No. 17-163

In the Supreme Court of the United States

CHAD M. JARREAU, *et al.*,
Petitioners,
v.
SOUTH LAFOURCHE LEVEE DISTRICT,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Louisiana Supreme Court interpreted Louisiana law to determine the compensation owed under state law for property appropriated under Louisiana's levee servitude. An appropriation of property under Louisiana's levee servitude is not a taking requiring just compensation under the Fifth Amendment. Should this Court review the Louisiana Supreme Court's decision regarding compensation required under Louisiana law for property appropriated under a levee servitude where the Fifth Amendment does not apply?

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INTRODUCTION

This case involves a levee servitude appropriation, which is distinct from a taking under the United States Constitution's Fifth Amendment. Under Louisiana's levee servitude, the state has always had the right to use riparian property for levees. So when the state exercises that right, as the Levee District did here, there is no constitutional taking of private property for public use. Thus, the Fifth Amendment does not mandate compensation for levee servitude appropriations. The question presented by the petition—whether the Fifth Amendment's Just Compensation Clause requires compensation when the condemnation of real property destroys the going-concern value of a business—was not an issue in this case. This Court does not have jurisdiction to review this case, and Jarreau's petition for writ of certiorari should be denied.

JURISDICTION

This Court lacks jurisdiction to review this case. As explained below, the question presented as framed by petitioners is not an issue in this case and was not decided by the Louisiana Supreme Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following Louisiana statutes and constitutional provisions: La. Civ. Code art. 665; La. Const. art. I, § 4(G); La. Const. art. VI, § 42(A); La. Rev. Stat. § 38:301(C)(1)(a); La. Rev. Stat. § 38:301(C)(1)(h); La. Rev. Stat. § 38:281(3); and La. Rev. Stat. § 38:281(4). The pertinent text of these provisions is printed in this opposition's appendix.

STATEMENT OF THE CASE

I. Factual Background

On January 10, 2011, the South Lafourche Levee District adopted a resolution appropriating a permanent levee servitude affecting certain properties along the west bank of Bayou Lafourche to upgrade the Larose to Golden Meadow, Louisiana, Hurricane Protection Project. Pet'rs' App. 4. The appropriation was necessary to enlarge and improve the Larose to Golden Meadow Hurricane Protection levee, which protects vulnerable property in Lafourche Parish, Louisiana from flooding. *Id.* The Levee District appropriated the property under Louisiana's levee servitude in accordance with Louisiana Civil Code article 665 and Louisiana Revised Statutes title 38, section 301. Pet'rs' App. 16. Among the property the Levee District appropriated was .913 acres of Chad Jarreau's 17.1-acre tract of land. Pet'rs' App. 5.

Under Louisiana's levee servitude, riparian property has always been subject to the state's right to use the land for levee purposes. Pet'rs' App. 19-20. And, as explained below, appropriation under the levee servitude is not a taking for purposes of the Fifth Amendment. Pet'rs' App. 21. So despite Jarreau's contention, his property was not taken by eminent domain. *Id.* Further, although Jarreau asserts that the property is not riparian and thus cannot be subject to the levee servitude, the Louisiana Supreme Court rejected that argument because Jarreau failed to challenge the validity of the appropriation. Pet'rs' App. 16 n.9. That the property is riparian and subject to the levee servitude is therefore a conceded fact.

Jarreau operates a construction and trucking business through his company, Bayou Construction & Trucking, LLC ("Bayou Construction"). Pet'rs' App. 5. One of many aspects of that business is excavating and selling dirt, and Jarreau used his property as a dirt pit for that part of his business. R. 608. Bayou Construction sells dirt from the property only when not busy with hauling, road work, overpass, or levee jobs, and those other jobs took priority over selling dirt. R. 608, 612. In fact, the evidence presented at trial shows that Bayou Construction had no dirt sales whatsoever in 2010—the year before the appropriation. R. 650. Jarreau presented evidence that the appropriation prevented Bayou Construction from performing a single contract for the sale of dirt. Pet'rs' App. 93-94; R. 609. But there is no evidence that the business was destroyed, that the appropriation deprived Jarreau of the going-concern value of the business, or that the business could no longer operate. Further, contrary to Jarreau's suggestion, there is no evidence of Jarreau's alleged "months of hard work" to convert dirt on his property into dirt suitable for construction projects. Nor is there evidence in the record that the Levee District used or took any dirt that Jarreau previously excavated or processed.[1]

So this case is actually quite different than Jarreau describes. Contrary to Jarreau's contention that the appropriated property is neither riparian nor subject to the levee servitude, the Louisiana Supreme Court specifically found that the property was appropriated under the levee servitude because its riparian nature

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[1] Petitioners fail to include citations to the record for these asserted facts.

was uncontested and thus a conceded fact. Pet'rs' App. 16, 16 n.9. The Levee District did not condemn Jarreau's property using eminent domain powers; it appropriated the property by exercising its rights under the levee servitude. Pet'rs' App. 4, 16. And while Bayou Construction was unable to fulfill one particular contract, the appropriation did not destroy Jarreau's business or deprive him of its going-concern value. These misstatements go to the heart of the question presented, and the result is that Jarreau requests review of an issue that is not present in this case.

II. Procedural Background

A. The trial court improperly awarded lost profits.

Despite receiving notice of the levee appropriation, which allows the Levee District to use, damage, or destroy the appropriated property, Jarreau continued to excavate dirt from the appropriated tract. Pet'rs' App. 5. In response, the Levee District filed suit seeking an injunction preventing Jarreau from further dirt excavation from the property and damages for the dirt already excavated. *Id.* Jarreau filed a reconventional demand against the Levee District seeking compensation for the appropriated land, economic and business losses, and other damages. *Id.* Bayou Construction later intervened in the suit as plaintiff-in-reconvention seeking compensation for lost profits, legal interest, and costs arising from the appropriation. Pet'rs' App. 5-6.

Though Jarreau initially contested the Levee District's right to a permanent injunction prohibiting dirt excavation on the appropriated tract, Jarreau later

stipulated to the permanent injunction and agreed not to remove dirt "from the property subject to the Levee Servitude appropriated" by the Levee District. Pet'rs' App. 6.

After a two-day bench trial, the court found that Louisiana Revised Statutes 38, section 301 governed the compensation owed in this case and ruled that, in addition to fair market value, Jarreau and Bayou Construction were entitled to $164,705 for economic and business losses related to their dirt excavation operation. *Id.*; *see* R. 407-08.

B. The Louisiana First Circuit Court of Appeal correctly reversed Jarreau's lost profits award.

Because the trial court improperly interpreted Louisiana's laws governing the compensation owed for levee servitude appropriations, the Levee District appealed. Pet'rs' App. 6-7. Statutory and constitutional amendments enacted by Louisiana's legislature in 2006 restricted compensation for levee servitude appropriations for hurricane protection projects, and the Levee District argued that those restrictions precluded any award for lost profits. Pet'rs' App. 7. The court of appeal correctly held that lost profits were not compensable under Louisiana's 2006 constitutional amendments, and it found that Louisiana law did not support any compensation award beyond the property's fair market value. Pet'rs' App. 7, 63.

C. The Louisiana Supreme Court correctly held that Jarreau is not entitled to lost profits.

Jarreau sought the Louisiana Supreme Court's review of the appellate court's decision to reverse the lost profits award. Recognizing that lost profits were not compensable under Louisiana's 2006 statutory and constitutional amendments, Jarreau presented a new argument to the supreme court. Jarreau argued that its lost profits award was really an award for the value of the dirt on the property and that it thus represented the property's fair market value. *See* Jarreau's La. Supreme Ct. Writ Appl., Assignment of Error, 5 ("Pursuant to Louisiana law and the Fifth Amendment to the United States Constitution, the fair market value of the property actually taken includes the value of the dirt. The appellate court properly concluded that the law affords the Property Owners a remedy for the taking of the dirt, but erred in applying the law to the facts in overturning the trial court's well-supported award of $164,705.40 for the value of the dirt appropriated."); Jarreau's La. Supreme Ct. Original Br. 7, 9-19. The court appropriately rejected that argument.

Despite Jarreau's contention in his petition, the Louisiana Supreme Court did find that Jarreau's property was subject to, and was appropriated under, Louisiana's levee servitude. Pet'rs' App. 16. Relying on longstanding precedent from the United States Supreme Court and multiple Louisiana courts, the court acknowledged that levee servitude appropriations are distinct from takings under the Fifth Amendment and that the Fifth Amendment does not mandate

compensations for such appropriations. Pet'rs' App. 13, 21-22 (citing *Gen. Box Co. v. United States*, 351 U.S. 159, 166-67 (1956); *Eldridge v. Trezevant*, 160 U.S. 452 (1896); *DeSambourg v. Bd. of Comm'rs*, 621 So. 2d 602, 606-08 (La. 1993); *Peart v. Meeker*, 12 So. 490, 490 (La. 1893); *Vela v. Plaquemines Parish Gov't*, 97-2608 to 97-2611, p. 3 (La. App. 4 Cir. 3/10/99), 729 So. 2d 178, 181).

Thus, Louisiana law alone governs the compensation owed to landowners for a levee servitude appropriation. *See* Pet'rs' App. 21 (noting that while the Fifth Amendment does not mandate compensation for levee servitude appropriations, the Louisiana constitution and state statutes require gratuitous compensation). The court reviewed Louisiana Revised Statutes title 38, section 301—the provision governing compensation for levee servitude appropriations—and related statutory and constitutional provisions that were amended in 2006. Pet'rs' App. 11-19. Those amendments limit the compensation for levee servitude appropriations for use in hurricane protection projects to the fair market value of the property and further provide that compensation shall not exceed the compensation required by the Fifth Amendment. Pet'rs' App. 14-17; *see* La. Const. art. I, § 4(G); La. Const. art. VI, § 42(A); La. Rev. Stat. § 38:301(C)(1)(h); La. Rev. Stat. § 38:281(3)-(4). And because Jarreau's property was appropriated for use in a hurricane protection project, the court found that Jarreau was entitled to nothing more than the appropriated property's fair market value. Pet'rs' App. 26. The Fifth Amendment was addressed in connection with the court's analysis of the measure of compensation owed because it was referenced in Louisiana state laws as an upper limit on

the compensation allowed under Louisiana law. Pet'rs' App. 26-31. The right to compensation for a levee servitude appropriation under Louisiana state law is not coextensive with the Fifth Amendment, and the Fifth Amendment was not addressed by the supreme court as an independent source of Jarreau's right to compensation.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review this case.

This Court has jurisdiction to review decisions from a state's highest court where any right is specially set up or claimed under the United States Constitution. 28 U.S.C. § 1257(a). The Court's power is to correct state judgments to the extent they incorrectly adjudge federal rights. *Ridgeway v. Ridgeway*, 454 U.S. 46, 54 (1981) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)). But where the federal question presented by a petitioner is not raised or passed on by the state court, this Court lacks jurisdiction. *Webb v. Webb*, 451 U.S. 493, 495 (1981). Jarreau asks this Court to decide whether the government must pay compensation under the Fifth Amendment's Just Compensation Clause when the condemnation of real property inevitably destroys the value of a business as a going concern. Pet'rs' Pet. i. But the two threshold issues assumed by that question are not present in this case—there was no Fifth Amendment taking and there is no evidence that the going-concern value of Jarreau's business was destroyed. Jarreau's question presented is not an issue in this case, and the Court thus lacks jurisdiction to review it.

A. The question presented was not an issue in this case.

This case does not involve a condemnation under the Fifth Amendment; it involves an appropriation under Louisiana's levee servitude. Pet'rs' App. 4, 16. That levee servitude on riparian property is an important public right that has existed in Louisiana for centuries. *See* Pet'rs' App. 19-21; *Dickson v. Bd. of Comm'rs*, 26 So. 2d 474, 478 (La. 1946) (discussing the levee servitude in "the earliest Colonial days"). Although the state does not always exercise it, the servitude grants the public a right to use riparian property—land that bordered navigable waters when it was severed from the sovereign—to construct levees to protect that property and neighboring property from flooding. *DeSambourg v. Bd. of Comm'rs*, 621 So. 2d 602, 606-07 (La. 1993). The levee servitude, currently codified in Louisiana Civil Code article 665, is so deeply ingrained in Louisiana's history that even before the Louisiana Purchase, France and Spain reserved public servitudes over riparian land in every land grant. Pet'rs' App. 19; *DeSambourg*, 621 So. 2d at 606; *Dickson*, 26 So. 2d at 478; *see* La. Civ. Code art. 665. What is more, those land grants required riparian landowners to build and repair levees at their own expense under penalty of forfeiture. Pet'rs' App. 19; *DeSambourg*, 621 So. 2d at 607; *Dickson*, 26 So. 2d at 478. Under that regime, the riparian *landowner* bore the burden and expense of protecting all property from flooding. Pet'rs' App. 19; *DeSambourg*, 621 So. 2d at 607; *Dickson*, 26 So. 2d at 478.

As the need for an efficient and unified statewide plan for flood protection emerged, levee construction and maintenance could no longer be left to individual landowners and instead became a governmental function. Pet'rs' App. 19; *DeSambourg*, 621 So. 2d at 607; *Dickson*, 26 So. 2d at 478-79. It thus became necessary for the state to have access to riparian property to build and maintain levees—this was accomplished through the state's exercise of its existing levee servitude through appropriation. Pet'rs' App. 20; *DeSambourg*, 621 So. 2d at 607; *Dickson*, 26 So. 2d at 479.

As this Court has recognized, property interests are not created by the United States Constitution; they are instead created, and their limitations are defined, by state law. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). And under Louisiana law, riparian landowners in Louisiana never received riparian property absent the levee servitude; the property has always been burdened by the state's right to use it for levee purposes. Pet'rs' App. 20 (citing *Eldridge v. Trezevant*, 160 U.S. 452, 465-66 (1896)); *DeSambourg*, 621 So. 2d at 607; *Dickson*, 26 So. 2d at 479. So the state's decision to exercise its rights under the servitude and use riparian land for levee purposes is not a condemnation or a constitutional taking of private property for public use—the servitude already belongs to the state—it is merely the exercise of a preexisting but previously unexercised public right. *Vela v. Plaquemines Parish Gov't*, 97-2608 to 97-2611, p. 3 (La. App. 4 Cir. 3/10/99), 729 So. 2d 178, 181; *see DeSambourg*, 621 So. 2d at 606; *Dickson*, 26 So. 2d at 479. That is why multiple courts, including this Court,

have held that appropriations of property under Louisiana's levee servitude are not takings for purposes of the Fifth Amendment and that the Fifth Amendment does not mandate just compensation for such appropriations.[2] *Gen. Box. Co. v. United States*, 351 U.S. 159, 167 (1956) (property subject to levee servitude was not taken under eminent domain power); *Eldridge*, 160 U.S. at 468-69 (no compensation owed for Louisiana levee servitude appropriations); *DeSambourg*, 621 So. 2d at 606; *Dickson*, 26 So. 2d at 479. And that is why the Louisiana Supreme Court likewise found in this case that the Fifth Amendment does not mandate compensation for the Levee District's levee servitude appropriation. Pet'rs' App. 21. That

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[2] This idea is not novel, and this Court has repeatedly held that a state's exercise of rights arising from background principles of law does not constitute a taking. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 731-33 (2010) (finding that a Florida beach renourishment project did not offend the Fifth Amendment because the state exercised rights under background principles of state property law and therefore did not violate any property owners' established rights); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 231-33 (1960) (finding no compensation owed for condemnation of water rights taken by government to build a dam because the government has a superior navigation easement that precludes private ownership of the water or its flow); *Scranton v. Wheeler*, 179 U.S. 141, 162-63 (1900) (interests of riparian landowners are held subject to federal navigation servitude that may be exercised without compensation to the riparian owner); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-30 (1992) (Scalia, J.) (noting that it "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title" without compensation because prohibiting an owner's property use that was already prohibited by background principles of nuisance or property law would not be a taking).

finding comports with and is supported by United States Supreme Court precedent and prevailing law. *See Gen. Box. Co.*, 351 U.S. at 167; *Eldridge*, 160 U.S. at 468-69; *DeSambourg*, 621 So. 2d at 606.

Simply put, this is not a Fifth Amendment takings case. The Fifth Amendment requires no compensation for the Levee District's levee servitude appropriation, and the Louisiana Supreme Court was not faced with deciding—and did not decide—the proper measure of compensation under the Fifth Amendment.

Moreover, while Jarreau contends that the Levee District's appropriation destroyed his business and deprived him of its going-concern value, there is no support for that in the record. Evidence was presented at trial that Bayou Construction was unable to fulfill one contract to sell dirt. R. 609. There was no evidence that Bayou Construction, which prioritized trucking and other construction jobs over selling dirt and sold no dirt in 2010, was destroyed, was unable to continue its business, or was deprived of its going-concern value.

Jarreau asks this Court to review just compensation requirements under the Fifth Amendment where the going-concern value of a business is destroyed. But those threshold issues—a taking under the Fifth Amendment and the destruction of a business's going-concern value—are not present here. This case does not present the federal question identified in the petition, and this Court lacks jurisdiction to review the decision below.

B. The question presented was not properly raised or passed on below.

This Court has consistently refused to decide federal constitutional issues that were not properly raised in or decided by the court below. *Webb v. Webb*, 451 U.S. 493, 498-99 (1981) (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)). It is essential to this Court's jurisdiction in reviewing a state court decision that (1) it appears affirmatively from the record that the federal question was presented for decision to the highest state court having jurisdiction, (2) that the state court's decision of the federal question was necessary to the determination of the cause, and (3) that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *Lynch v. People of N.Y., ex rel. Pierson*, 293 U.S. 52, 54 (1934).

This rule serves multiple purposes. First, it promotes the principles of comity in our federal system by affording state courts the opportunity to perform their duties, which include applying federal requirements where applicable. *Webb*, 451 U.S. at 499. It also affords the parties the opportunity to develop the record needed to properly adjudicate the issue. *Id.* at 500; *see Cardinale*, 394 U.S. at 439.

To assist this Court with determining whether it has jurisdiction, Supreme Court Rule 14(1)(g)(i) requires that a petition for writ of certiorari include information establishing that the federal question was properly raised. Specifically, the petitioner must include:

> [S]pecification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error).

Sup. Ct. R. 14(1)(g)(i).

Much of this specific information is notably missing from Jarreau's petition. This is not surprising given that the federal question presented by Jarreau—whether just compensation under the Fifth Amendment includes compensation for the loss of a business's going-concern value—was in fact not at issue in this case. It was not raised by Jarreau in the courts below, and it was not decided by the Louisiana Supreme Court.

In the assignment of error presented to the Louisiana Supreme Court, Jarreau asserted that the fair market value of the appropriated property includes the value of the dirt excavated by the Levee District. Jarreau argued to the supreme court that what the trial court deemed an award for economic and business losses was really an award for fair market value and that the fair market value of the property includes the value of the dirt on the property. *See* Jarreau's La. Supreme Ct. Writ Appl., Assignment of Error, 5; Jarreau's La. Supreme Ct. Original Br. 7, 9-19. Jarreau

did not argue that his business lost its going-concern value nor did he ask the Louisiana Supreme Court to decide whether the Fifth Amendment requires compensation where a condemnation of real property destroys a business's going-concern value. The court thus did not decide that issue. A simple review of the Louisiana Supreme Court's opinion confirms this. The court recognized multiple times that the Fifth Amendment does not mandate compensation for levee servitude appropriations such as the Levee District's appropriation of Jarreau's property, and it therefore analyzed state law to determine any compensation owed to Jarreau. Pet'rs' App. 13, 21.

Further, there was no record developed on Jarreau's newly-raised assertion that the appropriation destroyed his business and deprived him of its going-concern value. Jarreau did not introduce evidence related to the going-concern value of his business or to the alleged inability of his business to continue operations as a result of the appropriation. Because the federal question Jarreau requests this Court to review was not raised in the court below, the parties did not have an opportunity to develop a record or litigate that issue, and the Louisiana Supreme Court did not have an opportunity to apply the federal law to those undeveloped facts. That is precisely the problem that this Court's jurisdictional rules seek to avoid.

As the party seeking this Court's review, Jarreau must affirmatively establish the Court's jurisdiction. *See Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948). Jarreau has failed to do so here because he cannot.

C. The Louisiana Supreme Court's decision rested on its interpretation of state law.

Except in extreme circumstances, this Court will not review a state supreme court decision on state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). State courts are the ultimate expositors of state law, and a state supreme court's interpretation of state law is conclusive. *Id.* (citing *Murdock v. City of Memphis*, 87 U.S. 590, 635 (1875)); *see Sutter Butte Canal Co. v. R.R. Comm'n of Ca.*, 279 U.S. 125, 139 (1929).

As previously explained, the Fifth Amendment does not apply to the Levee District's appropriation under the levee servitude. *See* Pet'rs' App. 13, 21. Thus, the issue before the Louisiana Supreme Court was whether and what compensation Jarreau was entitled to ***under Louisiana law***. Pet'rs' App. 2-3. The court stated as much when explaining that it granted certiorari to, *inter alia*, "interpret specific provisions of the 2006 amendments to La. Const. art. I, § 4, La. Const. art. VI, § 42, and La. R.S. 38:281(3) and (4)." *Id.*

Louisiana Revised Statutes title 38, section 301(C) establishes the proper measure of compensation for lands taken or used for levee purposes:

> All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

La. Rev. Stat. § 38:301(C)(1)(a).

And when property is appropriated by way of a permanent levee servitude, like Jarreau's property here, the statute provides for compensation as follows:

> The measure of compensation for lands and improvements taken or destroyed for levee and levee drainage purposes by way of a permanent levee servitude shall be the fair market value of the property taken or destroyed before the proposed use of the property or construction of the levee facilities, without allowing any change in value caused by the construction of the levee facilities.

La. Rev. Stat. § 38:301(C)(1)(h).

"Fair market value" and "full extent of the loss" are defined terms within the chapter governing levee districts. *See* La. Rev. Stat. § 38:281(3); La. Rev. Stat. § 38:281(4).

After Hurricanes Katrina and Rita devastated portions of south Louisiana in 2005, the Louisiana legislature recognized the critical need for adequate hurricane protection levees. Pet'rs' App. 25. It responded with significant and comprehensive amendments to the laws governing compensation for levee servitude appropriations for use in hurricane protection projects. Pet'rs' App. 22-23. First, the legislature amended the Louisiana constitutional articles governing the taking or use of property to restrict compensation to what is required by the Fifth Amendment where, like here, property is appropriated for a hurricane protection project. Pet'rs' App. 22; La. Const. art. I, § 4(G); La. Const. art. VI, § 42.

The legislature likewise amended the Louisiana Revised Statutes sections governing levee districts' rights and obligations in connection with constructing and maintaining levees and the related compensation requirements. Pet'rs' App. 24-25. Specifically, the legislature amended the definitions of "fair market value" and "full extent of the loss" to refer to and incorporate the amended constitutional provisions. Pet'rs' App. 16-17, 26. Thus, where property is used for a hurricane protection project, the determination of fair market value "shall not exceed" the compensation required by the Fifth Amendment, and payment for the full extent of the loss shall not exceed fair market value and shall not exceed the compensation required by the Fifth Amendment. Pet'rs' App. 17-18, 26; La. Rev. Stat. § 38:281(3)-(4).

So to determine the compensation owed to Jarreau, the Louisiana Supreme Court analyzed these Louisiana statutes, constitutional provisions, and legislative amendments. Pet'rs' App. 21-27. The Fifth Amendment was discussed only because the Louisiana laws governing compensation for levee servitude appropriations refer to it as an upper limit on the compensation allowed under state law. Pet'rs' App. 26-29; La. Rev. Stat. §§ 38:301(C)(1)(h), 38:281(3)-(4). And because the Fifth Amendment itself does not mandate compensation for the Levee District's levee servitude appropriation, any discussion of the Fifth Amendment in connection with the court's analysis of Jarreau's compensation rights was only in the context of analyzing the measure of compensation under Louisiana law. Pet'rs' App. 21, 25. It is nothing more than dicta and is insufficient to confer jurisdiction to review the Louisiana Supreme Court's interpretation

of Louisiana law. This Court therefore lacks jurisdiction to review Jarreau's question presented, and Jarreau's petition should be denied. Even if jurisdiction existed, however, the Court should still deny the petition because, contrary to Jarreau's assertions, the Louisiana Supreme Court decision does not conflict with any decisions from this Court, any United States courts of appeal, or other state courts of last resort.

II. The Louisiana Supreme Court's decision does not conflict with this Court's decision in *Kimball Laundry* because that case applies in unique circumstances not present here.

Jarreau contends that the Louisiana Supreme Court's opinion in this case conflicts with this Court's opinion in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). Assuming this Court concludes that it should further consider Jarreau's petition despite its mischaracterization of the state court action as a condemnation proceeding, the unique nature of Louisiana's levee servitude, and the limitations of the relevant Louisiana constitutional and statutory provisions, this Court should nonetheless deny the petition because the Louisiana Supreme Court's statements regarding *Kimball Laundry* are in full accord with the holding of that case.

As recognized by Jarreau, *Kimball Laundry* involved a temporary taking of a laundry plant owned by Kimball Laundry Company ("Laundry") for use by the United States Army. *Kimball Laundry*, 338 U.S. at 3. The taking was to initially last about seven months but ultimately lasted about three and a half years. *Id.* Having no alternative, Laundry suspended its business

during the Army's occupancy. *Id.* Laundry then sought compensation contending, *inter alia*, that it should be awarded compensation for the "diminution in value of its business due to the destruction of its 'trade routes.'" *Id.* at 8. This Court held that under the unique facts of the case Laundry should be compensated for its lost "going-concern value." *Id.* at 16.

Before considering the circumstances in which going-concern value could be compensated, this Court first explained that "going-concern value" is a business's additional earning capacity resulting from the owner's superior management and solicitation of patronage, which contributes to future profitability. *Id.* at 8-11. Going-concern value is "transferrable to the extent that it has a momentum likely to be felt even after a new owner and new management succeeded to the business property." *Id.* at 9. This momentum is only maintained through continued energy and skill.[3] *Id.* The going-concern value is itself property—not simply a measure of damages. *Id.* at 11.

This Court recognized two situations in which going-concern value is compensable under the Fifth Amendment: (1) when the government has condemned business property with the intent to carry on the business and (2) as in Laundry's case, when the government takes temporary use of a business for itself. *Id.* at 12-14. In other circumstances, a business

[3] Significantly, Jarreau's business had no dirt sales during the year preceding the Levee District's appropriation and chose to excavate and sell dirt only when not busy with other trucking or construction jobs. R. 608, 612, 650.

owner may suffer a consequential business loss, but the going-concern value itself is not lost.

This Court reasoned that when the government takes a business for the purpose of operating the business, it takes not only the physical property but also the intangible going-concern value (good will, trade routes, etc.) of the business, which is then at the government's disposal. *Id.* at 12. After the taking, the government stands in the owner's shoes and is free from the former owner's competition. *Id.* at 13. Conversely, the owner retains none of the going-concern value previously possessed—the owner is not able to move the going-concern elsewhere. *Id.* Because the government's action prevents the condemnee's ability to continue its business after the condemnation, its going-concern value is a property interest that has been taken and is compensable.

The other situation in which going-concern value is compensable under the Fifth Amendment, and the situation present in *Kimball Laundry*, is when the government temporarily takes over a business, effectively preventing the owner from continuing to operate the business during its occupancy. *Id.* at 14. As a practical matter, Laundry could not purchase a new business during the temporary occupancy due to both lack of funding and the prospect of later having two competing businesses. *Id.* Nor could it transfer its business to another laundry from year to year, and even if it did so, it would be unable to recapture that value once the business was returned. *Id.* So Laundry could do nothing but wait for the Army's occupancy to end before resuming its business. *Id.* Under these circumstances, the going-concern value of its business

was taken during the government's occupancy, and Laundry was entitled to compensation for that taking.

This Court recognized that its decision was a departure from prior cases addressing the taking of a "fee" but also recognized that a temporary interruption "so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him." *Id.* at 14-15. "It is a difference in degree wide enough to require a different result." *Id.* at 15. The Court thus concluded that "since the Government for the period of its occupancy has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferrable value their temporary use may have had." *Id.* at 16.

In both of the limited situations in which compensation for going-concern value is available, the condemnee has no choice but to cease its operations. That is not the case here. Nor is it the case in any permanent taking of fee business property because when the government does not continue operating the former owner's business, the going-concern value has not been taken. *Id.* at 11. Rather, the owner is free to move his business to another location to continue operations. *Id.* And while there may be loss to the owner due to the difficulty of finding other premises suitable for the transfer of his good will, "such loss, like the cost of moving, is denied compensation as consequential." *Id.* at 11-12. As the Court stated in *Kimball Laundry*, compensation does not "vary with the owner's good fortune or lack of it in finding [a suitable replacement]." *Id.* at 12. So when an owner retains his business, compensation for going-concern

value is unavailable even if the business cannot be relocated due to other variables. *Id.* at 12.

Kimball Laundry is distinguishable on numerous grounds and does not require an award of additional compensation here. Importantly, this case does not fall into either of the two narrow situations where going-concern value is compensable according to *Kimball Laundry*. The Levee District is not operating Jarreau's business or selling dirt from Jarreau's dirt pit, and it is not *temporarily* occupying the property for its own use. Rather, it simply exercised its existing right to excavate dirt from its permanent levee servitude. These facts alone preclude an award of going-concern value under *Kimball Laundry*.

Jarreau asserts, however, that *Kimball Laundry* reaches farther and applies in any instance in which "condemnation of real property inevitably destroys the value of a business as a going concern." Pet'rs' Pet. i. But even under that interpretation, his argument fails because Jarreau failed to show that his business lost its going-concern value.[4] Further, unlike in *Kimball Laundry*, Jarreau presented no evidence that his business could not be relocated. The Louisiana Supreme Court acknowledged the importance of that distinction:

> Here, unlike in *Kimball Laundry*, the Levee District did not take Jarreau's business. The dirt's value in this case is subsumed in the value

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[4] There is no evidence in the record that Jarreau's business was destroyed or cannot continue to operate, and Petitioners provide no citations to the record to support those assertions.

> of the surface, and it is only after extraction and delivery to another location that the dirt has additional value. Moreover, ***no evidence in the record indicates that*** the dirt from Jarreau's property is of such high quality or has remarkable attributes that once he is compensated for surface, ***he cannot find another site to extract dirt and undertake his dirt hauling operations.***

Pet'rs' App. 31 (emphasis added).

In short, Jarreau did not establish, or even attempt to establish, that the going-concern value of his business was "inevitably destroyed" by the Levee District. Jarreau was awarded fair market value for his property, which included consideration of its use as a dirt pit, and he was free to move his business to another location. Pet'rs' App. 27-29. So even under Jarreau's proposed broad reading of *Kimball Landry*, Jarreau is not entitled to additional compensation.

In an attempt to frame this case to fit within the question presented, Jarreau conflates going-concern value—which has never been at issue in this case until his petition for writ of certiorari—with general consequential business losses (i.e., his award for lost economic and business losses resulting from the loss of a single contract), which this Court has long-recognized are not compensable under the Fifth Amendment. *See Kimball Laundry*, 338 U.S. at 11-12; *see also United States v. 50 Acres of Land*, 469 U.S. 24, 30-36 (1984) (rejecting the application of the "substitute facilities doctrine" as an exception to the "fair market value" measure of compensation); *United States v. 564.54 Acres of Land*, 441 U.S. 506, 514-517 (1979) (finding

that fair market value is the proper measure of compensation even when replacement property will cost more than the condemned land); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945) (stating that when the government takes a fee, "compensation for that interest does not include future loss of profits, . . . the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign."); *Mitchell v. United States*, 267 U.S. 341, 345 (1925) (noting that in fixing compensation, "[t]he settled rules of law . . . precluded [the President's] considering in that determination consequential damages for losses to their business, or for its destruction."); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675 (1923) ("Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation."). To be sure, unless the former owner of fee property fits into the narrowly defined exceptions recognized in *Kimball Laundry*, the owner is not entitled to general business damages as a matter of constitutional law, ***even if*** he cannot find another location to operate his business. *Mitchell*, 267 U.S. at 345-46.

The Louisiana Supreme Court decision is not only consistent with *Kimball Laundry*, but any award by the court for Jarreau's lost profits under the Fifth Amendment would be precluded by this Court's opinion in *Mitchell v. United States.* In *Mitchell*, the plaintiffs claimed that they were entitled to damages for the loss of their entire business after the military took their land for its use. 267 U.S. at 344. The plaintiffs were corn farmers, and the land involved was "especially

adapted to the growing of the particular quality of corn." *Id.* at 343. As a result, plaintiffs were unable to establish their business elsewhere. *Id.* The Court acknowledged that the land's value due to its adaptability for use in a particular business is an element that should be considered in awarding compensation under the Fifth Amendment. *Id.* at 344-45. But the Court held that consequential damages for losses to, or even destruction of, a business are not recoverable as compensation under the Fifth Amendment. *Id.* at 345. Under such circumstances, compensation is not owed unless an express statutory (or state constitutional) provision requires its payment. *Id.* at 345-46.

This Court's opinion in *Mitchell* is controlling here and has never been abrogated by this Court when addressing permanent takings of fee business property when the government has no intent to carry on the business. Indeed, this Court recognized this general rule in *Kimball Laundry* and the sound reasons for its continued application. *Kimball Laundry Co.*, 338 U.S. at 14-15. Since *Mitchell*, the Court has repeated its dictate that, absent a statutory mandate, the government must pay "only for what it takes, not for opportunities which the owner may lose." *United States, ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 282 (1943); *see also United States v. 564.54 Acres of Land*, 441 U.S. at 511-12; *United States v. 50 Acres of Land*, 469 U.S. at 33. An owner is not entitled to compensation for "nontransferable values deriving from his unique need for property or idiosyncratic attachment to it" such as business losses or lost profits. *United States v. 564.54 Acres of Land*, 441 U.S. at 512 (citing *Kimball Laundry*, 338 U.S. at 5).

Here, Jarreau seeks only consequential business losses, which have only "nontransferable value." The Louisiana Supreme Court's judgment denying Jarreau's claim for lost profits under Louisiana Revised Statutes title 30, section 301 is wholly consistent with *Kimball Laundry*, *Mitchell*, and other opinions by this Court addressing the Fifth Amendment. Jarreau's contention that the Louisiana Supreme Court misapplied *Kimball Laundry* is meritless.

III. The cases cited by Jarreau do not evidence a "deep split" in authority.

Jarreau also contends that this Court should grant his petition for certiorari because there is a "deep split" in how *Kimball Laundry* is applied by various United States courts of appeals and state courts of last resort. Jarreau asserts that some courts limit *Kimball Laundry*'s holding to only temporary takings or takings in which the government takes a business to run the business while other courts interpret the case expansively. But the cases Jarreau cites for the latter position do not interpret *Kimball Laundry* as broadly as he suggests. Specifically, Jarreau identifies three state supreme court decisions that he contends conflict with the Louisiana Supreme Court's decision. Again, because the Levee District appropriated Jarreau's property in accordance with the preexisting levee servitude, there has been no constitutional taking here. Even assuming a taking occurred, no "deep split" in authority actually exists. Rather, the purported split has been manufactured by misstating the nature of the cases cited and using selective quotations.

According to Jarreau, had his case been decided in Pennsylvania, Minnesota, or New Mexico,[5] the outcome would have differed. But not one of the cases on which he relies holds that *Kimball Laundry* requires an award of general business losses as just compensation under the Fifth Amendment. Rather, each case either mentions *Kimball Laundry* only in passing,[6] limits *Kimball Laundry*'s holding to its "unique" facts,[7] or applies a state law that grants greater rights to condemnees.[8] Thus, these cases do not evidence the purported "deep split" Jarreau claims exists.

Supreme Court of Pennsylvania. Jarreau first cites *Redevelopment Authority of Philadelphia v. Lieberman*, 336 A.2d 249 (Pa. 1975), in support of his

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[5] Jarreau's question presented also indicates that the Nevada Supreme Court expansively interprets *Kimball Laundry*. His analysis of the purported split, however, does not include a detailed discussion of any Nevada cases. He cites *National Advertising Co. v. State, Department of Transportation*, 993 P.2d 62, 67 (Nev. 2000) in footnote 5 of his petition. But *National Advertising* does not cite *Kimball Laundry* as authority; indeed, it includes no reference to any case decided by a federal court and makes no mention of the Fifth Amendment. *See id.* Thus, the case appears to apply state law and thus provides no support for the broad construction Jarreau contends has been given to *Kimball Laundry* by "some courts."

[6] *See Redevelopment Auth. of Philadelphia v. Lieberman*, 336 A.2d 249 (Pa. 1975).

[7] *See City of Minneapolis v. Schutt*, 256 N.W.2d 260, 262 (Minn. 1977).

[8] *See Primetime Hospitality, Inc. v. City of Albuquerque*, 206 P.3d 112 (N.M. 2009).

argument that some courts "apply *Kimball Laundry* to its full extent." But nothing in *Lieberman* dictates that Jarreau would be entitled to general business losses had this case been decided in Pennsylvania.

Lieberman involved the condemnation of a leasehold interest and a claim that the value of the lessee's liquor license should have been included in the lessee's compensation award.[9] *Lieberman*, 336 A.2d at 251. Relying on this Court's opinion in *Almota Farmers Elevator & Warehouse Co. v. United States*, the Pennsylvania Supreme Court found that the market value of a leasehold interest should include the value of its expected continued use. *Id.* at 254 (*citing Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 471-472 (1973)). The court recognized that this principle is consistent with Pennsylvania law, which statutorily defines "Fair market value" to include consideration of the "*present use* of the property and its *value for such use*." *Id.* at 255 (citing 26 P.S. § 1—603). The court examined whether use of a liquor license was the kind of interest that would add value to the leased premises and concluded that it would. *Id.* at 256-257. It is in this context that the court made its only reference to *Kimball Laundry* in a single citation with an explanatory parenthetical. *Id*. at 257. The *Lieberman* court's brief reference to *Kimball Laundry*

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[9] This Court has held that certain measures of compensation that are not required when the government takes fee interests in property are required when the government temporarily displaces a lessee. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 383 (1945). Even where leases are taken, however, the Court has concluded that future lost profits are not an appropriate measure of compensation. *Id.* at 380.

is not part of its holding and is not binding legal precedent that could be the basis of a split in authority regarding *Kimball Laundry*'s interpretation.

Rather, *Lieberman* stands for the unremarkable proposition that the nature of the business operated in a condemned property should be considered in awarding compensation. *Id*. at 255-58. Indeed, this Court recognized this same principle in *Mitchell*, stating that "[t]he special value of land due to its adaptability for use in a particular business is an element which the owner of land is entitled, under the Fifth Amendment, to have considered in determining the amount to be paid as compensation upon a taking by eminent domain." *Mitchell*, 267 U.S. at 344-45. Jarreau's appraiser considered the use of his property as a dirt pit in reaching his estimate of the fair market value of Jarreau's tract, so his award based on that appraisal is fully consistent with *Lieberman. See* Pet'rs' App. 27, 29. The Louisiana Supreme Court's decision is thus consistent with *Lieberman*'s holding, and Jarreau's reliance on *Lieberman* is simply misplaced.

Supreme Court of Minnesota. Remarkably, Jarreau next cites *City of Minneapolis v. Schutt*, 256 N.W.2d 260 (Minn. 1977), in support of his contention that he would have been awarded compensation for lost profits had this case been decided in Minnesota. But the Minnesota Supreme Court in fact rejected the condemnee's claim for going-concern value and distinguished *Kimball Laundry* on the basis that the taking in *Schutt* was not a temporary taking of the condemnee's entire business. *Id.* at 262. Indeed, the court in *Schutt* recognized that the "general rule" is that "in nearly all cases the [condemnee] is not entitled

to recover compensation for loss of 'going-concern' value as part of a condemnation award." *Id.* at 261-62. The court remarked that *Kimball Laundry* is "unique on its facts, to say the least." *Id.* at 262. Thus, *Schutt* too fails to evidence a split in authority regarding *Kimball Laundry*'s interpretation. In fact, the opinion limits the application of *Kimball Laundry* to temporary takings, just as those cases Jarreau criticizes. And it does not suggest that Jarreau would have been awarded something more had his case been decided in Minnesota.

Supreme Court of New Mexico. Jarreau also cites *Primetime Hospitality, Inc. v. City of Albuquerque*, 206 P.3d 112 (N.M. 2009), as additional support for the purported "deep split" in the way various courts apply *Kimball Laundry*. This case, like the others, offers no support for Jarreau's contention.

Primetime Hospitality was decided under New Mexico law and states, "Our case law has defined the purposes of just compensation broadly."[10] *Id.* at 116-

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[10] The court's reference to *Garver v. Public Service Co. of New Mexico*, 421 P.2d 788 (1966), when stating that its "inverse condemnation statute is designed to provide a remedy for violations of the constitutional right to just compensation" makes clear that the constitution to which the court refers in *Primetime Hospitality* is the New Mexico constitution. *Primetime Hospitality*, 206 P.3d at 116-17. The court in *Garver* specifically referenced the New Mexico constitution when making that statement. *Garver*, 421 P.2d at 793. As this Court has recognized, states can, and often do, include language in their statutes and constitutions allowing compensation beyond what is required by the Fifth Amendment. *See Mitchell*, 267 U.S. at 345-46. Thus, any case addressing a taking under state law may potentially be misconstrued to impart United States constitutional principles where none exist.

117. The Nevada Supreme Court recognized that *Kimball Laundry* was not authoritative and, indeed, noted that the Nevada appellate court was simply "drawing inspiration" from *Kimball Laundry*, among other cases. *Id.* at 117-18. Further, the court repeatedly recognized that "the question of whether [the condemnee's] claimed lost profits were an accurate reflection of its loss" was not actually before it. *Id.* at 116; *see also id.* at 119-120, 122. Finally, *Primetime Hospitality, Inc.* involved a temporary taking, which is one of the limited situations in which *Kimball Laundry* may be applied and is not a situation presented here. *Id.* at 116.

Thus, *Primetime Hospitality* does not support an expansive reading of *Kimball Laundry*, and because it applied New Mexico law, it does not evidence a jurisdictional divide in its application. Certainly, whether Jarreau could have been awarded business losses under New Mexico law is irrelevant to any determination of whether he should be awarded such compensation under the Fifth Amendment.

The Federal Circuit, the District of Columbia Court of Appeals, Supreme Court of Wisconsin, and the Supreme Court of Montana. Because Jarreau has not established that a single United States court of appeals or state court of last resort has issued an opinion with binding precedential value broadly interpreting *Kimball Laundry* in a manner inconsistent with the Louisiana Supreme Court's opinion here, whether other courts similarly limit *Kimball Laundry* to its facts is immaterial. The absence of any controlling precedent expanding its application confirms that the manner in which the Louisiana

Supreme Court applied *Kimball Laundry* is correct. In fact, the only two cases cited by Jarreau with precedential value analyzing and applying *Kimball Laundry* to facts similar to those here have applied it in the same manner as the Louisiana Supreme Court.[11] The well-reasoned opinions in *Mamo v. District of Columbia* and *City of Janesville v. CC Midwest, Inc.* further support the court's opinion here. *See Mamo*, 934 A.2d 376, 383 (2007); *City of Janesville*, 734 N.W.2d 428, 436-37 (2007). *Mamo* and *City of Janesville* are the only cases Jarreau cites in his analysis of the purported split in authority that truly apply *Kimball Laundry*'s holding in a binding and precedential manner, and both correctly recognize the limitations of that case.[12]

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[11] *See Mamo v. Dist. of Columbia*, 934 A.2d 376, 383 (D.C. Cir. 2007) (rejecting a claim for business losses and holding that *Kimball Laundry* applies only to temporary takings of business property); *City of Janesville v. CC Midwest, Inc.*, 734 N.W.2d 428, 436-37 (Wis. 2007) ("In *Kimball Laundry*, the Court explained the different effects of a taking when it is only temporary and the owner is unable to transfer its business goodwill to another location.").

[12] The other cases cited by Jarreau as having a restrictive interpretation of *Kimball Laundry* have no bearing on the issue he presents in his petition—whether compensation for general business losses are required under the Fifth Amendment when a business itself has not been taken. *See Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1382 n.3 (Fed. Cir. 2008) (holding that a regulatory taking had not occurred and mentioning *Kimball Laundry* in a footnote observing that going-concern value has been held to be compensable in temporary takings but not permanent takings); *Cooper v. United States*, 827 F.2d 762, 763-64 (Fed. Cir. 1987) (involving a claim for the value of timber and citing *Kimball Laundry* for the general proposition that additional compensation

Jarreau has failed to show that the Louisiana Supreme Court's decision here conflicts with another state court of last resort or of a United States court of appeals. There is no split in authority warranting this Court's review. Rather, the cases show that there is a unified approach in the interpretation of *Kimball Laundry* by those courts rendering binding opinions regarding its application. Thus, the cases cited by Jarreau do not support granting his petition for certiorari.

CONCLUSION

This case is not a Fifth Amendment takings case. The Louisiana Supreme Court was not faced with deciding the measure of compensation under the Fifth Amendment, and it did not decide the issue that Jarreau asks this Court to review. If this Court wants to address the question presented by Jarreau, it should do so in a case that actually presents that issue. Jarreau's petition for certiorari should be denied.

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is available for injuries resulting from a temporary taking); *Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 201 P.3d 8, 24 (Mont. 2008) (holding that *Kimball Laundry* does not apply to regulatory takings).

Respectfully submitted,

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APPENDIX 1

La. Civ. Code art. 665
Art. 665. Legal public servitudes

Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers and for the making and repairing of levees, roads, and other public or common works.

* * *

La. Const. art. I, § 4
§ 4. Right to Property

* * *

(G) Compensation paid for the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America.

* * *

La. Const. art. VI, § 42
§ 42. Compensation for Property Used or Destroyed; Tax

Section 42. (A) Compensation. Notwithstanding any contrary provision of this constitution, lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes shall be paid for as provided by law. With respect to lands and improvements actually used or destroyed in the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, such payment shall not exceed the amount of compensation authorized under Article I, Section 4(G) of this constitution.

* * *

La. Rev. Stat. § 38:281
§ 281. Definitions

* * *

(3) "Fair market value" means the value of the lands or improvements actually taken, used, damaged, or destroyed for levees or levee drainage purposes as determined in accordance with the uniform criteria for determining fair market value as defined in R.S. 47:2321 et seq. Pursuant to Article 1, Section 4(G) and Article VI, Section 42(A) of the Constitution of Louisiana, such determination of fair market value shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America unless an exception as provided in Article I,

Section 4(G) of the Constitution of Louisiana is applicable.

(4) "Full extent of the loss" shall not be construed to include payment for uses which are remote, speculative, or contrary to law; uses for which the property is still suitable; or elements of property ownership which are not actually taken, used, damaged, or destroyed for levees or drainage purposes. Further, pursuant to Article 1, Section 4(G) and Article VI, Section 42(A) of the Constitution of Louisiana, payment for the full extent of the loss shall not exceed fair market value and shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America unless an exception as provided in Article I, Section 4(G) of the Constitution of Louisiana is applicable.

* * *

La. Rev. Stat. § 38:301
§ 301. Construction and maintenance of levees and drainage; care and inspection of levees; measure of compensation; right of entry; bicycle paths and walkways

* * *

C. (1)(a) All lands, exclusive of batture, and improvements hereafter actually taken, used, damaged, or destroyed for levee or levee drainage purposes shall be paid for at fair market value to the full extent of the loss.

* * *

C. (1)(h) The measure of compensation for lands and improvements taken or destroyed for levee and levee drainage purposes by way of a permanent levee servitude shall be the fair market value of the property taken or destroyed before the proposed use of the property or construction of the levee facilities, without allowing any change in value caused by the construction of the levee facilities.

* * *