN
800 N. Michigan Avenue
Apt. # 3502
Chicago, IL 60611
(773) 450-4476
richard.epstein@nyu.edu

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, NW
Washington, DC 20008
(202) 237-8165
jaffe@esjpc.com

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*

The Real Estate Board of New York, Inc., International Council of Shopping Centers, National Multi Housing Council, and Real Estate Roundtable respectfully move for leave to file the following brief as *amici curiae* in support of the petition for certiorari. All parties were notified of *amici*'s intent to file this brief more than 10 days in advance of filing. Petitioner and Respondents Blackacre Bridge Capital LLC and SWH Funding Corp. have consented to the filing of this brief. Respondent Dormitory Authority of the State of New York has denied consent.

Amici's interest in this case arises from their extensive involvement in the real estate and development markets in New York City and State. The nature and membership of each amicus is described in greater detail at pages 1-3 of the accompanying brief. Based on the extensive experience of *amici* and their members with the way real market actors value land under development, they are concerned that the valuation methodology adopted in the courts below is severely out of step with market valuation methods and will disrupt the New York real estate market.

This brief will focus on the constitutional implications of using erroneous valuation techniques in real estate condemnations that raise issues under the just compensation requirement of the Fifth Amendment to the United States Constitution. It provides further insight into how the valuation method used below is inconsistent with real-world market valuation and with valuations methods used in other areas of the law.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

RICHARD A. EPSTEIN
800 N. Michigan Avenue
Apt. # 3502
Chicago, IL 60611
(773) 450-4476
richard.epstein@nyu.edu

Counsel for Amici Curiae

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QUESTION PRESENTED

Whether state-court valuation rules in condemnation proceedings that systematically exclude or ignore all relevant market-based evidence favorable to the owner on the value of a parcel in development afford the owner of real property "the full and perfect equivalent in money of the property taken," as required under the Just Compensation Clause of the Fifth Amendment to the United States Constitution?

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INTEREST OF *AMICI CURIAE* [1]

The Real Estate Board of New York, Inc. ("REBNY"), a non-profit corporation organized under New York law, is a trade association and leading advocate for the real estate profession in New York City. Its more than 12,000 members include major property owners and builders, brokers and managers, banks, financial service companies, utilities, attorneys, architects, contractors, and others, who together represent a major component of the City's economy.

REBNY promotes policies that expand New York City's economy, encourage the development of commercial and residential real property, enhance the City's appeal to investors, and facilitate property management. Its interest in this case is to oppose the adoption of skewed valuation methods that systematically undercompensate the owners of real property whose property is condemned in ways that disrupt the orderly investment in real estate development in New York and elsewhere.

The International Council of Shopping Centers ("ICSC") is a non-profit corporation organized under Illinois law. It is the global trade association of the shopping center industry with 54,045 members worldwide, 46,197 in the United States and 3,491 in the State of New York. Its members include developers, owners, retailers, lenders, and other entities that

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were given 10 days notice of *amici*'s intent to file this brief. Respondent DASNY denied consent to file; all other parties granted consent.

have a professional interest in the shopping center industry. ICSC's members own and manage essentially all of the more than 3,158 shopping centers in the State of New York, which in 2010 accounted for $108.4 billion in shopping center combined sales.

The National Multi Housing Council ("NMHC"), a non-profit corporation organized under District of Columbia law and based in Washington, D.C., is a national association representing the interests of the larger and most prominent apartment firms in the United States. NMHC's members are the principal officers of firms engaged in all aspects of the rental apartment industry, including ownership, development, management, and financing. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. One-third of American households rent, and over 14 percent of households live in a rental apartment (buildings with five or more units).

The Real Estate Roundtable ("Roundtable"), a non-profit corporation organized under District of Columbia law, brings together leaders of the nation's top public and privately-held real estate ownership, development, lending, and management firms with the leaders of major national real estate trade associations, to jointly address key national policy issues relating to real estate and the overall economy. Collectively, Roundtable members' portfolios contain over 5 billion square feet of office, retail, and industrial properties valued at over $1 trillion, over 1.5 million apartment units, and in excess of 1.3 million hotel rooms. The Roundtable is a vigilant advocate of our

members' constitutionally-protected property rights safeguarded by the Fifth Amendment, and frequently participates as an *amicus* in takings and eminent domain cases such as *Kelo* v. *City of New London,* 545 U.S. 469 (2005).

None of the above *amici* is publicly traded or has any parent corporations, and no publicly traded corporation owns 10% or more or any of the above *amici*.

STATEMENT

1. The just compensation for property taken by the government for public use is essential to ensure that the government's eminent domain power is exercised only in those cases where it advances the public good. That requirement can be met only when state valuation procedures reflect the full and fair market prices of the property so taken. In the absence of any voluntary transaction, correct valuations of necessity depend on extrinsic evidence from those persons who have the most to gain by accurate estimations and the most to lose by inaccurate ones. These people are, of course, the men and women who make their living as active participants in sale, lending, and leasing markets.

This case urgently calls for review in this Court because it shows the individual injustices and social dislocations that can occur whenever courts systematically exclude or ignore the best market-based evidence, only to rely on government appraisals that ignore all key elements of site-valuation that are everywhere else taken into account. This case also illustrates the constitutional and economic damage that state courts inflict by adopting valuation methodolo-

gies that drive compensation below the value that genuine market actors place on property under development.

2. This petition for certiorari arises out of one of the largest condemnation proceedings in the history of New York City. The Petitioner, River Center LLC ("River Center"), owned a large city-wide block of real estate in New York City located several blocks south of Lincoln Center. River Center had acquired title to the parcel in 1998, through intermediaries pursuant to a 1992 option, for approximately $49.5 million. Pet. App. 13a. From 1992 through 2001, River Center and its affiliated companies made major investments in time and money to develop the site as a multi-purpose 1.4 million square foot shopping center, complete with extensive parking facilities. Pet. 6. Those efforts were abruptly terminated on April 11, 2001, when the Dormitory Authority of the State of New York ("DASNY") condemned the entire site for an entirely different use—building a new dormitory for John Jay Criminal College in New York City. *Id.*

Both before and after the final purchase in 1998, River Center had taken extensive and productive steps toward developing the site. As of April 2001, the riskiest part of River Center's work was complete: River Center had bought out General Motors from its long term lease and the site was fully assembled; it had rezoned the property; had made all appropriate physical inspections; hired key personnel teams; completed long-term marketing studies; retained a prominent design team that had completed designs sufficient for fast-track construction; had drafted pre-

liminary plans; and identified and exchanged term sheets with potential anchor tenants. Pet. App. 7a-8a.

The work unfinished at the time of condemnation was far less subject to holdout or regulatory risk and thus more precisely quantifiable: removing short-term licensees, negotiating the construction loan, doing the construction, and leasing out individual units. All of those activities rely on a combination of clear property rights and competitive markets. River Center anticipated no difficulties or delays along its original 1996 critical path, which would have allowed it to be open for business as of April, 2001. Pet. 6.

During this predevelopment phase, River Center had secured two nonrecourse loans on its property, which at the time of condemnation stood at $33.1 million on the first mortgage, and $77.8 million on the second, for a total of $111 million. R.12326. That sum was in excess of the $82.2 million assigned by the DASNY appraiser for the entire project.

Prior to the condemnation, River Center received letters of intention from reputable outside developers to buy an interest in its venture for sums far in excess of the outstanding balance on the two nonrecourse loans. Pet. 11-12. The Metropolitan Development Group, backed by Lehman Brothers, made oral and concrete written presentations in late 2000 and early 2001, which in February 2001 valued the property at $175,000,000 plus 50% of profits, cash flow and fees. R.12959. Forest City Ratner delivered a Letter of Intention in April 2000, which valued the site at $155,000,000 plus a residual share of 50% of profits and fees in what was widely regarded as a rising market. R.12941-43.

Side by side with its own development efforts, River Center had ongoing business negotiations with John Jay College, the City University of New York ("CUNY"), and DASNY. As early as 1986, CUNY and River Center's predecessor, Metropolis II, had negotiated a complex agreement that would have allowed John Jay College, which would have shared the block with the River Center project, to obtain some 350,000 square feet for its own use. CUNY agreed to support River Center's application for zoning changes to maximize the use value of the larger parcel. Pet. 4-5. Ten years later, when River Center presented Phase II of its development program to the Planning Commission, CUNY and the State fought its application before the City Planning Commission, by claiming falsely that River Center had not acquired the appropriate development rights for the site. Pet. 6. After fruitless efforts to persuade CUNY and the State to retract their false statements, River Center successfully sued both for breach of contract, obtaining judgment against them in 1997. Pet. App. 28a; R.12077-80, 11342-45. But that successful action could not undo the damage done by those unnecessary delays.

Following DASNY's taking of the property, the dispute over just compensation and the proper valuation of the River Center project was tried in New York State Supreme Court. Robert Von Ancken, DASNY's appraiser, classified the property as "vacant land" to which he assigned a value of $82.2 million because, as the NYSC explained, completion of the development was not "imminent," given the unfinished work to be done. Pet. App. 8a, 15a-16a. Von Ancken assigned no value to River Center's develop-

ment work between 1992 and 2001, no value to the extensive below-grade space coveted for commercial purposes, and no value to the parcel's unusually large amount of on-site parking or its uniquely large size, both prized for their development value.

River Center's appraiser, M. Theresa Nygard, valued the site plus its development potential at a combined sum of $227 million. In the absence of comparable sales for this unique large-size parcel, Nygard broke down the project into five separate components, which supplied more accurate comparables to help determine the full site value.

The New York Supreme Court ("NYSC") first accepted appraisal offered by DASNY with one minor correction to the calculation, bringing it up to approximately $83.7 million. Thereafter, it made two upward adjustments: one for special permits and the other for rezoning, giving a final award of $97.25 million. Pet. App. 19a-21a. Having held that it was proper to apply the rule in *Allied Corp.* v. *Town of Camillus*, 80 N.Y.2d 351 (1992), treating any purchase of the subject property within three years prior to the condemnation as setting the presumptive baseline for determining current value, Pet. App. 13a-14a, the NYSC concluded that its adjusted price "reflects a market value which is consistent with the [1998] purchase price" that it used to set a baseline. Pet. App. 21a.

The court then rejected Ms. Nygard's use of the comparable components for failing to meet "generally accepted" appraisal techniques under *Frye* v. *United States,* 293 F. 1012, 1014 (S.D.N.Y. 1923). Pet. App. 16a-17a. The court declined even to discuss, much

less consider, the significance of either the two nonrecourse mortgages or the independent Letters of Intent by interested outside developers. It also refused to admit into evidence testimony offered by Steven Goodstein of Steven Goodstein Development Company on behalf of River Center, which assigned a land value of $195 million, plus a 40% share of profits for the additional site preparation. Pet. 10.

The New York Appellate Division (NYAD) affirmed the base award of just over $82 million. It summarily rejected as "speculative" the evidence of development effort solely because the project, even though on track, would not come "to fruition in the near future." Pet. App. 2a-3a. It also refused to consider the nonrecourse mortgages as evidence of value, and held inadmissible the bona fide current offers to buy into the project. Pet. App. 3a. The New York State Court of Appeals declined to hear the case, Pet. App. 42a, and a petition for certiorari was filed before this Court.

SUMMARY OF ARGUMENT

In *Monongahela Navigation Co.* v*. United States*, 148 U.S. 312, 326 (1893), this Court held that in all condemnation cases "the compensation must be a full and perfect equivalent for the property taken." This Court had previously elaborated on this standard as follows: "The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, *but with reference to the uses to which it is plainly adapted*; that is to say, what is it worth from its availability for valuable uses." *See Boom Co.* v*.*

Patterson, 98 U.S. (8 Otto) 403, 408 (1878) (italics added).

The insistence of the New York courts that the sale be "imminent" or that the transaction come "to fruition in the near future" is flatly inconsistent with these well-established constitutional principles. Instead of adopting rules that met this constitutional imperative, they excluded the most probative evidence in deferring to the State's flawed appraisal. The New York courts systemically refused to consider the arm's length decisions on valuation that professional investors routinely make in investing their own money.

The New York courts' unprecedented truncation of admissible evidence in real estate valuation led it to ignore both the outside bids and nonrecourse mortgage. That decision was at stark variance with the standard rules used in every tax dispute, bankruptcy proceeding, tort damage evaluation, and divorce. The explicit disregard of this vital evidence of value cannot be excused solely because it reduces the financial burden on the state.

Setting the right level of compensation is important on grounds of both fairness and efficiency. As *Monongahela* noted, it is unfair to "load[]" a disproportionate portion of the common burdens of government on the backs of the isolated individual or business that happens to own the property slated for government use. *See* 148 U.S. at 325. It is also inefficient for the state to have carte blanche to take private property at bargain prices, which gives it a perverse incentive to develop projects that are worth far less to the community than the private projects that they

displace. The failure to observe these sound constitutional principles creates a massive distortion in local real estate markets, by excluding from judicial consideration the best evidence of value that is everywhere accepted in the informed and knowledgeable real estate community.

This Court should grant certiorari to review the constitutionally skewed methodology that led to these fatal evidentiary omissions. To be sure, this Court cannot and should not review the adequacy of each condemnation award to assure that constitutional safeguards are fully protected. No set of legal rules that guaranteed continued miscarriages on valuation under state law rules should be allowed to stand without review from this Court.

REASONS FOR GRANTING THE WRIT

I. The Valuation Rules Adopted by the New York Courts Violate the "Just Compensation" Requirement of the Fifth Amendment by Rejecting the Fair Market Value Test that Has Been Uniformly Applied in Condemnation Cases and in All Other Areas of Law.

This case represents a massive departure from well-established condemnation procedures that could lead nationwide to wholesale undercompensation when private property is taken for public use. Our settled constitutional tradition gives the political branches of government sole power to choose which parcels of land are subject to condemnation proceedings. The public use requirement in the Fifth Amendment places, moreover, at most a weak judicial barrier in the path of condemnation. *See Kelo* v. *City*

of New London, 545 U.S. 469 (2005). It is equally well settled that the physical takings at issue in this instance are governed by a per se condemnation rule. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-35 (1982). The high degree of protection afforded in these real estate condemnation cases can only be vindicated by the faithful application of the just compensation requirement of the Fifth Amendment, which turns that per se standard into reality.

The proper measure of just compensation in our constitutional scheme was forcefully articulated by this Court in *Monongahela Navigation*:

> There can, in view of the combination of those two words ["just" and "compensation"], be no doubt that the compensation must be a full and perfect equivalent for the property taken * * *.
>
> 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. * * *
>
> The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

148 U.S. at 326-27. The justifications for *Monongahela*'s requirement of full and perfect equivalence in compensation are as sound today as they were in 1893.

The first concerns protection for the individual. No one person should be asked to bear more than his fair share of the cost of conducting government. Yet exactly that forbidden result is brought about whenever some key element of value is deliberately left out of the constitutional compensation equation. Using artificially low values in condemnation cases will necessarily deter future private investors from starting beneficial projects, given the omnipresent risk of partial confiscation by the state.

The second task of a robust just compensation rule is to discipline state officials, to ensure that public tax dollars are only used to fund ventures that are worth more to people than the private ventures that the government use of the condemned site displaced. Without this restraint, the government will engage in over-condemnation that will in time reduce the aggregate of wealth within the community.

It was for these two reasons that this Court in *Monongahela* awarded the plaintiff full compensation not merely for the lock on the Monongahela River that allowed boats free passage up and down its length. Rather, the United States also had to pay for taking the right of the claimant to collect tolls from ships that used its lock to move along the river.

The constitutionally correct standards for valuation become clear when the River Center valuation is tested against the standard that this Court set in the leading case of *McCandless* v. *United States*, 298 U.S. 342 (1936). There, the federal government condemned a cattle ranch for public use. The trial court excluded all evidence of its value for growing sugar as "speculative" because the owner had not entered into any

contracts to secure the water supply needed for growing sugar. *See id.* at 345. The unanimous Court held that the owner was entitled to introduce evidence showing that the water was available within reasonable distance at affordable prices, even though no specific water contract was then imminent. Justice Sutherland wrote:

> The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value, and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value.
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> * * *
>
> An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough.

Id. at 345, 346.

That same inclusive methodology for valuation lies, moreover, at the core of the valuation rules used to set rates for the supply of services by public utilities. Electric, gas, and telecommunications must all put their investment in the ground before they receive a dime in rate payments. To induce that socially beneficial investment, they have a constitutional guarantee of a return on their investment that "should be sufficient to assure confidence in the fi-

nancial integrity of the enterprise, so as to maintain its credit and to attract capital." *See Federal Power Comm'n* v. *Hope Natural Gas*, 320 U.S. 591, 603 (1944); *see also Duquesne Light Co.* v*. Barasch*, 488 U.S. 299, 307-10 (1989). The administrative ratemaking thus requires public agencies to make far more speculative determinations on valuation, based on future consumer use and technological change, than are necessary in the instant case. Yet no court has ever shunned the inquiry because the future expenses and future of a public utility's returns are too speculative to calculate.

Virtually all courts follow without hesitation the lead of this Court in admitting market-based evidence in any and all valuation disputes. A uniform line of precedents in other substantive areas shows none of the same hostility to market data expressed by the New York courts in the condemnation context. Here is a small sample of cases.

- In a suit to adjust the value of property partially destroyed by fire, the New York court in *Lucenti* v. *Cayuga Apartments, Inc.*, 66 A.D.2d 928, 930 (N.Y. App. Div., 3d Dept. 1978), *aff'd*, 48 N.Y.2d 530 (1979) took the position that in setting value, "any fact reasonably tending to throw light upon the subject should be considered, including original cost and the cost of reproduction, expert opinions, declarations against interest, and the gainful uses to which the property might have been put * * *." (Citation omitted.)

- In a Jones Act suit to project future lost earnings, the plaintiff, a nonunion member, could introduce evidence of union wages. The objections to the evidence "went only to the weight, not to the relevancy of the evidence." *Bower* v. *O'Hara*, 759 F.2d 1117, 1127 (CA3 1985).
- In a suit for tortious interference the court allowed expert evidence by an experienced record industry executive of the loss of future sales from a "new business enterprise" with minimal market exposure. *See TVT Records* v. *Island Def Jam Music Group*, 250 F. Supp.2d 341, 349 (S.D.N.Y. 2003).
- In an action for lost sales in the context of a breach of contract, calculations for lost profits were not limited to those pertaining to confirmed orders, and even a new business should not be "denied an opportunity to present their evidence of such damages at trial." *See Jewell-Rung Agency, Inc.* v. *Haddad Org., Ltd.*, 814 F. Supp. 337, 342 (S.D.N.Y. 1993).
- In divorce proceedings, the determination of the value of a partial interest in a real estate partnership the trial court "could properly rely on the amount of a purchase offer to set the net worth of" the partnership even if those offers had not culminated in a sale. *See Theberge* v. *Theberge*, 9 A.3d 809, 814 (Me. 2010).

This uniform and sensible approach, evident across a wide range of substantive areas, is conspi-

cuously and sadly lacking in the NYAD, whose narrow view on admissible evidence undermined the willing buyer/willing seller constitutional standard that both courts purport to embrace. Their widespread and recurrent errors are *not* subject to ordinary appellate review within the federal system. Either this Court reviews the constitutional issues on just compensation that this Petition presents, or aberrant and unchecked state court misvaluations will undermine the application of the just compensation principle of the Fifth Amendment to the States through the Fourteenth Amendment. *See Chicago, Burlington & Quincy R. Co.* v. *Chicago*, 166 U. S. 226, 235-41 (1897).

II. The NYAD's Flawed Valuation Tests Undermine the Federal Constitutional Guarantee of Just Compensation.

The flawed approach in this case derives from the NYAD's systematic disregard of the general principles of valuation at work in cases involving, bankruptcy, contract, divorce, insurance, and tort law. To be sure, the Constitution does not demand an unattainable perfection in valuation. Yet by the same token, it does not accept the systematic erosion of the just compensation guarantee making valuation errors, always in favor of the state, that should not be allowed to run rampant below this Court's radar.

The Principal Brief of River Center LLC addresses the voluminous case law at length, Pet. 15-20, and the Petitioner's evaluation of those cases is seconded

here. In addition, however, it is critical to pinpoint the major errors in the methodology of the NYAD.[2]

The initial error of the NYAD lies in its adoption of a valuation methodology that refuses to give any value to work done on a project that will not come "to fruition in the near future." Pet. App. 2a-3a. That basic error in turn led the NYAD to affirm a decision below that eliminated every key element of compensable value for the River Center site.

To say that a project must be "near fruition" imposes an impossible straightjacket on the process. That is especially telling in real estate development cases where the elaborate process of government approvals can easily cover years of work. No wildly over-inclusive notion of "speculation" can be allowed to let the government profit from the delays that its laws and regulations introduce into the permitting process. Indeed, the only proper treatment of these delays is to add them in as an element of value in the condemnation process, as was held in the major California decision of *Klopping* v. *City of Whittier*, 500 P.2d 1345 (1972), which treated the losses attributable to government delays as a proper component of compensation in eminent domain proceedings.

These observations are consistent with the general principles that necessarily require current estima-

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[2] We note only in passing that the NYSC's extensive discussion of the *Allied* rule set the stage for its errors which were then carried over to the NYAD. It is wholly improper to treat a sale of the condemned property within three years preceding condemnation as the starting point for determining value when it ignores the huge interim development efforts.

tion of future use values to determine the current value of land in all stages of development. In practice, none of these estimates assign zero value to projects whose development is not imminent or close to fruition. No estimate is better for that purpose that an estimate made by a party that will lose money if its bid is too high. If anything, these outside bids are only a *lower* bound on value, given that they may be raised during the course of negotiation or topped by another offer.

It is constitutionally inexplicable why these bids should be rejected, or why a court should reject expert testimony by Steven Goodstein, whose business success depends on making correct estimates when investing his own money. To be sure, these proposals could not take the form of final binding offers, for that formality requires the performance of due diligence and meeting of a wide variety of regulatory and business agreements. But, as *amici* can attest, these proposals are far more than casual documents, for they embody serious judgments of the project's value that independent parties, acting at arm's length, attach to the development value of the site. These dollar estimates were more than double Von Ancken's appraisal of the vacant land. Yet ignoring the development value of this parcel as speculative is squarely inconsistent with the decision of this Court to admit evidence of future water rights in *McCandless*, 298 U.S. at 345, 347-48. River Center did not offer into evidence idle guesses about what such a future bid might be. It offered to introduce actual letters of intent that contained precise numbers of the terms of

trade backed by River Center's potential partners, purchasers, and lenders.

To be sure, DASNY should be allowed to contest Petitioner's offer of proof by cross-examination. Similarly, DASNY should be able to introduce experts of its own. But there is no warrant for the categorical exclusion of this evidence. The probative value of these outside offers only increases when DASNY makes no effort to contradict or minimize their weight.

Once again these errors are of constitutional weight. No theory of valuation looks through blinders solely at the immediate future. All theories of valuation seek to determine the present value of any and all future streams of income of a project, less the present discounted value of the future costs and liabilities associated with project development. Sophisticated developers who buy and lend on projects in the early stages of development offer the best evidence of market value.

More concretely, the present value of *any* vacant lot of land can only be positive if its future use generates, in present value terms, net revenues over cost for the entire useful life of the project, once development is completed. Making that valuation for raw land is necessarily more uncertain than it is for land, like the River Center site, on which extensive pre-construction development activities have taken place. There is less uncertainty over the time to completion. And there is greater certainty over future use in light of the extensive and successful pre-construction development effort. In these cases, to be sure, the cost of

these development efforts is *not* the ultimate test of market value. In practice, however, those costs usually set a lower-bound estimate of value, because rational developers only incur those expenses with the expectation of future gain. Those costs therefore help generate the reliable valuations for both vacant land and for land in the process of development. Without such valuations, all real estate development necessarily comes to a standstill.

The foregoing propositions are amply borne out by the specific numbers used to support River Center's precise appraisals of its parcel's future use. Yet, contrary to every known valuation standard, the artificial "imminence" requirement of the New York courts would force valuation of all vacant land to zero. That mistake is of constitutional dimensions. In comparable sales, appraisers follow the lead of buyers and sellers in making their own estimates. Surely a recent bid at a specific dollar figure prior to condemnation counts as better evidence of value than the prior purchase price of the land a decade, or even three years, earlier that reflects none of the recent activity. To be sure, the plaintiff is *not* entitled to recover its costs for improving the land. But it is entitled to recover the increase in value those costs generated. In the normal case, benefits exceed costs, so those cost figures again represent at most a *lower* bound on the value of the parcel as a whole.

These general principles cover this case to a T. The sale of comparable parcels of land by unrelated parties counts a great deal. When, as here, the distinctive nature of the parcel yields no accurate comparison, it is proper, even under the *Frye* rule, to

adapt the standard procedures to novel circumstances, as with Theresa Nygard's creative use of comparables to the project's component parts, which, if anything, ignored the synergies between different portions of the development. Yet Van Ancken was able to compute DASNY's lowball appraisal of $82 million only by ignoring virtually *every* action of River Center that increased site value between 1992 and 2001. He then compounded those errors by understating available square footage for development, ignoring available space for parking facilities, and attaching no weight to available extra square footage for high value commercial use below ground. Pet. App. 15a-17a. As *amici* here can attest, any willing buyer would pay market value for each of these elements, and would especially prize the valuable underground square footage of floor space, none of which is charged to the Floor Area Ratio ("FAR")[3] that applies to improvements built above grade.

The particular errors that flow from this general approach are these:

First, the NYAD does not explain why it refused to take into account the $111 million in nonrecourse mortgages issued in an arm's length transaction in exchange for new funds dedicated to the project. A nonrecourse mortgage prevents the lender from

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[3] The New York Department of City Planning defines the Floor Area Ratio as "the ratio of total building floor area to the area of its zoning lot." A FAR of one allows construction of one square foot of usable space for each square foot of the zoned lot. Underground space is of special value because it is not charged against FAR. *See* New York City Dept. of City Planning, *Zoning Glossary* www.nyc.gov/html/dcp/html/zone/glossary.shtml.

reaching the personal assets of the borrower in the event of a loan default. The underlying property is by design the only source of repayment for the debt. Accordingly, no lender in an arm's length transaction will ever sit idle if the value of the property drops below the outstanding debt on loan. In this case, the arm's length lender stood pat, knowing that it was protected both by the current value of the property and the additional contributions to River Center LLC from its president, Joseph Korff. The unpaid mortgage amount thus represents powerful contemporaneous evidence of a voluntary transaction that once again sets a *lower-bound* estimate of River Center's proper market value. Of course, the condemnor is free to contest the valuation inferred from the nonrecourse mortgage. But it is a failure of constitutional dimensions for the New York courts to ignore that evidence altogether.

Instead of looking at the applicable Supreme Court precedents in order to understand the problem, however, the NYAD only made brief allusion to two irrelevant cases, *Farash* v. *Smith*, 59 N.Y.2d 952 (1983), and *In re School Site on West 187th St.*, 222 A.D. 554 (N.Y. App. Div., 1st Dept. 1928), *aff'd* 250 N.Y. 588 (1929), whose mortgages arose in self-dealing transactions, which are never evidence of market value. At no point, however, does the NYAD explain why, under the applicable federal constitutional standards, it is acceptable to treat projects in development as if they were vacant lots on which no site plan developments had taken place.

The NYAD also refused to allow in the arm's length offers to acquire an interest in property on the

strength of its own decision in *Brummer* v. *State of New York*, 25 A.D.2d 245 (N.Y. App. Div. 1966), which only stands for "the well-accepted general rule that an offer of *settlement* or an offer of purchase is inadmissible to show market value." *Id.* at 248-49 (italics added). *Brummer* only shows how far the NYAD twisted state law to support the clearly unconstitutional assertion that arm's length offers for River Center, made *outside* the settlement process, are inadmissible in setting condemnation value. Settlement offers are excluded so that settlement negotiations can take place with candor. No such interest pertains to outside offers made prior to the condemnation announcement to purchase property for public use.

The exact weight of River Center's evidence is for the trier of fact to decide. But that decision has to be made only after the trial court's critical rulings on admissibility let the right evidence be taken into account. It is an error of constitutional proportions for the New York courts to rubber-stamp the government appraisal, without explaining why.

The pervasive deprivation of value so evident in this case is inconsistent the compensation standard of a "full and perfect equivalent" that *Monongahela* sets. Major constitutional standards on just compensation must not be eroded by unsound valuation techniques. Within the federal court system, the principle of just compensation can be vindicated by the District and Circuit courts following the lead of the Supreme Court in cases like *McCandless* v. *United States*. But because of the independence of the state systems, the only path to the correction of constitutional errors lies

in addressing the constitutional ramifications of those errors by granting certiorari to articulate with unmistakable clarity the rules that should govern valuation in condemnation cases nationwide.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165
jaffe@esjpc.com

RICHARD A. EPSTEIN
800 N. Michigan Avenue
Apt. # 3502
Chicago, IL 60611
(773) 450-4476
richard.epstein@nyu.edu

Counsel for Amici Curiae

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