No. 17-163

In The Supreme Court of the United States

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

Petitioners,

v.

SOUTH LAFOURCHE LEVEE DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AMERICAN FARM BUREAU FEDERATION, AND AMERICAN FOREST RESOURCE COUNCIL IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether, in an eminent domain proceeding, business-related losses should be categorically excluded from a just compensation award, or whether the Just Compensation Clause of the Fifth Amendment requires compensation for *all* non-attenuated and foreseeable injuries, where causation is proven (*i.e.*, when the injury is non-speculative)?

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INTEREST OF AMICI CURIAE[1]

The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Legal Center files in this case because there is grave concern that small businesses are systematically

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[1] Counsels of record have consented to the filing of this brief. Letters evidencing consent have been filed with the Clerk of Court. In accordance with Rule 37.6, *Amici* state that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution to fund the brief's preparation or submission.

undercompensated in eminent domain condemnations. The Legal Center believes that under-compensation remains a pervasive and insidious problem for the small business community.

The American Farm Bureau Federation (Farm Bureau) is a voluntary general farm organization established in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. The Farm Bureau has member organizations in 50 states and Puerto Rico, representing just under six million member-families. It has regularly participated as *amicus curiae* in this Court in cases involving the interpretation of the Takings Clause of the Fifth Amendment to the Constitution.

The Farm Bureau's members own or lease vast tracts of land, on which they depend for their livelihoods and on which all Americans depend for the supply of high quality, affordable food, fiber, and other necessities. When their land is taken through eminent domain they suffer not only the loss of real property, but direct and non-speculative injuries in the loss of commodities grown on the land that have indisputable value at market. Further, with the loss of productive cropland agricultural businesses also suffer immediate lost revenues—which are especially concrete and indisputable where a contract for sale of the commodity has been frustrated.

The American Forest Resource Council ("AFRC") is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands throughout the West to enhance

forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. Many of AFRC's members have their operations in communities adjacent to federal and state forestlands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves.

Many AFRC members own their own timberlands, which they manage as a further source of timber supply, and AFRC members buy significant amounts of timber from private timberlands owned by members and non-members alike. Many of these timberlands are or have been affected by eminent domain proceedings for purposes such as roads or pipelines. If this land is taken without proper valuation for the timber, AFRC members, and by extension the communities where they operate, face increased costs, diminished timber supply, and decreased future investment.

SUMMARY OF ARGUMENT

This case presents an opportunity to resolve a direct and long-running split amongst lower courts on the question of when, and under what circumstances, businesses may be awarded compensation for business-related losses—verifiably and foreseeably caused by an eminent domain condemnation. *Amici* support this petition because this issue impacts the small business, agricultural and forestry communities nationwide. *Certiorari* is appropriate because a hardline categorical rule against compensating for business losses ignores economic realities. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 4 (1949) (granting *certiorari* because this is a "novel and serious question[]."); *see also United States v. Miller*, 317 U.S. 369 (1943) (granting *certiorari* because the petition presented a fundamental question of eminent domain law and "because of an apparent conflict with [Supreme Court precedent]…").

THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE QUESTION OF WHETHER THE JUST COMPENSATION CLAUSE CATEGORICALLY FORBIDS BUSINESS DAMAGES IS OF PROFOUND IMPORTANCE TO SMALL AND AGRICULTURAL BUSINESSES NATIONWIDE

The Constitutional imperative, with any exercise of eminent domain powers, is that the Government pay the "full and perfect equivalent" for whatever has been taken. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893); *see also Olson v. United States*, 292 U.S. 246 (1934) (explaining that "[j]ust compensation includes all elements of value that inhere in the property."); *Miller*, 317 U.S. at 373 ("The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."). In *Kimball Laundry*, Justice Frankfurter reaffirmed this principle, explaining that where a business seeks just compensation for its going-concern value, the "value compensable under the Fifth Amendment… is [] that value which is capable of transfer from one owner and thus of exchange for some equivalent." 338 U.S. at 5. But, unfortunately, today most jurisdictions take the view that the Just Compensation Clause *categorically* forbids compensation for business-related losses.

Amici agree with the Petitioners, who question whether this supposed categorical bar may be squared with *Kimball Laundry*. *See United States v. Toronto, Hamilton & Buffalo Nav. Co.*, 338 U.S. 396 (1949) ("Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."). But rather than

belaboring the legal merits of overturning the rule, *Amici*'s brief focuses on the real-life consequences that result when a small business is denied business-loss damages in a condemnation proceeding. *Amici* also highlight the special implications for farmers, ranchers and foresters.

When denied compensation for non-speculative business damages directly and foreseeably resulting from a condemnation proceeding, businesses are systematically undercompensated. This phenomenon creates special problems that warrant *certiorari*. Louisiana's hardline formulation cannot be squared with either this Court's historic guidance on the Just Compensation Clause, or modern takings doctrines. *See Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (emphasizing that "the Court has recognized few invariable rules in [our takings jurisprudence]."); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors In The Just Compensation Equation*, 32 B.C. L. Rev. 283, 299-302 (1991) (arguing that the hardline rule against compensating for business losses is inconsistent with this Court's modern takings jurisprudence—which now recognizes that "compensation may be required for the taking of a number of intangible interests, such as aerial easements, trade secrets, liens, and contracts.").[2]

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[2] "The rule denying recovery of incidental losses stems from the restrictive definitions that the courts originally ascribed to the terms 'property' and 'taking.' The perplexing question is why, when these terms have evolved over the last century to reflect more accurately the economic realities of property interests and government takings, does the business losses rule still persist?" 32 B.C. L. Rev. at 299.

A. This Matter Concerns to the Entire Small Business Community

While eminent domain can properly facilitate important public projects, the Takings Clause prohibits government from forcing property owners to bear burdens, which "in all fairness and justice … [should] be borne by the public as a whole." *Armstrong v. United States*, 124 U.S. 40, 49 (1960). The measure of just compensation is "that the government should pay 'not for what it gets but for what the owner loses.'" *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003) (quoting *Kimball Laundry*, 338 U.S. at 23). Nonetheless, when a government invokes eminent domain to take commercial property, owners often suffer injuries that go uncompensated. *See* Oswald, 32 B.C. L. Rev. at 374 (explaining the economic reality that "[r]efusing to compensate the landowner fully for the costs of condemnation by denying … recovery for business losses shifts some of the costs of that project to the owner.").[3] Small businesses are especially vulnerable because eminent domain may cause temporary disruptions. Condemnation may also inflict long-term injuries, as small businesses may find it difficult (sometimes impossible) to locate a comparable site that will satisfy their business

[3] *Id.* at 372 ("Commentators have criticized the current standard of measuring just compensation by the market value of the property taken as promoting inefficiency in eminent domain actions, because it encourages the government to ignore some of the real costs of the taking.") (Citing James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 59 Minn. L. Rev. 1277, 1293-1300 (1985)).

needs with an affordable price-point, consistent with the final condemnation award.[4] *Id*. at 287.

Denial of compensation for business losses is particularly "troublesome" because goodwill and going-concern value "reflect the inherent value of the business." *Id*. For example, a family-owned restaurant depends on a loyal customer-base that will be lost if the company moves to another location. *See Kimball Laundry*, 338 U.S. at 8-10 (referring to an existing customer base as a "trade route[]," which contributes to a company's "going-concern value").[5] The business might entirely lose its "trade routes" if forced to relocate to another City, where it must start fresh.[6] *Eminent Domain Valuations in an Age of Redevelopment: Incidental Losses*, 67 Yale L. J. 61,

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[4] This is a concern not only for brick-and-mortar shops, but also for agricultural businesses. For example, if a portion of a farm or forest is condemned, the owner might seek to purchase another tract of land, but might face higher costs in managing separate smaller tracts—especially if the owner is unable to purchase land near the existing operation.

[5] *Kimball Laundry* recognized that such "transferable momentum" may be attributable to the "exercise of managerial efficiency[,]" or investments in marketing that "contribute[] to the future profitability of the business…" 338 U.S. 9-11; *see also Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U.S. 436, 446 (1893) (noting that goodwill is value attributable to established patronage); *Los Angeles Gas & Elec. Corp. v. Railroad Comm'n*, 289 U.S. 287, 313 (1933); *In re Brown*, 242 N.Y. 1, 6 (1926) (Cardozo, J.) (emphasizing that "[m]en will pay for any privilege that gives a reasonable expectancy of preference in the race of competition…. [And] [s]uch expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers.").

[6] Rather than restarting from scratch, small business owners often chose to close their doors when their existing trade routes are extinguished with condemnation.

75 (1957). Yet even relocation within an existing community may result in lost "trade routes" if the new location proves less convenient for the company's existing customer base.[7] For example, market conditions and zoning restrictions might dictate that a restaurant must move—if it is to stay in business at all—to a downtown section where parking may be more difficult, or which may otherwise be unattractive to once-loyal patrons.

In many cases there may be room to dispute causation, or whether the alleged injury is conjectural. But, in other cases concrete facts in the record may demonstrate that a business has lost going-concern value as the direct and inevitable result of a condemnation.[8] For example, our hypothetical family-run restaurant might provide

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[7] "One of the long-standing explanations for the no business damages rule is the assumption that a business carried on condemned premises can usually relocate in such a way that nothing is lost but the value of the premises themselves. How such a situation, even if usually true, justifies a totally irrebuttable presumption that it is always true is quite problematical on both justice grounds and constitutional grounds." D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises Are Condemned*, 15 Seton Hall L. Rev. 483, 521-22 (1985).

[8] "Going-concern value is created by such factors as 'avoidance of start-up costs, increased operating efficiency, and increased marketing and administrative efficiencies.'" Oswald, 32 B.C. L. Rev. at 289 (citing Paulsen, Goodwill and Going Concern Value Reconsidered, MERGERS & ACQUISITIONS, 12 (Winter, 1980)); *see also Gray Line Bus co. v. Greater Bridgeport Transit. Dist.*, 188 Conn. 417, 422 (1982) (explaining that going-concern value refers to "the many advantages inherent in acquiring an operating business as compared to starting a new business with only land, buildings and equipment in place.").

evidence that with condemnation its only available option for relocation was to a neighboring community, along with supporting affidavits speaking to the fact that the company's base of regular customers has been displaced.[9] Indeed, a company may be able show that with the physical taking of its land, the condemning authority also took an objectively valuable business asset. *See Kimball Laundry*, 338 U.S. at 11 (observing a distinction between "the attitudes which generate going-concern value and those of which tangible property is compounded[,]" while emphasizing that "as the probability of continued patronage gains strength, this distinction becomes obliterated, and the intangible acquires a value to a potential purchaser no different from the value of the business's physical property.") (citing *Galveston Electric Co. v. Galveston*, 258 U.S. 388, 396 (1922) (Brandeis, J.) ("In determining the value of a

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[9] Shari Lutz, *Valuing Goodwill: Factors to Consider and Sources of Information*, 27-Dec Colo. Law. 45, 46, 48 (1998) (emphasizing that business valuation must consider *all relevant factors*, and illustrating the point in highlighting several location-specific factors that affect goodwill for a medical practice—including "referral sources;" "practice location;" "practice demographics;" and "amount of competition.") (citing Buying and Selling Medical Practices: A Valuation Guide, 39 (Chicago: American Medical Association, 1990)); *see also* Kevin M. Zanni, "Valuing a Going-Concern Location-Specific Business Operation in an Eminent Domain or Expropriation Matter," *Eminent Domain and Expropriation Insights: Best Practices*, Willamette Management and Associates (Summer, 2015) (explaining that the market, regulatory environment, cost of capital and other factors may have bearing in calculating lost going-concern value when a business is displaced with condemnation), *available at* http://www.willamette.com/insights_journal/15/summer_2015_1.pdf (last visited Sept. 20, 2017).

business as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property.")).

In such cases, displacement from a branded location will inevitably destroy, at least partially, the company's going-concern value. For example, if "Morgan's on Main Street" were to be displaced from Main Street, the Morgan Company might well lose going-concern value because it must brand itself anew.[10] To be sure, where a company's public identity is bound to a specific location—either intrinsically, by contract or by virtue of a well-executed marketing campaign—the company should at least have the opportunity to prove that its lost going-concern value was foreseeable and the direct result of the contested condemnation.

The present case illustrates how a categorical bar against compensating for business-related damages will under-compensate commercial property owners—in at least some cases. In condemning Mr. Jarreau's property, the South Lafourche Levee District took the land ***and*** destroyed an established property right (*i.e.*, a contract) with concrete economic value. *South Lafourche Levee District v. Jarreau*, 217 So.3d 298, 302 (2017) (observing that Jarreau "continued to excavate dirt from the

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[10] Likewise, if an iconic building—a known community landmark—were to be condemned, it would be unrealistic to assume that that the business could be transferred to another location without concrete damage to its going-concern value. *See generally*, Megan Bartkowski, *Trademarks as Components of Goodwill*, 19 J. Contemp. Legal Issues 163 (2006) (discussing "[b]rand valuation" and "the interrelationship between trademarks and goodwill.").

appropriated area to satisfy contractual obligations…"). As demonstrated here, condemnation can destroy rights established through contract in the same way that a physical invasion of private property may cause other direct and non-attenuated consequential damages requiring compensation under the Takings Clause.[11]

Where a contract is connected to land targeted for condemnation, the authorities have taken a valuable property right that could have been transferred from one party to the next prior to condemnation.[12] In such cases, compensation for the face value of the land itself is simply insufficient to make the owner

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[11] *See Ark. Game & Fish Comm'n*, 568 U.S. at 32 (rejecting the purported categorical rule that there can be no takings liability for unintentional consequential injuries).

[12] Some authorities cite this Court's decision in *Omnia Commercial Co. v. United States*, as saying that there can be no takings liability for damages to contractually created rights; however, *Omnia Commercial Co.* was unequivocal in saying that: "if [a contract is] taken for public use the government would be liable." 261 U.S. 502, 508 (1923). In any event, *Omnia Commercial Co.* was a regulatory takings case. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321-22 (2002) (emphasizing a strict compartmentalization between regulatory takings and physical takings case law). For that matter, *Omnia Commercial Co.* expressly distinguished between regulatory action that affects an ordinary commercial contract and an action in eminent domain that destroys economic rights that are "an integral part" of the condemned property. 261 U.S. at 513; *see also Board of Park Com'rs of Columbus v. DeBolt*, 15 Ohio St.3d 376, 378 (Sup. Ct. OH, 1984) ("The distinguishing feature between those cases which allow compensation for the loss or destruction of a contract and those which deny it is whether the contract rights of the party seeking compensation are a part of the *res* which is taken.").

whole for what is really taken because, in losing physical possession of the land, the owner has lost other connected rights with objective value. *See Monongahela River Navigation Co.*, 148 U.S. at 345 (holding that a property owner was entitled to compensation for the loss of a conferred and objectively valuable franchise to collect tolls with condemnation of a lock-and-dam operation).

For example, a couple might invest their savings, or acquire a loan to purchase of a franchise.[13] But what if the franchise agreement requires operation in a specific location? *See* Risinger, 15 Seton Hall L. Rev. at 486-87 (explaining that to control competition and market saturation, oil companies almost universally restrict franchise agreements to designated locations, and that it is necessarily more costly for an entrepreneur to obtain land with an existing gas station franchise); Zanni, *supra*, at 3 (offering examples of other location-specific business models). Condemnation then destroys the owner's most valuable business asset, *i.e.*, the right to run

[13] It is not uncommon for entrepreneurs to take out a reverse mortgage on their home, or to put their home up as collateral when seeking a loan necessary to launch a business, or to acquire an existing enterprise with established goodwill. *See* Alicia Robb, Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms, Commissioned by the U.S. Small Business Administration (Apr. 2013) (observing that entrepreneurs must often rely on personal assets when seeking to acquire startup loans), *available* online at https://www.sba.gov/sites/default/files/files/rs403tot(2).pdf (last visited Sept. 12, 2017); *see also* Small Business, Credit Access, and a Lingering Recession, NFIB Research Foundation (Jan. 2012), *available* online at http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-credit-study-nfib-2012.pdf (last visited Sept. 19, 2017).

the franchise. The owner must decide whether to close shop and eat the loss unmitigated, or to start again from scratch—with an entirely new business model. The latter option becomes less feasible because the proprietors may lack the energy to start anew, or because the loss of revenue has forced the business to the brink of bankruptcy.[14]

While courts should require evidence of direct and concrete damages, business owners should have an opportunity for compensation if they can make the requisite evidentiary showing of business losses. *Eminent Domain Valuations in the Age of Redevelopment*, 67 Yale L. J. at 75 (emphasizing that courts ignore economic realities and display "business naivete" in "dismissing [claims for] business losses… on the view that 'a good plumber should be able to continue his business in almost any location and do as well as he formerly did…"). Moreover, "[a] determination of fair market value [for a business] … [should] depend upon the circumstances in each case." Rev. Rul. 59-60, § 3, ¶ .01 (1959) (emphasizing that there can be "[n]o formula" or "generally applicable" rule, that "[a] sound valuation will be based on all relevant facts,

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[14] *See* Arthur B. Kennickell, Myron L. Kwast, and Jonathan Pogach, Small Business and Small Business Finance during the Financial Crisis and the Great Recession: New Evidence From the Survey of Consumer Finances, Federal Reserve Board: Division of Research & Statistics and Monetary Affairs, 8 (Feb., 2015) (discussing interdependencies between small business and household finance: "'[L]oans with personal commitments compromise a majority of small business loans, measured in numbers or dollar amounts.'") (internal citations omitted), *available* online at https://www.federalreserve.gov/econresdata/feds/2015/files/2015039pap.pdf (last visited Sept. 12, 2017).

[and that] the elements of common sense, informed judgment and reasonableness must enter into the process of weighing those facts and determining their aggregate significance."). Simply put, there should be no categorical bar on compensation for business losses.[15]

B. The Issue of Business Losses is of Special Concern and Practical Importance for Farmers, Ranchers and Foresters

Louisiana's hardline rule against compensating for business losses is of great concern for businesses within the agricultural, forestry and mineral industries, where the condemnation of land also amounts to a confiscation of commodities of indisputable value on the open market.[16] *See National Food & Beverage Co., Inc. v. United States*, 105 Fed.Cl. 679 (Fed. Cl. 2012) (holding that a landowner deserves compensation "where the mineral deposit itself is the property being condemned…") (quoting 4 Nichols on Eminent Domain § 13.14[3]); *United States v. Klamath and*

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[15] *See* Oswald, *Supra* at 374 ("The arbitrary excluding of some of the very real components of the value of property from the compensation equation creates an inconsistency and unfairness that cannot help but result in public perceptions of illegitimacy.").

[16] Some jurisdictions justify the *per se* rule against compensation for business losses on the view that such damages are always attributable to the gumption and ingenuity of management—with the assumption that such values cannot be transferred from one owner to the next. But, such logic could not justify denial of compensation for the taking of a concrete property interest, as with the destruction of fungible commodities, or the taking of valuable contractually created property rights.

Moadoc Tribes, 304 U.S. 119, 123 (1938) (holding tribes were entitled to have standing timber value "included as a part of the compensation for the lands taken"); *see also United States v. 22.80 Acres of Land, More or Less*, 839 F.2d 1362, 1364 n. 2 (9th Cir. 1988). This case illustrates that point well—as the District, condemned Jarreau's property to extract the dirt that his company had contracted to sell to a developer. *South Lafourche Levee Dist. v. Jarreau*, 192 So.3d 214, 219 (La. Ct. App. 2016) (noting that the District's condemning resolution gave it the right to "remove spoil or earth" from the premises, and that the District expressly notified affected owners that it would imminently begin "removing earthen material" from the condemned land). And the record demonstrates the concrete value of that dirt. *Id*. at 219 (noting the lower court awarded Petitioners only $11,869.00 for the land, but awarded $16,956.00 to the District "for the dirt that Mr. Jarreau excavated after the [] tract had been appropriated.").

The decision below is inconsistent with a lengthy tradition of Legislative and Congressional recognition that timber resources, as well as other agricultural commodities, have value separate and apart from the land on which they grow. As a stark example, the Oregon & California Railroad & Coos Bay Wagon Road Grant Lands Act of 1937, 43 U.S.C. § 2601 ("O&C Act"), requires management of over two million acres in western Oregon for "permanent forest production." The O&C Act provides that the timber on these lands "shall be sold, cut, and removed in conformity with the princip[le] of sustained yield. …" *Id.* But at the same time,

Congress severely restricts any sale or disposal of the underlying land. 43 U.S.C. § 1713.

Moreover, many states have long-standing statutes providing for treble damages in the event of timber trespass and/or timber theft, recognizing the separate and important value of the resource.[17] These statutes reflect a widespread judgment that timber theft is an egregious and outrageous intrusion on property rights. But, Louisiana's rule would inappropriately authorize the government to engage in such an intrusion.

Likewise, Louisiana's rule invites gamesmanship when taking farmland. In those jurisdictions applying Louisiana's rule—compensating only for the surface value of the land itself, while denying compensation for any direct businesses losses—condemning authorities might wait to initiate eminent domain until harvest season. This would allow them to reap an immediate profit. Indeed, by the logic of the Louisiana Supreme Court, a farmer would have no ground to seek compensation for the value of fully cultivated crops taken with the commendation of a corn or soy bean field—though that result seems difficult to reconcile with this Court's recent decision in *Horne v. U.S. Dept. of Agriculture*, 135 S. Ct. 2419, 2427-28 (2015) (holding that raisin producers must be compensated for the fair market value of crops taken by government action, and that such commodities are protected on the same terms as real property).

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[17] *See, e.g.*, 13 Vt. Stat. Ann. § 3606 (first enacted 1787); Rev. Code Wash. § 64.12.030 (enacted 1869); Cal. Civ. P. Code § 733 (enacted 1872).

Still, even less calculating condemnation actions may lead to the same abhorrent result. *See White v. Natural Gas Pipeline Co. of America*, 444 S.W.2d 298, 301 (Sup. Ct. Tex., 1969) (denying independent compensation for damage to crops or loss of timber, and allowing consideration of such features only to the extent they affect market value of the land); *People ex rel. Dept. of Water Res. v. Gianni*, 29 Cal.App.3d 151, 156 (Cal. Ct. of App., 1972); *State Roads Com'n of State Highway Admin. v. Toomey*, 302 Md. 94 (Md. Ct. of App., 1985); *Dorsey v. Donohoo*, 83 Ohio App.3d 415, 421 (Oh. Ct. of App., 1992). For example, the NFIB represents a small family-run business that manages and cultivates thousands of acres of timberland in California, which the company ultimately intends to harvest. After years of management and cultivation, at great expense, it would be inequitable and wholly unfair if a government should take a vast tract of the company's land without paying for the timber taken with condemnation of the underlying real property.[18]

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[18] Understandably the condemning authority desires to keep costs low when carrying out public projects; however, in denying compensation for timber or other agricultural commodities, the authority would necessarily be undercompensating the business for its actual losses—*i.e.*, damages directly, foreseeably and indisputably caused by the condemnation. *See Ark. Game & Fish Comm'n*, 568 U.S. at 30 (reinstating the Court of Federal Claim's decision that had previously awarded damages for unintended consequential injuries both for lost timber and projected reclamation costs); *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1372 (Fed. Cir. 2013) (upholding the District Court's judgment, and affirming that "it is not necessary that the government intend to invade the property owner's rights, as long as the invasion that occurred was 'the foreseeable or predictable result' of the government's actions.").

Typically, in these cases the authority will argue that it should only have to pay compensation for the fair market value of the strip of land affirmatively condemned—considering the highest and best prospective economic use of that property.[19] Yet that formulation overlooks the indisputable market value of commodities rooted in the land itself. Such an approach would allow for a windfall if the authorities should seek to capitalize on these assets—taken, but not paid for. *But see Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.) (emphasizing that, "The question is, What has the owner lost? Not what has the taker gained.").

Compensation for the surface value of the land does not necessarily compensate for the value of commodities readily derived from the land—especially where the independent market value of those commodities reflects the fruits of the owner's labor. The present case illustrates the point well. Indeed, none of the appraisals for the fair market value of the condemned land approximated the independent market value of the underlying dirt. *Jarreau*, 192 So.3d at 219.

In the same way as Justice Frankfurter suggested that "the expenditure of money in soliciting patronage" may be "readily recognized as a[] [compensable] asset of the business," *Kimball*

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[19] Compare *Cross v. State*, 320 N.Y.S.2d 625 (1971) (holding that it is improper to allow for separate valuation of trees); *Dept. of Transp. v. Willis*, 165 Ga.App. 271 (1983) (disallowing evidence of value for separate elements of a condemned parcel); with *City of Hillsborough v. Hughes*, 140 N.C. App. 714, 720 (2000) (holding that it was proper to admit evidence of valuation of timber for the purpose of determining fair market value of the property).

Laundry, 338 U.S. at 10, the government should provide independent compensation for the loss of transferable business assets created or cultivated through investment of capital and sweat equity. For example, annually a farmer might expend thousands of dollars in preparing land, planting, fertilizing, managing pests and irrigating a crop. The farmer reasonably expects to make at least a modest return on investment—consistent with prevailing markets. For that matter, in many cases farmers, ranchers and forest managers have already entered into production contracts to sell their products to suppliers long before harvest, and may be forced either to pay money back to the purchaser or to buy commodities from another party in order to avoid a breach when their lands are condemned.[20] Yet, under Louisiana's hardline rule, the farmer would be denied compensation for "lost profits" if the land were condemned at harvest—just as Mr. Jarreau has been denied compensation for his carefully cultivated commercial-grade dirt.

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[20] Where a production contract is in place, the farmer, rancher or forester acts as a bailee because they have already transferred title to a buyer, and are obligated to ensure delivery of the product at a future date. Accordingly, it would be absurd to pretend that the commodity in question is without independent market value. *See* Neil D. Hamilton, Farmer's Legal Guide to Production Contracts, University of Arkansas, The National Agricultural Law Center, 3 (Jan. 1995) (noting that agricultural production contracts are increasingly common), *available* online at http://nationalaglawcenter.org/publication/download/hamilton-a-farmers-legal-guide-to-production-contracts-174-pp-farm-journal-inc-1995/ (last visited Sept. 19, 2017).

Simply put, there is nothing "just" about a rule that denies compensation under these facts.[21] *See DeBolt*, 15 Ohio St.3d at 378 (recognizing an exception to Ohio's general rule against awarding separate compensation for crops where there is a preexisting sales agreement). Where an owner has invested time, energy and money to create or contribute to an objective and non-speculative value derived from the land, there should be full compensation for that transferable value—above and beyond the separate value that the land may have on the real estate market. *See El Paso Elec. Co. v. Pinkerton*, 96 N.M. 473, 474 (1981) (allowing compensation for "special or consequential damages" to existing crops); *Barnes v. United States*, 538 F.2d 865, 874 (Ct. Cl. 1976) (allowing separate valuation for mature crops); *Town of Newington v. Estate of*

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[21] *Amici* focus primarily on business losses suffered during eminent domain condemnation—in terms of damage inflicted on a businesses' goodwill, going-concern value, agricultural assets, and contractual agreements. But it is important to recognize that severance damages—*i.e.*, diminution in value to a residuary parcel—may also have hugely consequential impacts on business. In the agricultural context, a taking that severs an existing farm or ranch may greatly diminish the potential to generate future revenue on the remaining parcel because a smaller plat of land has less production capacity. Moreover, there are special challenges where a taking bisects an agricultural property. For example, condemnation for construction of a pipeline may result in access problems that may make it more costly or difficult to continue agricultural activities on a severed parcel, or which make timber harvest on the severed parcel much more costly. Yet Louisiana's rule would disallow compensation even for these sorts of losses. *South Lafourche Levee Dist.,* 217 So.3d at 312 (concluding that the Fifth Amendment requires compensation only for the fair market value of what is taken, "which does not include loss profits and other severance damages.").

Young, 47 Conn. Supp. 65 (Conn. Super. Ct. 2000) (allowing separate compensation for crops depending on whether they are ready for harvest). Indeed, there can be no justice in a rule so arbitrary as to completely deny compensation for a valuable commodity on the mere fact that it is still tethered to the condemned parcel—especially given that this Court has now made clear that full compensation would have to be paid if a crop were taken a day after harvest. *Horne*, 135 S. Ct. at 2427. No willing seller would ever agree to sell a farm without ensuring that the contract price would entail valuation for *both* the land and the market value of cultivated resources.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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