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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The salient facts of this case are few and simple. Respondent is a government entity that acquired an interest in Chad Jarreau's land—an interest that the trial court found was the equivalent of a fee-simple taking. Pet. App. 96. Jarreau demanded compensation for this taking, specifically invoking his rights under "the Fifth Amendment of the United States Constitution." The trial court specifically found that Jarreau had suffered $164,705.40 in business losses as a result of the taking, a finding that has gone unchallenged. App. 100. But the judgment of the Louisiana Supreme Court below, relying on federal law, denies Jarreau any compensation for these business losses. App. 31. As such, this Court can and should decide whether that judgment meets the requirements of the Just Compensation Clause.

Nothing in Respondent Levee District's Opposition should give the Court any pause in granting the petition. This case presents a federal question, and that question warrants this Court's review.

A. The Petition presents a federal question.

In the trial court, Jarreau pleaded an entitlement to compensation "[p]ursuant to the * * * Fifth Amendment of the United States Constitution." Jarreau continued to assert an entitlement to compensation pursuant to the Fifth Amendment throughout the proceedings below, and no court ever held that he waived

his Fifth Amendment claim. To the contrary, the Louisiana Supreme Court *expressly resolved* the federal issue, holding that: (1) Louisiana law, as relevant here, required the same level of "just compensation" that would be due under the Fifth Amendment, App. 25, and (2) federal law, and specifically this Court's decision in *Kimball Laundry*, did not entitle Jarreau to compensation for his business losses. App. 29–31. That is sufficient to confer jurisdiction on this Court.

The Levee District, however, contends that this raised-and-ruled-on federal question is not presented here, either because the Louisiana Supreme Court implicitly held that Jarreau was not deprived of any property interest protected by the Fifth Amendment or because lower courts sometimes used different phrases to describe Jarreau's business damages. Neither contention is correct.

As an initial matter, when a state court interprets its own constitution in a manner consistent with the federal constitution, this Court has jurisdiction to review the decision unless there is a "'plain statement' that the decision rests upon adequate and independent state grounds." *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983); *accord Florida* v. *Powell*, 559 U.S. 50, 56 (2010) ("[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action") (citation omitted). There is no such plain statement in the Louisiana Supreme Court's decision. To the contrary: The Louisiana Supreme Court explicitly stated that it was following federal law. App. 25.

The Levee District's contention otherwise depends entirely on its assertion that the Louisiana Supreme Court implicitly held that Jarreau was entitled to no compensation because his land was already subject to an ancient riparian servitude. This argument hinges on a false syllogism:

1. Land can be appropriated for levee construction purposes only if it is burdened by an ancient riparian servitude;

2. Jarreau's land was appropriated for levee construction purposes, and (as the Louisiana Supreme Court noted in a footnote) he waived the right to contest the validity of that appropriation;

3. Therefore, Jarreau's land is burdened by an ancient riparian servitude, and any compensation he is due is merely by the grace of the Louisiana legislature, rather than a federal constitutional entitlement.

The problem with this syllogism is that the major premise is simply incorrect. The right to "appropriate" land for levee construction purposes is not limited to lands burdened by the ancient levee servitude.[1]

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[1] Under Louisiana law, "appropriation" is a "quick take" procedure that allows the government to acquire a legal interest in property (or use or destroy that property) without first initiating a condemnation suit. La. Const. art. VI, § 42(B). As noted in the Petition, the appropriation in this case technically left Jarreau with the title to his land but appropriated a bundle of rights so extensive that the court below found it was the equivalent of a fee-simple taking. Pet. 5; App. 96. Appropriation is distinct from

The plain language of the Louisiana Constitution provides that the only precondition for "appropriating" property is that the appropriation be for levee purposes; whether land is subject to an ancient levee servitude is irrelevant under the Louisiana Constitution. La. Const. art. VI, § 42 ("Nothing * * * shall prevent the appropriation of" property "actually used or destroyed for levees or levee drainage purposes."). Moreover, the Louisiana Supreme Court has long recognized that land may be "appropriated" for levee construction, even if the land is not subject to an ancient servitude. *See DeSambourg* v. *Bd. of Comm'rs for Grand Prairie Levee Dist.*, 621 So. 2d 602, 607 (La. 1993) ("[The ancient levee servitude] applies to those lands that were riparian when separated from the public domain[.]"); *Delaune* v. *Bd. of Comm'rs for Pontchartrain Levee Dist.*, 230 La. 117, 131, 87 So. 2d 749, 754 (1956) ("Accordingly, in order to ascertain whether a particular property appropriated for levee purposes is subject to a servitude, it is essential to trace the title to the original grant when the land itself does not actually front on the stream.").

So the Levee District's syllogism falls apart: Although Jarreau did not contest the validity of the appropriation—indeed, he would have had no basis to—that has no bearing on whether his land is subject to

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the standard method of taking property by initiating a condemnation action, which Louisiana law calls "expropriation." La. Const. art. I, § 4. As explained more fully in the text, appropriation is a special procedure that can be applied only to "lands * * * used or destroyed for levees or levee drainage purposes." La. Const. art. VI, § 42(A).

an ancient riparian servitude. No court ever made a finding that Jarreau's land was subject to such an ancient riparian servitude because the lower courts held that Jarreau was entitled to Fifth Amendment compensation regardless. And, in any event, the burden would have been on the Levee District to prove the existence of such a servitude under Louisiana law. *See Grayson* v. *Comm'rs of Bossier Levee Dist.*, 229 So. 2d 139, 142 (La. App. 2 Cir. 1969). Significantly, the petition makes all of these points, Pet. 24–25 & n.8, and the Levee District has no answer to them.

The Levee District's second argument—that the question is not properly presented because the lower courts did not characterize Jarreau's business damages as a loss of "going concern" value—is similarly easily dismissed. There is no dispute in this case that Chad Jarreau suffered more than $150,000 in damages to his business as a result of the Levee District's taking of his land. It is immaterial whether those damages are characterized as "business damages" or "lost profits" or "loss of going-concern value." After all, a business that has lost profits has, by definition, both suffered damage and lost value as a going concern. The only thing necessary to resolve the question presented is for Jarreau to have presented sufficient evidence that those damages are nonspeculative and nonduplicative—which the trial court found he had, App. 96–100, and which the Levee District has never questioned.

B. The question presented is worthy of review.

1. The split of authority is real and serious.

Respondent attempts to reconcile many of the cases cited in the petition by again focusing on labels and language rather than the substance of the courts' judgments. "This Court, however, reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). And reading these cases, there is no question that (regardless of the particular phrasing employed) cases with very similar facts are turning out very differently indeed.

As Petitioners have explained, state courts of last resort across the country have used this Court's decision in *Kimball Laundry* to arrive at irreconcilable results in similar cases. Pet. 14–21. Respondent's arguments to the contrary ask this Court to ignore the actual decisional rules and outcomes in the cases Petitioners cite. For instance, Respondent argues that in *Redevelopment Authority of City of Philadelphia* v. *Lieberman*, the Pennsylvania Supreme Court was not actually approving an award for business losses or for the destruction of business value, but merely for the value of the property "includ[ing] the value of its expected continued use." Opp. 29. But this is a semantic distinction of no consequence: There is no difference between value of a property's "expected continued use" and the future profitability of the business located on the property. Indeed, the dissenting Justice Eagen recognized as much and objected to the property owner

receiving an award for "loss of business profits." 336 A.2d 249, 260 (Pa. 1975).

The artificiality of Respondent's proposed distinction is further underscored by comparing *Lieberman* with *Mamo* v. *District of Columbia*, which involved the condemnation of a gas station. 934 A.2d 376 (D.C. 2007). In *Mamo*, the D.C. Court of Appeals held that the gas station owner was not entitled to be compensated for the value of his lost franchise because such damages were merely for "business losses." *Id.* at 386. In *Lieberman*, however, the Pennsylvania Supreme Court explicitly stated that property owners were entitled to compensation for the value of their lost franchises. 336 A.2d at 257 ("As early as 1909, this Court held that the value of a condemned waterworks property was to be determined by considering the physical property *as a going concern*; to do so the value of intangibles such as a *franchise*, market price of stock, and income based on reasonable tolls were to be considered."). What is more, the court cited *Kimball Laundry* for that very proposition. *Id.* The decisional rules in *Mamo* and *Lieberman* are therefore simply irreconcilable.

Similarly, Respondent attempts to undermine Petitioners' reliance on *City of Minneapolis* v. *Schutt* by pointing out that the Minnesota Supreme Court in that case stated that "*Kimball* is not to be broadly interpreted" and ruled against the property owner. True. But in doing so, the court nonetheless squarely held that going concern value is compensable when it can be proven that a taking will destroy it. 256 N.W.2d 260

(Minn. 1977). The reason the court denied compensation was that the property owner could not prove he had lost going concern value. *Id.* So while the decision *said* that *Kimball* stood for a narrow rule, it actually *adopted* a rule under which Jarreau—who had unchallenged trial-court factual findings in his favor—would have prevailed.

Finally, the Levee District argues that *Primetime Hospitality, Inc.* v. *City of Albuquerque* is simply "irrelevant" because it was decided on state law grounds. Opp. 32. While this is technically true, throughout the decision the New Mexico Supreme Court cited and applied federal caselaw, including *Kimball Laundry*. *See* 206 P.3d 112, 117–24 (N.M. 2009). The court interpreted its own constitution in accordance with the U.S. Constitution, and at no point did the court so much as hint that the result turned on any unique aspect of state law. It cannot seriously be argued that in a future Fifth Amendment case, New Mexico's courts would consider themselves free to interpret *Kimball Laundry* in a manner inconsistent with the interpretation articulated in *Primetime Hospitality*. For purposes of establishing a split of authority, that is sufficient.

2. The decision below is incorrect and cannot stand.

Even if the Levee District were right in arguing that lower courts are reaching uniform results, this case would still merit this Court's review. Simply put,

a uniform rule in which courts across the country categorically forbid compensation for business damages in takings cases cannot be squared with this Court's actual holdings.

In arguing for the correctness of its asserted uniform no-compensation rule, the Levee District claims it is required by *Kimball Laundry* and by this Court's decision in *Mitchell* v. *United States*, 267 U.S. 341 (1925), a five-paragraph decision, which the Louisiana Supreme Court did not cite. Petitioners will not rehash their arguments about why the Louisiana Supreme Court's (and the Levee District's) cramped, fact-bound reading of *Kimball Laundry* is incorrect. *See* Pet. 11–14. And the addition of *Mitchell* to the discussion changes nothing, for at least three reasons:

First, the property owners in *Mitchell* were not seeking compensation for business losses resulting from the taking of their land. Indeed, they conceded that they had already received just compensation for the taking of their own land. The only claim at issue in that case concerned whether the plaintiffs were entitled to be compensated for business losses that were traceable to the condemnation of *land that was owned by others*. *Mitchell* v. *United States*, 58 Ct. Cl. 443, 448 (1923). An attenuated injury resulting from the condemnation of other people's property is entirely distinguishable from the direct and foreseeable damage to Jarreau's business that resulted from the Levee District taking *his own property*, on which he operated his business.

Second, the trial court in *Mitchell* had rejected the property owners' claims as a matter of fact, concluding that the property owners had failed to even prove any business losses. They had already been compensated for the taking of their own land, and the trial court found that the compensation they received would generate a likely annual return that would "not, in view of past history, fall much, if any, short of the annual dividends received from [their business] as a going concern." *Id.* at 449. In other words, any compensation for business losses in *Mitchell* would have resulted in double compensation. Again, that is not the case here because the trial court explicitly noted that in awarding business losses it was careful to avoid awarding "duplication of damages." App. 96–97.

Finally, even if *Mitchell* did stand for the categorical rule that the Levee District ascribes to it, it would no longer be good law. *See Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 484 (1973) (Rehnquist, J., dissenting) ("In either *Mitchell* or *Powelson*, the result would in all probability have been different had the Court applied the reasoning that it applies in this case."); *State by Mattson* v. *Saugen*, 169 N.W.2d 37, 44 (Minn. 1969) ("It has been argued that, notwithstanding the court's failure to say so expressly, *Mitchell* was substantially overruled sub silentio by *Kimball*.") (internal quotation omitted); *cf.* D. Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation*, 15 Seton Hall L. Rev. 483, 524 (1985) (reviewing pre-*Kimball* cases and concluding that the business damages rule is "a myth

* * * based upon gross misinterpretations of case law * * * carefully fostered and championed by the leading treatise writers who were clearly biased in favor of condemning authorities"). There is simply no serious reading of this Court's modern takings jurisprudence that would support a categorical rule excluding business damages from the Just Compensation Clause. Rather, this Court's consistent position has been that an "owner is to be put in the same position monetarily as he would have occupied if his property had not been taken." *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970); *see also Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 474–76 (1973) (holding that compensation for a condemned leasehold must take into account the expectation that the lease will be renewed).

But if one disregards these precedents and accepts the Levee District's assertion that there is a uniform no-compensation rule, this case still presents an important question worthy of this Court's review. No one disputes that Jarreau has suffered more than $150,000 in damages as a direct result of the Levee District's taking, and no one disputes that he has been awarded zero dollars in compensation for those damages. And on the Levee District's account of things, every court in the nation would refuse to compensate a property owner for such direct damages. When governments can use eminent domain to take property without paying the property owners for their losses—thereby securing a financial windfall for themselves while imposing

massive financial injuries on individual citizens—something has gone wrong. The Constitution requires *just* compensation, and this Court should grant review in order to address a wholesale, systematic evasion of that requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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OCTOBER 2017