COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

NO. CA 22-0432

c/w

NO. CW 22-0046

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT
Plaintiff-Appellant

VERSUS

BENDEL PARTNERSHIP (A PARTNERSHIP IN COMMENDAM), ET AL.
Defendants-Appellees

FROM THE 15TH JUDICIAL DISTRICT COURT,
PARISH OF LAFAYETTE, STATE OF LOUISIANA,
DOCKET NO. 2021-6273, DIVISION B
HONORABLE VALERIE GOTCH GARRETT, PRESIDING

CIVIL PROCEEDING

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Under Rule 2-12.11 of the Uniform Rules of Louisiana Courts of Appeal, the Institute for Justice (IJ) moves for leave to file a brief as amicus curiae in support of Defendants-Appellees Bendel Partnership (A Partnership in Commendam), et al. The brief is filed concurrently with this motion. Counsel for IJ has read the parties' briefs and would show the Court as follows:

I. Interest of the *Amicus Curiae*

IJ is a nonprofit, public interest law firm committed to defending the foundations of a free society. A central pillar of IJ's mission is to protect the right to own and enjoy personal and real property. Property rights are jeopardized, however, when property is taken without due process and when the power of eminent domain is abused. Both of those ills can be caused by financially interested government decision making.

IJ is the nationwide leader in litigating against eminent-domain abuse and financially interested government decision making. It represented the homeowners in the highly controversial *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the U.S. Supreme Court upheld the use of eminent domain solely for private economic development. It also represented the homeowners in the landmark *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court rejected *Kelo*, holding that eminent domain for private economic development violates the Ohio Constitution's Public Use clause. Further, IJ regularly files cases or amicus curiae briefs to combat unconstitutional financial incentives in government decision making. *See, e.g.*, *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236 (11th Cir. 2020); *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019); *Cain v. White*, 937 F.3d 446 (5th Cir. 2019); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d

1145 (D.N.M. 2018); Brief for institute for Justice as Amici Curiae Supporting Defendant-Appellant, *People v. Johnson*, No. 163073 (Mich. Mar. 7, 2022).

II. IJ's amicus brief will help the Court.

Given IJ's expertise in both eminent domain and unconstitutional financial incentives, IJ seeks to file an amicus brief to help the Court avoid the pitfall of approving a due-process violation. If the Court were to reverse the district court's judgment, the Court would be endorsing an unconstitutional financial incentive: the engineer who certified that the expropriation met the statutory requirements for quick take—and thus authorized the taking to occur—was poised to make an estimated $2.6 million only if the project was built.

The Institute for Justice therefore respectfully asks that the Court grant leave for it to appear as amicus curiae in support of Defendants-Appellees and that the Court affirm the district court's ruling that LCG cannot take Bendel Partnership's property via quick take.

Dated this 21st day of September, 2022.

Respectfully submitted,

INSTITUTE FOR JUSTICE
Christen Hebert (TX Bar No. 24099898)*
816 Congress Ave., Ste. 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: chebert@ij.org

Attorney for *Amicus Curiae*
*Admitted *Pro Hac Vice*

/s/ Sarah Harbison
Sarah Harbison (#31948)
PELICAN INSTITUTE OF PUBLIC POLICY
400 Poydras St., Ste. 900
New Orleans, LA 70130
Tel: (504) 952-8016
Fax: (504) 336-3114
Email: sarah@pelicaninstitute.org

Local Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was served this 21st day of September, 2022, via email to the following counsel of record:

Michael D. Hebert
BECKER & HEBERT
201 Rue Beauregard
Lafayette, LA 70508
Tel: (337) 233-1987
Fax: (337) 235-1748
mhebert@lawbecker.com

Camille Bienvenu Poche
Karen T. Bordelon
BABINEAUX, POCHE, ANTHONY & SLAVICH, LLC
P.O. Box 52169
Lafayette, LA 70505
Tel: (337) 984-2505
Fax: (337) 984-2503
cpoche@BPASFirm.com

Gregory J. Logan
THE LOGAN LAW FIRM
700 Jefferson St.
P.O. Box 52704
Lafayette, LA 70505
Tel: (337) 406-9685
greg@loganfirm.com

Omar J. Thibeaux
THE THIBEAUX FIRM
400 E. Kaliste Saloom Rd., Ste. 3200
Lafayette, LA 70508
Tel: (337) 453-4663
Fax: (337) 237-9507
thibeauxlaw@bellsouth.net

Counsel for Lafayette City-Parish Consolidated Government

Randall A. Smith, T.A.
L. Tiffany Hawkins
SMITH & FAWER, LLC
201 St. Charles Avenue, Suite 3702
New Orleans, LA 70170
Tel: (504) 525-2200
Fax: (504) 525-2205
rasmith@smithfawer.com
ltiffanyhawkins@smithfawer.com

Pride Justin Doran
Raven C. Boxie
DORAN & CAWTHORNE, PLLC
521 East Landry Street
Opelousas, LA 70570
Tel: (337) 948-8008
Fax: (337) 948-0098
pride@doranlawfirm.com
raven@doranlawfirm.com

Counsel for Bendel Partnership (A Partnership in Commendam), et al.

/s/ Sarah Harbison
Sarah Harbison
Local Counsel for *Amicus Curiae*

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

NO. CA 22-0432

c/w

NO. CW 22-0046

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT
Plaintiff-Appellant

VERSUS

BENDEL PARTNERSHIP (A PARTNERSHIP IN COMMENDAM), ET AL.
Defendants-Appellees

FROM THE 15TH JUDICIAL DISTRICT COURT,
PARISH OF LAFAYETTE, STATE OF LOUISIANA,
DOCKET NO. 2021-6273, DIVISION B
HONORABLE VALERIE GOTCH GARRETT, PRESIDING

CIVIL CASE

ORDER

Considering the foregoing Motion for Leave to File Amicus Brief, IT IS ORDERED that the Motion for Leave is GRANTED.

Dated this _____ day of _____, 2022.

_____

COURT OF APPEAL
THIRD CIRCUIT
STATE OF LOUISIANA

NO. CA 22-0432

c/w

NO. CW 22-0046

LAFAYETTE CITY-PARISH CONSOLIDATED GOVERNMENT
Plaintiff-Appellant

VERSUS

BENDEL PARTNERSHIP (A PARTNERSHIP IN COMMENDAM), ET AL.
Defendants-Appellees

FROM THE 15TH JUDICIAL DISTRICT COURT,
PARISH OF LAFAYETTE, STATE OF LOUISIANA,
DOCKET NO. 2021-6273, DIVISION B
HONORABLE VALERIE GOTCH GARRETT, PRESIDING

CIVIL PROCEEDING

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLEES, BENDEL PARTNERSHIP (A PARTNERSHIP IN COMMENDAM), ET AL.

INSTITUTE FOR JUSTICE
Christen Hebert (TX Bar No. 24099898)*
816 Congress Ave., Ste. 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: chebert@ij.org

Attorney for *Amicus Curiae*
*Admitted *Pro Hac Vice*

PELICAN INSTITUTE OF PUBLIC POLICY
Sarah Harbison (#31948)
400 Poydras St., Ste. 900
New Orleans, LA 70130
Tel: (504) 952-8016
Fax: (504) 336-3114
Email: sarah@pelicaninstitute.org

Local Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS INSTITUTE FOR JUSTICE

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the foundations of a free society. A central pillar of IJ's mission is to protect the right to own and enjoy personal and real property. Property rights are jeopardized, however, when property is taken without due process and when the power of eminent domain is abused. Both those ills can be caused by financially interested government decision making.

IJ is the nationwide leader in litigating against eminent-domain abuse and financially interested government decision making. It represented the homeowners in the highly controversial *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the U.S. Supreme Court upheld the use of eminent domain solely for private economic development. It also represented the homeowners in the landmark *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court rejected *Kelo*, holding that eminent domain for private economic development violates the Ohio Constitution's Public Use clause. Further, IJ regularly files cases or amicus curiae briefs to combat unconstitutional financial incentives in government decision making. *See, e.g.*, *Harper v. Pro. Prob. Servs. Inc.*, 976 F.3d 1236 (11th Cir. 2020); *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019); *Cain v. White*, 937 F.3d 446 (5th Cir. 2019); *Harjo v. City of Albuquerque*, 326 F. Supp. 3d

1145 (D.N.M. 2018); Brief for Institute for Justice as Amicus Curiae Supporting Defendant-Appellant, *People v. Johnson*, No. 163073 (Mich. Mar. 7, 2022).

Given IJ's expertise in both eminent domain and unconstitutional financial incentives, IJ files this brief to help the Court avoid the pitfall of approving a due-process violation. If the Court were to reverse the district court's judgment, the Court would be endorsing an unconstitutional financial incentive: the engineer who certified that the expropriation met the statutory requirements for quick take would make an estimated $2.6 million only if the project was built.

SUMMARY OF ARGUMENT

Engineer Pamela Granger was poised to receive $2.6 million *only if* she certified that Lafayette City-Parish Consolidated Government (LCG) met certain statutory requirements to expropriate Bendel Partnership's property via quick take, an expedited process that allows a government entity to take immediate possession of property and reduces judicial oversight. Ms. Granger certified the project, authorizing LCG to take Bendel Partnership's property.

But Ms. Granger's financial stake in LCG's expropriation violated the U.S. and Louisiana Constitutions, which guarantee that the government will not deprive a person of life, liberty, or property without due process.

Due process prohibits a decisionmaker from having a substantial financial incentive to authorize a deprivation. Although that rule has typically been applied to forbid judges from having a financial interest in cases that come before them, it bars any decisionmaker who decides whether to authorize a deprivation from having a substantial financial incentive to take life, liberty, or property.

Upholding the district court's ruling that LCG cannot expropriate Bendel Partnership's property avoids ratifying the violation of Bendel Partnership's due-process rights. Ms. Granger was a decisionmaker in LCG's expropriation. Her certification that LCG's project met certain statutory requirements authorized LCG

to expropriate the property using quick take. Due process therefore barred Ms. Granger from having a substantial financial stake in LCG's expropriation.

Yet LCG promised Ms. Granger 6.15% of the total construction costs for the project on Bendel Partnership's property, a promise expected to yield $2.6 million. That promise was worth nothing if Ms. Granger did not certify LCG's project.

Ms. Granger therefore had a substantial financial incentive to authorize LCG's expropriation, violating Bendel Partnership's due-process rights. Affirming the district court's judgment that LCG cannot expropriate Bendel Partnership's property avoids approving this constitutional violation.

For these reasons, as detailed below, Amicus Curiae Institute for Justice asks this Court to affirm the judgment of the district court.

ARGUMENT

I. Due process prohibits a decisionmaker from having a substantial financial incentive to authorize a deprivation of life, liberty, or property.

Both the United States and Louisiana Constitutions guarantee that the government will not deprive a person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; La. Const. art. I, § 2. At a minimum, that guarantee means a decisionmaker's compensation cannot depend on approving the taking of life, liberty, or property.

This principle has most commonly taken shape in the rule that a court cannot have a financial interest in the cases that come before it. *Tumey v. Ohio*, 273 U.S.

510, 523 (1927); *Caliste v. Cantrell*, 937 F.3d 525, 528 (5th Cir. 2019). Due process entitles a person to an impartial and disinterested tribunal in civil and criminal cases. *Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980). That neutrality requirement helps guarantee that "life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.* And it preserves both the appearance and reality of fairness by ensuring that the arbiter is not predisposed to find for one side. *Id.*

But the no-financial-interest requirement applies to more than just judges: *any* decisionmaker involved in the procedure to deprive a person of life, liberty, or property cannot have a substantial financial stake in the deprivation. *See id*. at 243 ("We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure."). No matter who the decisionmaker is, when life, liberty, or property is on the line, the decisionmaker cannot have a financial incentive to reach a particular outcome. A biased decisionmaker is "constitutionally unacceptable" and "our system of law has always endeavored to prevent even the probability of unfairness." *Ga. Gulf Corp. v. Bd. of Ethics for Pub. Emps.*, 96-1907, p. 9 (La. 5/9/97); 694 So.2d 173, 177 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

A. Substantial financial incentives for decisionmakers to deprive a person of life, liberty, or property violate due process.

Due process is violated when a decisionmaker has "a direct, personal, substantial pecuniary interest" in the decision to deprive a person of life, liberty, or property. *Tumey*, 273 U.S. at 523.

In *Tumey*, the mayor was paid $12—on top of his regular salary—each time he fined a person for possessing intoxicating liquor. *Id.* at 515, 531–32. He received no such extra payment for declining to issue a fine. *Id.* The $12 kickback per fine was not "a minute, remote, trifling, or insignificant interest." *Id.* at 532. In today's dollars, the mayor would have received over $200 for each fine he imposed.[1] The Supreme Court held that the personal interest of the mayor violated due process because due process forbids any procedure that would offer a "possible temptation to the average man as judge . . . which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Id*.

Likewise, the Supreme Court invalidated a system that paid unsalaried justices of the peace $5 (about $25 in today's dollars) for issuing search warrants but did not pay the justices for refusing to issue the warrants. *Connally v. Georgia*, 429 U.S. 245, 250–51 (1977). The system violated due process because the justices had a

[1] *See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm.

financial incentive to issue warrants. *Id.* A justice's financial welfare was "enhanced by positive action and [was] not enhanced by negative action." *Id.* at 250.

A financial incentive does not, however, have to be one that will enhance the decisionmaker's welfare personally to violate the due-process guarantee. Due process is also denied even when the *institution* that the decisionmaker serves substantially benefits from a decision's outcome. *See, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57, 58–60 (1972) (invalidating a procedure where fines and fees imposed by a mayor did not fund the mayor's salary but made up a "major part of village income"); *Caliste*, 937 F.3d at 531–32 (holding that allocation of a portion of bail bond fees to court expenses created an unconstitutional institutional incentive to set bail amounts).

And when is a financial incentive substantial? A financial incentive is substantial when it is a "possible temptation to the average man" to reach a particular outcome. *Tumey*, 273 U.S. at 532. Such an incentive robs the proceedings of the appearance of fairness because there is an "objective" and "unconstitutional potential for bias." *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *see also Allen v. La. State Bd. of Dentistry*, 543 So.2d 908, 915 (La. 1989), *as modified on reh'g* (June 29, 1989) (confirming that "the *appearance* of complete fairness" is a requirement of due process).

B. Any decisionmaker who approves a deprivation of life, liberty, or property cannot have a substantial financial incentive to give their approval.

The prohibition against substantial financial incentives does not apply to only judges. Due process bans any decisionmaker who is part of depriving a person life, liberty, or property from having a substantial financial incentive to authorize the deprivation.

As the U.S. Supreme Court has repeatedly explained, the obligation of impartiality governs not just judges, but anyone acting in a "judicial or quasi judicial capacity." *Tumey*, 273 U.S. at 522; *Marshall*, 446 U.S. at 248. The term "quasi-judicial" means "[o]f, relating to, or involving an executive or administrative official's adjudicative acts." *Quasi-Judicial Act*, Black's Law Dictionary (11th ed. 2019). Quasi-judicial acts, "which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens" and are "subject to review by courts." *Id.*

But the obligation to be free from improper financial incentives goes beyond those performing a judicial or quasi-judicial function and includes a decisionmaker initiating a civil action to take property. *See Harjo v City of Albuquerque*, 326 F. Supp. 3d 1145, 1151, 1195 (D.N.M. 2018) (finding that city's civil forfeiture program had an unconstitutional financial incentive to take property because "the more revenues they raise, the more revenues they can spend"). "[T]hose acting in a

prosecutorial or plaintiff-like capacity" cannot have a substantial financial incentive to exercise government power, although they are not held to the "strict requirements of neutrality" required in an adjudicative role. *Marshall*, 445 U.S. at 248–50. That's because "the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication." *Id.* at 249. "A scheme injecting a personal interest, financial or otherwise, into the enforcement process" can "raise serious constitutional questions," especially when the decisionmaker gets paid for one outcome over another. *Id.* at 249–50; *see also Connally*, 429 U.S. at 548.

And even private parties delegated a decision-making role in a deprivation cannot have a substantial financial stake in the deprivation. For example, in *Gibson v. Berryhill*, the Supreme Court found that a disciplinary scheme for optometrists violated due process. 411 U.S. 564, 578–79 (1973). There, an administrative board consisting of optometrists in private practice heard charges filed against fellow licensed optometrists who competed with the board members. *Id.* If the administrative board revoked the licenses of the optometrists before it, the "individual members of the Board, along with other private practitioners of optometry, would fall heir to this business." *Id.* at 571. The possible personal financial gain of the board members therefore deprived optometrists appearing before that board of due process. *Id.* at 578–79.

The private party in *Harper v. Professional Probation Services Inc.* also had a substantial financial interest that violated due process under the alleged facts. 976 F.3d 1236, 1243 (11th Cir. 2020).[2] There, the Eleventh Circuit held that a private probation company had an unconstitutional financial incentive to increase probation terms: it received a $40 monthly fee only if a probationer remained on a probation. *Id.* at 1243. The probation company's revenue thus "depended directly and materially" on the length of probation terms, giving the company an unconstitutional incentive to impose longer terms. *Id.* at 1243–44.

Other courts have invalidated decisions where a nonjudicial decisionmaker had a financial incentive, either personally or institutionally, to authorize a deprivation. *See, e.g.*, *United Church of the Med. Ctr. v. Med. Ctr. Comm'n,* 689 F.2d 693, 699 (7th Cir. 1982) (striking down a system where if a development commission found nonuse or disuse of a property, then the commission itself got the property); *In re Ross*, 656 P.2d 832, 840 (Nev. 1983) (concluding that state bar disciplinary procedure violated due process where the state bar administrators determined misconduct and state bar only benefited from findings of misconduct).

[2] In *Harper*, because the Eleventh Circuit reviewed a district court order dismissing the due-process claims for failure to state a claim, the court accepted all allegations in the complaint as true. *Id.* at 1238 & n.1. The Eleventh Circuit therefore concluded that a due-process violation existed under the facts as pleaded and remanded the case for further proceedings. *Id.* at 1244.

In sum, due process forbids a decisionmaker from having a substantial financial incentive to authorize the deprivation of life, liberty, or property. Otherwise, the financial incentive is a "possible temptation" that creates an "unconstitutional potential for bias" and robs the deprivation of the appearance of fairness. *Williams,* 579 U.S. at 8, 16 (quotation omitted).

II. Affirming the district court's decision avoids endorsing the due-process violation caused by Ms. Granger's incentive to certify that the expropriation satisfied the statutory requirements.

This condemnation violated Bendel Partnership's due-process rights because a decisionmaker who stood to gain financially if the Bendel property was condemned authorized the condemnation to proceed.

The district court's decision below, however, did not turn on constitutional grounds. Instead, the district court concluded that LCG's decision to expropriate the Bendel property was made arbitrarily, capriciously, or in bad faith and thus was invalid. In making that determination, the district court declined to credit Ms. Granger's testimony, as a factual matter, because Ms. Granger's financial stake created a risk of bias. This Court can and should affirm the district court's ruling on its own terms. *See Marcile v. Dauzat*, 2011-0099, p. 1 (La. 3/4/11); 56 So.3d 240, 241 ("[C]ourts should avoid constitutional rulings when a case can be disposed of on non-constitutional grounds."). But, to the extent this Court disagrees with the factfinding below, it will be left to grapple with a constitutional violation because

Ms. Granger had an unconstitutional financial incentive to authorize LCG's quick take of Bendel Partnership's property.

A. Because Ms. Granger was a decisionmaker in LCG's expropriation, due process prohibited her from having a substantial financial stake in the taking of the property.

If Ms. Granger did not certify that LCG's project was in the public interest, safety, and convenience, then LCG could not take Bendel Partnership's land through an expediated process known as quick take. Ms. Granger was therefore a decisionmaker in the deprivation of Bendel Partnership's property, and due process forbids Ms. Granger from having a substantial financial incentive to authorize LCG's expropriation.

When a government entity expropriates private property through the normal process, it cannot take the property until the trial court enters a judgment fixing the amount of compensation due to the owner and the governmental entity pays the compensation. La.R.S. 19:10. But the Louisiana Legislature specially authorized LCG to take property via the expedited procedure of quick take. La.R.S. 19:139(A). Through quick take, LCG can expropriate property *before* judgment and thus *before* any trial. *Id.* Indeed, upon filing suit and paying estimated compensation into the court registry, LCG can take immediate possession of the property. La.R.S. 19:139.2, 19:139.3.

In the quick-take context, judicial scrutiny of the expropriation is also narrowly circumscribed. A court may only inquire into three issues for an expropriation under a quick-taking statute: (1) whether the property was taken for a public purpose; (2) whether the expropriating agency acted arbitrarily, capriciously, or in bad faith in determining the necessity of the taking; and (3) the adequacy of the compensation. *Red River Waterway Comm'n v. Fredericks*, 566 So.2d 79, 82–83 (La. 1990).

Quick take thus allows a government entity to get possession of property faster with less judicial oversight.

Yet to obtain the special power of quick take, LCG must satisfy the statutory prerequisites, which are strictly construed against it. *State ex rel. Dep't of Highways v. Jeanerette Lumber & Shingle Co.*, 350 So.2d 847, 855 (La. 1977) (noting that statutes granting the power of expropriation are "construed strictly against the grantee"). LCG cannot take land "unless such right [to take] comes clearly and unmistakably within the limits of the authority granted." *Id.*

Louisiana's quick-take statutes generally require an engineer to certify the expropriation before the government entity can use the quick-take power. *See, e.g.*, La.R.S. 19:123(3)(b)–(c); La.R.S. 19:131.2(3)(b)–(c); La.R.S. 19:138.1(3)(b). For LCG, that means it can only use quick take if an engineer certifies that (1) the engineer "has fixed the right-of-way in a manner sufficient in his judgment to

provide for the public interest, safety, and convenience" and (2) "the location and design of the proposed improvements are in accordance with the best modern practices adopted in the interest of the safety and convenience of the public." La.R.S. 19:139.1(3)(b). The engineer's certification must be attached to the quick-take petition when a suit is filed. *Id.* Without such a certification, LCG cannot expropriate a property via quick take.

Once Louisiana placed substantive limits on LCG's discretion to expropriate property via quick take, it created a protected interest, triggering due-process protection. *See, e.g.*, *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) ("[A] State creates a protected liberty interest by placing substantive limitations on official discretion."); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").[3] Other courts have also found that state-law limitations on threshold decisions in the condemnation context trigger due-process protection. *See M.A.K. Inv. Grp., LLC v. City of Glendale*, 897 F.3d 1303, 1310 (10th Cir. 2018) (concluding that statutory right to judicial review of blight determination merited due-process protection); *Brody v. Village. of Port Chester*, 434 F.3d 121, 128–29 (2d Cir. 2005) (holding that

[3] The Court need not decide whether Bendel Partnership has a liberty or property interest to conclude that Bendel Partnership has an interest that due process protects here.

due process required individual notice of statutory right to challenge public-use determination).

Ms. Granger certified that the LCG's right-of-way was fixed in a manner to provide for the public interest, safety, and convenience and that the project's location and design satisfied the best modern practices. Because LCG could not have expropriated Bendel Partnership's property via quick take without Ms. Granger's certification, Ms. Granger was a decisionmaker in the deprivation of defendant's property. Her certification authorized LCG to use the quick-take procedure and narrowed judicial review over LCG's expropriation. Ms. Granger therefore played a critical adjudicative role in the expropriation, determining both the rights of LCG and Bendel Partnership. And, even if Bendel Partnership is later able to win in court, Ms. Granger's decision to certify the expropriation and permit quick take imposes "significant burdens on [the] defendant." *Marshall*, 446 U.S. at 249–50.

Due process thus prohibits Ms. Granger from having a substantial financial interest in the decision to certify LCG's proposed expropriation.

B. Ms. Granger's substantial financial interest in LCG's expropriation violates due process.

Ms. Granger had "a direct, personal, substantial pecuniary interest" in the decision to take Bendel Partnership's property that violated due process. *See Tumey*, 273 U.S. at 523. If Ms. Granger certified the project proposed for Bendel Partnership's land met the statutory requirements, she would be paid 6.15% of the

total construction costs—an estimated $2.6 million. And if she certified a second expropriation on another property, Ms. Granger was promised an estimated payment of $2.4 million. Thus, if both projects occurred, Ms. Granger expected a total kickback of $5 million on top of her hourly fees for consulting.

Ms. Granger's kickback scheme is like the financial incentives the Supreme Court ruled violated due process in *Tumey* and *Connally*. *Tumey*, 273 U.S. at 532; *Connally*, 429 U.S. at 250–51. Both Ms. Granger and the decisionmakers in *Tumey* and *Connally* received money from positive action—certifying the expropriation, imposing a fine, or issuing a search warrant—not negative action. *Tumey*, 273 U.S. at 532; *Connally*, 429 U.S. at 548. But Ms. Granger's estimated kickback of $2.6 million far exceeded the payments in *Tumey* and *Connally* (about $200 and $25 in today's dollars, respectively) and certainly offered a "possible temptation" that might lead the average person "not to hold the balance nice, clear, and true" between LCG and Bendel Partnership. *Tumey*, 273 U.S. at 532. A $2.6 million kickback from construction costs is not "a minute, remote, trifling, or insignificant interest." *Id.* Ms. Granger's revenue "depended directly and materially" on authorizing LCG to expropriate the property via quick take. *Harper*, 976 F.3d at 1244.

Ms. Granger therefore had a substantial financial incentive that violated the due-process guarantees of the U.S and Louisiana Constitutions. Like the city's civil forfeiture program in *Harjo,* which had an unconstitutional incentive to initiate

forfeiture actions, Ms. Granger had an unconstitutional incentive to initiate a quick-take action by certifying that LCG's project satisfied the statutory requirements. *See Harjo*, 326 F Supp 3d at 1151, 1195. But, as the court suggested in *Harjo*, there is a simple solution to this problem: due process requires removing the realistic possibility that a decisionmaker's judgment will be distorted by eliminating or lessening the financial incentive to take property. *Id.* at 1195, 1197. Unfortunately, that remedy would come too late for Bendel Partnership, which has already been denied due process in this quick-take action.

CONCLUSION

Ms. Granger had a substantial financial incentive—a $2.6-million incentive—to certify LCG's expropriation satisfied the statutory requirements to take Bendel Partnership's property via quick take. That incentive violated due process because a biased decisionmaker is constitutionally unacceptable when the government seeks to deprive a person of life, liberty, or property. The Institute for Justice therefore respectfully requests that the Court affirm the district court's ruling that LCG cannot take Bendel Partnership's property via quick take.

Dated this 21st day of September, 2022.

Respectfully submitted,

/s/ Sarah Harbison

Sarah Harbison (#31948)
PELICAN INSTITUTE OF PUBLIC POLICY
400 Poydras St., Ste. 900
New Orleans, LA 70130

INSTITUTE FOR JUSTICE
Christen Hebert (TX Bar No. 24099898)*
816 Congress Ave., Ste. 960
Austin, TX 78701

Tel: (512) 480-5936
Fax: (512) 480-5937
Email: chebert@ij.org

Attorney for *Amicus Curiae*
*Admitted *Pro Hac Vice*

Tel: (504) 952-8016
Fax: (504) 336-3114
Email: sarah@pelicaninstitute.org

Local Counsel for *Amicus Curiae*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing amicus brief was served this 21st day of September, 2022, via email to the following counsel of record:

Michael D. Hebert
BECKER & HEBERT
201 Rue Beauregard
Lafayette, LA 70508
Tel: (337) 233-1987
Fax: (337) 235-1748
mhebert@lawbecker.com

Camille Bienvenu Poche
Karen T. Bordelon
BABINEAUX, POCHE, ANTHONY & SLAVICH, LLC
P.O. Box 52169
Lafayette, LA 70505
Tel: (337) 984-2505
Fax: (337) 984-2503
cpoche@BPASFirm.com

Gregory J. Logan
THE LOGAN LAW FIRM
700 Jefferson St.
P.O. Box 52704
Lafayette, LA 70505
Tel: (337) 406-9685
greg@loganfirm.com

Omar J. Thibeaux
THE THIBEAUX FIRM
400 E. Kaliste Saloom Rd., Ste. 3200
Lafayette, LA 70508
Tel: (337) 453-4663
Fax: (337) 237-9507
thibeauxlaw@bellsouth.net

Counsel for Lafayette City-Parish Consolidated Government

Randall A. Smith, T.A.
L. Tiffany Hawkins
SMITH & FAWER, LLC
201 St. Charles Avenue, Suite 3702
New Orleans, LA 70170
Tel: (504) 525-2200
Fax: (504) 525-2205
rasmith@smithfawer.com
ltiffanyhawkins@smithfawer.com

Pride Justin Doran
Raven C. Boxie
DORAN & CAWTHORNE, PLLC
521 East Landry Street
Opelousas, LA 70570
Tel: (337) 948-8008
Fax: (337) 948-0098
pride@doranlawfirm.com
raven@doranlawfirm.com

Counsel for Bendel Partnership (A Partnership in Commendam), et al.

/s/ Sarah Harbison
Sarah Harbison
Local Counsel for *Amicus Curiae*