

No. 17-163

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In The  
**Supreme Court of the United States**

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CHAD M. JARREAU, et al.

*Petitioners,*

v.

SOUTH LAFOURCHE LEVEE DISTRICT,

*Respondent.*

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On Petition for Writ of Certiorari  
to the Supreme Court of Louisiana

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**AMICUS CURIAE BRIEF OF  
PACIFIC LEGAL FOUNDATION IN  
SUPPORT OF PETITIONERS**

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**QUESTION PRESENTED**

Whether the government must pay compensation under the Just Compensation Clause of the Fifth Amendment when the condemnation of real property inevitably destroys the value of a business as a going concern (as the high courts of Minnesota, Nevada, New Mexico, and Pennsylvania have held) or whether property owners are entitled to such compensation only if the government directly takes the business itself (as the court below held, joining the Federal Circuit and the highest courts of the District of Columbia, Montana, and Wisconsin).

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## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation submits this brief amicus curiae in support of Petitioners Chad M. Jarreau and Bayou Construction & Trucking, LLC (Jarreau).<sup>1</sup>

Pacific Legal Foundation (PLF) was founded over 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. 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*

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<sup>1</sup> All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

*Agriculture*, \_\_ U.S. \_\_, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Management District*, \_\_ U.S. \_\_, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm’n v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Jarreau’s petition.

### SUMMARY OF ARGUMENT

Jarreau’s petition for a writ of certiorari raises an important question concerning the protections guaranteed by the Just Compensation Clause of the Fifth Amendment to the U.S. Constitution. In the decision below, the Louisiana Supreme Court concluded that an award of just compensation “is limited to that required by the Fifth Amendment, which is the fair market value of the property at the time of the appropriation, which does not include loss profits and other severance damages.” *South Lafourche Levee Dist. v. Jarreau*, 217 So. 3d 298, 311 (2017). That interpretation of the Fifth Amendment conflicts with *Kimball Laundry Co. v. United States*, in which this Court held that a property owner was entitled to recover business losses that were attributable to a government condemnation action as a component of a just compensation award. 338 U.S. 1, 6 (1949).

There is no justification in the law or public policy to categorically bar the recovery of economic

injuries when the government condemns real property supporting a business. Certainly, over the years, courts have adopted a general presumption that economic losses are not recoverable in a just compensation award—but that presumption is due to the fact that business injuries are often consequential to a condemnation action.<sup>2</sup> *United States ex rel. & for Use of Tennessee Valley Auth. v. Powelson*, 319 U.S. 266, 281-83 (1943). That presumption, however, is not a hard and fast rule. Government condemnation actions against real estate can and do take property interests in businesses. Thus, in appropriate circumstances, this Court has consistently held that direct economic losses are recoverable. See, e.g., *Kimball Laundry*, 338 U.S. at 6; *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878). That 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 (1943). That principle can only be achieved if courts award compensation based on the unique facts of each case—not by relying on categorical rules like the Louisiana court did in the decision below. *Arkansas Game & Fish Comm’n v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 511, 518 (2012) (Admonishing against the use of per se rules in a takings case because there are a “nearly infinite

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<sup>2</sup> Consequential damages are losses or injuries that do not flow directly and immediately from a condemnation action but are unintended and incidental, such as lost profits or moving expenses. *Mitchell v. United States*, 267 U.S. 341, 345 (1925); *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990).

variety of ways in which government actions or regulations can affect property interests.”).

Certiorari is warranted and should be granted.

## ARGUMENT

### I

#### THE LOWER COURT’S DECISION TO BAR RECOVERY OF DIRECT ECONOMIC LOSSES CONFLICTS WITH THE PURPOSE AND INTENT OF THE JUST COMPENSATION REQUIREMENT

##### A. **Direct Economic Losses Must Be Recoverable, Where Appropriate, To Ensure That Dispossessed Owners Are Made Whole**

The Louisiana court’s decision to categorically bar recovery of economic losses as a component of a just compensation award conflicts with the purpose of the Fifth Amendment, which provides that “private property [shall not] be taken for public use without just compensation.” U.S. Const. amend. V. According to this Court, “just compensation” means “the full monetary equivalent of the property taken.” *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *see also United States v. Miller*, 317 U.S. 369, 373 (1943). 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. Accordingly, this Court “has been careful not to reduce the concept of ‘just compensation’ to a formula” and “has refused to make a fetish even of market value, since it may not be the

best measure of value in some cases.” *United States v. Cors*, 337 U.S. 325, 332 (1949); *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.”); *State ex rel. Miller v. Filler*, 168 Ariz. 147, 151, 153 (1991) (Concluding that there is no set formula for determining just compensation applicable to all condemnation cases; thus, the trier of fact may consider delay damages when determining the award.); *United States v. 320.0 Acres of Land, More or Less in Monroe Cty.*, 605 F.2d 762, 781 (5th Cir. 1979) (The methods for determining compensation are “not absolute and invariable.”).

The Louisiana court’s adoption of a categorical rule barring recovery of economic damages—rejecting the flexible, case-specific approach required by *Cors*—frustrates the purpose of the Just Compensation Clause. This Court has instructed 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. 166, 177-78 (1871) (The government must compensate a landowner to the extent that its actions inflict irreparable harm to an owner’s rights in his or her property.). Thus, although business losses are often excluded from compensation awards, this Court has long recognized that business injuries are recoverable as compensation in appropriate circumstances. *See, e.g.,* *Kimball Laundry*, 338 U.S. at 6; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U.S. 685, 691 (1897); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Mississippi & Rum River Boom*, 98 U.S. at 403.

Indeed, this Court's case law 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 (1985). 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 5. 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 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). *Kimball Laundry*, 338 U.S. at 4. This 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 Just Compensation 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.”<sup>3</sup> *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.* This Court upheld the award of business losses, explaining that courts must take into account the unique

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<sup>3</sup> *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 (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 (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 (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).

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 appraisal 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 407-08.

This Court also awarded business losses in *Monongahela Navigation*. In that case, a 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.* On review, this 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*, this 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.

Simply put, an owner's business interests constitute property. The Fifth Amendment demands that the government provide full and fair compensation when a condemnation action against real estate also destroys the owner's interests in his or her business. By adopting a per se rule disallowing any recovery of business losses, the Louisianan court undermined rights guaranteed by the Constitution. Review by this Court is necessary to ensure that the Just Compensation Clause is faithfully and consistently applied.

**B. The Just Compensation Guarantee Does Not Allow for Categorical Rules Barring Recovery of Losses Directly Attributable to Condemnation Actions**

The *Kimball Laundry* line of cases emphasizes a point essential to this petition: there is no per se rule excluding business losses from an award of just compensation. Instead, fundamental notions of fairness and justice demand that an owner be able to recover all business losses that are directly attributable to a government condemnation action against his or her property:

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. 606, 633 (2001) (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 (2002); *see also Almeta Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478 (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).

Indeed, *Mitchell*, 267 U.S. 341—the case most often cited as having establishing such a non-compensating per se rule—holds only that injuries consequential to a condemnation action are not recoverable. In *Mitchell*, the owners of a corn farm and a related 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.

This Court affirmed. But what it affirmed was not that business losses are never compensable. Instead, *Mitchell* 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.

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. Indeed, consistent with Professor Risinger’s interpretation, *Mitchell* 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.

The Louisiana Supreme Court’s conclusion that the Fifth Amendment does not allow for the recovery of economic losses as compensation—without any consideration of the unique facts of the case—is in direct conflict with precedents from this Court and warrants review.

## II

### **PUBLIC POLICY DEMANDS THAT DIRECT BUSINESS LOSSES BE RECOVERABLE AS COMPENSATION**

The reality of eminent domain is that condemnation actions often take more than just the targeted land. Indeed, 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, which itself is an injury to property:

This Court has declared it to be self-evident that there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, and that this element of value is a property right which should be considered in determining the value of the property, upon which the owner has a right to make a fair return.

*Los Angeles Gas & Elec. Corp. v. Railroad Commission*, 289 U.S. 287, 313 (1933) (internal quotation marks omitted); *see also Gray Line Bus Co. v. Greater Bridgeport Transit Dist.*, 449 A.2d 1036, 1039 (Conn. 1982) (Recognizing the value “inherent in

acquiring an operating business as compared to starting a new business with only land, buildings and equipment in place.”); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 289 (1991) (Business owners have an interest in the avoidance of start-up costs and the ability to realize a higher rate of return than a newly established firm due to greater efficiency in operations, marketing, and administration.).

For this reason, the Alaska Supreme Court concluded that the “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 direct business losses. *State v. Hammer*, 550 P.2d 820, 824 (Alaska 1976). In this vein, legal commentators have long-argued that a rule limiting just compensation to only the fair market value of the condemned real property will result in incomplete compensation.<sup>4</sup> Indeed, the earliest

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<sup>4</sup> See, e.g., Kanner, “Fairness and Equity,” or *Judicial Bait-and-Switch? It’s Time to Reform the Law of “Just” Compensation*, 4 Alb. Gov’t L. Rev. 38, 42 (2011); Oswald, *supra*, 32 B.C. L. Rev. at 289; Aloï & Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 Cornell L. Rev. 604 (1968); Kanner, *When is “Property” not “Property Itself”: A Critical Examination of the Bases of Denial of Compensation for Loss of Goodwill in Eminent Domain*, 6 Cal. W.L. Rev. 57 (1969); Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 Cal. L. Rev. 596 (1954); Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 Va. L. Rev. 437 (1962); Comment, “Just Compensation” for the Small Businessman, 2 Colum. J.L. & Soc. Probs. 144 (1966); Comment, *An Act to Provide Compensation for Loss of Goodwill Resulting from Eminent Domain Proceedings*, 3 Harv. J. On Legis. 445

scholars decried the development of such a rule as unjust and unsupportable. See Note, *Eminent Domain—Compensation—Damages for Loss of Good-Will*, 75 U. Pa. L. Rev. 783, 783 (1927) (The justifications offered for a rule excluding business losses are “more specious than real.”); Note, *Constitutional Law: Eminent Domain: Compensation for Injury to Business*, 11 Cornell L.Q. 215, 218 (1925) (A rule barring recovery of economic injuries creates “a situation which clearly works an injustice.”); Note, *Eminent Domain: Damages: Business*, 4 Cal. L. Rev. 248, 250 (1916) (“A fairer and more logical result will be reached when property is held to include land, business, good will or other intangible attribute, and when for the taking . . . of any of these the owner will be entitled to compensation.”).

A rule allowing for just compensation to include direct economic losses will undoubtedly impose some limits on the government exercise of eminent domain. But those constraints are beneficial to the public—indeed, those constraints are written into the text of the Fifth Amendment. 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.

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(1965); Comment, *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 Yale L.J. 61 (1957).

If this prevents some public projects from going forward, it is only because the projects did not make overall economic sense in the first place:

What society 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 to preserve constitutional liberty. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). The fact that a condemnation action may cost the government more than it would like to pay “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 289, 293 (Fla. 1958) (Drew, J., concurring). The government, after all, 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.* Thus, when a state decides to condemn land for a public 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 (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.”).

Review of the Louisiana Supreme Court decision is necessary to ensure that Fifth Amendment’s requirement that the government pay the actual costs of condemnation is enforced.

## 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. A rule that mechanically disallows recovery of economic losses, without regard to the unique facts of each case, is contrary to the constitutional command that the government put the dispossessed owner “in the same position monetarily as he would have occupied if his property had not been taken.” *Reynolds*, 397 U.S. at 16. Certiorari is both warranted and necessary to ensure that the Just Compensation Clause is followed in a faithful and consistent manner throughout the nation.

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Respectfully submitted,

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