No. 18-1062

In the Supreme Court of the United States

Love Terminal Partners, L.P., and
Virginia Aerospace, LLC,

Petitioners,

v.

United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the Federal Circuit err when it held that the federal government was not liable for the taking of Petitioners property because the Wright Amendment Reform Act did not direct the City of Dallas to acquire the Lemmon Avenue Terminal?

2. Whether this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), has permitted governments to collude with private parties to take property for private use without providing Just Compensation?

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INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public interest legal foundation organized under the laws of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside, own property, and work in all 50 states. Since its creation in 1977, MSLF and its attorneys have defended individual liberties and have been active in litigation opposing governmental actions that result in takings of private property. *See, e.g.*, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014).

[1] All parties have consented to the filing of this brief. Counsel of record for the parties received timely notice of the intention to file this brief. Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

Certiorari is appropriate and even needed in this case because the Federal Circuit's decision is inconsistent with Takings Clause jurisprudence. Petitioners aptly warn that "the government-friendly standard [erroneously] embraced . . . by the Federal Circuit lends itself to abuse by states, local governments, and private parties." Pet. at 35.

The Lemmon Avenue Terminal, owned by Petitioners, was condemned after the City of Dallas conspired with the City of Fort Worth and both Southwest Airlines ("Southwest") and American Airlines ("American") to divide up the North Texas market in the Five-Party Agreement. The Lemmon Avenue Terminal was removed because it was both a political and economic threat to the other parties. The conspiring parties have previously escaped liability for their blatant antitrust violation because the Wright Amendment Reform Act ("WARA") specifically incorporated the terms of the Five-Party Agreement, shielding it as a law. WARA explicitly directed Dallas to acquire the Lemmon Avenue Terminal.

Not only, however, were the parties to the Five-Party Agreement shielded from the consequences of their monopolistic behavior, the Federal Circuit further shielded their actions and denied Petitioners compensation for the condemnation and destruction of the Lemmon Avenue Terminal. Contrary to the history of WARA and multiple trial court findings, the Federal

Circuit's decision denied takings liability, in part, because WARA supposedly did not incorporate the *entire* Five-Party Agreement. Not only is this decision inconsistent with the rule that the federal government incurs takings liability when a third party acts under its directive, *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), it creates a dangerous road map for Congress, state, and local governments to work together to evade the Just Compensation requirement enshrined in the Fifth Amendment.

It is through this prism that *amicus curiae*, Mountain States Legal Foundation, urges this Court to grant certiorari and carefully consider the entirety of circumstances involved in the taking of Petitioners' property. The sordid saga of the Wright Amendment and WARA exposes how rent-seeking protectionism, government-sanctioned anticompetitive collusion, and the broad interpretation of the Public Use Clause of the Fifth Amendment, particularly after this Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), meld together to endanger property rights across the country.

This Court's decisions permit private parties to conspire with elected officials to achieve anticompetitive results. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 364, 382–83 (1991). They also permit private property to be taken by government and transferred to other more politically powerful or favored private parties under the guise of "public use." *Kelo*, 545 U.S. 469; *Hawaii*

Housing Authority v. Midkiff, 467 U.S. 229 (1984) (permitting land to be taken and given to the private parties leasing the property in order to break up a small group of private landowners). Now, in *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331 (Fed. Cir. 2018), the Federal Circuit goes further, and has permitted the government to immunize anticompetitive takings by: (1) combining value-enhancing regulatory changes with value-destroying takings, Pet. at 3; and (2) delegating the physical condemnation to a local government, which colluded with private parties to remove a competitor.

When viewed as a whole, this demonstrates the hazard that this Court's various precedents have placed on property owners, large and small, as they battle predatory government behavior at all levels. The *Kelo* majority suggested that property owners concerned about eminent domain abuse turn to the states for greater protection. *See* 545 U.S. at 489. Yet, where are property owners to turn when all levels of government conspire to not only take private property for private gain but also evade paying Just Compensation?

FACTUAL BACKGROUND

The Wright Amendment began as a protectionist measure designed to insulate both Dallas-Fort Worth International Airport ("DFW") and American from competition. A tiny entrepreneurial upstart called Southwest Airlines

refused to have its spirit, or aspirations, defeated by the anticompetitive deal cut by the once-warring cities of Dallas and Fort Worth. For decades, Southwest operated in spite of the Wright Amendment and it grew into one of the largest airlines in the United States. But prolonged battles against powerful special interests can become a Sisyphean labor where even the strongest free-market convictions can give way to harsh political realities and pragmatic deal making. The eventual repeal of the Wright Amendment was backed explicitly by Southwest and American Airlines, the cities of Dallas and Fort Worth, and the DFW Airport Authority and was plagued with the same anticompetitive baggage as the Wright Amendment itself. This time, however, it was Petitioners that became the sacrificial lamb. *See* Pet. at 1.

A. The Aviation Battle for North Texas

Prior to the Wright Amendment, Dallas and Fort Worth were engaged in a fierce rivalry over commercial aviation. Dallas operated Love Field, while Fort Worth constructed Greater Southwest International Airport—12 miles away. After a "gentle nudge" from the FAA's predecessor, the Civil Aeronautics Board ("CAB"), the two cities agreed to end the rivalry and jointly build a single airport for the area approximately midway between them, in Grapevine, Texas. Eight of the nine airlines servicing the region agreed to relocate their operations.

Southwest, a small commuter airline at the time which operated purely intrastate flights, chose to remain at Love Field. Dallas and Fort Worth, as well as the Regional Airport Board, filed suit against Southwest to force it to move operations to DFW. *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd.*, 494 F.2d 773 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974). Various other parties fought for the better part of the decade to prevent Southwest from operating at Love Field. *See Sw. Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 102 (5th Cir. 1977) ("This is the eighth time in three years that a federal court has refused to support the eviction of Southwest Airlines from Love Field.").

B. The Wright Amendment

In 1978, Congress dramatically shifted the paradigm by passing the Airline Deregulation Act, Pub. L. 95-504, 92 Stat. 1705, "aimed at removing government control and fostering competition in the airline industry." Jennifer C. Wang, *Time for Congress to Spread Love in the Air: Why the Wright Amendment Was Wrong Before, and Why It Deserves Repeal Today*, 70 J. Air L. & Com. 353, 357 (2005). Southwest, in turn, sought and received permission from CAB to offer interstate flights from Dallas to New Orleans, which alarmed politicians in both Dallas and Fort Worth. *Id.*

Fortunately for the two cities and DFW, then-House Majority Leader (and future Speaker of the House) Jim Wright represented Fort Worth. Rep.

Wright was at that time heavily involved in convincing American to move its headquarters from New York City to Texas. *See* Rowland Stiteler, *How We Got American Airlines*, D Magazine (July 1979). Wright did not have the political power to thwart deregulation, but was able to attach an amendment to the International Air Transportation Competition Act of 1979. Pub. L. No. 96-192, 94 Stat. 35 (1980). The initial version of the amendment would have banned *all* interstate flights from Love Field. *Love Terminal Partners, L.P. v. City of Dallas, Tex.*, 527 F. Supp. 2d 538, 544 (N.D. Tex. 2007). To secure passage in the Senate, a "compromise" version was enacted, which restricted interstate flights from Love Field to four contiguous states for planes with a capacity of 56 or more passengers and became known as the Wright Amendment. *Id.*

At that time smaller planes were not economically viable for long routes, so the Wright Amendment locked Southwest out of the larger interstate market and guaranteed a monopoly for long-haul flights at DFW.

Beginning in 1996, a startup called Legend Airlines ("Legend") sought approval from the Department of Transportation ("DOT") to work around the Wright Amendment by providing all-business class service on 56-passenger aircraft to profitable destinations such as New York City and Washington, D.C. Pet. at 6. These planes were capable of carrying more than 56 passengers but were modified to meet Wright Amendment restrictions. *Id.* at 7. The existing airlines objected

to DOT, but the Shelby Amendment clarified that these modified planes complied with the Wright Amendment. Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

Fort Worth and American tried to block the Shelby Amendment and engaged in a multifaceted litigation strategy that delayed Legend from providing service from Love Field until 1999. *American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 793–95 (5th Cir. 2000), *cert. denied*, 530 U.S. 1274, 1284 (2000). Meanwhile, Legend sought investors for the construction of a new terminal on its lease, ultimately settling on the parent company of Petitioners. *See* Pet. at 8. At a cost of $17 million, Petitioners' parent company completed the new terminal in early 2000. *Id.* at 10. Legend began offering service out of this new terminal in late 2000. While the litigation brought by American and Fort Worth ultimately failed, deprived of needed capital during this time, Legend filed for bankruptcy. *Id.* As part of the bankruptcy Petitioners resumed control of the terminal.

C. The Five-Party Agreement

By the mid-2000s, it was obvious that the Wright Amendment was unsustainable. The most vocal dissenter to the Wright Amendment's anticompetitive features, Southwest, had grown from a local startup to a formidable player in the airline industry and had engaged in a massive push for full repeal of the Wright Amendment. Southwest even threatened to move its headquarters away from

Dallas if the Wright Amendment was not repealed. Barret V. Armbruster, *Wright Is Still Wrong: The Wright Amendment Reform Act and Airline Competition at Dallas Love Field*, 81 J. Air L. & Com. 501, 509 (2016). In response, American lobbied for outright prohibition of commercial air service from Love Field.

Reluctant to choose sides between politically powerful organizations, Congress left the solution to the most influential of the affected parties: Dallas, Fort Worth, the DFW Airport Authority, American, and Southwest. From August 2005 to February 2006, Southwest and Dallas secretly discussed destroying the Lemmon Avenue Terminal. *Love Terminal Partners*, 527 F. Supp. 2d at 545. The two eventually agreed to destroy the Lemmon Avenue Terminal in order to "ensure the success of the scheme to divide the North Texas air markets and to insulate Southwest from increased competition." *Id.* This agreement was incorporated into the July 2006 Five-Party Agreement, which called for Congress to loosen the restrictions on Love Field but to do so at Petitioners' expense through the destruction of the Lemmon Avenue Terminal. *See* Pet. at 12–13.

Dallas was contractually obligated under the Five-Party Agreement to use its governmental powers to ensure the Lemmon Avenue Terminal was dismantled or demolished. *Love Terminal Partners*, 527 F. Supp. at 546. The Five-Party Agreement was explicitly contingent on Congress later adopting its terms. *Id.* at 550 ("This agreement is predicated upon the Condition that Congress will enact

legislation to implement the terms and spirit of this agreement."). Moreover, it would become null and void if Congress did not enact legislation by December 31, 2006. *Id.*

Meanwhile, in early 2006, Petitioners began negotiations with Pinnacle Airlines ("Pinnacle") to take over the lease at the terminal. *Id.* at 544. Pinnacle would have offered a new competitive option in the Love Field market and "introduced competition into markets monopolized by Southwest and Dallas." *Id.* The deal was valued at approximately $100 million. *Id.* at 554. When the Mayor of Dallas learned of this, fearing it would disrupt the Five-Party Agreement, she announced in June 2006 that Dallas did not intend for the Lemmon Avenue Terminal to be used for air travel. *Id.* (citing Emily Ranshaw & Suzanne Marta, *Legend's ghost haunts Love*, *Dallas Morning News* (June 3, 2006)). Pinnacle subsequently terminated negotiations with Petitioners. *Love Terminal Partners*, 527 F. Supp.2d. at 546.

D. Wright Amendment Reform Act

In 2006, Congress incorporated the Five-Party Agreement into WARA.[2] Pub. L. No. 109-352, 120 Stat. 2011 (2006). Sen. Kay Bailey Hutchison (R-TX) introduced the bill that became WARA two days after the Five-Party Agreement was executed. Pet. App. 173.

Congress was warned by the American Antitrust Institute to approach WARA "with a jaundiced eye, particularly where the agreement contains a provision immunizing the parties from the default rule of competition contained within the antitrust laws." Erin Marie Daly, *Antitrust Experts Condemn Proposed Wright Deal*, Law360 (Aug. 30, 2006), https://www.law360.com/articles/9376/antitrust-experts-condemn-proposed-wright-deal. In evaluating WARA, the Department of Justice remarked that the restrictions "would be hardcore, per se violations of the Sherman Act." *Id.* Were it not for the Five-Party Agreement and WARA, the Lemmon Avenue Terminal would have been viable for competitors to enter the market at Love Field.

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[2] Splitting monopoly power is difficult because it requires the conspirators to win a two-front war: "First they have to allocate the gains between them in a stable fashion that guards against cheating by either player. Second, they have to find a way to block new entry by savvy competitors that otherwise would find a comfortable new home underneath the monopoly umbrella." Richard A. Epstein, *The Wright Stuff*, 30 Reg. 8, 10 (Spring 2007). With these challenges in mind, Southwest and American turned to DFW, Dallas, and Fort Worth to craft a solution.

Pet. App. 110 (noting "the evidence demonstrate[d] that there was a market for [Petitioners'] property at the time of the taking"); Pet. App. 111 (finding that the highest and best use of Petitioners leasehold before WARA was as a passenger airline terminal).

The Court of Federal Claims remarked that WARA "was clearly anticompetitive" and announced that it "was enacted solely to protect the interests of two cities (Dallas and Fort Worth), two airlines (Southwest and American), and a competing airport (DFW), all to the detriment and expense of [Petitioners]." Pet. App. 128–129. Thus, Congress was "willing to tolerate and sanction some anticompetitive behavior" regarding airline competition in North Texas to bring about the eventual end of the Wright Amendment. *Love Terminal Partners*, 527 F. Supp. 2d. at 560.

E. Antitrust Litigation

Petitioners brought federal antitrust claims against Dallas, Fort Worth, American, Southwest, and the DFW International Airport Board under sections 1 and 2 of the Sherman Antitrust Act. *Love Terminal Partners, L.P. v. City of Dallas, Tex.*, 527 F. Supp. 2d 538 (N.D. Tex. 2007). The district court recognized, "[b]y… allocating the gates at Love Field to uphold Southwest's dominance over the short-haul market, and requiring that the LTP Terminal be demolished, [WARA] almost undoubtedly conflicts with the Sherman Act." *Id.* at 560.

Further, the WARA-incorporated Five-Party Agreement divided the market for flights to and from North Texas between American and Southwest, wherein Southwest agreed it would not compete with American in providing domestic, non-stop, long-haul flights for eight years, and never from DFW. *Id.* at 545. Southwest could not offer service at DFW without giving up one gate at Love Field for each it opened up at DFW. *Id.* Southwest further agreed that even if Congress repealed the Wright Amendment in less than eight years, it would not offer long-haul service from Love Field. American and Southwest agreed to extend the Wright Amendment's restrictions for eight additional years, even if Congress was not to act. *Id.*

Southwest benefitted from the barrier to entry at Love Field. *Id.* at 546. The Five-Party Agreement deterred other low-cost carriers from entering the Love Field market. *Id.* at 546. American benefitted because the Wright Amendment prevented competition from Southwest non-stop flights to states outside the Wright Amendment protected states. *Id.* at 545. Further, American was "simultaneously protected from low-cost entrants at Love Field who could compete with American's flights from DFW." *Id.* at 546. American was, thus, able to continue to charge a premium for long-haul flights out of DFW for eight more years. *Id.*

The Five-Party Agreement reduced the number of gates at Love Field from 32 to 20 and divided those gates among Southwest (16), American (2), and ExpressJet (2) (operated by Continental

Airlines). *Id.* The most expedient way to reduce the number of gates was to remove the six gates owned by Petitioners at the Lemmon Avenue Terminal. None of the three airlines at Love used those gates and neither Dallas nor Fort Worth had any control over the operations there. *Id.* As a result, the Five-Party Agreement required Dallas to use its eminent domain power to remove Petitioners from the market. *Id.* Without the Lemmon Avenue Terminal, Southwest was guaranteed a monopoly on short-haul flights. *Id.*

Because WARA mandated destruction of Petitioners' terminal, depriving Petitioners' property of its only economically viable use Petitioners ceased paying their lease. Pet. App. 13. At that point, Dallas evicted them, and ultimately demolished the terminal. *Id.*

For the actions committed by the parties prior to WARA, the district court concluded that because the Five-Party Agreement was ultimately codified in WARA, the anticompetitive acts were shielded from liability. In part because this Court has "expressly refused to recognize an exception [to *Noer-Pennington* immunity] that would apply 'when government officials conspire with a private party to employ government action as a means of stifling competition,'" *Love Terminal Partners*, 527 F. Supp. 2d at 548 (quoting *Omni*, 499 U.S. at 382), the district court had no choice but to hold that the Five-Party Agreement was immunized. *Id.* at 550.

In asserting antitrust liability for the post-WARA actions, Petitioners argued that WARA did not actually compel Dallas to implement the terms of the Five-Party Agreement. *Id.* at 558. The court held that ***WARA "plainly and unambiguously incorporate[d] all the rights and obligations of the [Five-Party Agreement]***." *Id.* at 558.

Petitioners were thus deprived of a remedy for the anticompetitive effect of the Five-Party Agreement and now, as a result of the challenged Federal Circuit decision, have also been deprived of compensation for the associated taking of their property. The Federal Circuit erred, creating monstrous precedent against the sanctity of property rights, and this Court should not let stand the uncompensated taking of private property for the monopolistic benefit of other private use.

ARGUMENT

I. CONGRESS COMMITTED A PHYSICAL TAKING BY DIRECTING DALLAS TO ACQUIRE THE LEMMON AVENUE TERMINAL

The Court of Federal Claims correctly held that WARA effected a physical taking of Petitioners' terminal because, by incorporating the Five-Party Agreement, it required Dallas to demolish

Petitioners' property. Pet App. at 235, 325.[3] The Court of Federal Claims explicitly found that it was clear that Congress intended to incorporate the Five-Party Agreement into WARA. *See* Pet. App at 268–295. It conducted a careful analysis and concluded that WARA either "replicated or gave effect to parallel [Five-Party Agreement] provisions." Pet. App. 273. WARA explicitly references the Five-Party Agreement several times. Pet. App. 273–74. It also specifically incorporated into federal law five key obligations in the contract. Pet. App. 275–95. Moreover, Congress itself recognized that the purpose of the WARA was to "implement a compromise agreement reached by the City of Dallas; the City of Fort Worth, Texas; American Airlines; Airlines; and [DFW] . . . on July 11, 2006, regarding air service at Dallas Love Field." Pet. App. 316.

The factual background clearly demonstrates that Congress incorporated the Five-Party Agreement into WARA. In fact, this incorporation is what spared the parties from antitrust liability. Through WARA, Congress destroyed the future value of Petitioners' terminal by mandating that it never be used again for air passenger service. It simultaneously instructed Dallas to condemn the terminal.

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[3] The U.S. District Court for the Northern District of Texas also held that WARA specifically incorporated the Five-Party Agreement. *Love Terminal Partners*, 527 F. Supp. 2d at 558–59.

Directly contrary to these findings and leaving Petitioners with no remedy, the Federal Circuit denied Petitioners Just Compensation by finding that "WARA did not codify the Five-Party Agreement in its entirety and specifically did not codify the portions of the Agreement in which Dallas agreed to acquire and demolish [Petitioners'] gates." Pet. App. 26.

The decision by the Federal Circuit flies in the face of existing law and should be reviewed and reversed. "[W]hen the Federal Government puts into play a series of events which result in a taking of private property, the fact that the Government acts through a state agent does not absolve it from the responsibility, and the consequences, of its actions." *Preseault v. United States*, 100 F.3d 1525, 1551 (Fed. Cir. 1996). A compensable taking occurs when the "government's actions on the intermediate third party have a 'direct and substantial' impact on the plaintiff asserting the takings claim." *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1361 (Fed. Cir. 2002). The exceptions to this rule occur when the federal government only has mere awareness of the actions of the third party, *Shewfelt v. United States*, 104 F.3d 1333, 1337 (Fed. Cir. 1997), or only engaged in "friendly persuasion" with respect to that activity, *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985), or the third party has exercised its own discretion, *Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297, 300–01 (Fed. Cir. 1987).

Preseault held that the federal government engaged in a taking by approving a state's lease of a former railroad easement to a city for conversion to a trail. *Id.* at 1551; *see also Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004) (federal government liable despite city being the entity that established trail). Additionally, in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), the Federal Circuit held the federal government liable for a taking when the EPA issued an order that authorized and directed the state to enter private land and establish monitoring wells.

Despite the Court of Federal Claims' findings about the similarities of these circumstances, here the Federal Circuit decided WARA did not incorporate Dallas' commitment to demolish the Lemmon Avenue Terminal. Pet. App. 27–28. Instead, it concluded "the requirement that federal funds not be used for removal of Lemmon Avenue gates explicitly distances the federal government from Dallas' intended action." Pet. App. 27. Moreover, even if WARA had codified that portion of the Five-Party Agreement, "it still would not constitute a physical taking" because "[i]ncorporation of these provisions, at most, required Dallas to negotiate with [Petitioners] and then, if negotiation proved unsuccessful, bring a condemnation proceeding pursuant to which [Petitioners] would receive just compensation." Pet. App. 28. Further, the Federal Circuit remarked that WARA's requirement that Dallas acquire the Lemmon Avenue Terminal through eminent domain would not be a taking by the United States because Petitioners

"could have chosen to retain their leases, thereby compelling Dallas to take the property through a condemnation proceeding." Pet. App. 28.

Left unchecked, the reasoning by the Federal Circuit puts any private property at risk for an uncompensated confiscation that can be orchestrated by or for politically powerful or favored private parties. *Amicus curiae* therefore requests that this Court grant Certiorari.

II. WITHOUT REVIEW OF THE FEDERAL CIRCUIT, *KELO* WOULD NOW PERMIT UNCOMPENSATED TAKINGS FOR PRIVATE BENEFIT

The Wright Amendment Reform Act's taking of the Lemmon Avenue Terminal once again demonstrates the hazard of this Court's Public Use Clause jurisprudence under *Kelo v. City of New London*, 545 U.S. 469 (2005). Although the propriety of a public use taking under *Kelo* is not directly at issue, this case evidences the ultimate consequence of the ever-deferential slope of takings jurisprudence: condemnation without compensation. Two elements related to *Kelo* are worth recognizing. First, any conceivable public benefit from the condemnation of the Lemmon Avenue Terminal is negated by the detrimental monopolistic effect on consumers. Second, Dallas's elimination of a competing terminal is not a legitimate public use.

A. The Public Use Requirement Has Been Eviscerated

In the aftermath of *Kelo*, the line between public and private takings has been blurred to the point where "the judiciary . . . uphold[s] eminent domain no matter what the facts may be." Dana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L.J. Forum 82, 92 (2015). Yet applying proper legal standards, the destruction of the Lemmon Avenue Terminal and corresponding restrictions on the use of the property cannot a be considered "public use."

As an initial matter, the *Kelo* majority recognized that "naked or pretextual transfers from one party to another are still blocked" by the public use requirement. Epstein, *supra*, at 13. The *Kelo* petitioners warned this Court that "without a bright-line rule nothing would stop a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more

productive use and thus pay more taxes." *Id.* at 486–87 (majority opinion).[4] Claiming that was not the issue before the Court, *id.* at 487, the majority dismissed those concerns. The majority assured us that "[w]hile such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases posited by petitioners can be confronted if and when they arise." *Id.*; *see also id.* at 491 (Kennedy, J., concurring) (noting courts should strike down condemnations when there is a "clear showing" that the taking "is intended to favor a particular private party, with only incidental or pretextual public benefits"). That case is here now and should be confronted.

In the years since *Kelo*, the warnings of the dissenters have proven prescient. *See, e.g.*, Berliner, *Looking Back*, *supra*, at 91 ("It is a sign of the damage *Kelo* caused that these two related features of the opinion–blind deference and the refusal to engage with the facts–have market post-*Kelo* jurisprudence."). For example, the Fifth Circuit upheld a proposed economic development taking of a family shrimping business even though the taking would benefit one influential family. *W. Seafood Co. v. United States*, 202 Fed. App'x 670, 674–75 (5th

[4] Of course, this kind of abuse was occurring prior to *Kelo*. *See, e.g*, *Midkiff*, 467 U.S. 229; *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by Cty. of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (permitting city to condemn entire working class neighborhood that was not blighted for General Motors assembly plant).

Cir. 2006). Elsewhere, in *Kaur v. New York State Urban Dev. Corp.*, 15 N.Y.3d 235, 933 N.E.2d 721 (2010), the New York Court of Appeals allowed a public authority to use eminent domain to displace thousands of vulnerable residents for the benefit of Columbia University, a multibillion-dollar institution. *See also Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164 (N.Y. 2009) (allowing use of eminent domain to build NBA arena). Nor do the courts seem to be concerned about public-private collusion. *See, e.g.*, *Whittaker v. Cnty. of Lawrence,* 674 F. Supp. 2d 668, 689–90 (W.D. Pa. 2009), *aff'd*, 437 F. App'x 105, 108 (3d Cir. 2011) (taking to build technology park that court recognized was possibly in bad faith did not violate the public use requirement); *see also* Ilya Somin, *The Judicial Reaction to Kelo*, 4 Alb. Gov't L. Rev. 1, 15 (2011) (noting that in both *Kaur* and *Goldstein* there was "considerable" evidence of political corruption).

B. The Use of Monopoly Power Negates Any Conceivable Public Use

The condemnation of the Lemmon Avenue Terminal does not satisfy the public use requirement of the Fifth Amendment. If there is to be any meaningful limitation on what constitutes "public use" then this Court cannot allow tangential benefits to third parties under a monopolistic regime to pass constitutional muster. *Cf. Kelo*, 545 U.S. at 501 (O'Connor, J., dissenting) ("Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not

realistically exclude any takings, and thus do not exert any constraint on the eminent domain power."). The Court of Federal Claims found that WARA destroyed Petitioners' property rights "for the sole benefit of the signatories to the Five-Party Agreement." Pet. App. 126. Moreover, the two prime beneficiaries of the condemnation and demolition of Petitioner's property are two private entities, Southwest and American—the two airlines that benefitted explicitly from WARA. Epstein, *supra*, at 13. *Cf. Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring) (observing that USDA's program that took raisins from citizens and gave them away or sold them to exporters, foreign importers, and foreign governments was likely not a public use).

While it could be argued that the public benefits from the participation of Dallas and Fort Worth in the deal, the use of the monopoly power negates that rationale. Epstein, *supra*, at 13. Were this rationale to qualify as a public use, it would sanction all private-to-private transfers as long as at least some of the public benefits while the rest of the public loses in the form of paying higher prices. *Id.* Prior to WARA's enactment, a group of leading antitrust scholars told Congress that WARA "utterly fail[ed] to help Dallas-Fort Worth fliers." Daly, *supra*. The scholars asserted that WARA not only placed an "undue burden on competition" but also imposed "substantial cost . . . upon consumers." *Id.* Another antitrust scholar, Prof. Darren Bush, remarked: "The agreement clearly exhibits enormous potential costs to consumers while showing them

little, if any, benefit." Robert Wilonsky, *Finding All That's Wrong About Wright Compromise*, Dallas Observer (Aug. 30, 2006), https://www.dallasobserver.com/news/finding-all-thats-wrong-about-wright-compromise-7145410.

C. Dallas's Removal of a Market Competitor is Not a Permissible Public Purpose

If it is determined as a matter of law that Dallas is the government entity responsible for the condemnation of Petitioners' property and not the federal government, Dallas did so for the impermissible purpose of removing a market competitor, which does not constitute public use. By removing the Lemmon Avenue Terminal, Dallas could charge a premium for gate access at the Main Terminal of Love Field, which it owned. When the government acts as a market participant, rather than as the sovereign, as it did here, the condemnation power should be subject to heightened scrutiny. This is because when the government acts to benefit its own financial interest to the detriment of its citizens, it no longer advances the public interest. *See* Jarod Bona & Luke Wake, *The Market-Participant Exception to State Action Immunity From Antitrust Liability*, 23 Competition: J. Anti. & Unfair Comp. L. Sec. St. B. Cal. 156, 171 (2014).

This Court has yet to clarify that elimination of competition is not a legitimate public use. *See, e.g.*, *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 239 So. 3d 243 (La. 2018), *cert. denied*, 139 S. Ct. 375 (2018) (upholding

government-owned port's use of eminent domain to eliminate competing private port six miles away as "public purpose"); *Commonwealth v. Susquehanna Area Reg'l Airport Auth.*, 423 F. Supp. 2d 472 (M.D. Pa. 2006) (airport authority used eminent domain to convert private parking facility into public parking facility). This is a *per se* violation of the Public Use Clause. *See, e.g.*, Brief for National Fed. of Ind. Bus. et al. as Amicus Curiae Supporting Petitioner, *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 139 S. Ct. 375 (2018).

D. The Court Should Stop The Parade of Horribles

When warned about the dangers of public-private collusion for the benefit of the politically well connected, the *Kelo* majority argued that "[a] parade of horribles [was] especially unpersuasive in this context, since the Takings Clause largely operates as a conditional limitation, permitting the government to do what it wants *so long as it pays the charge*." *Kelo*, 545 U.S. at 487 n.19 (quotations omitted) (emphasis added). Yet, in this case, the Federal Circuit determined that WARA was neither a per se regulatory taking of Petitioners' leases under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), nor a regulatory taking of the leases under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), nor a physical taking of the terminal itself. Pet. App. 2.

Petitioners had the entire value of their leases and property destroyed by open and obvious collusion

between American, Southwest, DFW, Dallas, and Fort Worth. Congress blessed this collusion by incorporating Five-Party Agreement into WARA but also managed to evade physical takings liability by directing the City of Dallas to acquire the Lemmon Avenue Terminal. Of course, Dallas was already contractually obligated under the Five-Party Agreement to do so and actively lobbied Congress to codify the Five-Party Agreement. *Love Terminal Partners*, 527 F. Supp. at 550. Dallas not only was able to remove a market competitor for gates at Love Field, but also had its own takings liability wiped out thanks to the predatory and anticompetitive provisions in WARA.

There may be no clear path for sorting through this tangled web of takings tests, rent-seeking, and collusion, but this Court has the opportunity to draw a line in the sand. *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 629 (2013) (Kagan, J., dissenting) (noting courts can use the *Penn Central* framework, the Due Process Clause, and other measures to prevent government from taking actions designed to evade takings law); *Norwood v. Baker*, 172 U.S. 269 (1898) (preventing circumvention of the Takings Clause by prohibiting government from imposing a special assessment for the full value of a property in advance of condemning it). What is clear is that this case demonstrates how *Kelo* enables many of the public-private schemes that threaten the core constitutional rights of property owners. *See Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting) ("The beneficiaries [of *Kelo*] are likely to be those citizens with disproportionate influence and

power in the political process, including large corporations and development firms.").

CONCLUSION

The taking of Petitioners' property rights for private gain without just compensation is inconsistent with the fundamental principles of our Republic. *See Calder v. Bull*, 3 U.S. (Dall.) 386, 388 (1798) ("[A] law that takes property from A and gives it to B: [ ] is against all reason and justice . . ."); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) (Justice Marshall stated, "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and inalienable rights of man . . . .").

Congress and the Federal Circuit have provided government entities and rent-seeking private parties a clear road map for uncompensated takings. When viewed against the larger backdrop of takings law, it is clear that this Court must reclaim its duty to protect property owners across the country from public-private collusion. *Kelo*, 545 U.S. at 507 (Thomas, J., dissenting) (quoting *Shepard v. United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in judgment) ("[I]t is 'imperative that the Court maintain absolute fidelity to' the [Takings] Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment."). Accordingly, this Court should grant the Petition for Certiorari.

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