No. 15-470

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM A. LIVINGSTON, for himself and all others similarly situated,
Petitioner,
v.

PAT FRANK, as the Clerk of the Circuit Court of Hillsborough County, Florida and the CITY OF TAMPA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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November 6, 2015

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2(b), the Cato Institute respectfully moves for leave to file the attached brief as *amicus curiae* supporting Petitioner. All parties were provided with timely notice of *amicus*'s intent to file as required under Rule 37.2(a). Petitioner's counsel consented to this filing. Respondents' counsel withheld consent.

The interest of the Cato Institute arises from its mission to advance and support the rights that the Constitution guarantees to all citizens. Cato was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty.

Toward those ends, Cato conducts conferences, publishes books, studies, and the annual *Cato Supreme Court Review*, and files *amicus* briefs. Recent cases in which Cato has filed briefs in this Court relating to property rights include *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); and *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

Cato has no direct interest, financial or otherwise, in the outcome of this case, which concerns Cato solely because it involves an abuse of government power in the context of eminent domain.

For the foregoing reasons, the Cato Institute respectfully requests that it be allowed to file the attached *amicus curiae* brief.

Respectfully submitted,

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QUESTIONS PRESENTED

Are eminent-domain funds deposited by the government into a court registry to take immediate title to land prior to final judgment private property entitled to Fifth Amendment protection as set out in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)? More specifically, is there an unconstitutional taking when the court clerk distributes 90 percent of the interest earned on eminent-domain funds to the government rather than to the ultimate owner of the deposit?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The present case concerns *amicus* because it represents an opportunity to bring Florida's takings law in line with the rest of the country and to fix the perverse incentives that the Florida judiciary has given to government authorities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Florida's statutory quick-take procedure allows a condemning authority to effectuate a second taking by entitling that authority to the investment interest on the property owner's compensation funds. A number of property owners have challenged the constitutionality of this procedure, but Florida's courts have held that no such second taking occurred. *Livingston v. Frank*, 150 So. 3d 239 (Fla. 2d Dist. Ct. App. 2014), *review denied* 2015 WL 2248455 (Fla. May 13, 2015); *Fla. Dep't of Transp. v.*

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[1] Rule 37 statement: No party's counsel authored any part of this brief and no person other than amicus funded its preparation and submission. Parties were timely notified and petitioner consented. Respondents withheld consent, so a motion for leave to file has been included with this brief.

Mallards Cove, LLP, 159 So. 3d 927 (Fla. 2d Dist. Ct. App. 2015), *review denied*, 2015 WL 5683074 (Fla. Sept. 28, 2015). The court below concluded that the property owner's compensation funds are "public property" and thus no taking occurs when interest on those funds is paid to the condemning authority. That holding is irreconcilable with this Court's long-held precedent in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), not to mention that it splits with other states' rulings.

Florida's courts have avoided the dictates of *Webb's* and thus created a massive exception to federal law. Their decisions have contorted the long-standing "interest follows principal" rule, *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003), leading to confusion in Florida's eminent domain proceedings. And because Florida's courts wield great persuasive authority, the confusion engendered by these holdings threatens to spread to other states.

Moreover, the Florida courts' interpretation of *Webb's* conflict with that prevailing in Nevada, which has legislated a similar quick-take deposit procedure as Florida. When challenged, the Nevada Supreme Court properly applied *Webb's* and held that such a procedure was unconstitutional. *Moldon v. County of Clark*, 188 P.3d 76, 81 (Nev. 2008). The Florida rulings also conflict with those of Texas, which has ruled that investment interest earned on deposited funds in the court's registry are the "private property" of the property owner. *See*, *e.g.*, *Whittington v. City of Austin*, 456 S.W.3d 692, 711 (Tex. App. Austin 2015).

Florida's exception to *Webb's* is especially problematic because it implicates basic property

rights in one of the nation's largest states. State property law affects the application of significant federal legislation—including the Bankruptcy Code—so these rulings have altered the property rights of all Floridians.

Compounding the problem, as it were, is the fact that what is at stake—the investment interest on deposited funds—amounts to large sums of money.

In sum, Florida has enlarged its own taking authority while altering the property rights of all its residents. Florida's courts made this possible by disregarding *Webb's* and dispensing with the rule that "interest follows principal." *Webb's*, 499 U.S. at 162. In the absence of this Court's guidance, Florida will continue with such second-derivative or "double" takings and other states could follow its example. The ability for state coffers to benefit from interest taken from those subjected to eminent domain would be attractive to other states, and Florida's courts have now provided a framework for them to ignore *Webb's* and reap the benefits. This Court should grant certiorari to make it clear that quick-take deposit funds are private property rather than an exception to the rule clearly announced in *Webb's*.

ARGUMENT

I. FLORIDA'S COURTS HAVE ESSENTIALLY NULLIFIED *WEBB'S* IN THE CONTEXT OF QUICK-TAKE PROCEEDINGS AND ARE IN CONFLICT WITH MANY OTHER STATES

Florida's quick-take eminent proceedings fast-track the appropriation of private property by authorizing the condemning authority to make a good-faith estimate of the property's value and then

depositing that estimate into the court registry. Fla. Stat. § 74.031. The legal significance of making that deposit is that it transfers title from the property owner to the condemning authority. Fla. Stat. § 74.051. Simultaneously, title to the deposited funds transfers to the property owner. *Id.*

At this point in the quick-take process, the property and deposited funds are vested in the condemning authority and the property owner, respectively. The clerk may then invest the deposited funds, Fla. Stat. § 74.051, and the funds remain invested until a final settlement for the purpose of generating interest. Once a final valuation of the property is rendered, the property owner receives the deposited funds, plus any excess declared by the final valuation. Fla. Stat. § 74.061.

But, according to the rule under review here, the accrued interest on the deposited funds goes to the clerk and to the condemning authority. According to the Florida courts, this transfer of investment interest is not a taking because the deposited funds are "public property."

While there are complicated questions about when, and to which corpus, interest attaches and accrues—such as pre-judgment and post-judgment interest—these technicalities are not at issue. The question here is much simpler: who owns the funds deposited into the court registry and, by extension, who owns the interest earned by the funds?

On this simple question, Florida law is now in direct conflict with *Webb's*. *Webb's* found that interpleader funds are "private property" while Florida deems quick-take registry funds to be "public property"—yet no meaningful difference exists.

Florida's property-classification two-step evades the long-standing rule that "interest follows principal" and that interest is held for the benefit of the ultimate owner. *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003). These are fundamental underpinnings of the law's recognition of property rights. If this Court does not resolve the conflict between *Webb's* and the Florida rulings, eminent-domain proceedings will propagate inconsistencies nationwide.

Florida's courts wield substantial persuasive authority, yet other large and important jurisdictions fundamentally disagree with their (mis)application of *Webb's*. Texas, for example, has an eminent domain procedure similar to Florida's. Yet the controlling Texas statute is silent as to which party is entitled to the interest earned from the compensation funds that have been invested by the clerk. Texas courts, applying *Webb's*, have held that property owners are entitled to the interest, rather than the condemning authority and clerk. *See*, *e.g.*, *Whittington*, 456 S.W.3d at 711.

D.C. courts also disagree with Florida, having concluded "that any interest earned or which should have been earned on the sums deposited in the court registry and later transferred to the District's general fund belonged to [each property owner], or both, and that the District's retention of such interest constituted a taking for public use under the Fifth Amendment." *Arthur v. District of Columbia*, 857 A.2d 473, 476 (D.C. 2004).

Maryland law is similarly conflicting: While "the interest paid between the judgment nisi and the taking is not intended to be part of the 'just

compensation' to which the condemnees are constitutionally entitled . . . . the purpose of the interest is to compensate for the loss of the use of the monies represented by the judgment.'" *Dodson v. Anne Arundel County*, 451 A.2d 317, 321 (Md. 1982) (quoting *I.W. Berman Properties v. Porter Bros., Inc.*, 344 A.2d 65, 79 (1975)).

II. FLORIDA'S COURTS, BY IGNORING *WEBB'S*, GAVE CONDEMNING AUTHORITIES DANGEROUS INCENTIVES TO PROFIT FROM THEIR TAKINGS

Under the Florida judiciary's novel interpretation of *Webb's*, Florida's statutory quick-take procedures inject an illegitimate profit motive into the limited state authority of appropriating property for the "public good." The statutory authority authorizes the clerk to pay the condemning authority the interest earned on the quick-take deposit account. Therefore, the condemning authority—often a government entity such as a public transportation agency—stands to net a gain on its "good faith estimate."

Florida's courts see this net gain as one generated on the beneficiary's—the condemning authority's—own funds. Thus, during the interim, the condemning authority owns *both* the appropriated property and the eminent-domain fee. Conversely, the erstwhile property owner owns *neither* his property nor the constitutionally mandated just compensation.

By monetizing a significant—and necessarily limited—constitutional grant of authority, Florida's quick-take procedures introduce perverse incentives. The most obvious and troubling incentive is a conflict of interest. If the condemning authority stands to

gain financially from its good-faith estimate, it will have an incentive to set this estimate higher than it otherwise would (thus harming taxpayers, too). And the longer the good-faith estimate stands invested, the more interest is earned. This gives the clerk an incentive to delay or withhold disbursement of the just compensation to the property owner.

This Court has recognized that providing government officials with an incentive and "inherent pressure" to delay disbursement of registry deposits to those owed compensation poses an unacceptable risk to property owners. *Webb's*, 499 U.S. at 162. Other states have also recognized these dangers. See *Simon v. Weismann*, 301 Fed. Appx. 107, 110 (3d Cir. 2008) ("interest accruing on the monetary property held by a state is analyzed as a per se taking"); *HSBC Realty Credit Corp. v. City of Glendale*, 735 N.W.2d 77, 87-88 (Wis. 2007) (recognizing constitutional problems in permitting clerks to invest eminent-domain registry deposits without paying the property owners investment interest).

III. IN THE ABSENCE OF THIS COURT'S GUIDANCE, FLORIDA WILL CONTINUE ITS SECOND-DERIVATIVE (OR DOUBLE) TAKINGS AND OTHER STATES MAY FOLLOW SUIT

The confusion created by the Florida courts' rulings in this litigation has already begun to spread. Awaiting a decision in the current case, a Florida court stayed a class action on a similar challenge to the quick-take deposit procedures. *Fla. Dep't of Transp. v. Mallards Cove, LLP*, 159 So. 3d 927 (Fla. 2d Dist. Ct. App. 2015). The class consisted of more than 77 members from a single county, in addition to

claimants from 12 other counties. *Id.* After the court here found that *Webb's* did not apply, the court in *Mallard's Cove* also declined to apply *Webb's*.

This confusion is not limited to eminent-domain proceedings in Florida. *Webb's*, which concerns property ownership of funds held in a court registry, applies broadly—to interpleader funds and interest earned on client money in a lawyer's trust fund account, to name two examples. The financial mechanism used in all these arrangements are the same: funds held on deposit. By creating a distinction between two of these arrangements—interpleader funds and quick-take deposit funds—Florida's judiciary has tainted a slew of financial arrangements with uncertainty.

The classification of property ownership is the starting point for both state and federal takings cases. Accordingly, the ruling below, if left to stand, will exacerbate the disparities between federal and state takings eminent domain procedures. For example, in *Kirby Forest v. United States*, this Court determined that depositing money into the court's registry in a federal taking constitutes payment to the property owner contemporaneous with the taking. 467 U.S. 1, 8-9 (1984). Here, however, the lower court determined that depositing money into the court's registry in a state taking constitutes an entitlement to be paid full compensation, not an entitlement to those specific funds placed on deposit. *Livingston*, 150 So.3d at 245.

In a Florida taking, therefore, because money is fungible, classification of property ownership starts a step ahead of federal takings cases: Florida entitles property owners to payment of the amount it

deposits rather than vesting ownership in the amount deposited. Florida's distinction between entitlement to compensation, versus ownership of funds, wedges a subtle yet significant divide between federal and state eminent domain law.

In short, Florida courts have ignored the constitutional significance of quick-take deposits, which are paid to consummate an immediate taking of private property. If the confusion created by these rulings is allowed to stand, thousands of property owners will be denied compensation for the interest earned on funds designated for compensating them.

CONCLUSION

Florida's quick-take deposit statute not only empowers the state government to expedite forcible appropriation, but also gives bad incentives to condemning authorities. The state appellate court here fashioned an exception to *Webb's* by deeming quick-take deposit funds "public property," thereby excusing Florida's condemning authorities from the constitutional mandate of compensating condemnees. The case has already operated to dismiss a similar class action in Florida.

Given the value of this revenue-generating scheme, other states have every reason to follow. To thus state the obvious, many people and businesses stand to be negatively affected and a large amount of property and monies are at stake. In the absence of clear guidance from this Court, confusion in eminent-domain proceedings will to abound.

For the foregoing reasons and those presented by the petitioner, *amicus* respectfully asks that the petition for writ of certiorari be granted.

Respectfully submitted,

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