No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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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).

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner Chad M. Jarreau is a natural person. Petitioner Bayou Construction & Trucking, L.L.C., is a Louisiana limited-liability company of which Petitioner Jarreau is the sole member.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Louisiana Supreme Court in this case.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court, App. 1, is reported at 217 So.3d 298. The opinion of the Louisiana Court of Appeal, App. 38, is reported at 192 So. 3d 214. The trial court's judgment, App. 80, is unreported and was based on a written Supplemental Reasons for Judgment, App. 83, and an oral explanation given in open court, App. 88, both of which are also unreported.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on March 31, 2017. On May 19, 2017, petitioners submitted to Justice Thomas an application for an extension of time to file a petition for certiorari up to and including July 31, 2017. Justice Thomas granted the application on May 25, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' claims in this case arise under the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT

Petitioner Chad Jarreau is (or was) a dirt farmer: Through months of hard work, he converted the dirt on property he owned in Louisiana into fine-grained sandy dirt suitable for construction projects. But when the South Lafourche Levee District condemned his property to use the dirt in levee construction, Jarreau lost not just his land, but also the prepared sandy dirt, some of which he had already contracted to sell. After trial, a judge concluded that losing the dirt-farming business cost Jarreau more than $100,000 above and beyond the loss of the underlying land. The question presented by this case, in essence, is whether the U.S. Constitution entitles Jarreau to be made whole.

The Fifth Amendment, of course, provides that "private property [shall not] be taken for public use, without just compensation." And in *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), this Court held that under the Fifth Amendment "an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value

of his business is a compensable 'taking' of property." *Id.* at 13.

But the Louisiana Supreme Court nonetheless held that Jarreau's business losses are categorically noncompensable because, while the Levee District took his dirt, it "did not take Jarreau's business." App. 31. In reaching this result, the court adopted an untenably narrow reading of this Court's *Kimball Laundry* decision, deepening an existing split on the scope of that case and holding that it applies only to circumstances in which the government takes a property owner's business for the purpose of running that business itself, rather than cases in which the government's taking "inevitably destroys" a business.

The decision below warrants this Court's review. There is a longstanding and deepening split of authority regarding when the Fifth Amendment requires compensation for business losses. This Court has not squarely addressed the issue since 1949, and the consequences of the lower courts' confusion are severe. By failing to account for eminent domain's permanent destruction of economically productive businesses, courts in many parts of the country have fostered a regime of systematic under-compensation. This puts a thumb on the scale in favor of eminent domain, leading to economically inefficient outcomes. Worse, it forces individuals to bear burdens that "in fairness ought to be borne by society as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

This case illustrates the problem perfectly. The Levee District wanted to acquire a fungible commodity: Jarreau's dirt. But because it acquired the underlying land instead of taking the dirt directly, the decision below allows it to pay Jarreau less than $12,000—even though the Levee District itself argued *in the same proceeding* that Jarreau had caused it more than $16,000 in damages by removing some of that same dirt from the property after it was acquired. There is no question that the dirt on Jarreau's property was quite valuable; the only question is whether the Levee District can take that value away from Jarreau without paying him for it. As the dissenting Justice Hughes succinctly put it:

> This court affirms an award of $11,869 despite evidence in the record that the dirt taken from the land has a value in excess of $100,000. Even if the most restrictive measure of compensation is applied, this value should be considered in determining the award to defendant. When the government can take private property without paying the landowner, something is wrong.

App. 36-37.

A. Background

The facts of this case are simple: Petitioner Chad Jarreau owns real property in Southern Louisiana that he used as a dirt farm—originally in his personal capacity and eventually through his business Bayou Construction & Trucking, L.L.C. App. 5; *see also* App.

92-93. Dirt farming as practiced by Jarreau is labor-intensive, requiring the farmer to excavate, drain, and then churn pits of dirt in order to create and then remove fine-grained, sandy dirt for use in the construction industry. Jarreau operated that business successfully for nearly a decade. App. 92-93. But on January 10, 2011, the South Lafourche Levee District adopted a resolution "appropriating" a permanent servitude over a strip of land that included Jarreau's dirt farm.[1] App. 4.

Jarreau soon received a letter in the mail notifying him of the appropriation, instructing him to "cease and desist performing any and all activities upon the property as appropriated," and informing him that the Levee District would soon begin excavating dirt from the property. App. 4. The Levee District soon thereafter tendered Jarreau a check for $1,326.69 as compensation for the appropriation. App. 5.

After receiving the letter, though, Jarreau continued business as usual for a time—he had contracts to fulfill, and he needed his dirt in order to make good on them. *Id.* In response, on May 19, 2011, the Levee District filed suit against Jarreau, seeking an injunction to prevent him from excavating any more dirt and

[1] The permanent servitude granted the levee district certain rights, including the right to cut away, dredge, or remove any soil and earth it needed from the land, but as the parties consistently litigated this case (and as the trial court below specifically found) these rights were so extensive that the servitude was the equivalent of a complete taking. App. 96.

demanding damages for his "wrongful excavation." App. 5.

Jarreau eventually stipulated to the injunction (leaving at least one contract unfulfilled), but he rejected the Levee District's measure of compensation, filing counterclaims alleging (among other things) that "[p]ursuant to the * * * Fifth Amendment of the United States Constitution, defendant Jarreau is entitled to be compensated to the full extent of his loss as a result of the actions of the Plaintiffs referenced herein."

This litigation followed.

B. State Court Proceedings

1. Louisiana Trial Court

The state trial court conducted a two-day bench trial at which both parties offered testimony about the value of the appropriated tract of land. Jarreau's appraiser testified that the value of the surface estate of the appropriated land, based on the per-acre value of other land in the area, was $11,869. App. 94-96. Jarreau also offered another expert witness who testified about the value of the subsurface dirt. App. 97-98. Jarreau himself testified about the quality of the dirt on the appropriated land and that, as a result of the appropriation, his business had lost a contract to supply 23,000 cubic yards of dirt to a third party. App. 93-94; App. 97.

The Levee District offered two appraisers of its own and also offered testimony regarding the damages

it had allegedly sustained when Jarreau continued to excavate dirt from the appropriated land. App. 94; App. 100-01.

Ruling from the bench, the trial court undertook a detailed examination of the evidence in the case. It rejected the testimony of the Levee District's appraisers with respect to the per-acre value of the land, accepting the valuation of Jarreau's appraiser and awarding $11,869. App. 96.

The court also awarded Jarreau $164,705.40 as compensation for the business losses caused by the taking. App. 100. The court arrived at this number after reviewing testimony concerning (1) the particular quality of the dirt taken and the existence of a contract to sell some of that dirt, (2) the total quantity of dirt available for excavation on the property, (3) the cost of excavating and selling it, and (4) the price at which it could be sold. App. 97-100. The court also noted that it was avoiding "duplication of damages" and that the value of the land was distinct from the value of the dirt that could be mined on that land. App. 96-97.

In addition, the court awarded the Levee District $16,956 as compensation for the value of dirt that Jarreau excavated from the land, without permission, after the District had appropriated it. The court explained that it arrived at this number by assigning the dirt the same value that it had used in its business-losses calculation. App. 102.

Separately, the court also awarded Jarreau attorneys' and expert witness fees along with some costs. App. 83-86.

2. Louisiana Court of Appeal

The parties cross-appealed. The court of appeal affirmed the $11,869 award, agreeing with the methodology of Jarreau's appraisal expert, but the court reversed the $164,705.40 award because, the court explained, the law "does not allow compensation for lost profit damages associated with the value of the dirt in the Jarreau tract." App. 63. The court of appeal also vacated the $16,956 award to the Levee District because the Levee District had not actually been harmed: It had taken the land for the purpose of excavating dirt for levee construction, and the record showed that there was still plenty of dirt to complete its project. App. 69-70 ("Since Mr. Angelette estimated that Mr. Jarreau had only removed 2,862 cubic yards of dirt after the appropriation, it follows that there was a surplus of dirt still available in the Jarreau tract for the Levee District to exercise its right to use the dirt that it estimated was necessary for constructing the levee."). Finally, the court also increased the award of attorneys' fees. App. 71-75.

3. Louisiana Supreme Court

The parties cross-petitioned the Louisiana Supreme Court for review, and the court granted the petitions. App. 9. The Levee District's chief argument was

that Jarreau was not entitled to *any* compensation because, supposedly, recent changes in Louisiana law eliminated all compensation for property "appropriated for hurricane protection purposes." App. 11. Jarreau disagreed, maintaining that he was entitled to full compensation as a matter of both state and federal law. App. 18.

The court rejected the Levee District's argument. It held instead that the relevant statutory language—which says that compensation for land taken for hurricane protection purposes "shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States," Louisiana Revised Statutes section 38:281(4)—was intended to treat all property owners equally, regardless of the purpose of a condemnation, by assuring that their compensation would be governed by the Fifth Amendment's just-compensation standard. App. 26. Because the Louisiana Supreme Court held that Jarreau was entitled under state law to compensation that met the standards of the Fifth Amendment, it did not distinguish between Jarreau's state-law arguments and his Fifth Amendment arguments. *Id.*

As a result, the court affirmed Jarreau's award of $11,869.00, accepting his expert's testimony about the value of the land. But it also held that Jarreau was not entitled to any compensation for business losses under the Just Compensation Clause, rejecting Jarreau's argument that compensation was owed under this Court's decision in *Kimball Laundry*. App. 29-31.

In *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), the federal government took possession of a commercial laundry facility and used it to wash military uniforms during World War II. The taking was temporary, and the government offered compensation for the purported rental value of the facility during the time the owner was displaced. The property owner argued, however, that it was also entitled to compensation for the "diminution in the value of its business due to the destruction of its 'trade routes' * * * [*i.e.*,] the lists of customers built up by solicitation over the years and * * * the continued hold of the Laundry upon their patronage." *Id.* at 9. In other words, the laundry had been a valuable going concern before the taking, but afterwards it had to start over building its business from scratch.

This Court agreed with the property owner, acknowledging that although compensation is not required for the going-concern value of a business when the business can be successfully relocated, the rule is different when "an exercise of the power of eminent domain * * * has the inevitable effect of depriving the owner of the going-concern value of his business." *Id.* at 13. In such cases, the destruction of "going-concern value * * * is a compensable 'taking' of property * * * whether or not [the government] chooses to avail itself of" the value of the business. *Ibid.*

Notwithstanding that the Levee District had destroyed Jarreau's business, and that the factual findings regarding Jarreau's losses were uncontested, the Louisiana Supreme Court held that *Kimball Laundry*

was inapplicable because "the Levee District did not take Jarreau's business." App. 31.

Justice Hughes dissented:

> Defendant is in the dirt business and owns land from which he digs and sells dirt. The government is entitled to "appropriate" defendant's land, but must pay him fair compensation mandated by the Constitution. This court affirms an award of $11,869 despite evidence in the record that the dirt taken from the land has a value in excess of $100,000. Even if the most restrictive measure of compensation is applied, this value should be considered in determining the award to defendant. When the government can take private property without paying the landowner, something is wrong.

App. 36-37.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's decision in *Kimball Laundry*.

While (as discussed more fully below) the intervening years have led to disagreement in the lower courts about when businesses are entitled to compensation under the Fifth Amendment, the logic of this Court's actual opinion in *Kimball Laundry* is clear—and clearly at odds with the holding below. The key holding of *Kimball Laundry* was that "an exercise of

the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable 'taking' of property." 338 U.S. at 13. Under this rule, pecuniary business losses are fully compensable. The only caveat is that the losses must be demonstrable rather than speculative or purely subjective. *See id.* at 14-15 ("[T]he amount of compensation payable should not include speculative losses * * * [but] it would be unfair to deny compensation for a demonstrable loss of going concern value upon the assumption that an even more remote possibility * * * might have been realized."). This caveat, however, is not a special rule for business losses. It is just the rule for all damages in all cases.

Nevertheless, the Louisiana Supreme Court erroneously concluded that *Kimball Laundry* was inapplicable because "the Levee District did not take Jarreau's business." App. 31. That is the exact same argument that the lower court made in *Kimball Laundry* itself. The Eighth Circuit had denied the laundry's claim for compensation because "[t]he Government did not take or intend to take * * * the Company's business[.] * * * No doubt the Government[ ] * * * disrupted and damaged the Company's business, although it could hardly have * * * disabled the Company from ever re-establishing its business." *Kimball Laundry Co.* v. *United States*, 166 F.2d 856, 860 (8th Cir. 1948).

This Court rejected that argument. The entire point of *Kimball Laundry* was that *even though* the government did not literally take the laundry business, and *even though* the business was not completely

destroyed going forward, the government had nevertheless harmed the business by taking property that was integral to its operation. *See Kimball Laundry*, 338 U.S. at 13 ("'the question is what has the owner lost, not what has the taker gained'" (quoting *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910))). It was the provable damage to the business that entitled the property owner to compensation.

It is worth noting that this Court's subsequent treatment of *Kimball Laundry*—all of which, admittedly, is *dicta*—agrees with this reading of the opinion. *See, e.g.*, *Brown* v. *Wash. Legal Found.*, 538 U.S. 216, 237 (2003) ("In *Kimball Laundry* * * * it was common ground [within the Court] that the government should pay 'not for what it gets but for what the owner loses.'"). This Court has consistently focused—as the trial court did—on ensuring that condemnation awards replace the full measure of what was actually lost by a condemnee, disallowing awards only where they would constitute a "windfall" for the condemnee. *Cf. United States* v. *50 Acres of Land*, 469 U.S. 24, 35 (1984) (noting that the mere fact that a replacement facility would cost more than the existing facility did not justify a higher compensation award because the more expensive facility "presumably is more valuable" than the condemned one); *see also id.* at 37 (O'Connor, J., concurring) (noting that condemnee in that case had failed to show factually that an award of the fair-market value of its property "deviate[d] significantly from the make-whole remedy intended by the Just Compensation Clause"). The Louisiana Supreme Court's holding below, which treats "business damages" as

categorically excluded from the Just Compensation Clause, cannot be squared with these cases and should therefore be reversed.

II. There is a deep split of authority regarding when compensation is required for takings that cause business losses.

Kimball Laundry was this Court's last word on the compensability of business losses under the Fifth Amendment. Over the course of the ensuing sixty years, many courts have abandoned the logic of this Court's decision and cabined *Kimball Laundry* to its facts, creating a deep split over the proper scope of compensation for condemnations of businesses. Some courts, like the court below, limit *Kimball Laundry* to its facts, applying it only to temporary takings or only to situations in which government takes a business for the purpose of running that business. But many other courts apply *Kimball Laundry* to its full extent, requiring compensation whenever a taking "inevitably destroys" a business's value.

A. Some courts have rejected the rationale of *Kimball Laundry*, limiting the case to its facts.

The Federal Circuit. Most takings claims against the federal government are confined to the United States Court of Federal Claims by operation of the Tucker Act, 28 U.S.C. § 1491. And the Federal Circuit, which hears the appeals from the Court of

Federal Claims, has limited *Kimball Laundry* to its facts, holding that a business can recover going-concern damages in temporary takings but can never do so in the context of a permanent taking. *E.g.*, *Huntleigh USA Corp.* v. *United States*, 525 F.3d 1370, 1382 n.3 (Fed. Cir. 2008) ("[G]oing concern value is a property interest that has been held to be compensable in the context of a temporary, but not a permanent, taking."); *accord Cooper* v. *United States*, 827 F.2d 762, 763 (Fed. Cir. 1987) ("[D]amages may be awarded under the Fifth Amendment for injuries from a temporary taking where the same injuries would not be compensable if a permanent taking occurred." (citing *Kimball Laundry*)).

The District of Columbia Court of Appeals. In *Mamo* v. *District of Columbia*, the District of Columbia Court of Appeals addressed the compensation due to the owner of a gas station franchise whose property was condemned by the District of Columbia to construct a municipal office building. 934 A.2d 376, 379 (D.C. 2007). The property owner argued that he should be compensated for the value of his franchise because it was non-transferrable. The court, however, held that the loss of the valuable franchise was merely an uncompensable business loss. The court distinguished *Kimball Laundry* as applying only to temporary takings. *Id.* at 383 ("Mr. Mamo also relies on *Kimball*

Laundry, but that case, unlike the one before us, involved a temporary taking of the property and business.") (internal citation omitted).[2]

The Supreme Court of Wisconsin. In *City of Janesville* v. *CC Midwest, Inc.*, 734 N.W.2d 428 (Wis. 2007), the Supreme Court of Wisconsin interpreted a statute that required that a condemnor provide relocation assistance to a business displaced by eminent domain. Before interpreting the statute, the Court satisfied itself that that relocation assistance has no constitutional "just compensation" component. In reaching this conclusion, the court found it necessary to distinguish *Kimball Laundry*:

> [T]o fall within the rule set out in *Kimball Laundry*, the condemnor must take over the business opportunity, at least on a temporary basis, as well as taking the real property, such that the business owner could not move his business to a new location and may be required to renew his business at a location temporarily taken if the government quits the condemned site before the expiration of the condemnee's lease term.

Id. at 437.

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[2] As illustrated by *Mamo*, the problem of under-compensation for condemned franchises is particularly severe. Franchisees invest substantial amounts of money up-front to pay for the franchise fee, they cannot have their franchises terminated except for cause, and they can even sell their franchises. Limiting compensation to the value of the land thus leads to severe under-compensation.

The Supreme Court of Montana. In the year 2000, Montana effectively outlawed certain types of hunting farms. The owners of several such farms brought an inverse-condemnation suit for the destruction of their businesses, and the Montana Supreme Court ultimately rejected their claims. *Kafka* v. *Montana Dep't of Fish, Wildlife & Parks*, 201 P.3d 8 (Mont. 2008). In its decision, the court distinguished *Kimball Laundry* as applying "only in those rare circumstances where the government actually intends to take over the claimant's business and thereby appropriate the goodwill and going-concern value for its own use." *Id.* at 23. Notably, the court explicitly followed the Federal Circuit's erroneous analysis in *Huntleigh*, supra. The dissenting justices, however, interpreted *Kimball Laundry* as applying whenever a "business was destroyed or made otherwise unusable as a result of the governmental action." *Kafka*, 201 P.3d at 61 (Nelson, J., dissenting).[3]

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[3] A number of trial courts and state intermediate appellate courts have likewise limited *Kimball Laundry*. *See, e.g.*, *City of Blue Mound* v. *Sw. Water Co.*, 449 S.W.3d 678, 685 n.6 (Tex. App. 2014) ("As set forth in the quote above from the *Kimball Laundry Co.* case, the distinctive feature of a taking that entitles the property owner to an award of going-concern value is that the condemnor takes over the business of the property owner to run it for itself on the real property it condemns."); *AVM-HOU, Ltd*. v. *Capital Metro. Transp. Auth*., 262 S.W.3d 574, 584 (Tex. App. 2008) (expressly disagreeing with the Minnesota Supreme Court and holding that *Kimball Laundry* applies only to temporary takings); *State ex rel. Com'r of Transp.* v. *Arifee*, 2009 WL 2612367 (N.J. App. 2009) (limiting *Kimball Laundry* to temporary takings); *Heir* v. *Delaware River Port Auth.*, 218 F. Supp. 2d 627 (D.N.J. 2002) ("According to Plaintiffs * * * the destruction of their franchise was

B. Other jurisdictions follow *Kimball Laundry* to its full extent, and in any of these jurisdictions, Mr. Jarreau would have prevailed in his claim for business losses.

The Supreme Court of Pennsylvania. In *Redevelopment Authority of City of Philadelphia* v. *Lieberman*, the city of Philadelphia condemned a tavern. The owner "found it impossible to find a suitable new building for his bar business," and he "unsuccessfully tried to sell the liquor license through several license brokers." 336 A.2d 249, 251 (Pa. 1975). He ultimately surrendered the license to the city, and it was canceled. Citing *Kimball Laundry* for the proposition that "going concern value" is compensable, the Pennsylvania Supreme Court held that the tavern owner was also entitled to be compensated for the value of the liquor license—a property interest under Pennsylvania law that had been rendered valueless by the taking. *Id.* In so holding, the court explained that the property owner had sufficiently proven that he had suffered a loss as a direct result of the taking of his property, and that "[t]o hold otherwise would be to ignore reality." *Id.* at 259.

The Supreme Court of Minnesota. In *City of Minneapolis* v. *Schutt*, the Minnesota Supreme Court considered a claim for business losses by the lessor of

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the 'inevitable effect' of the DRPA's actions. * * * [T]hose exceptional cases * * * such as *Kimball* * * * are inapposite, as the DRPA did not take Plaintiffs' franchise as a going concern[.]"); *United States* v. *70.39 Acres of Land*, 164 F. Supp. 451, 479 (S.D. Cal. 1958) (limiting *Kimball Laundry* to temporary takings).

a private parking garage. 256 N.W.2d 260, 265 (Minn. 1977). The city of Minneapolis seized 20% of the property to build a public parking ramp. Although the court held that the property owner had failed to prove a loss of going-concern value, in doing so, the court cited *Kimball Laundry* and articulated a test for when business losses are compensable: "[T]he holder of the interest to be lost by condemnation [must] show (1) that his going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that his business either cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest." *Id.*; *see also State by Mattson* v. *Saugen*, 169 N.W.2d 37, 44 (Minn. 1969) (the "intangible character of going-concern value does not preclude compensation for its taking") (citing *Kimball Laundry*, 338 U.S. at 5).[4]

The Supreme Court of New Mexico. In *Primetime Hospitality, Inc.* v. *City of Albuquerque*, a property owner was constructing a hotel when a waterline ruptured, substantially delaying the completion of the project. 206 P.3d 112 (N.M. 2009). The city of Albuquerque stipulated that the rupture caused a temporary taking. At issue was whether the property owner could

[4] The *Schutt* court also relied on the Michigan Court of Appeals decision in *Michigan State Highway Comm'n* v. *L & L Concession Co.*, 187 N.W.2d 465, 471 (Mich. App. 1971), where the court explained that: "The efforts to limit *Kimball* to temporary takings elides the central meaning of that case. The Federal government was not required to pay for the route lists because the plant was only temporarily taken or because they represented customer goodwill but because their value was destroyed by the taking."

obtain damages for the lost profits caused by the delay in opening the hotel. In a lengthy discussion, relying heavily on *Kimball Laundry*, the New Mexico Supreme Court explained that the touchstone was "loss to the condemnee." *Id.* at 119. The court went on to hold that lost profits are uncompensable when they are speculative, but where they are proven with reasonable certainty, the property owner is entitled to recover. *Id.* at 120-21. Because the city had stipulated to the lost profits, the court held that they had been properly awarded.[5]

If Mr. Jarreau's appeal had been heard by the supreme courts of Pennsylvania, Minnesota, or New Mexico, then the trial court's award of business losses would have been affirmed. The trial court made detailed factual findings concerning the value of the dirt that remained to be excavated on the appropriated property. App. 97-100. That value accounted for the cost of extracting the dirt from the ground. App. 97 ("Mr. Theriot * * * also used information on the cost of

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[5] The brief discussion of the cases above actually understates the degree of confusion regarding the proper measure of just compensation in business condemnations. There are still more courts that have taken various stances on the *Kimball Laundry* question, without actually citing the case itself. *Compare, e.g.*, *Nat'l Advert. Co.* v. *State, Dep't of Transp.*, 993 P.2d 62, 67 (Nev. 2000) ("The evidence in this case, however, clearly establishes that these billboards were in valuable, unique locations, and that the billboards could not be relocated to a comparable site within the market area."); *with, e.g.*, *Com.* v. *R.J. Corman R.R. Co./Memphis Line*, 116 S.W.3d 488, 496 (Ky. 2003) ("injuries to a business and loss of profits are non-compensable measures of value in eminent domain proceedings").

operating the business" to ensure that Jarreau's claim was for profit, not revenue.). The court also noted that it was avoiding any "duplication of damages" in its award. App. 96-97. In other words, Jarreau's business losses were not speculative. They were precisely quantified, they were proven, and they were directly attributable to the Levee District's taking. In a court that follows *Kimball Laundry* to its full extent, that would be sufficient. *See Kimball Laundry*, 338 U.S. at 14-15 ("[T]he amount of compensation payable should not include speculative losses * * * [but] it would be unfair to deny compensation for a demonstrable loss.").

III. The question presented is important.

Whether business losses are compensable under the Fifth Amendment is a frequently recurring question of great national importance. Local, state, and federal entities seize thousands or tens of thousands of properties (many of which are business properties) every year. And, of course, there is no way of finding out how many property owners, bargaining in the shadow of the law, have sold their properties for sums that did not include business losses that could have been easily proven.[6]

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[6] A study by the Institute for Justice documented, in the one year period immediately following this Court's decision in *Kelo* v. *City of New London*, 549 U.S. 469 (2005), at least 5,783 instances of local governments exercising or threatening to exercise eminent domain, with the intention of subsequently transferring the seized property to another private party. The total number of properties seized is of course far greater than that because that

The stakes of this case, which presents a question that surely affects thousands of individuals and controls the disposition of many millions of dollars, contrast sharply with the paucity of guidance offered by this Court. As discussed above, courts evaluate this important modern question of economics and property rights by relying on a World War II-era decision about a temporary taking. Unsurprisingly, the lack of modern guidance has yielded a diversity of approaches in the state and lower federal courts—with the inevitable result that property owners in some states enjoy vastly greater federal protections than do owners in other states (and, conversely, condemnors in some places face far greater financial burdens than those in other places). The undeniably massive consequences of the ongoing division in the lower courts justify this Court's review.

IV. This case is a good vehicle for deciding the question presented.

The petition should also be granted because there are neither legal nor factual obstacles to reaching and resolving the question presented in this case.

There are no legal obstacles to resolving the question presented because the federal Just Compensation Clause question was preserved by Jarreau at every

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study excludes instances of eminent domain in which the government keeps the property it takes. *See* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in a Post-*Kelo *World* (2006), http://ij.org/wp-content/uploads/2015/04/floodgates-report.pdf.

stage of the proceedings and actually decided by the Louisiana Supreme Court. To be sure, the Louisiana Supreme Court engages in a lengthy discussion of state law, including an in-depth history of the State's historical levee servitudes, and, concededly, if Jarreau's property were subject to such a preexisting servitude, it might call into question his right to compensation under the Fifth Amendment.[7] But nothing in the Louisiana Supreme Court's discussion suggests or holds that Jarreau's property is actually subject to such a servitude: Instead, it discusses these ancient servitudes in the course of rejecting the Levee District's argument that Louisiana law allows land subject to these servitudes to be condemned without any compensation at all. App. 19-26. And in rejecting this argument, the Louisiana Supreme Court holds that Louisiana law entitles even property owners whose land is already subject to a servitude to the "'just compensation' measure required by the Fifth Amendment[.]" App. 3. As such, the existence or nonexistence of a preexisting servitude was irrelevant under state law and therefore not resolved by the court below.

In any event, Jarreau's land is not subject to a preexisting servitude as a matter of state law. These

[7] Some property in Louisiana—though not Jarreau's—is subject to longstanding levee servitudes that date back to the original French and Spanish land grants. *See DeSambourg* v. *Bd. of Comm'rs*, 621 So.2d 602, 606-07 (La. 1993) (stating that "title to riparian lands fronting on navigable rivers is subject to the superior right of the public's legal servitude" but making clear that this riparian servitude only "applies to those lands that were riparian when separated from the public domain").

servitudes only burden land that was riparian in nature at the time the property was originally granted to private owners. *See, e.g.*, *Delaune* v. *Bd. of Comm'rs for Pontchartrain Levee Dist.*, 87 So.2d 749, 754 (La. 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."). If the government wants to claim the existence of such a servitude, it bears the burden of proof. *See Grayson* v. *Comm'rs of Bossier Levee Dist.*, 229 So.2d 139, 142 (La. App. 2 Cir. 1969). And, in the trial court, the Levee District never alleged, much less proved, that Jarreau's land fronts on an ancient body of water that could give rise to such a servitude.[8] To the contrary, the testimony at trial revealed that the only water Jarreau's property bordered was a "borrow canal" used to move dirt in the course of building levees, and the Levee District's own employee testified that this canal "was started 30 years ago." Because the Louisiana Supreme Court did not address the state-law question of whether a preexisting servitude existed—and because it would have found no support for such a holding had it inquired—there is no

[8] The existence of such a preexisting servitude was not a necessary element of the Levee District's proof that it was entitled to appropriate Jarreau's land, and so the District did not allege or prove its existence at trial. To take Jarreau's property, the District needed only to show that the property being appropriated was "used or destroyed for levees or levee drainage purposes." La. Const. art. VI, § 42(A). That much was uncontested below.

state-law obstacle to this Court's addressing the Just Compensation Clause question actually decided below.

Neither are there any factual obstacles to resolving the question presented. The trial court made specific factual findings, not challenged on appeal, that Jarreau suffered business losses as a direct consequence of the taking of his land, that those damages had been proven as non-speculative, and that those damages were not duplicative of the value of the underlying land being taken. There is no question whether Jarreau was damaged or what quantum of proof would be needed to show those damages because a fact-finder has conclusively resolved those questions.[9]

The Louisiana Supreme Court did not question the trial court's fact-finding but instead held that these facts were insufficient to justify compensation under its understanding of *Kimball Laundry*:

> Here, unlike in *Kimball Laundry*, the Levee District did not take Jarreau's business. The

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[9] Even if these findings had been challenged on appeal, Louisiana courts (like courts elsewhere) afford substantial deference to trial-court factual findings absent extraordinary error. *See Rosell* v. *ESCO*, 549 So. 2d 840, 844 (La. 1989) ("It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of 'manifest error' or unless it is 'clearly wrong,' and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable."); *accord Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

> dirt's value in this case is subsumed in the value 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 the surface, he cannot find another site to extract dirt and undertake his dirt hauling operations.

App. 31.

In other words, the Louisiana Supreme Court viewed *Kimball Laundry* as barring compensation for business losses as long as it is theoretically possible for a property owner to rebuild a business in a new location. Applying this rule, the Louisiana Supreme Court did not need to displace any of the trial court's findings that Jarreau had suffered damages above and beyond the per-acre value of the land taken—such as its finding that the dirt on Jarreau's former property was of particularly high quality, App. 97, or that there was an unfulfilled contract to sell some of it, App. 93-94—because the trial court had not made the only finding that would entitle Jarreau to compensation: that Jarreau would never be able to farm dirt anywhere else, ever again. And, of course, Jarreau theoretically *could* farm other dirt somewhere else—but he can never recover *this* valuable dirt, never recoup his investment in preparing this dirt, and never make good on the broken contractual agreement he had to sell it. In many jurisdictions, those facts would entitle him to compensation as a matter of federal law; in Louisiana, they do

not. This case allows this Court to resolve that split of authority.

Jarreau's business was selling dirt. And it was a valuable business that had contracts with third parties for the sale of dirt. The state took Jarreau's dirt away from him to use it for its own purposes, which deprived him of the value of his business and prevented him from fulfilling at least one contract. His business losses were not speculative; they were proven at trial and never subsequently challenged on appeal. The only question before the Court, then, is the question clearly presented: whether those facts are enough to entitle him to compensation under the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2017