No. 09-1204

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND WISCONSIN BUILDERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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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?

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IDENTITY AND INTEREST OF *AMICI CURIAE*

National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry.[1] As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations, of which the Wisconsin Builders Association (WBA) is one. About one-third of NAHB's 175,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

The organizational policies of NAHB have long advocated that a property owner must be compensated when government acquires their land or reduces its value by regulation. NAHB's members frequently face state action that eliminates the economically viable use of their property, and it supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party

[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief.

litigant and *amicus curiae* to safeguard the property rights and interests of its members. For example, NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007), and also participated in many other cases before this Court as *amicus curiae* or of counsel. A large number of those cases involved property rights and eminent domain issues, including regulatory takings, due process, and the Fifth Amendment's Public Use Clause.[2] Determining that a

[2] Cases in which NAHB has appeared as an *amicus curiae* or of counsel before this Court include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London,* 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Rapanos v.*

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leasehold interest does not constitute a property interest sends the wrong signal to property owners and holders of such interests. For example, the owner of a retail shopping center would be unable to assert that her tenants hold a valuable property interest in any condemnation that utilizes the undivided fee rule.

WBA is a statewide organization of builders, developers, and remodelers dedicated to the business of constructing residential housing, remodeling, light commercial construction, and related services. A significant part of the WBA's mission is to provide Wisconsin residents access to the housing of their choice and the opportunity to realize the American dream of home ownership. Its members conduct their business affairs with professionalism and skill. The WBA consists of 25 local homebuilder associations and approximately 6,500 members. On behalf of its members, the WBA regularly expresses its position on issues of significance, including questions of property rights and protections. The WBA believes that protecting the rights of Wisconsin residents and businesses to just compensation if their property is taken by eminent domain is crucial.

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United States, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife,* 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States,* 551 U.S. 130 (2008); *Summers v. Earth Island Inst.,* 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Protection Agency*, 129 S. Ct. 1498 (2009); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009).

SUMMARY OF ARGUMENT

The "undivided fee" rule – a rule of convenience under which a court will not value a leasehold interest separately if it is condemned along with the fee simple estate – cannot override the Fifth Amendment's guarantee of just compensation when property is taken.

A uniform standard is sorely lacking and the Wisconsin Supreme Court's rigid application of the undivided fee rule resulted in the literal evaporation of what was acknowledged by all parties to be a valuable property interest. The Private Property and Just Compensation Clauses require more.

Leaseholds are "property" protected from uncompensated takings by the Fifth Amendment, and if the VFW's lease alone had been condemned, there would be no question it would be entitled to compensation and to have a jury determine the lease's value. *See*, *e.g.*, *United States v. General Motors Corp*., 323 U.S. 373, 380 (1945) ("The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.").

The Wisconsin court's application of the undivided fee rule to value that lease at zero as a matter of law simply because the fee simple interest was also being acquired – and to prohibit the VFW from presenting evidence of the lease's actual value to the jury – ignored its status as Fifth Amendment property, entitled to recognition independent of the fee simple interest, and separate valuation.

This Court should grant the writ of certiorari to review the Wisconsin Supreme Court's conclusion that in eminent domain law, somehow the whole can be *lesser* than the sum of its parts.

ARGUMENT

I. LACKING THIS COURT'S GUIDANCE, JUST COMPENSATION JURISPRUDENCE HAS FRACTURED

The Takings Clause provides that "nor shall private property be taken for public use without just compensation." U.S. CONST. AMEND. V. "The critical terms are 'property,' 'taken' and 'just compensation.'" *General Motors Corp*., 323 U.S. at 377.

In the past half-century, this Court has clarified in what circumstances a valuable interest qualifies as "property" for purposes of the Takings Clause. *See*, *e.g.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (interest generated by money deposited in lawyers' trust accounts is property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on monies deposited in court is property); *Babbitt v. Youpee*, 519 U.S. 234 (1977) (the ability to transfer and receive property by descent or devise is property).

This Court has also clarified the standards for when a taking by the eminent domain power is "for public use." *See*, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (takings supported only by claims of

economic development are not always violative of the Public Use Clause); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) ("public use" is coterminous with the police power); *Berman v. Parker*, 348 U.S. 26 (1954) (taking of non-blighted property as part of a larger redevelopment project is not inconsistent with the Public Use Clause).

Guidance regarding the third part of the eminent domain equation, however, has been largely absent. The lack of attention is not the consequence of the law governing compensation in condemnation cases being well-settled, uniformly applied, and truly "just" (as the decision by the Wisconsin Supreme Court makes painfully clear). To the contrary, the long absence of guidance has permitted the majority of the lower courts to wander in the jurisprudential wilderness, and apply dramatically different rules that vary by locale with no discernible criteria or consistency; sometimes, as in the case at bar, with bizarre and inequitable results.[3] *See*, *e.g.*, Gideon Kanner, *And*

[3] Two Wisconsin justices concurred with the result reached by the majority below, while at the same time decrying its injustice. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States v. Redevelopment Auth. of the City of Milwaukee*, 768 N.W.2d 749, 770 (Wis. 2009) (Ziegler, J., concurring) ("While it is often said that bad facts make bad law, this court has not succumbed to that legal axiom in this case despite the absolutely dreadful situation the VFW finds itself in. . . . The VFW claimed its interest in the property was $1.8 million, but pursuant to the unit rule, the VFW was unfortunately left with no money for its interest in the property. As a result, the VFW was left not only with no place to conduct its

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Now, For a Word From the Sponsor: People v. Lynbar, Inc. *Revisited*, 5 U.S.F.L. REV. 39 (1970-71). As the petition correctly notes, the lower courts treat similarly situated cases differently, with some jurisdictions rigidly applying the undivided fee rule to *always* prohibit the separate valuation of lesser property interests, others *never* applying the rule, with still others utilizing the rule in *most* circumstances but refusing to apply it when it would result in a denial of compensation. *See* Pet. 13-17.

Whether the owners of leaseholds are entitled for their interests to be recognized as a matter of baseline Fifth Amendment law, and to be compensated when those interests are confiscated for public use "presents an important phase of the law of eminent domain." *United States v. Petty Motor Co.*, 327 U.S. 372, 373 (1946). The VFW's petition presents an excellent vehicle to revisit an area long deprived of this Court's direction.[4]

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business, but it was left with no money to find a new place to call home.").

[4] More recently, the compensation issue has appeared to be of interest in eminent domain and regulatory takings cases, even when the issue was not presented in the petition. *See*, *e.g.*, Transcript, *Kelo v. City of New London*, No. 04-108, at 21-22 (Feb. 23, 2005) ("JUSTICE KENNEDY: Let me ask you this, and it's a little opposite of the particular question presented. Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person that what we ought to do is to adjust the measure of compensation, so that the owner – the

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II. UNBENDING APPLICATION OF THE UNDIVIDED FEE RULE FAILS TO RESPECT LEASEHOLD INTERESTS AS FIFTH AMENDMENT PROPERTY

State law generally is determinative of whether a particular interest is "property," *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), and Wisconsin law recognizes leaseholds as such. *See Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794, 806 (Wis. 1980) ("[i]t is well settled that a lessee has a property interest; and, when that interest is completely taken by a condemning authority, the

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condemnee – can receive some sort of premium for the development?"); *id.* at 48 ("JUSTICE BREYER: So going back to Justice Kennedy's point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house? Or is he inevitably worse off?"); Transcript, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, No. 08-11, at 18 (Dec. 2, 2009) ("JUSTICE KENNEDY: Let me ask you this question on Florida valuation. Assume you prevail, there's a cause of action for a taking. You have a beachfront area, beachfront home, in which there's a hurricane and there's a loss of the beach and a sudden drop, so that it's now a 60-foot, a 60-foot drop. The State comes in and says the only way they can fix this is to extend the beach and make it a larger beach on what was formerly our submerged land, and it does that, and it has the same rule. Under your view, is the State required to pay you for the loss of your right of contact to the beach, your littoral right, because there's let's say another 100 foot of new beach? Are they entitled to offset that against the enhanced value to your property by reason of the fact that they've saved it from further erosion and have given you a beach where there was none before?").

lessee is entitled to compensation."). Thus, as a matter of federal constitutional law which establishes the baseline under which no state may go, *see Kelo*, 545 U.S. at 489, state law may not deny compensation by a legal fiction if a leasehold is taken. If condemned, a lease must be recognized and valued:

> Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing. . . . The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.

United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945). In *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), this Court held that when property subject to a leasehold is condemned, the lessee's possessory interest is extinguished, but the interest is entitled to be compensated at its fair market value. *Id.* at 378-79. Thus, there is no doubt that if Respondent were to have condemned only the VFW's leasehold interest, and not the fee simple interest, it would be obligated to pay compensation since the courts below could not assume the VFW's lease had no market value. *Veterans of Foreign Wars*, 768 N.W.2d at 752 (the VFW made an offer of proof of the value of its lease).

Yet, the majority below determined that the VFW's lease had no existence as a matter of law, simply because the fee simple interest was also being condemned:

> As we have stated, under the unit rule there is no separate valuation of improvements or natural attributes of the land, and the manner in which the land is owned or the number of owners does not affect the value of the property. When property that is held in partial estates by multiple owners is condemned, the condemnor provides compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest. Simply stated, the unit rule determines the fair market value as if only one person owned the property. When the value of the property is determined, the condemnor makes a single payment for the property taken and the payment is then apportioned among the various owners.

Id. at 758 (footnotes and citations omitted). This is not what would happen in a market sale, and it should not happen in eminent domain. The majority below attempted to support its conclusion by reference to *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). *See Veterans of Foreign Wars*, 768 N.W.2d at 767-68. In *Brown*, this Court held that although the interest generated by Washington's Interest on Lawyers' Trust Accounts (IOLTA) program was property, that property was valueless as a matter

of fact. *Brown*, 538 U.S. at 240. It is one thing for a court to conclude that if property is in fact worthless, that no compensation is "just compensation." However, it is of an altogether different dimension for a court to impose a rule of law prohibiting compensation for a valuable interest, simply because the form in which the property is held makes it less convenient for the court (or more expensive for the condemnor) to value each interest separately. *Veterans of Foreign Wars*, 768 N.W.2d at 758.

The *Brown* rule respected the nature of interest-on-principal as Fifth Amendment property, while recognizing that as a matter of fact its value was zero as a consequence of the way the Washington IOLTA program was structured. *Brown*, 538 U.S. at 239 (the individual deposits made to the IOLTA accounts could not have generated interest). By contrast, the undivided fee rule as applied by the court below assumes the VFW's lease was legally valueless (contrary to reality), and in place of this reality, imposed a legal fiction. *Veterans of Foreign Wars*, 768 N.W.2d at 758 ("Simply stated, the unit rule determines the fair market value *as if* only one person owned the property.") (emphasis added). The application of the undivided fee rule did not merely conclude the VFW's lease was property (but valueless), it determined it was not even property at all. *Veterans of Foreign Wars*, 768 N.W.2d at 772 (Prosser, J., dissenting) ("In short, may the Redevelopment Authority extinguish the leaseholder's rights without any compensation and still comply

with all the constitutional requirements designed to protect private property rights?"). The undivided fee rule is not a constitutional mandate. In *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910), this Court deprived the undivided fee rule of any constitutional pedigree when it held "[t]he Constitution does not require . . . a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole."

The converse is equally correct: when property *is* held as an encumbered whole, the Fifth and Fourteenth Amendments require it – as "property" – to be valued as an encumbered whole.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: May 2010.

Respectfully submitted,

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