ENSURING JUST COMPENSATION: ENDING LOWBALL OFFERS IN EMINENT DOMAIN

NOTE

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ABSTRACT

The Constitution's Takings Clause guarantees landowners the right to receive just compensation—defined as fair market value—when the government takes their property. However, many landowners frequently receive less than that. The government[1] typically attempts to negotiate a voluntary transfer of property before initiating eminent domain proceedings, and, because nearly all the leverage is stacked in favor of the government and against the landowner, the government can and often does make offers for less than fair market value.

When the government negotiates for a voluntary transfer, the landowner faces a choice: accept an initial "lowball offer" or dispute the government's appraisal in a subsequent condemnation proceeding and incur litigation expenses. Either way, the landowner receives less than fair market value. This Essay discusses the problem of under-compensation in condemnation proceedings as a result of lowball offers and proposes an attorney-fee solution that will restore landowners' constitutional right to just compensation. Requiring the government to pay the landowner's attorney fees encourages the government to make initial offers that accurately reflect property values, and, when the initial offer is still too low, gives landowners an opportunity to seek just compensation undiminished by litigation costs.

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[1] For the sake of simplicity and clarity, this Essay refers to all condemning authorities as "the government." But eminent domain authority is not always directly exercised by the government. Non-governmental entities may also condemn property when eminent domain authority is delegated to them by the government.

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I. INTRODUCTION

"It represents a dream to me . . . [t]he American dream," said Ociel Mendoza, speaking about his ranch in La Grulla, Texas.[2] Mendoza's dream was jeopardized when he learned that the federal government planned to take a portion of his ranch for the Trump administration's effort to construct a wall along the southern border of the United States.[3] By July 2020, the Trump administration had acquired at least 135 tracts of private property to construct the wall and intended to acquire at least 991 additional tracts.[4] After election day in November, the Trump administration accelerated its efforts to condemn even more private property for the border wall,[5] despite then-President-elect Joe Biden's promise to cease construction of the wall upon taking office in 2021.[6]

Mendoza and other landowners whose property has been condemned for the wall believe the government offered them less than what their properties are worth.[7] Based on the federal government's history of condemning property for barriers on the southern border, their concerns

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[2] Perla Trevizo & Jeremy Schwartz, *The Trump Administration Awarded Border Wall Contracts to Build on Land it Doesn't Own in Texas*, TEX. TRIB. (Dec. 23, 2020), https://www.texastribune.org/2020/12/23/trump-border-wall-land-texas/.

[3] *Id.*

[4] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-114, SOUTHWEST BORDER: INFORMATION ON FEDERAL AGENCIES' PROCESS FOR ACQUIRING PRIVATE LAND FOR BARRIERS (2020).

[5] Mark Reagan, *2020 Saw Marked Increase in Border Wall Lawsuits,* MONITOR (Jan. 2, 2021), https://myrgv.com/the-monitor/2021/01/02/2020-saw-marked-increase-in-border-wall-lawsuits/ ("In 2020, the government filed 102 lawsuits [in Cameron, Hidalgo, and Starr counties in Texas], nearly 10 times the total since it began filing the suits . . . .And nearly half, 42, of these lawsuits have been filed after Nov. 3, when Trump lost his re-election bid to President-elect Joe Biden."); Trevizo & Schwartz, *supra* note 2 ("The Trump administration's legal efforts have only intensified, with nearly 40 new eminent domain lawsuits filed in the Southern District of Texas since Election Day.").

[6] Camilo Montoya-Galvez, *New Report Details Trump Effort to Seize Thousands of Acres of Private Land for Border Wall*, CBS NEWS (Nov. 24, 2020), https://www.cbsnews.com/news/trump-border-wall-plans-private-land-seizure/.

[7] Trevizo & Schwartz, *supra* note 2.

are well founded. An investigation by ProPublica and the Texas Tribune concluded that in 2007, the last time a border fence was under construction, the Department of Homeland Security "issued low-ball offers based on substandard estimates of property values."[8] The investigation also concluded that the harmful impacts of this practice fell disproportionately on landowners who owned smaller parcels and could not afford lawyers.[9] This practice was repeated by the Trump administration when it condemned property for its border wall.[10]

Before the government initiated a condemnation proceeding against Mendoza to acquire part of his ranch, it took the standard step of attempting to negotiate a voluntary sale of the property.[11] The government initially offered about $93,000 as compensation for the condemned land.[12] Mendoza then faced a decision—accept the government's offer, which he believed to be significantly below his property's fair market value, or dispute the amount knowing that any compensation awarded would be diminished by his litigation expenses. Either way, he would receive less than what he believed was the fair market value of his property. Mendoza chose not to accept the offer, and the government initiated eminent domain proceedings.[13] After Mendoza failed to file a response by the required deadline, the court granted the government's request to take possession of Mendoza's property.[14] To this day, it has not been determined whether the government provided "just compensation."

Sixteen years have passed since the United States Supreme Court expanded the government's ability to exercise its eminent domain power

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[8] T. Christian Miller et. al., *The Taking: How the Federal Government Abused Its Power to Seize Property for a Border Fence*, TEX. TRIB. (Dec. 14, 2017), https://www.texastribune.org/2017/12/14/border-land-grab-government-abused-power-seize-property-fence/.

[9] *Id.* ("Larger, wealthier property owners who could afford lawyers negotiated deals that, on average, tripled the opening bids from Homeland Security. Smaller and poorer landholders took whatever the government offered—or wrung out small increases in settlements. The government conceded publicly that landowners without lawyers might wind up shortchanged, but did little to protect their interests.").

[10] Fiona Harrigan, Opinion, *Biden Stops Trump's Border Wall. But Property Owners Might Never Get their Land Back*, MIAMI HERALD (Feb. 15, 2021), ("The Department of Homeland Security frequently offered low bids to landowners—bids that wealthy folks could negotiate up with the help of lawyers and that poorer folks simply had to accept."); Trevizo & Schwartz, *supra* note 2 ("Noe Muñiz Jr. said the family has been going through the process without an attorney because it can't afford to pay one.").

[11] Trevizo & Schwartz, *supra* note 2.

[12] *Id.* The government's $93,000 initial "offer" came in the form of a deposit that was accessible to Mendoza. This is known as a "quick take." *See infra* notes 33-35 and accompanying text.

[13] United States v. 2.574 Acres of Land, No. 7:20-CV-00253, 2020 WL 7407316, at *1 (S.D. Tex. Dec. 17, 2020); Trevizo & Schwartz, *supra* note 2 (The government's latest offer for Mendoza's property was $136,000, which still fell short of the $200,000 he believes it is worth).

[14] *2.574 Acres of Land*, 2020 WL 7407316, at *1.

in *Kelo v. City of New London*.[15] In that case, the Court addressed the meaning of "public use" as it is used in the Takings Clause of the Fifth Amendment, which guarantees that "private property [shall not] be taken for public use, without just compensation."[16] The Court held that the phrase "public use" encompassed any use of the property that served a public purpose, even when property was condemned and subsequently transferred to another private party.[17] This holding significantly expanded the category of acceptable reasons for which the government can exercise its eminent domain authority and left most landowners powerless to object when the government decides to condemn their property. It also increased opportunities for eminent domain abuse, the effects of which fall disproportionately on minority communities.[18]

Unable to escape most condemnation actions as a result of *Kelo*, the last line of defense for landowners is that the Takings Clause also guarantees just compensation to a landowner when her property is condemned.[19] However, the *Kelo* Court did not address the question of what constitutes just compensation.[20] The majority left in place the Court's existing rule from *Kirby Forest Industries v. United States* and other prior decisions: that just compensation is measured using the property's "fair market value," defined as "what a willing buyer would pay in cash to a willing seller at the time of the taking."[21] Most states have similarly interpreted the takings clauses in their constitutions and measure just compensation using fair market value.[22]

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15 Kelo v. City of New London, 545 U.S. 469, 483-84 (2005).

16 U.S. CONST. amend. V.

17 *Kelo*, 545 U.S. at 485 ("[T]here is no basis for exempting economic development from our traditionally broad understanding of public purpose . . . .Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.").

18 THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE: A BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS iii-iv (2014) [hereinafter CIVIL RIGHTS COMMISSION REPORT], https://www.usccr.gov/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf (discussing how the use of eminent domain to improve "blighted" areas is often a façade for takings that target minority communities).

19 U.S. CONST. amend. V.

20 *Kelo*, 545 U.S. at 489 n.21.

21 467 U.S. 1, 10 (1984); *see also* United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984); United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979); Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949); United States v. Petty Motor Co., 327 U.S. 372, 377 (1946); United States v. General Motors Corp., 323 U.S. 373, 379 (1945); Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 285 (1943); United States v. Miller, 317 U.S. 369, 374 (1943); McCandless v. United States, 298 U.S. 342, 345 (1936); Olson v. United States, 292 U.S. 246, 255 (1934).

22 *See*, *e.g.*, Helmick Family Farm, LLC v. Comm'r of Highways, 832 S.E.2d 1, 5 (Va. 2019); Borough of Harvey Cedars v. Karan, 70 A.3d. 524, 526-27 (N.J. 2013); City of Devil's Lake v. Davis, 480 N.W.2d 720, 725 (N.D. 1992); C. Jarrett Dieterle, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*, 17 FEDERALIST SOC'Y

This last line of defense is failing landowners, as they are frequently being compelled to accept less than fair market value for their property because of the incentive structure in the current condemnation process. The government typically must attempt to negotiate a voluntary transfer of property before commencing formal condemnation proceedings. This is initiated by making an offer to purchase the landowner's property for a certain amount.[23] Unlike a negotiation between private parties, however, a landowner's rejection of the initial offer does not mean the parties simply go their separate ways. Instead, a landowner's rejection means the government will proceed to take the property anyway using eminent domain. Because of the government's vastly superior bargaining position, there is nothing to stop it from offering less than fair market value in the initial offer. These "lowball" offers are frequently accepted[24] because the landowner has no way to challenge the offer without incurring unreimbursed litigation costs in a subsequent condemnation proceeding, thereby facing the same diminution in compensation as if they had accepted the lowball offer in the first place. This failure to provide just compensation also disproportionately affects minority groups.[25]

Ociel Mendoza and his neighbors along the southern border might find relief if President Biden fulfills his campaign promise to halt construction of the border wall. On President Biden's first day in office, he signed an executive order effectuating an immediate pause on wall construction.[26] He has not, however, withdrawn pending eminent domain lawsuits.[27] The Biden administration has even stated that it could resume some border wall construction to plug some "gaps."[28] But even if these landowners are ultimately saved by the project's cancellation, the property

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REV. 38, 39 (2016) ("States have traditionally interpreted just compensation under state constitutions in the same way.").

23 *See infra* note 36 and accompanying text.

24 *See* Dieterle, *supra* note 22, at 41 ("Many potential examples of [low initial offers] go unreported because landowners accept the government's first offer, even if they view it as inadequate.").

25 CIVIL RIGHTS COMMISSION REPORT, *supra* note 18 (statement of Ilya Somin) ("[A]lthough the governing entities financially compensate most of the displaced [minority] property owners, they rarely, if ever, fully cover their losses, leaving the victims of eminent domain worse off than before.").

26 Nick Miroff & Arelis R. Hernandez, *Biden Orders a 'Pause' on Border Wall Construction, Bringing Crews to a Halt*, WASH. POST (Jan. 20, 2021), https://www.washingtonpost.com/national/biden-border-wall-executive-order/2021/01/20/5f472456-5b32-11eb-aaad-93988621dd28_story.html.

27 Gus Bova, *'Not Celebrating Yet': South Texans Wait for Biden to Cancel Trump's Wall*, TEX. OBSERVER (Mar. 10, 2021), https://www.texasobserver.org/not-celebrating-yet-south-texans-wait-for-biden-to-cancel-trumps-wall/.

28 Stephen Dinan, *DHS May Restart Border Wall Construction to Plug 'Gaps'*, WASH. TIMES (Apr. 5, 2021), https://www.washingtontimes.com/news/2021/apr/5/dhs-may-restart-border-wall-construction-plug-gaps/.

condemnations at the southern border are merely one example of the lowballing problem. Landowners across the country continue to face the prevalent practice of lowball offers in eminent domain actions.[29]

In response, this Essay argues that requiring the government to pay the landowner's attorney fees will substantially improve the lowballing problem. Part II of this Essay discusses the common shape of the condemnation process, including the standard (and often legally required) step that the government attempt to negotiate a voluntary transfer before initiating condemnation proceedings. Part III discusses how this process, coupled with the government's superior bargaining position, has led to the unfair practice of lowballing. Part IV identifies a solution to the lowballing problem, which would require the government to pay the landowner's attorney fees in a condemnation proceeding. Part V concludes.

II. THE CONDEMNATION PROCESS

Many think about the condemnation process in terms of the formal judicial proceeding by which the government actually transfers title of an individual landowner's property to itself. While federal and state constitutional provisions provide the basic framework for eminent domain, the mechanics of the process are governed by statute, and thus can vary from jurisdiction to jurisdiction. In most jurisdictions and at the federal level, however, the general steps are the same.[30] Formal condemnation proceedings are initiated when the government files a "complaint in condemnation" in the trial court.[31] The government must also provide formal notice to the landowner, who may respond by filing an answer.[32] The government may then take possession of the property. This can occur even prior to trial through a "quick take."[33] The quick take process allows the government to deposit compensation for the property based on its own appraisal in a fund accessible to the landowner and immediately take possession of the property.[34] At trial, the court will

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[29] *See infra* Part III.

[30] *See*, *e.g.*, Kirby Forest Indus. v. United States, 467 U.S. 1, 3-4 (1984).

[31] *See, e.g.*, FED. R. CIV. P. 71.1(c); IND. CODE § 32-24-1-4 (2002); *Kirby Forest*, 467 U.S. at 4.

[32] *See, e.g.*, FED. R. CIV. P. 71.1(d)-(e); CAL. CIV. PROC. CODE § 1250.320 (West 1976).

[33] *Kirby Forest*, 467 U.S. at 4-5; Dieterle, *supra* note 22, at 40-41 ("This accelerated process allows the condemning authority to enter the property and start its project before condemnation proceedings are formally instituted, which can be important for time-sensitive government projects that cannot wait several years for an eminent domain case to reach its conclusion. In most quick-take situations, if the landowner refuses the government's initial offer, the government will file a certificate of take with the local court where the land is located, as well as a deposit equal to the government's estimate of the property's value. The condemning authority is then required to bring a timely condemnation proceeding against the property.").

[34] Dieterle, *supra* note 22, at 40.

determine compensation, measured by the fair market value of the property, and transfer title from the landowner to the government.[35]

While this accurately describes the formal condemnation proceeding, the process actually begins much earlier. In nearly every jurisdiction, the government is required to attempt to negotiate a voluntary transfer of the property before initiating formal condemnation proceedings.[36] While the precise requirements at this preliminary negotiation stage may vary, generally, the government presents the landowner with an offer to buy his property prior to any formal condemnation proceeding. This initial offer is typically based on an appraisal performed either by an appraiser employed by the condemning authority or by an independently hired appraiser.[37] In many cases, the landowner accepts the government's initial offer, and formal condemnation proceedings never occur.[38]

On its face, this might look like any other instance of negotiation between private parties. It could not, however, be further from it. Unlike the landowner who can refuse to sell if the interested buyer's offer is not satisfactory, the landowner here knows he ultimately cannot refuse.[39] If he does not accept the government's offer, a condemnation proceeding will commence, and his only opportunity for increased compensation will be in the courtroom. His decision, then, is whether to accept the government's initial offer or to dispute the amount by going through the condemnation proceeding.

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[35] *See*, *e.g.*, FED. R. CIV. P. 71.1(h); *Kirby Forest*, 467 U.S. at 4, 10; THOMSON REUTERS, FEDERAL PROCEDURAL FORMS § 13.11 (2019), https://1.next.westlaw.com/Document/I51ada9af185311dcbd6d8fdf97dafff2/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default).

[36] *See*, *e.g.*, 735 ILL. COMP. STAT. 30/10-5-15(d)(2)-(3) (2007); TEX. PROP. CODE ANN. § 21.0113 (West 2011); VA. CODE ANN. § 25.1-204 (West 2003); Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 105 (2006).

[37] W. Harold Bigham, "*Fair Market Value," "Just Compensation," and the Constitution: A Critical View*, 24 VAND. L. REV. 63, 76 (1970).

[38] *See* Dieterle, *supra* note 22, at 41 ("Many potential examples of [low initial offers] go unreported because landowners accept the government's first offer, even if they view it as inadequate.").

[39] Danielle B. Ridgely, *Will Virginia's Eminent Domain Amendment Protect Private Property?*, 26 REGENT U. L. REV. 297, 322 (2013) ("The property owner faces an uneven playing field. The government, naturally, will not offer more than the property's fair market value and will likely argue for a lower amount. The government's access to eminent domain gives the government more leverage in negotiations; thus, property owners are automatically disadvantaged."); Garnett, *supra* note 36, at 127 ("Precondemnation negotiations really do occur 'in the shadow of the law.' . . . [B]oth parties to the negotiations understand that an objecting property owner cannot ultimately say no.").

III. THE LOWBALLING PROBLEM

The government often recognizes that the threat of a condemnation proceeding allows it to purchase property for a bargain. While most government officials are not so candid, one land acquisition officer made the following statement to prospective condemnees that accurately reflects the reality of the respective positions the government and the landowner occupy during a pre-condemnation negotiation:

> Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don't have to accept this 30 cents on the dollar . . . .After a couple of years if you won't take 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.[40]

When faced with a lowball offer, the landowner's decision is a matter of predictive math. A landowner simply determines whether the difference between the government's lowball offer and what she believes the fair market value to be is greater than the amount she would be required to spend on litigation expenses if she were to challenge the initial offer. Even if the landowner knew with complete certainty that she would be awarded what she thinks is the actual fair market value of her property at trial, the calculation would be the same.[41] "A rational property owner therefore will not force the government to follow through on its threat to condemn her land unless the expected value of the valuation proceeding—that is, the award minus these due process costs—exceeds the government's offer."[42] In many cases, even the threat of incurring litigation costs is sufficient to dissuade the landowner from pursuing

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[40] Althaus v. United States, 7 Cl. Ct. 688, 691-92 (1985).

[41] Bigham, *supra* note 37, at 77 n.41 ("Even when there is a legitimate difference of opinion between the experts employed by the landowner and those used by the condemning authority, the net compensation received by the landowner, if it develops that he is correct and the agency is wrong, must be diminished by the attorney's fee and other expenses.").

[42] Garnett, *supra* note 36, at 128. Many condemnation lawyers use a $75,000-$100,000 range. If the difference between the initial offer and the believed fair market value is less than $75,000, many lawyers advise the landowner to accept the initial offer. *See* Gideon Kanner, *[Un]Equal Justice Under Law: The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1105 (2007).

litigation. The landowner will instead submit to the government and accept the initial offer.[43]

The problem of lowballing has been called "the property rights issue of our time."[44] Examples of lowballing in condemnation proceedings are recent and widespread. Several condemnations were required for the construction of the Permian Highway pipeline in Texas, which began full commercial service on January 1, 2021.[45] Many of the initial offers were found to be below fair market value when challenged by landowners:

> In [one landowner's] case, an offer of $45,000 for a 3-acre strip of land turned into an award of $1.2 million after the hearing. In Blanco County, a landowner who was told by [the government] that his land was worth $20,000 was awarded $1.3 million. Another landowner in Gillespie County turned an offer of $85,000 into an $11 million award.[46]

Other examples have also been reported in recent years:

- The owner of a used car dealership in Hillside, New Jersey, received an initial offer of $40,000 for the front strip of his property, which the Department of Transportation sought in order to widen the road.[47] The owner of the dealership challenged the initial offer in court and was awarded $750,000 by a jury.[48]

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[43] Barry L. Friedman, Note, *Attorneys' Fees in Condemnation Proceedings*, 20 HASTINGS L.J. 694, 696 (1968) ("Consequently, following the announcement of the condemnor's intent to condemn and the initial offer to purchase, the condemnee will be prejudiced during any subsequent negotiations due to a fear of incurring substantial litigation expenses in the event that he and the condemnor are unable to reach a settlement. It is this fear that compels many landowners to settle out of court for less than just compensation: they wish to avoid what may be a *greater* loss occasioned by a jury award of the fair market value, from which is to be deducted the costs of the litigation.") (emphasis in original).

[44] Lynn Brezosky, *Farmers' Group Pushing for Transparency in Land Acquisitions*, SAN ANTONIO EXPRESS-NEWS, (Apr. 19, 2019), https://www.expressnews.com/business/local/article/Farmers-group-pushing-for-transparency-in-land-13781974.php (statement of the Texas Farm Bureau spokesman).

[45] J. Robinson, *Permian Highway Enters Service, Brightening Gas Market Outlook for West Texas*, S&P GLOBAL PLATTS (Jan. 4, 2021), https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/010421-permian-highway-enters-service-brightening-gas-market-outlook-for-west-texas.

[46] Mose Buchele, *Hill Country Landowners Say Kinder Morgan is Lowballing Them. Special Courts are Agreeing*, KUT 90.5 (Nov. 25, 2019), https://www.kut.org/energy-environment/2019-11-25/hill-country-landowners-say-kinder-morgan-is-lowballing-them-special-courts-are-agreeing.

[47] Larry Higgs, *Battle Over Slice of Highway Ends Up in Court and Land Owner Wins $750K from N.J.*, NJ.COM (Feb. 20, 2020), https://www.nj.com/traffic/2020/02/battle-over-slice-of-highway-ends-up-in-court-and-land-owner-wins-750k-from-nj.html.

[48] *Id.*

- In Spring Valley, New York, a court affirmed an award for $469,114 in the condemnation of a childcare center after the care center was initially offered only $90,960.[49]
- In Overland Park, Kansas, the government offered a landowner $9,000 to take a portion of his property in order to improve a road, and after the landowner rejected the offer, appraisers awarded $19,000 for the property.[50]
- In Houston, Texas, the state Department of Transportation initially valued a landowner's parcel at $3.2 million, but a jury awarded the landowner roughly four times the state's initial offer.[51]
- In New Orleans, Louisiana, the Louisiana Supreme Court affirmed an award of $34 million for a property that was initially valued at only $16 million.[52]
- In Brunswick, North Carolina, a jury awarded $2.6 million for a condemned property, which was almost twenty times the state's initial offer.[53]
- In Bloomfield, New Jersey, the township initially offered $400,000 for the taking of an old railroad station, and a jury later reached a verdict awarding $1.6 million for the property.[54]
- In West Jordan, Utah, the state Court of Appeals unanimously affirmed an award of $9 million for a condemned property, as well as nearly $4 million plus interest for damages to the remaining property after the state Department of Transportation offered only $5.2 million and called the property "nearly worthless dirt."[55]

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[49] Steve Lieberman, *Spring Valley Must Pay Former Day Care Center $233K for Property Seizure: State Court*, J. NEWS (May 7, 2019), https://www.lohud.com/story/news/local/rockland/spring-valley/2019/05/07/spring-valley-day-care-payment/1130260001.

[50] Sarah Plake, *Homeowner Wins Lawsuit, Doubles Award in Overland Park Eminent Domain Case*, KSHB KAN. CITY (Apr. 24, 2019), https://www.kshb.com/news/local-news/homeowner-wins-lawsuit-doubles-award-in-overland-park-eminent-domain-case.

[51] *Eminent Domain Lawsuit Results in $12.2 Million Jury Award to Property Owner, Reports Deal Sikes*, BUS. WIRE (Feb. 25, 2019), https://www.businesswire.com/news/home/20190225005849/en/Eminent-Domain-Lawsuit-Results-12.2-Million-Jury.

[52] Ramon Antonio Vargas, *St. Bernard Parish Can Keep Seized Riverside Facility, But at More Than Twice the Cost*, NEW ORLEANS ADVOC. (Feb. 22, 2019), https://www.nola.com/news/article_5faf29cd-fc95-527c-af24-d9d0c7a4a100.html.

[53] Bill Cresenzo, *Landowners Win $2.6M Verdict in Eminent Domain Case*, N.C. LAW. WKLY. (Jan. 15, 2019), https://nclawyersweekly.com/2019/01/15/landowners-win-2-6m-verdict-in-eminent-domain-case.

[54] Rob Jennings, *Town's Got to Pay for Land it Seized—$1.1M More Than it Wanted to*, NJ.COM (Jan. 14, 2019), https://www.nj.com/essex/2019/01/towns-got-to-pay-for-land-it-seized-11m-more-than-it-wanted-to.html.

[55] Utah Dep't of Transp. v. LEJ Invs. LLC, 437 P.3d 569, 570 (Utah Ct. App. 2018); David Wells, *Appeals Court Upholds $15 Million Judgment Against UDOT in Eminent Domain Case*, FOX 13 (Nov. 13, 2018), https://fox13now.com/2018/11/13/appeals-court-upholds-15-million-judgment-against-udot-in-eminent-domain-case/.

These are just some of the many examples that can be found,[56] and they cannot be brushed aside as isolated occurrences.[57] While it is somewhat difficult to study the prevalence of lowballing as an empirical matter,[58] existing studies support the conclusion that lowballing is pervasive.[59] Perhaps the most widely cited study on this problem—the Nassau County Study—was conducted by Curtis Berger and Patrick Rohan.[60] This study analyzed the condemnation practices in Nassau County, New York, based on unique access to the county's condemnation files provided by the County Attorney.[61] In cases where the landowner chose to settle with the government, the study found that "9.1 percent received an amount higher than, 6.6 percent an amount equal to, and 84.4 percent an amount less than the county's lowest appraisal."[62] The authors concluded that in Nassau County, "gross underpayment can now be substantiated" and that "the practices and attitudes of Nassau County, as we have reported them, may indeed typify those of condemnors elsewhere."[63] Another study by the Government Accountability Office noted that "[o]wners in [a

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[56] *See*, *e.g.*, Crystal Genteman, Note, *Eminent Domain and Attorneys' Fees in Georgia: A Growing State's Need for a New Fee-Shifting Statute*, 27 GA. ST. U. L. REV. 829, 858 n.201 (2011); Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887-88 (2007); Garnett, *supra* note 36, at 127 n.157. Gideon Kanner maintains a section of his blog which is dedicated to identifying examples of lowballing practices throughout the country. Gideon Kanner, GIDEON'S TRUMPET, http://gideonstrumpet.info/?s=low+ball+watch (last visited Apr. 17, 2021).

[57] Dieterle, *supra* note 22, at 42 ("One or two cases could be chalked up to a few 'bad apple' local governments, but the wave of sandbagging cases around the country suggests that many governments are engaged in a systematic deprivation of the Fifth Amendment's fundamental protections."); *See also*, Bell & Parchomovsky, *supra* note 56, at 887 ("Private property rights champions and eminent domain practitioners caution, however, that the settlement amount offered by the government in pretakings negotiations is much lower than the fair market value.").

[58] Garnett, *supra* note 36, at 126 ("There are significant impediments to gaining a more complete understanding of the bargains struck between the government and the potential targets of eminent domain. The opaque, decentralized nature of the bargaining process—the eminent domain power is exercised by tens of thousands of different state, local, and federal agencies—makes data collection and analysis extremely difficult."); Dieterle, *supra* note 22, at 41 ("Ultimately, it is hard to know the true extent of the problem. Many potential examples of it go unreported because landowners accept the government's first offer, even if they view it as inadequate.").

[59] Bell & Parchomovsky, *supra* note 56, at 888 ("One of the few empirical studies on the subject found widespread and intentional undercompensation in takings settlements."); Bigham, *supra* note 37, at 77 n.42.

[60] Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967).

[61] *Id.* at 431.

[62] Friedman, *supra* note 43, at 705 n.78 (citing Berger & Rohan, *supra* note 60); *see also* Bell & Parchomovsky, *supra* note 56, at 888 ("Berger and Rohan showed that 85.7% of completed takings in their study were finalized by a settlement agreement, 88.3% of the settlements resulted in the claimants receiving less than the County's mean appraisal for their land, and 29.3% of claimants received less than 70% of the mean appraised value.").

[63] Berger & Rohan, *supra* note 60, at 457-58.

particular] property rights organization who challenged initial offers reported receiving an average of 40 percent more in compensation than the initial offer."[64]

Some newspapers have reached similar conclusions. In 2003, the *Minneapolis Star Tribune* analyzed the records of the Minnesota Department of Transportation, identifying cases in which disputes over fair market value had been decided by court-appointed commissions.[65] The investigative reporter found that in two-thirds of these disputes, the commission[66] determined that the fair market value was at least 20% more than the initial offer, and that in one-third of the disputes, fair market value was at least double the department's initial offer. In 1999, a study by the *Salt Lake Tribune* concluded that "of the Utah property owners who rejected condemnor offers and insisted on valuation trials to establish their compensation, 80% recovered more in court than the condemnor's offers, with the average increase averaging 40% over those offers."[67]

Some might claim that both the anecdotal examples and the data from these studies simply demonstrate that juries are biased in favor of landowners. This claim about juries, however, does not appear to be accurate.[68] The available evidence suggests that jury awards *more accurately* reflect fair market value than awards given by commissions, [69] and some writers have suggested that jury awards are generally lower than awards given by commissions or judges.[70] The number of examples and the available data support the conclusion that lowballing is a current

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[64] U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED 35 (2006), http://www.gao.gov/new.items/d0728.pdf; Genteman, *supra* note 56, at 860.

[65] Gideon Kanner, *Kleptocracy*, GIDEON'S TRUMPET (Sept. 20, 2008), https://gideonstrumpet.info/2008/09/kleptocracy-2/; Bell & Parchomovsky, *supra* note 56, at 887-88.

[66] Some jurisdictions use court-appointed commissions that are tasked with determining just compensation in condemnation cases instead of a jury or judge. *See*, *e.g.*, FED. R. CIV. P. 71.1(h)(2); Bigham, *supra* note 37, at 79-80.

[67] Kanner, *supra* note 65; Ray Rivera, *UDOT: Fair Deals or Land Grabs? UDOT Buys Often Leave Trail of Bitterness; Buy-ups often leave trail of bitterness and mistrust*, SALT LAKE TRIB., Oct. 24, 1999, at A1.

[68] Bigham, *supra* note 37, at 70-71 (noting the lack of empirical proof for the proposition that "substantially more in the way of an award can be obtained from a jury than from a judge or a commission.").

[69] Wanling Su, *What is Just Compensation?*, 105 VA. L. REV. 1483, 1489 (2019) ("[C]ommissions appointed by government agencies or the courts . . . are less accurate than juries in assessing compensation.").

[70] Bigham, *supra* note 37, at 70-71 & n.24 ("[T]he available evidence indicates that the factual confusion that attends the trial of eminent domain cases is much more likely to result in a lower award from a jury of laymen than from a judge or an experienced and sophisticated commission or arbitration tribunal.").

and pervasive problem throughout the United States. Nothing stands in the way of the government taking advantage of its superior bargaining position to obtain property for less than fair market value.

IV. THE ATTORNEY-FEE SOLUTION

The constraint on the government that will provide necessary protection for landowners is to require the government to pay the landowner's attorney fees in addition to his compensation award if the landowner disputes the government's initial offer. This Essay makes the unique argument that the government should be required to pay the landowner's attorney fees in *every* case, regardless of the amount ultimately awarded by the court. The fact that the landowner is forced into the sale of his property presents a unique situation where justice requires that he be given the opportunity for a judicial determination of his property's value without incurring litigation expenses.[71]

Section A discusses why a categorical attorney-fee requirement would solve the lowballing problem and ensure landowners are compensated in the amount equal to their property's fair market value. Section B addresses potential concerns that might be raised in response to this proposed solution. Section C discusses the implementation of the proposed solution and its expected results, looking to examples of states that have already adopted similar approaches.

A. Why Attorney Fees Ensure That Fair Market Value is Received

Lowball offers work because the government knows that landowners cannot challenge the offer without incurring litigation costs.[72] If the government was required to pay the landowner's attorney fees, it would upset the government's superior bargaining position and effectively check abusive lowballing practices. First, requiring the government to pay the landowner's attorney fees would deter the government from intentionally making inadequate offers and would incentivize the

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[71] Friedman, *supra* note 43, at 716 n.148 (quoting La Mesa-Spring Valley School Dist. v. Otsuka, 369 P.2d 7, 12 (Cal. 1962)) ("It must be kept in mind that attorney's fees in a condemnation action are in a different category from those in other actions. Eminent domain, so far as the defendant is concerned, is not based upon any activity on his part. There is no voluntary element in such an action. When the public agency announces its intention to take his property, it is telling the owner that he must sell his property whether he wants to or not.").

[72] *See supra* note 41 and accompanying text; Friedman, *supra* note 43, at 703 (quoting San Francisco v. Collins, 33 P. 56, 57 (Cal. 1893)) ("To require the defendants in this case to pay any portion of their costs necessarily incidental to the trial of the issues on their part, or any part of the costs of the [condemnor], would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs.").

government to make its initial offer as accurate as possible.[73] Purposely making low offers under this rule would only increase costs for the government. If the landowner chose to litigate, the government would be on the hook for the landowner's attorney fees as well as the additional compensation, assuming the court found the initial offer was in fact below fair market value.

Second, if the initial offer is believed to be lower than the property's fair market value, the landowner can dispute the offer in court and actually have an opportunity to obtain just compensation in the form of fair market value without diminishing the final award by the amount spent on litigation costs. Without the need to hypothesize ahead of time about whether the attorney fees are likely to exceed the difference between the initial offer and the property's fair market value, the only question the landowner would face is whether the initial offer accurately reflects his property's fair market value. If it does, then it makes sense to accept the offer. If it does not, then the landowner has the opportunity to get a determination of the amount by a court.

B. Concerns with the Attorney-Fee Solution

The first objection to this solution is that it would not sufficiently account for the government's interest in preventing landowners from obtaining windfall awards in condemnation cases. In the context of just compensation, a windfall is any award that exceeds fair market value. Passing the burden of litigation costs to the government would not result in a windfall for property owners because, under the proposed system, fair market value is still the maximum amount a landowner could obtain. Nothing about requiring the government to pay the landowner's attorney fees enables the court to award the landowner any more than the fair market value of his property.

The second objection to the attorney-fee solution is the strongest. This concern is that, while the landowner may not be able to receive an award in excess of his property's fair market value, the shifting of litigation costs would encourage landowners to litigate all condemnation cases.[74] This would burden both the court system and the government's ability to acquire property for public works projects. One might further argue that as long as the landowner believed he could get even a trivially better award, he would be incentivized to litigate because the government

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[73] Dieterle, *supra* note 22, at 44-45 ("Requiring governments to reimburse the litigation expenses and attorney's fees of landowners in this way could provide a direct financial disincentive for governments to engage in sandbagging or lowballing tactics.").

[74] *See* Friedman, *supra* note 43, at 713-14.

would pay his attorney fees.[75] Opponents of the plan might also point out that because property appraisal is not an exact science and different appraisers routinely reach different conclusions, the landowner would often have promising chances that the court would value his property higher than the government did when it made its initial offer.

These concerns about excessive litigation, however, will likely not come to fruition. Litigating the compensation amount will still require a significant landowner investment of time and effort, which in most cases will be sufficient to dissuade a landowner from litigating solely for the possibility of a negligible increase.[76] Additionally, *because* property appraisal is not an exact science, a landowner would be taking a risk by choosing to litigate for only a negligible increase. If he believes that his property's fair market value is close to the government's initial offer, the chances that the court's award would be *lower* than the initial offer are likely to be just as high as the chances that the court would award increased compensation.[77] This means that a landowner will generally choose to dispute the initial offer only if he is confident that the offer is below fair market value.

If these two factors prove insufficient to dissuade frivolous litigation, the rule could be modified so that a landowner can only recover his attorney fees if the court's award exceeds the government's initial offer, or even only if the court's award exceeds the government's initial offer by a certain amount.[78] This extra requirement, however, in addition to probably being unnecessary based on the deterrent effect of the aforementioned factors, would also have a chilling effect on landowners who receive lowball initial offers from the government.[79] Landowners would be gambling in every case if they chose to litigate, because if the court's award ultimately did not meet the requirement of exceeding the initial offer, the landowner would not only receive the lower compensation award, but also would have incurred unreimbursed attorney fees. Because of the chilling effect this added requirement would

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[75] *See id.* at 715.

[76] *See, e.g., id.* at 705-06.

[77] *See id.* at 705 n.78.

[78] Some states have included these kinds of award-increase requirements. Genteman, *supra* note 56, at 851-52; Bell & Parchomovsky, *supra* note 56, at 890 n.108; *see* CAITLYN ASHLEY ET AL., LAW AND POLICY RESOURCE GUIDE: A SURVEY OF EMINENT DOMAIN LAW IN TEXAS AND THE NATION 11-13 (2017), https://scholarship.law.tamu.edu/nrs-publications/2.

[79] In response to the concern about frivolous litigation, Crystal Genteman proposes awarding attorney fees only where the attorney achieves a "benefit" for the client. Genteman, *supra* note 56, at 866-70. While Genteman's proposed solution is certainly an improvement on the current state of most laws, her qualification on the attorney-fee rule for client benefit is likely unnecessary to dissuade frivolous litigation for the reasons discussed in the previous paragraph. Genteman's proposal also risks creating the chilling effect discussed in this paragraph.

have, it would probably fail to completely resolve the lowballing problem. Barry Friedman suggests a better option to further dissuade frivolous litigation: grant the trial judge discretion to deny the recovery of attorney fees in cases where he or she determines the litigation is frivolous.[80]

A third potential objection is that requiring attorney fees alone would not fully solve the underlying issue of ensuring just compensation because there are other incidental costs that ought to be accounted for, such as the cost of the landowner's own appraisal. This objection is easily countered, since the current measure for just compensation is only the fair market value of the property. Therefore, our only concern is that the landowner obtains fair market value. Other incidental costs (such as relocation expenses) are not considered part of just compensation, even though they are sometimes provided to the landowner via statute.[81]

It could be argued that the same logic this Essay applies to attorney fees would also require the government to pay for a landowner's own appraisal. If it is true that an independent appraisal is necessary for the landowner to have a realistic estimate of the fair market value of his property (which seems reasonable, given the fact that takings are often for small portions of a property rather than the parcel as a whole), then it could be that the proposed solution should also include the cost of the landowner's own appraisal. Taking advantage of a cost-free appraisal, however, would not present the landowner with the same inconvenience or potential for loss that he would face in cost-free litigation. Landowners would have little incentive not to utilize the government-sponsored appraiser, and this could produce consequences that the attorney-fee requirement would not create (though appraisal costs are much smaller and therefore have a less significant impact on the incentive structure).

C. State Practice

States that have implemented attorney-fee requirements similar to that proposed by this Essay have seen progress in combatting the lowballing problem. All of these states have adopted these rules via statute, though

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[80] Friedman, *supra* note 43, at 715 ("This approach would permit the trial judge, who is aware of the facts in each case and better able to determine when litigation is frivolous, to allow or deny costs where he deems such actions appropriate."). Crystal Genteman's proposal similarly includes an element of judicial discretion. Genteman, *supra* note 56 at 868 ("[T]he trial judge retains the discretion to limit the award of fees when she finds that the condemnee unnecessarily delayed the proceeding, his position was substantially unjustified, or special circumstances would make an award of fees unjust. This built-in element of discretion would further deter frivolous or unjustified litigation.").

[81] *See*, *e.g.*, 42 U.S.C. § 4622 (providing reimbursement for moving and related expenses in some circumstances).

the Florida Supreme Court has suggested that the just compensation provision in the Florida State Constitution would be interpreted to include an attorney-fee requirement even without the statute.[82] State statutes that do allow for the recovery of attorney fees in condemnation proceedings often contain varying requirements. For example, some statutes only allow the court to award attorney fees if the court's award exceeds the government's initial offer, if the court's award exceeds the government's initial offer by a certain threshold, or if the government abandons the proceedings. Depending on the statute, these fees may be awarded only up to a certain capped amount or at the discretion of the court.[83] No state currently requires the government to pay the landowner's attorney fees in every case—including those cases where the landowner does not receive an increased award at trial—which is what this Essay proposes.

Florida is considered by many to have "the most liberal [laws regarding attorney fees in condemnation] found in any state."[84] In addition to the Florida Supreme Court's suggestion that its state constitution alone is sufficient to require the government to pay the landowner's attorney fees,[85] the state legislature has also enacted a statute which provides greater specificity to the rule.[86] Though Florida's attorney-fee rule is based on the difference between the government's initial offer and the ultimate judgment or settlement amount and thus does not require payment of the landowner's attorney fees in every case,[87] it still provides an informative example of how an attorney-fee requirement impacts landowners' and governments' incentives in condemnation proceedings, as well as their litigation tendencies.

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[82] Jacksonville Expressway Auth. v. Henry G. DuPree Co., 108 So. 2d 289, 294 (Fla. 1959); Genteman, *supra* note 56, at 849-50 ("[T]he Florida Supreme Court has ruled that recovery of attorneys' fees and litigation costs are part of the state constitution's requirement of just compensation."); Friedman, *supra* note 43, at 705 ("Yet the Florida Supreme Court has gone so far as to suggest that the Florida constitutional provisions for 'just compensation' are in fact self-executing, and has indicated that it would allow recovery of attorneys' fees *even without* statutory authority.") (emphasis in original); John Woolslair Sheppard, *Compensation in Florida Condemnation Proceedings*, 14 U. FLA. L. REV. 28, 44 (1961) ("In Florida, however, allowance of reasonable attorney's fees to the owner has been said to be a part of the full compensation guaranteed by the constitution.").

[83] ASHLEY, *supra* note 78, at 12; Genteman, *supra* note 56, at 851-56; Bell & Parchomovsky, *supra* note 56, at 890; Garnett, *supra* note 36, at 129 & n.175.

[84] Friedman, *supra* note 43, at 704; *see also* Genteman, *supra* note 56, at 849 ("Florida has long been known for providing the most generous recovery scheme of all states.").

[85] *See supra* note 82 and accompanying text.

[86] FLA. STAT. §§ 73.091-73.092 (2000).

[87] *Id.*; Genteman, *supra* note 56, at 850 ("[T]he Florida legislature amended the statutes relating to attorneys' fees in 1994 to require that legal fees be computed according to the difference between the state's original offer and the final award to the landowner.").

Florida's rule has been met with widespread approval[88] and appears to be effective in ensuring that landowners subject to condemnation proceedings are able to receive fair market value for their property.[89] The primary objection to the proposed attorney-fee rule—that it would incentivize and encourage frivolous litigation—has not been realized in Florida. This is because "the inconvenience and delay of litigation, when considered with the fact that a court cannot award *more* than 'just compensation,' evidently suffice to discourage unjustified litigation in Florida."[90] Oregon provides an additional example. In Oregon, the attorney-fee requirement has actually *decreased* litigation.[91]

There is every reason to believe that the same factors that have proven successful in these states will also guard against frivolous litigation if the attorney-fee rule is enacted in other states or nationwide at the federal level. The available empirical data suggests as much,[92] and states that have attorney-fee rules have seen similar results. The success of these attorney-fee rules is evident, and other jurisdictions should follow suit by

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[88] Friedman, *supra* note 43, at 706 ("There is a marked absence of criticism of this policy in the legal literature of Florida. Rather, both the judiciary and the legal writers express consistent approval of Florida's policy, and not only has the legislature continued this policy, but it has broadened its scope through successive reorganizations and amendments of the statutes. This absence of criticism and presence of praise regarding the Florida provisions can only dispel the arguments of critics who claim that such legislation would bankrupt condemnors and shift the scale too far in favor of the condemnee.").

[89] *Id.* at 705 n.78 (discussing the fairness of the Florida system).

[90] *Id.* at 705-06 (emphasis in original).

[91] During hearings before the United States Senate in 1968, which was considering a bill that would enact an attorney-fee rule similar to Oregon's at the federal level, Oregon attorneys testified that the attorney fee requirement had "not raised the level of litigation but, on the contrary, [had] lowered it. What [it had] raised, however, is the level of the offer of the condemnor." Friedman, *supra* note 43, at 714.

[92] The empirical data from the Nassau County Study suggest that these factors are not unique to Florida or Oregon. Berger & Rohan, *supra* note 60, at 450 ("What do we derive from the trial statistics? First, that the claimant did not automatically find the Nassau County courtroom paved with gold; he who refused a 'fair settlement' gambled unwisely. Second, that the County had no reason to view its trial prospects glumly; to have settled much beyond a solid appraisal simply to avoid trial would have been unwarranted most of the time. Third, that the claimant who sought not a windfall but only a decent recovery was far likelier to achieve this from a court than from the County's negotiator."); Friedman, *supra* note 43, at 705 n.78 ("[T]he researchers in the *Nassau County Study* found that of those cases where the award was determined by a court, 32.3 percent received an amount higher than, 49.6 percent an amount equal to, and 18.1 percent an amount less than the county's *lowest* appraisal. This would indicate that the awards of a trial court would generally not exceed an offer of the county's *mean* appraisal value; or, in other words, that a trial after an offer of just compensation would be a waste of time for both parties . . . .Comparing these results with those where the award was determined by a court, and assuming that the practices in Nassau County are not dissimilar from those of most condemnors, the fairness of the Florida system, which enables a condemnee to insist on a trial without fear of burdensome litigation expenses, is manifest.") (internal citation omitted) (emphasis in original).

implementing a categorical attorney-fee requirement in eminent domain proceedings.

V. CONCLUSION

Landowners in the United States have a constitutional right to just compensation when the government takes their property in an eminent domain proceeding.[93] Just compensation is measured using the property's fair market value.[94] Landowners should thus be given no less than fair market value for their property in condemnation proceedings, but they are regularly forced to accept just that. The government frequently takes advantage of its superior bargaining position and pressures landowners to accept less than fair market value for their property by making lowball initial offers. Landowners must either accept the inadequate offer or incur litigation expenses to dispute it. Either way, the landowner is undercompensated. This problem adds to the opportunities for eminent domain abuse that already exist.

This pervasive under-compensation problem could be alleviated to a large extent by requiring the government to reimburse the landowner for her attorney fees in addition to the fair market value of her property in condemnation proceedings. Though several states have enacted similar requirements via statute, no state requires the government to pay the landowner's attorney fees in every case. A categorical attorney-fee requirement would incentivize the government to make honest initial offers that accurately reflect the property's fair market value and would give landowners an opportunity to pursue judicial relief and actually obtain fair market value when the government's initial offer is insufficient. The Takings Clause of the Fifth Amendment does not merely guarantee compensation—it guarantees *just* compensation. It is time to hold governments accountable in condemnation proceedings and ensure that landowners receive the just compensation they have been promised.

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93 U.S. CONST. amend. V.

94 *See supra* note 21 and accompanying text.