

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN DEPARTMENT OF
TRANSPORTATION

Plaintiff-Appellant,

v

RODNEY TOMPKINS and
DARCY TOMPKINS,

Defendants-Appellees.

Supreme Court No. 132983
Court of Appeals No. 256038
Kent County Circuit Court
No. 01-07548-CC

Brief of Amici Curiae
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Michigan Association of Counties
Michigan Townships Association
County Roads Association of Michigan
Michigan Municipal Electric Association

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF BASIS OF JURISDICTION iv

STATEMENT OF QUESTION PRESENTED v

STATEMENT OF FACTS vi

DESCRIPTION OF THE AMICI CURIAE 1

STANDARD OF REVIEW 4

ARGUMENT 4

I INTRODUCTION 4

II AN AWARD OF CONSEQUENTIAL DAMAGES IN THE NATURE OF
WHAT THE DEFENDANTS-APPELLEES HAVE ASSERTED—AND
THE COURT OF APPEALS HAS ENDORSED—FAILS TO PROTECT
TAXPAYERS WHO ULTIMATELY BEAR THE BURDEN OF
COMPENSATING PROPERTY OWNERS IN CONDEMNATION
CASES 5

III THE "INTEGRAL AND INSEPARABLE" EXCEPTION TO THE
CAMPBELL RULE IS CONTRARY TO BOTH SOUND PUBLIC
POLICY AND MICHIGAN JURISPRUDENCE 8

CONCLUSION AND RELIEF REQUESTED 12

TABLE OF AUTHORITIES

<u>CASES</u>	PAGE(S)
<i>Bevan v Brandon Twp</i> , 438 Mich 385; 475 NW2d 37 (1991).....	6
<i>Campbell v US</i> , 266 US 368, 45 S Ct 115; 69 L Ed 328 (1924)	8
<i>Dep't of Transportation v Tomkins</i> , 270 Mich App 153; 715 NW2d 363.....	10, 11
<i>Fitzsimmons & Galvin, Inc v State Hwy Comm'r</i> , 243 Mich 649; 220 NW 881 (1928).....	8, 9, 10
<i>In re Widening of State Assessment Dist Rd No 475</i> , 249 Mich 530; 229 NW 500 (1930).....	8
<i>Kohl v US</i> , 91 US (1 Otto) 367; 23 L Ed 449 (1857)	5
<i>Loomis v Hartz</i> , 165 Mich 662; 131 NW 85 (1911).....	5
<i>Maskery v Univ of Michigan Bd of Regents</i> , 468 Mich 609; 664 NW2d 165 (2003)	4
<i>Mayor of Lansing v Public Service Comm'n</i> , 470 Mich 154; 680 NW2d 840 (2004)	4
<i>Pennsylvania Coal Co v Mahon</i> , 260 US 393; 43 S Ct 158; 67 L Ed 322 (1922)	6
<i>State Hwy Comm'r v Busch</i> , 326 Mich 183, 188-89; 40 NW2d 111 (1949)	10
<i>US v Fuller</i> , 409 US 488; 93 S Ct 801; 35 L Ed 2d 16 (1973).....	6
<i>Walsh v Taylor</i> , 263 Mich App 618; 689 NW2d 506 (2004).....	4
<i>Wayne County v Britton</i> , 454 Mich 608; 563 NW2d 674	8
 <u>STATUTES</u>	
MCL 213.70(2).....	4
MCL 247.651 <i>et seq.</i>	7
 <u>CONSTITUTIONAL PROVISIONS</u>	
Mich Const 1963, art 10, § 2	5
US Const, Am V	5

OTHER AUTHORITIES

Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 Minn L R
1277 (1985).....6

Fields, *Eminent Domain and Land Valuation Litigation: Must Compensation Be
"Just" to Both the Owner and the Condemnor? CLE Course of Study SM006, ALI-
ABA 367 (2007)*6

STATEMENT OF BASIS OF JURISDICTION

The jurisdictional summary in the brief of the Plaintiff-Appellant Michigan Department of Transportation is correct and is adopted by the amicus curiae.

STATEMENT OF QUESTION PRESENTED

By excluding general effects of a project experienced by the public at large from the determination of just compensation for an owner of property that has been subjected to a partial taking and by requiring just compensation for special effects that, standing alone, would constitute a taking of private property, does MCL 213.70(2) balance the interests of property owners and the taxpaying public at large while adhering to principles of just compensation embodied in Const 1963, art 10, § 2?

Plaintiff-Appellant says	"Yes"
Defendants-Appellees say	"No"
Amici Curiae say	"Yes"
The Court of Appeals said	"No"
The Circuit Court said	"Yes"

STATEMENT OF FACTS

The amici curiae Michigan Municipal League Legal Defense Fund, Michigan Association of Counties, Michigan Townships Association, County Roads Association of Michigan and Michigan Municipal Electric Association accept the statement of facts asserted by the Plaintiff-Appellant Michigan Department of Transportation as complete and correct.

DESCRIPTION OF THE AMICI CURIAE

The Michigan Municipal League

The Michigan Municipal League is the principal association of cities and villages in the State of Michigan. It is a non-partisan, non-profit corporation whose central objective is to improve the quality of municipal government within the state by providing technical, educational, and administrative resources to the cities and villages that make up its membership, while increasing public awareness of the functions and needs of local governments in Michigan. The League has over 500 member municipalities, approximately 83% of which are also members of the Michigan Municipal League Legal Defense Fund. The Legal Defense Fund represents the League's member cities and villages in state and federal litigation that may affect the structure, operation, authority, or financial well-being of municipalities within the state.

The County Roads Association of Michigan

The County Roads Association of Michigan ("CRAM") represents the interests and concerns of Michigan's 83 county road agencies. Along with each county road agency, CRAM is working to ensure safe and efficient roads for all who travel in Michigan. CRAM's mission is to promote greater efficiency in the operation of Michigan county road systems through the cooperative efforts of its members. CRAM also works to educate its members and advocate on their behalf and on the behalf of the public at-large in connection with issues that affect Michigan roads.

The Michigan Association of Counties

The Michigan Association of Counties ("MAC") was formed in 1898 to advocate for

the interests of Michigan's county governments. MAC offers the full spectrum of association services that distribute important public information to its members and help protect their interests. Sixteen appointed county commissioners make up MAC's board of directors. MAC's board is the association's decision-making body, and acts on recommendations of MAC Committees. MAC Committees are charged with recommending policy for the association on legislative issues and developing political platforms that explain MAC's positions on important legislative issues.

The Michigan Municipal Electric Association

The Michigan Municipal Electric Association ("MMEA") is Michigan's trade group representing 39 municipally owned electric utilities. As units of local government, the municipal electric systems are nonprofit, community owned and operated, and regulated directly by the municipality and customers they serve. MMEA educates its members and advocates on behalf of municipalities in connection with issues affecting public utilities.

The Michigan Townships Association

The Michigan Townships Association ("MTA") is a non-profit organization formed in 1953 to provide a unified voice for Michigan's township governments. MTA is proud to claim more than 99 percent of the 1,242 Michigan townships as members. The MTA staff and board of directors are committed to helping MTA's 6,500 member township officials govern their townships more efficiently and improve the services they provide to Michigan's four million-plus township residents. Influencing legislation, policy and regulations by representing townships before the Legislature, the executive office and state agencies are at

the heart of MTA's mission. MTA initiates and monitors legislation that is in the best interest of townships and follows it through the legislative process.

STANDARD OF REVIEW

This Court is with an appeal of an order granting summary disposition, which is reviewed *de novo*. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). This case involves matters of statutory and constitutional construction, which are reviewed *de novo*. *Mayor of Lansing v Public Service Comm'n*, 470 Mich 154, 157; 680 NW2d 840 (2004).

ARGUMENT

I INTRODUCTION

In the case at bar, this Court is faced with determining whether the Legislature has fallen short of constitutional requirements relating to just compensation by providing under Section 2 of the Uniform Condemnation Procedures Act, 1980 PA 87, that

[t]he general effects of a project for which property is taken, whether actual or anticipated, that in varying degrees are experienced by the general public or by property owners from whom no property is taken, shall not be considered in determining just compensation. A special effect of the project on the owner's property that, standing alone, would constitute a taking of private property under section 2 of article X of the state constitution of 1963 shall be considered in determining just compensation.

MCL 213.70(2). This case has fundamental implications for the State of Michigan and local governments, as its outcome will have a significant effect on the cost of public projects. If the Court of Appeals' decision is upheld, state entities and local governments will face broad uncertainty as to the costs of public project, although costs will be certain to increase. The amici curiae Michigan Municipal League (Legal Defense Fund), Michigan Association of Counties, Michigan Townships Association, County Roads Association of Michigan and

Michigan Municipal Electric Association submit to this honorable Court that the Court of Appeals' holding, which allows for unbounded and unpredictable awards of just compensation, not only conflicts with constitutional jurisprudence, as the Plaintiff-Appellant has described in its brief, but it also places an inequitable burden on taxpayers, thereby disrupting the balance sought by the common law interpretation of just compensation both at the state and federal levels.

II AN AWARD OF CONSEQUENTIAL DAMAGES IN THE NATURE OF WHAT THE DEFENDANTS-APPELLEES HAVE ASSERTED—AND THE COURT OF APPEALS HAS ENDORSED—FAILS TO PROTECT TAXPAYERS WHO ULTIMATELY BEAR THE BURDEN OF COMPENSATING PROPERTY OWNERS IN CONDEMNATION CASES

Debate over the power of eminent domain, the process by which governments exercise such power and the calculation of just compensation in takings cases typically centers on the individual rights of a property owner or group of property owners, and rightly so. After all, neither the United States Constitution nor the Michigan Constitution confers the power of eminent domain upon the sovereign—it is inherent in state and federal police powers. *See Kohl v US*, 91 US (1 Otto) 367; 23 L Ed 449 (1857); *Loomis v Hartz*, 165 Mich 662; 131 NW 85 (1911). Rather, both establish the core limitation to the sovereign's inherent power to take property for a public purpose: the requirement that no private property may be so taken "without just compensation." Mich Const 1963, art 10, § 2; US Const, Am V. At the federal level, reference to just compensation in the Fifth Amendment is clearly a matter of due process; the Michigan Constitution's treatment of just compensation at Article 10 places it within the realm of property rights (although certainly federal due process concepts apply by application of the Fourteenth Amendment, U.S. Const, Am XIV.) In either case,

the state and federal constitutional framework relating to takings and just compensation begs questions of individual rights. *See, e.g., Pennsylvania Coal Co v Mahon*, 260 US 393; 43 S Ct 158; 67 L Ed 322 (1922); *Bevan v Brandon Twp*, 438 Mich 385; 475 NW2d 37 (1991).

Traditional debate on the subject of just compensation, however, tends to overlook the interests of the taxpaying public, which enjoys the ultimate benefits of a project for which private property is taken and bears the ultimate cost of providing just compensation to property owners. *See, e.g., Durham, Efficient Just Compensation as a Limit on Eminent Domain*, 69 Minn L R 1277 (1985). Legislatures and courts, therefore, are charged not only with protecting individual due process and property rights, but also with balancing those rights against the taxpaying public's interest. *See id.*; *see also* Fields, *Eminent Domain and Land Valuation Litigation: Must Compensation Be "Just" to Both the Owner and the Condemnor?*, CLE Course of Study SM006, ALI-ABA 367 (2007). Governments exercising the power of eminent domain must adequately compensate a property owner subject to a taking, but they are also entrusted with the responsibility of balancing costs and benefits on behalf their constituents. *See* Fields, *supra*, at 1278.

The United States Supreme Court has recognized the economic balancing act intrinsic to takings cases. In *US v Fuller*, the Court was faced with the question of determining just compensation for a landowner subject to a taking of land used for raising cattle. 409 US 488; 93 S Ct 801; 35 L Ed 2d 16 (1973). The land taken had a potential increase in market value due to the availability of government-issued grazing permits, and the landowner sought compensation based on such increased valuation. In rejecting the landowner's theory, the Court observed that "the Government as condemnor may not be required to compensate a

condemnee for elements of value that the Government has created or *that it might have destroyed under the exercise of governmental authority other than the power of eminent domain.*" *Id.* at 492 (emphasis added). Although the facts in *Fuller* involve the creation of additional value by the exercise of some governmental function other than eminent domain, the Court's finding relating to compensation for value destroyed by the exercise of some power other than eminent domain has particular application in the instant case. *Fuller* stands for the principle that a property owner should be compensated for all loss in value directly attributable to a taking, but no more. Any greater compensation represents an over-expenditure of public funds and a windfall to the property owner at the expense of the taxpayers on whose behalf a government entity takes and pays for private property.

Under the *Fuller* rationale, if a property's value is diminished by the effect of circumstances other than the taking itself, even circumstances resulting from government action, no compensation is required. In the case at bar, the Defendant-Appellees seek compensation based not on the taking of their property, but on the Plaintiff-Appellant's exercise of its direct power to construct highway projects under 1951 PA 51, MCL 247.651 *et seq.* The exercise of such power falls wholly outside the Plaintiff-Appellant's eminent domain powers, and the effects at issue on the Defendants-Appellees' property are unrelated to a taking of private property for valuable public use. Any compensation for such effects would therefore represent an expenditure of taxpayer dollars in exchange for no value.

Michigan courts have similarly recognized that the calculation of just compensation has implications beyond its effect on an individual property owner's rights. Property owners subject to takings should not be entitled to a windfall at the public's expense. This Court has

held that "[j]ust compensation should neither enrich the individual at the expense of the public nor the public at the expense of the individual. The injured party whose lands are taken should be left in as good a position as if his lands had not been taken." *In re Widening of State Assessment Dist Rd No 475*, 249 Mich 530, 501; 229 NW 500 (1930); see also *Wayne County v Britton*, 454 Mich 608, 622; 563 NW2d 674; *Fitzsimmons & Galvin, Inc v State Hwy Comm'r*, 243 Mich 649; 220 NW 881 (1928). This Court's recognition of the public's interest in the determination of just compensation further supports the notion that the proper calculation should be limited to loss attributable to the taking itself.

III THE "INTEGRAL AND INSEPARABLE" EXCEPTION TO THE *CAMPBELL* RULE IS CONTRARY TO BOTH SOUND PUBLIC POLICY AND MICHIGAN JURISPRUDENCE

In *Campbell v US*, the United States Supreme Court was faced with the question of whether a landowner subject to a partial taking should receive compensation based on the diminution in value of land not taken, which diminution resulted from the government's activities on land taken from surrounding properties. 266 US 368, 45 S Ct 115; 69 L Ed 328 (1924). The Court followed well-established precedent in holding that the plaintiff landowner's compensation was to be limited to damage directly caused by the taking of his own property. *Id.* at 371. The *Campbell* Court's decision essentially incorporates much of the analysis in *Fuller, supra*, and related cases—specifically the notion that in a taking case an award of compensation *not related to the taking itself but to some other effect of a given public project* constitutes a market failure because such compensation confers a benefit to the landowner in excess of the value of the public good purchased from that property owner. The *Campbell* Court observes the central flaw in the logic underlying the assertion that the

property owner in that case was entitled to damages beyond those directly attributable to the taking:

if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply; and there is no statute applicable in this case that enlarges the constitutional right. If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property.

Id. at 371-72. The above-quoted passage identifies the windfall accruing to a property owner subject to a taking who is compensated for damage beyond what is caused by the taking itself—as the Defendants-Appellees and others similarly situated will be if the Court of Appeals' decision stands. As both parties acknowledge in their briefs before this Court, there is no question that a property owner whose land is not taken but suffers a diminution in value due to a public project is entitled to no compensation. Under the Court of Appeals' decision, if that property owner's neighbor owns a similar parcel of land and suffers an equal diminution in value but in addition has even a minor portion of her land taken, the neighbor is entitled not only to compensation for the taking itself, but also compensation for the diminution in value due to the project. The net difference between the harm suffered by the former owner and the latter owner is equal to the value of the latter's taken land, which is also equal to the value accruing to the public, as discussed in Section II, *supra*. The latter property owner, however, is compensated for much more. This scenario represents a failure of market and equity principles, which the *Campbell* Court recognized.

Instead of following the core analysis in *Campbell*, the Court of Appeals seized on an exception to *Campbell* that finds no support in Michigan law and is based on what amounts to dicta in the Supreme Court's opinion:

The land taken from plaintiff was not shown to be indispensable to the construction of the nitrate plant or to the proposed use of the other lands acquired by the United States. The damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others.

Id. From this language grew the "integral and inseparable" exception to *Campbell*. The appeals court cites the decisions of courts outside of Michigan in support of the conclusion that to the extent that land taken constitutes an "integral and inseparable part of a single use to which the land is taken and adjoining land is put" the property owner may recover the full damage to the remaining property *attributable to the improvement* (not the taking itself). *Dep't of Transportation v Tomkins*, 270 Mich App 153, 168; 715 NW2d 363 (citing *Andrews v Cox*, 129 Conn 475, 482; 29 A2d 587 (1942); *City of Crookston v Erickson*, 244 Minn 321, 327; 69 NW2d 909 (1955)).

The Court of Appeals' reliance on the "integral and inseparable" exception to *Campbell* is out of step with Michigan jurisprudence. In *State Hwy Comm'r v Busch*, this Court held that owners of property subject to a partial taking for a road widening project were not entitled to compensation for diminution in value to their property due to the alteration of surrounding lands. 326 Mich 183, 188-89; 40 NW2d 111 (1949). The *Busch* Court invoked *Campbell*, noting

Had the road improvement project ended at the south boundary of defendants' farm, they could not have obtained redress for the depreciation in the value of their realty due to the proximity of the highway to the house. It was only for the taking of a part of their own land that they would be entitled to receive just

compensation for the damage to the remainder, and the extent of recovery may not be thereby enlarged so as to include items otherwise not compensable. . . . The general rule applied when part of a parcel of land is condemned is that just compensation does not include the diminution in the value of the remainder caused by the acquisition of the adjoining lands of others for the same undertaking.

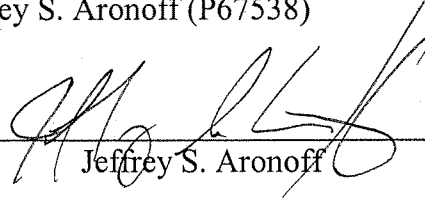
Id. at 188-89 (citing *Campbell, supra*, and *Johnson Consolidated Gas, E L & P Co*, 187 Md 454; 50 A2d 918; 170 ALR 721 (1947)). The Court of Appeals justified its decision to apply the foreign "integral and inseparable" exception by determining that *Busch* is distinguishable from the instant case. *Tompkins, supra*, at 163. The court based its distinction on the fact that the Defendants-Appellees are not claiming damages from the taking of neighboring land, but rather the diminution in value to their own remaining land based on the effects of the highway project at issue. *Id.* Amici curiae submit to this Court that the Court of Appeals' finding in this regard is a distinction without a difference, and the Court of Appeals offers no rationale to justify its finding that the factual difference between *Busch* and the instant case has legal significance. Indeed the facts differ as the appeals court suggests, however the determinative principal identified in *Campbell* and *Busch* remains: Where a taking occurs, diminution in the value of remainder property resulting from the effects of the public project for which the taking occurred, but not resulting from the taking itself are non-compensable. The fact that the non-taking-related diminution results from "highway effects" rather than the taking or alteration of surrounding property does not affect the conclusion that such diminution is outside the scope of what the property owner has lost and the public has gained by exercise of the power of eminent domain. As such *Campbell* and *Busch* remain applicable, trumping the Court of Appeals' recognition of the foreign "integral and inseparable" exception.

CONCLUSION AND RELIEF REQUESTED

Based upon the foregoing arguments and authorities, the amici curiae respectfully request that this Court reverse the Court of Appeals' decision.

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