No. 17-163

In The
Supreme Court of the United States

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

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

BRIEF OF AMICI CURIAE DON HOWARD WILLIAMS, JR., AND OWNERS' COUNSEL OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the government must pay compensation under the Just Compensation Clause of the Fifth Amendment when the condemnation of real property inevitably destroys the value of a business as a going concern (as the high courts of Minnesota, Nevada, New Mexico, and Pennsylvania have held) or whether property owners are entitled to such compensation only if the government directly takes the business itself (as the court below held, joining the Federal Circuit and the highest courts of the District of Columbia, Montana, and Wisconsin).

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INTEREST OF AMICI CURIAE[1]

Amici are an individual who is on the target end of eminent domain, and an organization which frequently participates in cases which present constitutional and property rights issues of national importance.

Don Howard Williams, Jr. Mr. Williams is the owner of a vacant parcel on south shore of the island of Maui, Hawaii, which is in the process of being condemned by the State of Hawaii. Until it was condemned, Mr. Williams had leased the property to the State under a thirty year lease. Twenty years into the lease term, the State concluded that the rent was too expensive; it terminated the lease by condemning the land, and now claims that Mr. Williams is not entitled to value of the lost rental income stream, and as in the case at bar, the jury is not entitled to consider the income-producing nature of the land or Williams' business.

Owners' Counsel of America. Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private

1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Evidence of consent has been filed with the Clerk of the Court. Counsel of record for the parties received notice of the intention to file this brief three days prior to the due date of this brief; counsel for the parties have acknowledged notice and consented to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

SUMMARY OF ARGUMENT

This case presents the Court with a unique opportunity to address a yawning gap in Fifth Amendment eminent domain jurisprudence: the lower courts' failure to recognize the indemnity principle behind the Just Compensation Clause in ensuring that owners are made truly whole when their property and businesses tied to the land are pressed into public service.

This brief makes two main points, one practical, one doctrinal. *First*, the practical: the theory of just compensation often diverges from the reality experienced by property owners. Although owners are, in theory, to be made whole—as if the taking never happened—the way that theory is applied often ends up with owners being forced to bear more than their fair share of public burdens. This Court should be awake to the very real context in which Just Compensation law is applied by the lower courts. The eminent domain process frequently leaves condemnees holding the economic bag for public improvements. This is neither just, nor fair. Accepting review in this case would go a long way towards rectifying that. *Second*, as a matter of Just Compensation doctrine, the original rationale for denying business losses in eminent domain—most land taken was undeveloped land—has now been superseded by more modern principles, resulting in a patchwork of lower court rules which only this Court can address.

ARGUMENT

I. IN APPLICATION, JUST COMPENSATION PRINCIPLES ARE OFTEN UNJUST

The overarching point of the Just Compensation Clause—as this Court has consistently reminded—is to ensure that owners whose property is pressed into public service are fully compensated. Thus, an owner has the right "to be put in as good position pecuniarily as he would have occupied if his property had not been taken," *United States v. Miller*, 317 U.S. 369, 373 (1943), and to receive the "full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1892). Excellent principles, unquestionably.

But these lofty principles ring hollow in many cases. The reality for many property owners can be far, far different than the grand theory set out in the pages of case reports and law journals. The reality is that "just compensation" is, in application, often neither just nor results in compensation. Owners are routinely *not* made whole, and frequently are required to shoulder more than their fair share of "public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[2] This petition presents one such case because it involves not only the compensation for the land condemned, but

2. Moreover, one oft-advanced justification for the courts' lax check on the legislature's determination that a taking is "for public use"—*see, e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (rational basis review under the Public Use Clause)—is that payment of Just Compensation makes things right by ensuring the owners whose property is being appropriated will at least not suffer any economic consequences. "But they'll get paid," is the mantra. Under this theory, taking someone's property isn't necessarily unfair because, well, they will be fully compensated.

the denial of compensation for the loss of Petitioners' livelihood that was inextricably tied to the land by application of a categorical rule.

Other recent examples of unjust compensation from this Court's docket are not difficult to locate, either. For example, in *Bay Point Properties, Inc. v. Mississippi Trans. Comm'n*, the Court denied review in a Just Compensation case in which the state "negotiate[d] an easement limited to one purpose but later use[d] the land for an entirely different purpose, . . . and . . . limit[ed], by operation of statute, the compensation it . . . [paid] for that new taking[.]") 137 S. Ct. 2002 (2017) (statement of Gorsuch, J., joined by Thomas, J.); *City of Milwaukee Post No. 2874 v. Redevelopment Auth. of City of Milwaukee*, 768 N.W.2d 749 (Wis. 2009) (applying "undivided fee rule" to deny compensation for admittedly valuable long-term leasehold interest that was destroyed by the condemnation), *cert. denied*, 561 U.S. 1006 (2010); *In re John Jay College of Criminal Justice of City Univ. of N.Y.*, 905 N.Y.S.2d 18 (N.Y. App. Div. 2010) (excluding evidence of deliberate government actions to depress the value of the taken property), *rev. denied*, 948 N.E.2d 925 (N.Y. 2011), *cert. denied sub nom. River Ctr. LLC v. Dormitory Auth. of State of N.Y.*, 566 U.S. 982 (2012). In each of these examples, the property owner lost millions when their property was targeted by eminent domain, but ended up with virtually nothing approaching what the free market would view as just compensation.

Amici Don Williams finds himself in similar circumstances, even though his odyssey has not yet completely run its course. His story is an unfortunate exemplar of the gauntlet through which property owners are routinely run—and the fees and costs they must expend, which, in most cases are nonrecoverable—simply to force the condemnor to provide what the Constitution is supposed to guarantee.

Williams owns a vacant one-acre parcel of land on the south shore of the Hawaiian island of Maui, immediately adjacent to the State of Hawaii-owned-and-operated Maalaea Small Boat Harbor. *See State of Hawaii v. Don Howard Williams, Jr.*, Civ. No. 13-1-0724(1) (Haw. 2d Cir.). This being one of the last undeveloped parcels near the Boat Harbor, in 1994, the State leased the property from Williams for thirty years. The land remained undeveloped, and the State used it for storage and parking. For two decades, the State paid the rent, which was reset periodically based on the appraised value of the land. Obviously, land on Maui wasn't getting any cheaper during this time (it still isn't), and over the first twenty years of the lease, the State's rental obligation increased, substantially. So after a new governor took office, the new administration's Harbors Division apparently decided that it should not have to abide by its contractual obligations, and in 2013, instituted an eminent domain lawsuit in state court to condemn the property from Williams.

Immediately upon filing the lawsuit and without notice to Williams, the State stopped paying rent. It later claimed to have invoked the lease's "condemnation clause," which provided that in the event the property was condemned by an entity with the power of eminent domain (which in the State's view, included itself), its contractual obligations would automatically terminate. In short, the State of Hawaii used its power of eminent domain to do what a nongovernmental tenant could never do: break a lease at its sole discretion.

The State also deposited with the court its estimate of just compensation (approximately $4 million), which entitled the State to immediate possession of

the land under Hawaii's eminent domain code. Land which it *already* possessed the lessee. In other words, literally nothing changed—the State continues to use the vacant land for storage and parking—except the State no longer paid rent to Williams. Stopping rental payments put Williams over the proverbial barrel, because he had been using the rental income stream to service his debt on the property. Cut off from a predictable income which had, until then, continued for twenty years unabated, Williams was forced to withdraw the State's $4 million deposit of estimated compensation in order to avoid defaulting on the loan. By doing so, under Hawaii law he forfeited his ability to challenge the taking. *See* Haw. Rev. Stat. § 101-31 ("A payment to any party as aforesaid shall be held to constitute an abandonment by the party of all defenses interposed by the party, excepting the party's claim for greater compensation or damages."). Williams did not even retain much of the $4 million deposit, since the lender grabbed the lion's share.

"Not a big problem," thought Williams, "condemning the property could not make my land's value as a rental property simply disappear, and I will recover compensation for my property's fair market value which includes the lost ten-years-plus of rent that the State is obligate to pay me, in the just compensation case." (We are paraphrasing of course, but this was the essence of his responsive pleadings.) He was right, because it is a fundamental tenet of Just Compensation law that condemned property is never valued in its condemned state, but by how the market would value the property in the absence of the condemnation action itself. This Court said it better in *United States v. Miller*, 317 U.S. 369 (1943), where

it held that "[s]ince the owner is to receive no more than indemnity for his loss, the property's special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value." *United States v. 320.0 Acres of Land*, 605 F.2d 762, 782 (5th Cir. 1979) (quoting *Miller*, 317 U.S. at 375). This rule is also universally accepted by lower courts nationwide even though the principle that the condemnation itself cannot figure into the market value of property being taken goes by several names—"project influence," "scope of the project," "project enhancement," and "condemnation blight." In other words, just compensation is measured without reference to the fact that the property is being condemned. *See*, *e.g.*, *City of Boulder v. Fowler Irrevocable Trust 1992-1*, 53 P.3d 725, 727-28 (Colo. App. 2002) ("Under the principle referred to by the parties and the trial court in this case as the 'project influence rule,' just compensation cannot include any enhancement or reduction in value that arises from the very project for which the property is being acquired.") (citing *Nichols on Eminent Domain* § 12B.17[1] (rev. 3d ed. 1999)). "This principle promotes fairness in valuing property by preventing a windfall to the property owner based on speculative potential enhancements in value while, at the same time, protecting the property owner from the injustice of assessing against it a diminution in the property's value caused by the same project for which it is being taken." *Id*. at 728. As one court correctly put it, "[t]he intent of the project influence rule is ensure that a condemned property is valued as if the project never occurred. It seeks to factor out any increase or diminution in the value of the property caused by the

project." *Matter of City of New York (Fifth Amended Brooklyn Ctr. Urban Renewal Area, Phase 2)*, 980 N.Y.S.2d 275, 275 (N.Y. Sup. Ct. 2013) (citing *Miller*, 317 U.S. at 369).

In the event the State denied applicability of the project rule, Williams instituted a counterclaim for breach of contract for the State's failure to meet its obligation to pay rent for the remaining term of the lease. Shortly thereafter, however, Williams dismissed the breach of contract counterclaim, based on the State's acknowledgement that indeed, he would recover the rental income for the remaining lease term as part of Just Compensation in the State's eminent domain action. Because he was going to be compensated for the loss of the ten-plus years of rent which the State no longer was paying, he had no claim for breach of the lease. As the State represented to the court, "courts have concluded that the correct method for determining just compensation under a lease in a condemnation action includes a determination of the present value of rental income over the lease period." Based on this and other unequivocal representations (*e.g.*, the State noted that the measure of compensation is "[t]he present worth (discounted value) of the future net rents under the terms of the lease," plus the value of the land itself), the court accepted Williams' voluntary dismissal of his breach of contract counterclaim.

The case moved slowly through the system, with both the State and Williams retaining appraisers to offer their expert opinions on just compensation, with both agreeing that the most valuable feature of Williams' land—its "highest and best use" in eminent domain lingo—was its ability to produce for its owner a reliable long-term income stream from a low-risk

tenant highly unlikely to default. Consequently, both the State and Williams' appraisers rendered opinions that the compensation he was entitled to receive was well above the $4 million the State initially estimated and deposited with the court. Their bottom line valuation conclusions differed, naturally, but their basic approach to value methodology did not.

But just a few days before jury selection, the court granted the State's motion in limine and barred Williams from introducing evidence of the property's ability to generate income as leased land. Applying the "undivided fee rule," the court concluded that the jury could only consider the value of the property as a fee simple absolute estate (even though the property at the time of the taking was decidedly *not* held as a fee simple estate). In sum, the undivided fee rule—a rule in which condemned property held by two different parties (a landlord and a tenant, for example) is valued as a single estate—mechanically applied, resulted in the jury only allowed to hear about a fiction: land that was in fact leased by the condemnor at the time of the condemnation was required to be valued as if it were not. *Cf. Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 194 (1910) (constitution does not require a disregard of the mode of ownership). This rendered Williams' expert appraisal witness inadmissible only days before trial. Adding injury to insult, this allowed the State to argue that the fee simple value of the property (*i.e.*, as land that had no income-producing ability) was actually substnatially *lower* than not only its own appraiser's value conclusion, but even lower than its initial $4 million estimate on which its deposit had been based. Which meant that if the jury agreed with the State, Williams not only would lose

his land, *he would owe the State more than $1 million, plus interest*.

All of this is taking place under the procedures in Hawaii's eminent domain code in which the deck is stacked against owners like Williams, and in favor of condemnors. Eminent domain, however, is an extraordinary proceeding, and not typical evenhanded civil litigation. "Defendants" in eminent domain lawsuits only find themselves sued because they own property the condemnor says it needs (even where, as in *Williams*, the government already has sole possession of the land and its use did not change, so is hard pressed to say it really "needed" the land). Williams has done nothing wrong—breached no duty, nor repudiated a promise—yet he has been hauled into court, required to retain attorneys and costly experts, and is now even subject to the risk that when the dust settles, he may owe the State a huge amount of money if he dares risk a just compensation trial in which the jury has been unconstitutionally limited in the valuation evidence it can consider. This is not justice, but amounts to economic extortion under the guise of a fair process.

This is not hyperbole. Owners like Williams have little power to contest a condemnation, and there are not many tools which the law provides them to stop the seizure of their property or the wiping out of their income or business tied to that land, even if the land and the business have been in the family for generations, as is often the case. For example, they can challenge a taking only by mustering extraordinary proof under both federal and Hawaii law. *See Kelo v. City of New London*, 545 U.S. 469 (2005) (rational basis review, unless the owner can show the public use determination is "pretextual," a term that

remains undefined); *Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008) (courts owe "substantial deference" to a condemnor's asserted reasons for a taking). Owners can be thrown off their property *ex parte*, immediately upon the filing of the complaint and with little notice, regardless of the consequences to their homes or businesses. *See* Haw. Rev. Stat. §§ 101-28, 101-29 (providing for orders of immediate possession). Even *before* the government exercises eminent domain, it can force entry to property to conduct extensive and intrusive surveys and studies, and owners have no remedy for trespass. *Id*. § 101-8.

The only measure of justice in most eminent domain cases is the award of just compensation, so a property owner's right to present all evidence of her actual losses to a jury must be zealously protected by the courts. *See*, *e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (jury's role in regulatory takings cases). The focus in these cases is on the property owner's actual losses, not the condemnor's gain. *See United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956) (Fifth Amendment measures the loss to the owner, not the gain to the taker). Inflexible rules like those adopted by the Louisiana Supreme Court should not make it even harder than it already is for property owners to be made economically whole by our courts.

Finally, even if a property owner successfully proves the government's offer of just compensation was wholly inadequate, *see*, *e.g.*, *Virginia Elec. & Power Co. v. Hylton*, 787 S.E.2d 106 (Va. 2017) (an unacceptably low offer of compensation still qualifies as a "bona fide" offer), making an owner truly whole is often impossible under the law of most jurisdic-

tions: the owner must retain appraisers and lawyers to challenge the taking or the amount of just compensation which the condemnor has offered, but absent unusual circumstances, in a majority of states and in federal court, she must bear her own costs. *See State v. Davis*, 499 P.2d 663, 667 (Haw. 1972) ("Haw. Const. art. I, § 18 [renumbered as art. I, § 20] does not embrace attorneys' fees and expenses, including expert witness' fees within the meaning of 'just compensation'"). Thus, even though the purpose of the Just Compensation imperative is to ensure that property owners receive the "full and perfect equivalent" when their property is put to public use, owners who retain counsel and pursue their rights will, by definition, be undercompensated even if they prevail and the jury awards them 100% of what they seek (unless the property happens to be located in a state where recovery of fees and costs has been granted as a matter of legislative grace). Every dollar these owners must spend on lawyers and appraisers is a dollar less they get as compensation for their property.

Mr. Williams' tale unfortunately is not a rarity. OCA's lawyers, who represent property owners in condemnation cases nationwide, have similar anecdotes of *Catch-22* situations that would make Yossarian blush. It has been more than three decades since this Court last weighed in on the Just Compensation Clause, *see United States v. 50 Acres of Land*, 469 U.S. 24 (1984), and the Court's long absence from the field has allowed the lower courts to become unmoored from basic principles, and adopt rules starkly divergent from the guiding principles inherent the concept of "just compensation." Guidance from this Court regarding what is, as a practical matter, the

most important part of the takings calculus (just compensation, not public use, is the subject of an overwhelming majority of eminent domain cases nationwide) has been mostly absent.

If left unreviewed, the Louisiana court's ruling will unnecessarily add to the burdens under which property owners on the target end of eminent domain already struggle. The Just Compensation Clause deserves this Court's attention yet again in this case, to emphasize the constraints the Fifth Amendment places on the power of a state to limit by fixed and arbitrary rules the evidence of value which the jury considers.

II. ABSENT A RULE OF FULL COMPENSATION, CONDEMNORS WILL NOT CONSIDER THE TRUE COST OF TAKINGS

A categorical rule denying compensation for anything but the raw value of condemned land may have once made sense. During the early years of our Republic,

> land was usually undeveloped and takings seldom created incidental losses. Thus the former interpretation of the 'just compensation' provision of our constitution seldom resulted in the infliction of incidental losses. The rule allowing fair market value for only the physical property actually taken created no great hardship.

Luber v. Milwaukee Cnty., 177 N.W.2d 380, 385 (Wis. 1970). "The rule denying recovery of incidental losses stems from the restrictive definitions that the courts originally ascribed to the terms 'property' and 'taking.'" Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors In The Just Compensation*

Equation, 32 B.C. L. Rev. 283, 299 (1991). But with the country's expansion and development, and the need to redevelop in highly populated areas, "commercial and industrial property [was] often taken in condemnation proceedings." *Luber*, 177 N.W.2d at 385. Indeed, the loss of a business "does not merely reflect the value of the real estate, for frequently the value of the business greatly exceeds that of the premises where it is conducted." *Bowers v. Fulton Cnty.*, 146 S.E.2d 884, 891 (Ga. 1966). "[I]n a shabby and cheap building a very valuable business may be established," one where "the business has a value of $100,000 and the building $5,000." *Id.* Compensation is not "just" when it allows the condemnor to artificially compensate only for the land, and not for the fact that a business which is integral to that land and cannot be easily relocated is wiped out by the taking. This is a recipe for eminent domain abuse because it allows the condemnor to consider taking property without an honest evaluation of its actual costs. *See* Oswald, *Goodwill and Going-Concern Value*, 32 B.C. L. Rev. 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)).

A rule that may have once made sense should be reexamined when it no longer serves the purpose of the Just Compensation Clause, and for decades, some lower courts have acknowledged the harshness of the categorical rule that prohibits businesses

whose property has been condemned from receiving compensation for what are blithely labeled "business losses." Many of these courts have interpreted their state constitutions as requiring some sort of compensation for business losses. *See, e.g.*, *State v. Hammer,* 550 P.2d 820, 825 (Alaska 1976) ("It is incongruous that courts allow proof of loss of profits damages in most types of actions, on a case by case basis, and yet in eminent domain cases bar all such claims as inherently speculative. Loss of profits damages are as susceptible of proof in an eminent domain case as in any other . . . ."); *Bowers,* 146 S.E.2d at 889 ("All of these cases were predicated upon the concept that the constitutional provision in referring to property meant only physical or corporeal property. The view is too narrow. . . [A] condemnee is under the constitutional provision entitled to just compensation for every species of property taken or damaged, real or personal, corporeal or incorporeal."); *State v. Saugen,* 169 N.W.2d 37, 46 (Minn. 1969) ("The present case is one where the way is open to award appellant compensation for the going-concern value of the business."). Here, Petitioners were deprived of far more than the simple value of cold assets or square footage of dirt: Respondent's exercise of its power to appropriate the land effectively destroyed Petitioners' "valid and unrevoked ability to continue to engage in . . . business," as surely as if Respondent had acknowledged acquiring the business itself. *Id.* at 46. The bedrock indemnity principle behind the Just Compensation Clause (and the language in cases such as *Monongahela* and *Miller*) would seem to require recovery of these kinds of concrete losses, or at the very least the jury should be permitted to consider evidence of these losses. As

one court correctly put it, denying "recompense for incidental losses—losses typified by damage to or destruction of good will, expenses incurred in moving to a new location and profits lost because of business interruption or inability to relocate," and still calling Just Compensation "just" "reflects dubious wisdom and logic." *Luber*, 177 N.W.2d at 385 ("In denying these losses, courts have recognized that such action constitutes a derogation of the indemnity principle and makes 'harsh' law. Nonetheless, the practice continues, justified by reasoning which, upon critical examination, reflects dubious wisdom and logic.") (quotation omitted)). Nor has this stark incongruity escaped the eyes of legal scholars. *See*, *e.g.*, Frank A. Aloi & Arthur Abba Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 Cornell L. Rev. 604 (1968); W. Harold Bigham, *"Fair Market Value," "Just Compensation," and the Constitution: A Critical View*, 24 Vand. L. Rev. 63 (1970); Joseph M. Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L.J. 221 (1931); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967).

Several cases illustrate the hardship which businesses suffer, and the lower court split of authority. In *Mamo v. District of Columbia*, 934 A.2d 376 (D.C. 2007), the government condemned land on which a gas station stood. An oil company leased the land to a gas station operator. *Id.* at 378. When the government condemned, it paid the oil company over $700,000 for the land. *Id.* at 379. The operator sought an additional $500,000 for the value of the gas station, but received nothing. *Id.* at 379–80.

In *Dep't of Transportation v. M.M. Fowler, Inc.*, 637 S.E.2d 885, 888 (N.C. 2006), the state condemned a portion of a business owner's property which included a gas station and a convenience store. The state estimated that just compensation for the taking was $166,850—merely for the value of the land. *Id.* at 888. The business owner, however, estimated that the loss in value caused by the taking was between $500,000 and $540,000. *Id.* After a trial where the business presented evidence of lost profits to the jury, the jury returned an award of $375,000 for the taking. *Id.* But the North Caroline Supreme Court held as a matter of law that the jury should never have been allowed to consider such evidence, and was limited only to the value of the dirt taken. *Id.* at 895.

Finally, in *Community Redevelopment Agency v. Abrams*, 543 P.2d 905, 908 (Cal. 1975), a city condemned the property of a pharmacist who had operated his business on the property for nearly three decades. As a consequence of the taking, the business was destroyed. *Id.* at 908. He received compensation for the loss of the land, but nothing for destruction of the business. *Id.* at 909.

It is not enough to pass on the responsibility to fully compensate property owners to a patchwork of state courts and state constitutions, because it should not depend where property happens to be located on whether the owners receives the "full and perfect equivalent" for the property taken. This is a national imperative. The Just Compensation Clause embodies an indemnity principle that transcends state lines. *See* Oswald, *Goodwill and Going-Concern Value*, 32 B.C. L. Rev. at 299-302 (the hardline rule against compensating for business destruction in

eminent domain is inconsistent with this Court's modern takings jurisprudence, which recognizes "compensation may be required for the taking of a number of intangible interests, such as aerial easements, trade secrets, liens, and contracts."). Times have changed, and "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?" *Id*. at 299. This case presents the Court with the opportunity to revisit this long-neglected issue in a case in which the facts are a natural limitation on the scope of the rule which Petitioners ask the Court to adopt.

CONCLUSION

This Court should grant the petition and review the judgment of the Louisiana Supreme Court.

Respectfully submitted.

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