No. 19-0017

In the Supreme Court of Texas

BERNARD MORELLO and
WHITE LION HOLDINGS, L.L.C.

Petitioners,

v.

SEAWAY CRUDE PIPELINE COMPANY, LLC,

Respondent.

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

On Petition for Review from the
First Court of Appeals – Houston
Cause No. 10-16-00765-CV

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**Motion for admission pro hac vice to be filed.*

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Supreme Court infamously held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution.

IJ continues to litigate important statutory and constitutional questions in eminent domain cases around the country, both as amicus

[1] Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *amicus* confirms that no person or entity other than *amicus* made a monetary contribution to the preparation or filing of this brief.

and as counsel for property owners. Recently, IJ has filed amicus briefs in the Colorado Supreme Court (where IJ was invited to argue) and this Court, arguing that eminent domain condemnations do not satisfy the public use test when the proposed public use is a pretext for an impermissible purpose. *See Carousel Farms Metro. Dist. v. Woodcrest Homes*, 2017 COA 149, 2017 WL 5897715 (Colo. Ct. App. Div. II, Nov. 30, 2017), *cert. granted*, No. 18-SC-30, 2018 WL 3222171 (Colo. July 2, 2018); *KMS Retail Rowlett, LP v. City of Rowlett*, 559 S.W.3d 192 (Tex. App—Dallas 2017, pet. granted, 17-0850). This case implicates some of the same principles.

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To The Honorable Supreme Court of Texas:

The Institute for Justice respectfully submits this amicus curiae brief in support of Petitioners Bernard Morello and White Lion Holdings, LLC, pursuant to Texas Rule of Appellate Procedure 11.

STATEMENT OF THE CASE

For purposes of this brief, the Institute for Justice incorporates by reference the Statement of the Case provided by Petitioners Bernard Morello and White Lion Holdings, LLC.

ISSUES PRESENTED

Did the Court of Appeals err in holding that it is constitutional for a condemning authority to use eminent domain in order to escape the consequences of its own prior contract with the condemnee?

STATEMENT OF FACTS

For purposes of this brief, the Institute for Justice incorporates by reference the Statement of Facts provided by Petitioners Bernard Morello and White Lion Holdings, LLC.

SUMMARY OF ARGUMENT

Petitioners have presented a number of issues that this Court may wish to consider, but IJ submits this *amicus* brief to emphasize one particular issue that especially merits review. The court below

erroneously held that there is nothing wrong with a condemnor using eminent domain in order to escape the consequences of a contract with the condemnee. That is wrong—regardless of whether the condemnee will ultimately be able to prove his case at trial. Indeed, the court's holding is inconsistent with almost a century of eminent domain precedent from around the country, and it has the potential to undermine the rights of property owners throughout Texas.

The facts of this case are straightforward.[2] Petitioner Morello owns a large, valuable piece of property that he has been holding as an investment for future development. Although this land is already encumbered by a pipeline easement—owned by Respondent Seaway—that easement is subject to the condition that Seaway must relocate the pipeline, either by changing the route or burying it deeper, if the land becomes viable for commercial development. Seaway struck this bargain in 1975. Now that the land has become viable for development, and Seaway's potential liability under that contract has become significant, Seaway is attempting to use the power of eminent domain

[2] Because this case was decided at summary judgment, the facts throughout this brief are described in the light most favorable to Petitioner, the non-moving party. *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000).

to render that contract worthless. By condemning a new easement not subject to a relocation condition, right next to the old one, Seaway makes this land permanently unsuitable for development and will never have to abide by the terms of the original contract.

When confronted with this situation, the Court of Appeals said, essentially, "so what?" A "desire to save money," the Court held, is not illegal. What the court failed to appreciate is that there is a fundamental difference between (1) a condemnor choosing to condemn a particular easement because constructing a pipeline on that land will be cheaper, and (2) a condemnor choosing to condemn a particular easement because doing so will allow it to escape the costly obligations of a contract that it had previously negotiated with the landowner. The latter is illegal.

It is black letter law that a condemnation does not satisfy the constitutional public use test when its stated purpose is a mere pretext for an impermissible objective. Escaping the consequences of an arm's length bargain is one such impermissible purpose. And it does not matter if the stated public use is a so-called "classic" one like the construction of a road or other common-carrier infrastructure. Nor does

it matter if the land at issue will in fact be dedicated to the stated purpose and used by the public. The impermissible purpose renders the entire condemnation unlawful.

The illegality of the taking in this case is bolstered by another constitutional provision: the Contract Clause, which prohibits states from "impairing the Obligation of Contracts." Although the Supreme Court has, in the last 100 years, departed from the original understanding of the Contract Clause, there is one circumstance where the Clause retains full force—when the state is trying to escape its own deals. The Contract Clause underscores the illegitimacy of using government power to advance narrow, private objectives.

The courts below held that Morello had failed to raise a genuine issue of material fact sufficient to defeat summary judgment, but those rulings were made against the backdrop of an erroneous understanding of the law: that there is nothing wrong with a condemnor using eminent domain to "save money," even when the savings are at the expense of the condemnee, by undoing a contract between the condemnor and the condemnee. Under a correct understanding of the law, Morello has met his burden to defeat summary judgment.

ARGUMENT

It is well established that a condemnation is unconstitutional when it is done for an illegitimate purpose, regardless of what use will eventually be made of the property. It is also clear that courts have an independent duty to determine the true purpose of a condemnation, without deference to the condemning authority. One of many illegitimate purposes for eminent domain is to escape the consequences of one's own contracts. The illegality of that objective is made even clearer by reference to the U.S. Constitution's Contract Clause, which explicitly prohibits the use of state power to undo existing contracts. The court below incorrectly ruled that there is nothing wrong with using eminent domain to escape a contract. That erroneous ruling was the basis for the court's summary judgment ruling. But under the correct law, Petitioner has raised a genuine issue of material fact.

I. Courts have a responsibility to independently determine whether the stated public use for a condemnation is pretextual.

Both the United States and Texas Constitutions provide that the government may only take private property for a "public use." U.S. Const. amend. V; Tex. Const. art. I, § 17. Although Texas courts have

interpreted the term "public use" more narrowly than the U.S. Supreme Court,[3] even under federal precedent, there are still important, judicially enforceable limits on what can be considered a public use. One of those limitations is dispositive in the present case—the prohibition on takings where the asserted public use is a pretext.

It is now well established that a taking's constitutionality does not turn solely on whether the proposed use of the property being taken is a traditionally public one. Although takings for roads, parks, and common-carrier utilities are frequently constitutional, they are not *per se* constitutional. To the contrary, overwhelming authority demonstrates that courts have a duty to independently evaluate the purpose of a taking to determine if it is permissible. Courts have repeatedly rejected takings for even such "classic" public uses as

[3] S*ee, e.g., Whittington v. City of Austin*, 174 S.W.3d 889, 897 n.3 (Tex. App.—Austin 2005, pet. denied) ("The court has also steadfastly rejected that liberal definition of the phrase public use which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business or undertaking to which the property is devoted. Instead, Texas courts have espoused a narrower use by the public concept: property can only be taken when the public be entitled to share indiscriminately in the proposed use as a matter of right. Under these principles, the supreme court has invalidated takings for private benefit even in the face of legislative declarations of public use, and despite claims that the use would confer indirect public benefits.") (cleaned up).

roads—when the court finds that the asserted public purpose was a pretext.

The United States Supreme Court's most recent word on the question of public use was in *Kelo v. City of New London*, 545 U.S. 469 (2005). Although the decision was a defeat for the property owners—the Court infamously held that the power of eminent domain can be used to transfer private property to other private parties for purposes of "economic development"—the Court nonetheless reaffirmed the longstanding principle that private property cannot be taken "under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit." *Id.* at 478. While the *Kelo* Court found that the proposed taking at issue in that case was not pretextual, the Court emphasized that its holding was based on the specific facts of the case: There was "no evidence of an illegitimate purpose," the taking was "executed pursuant to a carefully considered development plan," and the plan "was not adopted to benefit a particular class of identifiable individuals." *Id.* (quotation marks omitted); *see also id.* at 490 (Kennedy, J., concurring) ("[T]ransfers intended to confer benefits on

particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.").

The *Kelo* Court's treatment of pretext was neither dicta nor an aberration. Many other courts, before and since *Kelo*, have recognized (1) that pretextual takings are unconstitutional and (2) that courts have a duty to independently determine the true purpose of a condemnation. For instance, the Supreme Court of Georgia invalidated a taking that was ostensibly for the purpose of building a public park. All parties had agreed "that a public park for recreational purposes is a public purpose." *Earth Mgmt., Inc. v. Heard Cty.*, 283 S.E.2d 455, 459 (Ga. 1981). Nevertheless, the property owner argued that the proposed park "was a mere subterfuge utilized in order to veil the real purpose" of the taking—preventing the property owner from building a waste disposal facility. *Id.* at 460. The court agreed with the property owner, explaining that the record clearly demonstrated that the condemning authority had no previous interest in building a park, and that it did

not even evaluate the suitability of the condemned land for a park before seizing it. *Id.* Further such examples abound.[4]

[4] See *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc) (invalidating a taking because the official rationale of blight alleviation was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price"); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Store v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual"); *In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) (remanding for further proceedings to determine if the public was the "primary and paramount beneficiary of the taking," as required by the Fifth Amendment); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) ("[I]n order to uphold the invocation of the power of eminent domain, this Court must find that the recreational purpose was real and fundamental, not post-hoc or pre-textual."); *City & Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991) (remanding to give the property owner the opportunity to prove that the stated public purpose was not the true purpose); *Pheasant Ridge Assocs. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1154 (Mass. 1987) (invalidating taking for ostensible purpose of building a public park when true purpose was to prevent the construction of low-income housing); *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434, 437 (Colo. App. 1989) (holding that a condemnation is unlawful when the "essential purpose" was to facilitate a private transaction); *Casino Reinvestment Dev. Auth. v. Banin*, 320 N.J. Super. 342, 345, 727 A.2d 102, 103 (Law Div. 1998) ("Where, however, a condemnation is commenced for an apparently valid public purpose, but the real purpose is otherwise, the condemnation may be set aside. *"); Borough of Essex Fells v. Kessler Inst. for Rehab.*, Inc., 289 N.J. Super. 329, 338, 673 A.2d 856, 861 (Law Div. 1995) ("public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive") (setting aside condemnation where the asserted purpose was to

The Hawaii Supreme Court has even explicitly rejected the argument that there is any category of *per se* constitutional public uses. The case addressed a condemnation for the construction of a public highway. The property owner did not dispute that a highway was planned for the land and that the public would in fact use the highway. The owner alleged, however, that the real purpose of the highway was to aid a private developer. The majority ruled for the property owner, and in so doing, it squarely rejected the dissent's argument that "whenever a property is taken for a highway, it is for a public use." *Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 198 P.3d 615, 647 (Haw. 2008).

In short, overwhwelming authority from around the country establishes that the public use question in this case cannot be answered simply by pointing out that Seaway intends to build a common-carrier pipeline. Where the property owner alleges that the true purpose of a condemnation is impermissible, independent judicial review is necessary. The court below, however, neglected its duty to independently determine the purpose of this condemnation, instead

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preserve open space, but the true purpose was to prevent a particular developer from building).

giving total deference to the pipeline. *See, e.g., Morello v. Seaway Crude Pipeline Co., LLC*, No. 01-16-00765-CV, 2018 WL 2305541, at *14 (Tex. App.—Houston May 22, 2018, pet. filed) ("Seaway's decision need not be the only feasible option or the option most advantageous to the landowner. Condemnors are permitted to reject viable alternative routing choices.") (cleaned up).

II. Escaping the consequences of a contract is not a valid public purpose.

There is no comprehensive list of impermissible objectives for eminent domain. As the cases cited above demonstrate, courts have invalidated takings when the true purpose was to stop the owner from making a particular use of his property, to benefit a private party, or simply to help the condemnor make money at the expense of the property owner. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (noting that the purpose of condemnation is not for the condemnor to "secure a windfall for itself"); *Patel v. S. California Water Co.*, 97 Cal. App. 4th 841, 843 (2002), *as modified* (May 13, 2002) ("The real question raised by this appeal is whether . . . the power of eminent domain [can be used] to take private property for a purpose, say, [of]

simply making money. . . . The answer is, of course, no."). This case implicates that latter illegal purpose. Regardless of whether a condemnor intends to let the public use the condemned property, condemnation is illegal when the condemnor's true purpose is to escape its own contracts.

It has long been recognized that in determining just compensation, the court's objective is to compensate the property owner with "the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining." *Olson v. United States*, 292 U.S. 246, 257 (1934).

Yet courts also recognize the significant likelihood of an error in a judicially determined compensation award. For example, when parties in litigation, for one reason or another, are trying to prove the fair market value of a particular property, they may point to other supposedly comparable property sales. But if the transactions at issue involved an entity that had the power of eminent domain, then courts

do not merely discount the value of such evidence, they exclude it as irrelevant. *See Bajwa v. Sunoco, Inc.*, 329 F. Supp. 2d 726, 733 (E.D. Va. 2004) ("It is well established that sales to potential condemnors are involuntary sales and as such cannot establish the fair market value of comparable property."); *accord Pinczkowski v. Milwaukee Cty.*, 706 N.W.2d 642, 648 (Wis. 2005). The rationale for this rule is that such a sale is not truly voluntary, since both parties know that the property could be forcibly transferred through litigation. And of course, the reason that sales conducted in the shadow of eminent domain are not reliable indicators of value is because eminent domain condemnation awards themselves are not reliable indicators of value. The rule, therefore, reflects reality: Condemnation awards are at best a rough estimate.

Partly because judicially determined condemnation awards are inherently unreliable, courts have consistently been unwilling to allow eminent domain litigation to be used to displace the parties' own bargains. For instance, in *Albrecht v. United States*, the government had contracted with private parties to purchase some land, but the government later concluded that the purchase price was "grossly

excessive" due to "fraud and other things." 329 U.S. 599, 600 (1947). Instead of purchasing the land at the contracted price, the government initiated condemnations, hoping to obtain the land at a lower, judicially-determined price. The Supreme Court held that, by agreeing to a price for the land, the government had taken those transactions "out of the range of the Fifth Amendment," *id.* at 603, and given up the right to argue that just compensation should be lower. *Id.* at 604 ("Since these petitioners have chosen to stand on their contract terms as to the amount they will receive for their property, rather than to have 'just compensation,' in the constitutional sense, fixed by the courts, we must look to those terms for the measure of their compensation"). By the same token, the landowners had given up the right to argue that they were entitled to post-taking interest, because the contract did not allow for it. *Id.* at 609–10.

The Supreme Court justified its reluctance to displace the clear terms of the contract by pointing out the "inadvisability of applying a constitutional rule [for compensation] . . . to an entirely different situation in which parties, supposedly with due regard to their own interests, bargain between themselves as to compensation." *Id.* at 604;

see also State, Dep't of Econ. & Cmty. Dev. v. Attman/Glazer P.B. Co., 594 A.2d 138, 144–45 (Md. 1991) (strictly enforcing a lease between a property owner and a tenant with condemnation authority). The contract trumped the government's right to a judicial determination of just compensation.

The Rhode Island Supreme Court has likewise recognized that eminent domain cannot be used to escape the consequences of a bargain. The case concerned a private company that had contracted with a government agency to build a parking garage at an airport. *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 91–92 (R.I. 2006). Under the terms of the agreement, the builder would have the exclusive right to operate the parking garage for 20 years. *Id.* at 91–92. At the expiration of the term, the garage would revert to the agency. *Id.* at 92. Additionally, the agency had the right to buy the garage before the expiration of the 20-year period, and the contract provided for different purchase prices depending on when that option might be exercised. *Id.* Eventually, however, the agency decided that it had made a bad deal. Rather than buy out the remainder of the

contract, the agency decided to condemn an "easement" in the garage that would lead to an immediate transfer of possession. *Id.* at 93.

The court held that the proposed condemnation was not for a public purpose and was therefore unconstitutional. Although there was no question that the public would in fact use the garage—for parking, as it had done before—the court emphasized that the *purpose* behind the taking also had to be public. The court found, however, that the true purpose of this condemnation was "a desire for increased revenue," which was not "a legitimate public purpose." *Id.* at 104.

The key fact for the court was that the government already had a method, via its option contract, to obtain possession of the garage. The court was unwilling to displace the terms of that bargain: "It is apparent to us that changes to the [contract] . . . that [the government] could not achieve at the bargaining table were obtained in Superior Court through an exercise of the state's eminent domain authority." *Id.* at 106; *see also Syracuse Univ. v. Project Orange Assocs. Servs. Corp.*, 71 A.D.3d 1432, 1434 (N.Y. Super. Ct. 2010) (finding no public use where "the proposed condemnation is the last in a series of attempts to free

[the condemnor] from an unfavorable contractual agreement with [the condemnee].").

The same is true in the present case: Petitioner has presented evidence that building the pipeline in the existing easement, about which they had already contracted, was feasible and that Seaway refused to even discuss the issue, notwithstanding that Seaway had negotiated over similar terms with other property owners. This evidence at least raises a fact issue regarding why Seaway chose to condemn a new easement.[5] If it was to escape the consequences of the 1975 contract, then the taking was not for a public use. Morello should have the opportunity at trial to prove his case. [6]

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[5] The court below also found, inexplicably, that there was no evidence that Seaway was aware of the terms of the 1975 easement. That Seaway could be in the process of acquiring another easement across the same property and not know the terms of the preexisting easement *that Seaway itself owned* is utterly implausible. Unless Seaway had offered any evidence that it was unaware of the 1975 agreement, then Morello should not have had any burden of production on that question. Parties may be assumed to know the terms of contracts to which they are party. *See Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1088 (Tex. 1932).

[6] The court cited *Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610 (Tex. App.—Corpus Cristi 1989, writ denied), for the proposition that there is nothing unconstitutional about "a desire to save money," *Morello*, 2018 WL 2305541 at *13, but that case is quite different. In *Ludewig*, a property owner argued that a pipeline could have been routed in a way that had less negative impact on the value of his land, but the court held that the pipeline was permitted to use the least expensive

III. The Contract Clause reinforces the conclusion that it is unconstitutional to use eminent domain to escape a contract.

The illegality of the condemnation in this case is reinforced by another constitutional provision. The U.S. Constitution's Contract Clause explicitly provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const., Art. I, § 10, cl. 1. If there were any question whether it is legitimate to use eminent domain to undo one's own contracts, the Contract Clause surely answers that question in the negative.

Although the Contract Clause is not frequently litigated today, it was one of the most important limitations on state power embodied in the original Constitution. The Framers considered it essential—even while at the same time they were insisting that a bill of rights was unnecessary. *See City of El Paso v. Simmons*, 379 U.S. 497, 591 (1965) (Black, J., dissenting); *The Federalist* No. 84 (Alexander Hamilton). In fact, one of the major reasons for the Philadelphia Convention was the widespread dissatisfaction with the way that state legislatures had

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route. The costs that the *Ludewig* court was addressing were the actual costs of construction. Nothing in the case is inconsistent with the cases holding that eminent domain cannot be used to undo a party's own contract.

been routinely tampering with the contractual relations between creditors and debtors. James W. Ely, Jr., *The Contract Clause: A Constitutional History* 7–12 (2016). Unsurprisingly, considering its central importance to the founding generation, the Contract Clause was the basis of the first federal decision striking down a state law. In *Champion and Dickason v. Casey* (1792), the U.S. Circuit Court, including Chief Justice John Jay, struck down a Rhode Island debt-relief measure. *See* Ely, *The Contract Clause* 22–23. And the Contract Clause went on to be by far the most frequently litigated constitutional provision throughout the 19th Century. *See Id.* at 1, 103.

It is true that, in the 20th Century, the Supreme Court drastically circumscribed the Contract Clause's scope. In 1934, the Court said that the Clause "must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 443 (1934). The Court's modern test asks only whether the law causes a "substantial impairment" of contract rights, whether it serves a "legitimate public purpose," and whether it is "reasonable." *Energy Reserves Grp. v. Kansas Power & Light Co.*, 459 U.S. 400, 412–413

(1983). Nevertheless, despite these narrowing constructions, there is one area in which the Court has consistently held that the Clause has continuing vitality: Where governments are seeking to undo their own contracts.

In *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court held that when the state is attempting to undo its own contracts rather than those of third parties, more searching review is required: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 26; *see also Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 505 (5th Cir. 2001) ("[W]hen the State is a party to the contracts, the court cannot defer to the State because the State's self-interest as a party is implicated.").

It is true that the Contract Clause does not prohibit a state from breaking a promise *not* to use eminent domain. *Id.* at 505; *City of Glendale v. Superior Court*, 23 Cal. Rptr. 2d 305, 311 (Cal. Ct. App. 1993). The premise of that rule is that such a promise was always void

because eminent domain is an aspect of sovereignty that cannot be surrendered by contract. *Id.* at 312. One legislature could not bind another legislature to a course of action simply by entering a private contract with a third party. The present case, however, is different. This is not a case where a contract stands in the way of an otherwise valid use of eminent domain; this is a case where the condemnor has already bargained for the power to do what it wants to do, but it is simply unhappy with the terms of that deal and has turned to eminent domain for the *specific purpose* of undoing that contract. That is precisely what the Contract Clause was designed to prevent.

IV. This Court should grant review because the decision below erroneously held that there is nothing illegal about using eminent domain to escape the consequences of one's own bargains.

The court below made a fundamental error in holding that it is constitutional to use eminent domain to undo one's own contracts. There is nothing illegal, the court held, about a mere "desire to save money." *Morello*, 2018 WL 2305541, at *13. In the abstract, of course, that is true. But the question is *how* the condemnor is trying to save

money. If it is by undoing its own contracts and obtaining a windfall at the expense of the property owner, that is illegal.

The Court of Appeals assessed the evidence in this case in the context of an erroneous understanding of the law. Morello has at the very least raised a genuine issue of material fact that the taking was pretextual. His evidence indicates that the true purpose of the condemnation was to help Seaway profit at his expense, by undoing a potentially expensive contract with which Seaway no longer wishes to comply. He should have the opportunity to prove his case at trial.

PRAYER

The petition should be granted and the judgment of the Court of Appeals reversed.

RESPECTFULLY SUBMITTED this 7th day of May 2019,

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**Motion for admission pro hac vice to be filed.*

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CERTIFICATE OF COMPLIANCE

This brief contains 4,687 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on May 7, 2019, I caused a true and correct copy of the foregoing Amicus Curiae Brief of Institute for Justice in Support of Petitioner to be sent to the following counsel via the ProDoc electronic filing:

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