No. 14-23-00948-CV

IN THE FOURTEENTH COURT OF APPEALS

HENRY JONES, ET AL.,
Appellants,

v.

PORT FREEPORT,
Appellee.

Appeal from the County Court of Law No. 3 of Brazoria County, Texas
Trial Cause No. CI62105

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE

This case is an eminent domain condemnation, brought by the Appellee Port of Freeport against properties owned by the Appellant Marshall Family. CR 8–18. The parties filed cross-motions for partial summary judgment, regarding the Port's right to take the property under Texas statute, the Texas Constitution, and the United States Constitution. CR 416–475; CR 481–565. The trial court granted the Port's motion and denied the Marshall Family's motion. CR 760–767. The parties later stipulated to the quantum of just compensation without waiving right to appeal the partial summary judgment ruling on the Port's right to take. CR 1227–1232. This timely appeal followed. CR 1260.

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument would assist this Court in the resolution of this case. This appeal raises important constitutional and statutory issues regarding the scope of a condemning authority's power to take property without having first identified a public use or legitimate public necessity. This appeal also concerns the proper interpretation of the 2009 amendment to Article I, Section 17 of the Texas Constitution—an amendment that Appellants' counsel helped to draft.

The Texas Supreme Court has not yet squarely interpreted that provision, but it has indicated that it would welcome the opportunity to do so.

ISSUES PRESENTED

1. Whether, under Article I, Section 17 of the Texas Constitution, property may be condemned and leased to as-yet-unknown private parties for purposes of "economic development."
2. Whether—consistent with Tex. Prop. Code § 21.012(b)(2), the Texas Constitution, and the United States Constitution—the Port's proposed taking satisfies the baseline requirement that a condemnor establish that the condemned land is necessary for a specific public use.

STATEMENT OF FACTS

Appellants in this case are members of the Marshall Family, which has owned property in the East End of Freeport, Texas, since 1940. The East End is—or was—a historically black neighborhood that was created in the 1930s, when the city was beginning to grow and prosper.[1] The city's white residents enacted and enforced an ordinance requiring all black residents to live in a "negro district," which became known as the East End.[2] The area was soon encircled by chemical plants (Dow arrived in 1939) and was systematically deprived of basic municipal services (the roads were unpaved).[3] And the City's mistreatment of the East End was not just neglect; the City also had a longtime practice of denying the residents permits to make improvements or even basic repairs to their own properties.[4] Nevertheless, the residents managed to build a thriving

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[1] This historical background is all a matter of public record, and it is useful context to understand why Texas enacted legal reforms that control the outcome in this case, as explained in the Argument section of this brief.

[2] *See Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 637 (5th Cir. 2021).

[3] Amal Ahmed, *How to Erase a Neighborhood*, Tex. Monthly (Apr. 13, 2020), https://www.texasmonthly.com/news-politics/east-end-neighborhood-freeport-erased/.

[4] Michael Barajas, *Freeport's East End Began in Segregation and Will End With Displacement*, Tex. Observer (Sept. 12, 2018), https://www.texasobserver.org/freeport-east-end-segregation-displacement/.

community, dotted by churches, schools, stores, and barbershops, all on land that they owned. Property ownership gave the residents generational wealth, tying families together.[5] That is, until the Port of Freeport decided that it wanted the land.

In 2020, the Port filed condemnation actions against the Marshalls' property, alleging that it needed their land to expand the Port. The Port's offers, both to the Marshalls and to other property owners, suggested that it thought their properties were nearly worthless.[6] Many property owners, unable to secure representation, took what was on the table, and left behind their family legacies. At the time, many property owners thought that there was little they could do to fight back. It is difficult to get an attorney to fight over the valuation of relatively modest properties, and as for challenging the Port's right to take, well, a port is a classic "public use" . . . isn't it?

In 2023, the Marshall Family finally learned the truth, when they deposed the Port's CEO, Phyllis Saathoff, who testified as the Port's Rule

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[5] Colleen Hagerty, *'Everything's Going to Pieces': How a Port Took Over a Black US Neighborhood*, The Guardian (Mar. 24, 2022), https://www.theguardian.com/us-news/2022/mar/24/port-freeport-texas-east-end-historically-black-neighborhood

[6] Barajas, *supra* note 4; Ahmed, *supra* note 3.

199.1 representative. When asked what the Port planned to do with the Marshalls' property, she could not answer. She said the Port did "not have a specific plan today to present" regarding their property. CR 438 at 22:15–16; CR 437 at 18:4–6 ("That's not set in stone. I don't have a specific plan yet to present on that, but that is a discussion among staff.").

All she could say was that the land will eventually be used for "port-related purposes that are associated with the movement of international commerce and business and economic activity." CR 435 at 10:20–22. She listed a number of things that the land "could be" used for, *id.* at 11:24–25, such as "roadways," *id.* at 11:23, "cargo storage areas," *id.* at 12:5, "truck transfer facilities," *id.* at 12:6, spaces for federal agencies to conduct inspections, *id.* at 12:15–13:4, "additional office infrastructure," *id.* at 13:5–6, or "[t]here could be storage areas, warehouses, or there could just be open storage areas; areas to stage trucks before they enter." *Id.* at 13:6–8. Even when the Port's counsel attempted to rehabilitate her testimony on redirect, the most the Port was willing to say was that "[t]here have been preliminary schematics of how the space could be incorporated." CR 446 at 55:22–23.

The Port's plans to fund these possible facilities were equally

nebulous: "Some will be built by port. Some could be built in partnerships. Some might be partly state grant funded; may be partly federal grant funded. Just as the area is developed, we'll look at all of our means for funding that type of infrastructure." CR 435 at 13:18–22. When asked point-blank to confirm that "there's no financing plan decided on for how" the Port is "going to develop the other facilities," the Port responded: "That would be correct." CR 443 at 45:9–13.

The timeline for development was also vague. The Port testified that it "expect[ed]" that something would be done with the land "within five years," CR 437 at 20:6–7, but that it was "possible," *id.* at 20:25, that the land could sit vacant for as long as "ten year[s]." *Id.* at 21:20.

As for why the Port didn't know what it was going to do with the property, the Port said it couldn't be expected to decide until it had already condemned it: "[B]efore [the Port] planned out everything" it "had to complete the acquisition of the properties[,] . . . relocate individuals or residents[, and] . . . demolish structures." CR 436 at 14:7–11.

Based on this testimony, the Marshalls moved for summary judgment, arguing that the Port had no right to condemn property for speculative future uses and that it must have an actual plan in place so

that the court could exercise its constitutional responsibility to assess public use and public necessity. In its cross-motion for summary judgment, however, the Port finally asserted that it had (sort-of) decided what to do with the Marshalls' property, three years after condemning it. Saathoff submitted a sworn affidavit explaining that the Marshalls' particular property would not be used by the Port itself. Rather, the Port would "market[the properties] to potential users for lease as industry and business sites" in order to "encourag[e] more investment in our region and state, creating more economic activity and jobs that will support families in our community." CR 495, *reproduced at* Appendix B. Yet, "[b]ecause the sites to be leased will be developed by private industrial and business users, Port Freeport does not have any specific plans for what will be developed." *Id.*[7]

The Marshalls argued that these kinds of private-to-private transfers had been outlawed by the 2009 amendment to the Texas Constitution, which explicitly states that "'public use' does not include the taking of property . . . for transfer to a private entity for the primary

[7] The affidavit did not explain why Saathoff seemed unaware of this plan to transfer the land to private users during her deposition. *Id.*

purpose of economic development or enhancement of tax revenues." Tex. Const. art. I, § 17. The trial court nevertheless granted the Port's motion for partial summary judgment on the "right to take" question. The parties later stipulated to the amount of compensation, without waiving appeal rights, and the Marshalls appealed the summary judgment rulings.

SUMMARY OF ARGUMENT

This is an unlawful condemnation, and it isn't a close call. The Port has submitted sworn testimony stating that it intends to hand over the Marshalls' property to as-yet-unknown private businesses, in order to spur economic development and bring jobs to the region. Although the U.S. Supreme Court blessed similar condemnations in *Kelo v. City of New London*, the people of Texas rejected them when they specifically amended their constitution to outlaw these kinds of private-to-private transfers.

Even before the Port belatedly came clean with its unlawful plan to transfer these properties to private parties, its condemnation petition was *still* insufficient because it did not identify a specific public use, as required by Texas statute, the Texas Constitution, and the U.S. Constitution. Jurisdictions around the country have universally

recognized that condemnors cannot take property and decide what to do with it after. They must tell the court what they plan to do so the court can exercise its constitutional duty to assess public use. Moreover, they must demonstrate that there is a reasonable probability that the planned public use will, in fact, materialize. In other words, courts evaluate whether a proposed project is likely to materialize in a reasonable time period because there can be no public necessity to condemn land unless it is going to be used for something. This condemnation fails that test too.

ARGUMENT

The trial court erred in approving this condemnation for two independent reasons. First, Texas law flatly forbids this kind of private-to-private "economic development" taking. Second, the Port has throughout this case fallen short of the bedrock requirement that every Texas condemnation must be supported by a particular, present, and plausible public use.

I. Texas has outlawed these kinds of "economic development" takings.

The Port candidly admits that it is seizing homes in order to hand the land over to private parties, ostensibly to promote "economic development" in the region. This admission makes the case easy. Texas

has recently and specifically outlawed *exactly* these kinds of takings. The 2009 amendment to the Texas Constitution was a direct response to the U.S. Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which infamously held that the Fifth Amendment's public use clause is satisfied when the government takes private property and hands it over to other private parties for purposes of economic development (at least so long as the transfer happens as part of a comprehensive and detailed development plan).

To understand the 2009 amendment, it is necessary to understand *Kelo*. The case concerned a plan by the City of New London to redevelop its downtown and waterfront areas. *Id.* at 472. The City expected that the centerpiece of this redevelopment would be a massive new research center for the Pfizer pharmaceutical corporation, but the City also expected a wide range of residential and commercial developments in the area. But some of the people who owned homes and businesses in the development zone did not want to sell their properties. They argued that taking their property and handing it over to other private parties, for purposes of "economic development," would violate the Public Use Clause of the Fifth Amendment. U.S. Const. amend. V ("[N]or shall private

property be taken for public use, without just compensation."). The Supreme Court, in a five-to-four decision, disagreed. Justice Stevens's majority opinion said that there was "no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.* at 485.

Justices O'Connor and Thomas each authored blistering dissents (the former joined by Chief Justice Rehnquist and Justices Thomas and Scalia). Justice O'Connor's dissent focused on the perverse results that the majority's opinion would cause:

> For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory. . . .
>
> . . . .
>
> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result.

Id. at 503–05.

Justice Thomas's dissent emphasized that the majority's approach was ahistorical. At the time the Fifth Amendment was ratified, he explained, "public use" was understood to mean that the government would "provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks," or that a "common carrier" such a grist mill would own the property. *Id.* at 512. After discussing the history of the Court's takings jurisprudence in some detail, he echoed Justice O'Connor's concern that the Court's ruling would ultimately victimize those who were already vulnerable:

> The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. . . . Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. In 1981,

> urban planners in Detroit, Michigan, uprooted the largely lower-income and elderly Poletown neighborhood for the benefit of the General Motors Corporation. Urban renewal projects have long been associated with the displacement of blacks; in cities across the country, urban renewal came to be known as "Negro removal." Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

Id. at 521–22 (cleaned up).

The majority's decision in *Kelo* was a bombshell, and the backlash was immediate. Polls showed between 81 and 95 percent of Americans disagreed with the ruling. *See* Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 Minn. L. Rev. 2100, 2111 (2009). Justice Stevens later referred to it as "the most unpopular opinion I ever wrote, no doubt about it." Jess Bravin, *Justice Stevens on His 'Most Unpopular Opinion'*, Wall St. J. (Nov. 11, 2011), https://www.wsj.com/articles/SB10001424052970204358004577032071046475782. States immediately began rejecting *Kelo* as a matter of state constitutional law. Forty-four states enacted statutory reforms to reject or limit economic-development takings, eleven state high courts interpreted their own constitutions to be more protective of private property than the Fifth

Amendment (with four of those courts explicitly rejecting *Kelo*[8]), and twelve states amended their constitutions to limit economic development takings. *See* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. Forum 82 (2015);[9] *see also* Institute for Justice, *Eminent Domain*, https://ij.org/issues/private-property/eminent-domain/. Texas was one of those states—and its reforms were among the most sweeping in the nation.

In a special session the same year *Kelo* was decided, the Texas Legislature enacted statutory reforms that outlawed the use of eminent domain for "economic development purposes." Tex. Gov't Code § 2206.001(b). But Texas wasn't done. In 2009 it enacted constitutional reforms as well, by amending Article I, Section 17 of the Texas Constitution. The amended language (drafted, incidentally, in consultation with counsel for Appellants), now reads that "'public use' does not include the taking of property . . . for transfer to a private entity

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[8] A fifth state's supreme court, Michigan, explicitly rejected economic-development takings before *Kelo*. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).
[9] The cited article says three state high courts explicitly rejected *Kelo* because the article pre-dates the Iowa Supreme Court's decision in *Puntenny v. Iowa Utilities Board*, 928 N.W.2d 829 (Iowa 2019), which also expressly rejects *Kelo* as a matter of state law.

for the primary purpose of economic development or enhancement of tax revenues." Tex Const. art. I, § 17. Every justice of the Texas Supreme Court recognized that this amendment was intended "to codify the positions Justices O'Connor and Thomas took when they dissented in *Kelo*." *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 193 (Tex. 2019).

In Texas, it is now unambiguously illegal to take property from *A* and give it to *B*, simply because doing so may be good for the economy. But the Port is openly attempting to do exactly that. Its own CEO submitted a sworn declaration, stating that the Port's intention was to take Appellants' homes and "market[them] to potential users for lease as industry and business sites." CR 495. The Port says it has no idea who will use those properties or what they will do with them; that will just depend on "the needs and specifications of the tenant." *Id.* According to the Port, handing this land over to these as-yet-unknown "private industrial and business" users is a good thing because it will "encourag[e] more investment in our region and state, creating more economic activity and jobs that will support families in our community." *Id.* This is *Kelo* all over again, and the Port isn't even trying to hide it. *Kelo*, 545 U.S. at 483

("The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue.").

In the proceedings below, the Port offered two arguments in defense of these condemnations, but neither holds water. First, it cited a number of Texas cases from the middle of the twentieth century that, it claims, establish that "economic development" is a valid public purpose under the Texas Constitution. CR 736 (citing cases from 1940, 1955, and 1959). But the Court need not parse the language of those cases: To the extent they purport to allow what is going on in the present case, they have unquestionably been abrogated by the 2009 amendment to the Texas Constitution. *See KMS Retail*, 593 S.W.3d at 194 (Tex. 2019) ("A change to the constitution itself, however, can prompt us to revisit prior decisions.").

The Port's second argument, advanced orally at the summary judgment hearing, was that the 2009 amendment doesn't apply because the Port is only going to *lease* the land to private parties, rather than transfer a fee simple title:

> The Constitution under the amendment in 2009 does say that you can't transfer property to a private entity for economic development. The Port owns this land. The Port will own this land. There's no transfer contemplated but there will be leases and that gets to the, you don't know what you're going to do, and that's because we're not the ones that are going to be doing it. Dow Chemical will be doing it. Del Monte will be doing it. The industries that the Port attracts to enhance the overall economic environment of the region, which is what a port is for.

3 RR 13:22–14:7.

But this second argument fails because *Kelo* itself was a case about condemning property to lease it to private entities. In *Kelo*, just like here, the condemnor planned to enhance the overall economic environment by "transfer[ing] certain of the parcels to a private developer in a long-term lease" to ensure their development. *Kelo*, 545 U.S. at 479 n.6. "Specifically, the [condemnor] was negotiating a 99-year ground lease with . . . a developer selected from a group of applicants." *Id.* at 476 n.4. None of the Justices in *Kelo* thought it remotely significant that the transfers at issue took the form of leases. The dissents did not mention it as part of their analysis. Neither the majority nor the concurrence invoked the leases as a justification for the takings' constitutionality. The same should be true here. If, as the Texas Supreme Court says, the 2009 amendment was intended to reject *Kelo* as a matter of state law and to

codify the dissents of Justice O'Connor and Justice Thomas, then the amendment applies equally to leases and to transfers of fee simple titles. In short, the Port has not only failed to distinguish *Kelo*; it has failed to even identify a factual difference between that case and this one. The lower court's judgment should therefore be reversed.

But even if the Texas Supreme Court had not already told us that the amendments to Section 17 were meant to codify the *Kelo* dissent, this Court could reject the Port's argument based on the amendments' text alone. Section 17, as amended, instructs that "'public use' does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues." Tex. Const. art. I, § 17. To reach the Port's interpretation, the Court would have to add words, essentially reading it to say that public use does not include taking property "for transfer *in fee simple* to a private entity." But, of course, courts reading text should read the text, not supplement it: "Nothing is to be added to what the text states or reasonably implies[.]" Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012).

Beyond doing violence to the text, the Port's offered gloss on Section

17 makes little sense. The people of Texas (indeed, of the entire country) were outraged by the result in *Kelo*, and they wanted to ensure that private property could not be forcibly seized and handed over to the wealthy and powerful. They enacted reforms, including the 2009 amendment, to ensure that such abuses wouldn't happen in their states. Is it really conceivable that they would want to allow these kinds of abuses so long as the government kept its name on the property's title? Is it plausible to think that the purpose of the amendment was to prevent condemnors from transferring full title to condemned land to private entities while leaving them empowered to transfer any other interest in the property—a leasehold, a life estate, a springing executory interest—as they saw fit? Of course not. The people of Texas were not writing a 1L property exam. They were trying to prevent the condemnation of land for the use and benefit of private economic interests. That is exactly what they did, and the Court should reject the Port's invitation to undo that important constitutional change.

If the Port's interpretation of the Texas Constitution were correct, then the sweeping reforms to Section 17 would be a dead letter. Any private-to-private transfer could be restructured as a long-term lease,

allowing the same takings for the same purposes after the amendment as would have been allowed before it. Condemnors would be forbidden from *selling* condemned land to private developers, but they could lease it for a thousand-year term. They would be prohibited from *giving* condemned property to private interests, but they could agree to charge those same interests only a dollar in rent.

Again: Surely not. When the people of Texas repudiated *Kelo*, they were not just imposing a set of formal drafting requirements for how the government should structure its transactions when it takes private property and transfers it to other private parties. They were *prohibiting* such transfers entirely. This Court should honor their decision and not presume that they did a useless thing. *Cf. Hunter v. Fort Worth Cap. Corp.*, 620 S.W.2d 547, 551 (Tex. 1981) ("[T]he legislature is never presumed to do a useless act.").

II. Texas does not allow land to be taken except for a particular, present, and plausible public use.

As discussed above, by summary judgment, the Port had finally admitted to an explanation for this condemnation—to lease the land to private businesses for their private use—that flatly violates the Texas Constitution. But the condemnation should also have failed for another,

independent reason: Texas law requires a condemnor to have a good reason for taking land, and the Port simply doesn't have one.

As explained in Part A below, Texas law requires a condemnor to identify both a particular public use for condemned land and to show public necessity—that is, to persuade a reviewing court that the stated use is likely to come to fruition. As explained in Part B, these basic requirements are the law not only in Texas, but in states across the country—indeed, by authorizing this condemnation, the trial court embraced a rule of law that is *less* protective of property rights than the rule embraced by states as far-flung as New Jersey and California. And, as explained in Part C, the Port cannot seriously contend that it has met this minimum requirement; instead, the Port insists that Texas law empowers it to take now and sort out what to do with the land later. Texas law allows no such thing, and the judgment below should be reversed.

A. Texas law authorizes condemnations only when the condemnor can show it is reasonably likely to put the condemned property to a particular public use.

As a matter of both statutory and constitutional law, any valid condemnation in Texas must be supported by a particular public use. The

Texas Property Code requires a petition for condemnation to "state *with specificity* the public use for which the entity intends to acquire the property[.]" Tex. Prop. Code § 21.012(b)(2) (emphasis added. And Texas courts hold condemnors to their stated use. *See, e.g.*, *City of Corsicana v. Herod*, 768 S.W.2d 805, 811 (Tex. App.—Waco 1989, no writ) (holding that a petition seeking to condemn land for a "gravel roadway" would not have encompassed a public gravel roadway). This requirement of a particular stated us makes sense because the existence of a public use is a "judicial question" in Texas. *KMS Realty*, 593 S.W.3d at 187. It is not enough for a condemnor to say, "Trust us." It must *identify* a public use, and it must do so with enough specificity that a court may *evaluate* that use.

This is not to say that courts easily set aside stated public uses, of course. Texas courts are satisfied with a "reasonable probability" that the asserted public use will come to pass. *See Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 202 (Tex. 2012) (requiring a "reasonable probability" that a pipeline would be a common carrier to authorize condemnation). In other words, a condemnor in Texas must both *identify* a public use and provide some *reasonable probability*

that it will achieve that use.

This requirement is further underscored by section 21.101 of the Texas Property Code, which provides that a condemnee has the right to re-purchase condemned property if "***the*** public use for which the property was acquired through eminent domain is canceled before the property is used for that public use" or if "no actual progress is made toward ***the*** public use for which the property was acquired between the date of acquisition and the 10th anniversary of that date" or if "the property becomes unnecessary for ***the*** public use for which the property was acquired, ***or a substantially similar public use***, before the 10th anniversary of the date of acquisition." Tex. Prop. Code § 21.101(a)(1)–(3) (emphases added).

In other words, Texas law requires that a condemnor take property for a specific, identifiable use, and then it requires the condemnor to *actually use* that property in the specifically identified fashion within a set period of time. A condemnor that says it is taking land for a park cannot use it to build a new city hall without running afoul of section 21.101—and it cannot make an end-run around section 21.101 by simply asserting that it is taking the land for "a public use to be named later." It

must instead, again, "state *with specificity* the public use for which the entity intends to acquire the property[.]" Tex. Prop. Code § 21.012(b)(2) (emphasis added).

This bedrock requirement underlies all Texas protections for property rights because Texas courts must examine each taking to ensure that there is a public use and a present public necessity. They must ensure, for example, that a decision to condemn was made according to "reason or judgment" rather than a "willful and unreasoning action" in light of "facts and circumstances that existed at the time the condemnation was decided upon[.]" *City of Austin v. Whittington*, 384 S.W.3d 766, 782 (Tex. 2012). They must ask whether the decision to condemn was made in "bad faith" with "knowing disregard" of property owners' rights. *Id.* at 781. They must ask whether the stated public use is the true one—or whether, instead, the condemnation is "fraudulent." *Id.* at 778–79. And a proper statement of the Port's actual objectives here would have made clear (at the outset or at any later stage of the proceedings) that these condemnations fail on each of these fronts. The Port has no plan in place, no funding for that plan, and no timeline for construction. It has shifted the asserted purpose for these condemnations

midstream, moving from an ostensible inability to identify any public use at all to embracing an explicit (if still vague) unconstitutional private use. And it has gotten away with it (so far) because the trial court failed to hold it to Texas's basic constitutional and statutory requirements for condemnations.

In short, Texas law is clear. A condemnor, at the outset, must identify the particular public use to which it will put the property it seeks to condemn. It must *stick* to that use. And it must persuade a court that it has a reasonable likelihood of actually achieving that public use. As discussed below, these criteria are not just the law in Texas. They are near-universal. And at no point in this litigation has the Port come close to meeting any of them.

B. The ruling below leaves Texans with weaker property rights than any other American jurisdiction.

These basic requirements are not idiosyncratic characteristics of Texas law. They are bedrock protections for property rights recognized by courts nationwide.

Begin with the basic idea that a condemnation must be supported by a specifically articulated public use. This is a requirement in Texas, as explained above, but it is a requirement *everywhere*. Courts

nationwide, unlike the trial court below, reject takings in the absence of such a specific articulation. In Utah, for example, the state high court rejected a taking because the condemning agency "appears not to have clearly articulated its anticipated plans or purposes for the excess property at issue." *Utah Dep't of Transp. v. Carlson*, 332 P.3d 900, 907 (Utah 2014) (remanding to allow agency to attempt sufficient articulation of purpose). So too in Nebraska, which squarely holds that "a condemning agency must have a *present* plan and a *present* public purpose for the use of the property before it is authorized to commence a condemnation action" and that "the possibility that the condemning agency at some future time may adopt a plan to use the property for a public purpose is not enough to justify a present condemnation." *Krauter v. Lower Big Blue Nat. Res. Dist.*, 259 N.W.2d 472, 475–76 (Neb. 1977).

The same is true in New York. *HBC Victor LLC v. Town of Victor*, 212 A.D.3d 121, 125 (N.Y. App. Div. 2022) ("Because the Town has not indicated what it intends to do with the property, we are unable to determine whether 'the acquisition will serve a public use[.]'"). And in Ohio. *State ex rel. Sun Oil Co. v. City of Euclid*, 130 N.E.2d 336 (Ohio 1955) (holding that land may not be appropriated for a contemplated but

undetermined future use). The list goes on.[10]

Other jurisdictions likewise agree that *articulating* the use is not enough. The use must be *reasonable* and *plausible* before it can support condemnation. Take, for example, *Casino Reinvestment Development Authority v. Birnbaum*, where a state agency sought to condemn property for a redevelopment project surrounding a new casino—only to be met with a series of economic reversals (including the closure of the casino) that imperiled the viability of its overall project. 203 A.3d 939, 944–46 (N.J. Super. Ct. App. Div. 2019). The condemnor argued that these developments were irrelevant because its statutory mandate allowed it to acquire property "whether for immediate use" or not. *Id.* at 949. But the New Jersey courts rejected the taking anyway, reasoning that the statute must necessarily have an implicit "limitation of reasonably foreseeable future use rather than limitless future use." *Id.* at 950. The

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[10] *See, e.g.*, *City of Stockton v. Marina Towers, LLC*, 88 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2009) (rejecting "amorphous" resolutions of necessity as insufficient to support condemnation); *Regents of Univ. of Minn. v. Chi. & N.W. Transp. Co.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996) (rejecting condemnation where condemnor identified multiple, conflicting "potential uses" of the property); *Borough of Glassboro v. Grossman*, 200 A.3d 419, 423 (N.J. Super. Ct. App. Div. 2019) (requiring condemnor to "articulate a definitive need to acquire the parcel for an identified redevelopment project . . . more specific than the mere 'stockpiling' of real estate'").

same should hold true here. As the trial court in *Birnbaum* aptly reasoned, "[o]ur legislature did not intend, and the Constitution does not permit, property to be acquired and remain idle indefinitely, without a reasonable assurance that the proposed plan to justify the taking will be implemented." *Id.* at 945 (quoting trial-court opinion). If New Jersey's legislature and constitution have that much respect for property rights, surely Texas's do as well.

And Birnbaum is no outlier. To the contrary, courts regularly reject takings where there is no reasonable expectation that the condemned land will be used in the near future. *See, e.g.*, *City of Phoenix v. McCullough*, 546 P.2d 230, 237 (Ariz. Ct. App. 1975) (rejecting taking as arbitrary where there was no reasonably expected use within 15 years); *State ex rel. Sharp v. 0.62033 Acres of Land*, 112 A.2d 857, 860 (Del. 1955) (taking of land for highway without plan and that may be needed "some time in the future" not in the reasonable foreseeable future and thus not necessary); *Meyer v. N. Ind. Pub. Serv. Co.*,258 N.E.2d 57, 58–59 (Ind. 1970) (holding taking of right of way for "sometime in the future, maybe as much as six or ten years" was a "purely speculative future need" that could not support condemnation), *superseded on unrelated grounds*, 287

N.E.2d 882 (Ind. 1972). The list, again, goes on.[11]

This widespread rejection of purely speculative condemnations sometimes takes different forms—courts sometimes reject the taking as "arbitrary," other times as "speculative," others as not "necessary"—but they reflect a universal understanding that forcibly taking land without a reasonable prospect of *using* that land is unlawful. Texas law, which requires both a public use and a public necessity, recognizes the same thing. *See supra* Part II.A; *see also* CR 360–62, 378–80, 416–29, 570–82 (preserving challenge to public use and public necessity).

Indeed, even under the Supreme Court's decision in *Kelo* (which, as noted above, Texas explicitly rejects) condemnors are required to supply a specific, well-grounded plan to support an economic-development taking. The *Kelo* majority explicitly conditioned its approval of the

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[11] *City of Helena v. DeWolf*, 508 P.2d 122, 128 (Mont. 1973) (where parking would be needed only if other parts of the project succeeded, government could not seek property now "to await money, motivation, and the hopes of planners."); *People ex. rel. Director of Fin. v. YWCA*, 427 N.E.2d 70 (Ill. 1981) (finding condemnation unnecessary where contracts for construction or use of building not in place); *Meyer v. N. Ind. Pub. Serv. Co.*, 258 N.W.2d 57 (Ind. 1970) (taking of right of way for "sometime in the future" was too speculative to justify condemnation), *superseded on unrelated grounds*, 287 N.E.2d 882 (Ind. 1972); *San Diego Gas & Elec. Co. v. Lux Land Co.*, 14 Cal. Rptr. 899 (Cal. Ct. App. 1961) (taking of easement for telephone, gas, and electrical use is speculative where utility has no present intention to install transmission lines).

condemnations in that case on "the comprehensive character of the plan [and] the thorough deliberation that preceded its adoption." *Kelo*, 545 U.S. at 484.[12] Where those elements are missing, courts reject the condemnation. *See, e.g.*, *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) (concluding that "evidence of a well-developed plan of proper scope is significant proof that an authorized purpose truly motivates a taking"); *Mayor & City of Baltimore v. Valsamaki*, 916 A.2d 324, 352–53 (Md. 2007) (noting absence of clear plan for the use of condemned property and contrasting with *Kelo*); *R.I. Econ. Dev. Corp. v. Parking Co., L.P.*, 892 A.2d 87, 104 (R.I. 2006) (emphasizing difference between condemnor's approach in that case and the "exhaustive preparatory efforts that preceded the takings in *Kelo*"). The record in this case reflects no similarly exhaustive preparatory efforts—indeed, no preparatory efforts at all—and so this condemnation should have been rejected even as a matter of federal constitutional law.

In short, the trial court's decision ratified a plan to "condemn first,

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[12] Of course, for all the Supreme Court's lauding of the planning process in New London, that planning process was a complete failure. *See infra* Part II.C. At minimum, the catastrophic failure of the "exhaustive" planning in *Kelo* should make courts skeptical of the utterly un-planned taking at issue here.

decide what to do with the property later[.]" *City of Stockton v. Marina Towers, LLC*, 88 Cal. Rptr. 3d 909, 913 (Cal. Ct. App. 2009); *see also id.* at 915 (rejecting condemnation). The Port is not the first condemnor to attempt to take property pursuant to such a vague and aspirational plan—indeed, as the cases above illustrate, these attempts are rampant. But they are *consistently rejected by the courts*. This case is unusual only in that the trial court chose to allow land to be taken in furtherance of an entirely inchoate, unidentified public purpose. That was error, and the ruling below should therefore be reversed.

C. The Port claims the power to take property based solely on its shifting assurances that it will be used for some unidentified use at some unidentified time.

The Port, at every stage of this case, has fallen short of these basic legal requirements. Its original petition in the case declined to identify a particular public use at all, asserting in sweeping terms that the condemnation was "for the expansion of Plaintiff's facilities [or] for the development of business and industries upon the land." CR 10.

Things got no better for the Port at its deposition, where the Port suggested it was still considering plans without settling on anything in particular. It had not identified any funding for any projects on the land.

It could not guarantee that, whenever it settled on a use, it would begin construction for that use in five years. Or ten. *See supra* at 3–5.

At summary judgment, the Port finally confessed to a plan (albeit an unconstitutional one): It would identify, at some future point, private businesses that would lease the land and use it for their own purposes. CR 495. But even then, its presentation fell far short of the careful plan approved in *Kelo*. The Port still provided no basis for believing anything would happen anytime soon. It still had no information about what or who or when or how anything would be done on the land. At the summary-judgment hearing below, its counsel freely admitted that "[we] don't know what [we're] going to do . . . because we're not the ones that are going to be doing it." 3 RR 14:2–4. The Port just thinks that's okay: It is enough to say that an unidentified private tenant will emerge at some point in the future and build whatever it wants on the property because whatever that tenant does will be a public use. 3 RR 24:12–13 ("We do know who's going to be building it. Our tenants. We do know what money, with their money[.]"). In other words, *if we take it, they will come*. This is backwards: The public use comes *before* a property owner loses her land, not *after*.

The Port's argument here was exactly the argument rejected by the New Jersey court in *Birnbaum*. There, as here, the condemnor was authorized to take land for a broad purpose—there, to "spark [ ] statutorily required investment in [a] Tourism District"[13], here the "aid of the development of industries and businesses on the land."[14] There, the condemnor could provide only a "'conceptual plan'" for what it might do with the property;[15] here, the Port offered even less, denying that it had any "specific plan . . . to present" at all.[16] In *Birnbaum*, though, the condemnation was rejected because the condemnor failed to "provide evidence-based assurances that the Project would proceed in the reasonably foreseeable future"[17] whereas here, the lower court declined to require any. If anything, Texas courts should require *more* than New Jersey courts—New Jersey, after all, refuses to put a "strict timeline" on when redevelopment projects must begin, where Texas puts a strict 10-year deadline on *all* condemnation projects.[18] But the trial court's ruling

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[13] *Birnbaum*, 203 A.3d at 945.
[14] Tex. Water Code § 62.107(a).
[15] *Birnbaum*, 203 A.3d at 951.
[16] CR 438 at 22:15–16.
[17] 203 A.3d at 952.
[18] Tex. Prop. Code § 21.101(a)(2).

insists that Texas requires far less.

And the Port's insistence that Texas law embraces this sort of blue-sky taking is all the more striking given Texas's clear rejection of *Kelo*. As explained above, the Texas Constitution deliberately and explicitly rejects the Supreme Court's rule in *Kelo* and adopts the position of the dissents. *See supra* at 12. Adopting the *Kelo* dissents mean adopting their skepticism of vague, underexplained explanations for the purpose of a taking. *See Kelo*, 545 U.S. at 495 (O'Connor, J., dissenting) (criticizing *Kelo* plan as slating some properties "mysteriously, for 'park support'" and noting that "counsel for respondents conceded the vagueness of this proposed use"). And this criticism was prescient: As Justice O'Connor might have predicted, the vague plans underlying the *Kelo* taking predictably collapsed, causing the previously productive land to lie vacant for the next two decades. *See* Johana Vazquez, *New London to Sell Remainder of Fort Trumbull Properties*, The Day (Jan. 19, 2023), http://tinyurl.com/wky4duup (noting that condemned land had been vacant for "nearly 20 years").

In other words, one lesson of *Kelo* is that permitting the government to take land based on "vague[]" and "mysterious[]" promises of a future

public use can lead to that land laying fallow for years on end. *Cf. Birnbaum*, 203 A.3d at 950 (noting that the aftermath of *Kelo* has resulted in "greater judicial and legislative scrutiny of redevelopment-based takings" (citation omitted)). The people of Texas learned that lesson. They looked at the vague, mysterious, and privately driven condemnation in *Kelo* and determined that nothing like that should happen here, amending the Texas Constitution to guarantee that it wouldn't. But the trial court's ruling ignores this and allows exactly that same kind of vague, mysterious, and privately driven condemnation to move forward. This was error, and the judgment below should be reversed.

PRAYER

The judgment below should be reversed and this case remanded for further proceedings to determine the damages the Port has caused during its putative condemnation and what amount of attorneys' fees the Port must pay under section 21.019 of the Texas Property Code and other applicable laws.

Dated: February 28, 2024.

Respectfully submitted,

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Christopher S. Johns

/s/ Jeffrey Redfern
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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2024, a true and correct copy of the foregoing Appellants' Opening Brief was filed with the Clerk of Court and served in compliance with the Texas Rules of Appellate Procedure via the Court's electronic filing manager on all counsel of record.

/s/ Christopher S. Johns
Christopher S. Johns
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Appellants' Opening Brief contains 7,239 words, excluding the portions of the brief exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Christopher S. Johns
Christopher S. Johns
Counsel for Appellants

No. 14-23-00948-CV

IN THE FOURTEENTH COURT OF APPEALS

HENRY JONES, ET AL.,
Appellants,

v.

PORT FREEPORT,
Appellee.

Appeal from the County Court of Law No. 3 of Brazoria County, Texas
Trial Cause No. CI62105

APPENDIX TABLE OF CONTENTS

APPENDIX A

Filed for Record
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Joyce Hudman, County Clerk
Brazoria County, Texas
CI62105
Cheryl Matt, Deputy

CAUSE NO. CI62105

PORT FREEPORT	§	COUNTY COURT AT LAW
	§	
VS.	§	
	§	
THE UNKNOWN HEIRS OF LUCILLE MARSHALL, DECEASED; JIM JOHNSON OR THE UNKNOWN HEIRS OF JIM JOHNSON, DECEASED; NAOMI JOHNSON CONNOR; ROBERT G. JONES, SR.; TRISTON EMILY JONES-MAXIE; MATTHEW ISAAC JONES; GLEN JOHNSON; EUNICE WATTS JOHNSON; FIELDING JOHNSON, III; ARNOLD JOHNSON; ELSIE HIGGINS CAMPBELL; BRUCE EDWARD HIGGINS; WILLIAM A. BROWN; RODERICK L. BROWN; REGINALD A. BROWN; ALPHONSE JOHNSON, SR.; THE UNKNOWN HEIRS OF JERRY JOHNSON, DECEASED; MARY LEE JOHNSON; MARVELOUS JOHNSON; JOYCE WILLIAMS; ROOSEVELT JOHNSON, SR.; JOHN HENRY JOHNSON; PENDLETON JOHNSON; VICTORIA GILFORD OR THE UNKNOWN HEIRS OF VICTORIA GILFORD; JOSEPH MOORE, SR., JARVIS L. JONES OR THE UNKNOWN HEIRS OF JARVIS L. JONES; JEFFREY CLARK; DEMETRIA JONES; ANGIE NICOLE CLARK JOHNSON; LOTTIE JONES SANDERS; BOBBIE JEAN DARTHARD; JANICE CATLEY A/K/A JOHNNIE CATLITE; ALICE MAE COX OR THE UNKNOWN HEIRS OF ALICE MAE COX; DARREL JOHNSON OR THE UNKNOWN HEIRS OF DARREL JOHNSON; CURT JOHNSON OR THE UNKNOWN HEIRS OF CURT JOHNSON; DOTTI L. JONES; LONNIE JONES; TIFFANY YVETTE MITCHELL; JASON EVERITT MITCHELL; CAROLYN JONES-GAUL; HENRY JERRY JONES; GABRIEL JONES; AARON STEPHEN JONES, JR.;	§	NUMBER THREE (3) OF

RACHEL R. THOMAS; TIMOTHY JONES; TERRANCE JONES; THE UNKNOWN HEIRS OF ALICE JONES MOORE F/K/A ALICE MAE JONES CLARK, DECEASED; THE UNKNOWN HEIRS OF MOSE M. EAGLETON JR., DECEASED; THE UNKNOWN HEIRS OF EICHLITZ "IJ" JONES, DECEASED; THE UNKNOWN HEIRS OF TYREE JONES, DECEASED; THE UNKNOWN HEIRS OF ELIJAH DOUGLAS JONES, DECEASED; THE UNKNOWN HEIRS OF MARJORIE JONES MITCHELL, DECEASED; THE UNKNOWN OWNERS OF LOTS 1 AND 2, BLOCK 11, CITY OF FREEPORT, BRAZORIA COUNTY, TEXAS; OFFICE OF THE ATTORNEY GENERAL (BY ASSIGNMENT FROM MELISSA GAIL MILLER); AND THE TAX ASSESSOR & COLLECTOR OF BRAZORIA COUNTY ON BEHALF OF THE FOLLOWING TAXING JURISDICTIONS: BRAZORIA COUNTY, TEXAS, BRAZOSPORT COLLEGE, BRAZORIA INDEPENDENT SCHOOL DISTRICT, CITY OF FREEPORT, PORT FREEPORT, SPECIAL ROAD & BRIDGE FUND, AND VELASCO DRAINAGE DISTRICT	§ §	BRAZORIA COUNTY, TEXAS

FINAL JUDGMENT

BE IT REMEMBERED that on this day, pursuant to setting regularly made and notice regularly given, came on for consideration the above-captioned cause. Pursuant to the papers filed in this cause and the stipulation of the parties entered herein, the Court finds that:

I.

Through its latest amended petition, Plaintiff, Port Freeport, seeks to condemn fee title to a tract of land for the expansion of Plaintiff's facilities for the development of

business and industries upon the property, including appurtenances determined to be reasonable and necessary for the construction, installation, operation, and maintenance of such facilities, such property being more particularly described as follows:

> Lots One (1) and Two (2) in Block Eleven (11), Freeport Townsite in the City of Freeport, Brazoria County, Texas, according to the map or plat thereof recorded in Volume 2, Page 95 of the Plat Records of Brazoria County, Texas.

Plaintiff is acquiring the Property from the following Defendants, who own or claim an interest in the Property: the unknown heirs of Lucille Marshall, deceased, Jim Johnson or the unknown heirs of Jim Johnson, deceased, Naomi Johnson Connor, Robert G. Jones, Sr., Triston Emily Jones-Maxie; Matthew Isaac Jones, Glen Johnson, Eunice Watts Johnson, Fielding Johnson, III, Arnold Johnson, Elsie Higgins Campbell, Bruce Edward Higgins, William A. Brown, Roderick L Brown, Reginald A. Brown, Alphonse Johnson, Sr., The unknown heirs of Jerry Johnson, deceased, Mary Lee Johnson, Marvelous Johnson, Joyce Williams, Roosevelt Johnson, Sr., John Henry Johnson, Pendleton Johnson, Victoria Gilford or the unknown heirs of Victoria Gilford, Joseph Moore, Sr., Jarvis L. Jones or the unknown heirs of Jarvis L. Jones, Jeffrey Clark, Demetria Jones, Angie Nicole Clark Johnson, Lottie Jones Sanders, Bobbie Jean Darthard, Janice Catley a/k/a Johnnie Catlite, Alice Mae Cox or the unknown heirs of Alice Mae Cox, Darrel Johnson a/k/a Darryl Johnson or the unknown heirs of Darrel Johnson, Curt Johnson a/k/a Kirk Johnson or the unknown heirs of Curt Johnson, Dotti L. Jones, Lonnie Jones, Tiffany Yvette Mitchell, Jason Everitt Mitchell, Carolyn Jones-Gaul, Henry Jerry Jones, Gabriel Jones, Aaron Stephen Jones, Jr., Rachel R. Thomas, Timonthy Jones, Terrance Jones, the unknown heirs of Alice Jones Moore f/k/a/ Alice

Mae Jones Clark, deceased, the unknown heirs of Mose M. Eagleton Jr., deceased, the unknown heirs of Eichlitz "IJ" Jones, deceased, the unknown heirs of Tyree Jones, deceased, the unknown heirs of Elijah Douglas Jones, deceased, the unknown heirs of Marjorie Jones Mitchell, deceased, the unknown owners of Lots 1 and 2, Block 11, City of Freeport, Brazoria County, Texas, the Office of the Attorney General (By Assignment from Melissa Gail Miller), and the Tax Assessor & Collector of Brazoria County on behalf of itself and the following taxing jurisdictions: Brazosport College, Brazoria Independent School District, City of Freeport, Port Freeport, Special Road & Bridge Fund, and Velasco Drainage District. The above-named defendants were named as the only persons with an apparent interest in the property located in Brazoria County, Texas, that is the subject of this condemnation action.

II.

The Court appointed three disinterested freeholders in Brazoria County, Texas to act as special commissioners. After lawful notice was given to the named Defendants in this case, the special commissioners convened in Brazoria County, Texas, to hear evidence. On August 25, 2021, after having heard the evidence presented to them, the special commissioners entered an award in the amount of $28,000.00. The county clerk accepted the Decision and Award of Commissioners in this case into its files on August 26, 2021. Plaintiff deposited the above-stated amount of the special commissioners' award into the court's registry on August 30, 2021.

III.

Defendants filed objections to the special commissioners' award within the time period required by the Texas Property Code, thereby converting this cause from an administrative proceeding into a judicial proceeding. In the judicial proceeding, the parties filed cross motions for partial summary judgment on the issue of Plaintiff's right to condemn Defendants' property for the purposes set forth in its latest amended petition. The parties' competing motions were heard by the Court on September 29, 2023. The Court issued orders denying Defendants' partial motion for summary judgment and granting Plaintiff's motion for partial summary judgment.

The only remaining issue to be determined was the market value of the property to be acquired. On this issue, the parties have stipulated that the total compensation owed to Defendants for Plaintiff's acquisition of the property is $100,000.00, inclusive of prejudgment interest.

IV.

From the papers filed in this cause, evidence received, and the parties' stipulations made, the Court finds:

(l) that Defendants timely filed objections to the award of special commissioners and caused the parties to be cited accordingly;

(2) that all jurisdictional prerequisites to the filing of this condemnation action have been satisfied, that the Special Commissioners dutifully entered an Award in this case, and that Plaintiff possesses the power of eminent domain to condemn the property rights being taken in this action; and

(3) that the damages to which Defendants are entitled as a result of Plaintiff's acquisition of the property, including prejudgment interest, is $100,000.00.

V.

It is, therefore,

ORDERED that Plaintiff shall recover of and from Defendants, and the unknown owner or owners of said property whose names, residences, addresses, and whereabouts are unknown, and any and all other persons and entities, including all adverse claimants, owning, having or claiming any legal or equitable interest in or a lien upon said property (and if any of said unknown owners, persons, and entities are deceased, dissolved, or legally incapacitated, the deceased, dissolved, or incapacitated owners' heirs, devisees, successors, assigns, and legal representatives), and the unknown owner's or owners' unknown spouse or spouses, all of whose names, residences, addresses, and whereabouts are unknown (and if said spouse or spouses are deceased or legally incapacitated, the deceased or incapacitated spouse's or spouses' unknown heirs, devisees, and legal representatives, whose names, residences, addresses, and whereabouts also are all unknown), fee simple title to the property described herein. It is, further,

ORDERED that fee simple title for the above-described purposes is hereby vested into Plaintiff provided, however, there is excluded from the estate vested in Plaintiff and reserved to Defendants the right to all oil, gas, and sulphur beneath said land, with no right remaining in the owner or owners of said oil, gas, and sulphur of ingress or egress to or from the surface of said land for the purposes of exploring, developing, drilling or mining of same. It is, further,

ORDERED that Defendants shall have and recover of and from Plaintiff the total sum of ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00), which amount constitutes the compensation owed by Plaintiff in this proceeding. Plaintiff shall receive credit for the TWENTY-EIGHT THOUSAND AND NO/100 DOLLARS ($28,000.00) previously deposited into the court's registry, leaving an unpaid judgment amount of SEVENTY-TWO THOUSAND AND NO/100 DOLLARS ($72,000.00), which amount Plaintiff shall deposit into the court's registry within thirty (30) days of entry of judgment. It is, further,

ORDERED that, upon its deposit of the unpaid judgment amount into the court's registry for the benefit of Defendants, Plaintiff has satisfied all amounts due under this judgment in full. It is, further,

ORDERED that all costs of court, attorneys' fees, and any other expenses expended or incurred in this cause are to be borne by the party which incurred said costs, fees, or expenses. It is, further

ORDERED that the Lis Pendens Notices recorded at Instrument No. 2020078085, Instrument No. 2021027566, and Instrument No. 2021056628 in the Official Public Records of Brazoria County in connection with this proceeding are released.

All relief not expressly granted herein is denied. This is a final, appealable judgment.

SIGNED this _____ day of November 17, 2023, 2023.

JUDGE PRESIDING

APPROVED AS TO FORM
AND ENTRY REQUESTED:

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Filing Description: Final Judgment
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Associated Case Party: Port Freeport

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Associated Case Party: WilliamsM.Tigner

Name	BarNumber	Email	TimestampSubmitted	Status

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Craig Judge on behalf of Laura Manion
Bar No. 24074647
cjudge@mcfarlandpllc.com
Envelope ID: 80808400
Filing Code Description: Proposed Order
Filing Description: Final Judgment
Status as of 10/24/2023 3:26 PM CST

Associated Case Party: WilliamsM.Tigner

Williams Tigner	24056848	wtigner@gmail.com	10/20/2023 11:42:23 AM	SENT

Associated Case Party: Janice Catley

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Associated Case Party: HenryJerryJones

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Christopher Johns		chris@cobbjohns.com	10/20/2023 11:42:23 AM	SENT
Jeffrey Redfern		jredfern@ij.org	10/20/2023 11:42:23 AM	SENT
Robert McNamara		rmcnamara@ij.org	10/20/2023 11:42:23 AM	SENT
Roxy JBarbera		roxy@cobbjohns.com	10/20/2023 11:42:23 AM	SENT
Bill Cobb		bill@cobbjohns.com	10/20/2023 11:42:23 AM	SENT

APPENDIX B

BLOCK 11 LOTS 1-2

CAUSE NO. CI62105

PORT FREEPORT	§	COUNTY COURT AT LAW
	§	
VS.	§	NUMBER THREE (3) OF
	§	
THE UNKNOWN HEIRS OF LUCILLE	§	
MARSHALL, DECEASED, ET AL.	§	BRAZORIA COUNTY, TEXAS

AFFIDAVIT OF PHYLLIS SAATHOFF

STATE OF TEXAS	§
	§
COUNTY OF BRAZORIA	§

Before me, the undersigned authority, on this day personally appeared Phyllis Saathoff, who swore on oath that the following facts are true:

1. "My name is Phyllis Saathoff. I am over 18 years of age, have never been convicted of a felony or a crime of moral turpitude, am of sound mind and fully competent to make this Affidavit. I have personal knowledge of the facts stated herein that form the bases of this affidavit, and these facts are true and correct.

2. I am the Executive Director and CEO of Port Freeport, which is an independent governmental body created by Brazoria County voters and authorized by an act of the Texas Legislature in 1927. It is governed by the Port Freeport Commission, which is comprised of six Commissioners who are elected and serve six-year staggered terms.

3. I have been extensively involved in the Expansion Area facilities project that has necessitated the acquisition of Defendants' properties that are the subject of this condemnation case. As a port and navigation district governed by Chapters 60 and 62 of the Texas Water Code, Port Freeport is charged with facilitating international commerce and the development of industries and businesses within Port Freeport. This involves identifying and pursuing potential users to locate their businesses within Port Freeport, including within the Expansion Area for which Defendants' properties have been acquired.

4. Development of industries and businesses is necessary and essential to the successful operation of a port and the facilitation of international commerce. Port Freeport owns approximately 7,600

EXHIBIT A

B

acres of land. However, approximately 4,000 of these acres are encumbered with easements or other impediments that preclude development. Approximately 900 acres have been developed, and 770 of these acres are currently leased by third parties for purposes of industrial or business development and the facilitation of international commerce. These tenants include Freeport LNG, KDC (for Volkswagen Group of America), Dole Fresh Fruit Company, Del Monte Fresh Produce, N.A. Inc., Riviana Foods, Chiquita Brands Inc., Amports, Inc., Tenaris and numerous others. While the Port owns approximately 2,800 acres of land that are not committed and not developed, none of this land is located in close proximity to existing berths for the Port's operations.

5. The acquisitions for the Expansion Area project will accommodate operations necessary to facilitate additional international commerce and allow for the efficient management of truck traffic, reducing both congestion and emissions. Additionally, this area will support the expanded operations of U.S. Customs and Border Protection and U.S. Department of Agriculture. Acquiring this land allows the Port to plan and prepare for expansion, encouraging more investment in our region and state, creating more economic activity and jobs that will support families in our community.

6. Defendants' properties, as a small portion of the overall footprint of the Expansion Area project, will be marketed to potential users for lease as industry and business sites. Collectively, the properties are readily accessible to the navigable waters and ports developed by Port Freeport and are adjacent to existing Port facilities, and, as such, are well suited to this use.

7. Because the sites to be leased will be developed by private industrial and business users, Port Freeport does not have any specific plans for what will be developed on any particular property within the area of the project. Instead, each site will be developed according to the needs and specifications of the tenant.

8. Until recently, the marketing of property within the project area for industry and business development has been impeded by difficulties in obtaining all of the necessary property rights to accommodate development within the Expansion Area. Recently, Port Freeport reached an agreement with the City of Freeport securing its conveyance of the public streets and alleyways within the project area. This conveyance will enable the Port to finalize negotiations with

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tenants for industry and business development within the Expansion Area.

9. I am a custodian of records of Port Freeport and am familiar with the manner in which its records are created and maintained by virtue of my duties and responsibilities.

10. Attached to this affidavit are 11 pages of records. These are the original records or exact duplicates of the original records. The records were made at or near the time of each act, event, condition, opinion, or diagnosis set forth. The records were made by, or from information transmitted by, persons with knowledge of the matters set forth.

11. The records were kept in the course of regularly conducted business activity of Port Freeport, and it is the regular practice of the business activity to make the records.

12. As Executive Director of Port Freeport, I certify that Exhibit 1 to this affidavit is a true and correct copy of the details of the Port Freeport's facilities expansion project that is the subject of this condemnation proceeding and that Exhibit 2 to this affidavit is a true and correct copy of the Port Commission's Resolution Authorizing Acquisition of Real Property Interests and Initiation of Condemnation Proceedings, and the Port Commission of Port Freeport's Certificate of Resolution for the project that is the subject of this condemnation proceeding. These are true and correct copies of public records of Port Freeport.

13. I am authorized to make this certification."

Phyllis Saathoff

31st SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the day of August, 2023.

MICHAELA A BEVERS
Notary Public, State of Texas
Comm. Expires 07-08-2025
Notary ID 12948414-6

Notary Public in and for State of Texas

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David Johns on behalf of Christopher Johns
Bar No. 24044849
david@cobbjohns.com
Envelope ID: 85010732
Filing Code Description: Brief Requesting Oral Argument
Filing Description: Appellants' Opening Brief
Status as of 2/28/2024 2:58 PM CST

Associated Case Party: Henry Jones

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Christopher Johns		chris@cobbjohns.com	2/28/2024 2:51:20 PM	SENT
David Johns		david@cobbjohns.com	2/28/2024 2:51:20 PM	SENT
Bill Cobb		bill@cobbjohns.com	2/28/2024 2:51:20 PM	SENT
Robert McNamara		rmcnamara@ij.org	2/28/2024 2:51:20 PM	SENT
Jeffrey Redfern		jredfern@ij.org	2/28/2024 2:51:20 PM	SENT

Associated Case Party: Port Freeport

Name	BarNumber	Email	TimestampSubmitted	Status
Charles B.McFarland		cmcfarland@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
Laura S.Manion		lmanion@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
Dani Aedo		dvaedo@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
Marie Harlan		mharlan@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
Craig Judge		cjudge@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
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Pamela Milliner		pmilliner@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
Levin Rosales		lrosales@mcfarlandpllc.com	2/28/2024 2:51:20 PM	SENT
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David Johns on behalf of Christopher Johns
Bar No. 24044849
david@cobbjohns.com
Envelope ID: 85010732
Filing Code Description: Brief Requesting Oral Argument
Filing Description: Appellants' Opening Brief
Status as of 2/28/2024 2:58 PM CST

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