

SUPREME COURT
STATE OF LOUISIANA

No. 17-C-434

**SAINT BERNARD PORT, HARBOR & TERMINAL DISTRICT,
Respondent,**

versus

**VIOLET DOCK PORT, INC., LLC,
Applicant.**

On Writ of Certiorari to the Louisiana Supreme Court from the
Fourth Circuit Court of Appeal, No. 2016-CA-0096,
(Consolidated with Nos. 2016-CA-0262 and 2016-CA-0331)
Judges Love, Belsome, and Lobrano,
and from the 34th Judicial District Court, Parish of St. Bernard,
State of Louisiana, No. 116-860, Division "E"
Honorable Jacques A. Sanborn, Judge Presiding

CIVIL PROCEEDING

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF
WRIT APPLICANT VIOLET DOCK PORT, INC., LLC**

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Pursuant to Supreme Court of Louisiana Rule 12, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Applicant Violet Dock Port, Inc., LLC. This brief is conditionally submitted with the accompanying motion seeking leave to file an amicus brief.

INTEREST OF AMICUS 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 (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, 121 S. Ct. 2448 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (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.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises two important questions concerning the limitations that the Louisiana Constitution places on the government's authority to condemn private property. La. Const. art. I, §§ 2, 4(B); *see also State, Through Dep't of Highways v. Jeanerette Lumber & Shingle Co.*, 350 So. 2d 847, 855 (La. 1977). Specifically, this case asks (1) whether the Public Use Clause prohibits government entities like the St. Bernard Port, Harbor & Terminal District (St. Bernard) from exercising eminent domain powers for "economic development" purposes and (2) whether the Just Compensation Clause authorizes courts to award compensation in excess of the land's "fair market value" when government condemnation actions against private property directly impair an existing business on the condemned land. La. Const. art. I, § 4. The answer to both questions is yes.

Condemnation actions for economic development purposes are contrary to the public interest and open the door to eminent domain abuse. Indeed, the adverse policy implications of "economic development" takings are exemplified by the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), which was met with outrage from a vast majority of Americans, spanning the geographic, political, and social spectrum. Ilya Somin, *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain*, 139 (The University of Chicago Press, 2015). In that case, the U.S. Supreme Court held that the City of New London could lawfully condemn 115 privately owned properties and homes in the hopes that the neighborhood might be redeveloped into an office park with hotels and restaurants, resulting in more property taxes for the community. In response to that shocking decision, forty-four states—including Louisiana—enacted laws or amended their state constitutions to strengthen protections against that

particular type of eminent domain abuse. Dana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L.J. Forum 82, 84 (2015) (citing La. Const. art. I, § 4 (2006)). And seven state high courts rejected *Kelo*'s reasoning, interpreting their state constitutions to prohibit the use of eminent domain for private development. *Id.* at 88. Despite this trend away from *Kelo*, the decision below construed Louisiana's Constitution to provide ports with "exceptionally broad" authority to take over a private business for economic development. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2016-0096, slip op. p. 7 (La. App. 4 Cir 12/14/2016). But as demonstrated by *Kelo* and other similar cases, the contention that economic development, standing alone, should be considered a legitimate public purpose is in fact an argument to eliminate any meaningful limit on the exercise of eminent domain and is often contrary to the public interest. This Court should take this opportunity to make clear that the Public Purpose Clause does not allow takings solely for economic development purposes.

The court of appeal's conclusion that the fair market value of a condemned property will determine the amount of just compensation due in every condemnation case violates the 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 (1943). Certainly economic losses are often not recoverable in a just compensation award, but that is not due to any bright line rule limiting the ways in which a court may calculate compensation—it 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 (1943). The U.S. Supreme Court has repeatedly held that losses in

excess of fair market value are recoverable in appropriate circumstances. *See, e.g., Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. (8 Otto) 403, 408 (1878); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6, 69 S. Ct. 1434 (1949) (when the government condemns land that supports a business, the owner may be entitled to compensation for business losses). The lower court’s decision conflicts with precedents from the U.S. Supreme Court and finds no support in Louisiana state law. *South Lafourche Levee Dist. v. Jarreau*, 2016-0788 (La. 3/31/17); ___ So.3d ___ (recognizing circumstances where the Constitution requires compensation in excess of a property’s bare “fair market value”). It is incumbent upon the courts to determine the proper measure of compensation based on the unique facts of each case. The court of appeal’s decision to the contrary deprives landowners of the right to full compensation guaranteed by the State and Federal Constitutions and must be reversed.

ARGUMENT

I

THE PUBLIC PURPOSE CLAUSE PROHIBITS GOVERNMENT FROM EXERCISING EMINENT DOMAIN TO BESTOW PRIVATE BENEFITS

A. The “Economic Development” Condemnation Rationale Undermines the Prohibition Against Private Takings and Encourages Eminent Domain Abuse

The court of appeal’s conclusion that economic development is a legitimate public purpose eliminates any meaningful protection against private takings. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (A “law that takes property from A and gives it to B [] is against all reason and justice . . .”). Indeed, the argument that economic development is a public purpose rests on the

belief that property, once transferred to a new owner, might lead to some economic benefit, like increased employment or tax revenue. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J. L. & Liberty 949, 950 (2005). Without some additional, legitimate public use rationale, nearly any compelled transfer of property from one party to another could be justified as economic development—particularly where property is transferred from a poor owner to a wealthier person. See Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 170 (Harvard University Press, 1985).

A stark example of this brand of eminent domain abuse arose in 1981, when Detroit condemned the Poletown neighborhood for the benefit of the General Motors Corporation, promising that a new automobile factory would create approximately 6,000 jobs and alleviate a crushing economic recession. See generally Jeanie Wylie, *Poletown: Community Betrayed* (1989). After heated protests and a hurried decision by the Michigan Supreme Court upholding the condemnation for economic development purposes,¹ the city razed the Poletown neighborhood to make way for an auto plant that never created the promised jobs. Wylie, *supra*, at 230. Recognizing its mistake, the Michigan Supreme Court overruled the much disgraced *Poletown* decision:

To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. Poletown's [economic development] rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's

¹ *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, “megastore,” or the like.

Hathcock v. Wayne Cty., 684 N.W.2d 765, 786 (Mich. 2004); *see also City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (citing *Hathcock*’s criticism of economic development positively).

Kentucky and Illinois’s Supreme Courts have also pointed out that the economic development rationale provides no logical limits on the exercise of eminent domain. The Kentucky Supreme Court noted that every new legal business provides some sort of benefit that could be described as economic development. *City of Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) (quoting 26 Am. Jur. 2d Eminent Domain § 34, at 684-85 (1966)). Thus, if mere economic development is a public purpose, “there is no limit that can be drawn.” *Id.* The Illinois Supreme Court dismissed the economic development rationale by explaining: “If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of [an interest group’s] ability to develop land cannot justify a surrender of ownership to eminent domain.” *Sw. Ill. Dev. Auth. v. Nat’l City Envtl.*, 768 N.E.2d 1, 10 (Ill. 2002).

Indeed, even the suggestion that the economic development imparts broad public benefits is readily refuted. In truth, redevelopment plans frequently fail and visit many negative consequences on the community. Gideon Kanner, *We Don’t Have to Follow Any Stinkin’ Planning—Sorry About That*, *Justice Stevens*, 39 Urb. Law. 529, 536 (2007). Quite often, government officials overestimate the benefits of public works projects because they do not understand how certain plans will precisely affect the economy—sometimes, they simply do so to sell the project on the public. *Cf.* Garrett Johnson, *The Economic Impact of New Stadiums and Arenas on Cities*, 2011 U. Denv. Sports & Ent.

L.J. 1, 14-15 (2011) (explaining how local officials are often overly optimistic that sporting events will increase revenue for local economy because they do not consider how spending money on sporting events is usually offset by reduced spending in other areas of entertainment). Moreover, redevelopment plans do not necessarily lead to the benefits they promise because there is no legal mechanism to require the new owner of the condemned property to follow the promised redevelopment plans. Kanner, *supra*, at 539. After the redeveloper acquires condemned land, it will own it in fee simple and is “free to resell it or put it to any lawful use [it] choose[s].” *Id.* at 540.

Kelo is an example of such a misleading and harmful project plan. Hoping to capitalize on Pfizer’s plan to build a nearby facility, New London Development Corporation (NLDC) condemned numerous homes in the Fort Trumbull neighborhood to build new facilities, including a marina, park, hotel, office space, and upscale housing, in hopes of revitalizing an economically depressed area. Shortly after the property owners lost their case at the Supreme Court and surrendered their homes, Pfizer abandoned its plans to operate its New London facility. *Grasping Hand, supra*, at 235. Accordingly, NLDC did not carry out their redevelopment plans. *Id.* Nor have other redevelopment plans materialized. *Id.* Eleven years after *Kelo* was decided, the site of the former Fort Trumbull homes sits as an empty lot. *Id.* *Kelo* has become an embarrassment for those involved. Connecticut Supreme Court Justice Richard Palmer—a member of the four judge majority that permitted the condemnation at state court—subsequently apologized to one of the former homeowners, Susette Kelo, for voting to allow the taking. *Id.* at 234. Justice Palmer told Kelo that he “would have voted differently” had he known what would happen to her home and community. *Id.*

Like the cases discussed above, St. Bernard cannot guarantee that any of the economic

benefits cited as justification for its decision to expropriate Violet Dock Port’s property will ever materialize. The district’s condemnation action simply transferred property from one person to another in the hope that the new owner will use the property in a more beneficial manner, which constitutes a private taking and is expressly prohibited by both the state and federal Constitutions.

B. “Economic Development” Takings Often Benefit the Wealthy at the Expense of Poor and Minority Communities

The use of eminent domain for economic development is often harmful to the public interest. Indeed, in jurisdictions where the government is authorized to condemn property for economic development, wealthy and well-connected interests are encouraged to engage in a practice that economists call “rent seeking,” whereby private interests try to gain control of the eminent domain power and use it for their own benefit at the expense of the public. Thomas W. Merrill, *Rent Seeking & the Compensation Principle*, 80 Nw. U. L. Rev. 1561, 1577 (1986) (“If the prior distribution of wealth can be changed by the state, . . . then the resources of society will be consumed in a factional struggle to capture the state apparatus in order to obtain benefits for one faction at the expense of everyone else.”). This practice is problematic because once interest groups gain government powers, they may use them to impose burdens on the public—including small homeowners and small businesses. See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (University of Michigan, 1962), The Online Library of Liberty, Sept. 2011, at 206² (“interest-group activity . . . is a direct function of the ‘profits’ expected from the political process by functional groups”). In the eminent domain context, interest groups will use their government connections to transfer other

² http://files.libertyfund.org/files/1063/Buchanan_0102-03_EBk_v6.0.pdf.

people's property to themselves. Donald J. Kochan, "*Public Use*" and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 *Tex. Rev. L. & Pol.* 49, 85 (1998).

By construing Louisiana's Constitution to provide ports with "exceptionally broad" eminent domain powers, the decision below facilitated rent seeking and other types of eminent domain abuse. *St. Bernard Port, Harbor & Terminal Distr., LLC*, slip op. at 7. Indeed, the lower court's opinion will allow interest groups to lobby the government to condemn private property because it is cheaper to do so than negotiating with property owners for their land. See Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149, 173-74 (1971). Unfortunately for property owners, rent seeking is difficult to stop because government bodies are willing to capitulate to interest groups in exchange for money and political support. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *Colum. L. Rev.* 223, 230 (1986) ("Interest groups influence the political process by such overt methods as promises of political support, campaign contributions, and outright bribes . . ."). Moreover, a condemned landowner often lacks the finances to mount a counter-lobbying effort against eminent domain abuse because costs of redevelopment projects are typically dispersed between many landowners while the benefits are concentrated to favor the rent seeker. See Kochan, *supra*, at 81. For instance, suppose the government takes \$1 from each of 100 people and gives it all to an interest group. The interest group would have an incentive to spend \$99 to convince the government to do this again; but each individual only has a \$1 incentive to lobby the government not to.

Rent seeking is inherently unjust because it results in a citizen losing his or her property

because of an interest group's success at lobbying.³ The Constitution's framers were hostile towards this type of naked preference because they feared "that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690-91 (1984). Instead, for a condemnation action to be just, the "government action [should] result [] from a legitimate effort to promote the public good rather than factional takeover." *Id.*

Economic development takings are also harmful to the public interest because they disproportionately impact poor and minority communities—the very people who are the least able to oppose a condemnation action. Writing in dissent in *Kelo*, Justice O'Connor discussed how politically connected groups, including large corporations and development firms, would use their powers to victimize the weak if eminent domain could be used for mere economic development. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice Thomas similarly observed that the poor are the least likely to "put their lands to the highest and best social use [and] are the least politically powerful." *Id.* at 521 (Thomas, J., dissenting). Accordingly, the poor would be susceptible to condemnation if economic development is a valid public use. Justice Thomas also added that minority communities would be disproportionately harmed by a broad definition of public use, observing that after the Court had first upheld the use of eminent domain to redevelop blighted areas

³ Rent seeking also results in windfalls for special interests because "[e]minent domain almost always generates a surplus—a resource's value after condemnation is almost always higher than before. The present compensation formula allocates 100% of this surplus to the condemnor, and none to the condemnee." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 85 (1986). Therefore, interest groups have an incentive to use eminent domain because they stand to profit from its use.

in *Berman v. Parker*, 348 U.S. 26 (1954), cities rushed to draw plans for downtown development. *Id.* at 522. Of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, 63% were racial minorities. *Id.*; see also Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol’y Rev. 1, 6 (2003) (“Blight was a facially neutral term infused with racial and ethnic prejudice.”).

Considering the demonstrably unfair history of eminent domain use, Justices O’Connor and Thomas’s skepticism towards promised economic development was warranted. Indeed, since *Kelo*, new empirical evidence demonstrates that Justices O’Connor and Thomas correctly assessed how eminent domain would devastate poor and minority communities. Dick M. Carpenter & John Ross, *Testing O’Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, Urb. Studies, Vol. 46 (11), p. 2447, Oct. 2009. Even if explicit discrimination no longer poses major problems, poor and minority communities still face the brunt of eminent domain use. Communities targeted by eminent domain tend to have more ethnic or racial minorities, have less education, and earn significantly less income than surrounding communities unaffected by condemnations. *Id.* at 2455. Those who are displaced by eminent domain use are also more likely to be renters and live at or below the federal poverty line. *Id.* at 2456.

It is not surprising that poor and minority communities are more vulnerable to eminent domain abuses. To begin, it is cheaper to condemn poor people’s property. James Freda, *Note, Does New London Burn Again?: Eminent Domain, Liberty & Populism in the Wake of Kelo*, 15 Cornell J.L. & Pub. Pol’y 483, 504 (2006). This fact provides local governments a bad incentive to condemn poor and minority communities because if they “are concerned with improving their tax bases, it

simply is not economical to pay attention to the needs or desires of the poor.” Paul Boudreaux, *Eminent Domain, Property Rights, & the Solution of Representation Reinforcement*, 83 Denv. U. L. Rev. 1, 47 (2005). Planning boards are also typically too smart and savvy to target the middle and upper classes because they are more likely to have the resources to challenge actions to acquire their property. *See Grasping Hand, supra*, at 101. Therefore, planning boards, if given the power to condemn land for economic development purposes, will continue to target poor and minority groups because, lacking resources, they are less likely to challenge eminent domain abuse. *Id.*

The Public Use Clause is an essential restraint on the government’s otherwise awesome and terrible power to take an individual’s private property. *See Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 307 (1795) (noting eminent domain’s origin in the “absolute despotic power” of the monarch). To ensure that the public use requirement continue to guard against eminent domain abuse, this Court should reject the decision below and hold that the Constitution does not allow the government to condemn private property for economic development.

II

THE JUST COMPENSATION REQUIREMENT IS INTENDED TO MAKE THE OWNER WHOLE

A. The Requirement That Government Make Dispossessed Owners Whole Militates Against a Rule Allowing Only One Methodology for Calculating Just Compensation

The “fair market value” methodology for calculating the value of condemned property is not the only methodology by which a court can calculate just compensation. 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 (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 (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 economic losses are often excluded from compensation awards, the U.S. Supreme Court has long recognized that economic and 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 (1897); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S. Ct. 622 (1882); *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 losses in excess of a property’s fair market value: 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 (1983). 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 (1945); and *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596 (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.”⁴ *Id.* at 11. Thus, if an owner can show that the government’s condemnation activities take more than the property’s bare value, 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 appraisal in all cases. Exceptional circumstances

⁴ *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, 414, 47 S. Ct. 144 (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 (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 (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).

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.

The 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.* 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 direct losses from an award of just compensation. Indeed, *Mitchell v. United States*⁵—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 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 the 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:

⁵ 267 U.S. 341, 45 S. Ct. 293 (1925).

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 510. 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 344-45.

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 appeals’ decision to the contrary must be reversed.

B. Public Policy Demands That Dispossessed Owners Receive Compensation for All Direct Injuries Caused by a Condemnation Action

Fundamental notions of fairness and justice demand that this Court reverse the lower court’s per se application of the fair market value methodology and adopt a rule allowing for additional compensation 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, 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 (2002); *see also Alмота Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478, 93 S. Ct. 791 (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*.

A rule allowing courts 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. 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 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). 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.

CONCLUSION

For the foregoing reasons, amicus curiae PLF respectfully requests that this Court reverse the decision below and reaffirm the fundamental protections guaranteed by the Public Use and Just Compensation Clauses of the Louisiana Constitution.

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Respectfully submitted,

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