

No. 16-1077

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

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BAY POINT PROPERTIES, INC.  
f/k/a BP Properties, Inc.,

*Petitioner,*

v.

MISSISSIPPI TRANSPORTATION COMMISSION  
and MISSISSIPPI DEPARTMENT OF  
TRANSPORTATION,

*Respondents.*

—◆—  
**On Petition for Writ of Certiorari  
to the Supreme Court of Mississippi**

—◆—  
**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE AND BRIEF AMICUS  
CURIAE OF PACIFIC LEGAL FOUNDATION  
IN SUPPORT OF PETITIONER**

—◆—  
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**MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE**

Pursuant to Court Rule 37.2(b), Pacific Legal Foundation (PLF) respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner Bay Point Properties, Inc. PLF timely sent letters indicating its intent to file an amicus brief to all counsel of record pursuant to Rule 37.2(a). Bay Point granted consent for amicus participation, but by letter dated March 23, 2017, Respondents Mississippi Transportation Commission and Mississippi Department of Transportation withheld consent.<sup>1</sup>

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 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 (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). Moreover, PLF participated as an amicus curiae in numerous cases interpreting the scope of eminent domain power, including *Kelo v. City of New London*, 545 U.S. 469 (2005), and *Hawaii*

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<sup>1</sup> The letters granting and withholding consent are filed herewith.

*Housing Authority v. Midkiff*, 467 U.S. 229 (1984). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state and federal courts across the country. PLF believes that its experience and expertise in property rights matters, in particular the limits of eminent domain, will provide an additional and useful viewpoint in this case.

For all the foregoing reasons, the motion of Pacific Legal Foundation to file a brief amicus curiae should be granted.

DATED: April 6, 2017.

Respectfully submitted,

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**QUESTIONS PRESENTED**

1. Does the Just Compensation Clause prohibit a legislature from limiting how just compensation for a taking is calculated?

2. Does the Just Compensation Clause allow the jury to value the fee interest taken as if it were still encumbered by the discontinued highway easement?

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## INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioner Bay Point Properties, Inc.<sup>1</sup> 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 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 (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). Moreover, PLF participated as an amicus curiae in numerous cases interpreting the scope of eminent domain power, including *Kelo v. City*

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<sup>1</sup> PLF timely sent letters indicating its intent to file an amicus brief to all counsel of record pursuant to Rule 37.2(a). Bay Point granted consent for amicus participation, but by letter dated March 23, 2017, Respondents Mississippi Transportation Commission and Mississippi Department of Transportation withheld consent.

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.

of *New London*, 545 U.S. 469 (2005), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state and federal courts across the country. PLF believes that its experience and expertise in property rights matters, in particular the limits of eminent domain, will provide an additional and useful viewpoint in this case.

**INTRODUCTION AND  
SUMMARY OF REASONS FOR  
GRANTING THE PETITION**

Bay Point Properties' petition for a writ of certiorari raises an important issue concerning the protections provided by the Just Compensation Clause of the Fifth Amendment of the U.S. Constitution. Specifically, the petition asks whether a state legislature can lawfully enact a statute that limits the amount of money an owner of a condemned property can recover as just compensation. It cannot.

Condemnation is the sovereign power to take private property without the owner's consent in certain limited circumstances. 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). Because this awesome power operates in derogation of property rights, the nation's founders placed two key restrictions on its exercise: that government shall not take property unless it is for a valid public use and just compensation is paid. U.S. Const. amend. V. For compensation to be just, the award must place the dispossessed property in "as good a position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*,

317 U.S. 369, 373 (1943). And that determination is reserved for the judiciary as the trier of fact. *See, e.g., Bauman v. Ross*, 167 U.S. 548, 569-70 (1897) (“It is impossible for the legislature to fix compensation in every individual case.”) (citation omitted).

The Mississippi Supreme Court’s decision is particularly objectionable—and particularly appropriate for review—because it departs from this Court’s just compensation precedents by allowing the legislature to interfere with the role of the fact-finder by enacting legislation that significantly limits the amount of money that can be awarded in a condemnation case. As set out in the petition, the jury below determined that the Mississippi Transportation Commission had taken Bay Point’s property when the Commission converted an old, disused highway easement into a public park. Petition at 4-6. Although the land was valued between \$8-\$16 million, a state statute (Mississippi Code § 65-1-123) capped compensation at \$500—the purported value of the sliver of land that was not encumbered by the highway easement. Petition at 7-9. The trial court accordingly instructed the jury to limit its award to the amount allowed by the statute, effectively giving the Commission millions of dollars of land for a pittance. *Id.* at 10.

The fact that Bay Point held a valuable and protected property interest in the land under the easement cannot be disputed. The grant of an easement transfers no ownership interest in the underlying land to the holder of the right-of-way.<sup>2</sup>

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<sup>2</sup> *Preseault v. United States*, 100 F.3d 1525, 1542 (Fed. Cir. 1996) (*Preseault II*); *see also Louis W. Epstein Family Partnership v.* (continued...)

Instead, an easement creates a servitude on the land—an incorporeal hereditament—that grants the holder “a right to make use of the land over which the easement lies for the purposes for which it was granted.”<sup>3</sup> When that use ends, the easement is extinguished and full title reverts to the fee owner “free and clear of any such burden.”<sup>4</sup> Accordingly, the owner of land burdened by an easement is considered to have a present interest in the entire property.<sup>5</sup> The Mississippi statute, however, barred the trial court from considering the value of that reversionary interest when determining just compensation.

If left unreviewed, the lower courts’ rulings will provide a road map for government to circumvent the Just Compensation Clause by enacting legislation that limits the amount of money that can be awarded in payment for condemned property. Such legislation is repugnant to the Constitution for several reasons. First, it deprives the judiciary of its essential charge to determine the amount of money necessary to make a dispossessed property owner whole. Second, it deprives the owner of his or her right to recover an

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<sup>2</sup> (...continued)

*Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) (“[T]he owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted.”); *Board of County Sup’rs of Prince William County v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995) (“[A] fee simple estate is not an easement, or vice versa.”).

<sup>3</sup> *Preseault II*, 100 F.3d at 1545 (citing 7 Thompson on Real Property § 60.02(c), (d) (David A. Thomas, ed., 1994)).

<sup>4</sup> *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004).

<sup>5</sup> *Railroad Co. v. Baldwin*, 103 U.S. 426, 430 (1880).

award based on the unique circumstances of the property. And third, it eliminates an essential check on the legislature's power to condemn property by placing the power to determine compensation in the same hands that choose when and where to exercise the government's condemnation power.

Amicus PLF urges this Court to grant Bay Point's petition to resolve the conflicts created by the Mississippi Supreme Court's decision and to reaffirm the principle that the Fifth Amendment obligates the government to pay just compensation for a taking of private property.

## ARGUMENT

### I

#### THE MISSISSIPPI COURT'S APPROVAL OF LEGISLATION LIMITING THE RIGHT TO JUST COMPENSATION CONFLICTS WITH DECISIONS OF THIS COURT

This Court should grant the petition because the opinion of the Supreme Court of Mississippi authorizes its legislature to limit the amount of compensation that may be awarded in takings cases, in violation of the just compensation requirement of the Fifth Amendment and in conflict with decisions of this Court.<sup>6</sup>

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<sup>6</sup> The Just Compensation Clause of the Fifth Amendment is incorporated against the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

**A. The Constitution Places the  
Determination of Just Compensation  
with the Trier of Fact,  
Not the Legislature**

This Court has repeatedly held that “[t]he ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.” *United States v. New River Collieries Co.*, 262 U.S. 341, 343-44 (1923); *see also Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893) (“[T]he measure of compensation . . . is a judicial, and not a legislative, question.”); *Baltimore & O.R. Co. v. United States*, 298 U.S. 349, 368 (1936) (“The just compensation clause may not be evaded or impaired by any form of legislation.”); *see also Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306 (1923) (“It is obvious that the owner’s right to just compensation cannot be made to depend upon state statutory provisions.”). Thus, when a legislature attempts to place a limit on the amount of compensation that may be awarded for a taking, its actions are unlawful and in excess of its powers under the Constitution. *Monongahela*, 148 U.S. at 327.

Indeed, there is a very good reason why our Constitution vests the power to determine just compensation in the judicial branch—because the decision to condemn private property for a public use lies with the legislative branch. To allow the legislature to set a price for the condemned property would invite mischief and self-dealing, and would

eliminate an essential check on such an awesome power.<sup>7</sup> *Monongahela*, 148 U.S. at 327.

For example, in *Isom v. Mississippi Cent. R. Co.*, 36 Miss. 300 (1858), the Supreme Court of Mississippi recognized that the Constitution forbids the legislature from determining compensation for a taking. *Id.* at 315. The case involved a taking of a road bed by a railroad. *Id.* at 302. A statute required the jury to take into account any purported benefits resulting from the construction of the railroad and lower its award to the private property owner. *Id.* at 310. In holding that the statute was unconstitutional, the Supreme Court of Mississippi stated:

The right of the legislature or the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the “just compensation” it ought to pay therefor; or how much *benefit* it has conferred upon the citizen by thus taking his property without his consent; or to extinguish any part of such “compensation,” by prospective conjectural advantage; or, *in any manner*, to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our constitution. If anything *can be* clear and undeniable, upon principles of natural justice, or constitutional law, it seems that this must be so.

*Id.* at 314-15 (emphasis in original).

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<sup>7</sup> See *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 307 (noting eminent domain’s origin in the “absolute despotic power” of the monarch).



In the decision below, however, the Mississippi Supreme Court upheld a jury instruction limiting the amount of money it could award to the \$500 allowed by Section 65-1-123 as “just compensation” for a parcel of land valued in the million of dollars. *Bay Point Properties, Inc. v. Mississippi Transp. Comm’n*, 201 So. 3d 1046, 1055 (Miss. 2016). In doing so, the lower court applied a state statute “in a manner that thwarts a landowner’s state and federal constitutional rights to just compensation for a governmental taking of private property.” *Id.* at 1059 (Kitchens, J., dissenting).

**B. The Just Compensation Requirement  
Requires an Assessment of the Unique  
Facts of the Case**

Review is additionally warranted because the lower court’s decision undermined the requirement that compensation awards be based on the unique facts and circumstances of the case. Calculating the amount of compensation due for a taking requires courts to focus on the unique facts of each case because there are a “nearly infinite variety of ways in which government actions or regulations can affect property interests.” *Arkansas Game & Fish Comm’n*, 133 S. Ct. at 518 (cautioning against the use of per se rules in a takings case). 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.”).

Indeed, a bedrock principle of takings jurisprudence is that fairness and justice require that

the trier of fact consider the unique circumstances of each case rather than applying rigid, per se rules when determining just compensation:

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 in Tahoe-Sierra Preservation Council, Inc. v. Tahoe-Sierra Planning Agency*, 535 U.S. 302, 336 (2002).

Accordingly, the Constitution ensures that the trier of fact is not bound to one methodology or expert opinion when determining just compensation for a taking. Instead, the trier of fact must take into account all the facts and reach a fair and just result. *Miller*, 317 U.S. at 375 (“Courts have to adopt working rules in order to do substantial justice in eminent domain proceedings.”). Therefore, it was up to the jury in this case to “synthesize in its mind the . . . record before it, determine to what extent opinion evidence rested on facts, consider and weigh it all, and come up with figures supported by all the evidence, perhaps, though not identified with any of it.” *United States v. Northern Paiute Nation*, 393 F.2d 786, 800 (Ct. Cl. 1968).

In this case, however, the trier of fact was not given an opportunity to weigh the particular circumstances of the taking in this case. Instead, pursuant to Mississippi Code § 65-1-123, the trial court instructed the jurors that they could award no more than \$500 in compensation—the jury was not allowed to award any compensation for land over which the highway easement had run. *See Bay Point*, 201 So. 3d at 1055. Due to the per se nature of the state statute, it did not matter that the jury had found that the park exceeded the scope of the easement and that the Commission had in fact taken Bay Point’s property interest in the servient estate. Instead, Section 65-1-123 imposed an inflexible rule that deprived Bay Point of its right to be compensated for the land running under the discontinued highway. This Court should grant the Petition to reverse the judgment of the Supreme Court of Mississippi.

## II

### **THE MISSISSIPPI COURT’S DECISION UNDERMINES THE POLICY AND PURPOSE OF JUST COMPENSATION**

The purpose of the Just Compensation Clause is to ensure that a dispossessed property owner is put in “as good position pecuniarily as he would have occupied if his property had not been taken.” *Miller*, 317 U.S. at 373. To that end, this Court has made clear that no single rule or methodology can accurately calculate the amount of compensation due in every situation. *United States v. Cors*, 337 U.S. 325, 332 (1949) (“The Court in its construction of the constitutional provision has been careful not to reduce the concept of ‘just compensation’ to a [single] formula.”). The application of inflexible rules or formulae for determining just

compensation will result in an award of too little or too much compensation. *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) (“Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules.”); *see also United States v. 34.09 Acres of Land, More or Less, in City of Norfolk, State of Va.*, 290 F. Supp. 551, 555 (E.D. Va. 1968) (“*City of Norfolk*”) (“Just compensation should not be determined by selecting any one formula of valuation and pursuing that to the very end as this would inevitably give an erroneous result.”); *Indep. Park Apartments v. United States*, 465 F.3d 1308, 1311 (Fed. Cir. 2006) (“As the Supreme Court has recognized, the task of measuring just compensation can be difficult in certain instances and is not amenable to a rigid formula.”).

To avoid that risk, “‘just compensation’ should be carefully tailored to the circumstances of each particular case.” *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1368 (Fed. Cir. 2012) (“*Otay Mesa I*”) (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 20 (1949)). This type of tailoring cannot be accomplished through generally applicable legislation. *Bauman*, 167 U.S. at 569-70. Instead, “computation of the compensation due” should be consistent “with an approach which seeks with the aid of all relevant data to find an amount representing value to any normally situated owner or purchaser of the interests taken.” *Kimball Laundry*, 338 U.S. at 20; *see also Cors*, 337 U.S. at 332.

In *Kimball Laundry*, for example, the federal government took temporary possession of Kimball Laundry to clean military clothes during World War II.

338 U.S. at 3. The laundry could not serve its own 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” (*i.e.*, customer base, goodwill, earning potential), because such damages had not been awarded in earlier temporary takings cases. *Id.* at 4. This Court reversed, holding that the facts of the case warranted the inclusion of “going concern” business damages as part of the compensation award. *Id.* at 16. The Court explained that the taking of Kimball Laundry had “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 former owner whole, the Court held that the government had to pay Kimball Laundry for damage to its earning power, customer base, and goodwill. *Kimball Laundry*, 338 U.S. at 16.

Therefore, “it is both correct and important for a trial court to use its flexibility to tailor a fair and reasonable result based on the evidence it credits or rejects.” *Otay Mesa Prop., L.P. v. United States*, 779 F.3d 1315, 1326 (Fed. Cir. 2015) (“*Otay Mesa II*”). Likewise, the trial court and the jury in this case should have had the flexibility to tailor a fair and reasonable result based on the evidence it credited or rejected and to consider such factors as the residual value in Bay Point’s reversion interest in the former

highway easement, which considerations were outright barred by Mississippi Code § 65-1-123.

The decision below conflicts with precedents from this Court by allowing state legislatures to set the terms for what constitutes just compensation. If allowed to stand unreviewed, vesting such power in the legislature would eliminate one of the only checks on the government's eminent domain authority result in the type of uncompensated takings that our Constitution was designed to curtail. This Court should take review of this case to resolve the conflicts created by the Mississippi court's decision.

### III

#### **A RULE THAT ELIMINATES THE JUST COMPENSATION REQUIREMENT WILL HAVE HARMFUL CONSEQUENCES**

The Just Compensation Clause is founded on the principle that “public burdens . . . should be borne by the public as a whole” and cannot be shifted onto individual property owners. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This rule is particularly important where the government targets property for some popular public use, like converting a disused highway easement into a public park. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1569-70 (2003) (“Specifically, a constitutional limitation anticipates the danger that a local majority might co-opt the legislature and persuade it to seize the property of a minority without paying compensation.”). In circumstances like that, the just compensation mandate serves as the only meaningful restriction on the government's condemnation power.

The Just Compensation Clause protects against these harmful consequences by ensuring that the government fully compensate the former owner when it takes property for public use. The clause thus acts as a check on government power, limiting the manner in which the government exercises the power of eminent domain. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 321 (1987) (“[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.”). In turn, by protecting property from unreasonable government interference, the clause helps protect individual liberty. James Madison, *Property*, reprinted in *4 Letters and Other Writings of James Madison* 478 (1865) (“Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions.”).

Indeed, why would a government entity ever negotiate for the purchase of property if it could simply condemn the land and enact a law capping the amount of compensation due? See Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 *Yale L.J.* 149, 173-74 (1971). Why would the government take only that land necessary for public use if it could take surplus land for pennies, then sell it for full market value later? Thomas W. Merrill, *The Economics of Public Use*, 72 *Cornell L. Rev.* 61, 85 (1986) (“Eminent 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.”). And why would the

government evaluate the economic risks of condemnation if it did not have to pay market value for the targeted land?

Put simply, unrestrained eminent domain authority undermines our constitutional system of private property. It is also unjust because it results in a citizen losing his or her property—and all value therein—based on the public’s desire for the land. In order to protect individual’s liberty and property, the Constitution places limits on the exercise of the eminent domain power. The decision below, however, allowed the Mississippi legislature to usurp those limits by placing limits on the compensation to be paid for a taking of private property. This Court should grant the petition in order to reaffirm that the power of eminent domain is not unlimited, and to ensure the proper constitutional protections for all property owners.





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**CONCLUSION**

This Court should grant the Petition to reverse the judgment of the Supreme Court of Mississippi.

DATED: April, 2017.

Respectfully submitted,

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