SUPREME COURT

STATE OF LOUISIANA

No. 2016-C-904

SOUTH LAFOURCHE LEVEE DISTRICT,

Respondent,

versus

CHAD M. JARREAU AND BAYOU CONSTRUCTION & TRUCKING, L.L.C.,

Applicants.

CIVIL PROCEEDING

On Writ of Certiorari to the First Circuit Court of Appeal, No. 2015-CA-0328,
Judges Guidry, Pettigrew, Higginbotham, Crain, and Drake,
and from the Seventeenth Judicial District Court, Parish of Lafourche,
State of Louisiana, No. 117693, Honorable Jerome J. Barbera, III, Judge Presiding

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS CHAD M. JARREAU AND BAYOU CONSTRUCTION & TRUCKING, L.L.C.

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Pursuant to Supreme Court of Louisiana Rule VII, Sec. 12, Pacific Legal Foundation (PLF) and National Federation of Independent Business Small Business Legal Center (NFIB) respectfully submit this brief amicus curiae in support of Petitioners Chad M. Jarreau and Bayou Construction & Trucking, L.L.C. PLF and NFIB provided timely notice of their intent to submit an amicus brief to all counsel of record. This amicus brief is conditionally submitted with the accompanying motion seeking leave to file an amicus brief.

INTEREST OF AMICI CURIAE

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Horne v. Department of Agriculture*, __ U.S. __, 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015); *Koontz v. St. Johns River Water Management District*, __ U.S. __, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Arkansas Game & Fish Comm'n v. United States*, __ U.S. __, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state courts across the country. PLF believes its perspective and experience with property rights litigation will

aid this Court in the consideration of the issues presented in this case.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. The Small Business Legal Center is affiliated with the National Federation of Independent Business (NFIB), which is the nation's leading small business association, representing hundreds of thousands of members nationwide. The issue before this Court is of particular importance to the NFIB Small Business Legal Center and NFIB members because condemnation actions against land often directly damage associated businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether the Takings Clause of the Fifth Amendment of the U.S. Constitution authorizes courts to award business losses as just compensation when government condemnation actions against private property directly impair an existing business on the condemned land. It does. While there is a general presumption that business losses are not recoverable in a just compensation award, that presumption is due to the fact that economic injuries are often consequential to a condemnation action and are therefore not recoverable. *United States ex rel. & for Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281-83, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943). The U.S. Supreme Court has repeatedly held that business losses are recoverable in appropriate circumstances. *See*, *e.g.*, *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403, 408, 25 L. Ed. 206 (1878). This recognition is based on the fundamental principle that a dispossessed owner must be put in "as good position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373, 63 S. Ct. 276, 87 L. Ed. 336 (1943).

There is no per se rule excluding business losses from a just compensation claim. Indeed, the U.S. Supreme Court has long-recognized that an individual's interest in real property is no different in kind than a taking of his or her intangible interest in a business—both constitute property and both are protected by the Fifth Amendment. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949). Thus, when the government condemns land that supports a business, the owner may be entitled to compensation for business losses. *Id*.

The First Circuit Court of Appeal's conclusion that business losses can never be recovered in a condemnation case is in direct conflict with binding precedents from the U.S. Supreme Court and finds no support in Louisiana state law. *South Lafourche Levee Dist. v. Jarreau*, 15-0328, p. 14-16 (La. App. 1 Cir. 3/30/16); 192 So. 3d 214, 226-27. Louisiana Revised Statute 38:301(C)(1)(a) requires that the government compensate the owner of condemned property "at fair market value to the full extent of the loss." *See also* La. R.S. 38:301(C)(1)(h) (The measure of compensation "shall be the fair market value of the property taken or destroyed."); La. R.S. 38:281(3) (Defining "fair market value" as "the value of lands or improvements actually taken, used, damaged, or destroyed for levees."). For decades, Louisiana courts read those statutes in conjunction with the State's Takings Clause to require compensation for business losses, where appropriate. *See State through Dep't of Highways v. Constant*, 369 So. 2d 699, 701 (La. 1979); *see also Packard's W. Store, Inc. v. State, Dep't of Transp. & Dev.*, 618 So. 2d 1166, 1172 (La. Ct. App. 1993). In 2006, Louisiana's legislature amended its constitution to clarify that a determination of "fair market value to the full extent of the loss" shall not result in awards that "exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America." La. Const. art. I, § 4(g).

Without citing any authority, the Court of Appeal concluded that the amendment's reference to the Fifth Amendment barred recovery of business losses in a condemnation case. *South Lafourche Levee Dist.*, 15-0328, p. 14-16, 192 So. 3d at 226-27. It did not. While business losses are often excluded from compensation as consequential damages, the U.S. Supreme Court has recognized many circumstances in which they are recoverable. It is therefore incumbent upon the courts to consider the unique facts of each case in order to determine the proper measure of compensation. The First Circuit Court of Appeal's decision to the contrary must be reversed.

ARGUMENT

I

THE JUST COMPENSATION REQUIREMENT IS INTENDED TO MAKE THE OWNER WHOLE, INCLUDING BUSINESS LOSSES WHERE APPROPRIATE

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. According to the U.S. Supreme Court, "just compensation" means "the full monetary equivalent of the property taken." *United States v. Reynolds*, 397 U.S. 14, 16, 90 S. Ct. 803, 25 L. Ed. 2d 12 (1970); *see also United States v. Miller*, 317 U.S. at 373. In other words, the dispossessed owner "is to be put in the same position monetarily as he would have occupied if his property had not been taken." *Reynolds*, 397 U.S. at 16. That guiding principle requires that courts take into account the unique facts of each case. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. at 518 (Cautioning against the use of per se rules in a takings case because there are a "nearly infinite variety of ways in which government actions or regulations can affect property interests."); *see also*

Reynolds, 397 U.S. at 16-17 ("[F]air market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking."). Accordingly, courts have long recognized that "[t]here is no formula or artificial measure of damages applicable to all condemnation cases." *Poirier v. Grand Blanc Twp.*, 481 N.W.2d 762, 766 (Mich. Ct. App. 1992) (omitting quotations); *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282 (Fed. Cir. 2009) ("[T]here is no magic number or formula in takings cases.").

Importantly, federal takings law holds that it is the owner's actual loss, not the government's gain, that determines the measure of compensation for the property taken. *Powelson*, 319 U.S. at 281; *see also Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 177-78, 20 L. Ed. 557 (1871) (The government must compensate a landowner to the extent that it actually invades private property, thereby exercising dominion over the landowner's rights and inflicting irreparable harm thereto.). Although business losses are often excluded from compensation awards, the U.S. Supreme Court has long recognized that business injuries are recoverable as compensation in certain circumstances. *See*, *e.g.*, *Kimball Laundry*, 338 U.S. 1; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 691, 17 S. Ct. 718, 41 L. Ed. 1165 (1897); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893); *Mississippi & Rum River Boom*, 98 U.S. at 403.

The High Court's case law on this question establishes a simple and predictable rule for recovery of business losses: where the injuries are directly attributable to the government's condemnation actions, they are recoverable; where they are consequential in nature, they are not. *Powelson*, 319 U.S. at 281-83; *see also* D. Michael Risinger, *Direct Damages: The Lost Key to*

Constitutional Just Compensation When Business Premises Are Condemned, 15 Seton Hall L. Rev. 483, 491 (1984). In *Kimball Laundry*, for example, the federal government took temporary possession of the laundry facility to clean military clothes during World War II. 338 U.S. at 3. The laundry could not serve its customers for the entire duration of the taking—a period of three-and-a-half years. *Id.* The trial court awarded rent for the time of the taking, plus interest, and additional compensation for damage to the plant and machinery beyond regular wear and tear. *Id.* at 4. But the trial court denied damages for the loss of "going concern" because such business damages had not been awarded in the cases, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945); and *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946). *Kimball Laundry*, 338 U.S. at 4. The Supreme Court reversed, holding that the facts of the case warranted the inclusion of business losses as part of the compensation award. *Id.* at 16. The Court explained that *Petty Motor* and *General Motors* only involved a government occupation of the premises; whereas, the taking of the Kimball Laundry facility "completely . . . appropriated the laundry's opportunity to profit" from its established customer base for the duration of the occupation, leaving the laundry with far fewer customers when the property was eventually returned. *Id.* at 14. Because the goal of the Takings Clause is to make the dispossessed owner whole, the Court held that the government was obligated to compensate Kimball Laundry for damage to its earning power, customer base, and goodwill. *Kimball Laundry*, 338 U.S. at 16. Importantly, the Court explained that the "intangible" interest in a business's goodwill has a value "no different from the

value of the business's physical property."[1] *Id*. at 11. Thus, if an owner can show that the government's condemnation activities take his or her business interests, then "the Fifth Amendment requires compensation." *Id*.

In *Mississippi & Rum River Boom Co. v. Patterson*, a boom company, acting with legislative authority, condemned several privately-owned islands that were ideally situated for forming large log booms. 98 U.S. at 405. In determining compensation, a jury awarded both the base value of the property and the economic value of a log boom operation. *Id*. The U.S. Supreme Court upheld the award of business losses, explaining that the court must take into account the unique circumstances of the case to determine if the taking of land also appropriates a business interest:

> So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.

Id. at 408.

The Court also awarded business losses in *Monongahela Navigation*. In that case, a

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[1] *Kimball* cited three cases in support of its conclusion that going-concern value is a compensable property right. *See McCardle v. Indianapolis Water Co.*, 272 U.S. 400, 415, 47 S. Ct. 144, 71 L. Ed. 316 (1926) (going-concern value is a property right and must be considered in determining rate water company may charge); *Galveston Elec. Co. v. City of Galveston*, 258 U.S. 388, 396-97, 42 S. Ct. 351, 66 L. Ed. 678 (1922) (although going-concern value must sometimes be compensated for if taken, it does not affect computation of fair rate of return for street car company); *Des Moines Gas Co. v. City of Des Moines*, 238 U.S. 153, 165, 35 S. Ct. 811, 59 L. Ed. 1244 (1915) (going-concern value is a property right and should be taken into account in determining value of property on which gas company has a right to make a fair return).

company had been granted a charter to construct and operate locks on the Monongahela River. 148 U.S. at 312-13. Later, the federal government took the locks and began collecting tolls for passage through the locks. *Id*. at 313. The government compensated the company for the appropriated physical property, but refused to pay for the value of the business. *Id.* at 313. On review, the Supreme Court concluded that the toll franchise was an integral part of the property's value to the owner. *Id*. at 345. Thus the basic requirement that the government provide the owner with the "full and perfect equivalent" of appropriated property included compensation for the business losses. *Id*.

Similarly, in *Long Island Water-Supply Co. v. City of Brooklyn*, the Court upheld a compensation award that included business losses when the city condemned a water company's reservoir, wells, machinery, pipes, franchises, and all other property in order to take over water delivery services. 166 U.S. at 692. The Court confirmed that the water company's business interests constituted property and therefore could be condemned upon payment of just compensation. *Id.* at 690. Rejecting an argument that the condemnation proceeding violated the Contracts Clause, the Court explained, "The true view is that the condemnation proceedings do not impair the contract, do not break its obligations, but appropriate it, as they do the tangible property of the company, to public uses." *Id.* at 691.

The above cases emphasize a point essential to this case: U.S. Supreme Court case law contains no per se rule excluding business losses from an award of just compensation. Indeed, *Mitchell v. United States*[2]—the case most often cited as having establishing such a rule—holds only that *consequential damages* are not recoverable. In *Mitchell*, the owners of a corn farm and a related

[2] 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644 (1925).

canning business were offered and accepted $76,000 in compensation when the federal government condemned their property for military purposes. *Mitchell v. United States*, 58 Ct. Cl. 443, 445 (1923), *aff'd* 267 U.S. 341. Later, the owners discovered that the government's taking of surrounding properties had impaired their ability to grow their specialized crops on their remaining land. *Id*. at 448. The owners sued to recover an additional $100,000 in compensation. The trial court rejected the claim, in part, because the owners failed to show "any reduction or loss in net income" resulting from the government's condemnation activities. *Id*. at 446.

The U.S. Supreme Court affirmed. But what it affirmed was not that business losses are never compensable. Instead, the Court held that the claimants could not recover business damages based on the government's condemnation of neighboring properties:

> No recovery therefor can be had now for a taking for the business. There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.

Mitchell, 267 U.S. at 345 (citations omitted).

Professor Risinger explains that *Mitchell* concerned only whether consequential damages were recoverable in a just compensation award:

> All Justice Brandeis says [in *Mitchell*] is that they are not entitled to *consequential* damages for the loss to their business, or for its destruction, which was the "*unintended incident of the taking of land*" . . . not their land, but the land around them. He then says "no recovery can be had *now* as for the taking of their business." The "now" in this sentence is significant. All they were asserting now was consequential damages. They had never asserted direct damage market value destruction of the business as a result of the taking of their own land, and even if they had tried, the Court of Claims had already all but held that they had already received it. As such, *Mitchell* is in fact not very relevant to . . . a direct damages claim for destruction of a business by the condemnation of the building premises.

Risinger, *supra*, at 509-10. Consistent with Professor Risinger's interpretation, the *Mitchell* Court acknowledged that a landowner may be entitled to "the special value of land due to its adaptability for use in a particular business," but then concluded that "[d]oubtless such special value of the plaintiffs' land was duly considered by the President in fixing the [$76,000] amount to be paid therefor." *Mitchell*, 267 U.S. at 345.

Clearly, the government's condemnation actions against an individual's land can also directly effect a taking of his or her protected property rights in a business interest. The Court of Appeal's decision to reverse the trial court's award of business losses—without any consideration of the unique facts of the case—is in direct conflict with binding precedents from the U.S. Supreme Court and must be reversed.

II

PUBLIC POLICY DEMANDS THAT DIRECT BUSINESS LOSSES BE RECOVERABLE AS COMPENSATION

Fundamental notions of fairness and justice demand that this Court reverse the lower court's per se approach to business losses and adopt a rule allowing for recovery of such injuries where government condemnation actions directly impair a business interest.

> The concepts of "fairness and justice" . . . underlie the Takings Clause, [but] of course, are less than fully determinate. Accordingly, we have eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. The outcome instead depends largely upon the particular circumstances [in that] case.

Palazzolo v. Rhode Island, 533 U.S. at 633 (O'Connor, J. concurring) (citations and quotations omitted), quoted by *Tahoe-Sierra Preservation Council, Inc. v. Tahoe-Sierra Planning Agency*, 535

U.S. 302, 336, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); *see also Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478, 93 S. Ct. 791, 35 L. Ed. 2d 1 (1973) (The "constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.") (citations omitted).

The reality of eminent domain is that condemnation actions often take more than just the targeted land. When real property supporting an established business is condemned, the owner is forced either to relocate or lose his or her investment. Even under the best circumstances, the owner will incur substantial business-related injuries directly attributable to the government's condemnation actions. The intangible interests that make up the business, such as goodwill and going-concern value, are harmed or destroyed, and along with them, the very value of the business. Yet, while the condemning agency automatically reimburses the owner for value of the real property, it typically refuses to compensate the owner for business injuries—often based on a misreading of cases like *Mitchell*.

Given the manifest injustice of such an exclusionary rule, it is not surprising that courts and legislatures across the nation are trending toward compensating landowners for business damages. The Alaska Supreme Court, for example, concluded that "[t]his court would poorly serve the law if it were so blind itself to the realities of condemnation" that it could allow the government to continue to take private property for public use without reimbursing business losses. *State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976). This is especially true where the most basic principles of just compensation call for recovery of all direct losses. *Miller*, 317 U.S. at 373 (The goal of the just compensation requirement is to put the owner in "as good position pecuniarily as he would have

occupied if his property had not been taken.").

Prior to the 2006 amendments, Louisiana's Constitution clearly allowed for recovery of business losses (and still does). *See* La. Const. of 1974, art. I, §4; *Constant*, 369 So. 2d at 701. Montana's constitution also provides for compensation for business losses in condemnation cases. *See* Mont. Const. art. II, § 29. Florida and Vermont adopted statutes providing compensation for loss of goodwill and/or damage to going-concern value in condemnation cases. *See* Fla. Stat. Ann. § 73.071(3)(b) (2002); Act of June 21, 1957, 1957 Vt. Laws 242, *codified as amended* Vt. Stat. Ann. tit. 19, § 501 (1987). Section 1016 of the Uniform Eminent Domain Code provides for compensation for loss of goodwill.[3] California and Wyoming adopted the Uniform language. Cal. Civ. Proc. Code § 1263.510 (2006); Wyo. Stat. § 1-26-713 (1981). And courts in Alabama, Alaska, Connecticut, Colorado, Florida, Georgia, Michigan, Minnesota, Texas, and Wisconsin all determined that, as a matter of constitutional law, business losses are compensable. *See*, *e.g.*, *Harco Drug, Inc. v. Notsla, Inc.*, 382 So. 2d 1, 4-6 (Ala. 1980); *State v. Hammer*, 550 P.2d at 827; *Laurel, Inc. v. Commission of Transp.*, 428 A.2d 789, 803-04 (Conn. 1980); *City of Englewood v. Denver Waste Transfer*, 55 P.3d 191, 199 (Colo. Ct. App. 2002); *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So. 2d 289, 291 (Fla. 1958); *Bowers v. Fulton County*, 146 S.E.2d 884,

[3] Uniform Eminent Domain Code § 1016.7 ("(a) In addition to fair market value determined under Section 1004, the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill, (3) will not be included in relocation payments under Article XIV, and (4) will not be duplicated in the compensation awarded to the owner.").

891 (Ga. 1966); *Metropolitan Atlanta Rapid Transit Authority v. Ply-Marts, Inc.*, 241 S.E.2d 599, 601-02 (Ga. Ct. App. 1978); *City of Lansing v. Wery*, 242 N.W.2d 51, 54-55 (Mich. Ct. App. 1976); *State by Mattson v. Saugen*, 169 N.W.2d 37, 39-40 (Minn. 1969); *Texas v. Whataburger*, 60 S.W.3d 256, 263 (Tex. Ct. App. 2001); *Luber v. Milwaukee County*, 177 N.W.2d 380, 384 (Wis. 1970); *see also* Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 320, 334-54 (1991). Minnesota courts addressed the injustice of disallowing business losses by adopting a rule allowing recovery where a business is uniquely located.[4] *See*, *e.g.*, *City of Minneapolis v. Schutt*, 256 N.W.2d 260, 261-62 (Minn. 1977); *City of Detroit v. Michael's Prescriptions*, 373 N.W.2d 219, 225 (Mich. Ct. App. 1985).

A rule allowing for the fair market value calculation to include direct business losses will undoubtedly impose some limits on the government exercise of eminent domain. But those constraints are beneficial to the public. Specifically, by preventing the government from transferring the business costs associated with condemnation to individual owners—which is precisely what occurs when such losses are excluded from compensation—the government is forced to consider the full and actual costs and benefits of eminent domain. As a result, the government will make more economically efficient condemnation decisions. If this prevents some projects from going forward, it is only because the projects did not make overall economic sense in the first place: "What society

[4] "Recovery of the going concern value of a business lost to condemnation will depend on the transferability of that business to another location. If the business can be transferred, nothing is taken and compensation is therefore not required. Whether a business is transferable will be decided on a case-by-case basis inasmuch as a specific factual analysis is required. Generally, however, recovery will be allowed where the business derives its success from a location not easily duplicated." *Michael's Prescriptions*, 373 N.W.2d at 224.

cannot . . . afford is to . . . instigate measures whose costs, including costs which remain 'unsocialized,' exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1181 (1967) (footnotes omitted).

Perhaps more fundamentally, placing such limits on the "freedom and flexibility" of eminent domain powers is absolutely necessary for constitutional liberty. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987). The fact that Louisiana may want to acquire "large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of great concern to the courts." *Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d at 293 (Drew, J., concurring). The government, of course, has the power to raise the funds to acquire the targeted property, or to leave it be if the cost proves to be too unpopular. If, however, the courts were to "cease to protect the individual—within, of course, constitutional and statutory limitations—such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign." *Id*. When a state decides to condemn large areas of land for a public health or safety purpose, "it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed." *Id*.; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant

achieving that desire by a shorter cut than the constitutional way of paying for the change."). Enforcing the Fifth Amendment's requirement that the government pay the actual costs of condemnation will benefit both individuals and the public at large.

CONCLUSION

Government condemnation actions can and do take business interests. Even where the condemning authority may have only wanted the land and not the business, condemnation often results in the destruction or damaging of the underlying business. To protect the rights of all property owners, this Court should hold that there is no per se rule disallowing business losses in every case; instead, the question whether business losses can be recovered must be determined upon consideration of the unique facts of each case.

DATED: September 30, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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via electronic mail and U.S. Mail, this 30th day of September, 2016.

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