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' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

In their opening brief, the Appellant Landowners established that the condemnation in this case violates the public-use requirement of the Texas Constitution in two fundamental ways. First, the Port expressly testified in support of its motion for summary judgment below that it intends to lease this land to private businesses for their private use in direct violation of the 2009 amendment to Article I, Section 17 of the Texas Constitution, which expressly forbids economic-development takings. Second, even setting aside that direct confession of its intention to violate the Constitution, the Port has steadfastly refused to provide any evidence that it has any concrete plans for the condemned land or that it can reasonably expect to do anything with it in the coming years. That also violates the Texas and U.S. Constitutions, which require that condemnors identify a specific public use that is reasonably likely to materialize. As demonstrated below, the Port has failed to refute either argument.

I. The Port's condemnation violates the 2009 amendment to Article I, Section 17 of the Texas Constitution.

As explained in the Landowners' opening brief, the 2009 amendment to Article I, Section 17 was specifically intended to adopt the dissenting opinions in *Kelo v. City of New London*, 545 U.S. 469 (2005), and to forbid the

sort of private-to-private taking at issue in that case. Op. Br. 11–13. In its response, the Port does not dispute the purpose of the amendment or that *Kelo* (like this case) was about condemning land to lease it to private businesses in the name of economic development.

Instead, the Port largely just contends that the law doesn't apply to it—either because the Landowners waived this argument by raising it in opposition to the Port's motion for summary judgment rather than in their own cross-motion (part a, below); or because the Landowners' objection (which, again came in their summary-judgment opposition) was untimely (part b); or because the Landowners are not allowed to object to this particular condemnation without challenging the Port's underlying enabling statute (part c); or because the Texas Constitution *sub silentio* exempts ports from its commands (part d); or else because the private parties to whom it plans to transfer the Landowners' property might conceivably decide to use it for a public use (part e). As explained below, each argument is mistaken.

a. The Landowners properly preserved this constitutional challenge.

The Port argues that the Landowners failed to preserve for appellate review their argument that the 2009 amendment to Article I, Section 17 of the Texas Constitution applies to this condemnation because the

Landowners first raised it in opposition to the Port's motion, rather than in their own cross-motion. Resp. Br. 11–14. Yet the Port acknowledges that the Landowners did present this argument to the trial court, both in briefing and orally, and both in response to the Port's summary-judgment motion and (once the Port admitted for the first time that this was an economic-development taking) in the Landowners' reply brief in support of their summary-judgment motion. R.570; R.751; 3.RR.8:1–5 ("[T]he entire Texas Supreme Court has recognized that the point of this amendment in 2009 was to codify the dissent of *Kelo*. So [the Port] admitted to doing exactly what the Constitution prohibits.").

The Port responded to this argument on the merits, never even hinting that the argument was untimely or that the court below should not consider it. 3.RR.13:22–14:2 ("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[.]").

After considering this adversarial presentation, the trial court granted the Port's motion for summary judgment while denying the Landowners' cross-motion. The argument was therefore timely presented and actually

ruled on. Ironically, it is the Port that has waived any timeliness argument by failing to object before the trial court.

"Preservation of error is an inter-court systemic requirement, it is not an intra-court requirement." *State v. Herndon*, 215 S.W.3d 901, 909 (Tex. Crim. App. 2007). That means that parties may not present arguments to an appellate court unless they "first allow[ed] the trial court an opportunity to make a ruling." *Veal v. State*, 682 S.W.3d 577, 584 (Tex. App.—Houston [1st Dist.] 2023, pet. ref'd). It does not mean that appellate courts micromanage the timing of arguments that were—unquestionably—raised below. If the Port believed that the argument had been raised in an untimely fashion below and that it should not have been considered, the place to raise that objection was in the trial court.

Even if the Port had raised this issue below, the trial court would have had broad discretion to consider the constitutional argument anyway. Texas courts are free to "consider claims and arguments that were not *timely* made in that particular court as long as they are made while the parties are still in that particular court." *Herndon*, 215 S.W.3d at 910. In other words, the Port's request is improper twice over: It is not merely asking this Court to decide an issue that was never presented below; it is asking this Court to

usurp the broad discretion that the court below *would have had* if the issue had ever been presented.

b. The Landowners' arguments below were timely.

Even if the Port had preserved an argument about the timeliness of the Landowner's constitutional claim, its argument would fail on the merits. The Landowners first raised the Article I, Section 17 argument in their opposition to the Port's cross-motion for summary judgment. It was perfectly appropriate for them to do so, for two reasons.

First, and most straightforward, this was a response brief, not a reply brief, so the Port had every opportunity to respond to this argument. While courts will often decline to consider new arguments raised in *reply* briefs, an argument raised in an opposition brief is always timely. *Cf. Bankhead v. Maddox*, 135 S.W.3d 162, 164 (Tex. App.—Tyler 2004, no pet.) ("issues raised for the first time in a reply brief may not be considered"). Indeed, if parties cannot raise new arguments in opposition to a motion for summary judgment, it is unclear how they can oppose summary judgment at all.

Second, this particular argument was premised on the Port's summary-judgment affidavit, in which the Port stated for the first time that it had decided that the Landowners' property, *specifically*, "will be marketed

for potential users for lease as industry and business sites" to "creat[e] more economic activity and jobs," and that the Port did not "have any specific plans" for the property because it would be all up to the unknown future tenants. R.495. This testimony made clear that the Port's plan—if it can be called a plan—was to blatantly violate the 2009 constitutional amendment, which outlawed private-to-private transfers for the purpose of economic development.

The Port now argues that the Landowners should have been wise to this scheme because of the Port's earlier deposition testimony, when the Port described itself as a "landlord port" and noted that some of the financing for the expansion would come from lease payments. Resp. Br. 13–14. Even if that were true, the Port cites no authority that says the Landowners could only raise this argument in an affirmative motion for summary judgment instead of in opposition to the Port's motion.[1]

Moreover, the Port is just wrong: Its earlier testimony did not come close to telling the Landowners that the Port intended to market *their specific*

[1] The Landowners also raised the argument in their later reply brief—and they would have raised the argument in their initial motion for summary judgment if they had known the Port's plan, but the first time the Port disclosed its private-to-private economic-development taking was in the Port's response to the Landowners' summary-judgment motion.

properties to third parties for purposes of economic development, that the Port had no particular plans for the properties, and that it would allow the third parties to decide what to do with them. R.495 ("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."). Those are the crucial facts for this constitutional argument, not that some of the property might be leased to private parties.

The deposition testimony that the Port now points to simply explained, in general terms, how leases at the port have historically worked. *E.g.,* R.631 ("A: We often pay for the improvements, then we'll have a lease that's leased space to a tenant to conduct their operations; could be a truck storage area . . . . Q: The port would build the infrastructure, then lease that? A: That is a possibility, yes. We've done that before.").

In other words, the crux of the Landowners' constitutional argument is not that the Port sometimes leases land or even that the Texas Constitution

imposes a categorical bar on leasing *this* land.[2] There are, of course, situations where private parties may use property in a way that satisfies the Public Use Clause, as the *Kelo* dissenters acknowledged. *See Kelo v. City of New London*, 545 U.S. 469, 498 (2005) (O'Connor, J., dissenting) (noting that "a railroad, a public utility, or a stadium" would satisfy the public-use requirement); *id.* at 512 (Thomas, J., dissenting) (noting that private property could be transferred to private parties to operate grist mills as common carriers).

The constitutional relevance of the Port's summary-judgment testimony was that it confessed, for the first time, that its plan was to lease this land to private businesses for them to use as they saw fit, all in the name of creating "economic activity and jobs." That is a *Kelo*-style taking of exactly the sort that the 2009 amendments were meant to abolish, and the Landowners were well within their rights to ask the trial court to hold as much.

[2] Rather, it was the Port who argued for a categorical rule, claiming that, so long as it was leasing property rather than giving away a fee simple title, the 2009 amendment simply didn't apply.

c. This is not a challenge to the constitutionality of a statute.

The Port also wrongly suggests that the Landowners' constitutional objection to this condemnation is, in reality, a challenge to the constitutionality of Section 62.107 of the Texas Water Code, and that the Landowners failed to file the form required by Section 402.010 of the Texas Government Code when challenging the constitutionality of a Texas statute. The Landowners' challenge, however, is to the taking and the condemnation petition itself, not to any statute. Every entity that exercises the power of eminent domain does so pursuant to some statutory grant of authority, but constitutional limitations on eminent domain apply to each individual exercise of that authority under every statute. If a particular taking or condemnation petition is unconstitutional, that does not make the statute delegating eminent-domain authority unconstitutional.

For instance, a Texas statute provides that a search warrant "shall be sufficient . . . if it contains" certain "prerequisites." TEXAS CODE CRIM PROC. § 18.04 Nobody would suggest that the statute is unconstitutional because it does not expressly incorporate all of the limitations of the Fourth Amendment. More to the point, nobody would argue that a constitutional challenge to a particular search is, in fact, a challenge to the constitutionality

of the criminal code. Nor would anyone suggest that the statute authorizing arrests without warrants is unconstitutional[3] simply because it does explicitly incorporate well-known equal-protection and First Amendment limitations. *See, e.g., Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019) (holding that probable cause will not defeat a retaliatory arrest claim where "plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been"); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166 (10th Cir. 2003) ("[E]qual protection may be violated even if the actions of the police are acceptable under the Fourth Amendment."). Similarly, the Port must follow the Texas Constitution, independently of anything written in the Water Code. That does not make the Water Code unconstitutional.

d. The Texas Constitution contains no exemption for ports, and the Port forfeited this argument anyway.

On the merits, the Port claims that the 2009 amendment to Article I, Section 17 of the Texas Constitution simply doesn't apply to ports. Resp. Br. 20 ("Texas lawmakers were careful to avoid any potential limitation on the eminent-domain authority of ports and other critical infrastructure."). The

[3] *See* TEX. CODE CRIM. PROC. § 14.01(b) ("A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.").

Port's brief, however, contains no relevant authority for that proposition—and very little discussion of the Texas Constitution, either. Instead, the Port focuses on statutes that are not at issue and decisions that predate the 2009 amendment. And, in any event, the Port forfeited all its ports-are-exempt arguments by not raising them below.[4]

Even if this Court could consider the merits of the Port's new arguments, Texas courts are still required to follow the plain text of the Constitution, and the text of Article I, Section 17 contains no exemption for ports. *See EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, 554 S.W.3d 572, 577 (Tex. 2018) ("If our case law contradicts the constitution's plain text, our case law is wrong."); *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 549 (Tex. 2016) ("Constitutional mandates need not be shoehorned into common-law concepts when those concepts conflict with the Constitution's plain text."). The Constitution says simply that "'public use' does not include the taking of property . . . for transfer to a private entity for

[4] The Port did not raise its atextual, "ports-are-exempt-from-the-Texas-Constitution" argument in the trial court. There, it seemingly conceded that the 2009 amendment applied to ports, arguing instead that it could escape the amendment by leasing the properties at issue rather than giving or selling them outright. 3.RR.13:22–14:2 ("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[.]").

the primary purpose of economic development or enhancement of tax revenues." TEX. CONST. art. I, § 17. Nothing about ports in there. That should be the end of the matter.

Moreover, the fact that certain *statutory* post-*Kelo* reforms exempted certain entities, including ports and transportation projects, does not mean that such an exemption should be read into the Texas Constitution, which says nothing about them. Rather, it "demonstrates that the Legislature knew how to exempt" ports if it wanted to. *Miller v. Keyser*, 90 S.W.3d 712, 719 (Tex. 2002); *cf. Leonard v. Abbott*, 366 S.W.2d 925, 927 (Tex. 1963) ("The Legislature knew how to use appropriate language to confer venue where the cause of action or a part thereof arose, had it desired to do so."). The Port's approach to constitutional interpretation would make the words of the Constitution subservient to very differently worded contemporaneous statutes. That is not a valid approach. *See Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 550–51 (Tex. 2021) ("[T]he dissent's need to alter section 9's wording to limit its proposed new exemption confirms that the section contains no separate exemption[.]").

When the Port does finally turn to the constitutional text, it argues that all of the statutory exemptions that were explicitly written into Texas

Government Code § 2206.001 are somehow implicit in a single word of the 2009 amendment—"primary." Resp. Br. 24 ("the constitutional amendment inserts the word 'primary,' which accomplishes the same goal"). This is just not a plausible interpretation of the plain text of the Constitution. Whether property is being taken for the "primary purpose of economic development" does not depend on whether the entity taking the property happens to be a port. What matters is *why the property is being taken*.

The words of the Texas Constitution and the words of the statutory reforms are different, and this Court should give effect to those words. While the statutory and constitutional reforms reflect a similar concern with eminent-domain abuse, they do not accomplish the same things. The statutory reforms contain a large number of categorical carveouts for, among other things, ports, but the statute is significantly more restrictive than the 2009 constitutional amendment with regard to things that it does cover. Under the statutory reforms, unless a specific exemption applies, eminent domain is unlawful if it "confers a private benefit on a particular private party through the use of the property" or "is for economic development purposes." TEX. GOV'T CODE § 2206.001(b). By contrast, under the constitutional amendment, the eminent domain is unlawful if its "primary

purpose" is economic development. The latter standard applies more broadly (because it has no carveouts), but it is therefore less demanding (in that it does not forbid all private benefits). The Port's approach would read these differences out of the law entirely, and it should therefore be rejected.

e. The record establishes that the Port intends to take the Landowners' property for a prohibited economic-development purpose.

The record supporting taking and the condemnation petition is remarkably sparse. The Port testified that it does not know what it will eventually do with the Landowners' properties, other than market them "to potential users for lease as industry and business sites." R.495. What happens to the property will depend entirely on the private businesses that use it: "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." R.495. This will hopefully "encourag[e] more investment in our region and state, creating more economic activity and jobs that will support families in our community." R.495.

In candor, the Port's summary-judgment testimony reads as if it were *trying* to violate the Texas Constitution, which specifically states 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. The Port's own declaration squarely says it wants to do exactly the thing prohibited by Section 17, and this Court is entitled to take the Port at its word.

In its brief, the Port suggests that allowing private businesses unfettered discretion over how to use the land should cut in its favor. After all, it reasons, a third party could build *anything*, listing examples like inspection facilities for U.S. Customs and Border Control or the Department of Agriculture, refrigeration facilities (for bananas and avocadoes), or truck staging areas. Resp. Br. 26–27. Even if we were to grant that some of these proposed uses would be public (the inspection facilities might be; banana refrigerators less so), they are still just hypothetical, and they are not the reason that the Port took these properties. The reason the Port took them was so that private businesses could decide what to do with them. R.495 ("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[.]").

That violates the Texas Constitution, regardless of the possibility that some of those businesses might eventually decide to put the property to a

valid public use. *Cf. Mayor v. Thomas*, 645 So. 2d 940, 943 (Miss. 1994) (setting aside condemnation where "City failed to provide conditions, restrictions, or covenants in its contract" with a third party "to ensure that the property will be used for the" promised public use.).

If this Court were to embrace the Port's argument, the 2009 amendment would be a dead letter. Parties could always seize property for redevelopment and defend their actions by stating that it's theoretically possible that some potential private purchasers might put the property to a public use. Indeed, in *Kelo* itself,[5] the condemnor could equally plausibly have said that a future private developer might decide some of the land would be put to a better use as parkland. At bottom, the Port's contention is that Texas courts have no business reviewing condemnations. But the law is otherwise: Courts have an affirmative responsibility to assess public use at the time of the taking. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex.*, LLC, 363 S.W.3d 192, 198 (Tex. 2012) ("We have long held that 'the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts.'"). The Port's approach would make

[5] As explained in the Landowners' opening brief, and as the Port does not contest, the point of the 2009 amendments was specifically to adopt the position of the dissents in *Kelo*.

it impossible to discharge this duty. Its position should be rejected, and the trial court's ruling to the contrary should be reversed.

II. This taking is illegal because Texas condemnations, like condemnations anywhere, must be supported by a present, plausible public use.

The Landowners' opening brief also established that Texas courts, like the courts of every other state across the country, require a condemnor to establish *both* a particular public use justifying a condemnation *and* a reasonable probability that this public use will come to fruition. Indeed, these are requirements under both the U.S. and Texas Constitutions. Even setting aside the unconstitutionality of its late-breaking announcement that it actually plans to transfer the Landowners' property to private owners, this condemnation fails on both fronts. Op. Br. 18–23.

In response, the Port asserts, incorrectly, that Texas courts are less protective of property rights and more deferential to condemnors than are the courts of other states (addressed in part a, below). It also falsely claims that Texas courts allow condemnations to proceed to judgment based on vague, "categorical" assertions of public use like "school purposes" (part b). And, finally, it suggests that Texas courts bless condemnations even when

the condemnor has no chance of using the land (part c). Each argument is addressed and refuted in turn below.

a. Texas courts are not significantly less protective of property rights than the courts of other states.

As demonstrated in the Landowners' opening brief, nearly every state requires that a condemnation be supported by a particular public use and that the stated use be reasonably likely to occur. Op. Br. 23–33. These decisions are grounded in both the U.S. Constitution and the applicable state constitutions.

In its response, the Port seemingly concedes that this requirement exists in other states. It insists, however, that Texas courts are simply less protective of property rights than are the courts of New York or New Jersey or California or Mississippi or Utah.

They are not. And the Port's misguided belief that Texas courts are more willing to indulge sketchy condemnations than the courts of other states rests entirely on its failure to engage with the cases cited in the Landowners' opening brief. The Port's apparent position is that none of these cases is applicable because a Texas condemnation will be set aside only in the case of "fraud, bad faith, or arbitrary and capricious conduct." Resp. Br. 30–31. But, of course, it is "arbitrary" and "capricious" and in "bad

faith" to take land for no reason, in service of a project that will never come to pass. That is exactly what the cases cited in the Landowners' opening brief say.

Indeed, many of the cases cited in Landowners' opening brief articulate almost exactly the standard of review that Texas invokes—and they use this standard to invalidate speculative takings just like the one here. Op. Br. 23–29 (collecting cases); *see, e.g., State ex rel. Sharp v. 0.62033 Acres of Land*, 112 A.2d 857, 859 (Del. 1955) ("In the absence of fraud, bad faith or abuse of discretion, the determination of the Legislature or of the state agency to whom the power has been delegated will not be disturbed."); *City of Stockton v. Marina Towers LLC*, 88 Cal. Rptr. 3d 909, 921, 924 (Cal. Ct. App. 2009) (noting that a condemnor commits a "gross abuse of discretion" when it "acts arbitrarily or capriciously" and rejecting condemnation where authorizing was "woefully lacking in its identification of the project"); *Casino Reinvestment Auth. v. Birnbaum*, 203 A.3d 939, 949–50 (N.J. Super. Ct. App. Div. 2019) (noting that the relevant standard was "manifest abuse of power[,]" which it equated with "'fraud or bad faith'").[6]

[6] It does not matter whether a court locates the requirement that future public use not be speculative, arbitrary, in bad faith, or capricious in the "public use" requirement or in the "public necessity" requirement. The underlying principle is the same, and the Landowners challenge the Port's taking on these grounds, no matter what you call them.

The only way to conclude that these cases applied a different substantive standard than the one that governs Texas's public-use inquiry is to fail to read them. But if the Port had read these cases, it would have seen that their plain text applied either identical or equivalent standards of review—and the courts uniformly found that these standards required them to reject takings that lacked a specific purpose the condemnor could reasonably expect to achieve.

Most of these decisions, moreover, do not purport to be based in any unique aspect of state law. Rather, they cite decisions from within the state, from other states, and from federal caselaw interchangeably. That is because they were applying general eminent-domain principles that are the same under the U.S. Constitution and that of every state, including Texas. The Port's contrary arguments should be rejected, and the trial court's decision should be reversed.

b. This taking fails because the Port failed to identify a particular proposed use for the condemned property.

As demonstrated in the Landowners' opening brief, an inherent element of establishing a *public* use for a condemnation is establishing a specific use in the first place. Op. Br. 19–23. This makes logical sense: If

courts must evaluate whether a use is sufficiently public to justify a condemnation, they must know what the proposed use is.

The Port responds by claiming that Texas law permits condemnations for broad, "categorical" purposes like "school purposes" or "the transportation of water" and therefore (one assumes) also allows condemnations justified by no more than the invocation of *port purposes* as well. Resp. Br. 29–30.

But Texas courts allow no such thing, and the Port's own cases undermine the Port's theory. The Port first relies on *Circle X Land & Cattle Co. v. Mumford Independent School District*, 325 S.W.3d 859, 868 (Tex. App.—Houston [14th Dist.] 2010, pet. denied), for the proposition that a condemnation can be premised on no more than "educational purposes." Hardly. The condemnor in *Circle X* "submitted . . . architectural drawings of [its] new facilities and an email from an architecture firm . . . explaining why [it] needed to condemn thirty acres." *Id.* at 866. To be sure, the initial resolution authorizing the condemnation in that case was vague, failing to "expressly state the condemnation's purpose or necessity," but that failing was more than cured by subsequent testimony and evidence. *Id.* at 865–66.

The Port's only other case is more of the same. In *Lin v. Houston Community College System*, 948 S.W.2d 328 (Tex. App.—Amarillo 1997, writ denied), the court held that a vague invocation that land would be used for "school purposes" was enough to establish *jurisdiction* because the vague purpose could be cured "through the normal trial litigation procedures[.]" *Id.* at 334. And it *had been* cured: The condemnor had subsequently clarified that it would build "a health careers center" on the condemned land. *Id.*

At most, then, the Port's cases stand for the proposition that an inadequate initial pleading is *curable* in a condemnation case. A condemnor that files a petition with a vaguely stated public use may be permitted to fill in the details later. But the Port *did not* fill in the details later (at least not any constitutionally acceptable details), and that makes all the difference. According to the Port's cases, Texas courts must evaluate the lawfulness of the particular use justifying a condemnation, which means a condemnor must actually *identify* that particular use. Op. Br. 22.

The Port has still not done so. At the outset, this condemnation was supported by the vague invocation that the Port would do something port-related with the land at some unspecified future date. That is still the Port's only justification for the taking. The Port does not have the architectural

drawings that justified the condemnation in *Circle X*. It has not identified the health careers center at the heart of the condemnation in *Lin*. It has not identified *anything* that it will do with this land beyond using it for whatever it decides to use it for (or whatever its eventual private transferees decide to use it for). That is insufficient to establish a public use, and the trial court's ruling to the contrary was error.

c. The taking also fails because the Port could not prove that its proposed public use is reasonably likely to occur.

The Landowners' opening brief further established that a proposed public use in Texas (like anywhere else) must be reasonably likely to occur. Op. Br. 20–21. The Port's contrary arguments—either that no such standard exists in Texas or that this taking could survive it—fail.

Begin with the standard. The Port says it needn't meet any reasonableness standard at all because the case in which the Texas Supreme Court most clearly articulated the "reasonable probability" standard—*Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 202 (Tex. 2012)—was a case about whether a proposed pipeline would in fact be a common carrier. Resp. Br. 32–33. But nothing in *Denbury Green* suggests that it is articulating a test that applies only to common carriers—

that a *pipeline* must present a reasonable likelihood of future public use but that anyone else may rely on raw speculation.

And the only case the Port can muster to the contrary is *Circle X*—a case where, again, the condemnor provided detailed architectural plans in support of the specific project it intended to build. *See supra* 20–21. The Port provides no Texas case—indeed, no case from anywhere—endorsing the idea that a condemnor can take property based on its own unsupported assertions that it will come up with something to do with it. The cases all go the other way, and the trial court's ruling to the contrary should therefore be reversed.

The Port fares no better when it argues in the alternative that this condemnation would survive the "reasonable probability" standard that it insists should not apply. Its argument on this front relies entirely on the idea that it need prove only that it is likely to *do something*—not that it is likely to do something *with the Landowners' property*. The Port's brief avoids talking about the actual properties that are at issue in this case, preferring instead to discuss the much larger "expansion area." Resp. Br. 5, 6, 13, 25, 26, 34. For instance, the Port says it has secured funding and taken concrete steps to build roads for an expansion of its facilities. Port Br. 33–34. But it does not

contend (because it is not the case) that those roads will be built on the Landowners' property. It does not contend that *anything* will be built on the Landowners' property.

That is because it has no plans for the Landowners' property. At best, it says it wants to expand the Port's facilities, and it expects that, one day, that expansion will require the Landowners' property—***though it may not need the land for over a decade***, and cannot say what it will be needed for or how it will pay to build anything on it. The Port confessed this openly at its entity deposition below. Op. Br. 3–5. And the Port's appellate brief does not explain how to square that testimony with any version of a "reasonable probability" test. The Port ignores the record evidence, and apparently hopes this Court will ignore it as well. But record evidence matters in Texas, and the Port has repeatedly declined to provide any kind of evidence to suggest that the Landowners' property will be used for *anything* at any *time*. That means the Landowners' property cannot be condemned today in service of this wildly speculative future use, and the trial court's ruling to the contrary should be reversed.

* * *

At bottom, the Port attempts to turn the usual eminent-domain burdens on their head. Ordinarily, a condemnor must come into court and prove that it intends to use the condemned land for a constitutionally valid public use. Here, the Port contends that it should be entitled to announce only that it intends to use the condemned land however it sees fit—or however unknown third parties see fit—that it may choose to use it for a traditional public use or for an entirely private use or for nothing at all. In the Port's view, this makes its condemnation beyond constitutional challenge because, after all, the Landowners cannot conclusively prove that the land will be used for a private use if the record does not establish that it will be used for anything at all. But in Texas, the tie goes to the property owner, not the condemnor. *Denbury Green*, 363 S.W.3d at 198 (noting that eminent-domain powers are "strictly construed in favor of the landowner").

The Landowners do not need to prove that their land will be used for *un*constitutional purposes; the Port needs to prove that the land will be used for *constitutional* purposes. The trial court's decision gets that rule exactly backwards. This rule is not, as the Port would have it, "impractical." Resp. Br. 1. It is how eminent domain works everywhere, including Texas. It will not hamstring the Port, and it will (sadly) not even protect the Landowners'

property forever; it will simply require that the Port have an actual plan in place before it forces people out of homes that their families have lived in for generations.

CONCLUSION

The trial court's ruling should be reversed and this case remanded for further proceedings to determine what damages the Port's unlawful condemnation has caused and what amount of attorneys' fees the Port must pay under Texas Property Code § 21.019 and other applicable laws.

Dated: May 20, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2024, a true and correct copy of the foregoing Appellants' Reply 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.

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CERTIFICATE OF COMPLIANCE

Microsoft Word reports that the foregoing Appellants' Reply Brief contains 5,833 words, excluding the portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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