

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

BERNARD MORELLO, et al.,

*Petitioners,*

v.

SEAWAY CRUDE PIPELINE COMPANY, LLC,

*Respondent.*

On Petition For A Writ Of Certiorari To  
The Court Of Appeals Of Texas, First District

**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

Whether eminent domain can be used to as mere pretext to rewrite the parties' own prior bargains, or otherwise circumvent existing obligations in a previously negotiated, enforceable contract.

Whether the Texas Constitution's adequate compensation standard conflicts with the federal constitutional requirement of just compensation as applied in this case.

Whether a state, through judicial action or inaction, may delegate to private entities unbridled, unchallengeable eminent domain authority when courts consistently fail to enforce constitutional limitations.

## **PARTIES TO THE PROCEEDING**

Petitioners are Bernard J. Morello and White Lion Holdings, L.L.C., a Texas limited liability company, whose sole member is Bernard J. Morello. White Lion Holdings, L.L.C. has no parent corporation and is not publicly held. Petitioners were the landowner defendants in the trial court, the Appellants in the court of appeals and Petitioners in the Supreme Court of Texas.

Respondent is Seaway Crude Pipeline Company, L.L.C., (“Seaway”) which is owned by Enterprise Products Partners, L.P., (50%) a publicly traded Delaware company and Enbridge Inc., (50%) a publicly traded Canadian company. The general partner of Enterprise Products Partners, L.L.C. is Enterprise Products Holdings L.L.C., a publicly traded Delaware limited liability company. Seaway was the plaintiff condemnor in the trial court, Appellee in the court of appeals and Respondent in the Supreme Court of Texas.

## **RELATED CASES**

*Seaway Crude Pipeline Company LLC v. Bernard J. Morello and White Lion Holdings, LLC*, No. 13-CCV-050231, Fort Bend County Court at Law No. 3. Judgment entered September 21, 2016.

*Seaway Crude Pipeline Company LLC v. White Lion Holdings LLC*, No. 13-CCV-050233, Fort Bend County Court at Law No. 4. Consolidated with the previous proceeding, consolidation order signed on April 9, 2015.

**RELATED CASES – Continued**

*Bernard Morello and White Lion Holdings, LLC v. Seaway Crude Pipeline Company, LLC*, No. 01-16-00765-CV, First Court of Appeals at Houston, Texas. Judgment entered May 22, 2018.

*Bernard Morello and White Lion Holdings, LLC v. Seaway Crude Pipeline Company, LLC*, No. 19-0017, Supreme Court of Texas. Petition for Review denied on May 31, 2019; Motion for Rehearing denied on December 13, 2019.

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## **PETITION FOR A WRIT OF CERTIORARI**

This case demonstrates the consequences of unchecked, unchallengeable eminent domain power delegated to private, for-profit companies. The Texas court below ignored individual property rights in favor of “large scale projects” questioning whether landowners should even have the right to challenge such takings by for-profit companies given the right of eminent domain. (App.17, fn. 7). Avoiding the question, the court engaged in intellectually dishonest discourse to reach a desired result, disregarding all evidence of ulterior motive and relinquishment of its eminent domain authority to independent contractors. (App.18). The court’s disregard of individual rights leaves landowners without recourse and eviscerates fundamental property rights guaranteed by our constitution. Texas may delegate its eminent domain authority to private infrastructure companies, but not without constitutional limitations or meaningful judicial review. Here, Morello did not seek to obstruct the pipeline: he offered Seaway an easement. (App.9-10). The issue arose because what Morello offered – to amend the existing easement – would have preserved his contractual rights and the future development of the Property. Seaway rebuffed Morello’s offer, dodging the parties preexisting easement agreement with new terms it found more advantageous. (App.11-12).

The Opinion sanctions circumvention of not only existing contract rights, but our jury system, and tolerates grossly abusive conduct taken toward landowners when the subject is an oil pipeline exercising eminent

domain. In fact, this case affirmatively holds that condemnors “have no duty of good faith” toward landowners while taking their land by condemnation – creating a new “*no faith*” standard in condemnation cases. (App.35-40). This holding creates a new draconian precedent which disregards constitutionally protected private property rights in favor of private condemnors. Seaway’s refusal to consider requests, holding “[g]ranular necessity determinations are not required.” (App.27).

Morello asks this Court to answer a fundamental question: whether *unchallengeable* eminent domain power is constitutional and thus, can be exercised without good faith or consideration of individual property rights? In short, Morello asks this Honorable Court to establish a constitutional benchmark by deciding whether landowners are entitled to good faith negotiations, based on concepts of “fairness and justice” and truthful disclosure by private pipeline companies that make condemnation decisions without public hearing. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334 (2002). If private condemnors have no duty to negotiate and are only required to send two letters as set forth Section 21.0113 of the Texas Property Code, (App.35), how are landowners legally afforded the opportunity to assert their property rights? The court below misconstrued *Hubenak* – a case addressing good faith in the sense of a monetary offer – to abdicate judicial review.

The Texas constitution guarantees *adequate* compensation, not *just* compensation, and based on the Opinion, Texas courts may limit compensation to only the part taken regardless of this Court’s long-standing precedent that: (1) highest and best use is a fact issue; and (2) just compensation includes compensation for the part taken as well as damages to the remainder property. In fact, courts may only consider current uses in Texas, disregarding centuries of case law to the contrary. The new Texas standard announced for valuing takings defies the basis for just compensation in any tribunal. This Court must review whether *just* compensation controls over lesser state standards.



### OPINIONS BELOW

The Court of Appeals for the First District of Texas opinion is reported at *Bernard J. Morello v. Seaway Crude Pipeline Company, L.L.C.*, 585 S.W.3d 1 (Tex. App. – Houston [1st Dist.] 2018, pet. denied) and reproduced at App. 1-72, (“the Opinion”). The Court denied rehearing. (App.107). The Supreme Court of Texas denied review and rehearing. (App.108, 109).



## **JURISDICTION**

The Court of Appeals for the First District of Texas issued its opinion on May 22, 2018. (App.1-72). The Supreme Court of Texas denied the Petition for Review on May 31, 2019 (App.108). The Supreme Court of Texas denied the Motion for Rehearing on December 13, 2019. (App.109). Justice Alito extended the time for filing this petition to May 11, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).



## **CONSTITUTIONAL PROVISIONS INVOLVED**

This case involves application and interpretation of the Takings Clause found in the Fifth Amendment of the United States Constitution, which is made applicable to the States through the Equal Protection Clause of the Fourteenth Amendment. It also involves the Contract Clause and Right to Jury Trial in civil proceedings.

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

U.S. CONST. ART. I, § 10, CL. 1

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. AMEND. VII.

**TEXAS CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

The Texas constitution takings provision found at TEX. CONST. ART. 1, § 17, reproduced at App. 109-10, and the Texas eminent domain statute, TEX. PROP. CODE ANN. § 21.019, reproduced at App. 110-11, are also relevant to the matter *sub judice*.



The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

TEX. CONST. ART. 1, § 15.

### **TEXAS NATURAL RESOURCES CODE**

- (a) Common carriers have the right and power of eminent domain.
- (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.

TEX. NAT. RES. CODE ANN. § 111.019(a)-(b)



### **INTRODUCTION AND STATEMENT OF THE CASE**

The Fifth Amendment to the Constitution provides “private property [shall not] be taken for public use, without just compensation.” Justice O’Connor explained there are “two distinct conditions on the exercise of eminent domain: ‘[T]he taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.” *Kelo v. City of New London*, 545 U.S. 469, 496 (2005). (citing *Brown v. Legal Foundation of Wash.*, 538

U.S. 216, 231-232 (2003). Both of these constitutional requisites are implicated in this petition.

Petitioners, Bernard Morello and White Lion Holdings, L.L.C. (jointly herein “Morello”), own 200 acres of valuable property in Fort Bend County, Texas being held for future development (the “Property”) The Property is uniquely situated for logistics – abutting a rail line, a portion of which is operated by Kansas City Southern Railroad Company (“KCSRR”) and the remaining portion operated by Union Pacific Railroad (“UP”). The railroad parallels Highway 529, which is directly adjacent to Highway 69.<sup>1</sup> (App.1, 5-7). The Property was a rail-served industrial facility with a rail spur at the time Morello purchased the Property in 2004; however, the Property was severely damaged prior to his taking possession and Morello spent years restoring the Property and preparing it for development.

In 2009, KCSRR began replacing its tracks along the Property and Morello inquired about the market demand and future use of the spur in relation to an industrial logistics facility.<sup>2</sup> (App.6). Thereafter,

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<sup>1</sup> Interstate 69 incorporated this section of Highway 59 for the NAFTA route and coincides with the railroad improvements along this section. These market conditions, which existed at the time of the taking, were considered by Mark Sikes, Morello’s appraiser, in determining the reasonable foreseeability of the Property’s development and its highest and best use.

<sup>2</sup> It is undisputed that the prior owner had contaminated a portion of the Property and there were other obligations related to the Property that were being addressed at the time of the condemnation.

Morello removed the old spur, in anticipation of development of new tracks leading into the Property.

In 2012, the City of Rosenberg sought to annex the land but Morello negotiated 15-year tax abatement agreements which abated annexation and imposition of City taxes on the unimproved acreage, maintained the agricultural exemption until development, and provided for automatic termination in the event Morello applied for development permits. The agreements could be terminated at any time. (App. 113-116).

In 2012, Respondent, Seaway Crude Pipeline Company, L.L.C., (“Seaway”) announced a new pipeline (“SW2”) that would run parallel to its existing pipeline (“SW1”) which already crossed Morello’s Property. (App.7-8). Seaway began contacting landowners to acquire easements, including Morello. *Id.* Although Seaway owned a 60-foot pipeline easement, Morello’s Property had been essentially unencumbered because the preexisting 1975 easement agreement required Seaway, upon notice by Morello, to lower, encase *or relocate* the SW1 pipeline at its own expense to accommodate future development and without preconditions. (App.4). With the contemporaneous infrastructure improvements surrounding the Property, Seaway’s potential liability under the 1975 easement became significant and imminent.

When first approached by Seaway, Morello offered the use of the existing easement for the new pipeline,

but Seaway refused to consider this request.<sup>3</sup> (App.9). Seaway commenced condemnation proceedings and filed a *lis pendens* against the Property instead. (App.10). By condemning a new easement adjacent to the existing easement with no development accommodation, Seaway imposed the financial burden of modifying the new pipeline on Morello's shoulders and all but eliminated the obligation to relocate the SW1 pipeline. Logistically, it makes little sense to relocate the 1975 SW1 pipeline, if the 2013 SW2 pipeline remained in place and the easement Seaway condemned contains no similar right to relocate the pipeline. (App.11-12). The costs associated with lowering and encasing the new pipeline were uncontroverted and totaled over \$3.1 Million. (App.44).

It is well-established that a condemnation is unconstitutional when it is done for an illegitimate purpose, regardless of what use will eventually be made of the property. It is also clear that courts have an independent duty to determine the true purpose of a condemnation, without deference to the condemning authority. One of many illegitimate purposes for eminent domain is to escape the consequences of one's own contracts. The illegality of that objective is made even clearer by reference to the U.S. Constitution's Contract Clause, which explicitly prohibits the use of state

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<sup>3</sup> From the beginning, Seaway representatives touted safety as the basis for refusing to use the existing easement, although it was later proven that the existing easement was the preferred route of Seaway's governing body, this accommodation was made for numerous other landowners, and Seaway never actually analyzed any safety issues – safety was a ruse.<sup>3</sup>

power to undo existing contracts. The reviewing court below incorrectly ruled that there is nothing wrong with using eminent domain to escape a contract

Faced with uncontroverted evidence of costs to cure the Property, Seaway filed motions to strike Morello's experts relating to remainder damages.<sup>4</sup> Respondent argued the tax abatement agreement barred Morello from developing the Property for the 15-year term, resulting in the Property's highest and best use as agricultural at the time of the taking, and for the reasonably foreseeable future. (App.96-97). Seaway argued that since future development was too remote (based on an overly rigid self-interpretation of the 15-year term of the abatement agreement) and was speculative, Morello's remainder damages were not recoverable.<sup>5</sup> The trial court agreed and struck all experts as irrelevant and speculative because, in the court's opinion, remainder damages were too remote.<sup>6</sup> (App.95-97).

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<sup>4</sup> Seaway also moved to strike Morello's expert that opined there was a lack of any safety analysis that would prevent use of the existing easement, establishing safety was an unfounded excuse.

<sup>5</sup> Ignored by the courts, Seaway's expert opined that the highest and best use of the Property before the taking was not agricultural, but industrial/commercial.

<sup>6</sup> The court also struck the expert on the basis of untimely designations, which is inconsistent with the record. Morello will more fully address the timeliness issues should this Court grant review.

While the case pended for three years, the central issue regarding damages to the remainder were based on these costs to cure SW2 to allow for future development. Morello retained three experts on this issue, each of which were timely disclosed with written reports. Morello incurred thousands of dollars in expenses retaining experts, preparing production reports and deposing witnesses.<sup>7</sup> Morello's experts included a land planner and drainage expert, Jack Carter, to show the physical adaptability of the Property and increased costs associated with crossing the pipeline to reach the Property's outflow; a pipeline construction cost estimator, Dale Morris, to establish the cost of lowering the pipeline so that it could be crossed;<sup>8</sup> and a real estate appraiser, Mark Sikes, to opine on the Property's value before the taking, the impact of the cure costs on remainder damages, and the total compensation due Morello. Because the costs of curing the Property by lowering the pipeline were less (\$3.1 million) than the economic damage to the remainder if the Property was not cured, (\$3.3 million) Sikes opined that the cure

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<sup>7</sup> Morello's costs exceeded the amount the court ultimately awarded.

<sup>8</sup> Seaway constructed the pipeline with minimum cover, only three feet, which, according to its own construction guidelines, could not be crossed with industrial traffic or rail. In order to allow for future development, the pipeline needed to be lowered to ten feet.

model was more financially feasible prior to the taking.<sup>9</sup> (App.45).<sup>10</sup>

Prior to the *Daubert* hearing, Seaway amended its petition purporting to absorb the costs associated with the lowering of the pipeline to accommodate future development – but with conditions it attached to its concession. These conditions, in actuality, precluded future development and the ability to *cure* the Property. In response, Morello timely supplemented discovery by adding one new expert, Chris Farrar, to opine on the economic feasibility of the preconditions added to the amended petition, and reclassified two consulting experts<sup>11</sup> as testifying experts. Morello also amended the timely designated expert reports of Sikes and Carter to address the new compensation facts. Seaway moved to strike Farrar on the basis that: (1) his testimony was irrelevant since remainder damages were

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<sup>9</sup> The record shows, Sikes’ opinion of before taking highest and best use (industrial utilizing rail) and value (\$30,000/acre) was nearly identical to Seaway’s expert – the difference was the impact on the remainder. Seaway’s expert ignored the *terms* of the 1975 easement, and thus concluded, there was no damage to the remainder.

<sup>10</sup> The court of appeals inconsistently held that Sikes’ opinion that the compensation increased with the amended petition, essentially defeated the motion for. *Id.* However, the court affirmed the trial court’s interpretation of the concession as a “practical approach,” struck Sikes’ opinion, and resulting in a judgment awarding a mere \$88,000, less than three percent (3%) of the original damage model. (App.2, 73, 99).

<sup>11</sup> Both consulting experts, David Heslep and Dale Morris, were timely disclosed, including reports, and were available for deposition.

precluded, and (2) untimely, even though the deadline to designate experts expired one year prior to Seaway having filed its amended petition.

Less than thirty days prior to trial, the court conducted a hearing on Seaway's various *Daubert* motions and Morello's Motion for Costs related to Seaway's amended petition.<sup>12</sup> The trial court struck all but one of Morello's experts on the issue of attorney's fees and limited Sikes' testimony to only the value of the part taken, striking his opinions on highest and best use after the taking and the remainder damages caused by the lack of economic feasibility imposed by Seaway's preconditions set forth in Seaway's amended petition. Failing to understand the impact, and referring to the amendment as a "practical approach" in the Order, (App.99) the trial court denied Appellants' Motion for Costs. App.42-44).

Days before trial, the court conducted a hearing on cross-dispositive motions. Seaway moved for judgment on all Morello's affirmative defenses related to its abuse of eminent domain, i.e., the determination to take the particular parcel as a pretext, made in bad faith and with the designation of land to be taken

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<sup>12</sup> In Texas, the legislature provides that a condemnor is liable for the landowner's costs, expert fees and legal fees if it an amended pleading acts as a functional dismissal of the original claim by materially changing the compensation facts. TEX. PROP. CODE ANN. § 21.019(b); *FKM P'ship, Ltd. v. Bd. of Regents of the Univ. of Houston Sys.*, 255 S.W.3d 619 (Tex. 2008). The purpose is to prevent exactly what happened in this case, a condemnor changing compensation facts to such a degree that it prejudices the landowner.



impermissibly delegated to independent contractors.<sup>13</sup> The court granted Seaway’s motion and struck all of Morello’s affirmative defenses. The court’s rulings compounded error when the trial court erroneously concluded there were no issues remaining for the jury, which served as the basis for the trial court’s summary judgment ruling and deprived Morello of the right to jury trial.



### REASONS FOR GRANTING THE PETITION

Historically, Americans, and Texans in particular, have placed great value on individual property rights and looked askance at the exercise of the power of eminent domain. Both the U.S. Constitution and Texas Constitution safeguard private property by limiting eminent domain only for “public use.” When the Legislature grants private entities the power of eminent domain, the fundamental constitutional canon controls: “no taking of property for private use.” *Texas Rice Land Partners, LTD v. Denbury Green Pipeline–Texas, LLC*, 363 S.W.3d 192, 194-95 (Tex. 2012).

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<sup>13</sup> The power of eminent domain is granted only to the condemnor’s governing body and cannot be delegated to agents without retaining supervision and approval. *FKM P’ship v. Bd. of Regents*, 255 S.W.3d 619, 630 (Tex. 2008). A condemning authority “act[s] only through its governing body and cannot delegate its eminent domain power, and must manifest its official actions through orders, resolutions, and minutes.” *Whittington v. City of Austin*, 174 S.W.3d 889, 901 (Tex. App. – Austin 2005, pet. denied). Hence, it is an abuse of discretion for the condemnor to completely abdicate the power of eminent domain.

There are two aspects to public use. First, the condemnor must intend a public use. Second, the condemnation must actually be necessary to advance or achieve the ostensible public use. *Whittington v. City of Austin*, 174 S.W.3d 889, 906 (Tex. App. – Austin 2005, pet. denied) (“*Whittington 1*”); see, *Kelo*, 545 U.S. 477-478. This second aspect of public use, including purpose, is commonly termed the “necessity” or “public necessity” requirement. *Id.*; Judge Madison Rayburn, RAYBURN ON CONDEMNATION § 8.03 (21st ed. 1998) (distinguishing the issue “where there is no doubt or uncertainty as to the public character of the use . . . the only question involved is the *purpose*, or *necessity*, of the extent of the use.”) (emphasis added).

Common carrier status satisfies “public use.” TEX. NAT. RES. CODE § 111.019(a). But the legislature limited their authority – only property “*necessary for* the construction, maintenance, or operation of the common carrier pipeline” may be taken. TEX. NAT. RES. CODE § 111.019(b). Moreover, in response to *Kelo*, the Texas legislature enacted Government Code chapter 2206, which added new statutory limits on eminent domain authority, specifically addressing pretextual takings. Act of Aug. 16, 2005, 79th Leg., 2d C.S., ch. 1, § 1, 2005 Tex. Gen. Laws 1, 1–2. Specifically, chapter 2206 prohibits a taking that (1) “confers a private benefit on a particular private party through the use of the property”, [or] (2) “is for a public use that is merely a pretext to confer a private benefit on a particular private party”, . . . TEX. GOV’T CODE § 2206.001(b)(1)–(2). *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175,

181–82 (Tex. 2019), reh’g denied (Oct. 4, 2019).<sup>14</sup> Cf., *Denbury Green*, 363 S.W.3d at 197, fn. 13. Although common carrier pipelines are exempted from chapter 2206, constitutional and statutory constraints of public use and necessity remain. TEX. NAT. RES. CODE § 111.019(b).

Even if a pipeline company meets its threshold burden of public use and necessity, a landowner can challenge condemnation authority by proving the affirmative defenses of fraud, bad faith, or arbitrary and capricious conduct, which are subject to judicial review. *City of Austin v. Whittington*, 384 S.W.3d 766, 777 (Tex. 2012) [*Whittington 2*].<sup>15</sup> “Moreover, our case law interpreting and applying the constitution’s public-use requirement provides that a condemnee may seek to invalidate a taking for public use on a showing that the taking was fraudulent, in bad faith, or arbitrary and capricious.” *KMS Retail*, 593 S.W.3d at 184 (citing *Whittington II*). However, the last successful right to take challenge based on these affirmative defenses was *Houston Lighting and Power Co. v. Klein Independent School District*, 739 S.W.2d 508 (Tex. App. – Houston

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<sup>14</sup> Two weeks after the Supreme Court issued its opinion, it denied Morello’s petition for review.

<sup>15</sup> In *Whittington I*, following summary judgment, the court of appeals determined there was a fact issue on the landowner’s affirmative defenses challenging the right to take the property. The Texas Supreme Court denied review. On remand, the jury found in favor of the landowner and the court of appeals affirmed. In *Whittington 2*, the Supreme Court reversed, finding the City had the right to condemn.

[14th Dist.] 1987, writ denied).<sup>16</sup> Most relevant to pretext or purpose, is the affirmative defense of bad faith, which implies an intent to injure, *or some other improper motive*. *Whittington II*, 384 S.W. 3d at 781. Using eminent domain as a pretext to escape one's contractual obligations is bad faith.

Notwithstanding these constitutional limitations, the court below also announced a new standard for awarding damages in condemnations that violated the Fifth and Fourteenth Amendments, excluding all evidence of remainder damages. These important issues need to be addressed before more landowners are left vulnerable to unconstitutional appropriation of their property without recourse.

**I. Seaway's Use of Eminent Domain to Rewrite its Previously Negotiated Easement Agreement to Escape its Obligations Under the Enforceable Contract Is Unconstitutional.**

Morello has been holding Property as an investment for future development. The Property was encumbered by Seaway's 1975 pipeline easement, which required Seaway to relocate the pipeline, either by changing the route or burying it deeper, when the land is developed. Seaway struck this bargain in 1975,

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<sup>16</sup> *Malcomson Rd. Util. Dist. v. Newsome* held Newsome raised a fact issue on whether the District abdicated its discretion to determine whether and how much to condemn, remanding for trial. 171 S.W.3d 257, 275 (Tex. App. 2005). Distinguishing this precedent, the court below debased Morello's evidence – admission by Seaway's chairman that it made no such determinations.

knowing the Property was uniquely situated along a rail line with 3500 feet of rail frontage and two separate railroad operators. Now that the land has become viable for development, Seaway utilized eminent domain to render the 1975 contract worthless. By condemning a new easement not subject to a relocation condition, and placing such pipeline immediately adjacent to the 1975 pipeline, Seaway ensured that Morrello's land became permanently unsuitable to develop and would never have to abide by either the terms of the 1975 contract or its artificial concession contained in its amended petition.

The Court of Appeals failed to appreciate that there is a fundamental difference between (1) a condemnor choosing to condemn a particular easement because constructing a pipeline on that land will be cheaper, and (2) a condemnor choosing to condemn a particular easement because doing so will allow it to escape the costly obligations of a contract previously in place with the landowner. The latter is illegal.

Both the Federal and Texas Constitutions limit eminent domain authority to public use, but here, the Texas court's determination of public use is inconsistent with the Fifth Amendment. While it is true common carrier pipelines constitute a public use in virtually all jurisdictions, there are still important, judicially enforceable limits on what is or can be considered a public use. One such limitation is dispositive in the present case – the prohibition on takings where the asserted public use is a pretext.

When challenged, a taking's constitutionality does not turn solely on whether the proposed use of the property being taken is a traditionally a public one – such takings are not *per se* constitutional. Rather, courts have a duty to independently evaluate the *purpose* of a taking. When the facts are in dispute, it is for the factfinder to determine. The court below failed to independently evaluate the pretext present in this case and upheld a summary judgment, denying Morello his constitutional protections against unlawful takings. The lower appellate court said, essentially, “so what?” A “desire to save money,” the Court held, is not illegal. (App.34). But as applied in this case, it is illegal and unconstitutional because the benefit being conferred is escaping preexisting obligations. The Texas Supreme Court turned a blind eye – this Honorable Court must not.

**A. Texas Landowners Are Not Afforded the Protections Against Pretextual Takings Because The Condemnor is Given Absolute Deference in Route Determination.**

As shown *supra*, a condemnation does not satisfy the constitutional requirement of public use when used as a pretext to achieve an impermissible objective. Escaping the consequences of one's own arm's length bargain is one such impermissible purpose. It is of no moment the stated public use is a so-called “classic” one such as common-carrier infrastructure. Nor does it matter whether the land at issue will be used by the public. The impermissible purpose renders the entire condemnation unlawful.

Use of eminent domain as a pretext to conceal true motive is not novel. This Court spoke to the use of pretext in *Kelo*. Although the decision was not in favor of the landowner under the facts of that case, the Court nonetheless reaffirmed the longstanding principle private property cannot be taken “under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.” *Kelo*, 545 U.S. at 478. Such is the issue before the Court today, and an issue disregarded by the Texas courts.

Many courts, before and since *Kelo*, recognize (1) pretextual takings are unconstitutional and (2) courts have a duty to independently determine the true purpose of a condemnation.<sup>17</sup> The Texas court failed to conduct any such inquiry, stating that the decision to

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<sup>17</sup> See, e.g., *Earth Mgmt., Inc. v. Heard Cty.*, 283 S.E.2d 455, 459 (Ga. 1981) (invalidated taking ostensibly for the purpose of a public park, when there was evidence the actual purpose was to prevent the landowner from developing the property as a waste disposal facility); *In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 258 (Pa. 2010) (remanded to determine if the public was the “primary and paramount beneficiary of the taking,” as required by the Fifth Amendment); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007) (to uphold the invocation of the power of eminent domain, court must find recreational “purpose was real and fundamental, not post-hoc or pre-textual.”); *City & Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824 (Colo. 1991) (remanding to give property owner opportunity to prove the stated public purpose was not the true purpose); *Borough of Essex Fells v. Kessler Inst. for Rehab., Inc.*, 289 N.J. Super. 329, 338, 673 A.2d 856, 861 (Law Div. 1995) (“public bodies may condemn for an authorized purpose but may not condemn to disguise an ulterior motive”) (setting aside condemnation where the asserted purpose was to preserve open space, but the true purpose was to prevent a particular developer from building).

condemn is nearly absolute and giving complete deference to Seaway.

Analogous to the matter *sub judice*, the Hawaii Supreme Court explicitly rejected any category of *per se* constitutional public uses. The case addressed a condemnation for the construction of a public highway. The property owner, like Morello, did not dispute a highway was planned or that the public would in fact use the highway. The owner alleged, however, the real purpose of the highway was to aid a private developer. The court ruled for the property owner, and in so doing, squarely rejected the argument “whenever a property is taken for a highway, it is for a public use.” *Cty. of Hawaii v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615, 647 (Haw. 2008).

The Rhode Island Supreme Court recognized eminent domain cannot be used to escape the consequences of a preexisting bargain. That case concerned a private company which had contracted with a government agency to build a parking garage at an airport. *Rhode Island Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 91–92 (R.I. 2006). Under the agreement terms, the builder had exclusive rights to operate the parking garage for 20 years, after which the garage would revert to the agency. *Id.* at 91–92. The agency negotiated an option to buy the garage earlier with different purchase prices depending on when that option was exercised. *Id.* When the agency decided it made a bad deal, rather than buy out the remainder of the contract, it condemned an “easement” in the garage that



would lead to an immediate transfer of possession. *Id.* at 93.

Not fooled by the pretext, the court held the proposed condemnation was not for a public purpose and unconstitutional. Though there was no question that the public would in fact continue to use the garage, the court emphasized the *purpose* behind the taking also had to be public. Ultimately, the court found the true purpose was “a desire for increased revenue,” which was not “a legitimate public purpose.” *Id.* at 104.

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

The same is true in the present case: an existing easement was in place with negotiated terms affecting future development of Morello’s land. Seaway avoided having to honor these terms by condemning an adjacent easement, subject to new conditions made part of the condemnation – not negotiation. These new

conditions allowed Seaway to escape the prior contract and effectively annulled Morello's contract rights. At a minimum, such conduct should have been a question for the fact finder with regard to Seaway's "purpose." *Did Seaway utilize condemnation to escape the consequences of the 1975 contract?* If so, the taking was not for public use and Morello should have the opportunity to prove his case at trial.

Likewise, in *Albrecht v. United States*, the government contracted to purchase land, but the government later concluded the purchase price was "grossly excessive." 329 U.S. 599, 600 (1947). Instead of purchasing the land at the contracted price, the government initiated condemnation, hoping to obtain the land at a lower, judicially-determined price. This Honorable Court held that, by agreeing to a price for the land, the government had taken those transactions "out of the range of the Fifth Amendment," and given up the right to argue that just compensation should be lower. *Id.* at 603-04. The contract trumped the government's right to judicial determination of just compensation. Likewise, Seaway had a pipeline easement that was sufficient to house the new pipeline by Seaway's own standards. Accordingly, condemning a new easement to rewrite that contract is beyond the Fifth Amendment.

As the cases cited above demonstrate, courts have invalidated takings when the true purpose was to stop the owner from making a particular use of his property, to benefit a private party, or simply to help the condemnor make money at the expense of the landowner. See *Patel v. S. California Water Co.*, 97 Cal. App. 4th 841,

843 (2002), *as modified* (May 13, 2002) (“The real question is whether . . . the power of eminent domain [can be used] to take private property for a purpose, say, [of] simply making money. . . . The answer is, of course, no.”). Regardless of whether a condemnor intends to let the public use the condemned property, condemnation is illegal when the condemnor’s true purpose is to escape its own contracts. Morello, and other Texas landowners like him, deserve the same federal constitutional protections, regardless of Texas’s view that pipelines are so important to the Texas economy that pipeline companies can escape constitutional scrutiny.

In short, overwhelming authority from around the country establishes the public use question presented here cannot be answered simply by accepting that Seaway intends to build a common-carrier pipeline. Where the landowner alleges the true purpose of a condemnation is impermissible, independent judicial review is necessary. The court below neglected its duty to independently determine the pretext and purpose of this condemnation in exchange for the grant of blind, total deference of constitutional magnitude.

**B. Seaway’s Use of Condemnation To Avoid Its Contractual Obligations Violates the Contract Clause.**

The illegality of the taking in this case is bolstered by another constitutional provision: the U.S. Constitution’s Contract Clause, which explicitly provides that

“[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .” U.S. CONST., ART. I, § 10, cl. 1. If there were any question whether it is legitimate to use eminent domain to undo one’s own contracts, the Contract Clause surely answers that question in the negative. Although this Court has, in the last 100 years, departed from the original understanding of the Contract Clause, there is one circumstance where the Clause retains full force – when the state is trying to escape its own deals. The Contract Clause underscores the illegitimacy of using government power to advance narrow, private objectives, in this case avoiding contractual obligations.

Although the Contract Clause is not frequently litigated today, it was one of the most important limitations on state power embodied in the original Constitution. The Framers considered it essential – even while at the same time they were insisting that a bill of rights was unnecessary. *See City of El Paso v. Simmons*, 379 U.S. 497, 591 (1965) (Black, J., dissenting); *The Federalist* No. 84 (Alexander Hamilton). The fact this contract was contained in a deed of conveyance does not make it any the less a contract within constitutional protection. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

In *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977), this Court held, when the state is attempting to undo its own contracts, more judicial scrutiny is required: “[i]f a State could reduce its financial obligations whenever it wanted . . . , the Contract Clause would provide no protection at all.” *Id.* at 26;

*see also Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 505 (5th Cir. 2001) (“[W]hen the State is a party to the contracts, the court cannot defer to the State because the State’s self-interest as a party is implicated.”). Giving deference to Seaway, seeking to build a private, for-profit pipeline, adjacent to its existing pipeline easement violates this vital premise.

This is not a case where a contract stands in the way of an otherwise valid use of eminent domain. Instead, this is a case where the condemnor already bargained previously, but it is simply unhappy with the terms of that deal and has turned to eminent domain to undo the previously negotiated contract. That is precisely what the Contract Clause was designed to prevent.

The court below made a fundamental error in holding it constitutional to use eminent domain to undo one’s own contracts. There is nothing illegal, the court held, about a mere “desire to save money.” (App.34). In the abstract, of course, that is true, but the question is how the condemnor is trying to save money. If it is by undoing its own contracts and obtaining a windfall at the expense of the property owner, that is illegal and unconstitutional on any level.

**II. The Texas Constitution’s “adequate compensation” standard conflicts with the Federal Constitutional requirement of “just compensation” Because Texas pronounced new standards for highest and best use analysis beyond USPAP and in direct contravention of this Court’s longstanding precedent.**

“In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.” *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1892). The question of just compensation is a constitutional safeguard and always a matter of importance. *Olson v. United States*, 292 U.S. 246, 254 (1934). It has been long recognized that in determining just compensation, the court’s objective is to compensate the property owner with “the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining.” *Id.*, at 254-55.

In response to the amended petition, Morello retained real estate finance expert, Chris Farrar, who opined that Seaway’s amended petition imposed preconditions that would be rejected in the marketplace, thereby hindering future development. The effect of

these pre-conditions would be considered by purchasers, but the trial court struck Farrar, noting that his testimony was untimely and irrelevant, based upon its interpretation the tax abatement was unbreakable for 15 years.

**A. The Court of Appeals Improperly Narrowed Highest and Best Use – Generally a Fact Issue – To Current Uses, Which Runs Afoul of *Olson*.**

This Court noted that a landowner “is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.” *Brown v. Legal Found. of Washington*, 538 U.S. 216, 236 (2003) (citing, *Olson*, 292 U.S. at 255). A landowner is entitled to receive the value of the highest and best use for which the property is *adaptable*. Just compensation includes all elements of value *not only the current uses of the land*, but also consideration of all the uses for which it is suitable. “The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered[.]” *Id.* “[A] radical curtailment of a landowner’s freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property.” *Kirby Forest Indus. v. United States*, 467 U.S. 1, 14 (1984). Whenever the use of the land is restricted or some incorporeal hereditament is

taken which was appurtenant thereto, it constitutes a taking just as if the land itself had been appropriated. Tiedeman, *State and Federal Control of Real and Personal Property*, p. 702, § 143; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922).

Texas likewise requires compensation for both the part taken and any resulting damage to the remainder. *County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004); TEX. CONST. ART. 1, § 17. However, Morello was denied just compensation through pre-trial rulings that rejected USPAP-complaint highest and best use analysis by Morello's experts and struck all evidence of damages to his remainder Property caused by preconditions in the amended petition.<sup>18</sup> Morello did not receive just compensation.

In *Cannizzo*, this Texas Supreme Court, consistent with this Court's precedent, recognized "consideration of all uses to which the property was reasonably adaptable and for which it was, or in reasonable probability would become, available within a reasonable time" was permissible in determining market value in condemnation, excluding only uses for which the property is "wholly unavailable." *City of Austin v. Cannizzo*, 153 Tex. 324, 267 S.W.2d 808, 814 (1954). It was undisputed the Property had a thirty-year history of industrial/rail use which Sikes relied on to support his highest and best use conclusion of industrial with rail access and such use was not "wholly unavailable."

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<sup>18</sup> Uniform Standards of Professional Appraisal Practices.



In 2002, the court of appeals first circumscribed *Cannizzo* by creating a three-prong test, not based on the adaptability of the property for the future use, but on *actual implementation* of the use being reasonably probable within the immediate future. *Southwestern Bell Tel. Co. v. Radler Pavilion Ltd. P'ship*, 77 S.W.3d 482, 486 (Tex. App. – Houston [1st Dist.] 2002). Here, the same court of appeals further narrowed *Cannizzo* and *Olson* by requiring evidence of *current implementation* and applied *Radler* to the moment of the take. App. 22-24. Requiring that the issue of future use must be demonstrated by evidence of present steps taken toward implementation redefines longstanding principles set out in *Olson* and *Cannizzo*. By limiting the Texas standard to only consider current use or uses that the landowner is implementing at the time of the condemnation, the courts have set an unattainable standard to be entitled to “just compensation” under the Constitution. This new rule applied retroactively, denies Morello his constitutional rights to just and adequate compensation under both the U.S. and Texas Constitutions.

In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993) and *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) our highest federal and state courts held expert opinion testimony is relevant when it is “sufficiently tied to the facts of the case” to “aid the jury in resolving a factual dispute.” This new test does not account for the facts of this case nor investors, as opposed to developers, with no intent to implement a plan. The court impliedly overruled the

holding that retaining property as an investment for future development is a highest and best use. *In re State*, 355 S.W.3d 611, 618 (Tex. 2011). The Opinion runs afoul of the mandate – a condemnor does not have [nor should it have] the power to constrain landowners’ evidence of the highest and best use to determine value. *Id.*

Sikes and Carter were improperly struck based on a fundamental misunderstanding. First, Carter’s development plan demonstrated: (1) physical adaptability, and (2) financial feasibility of mitigation. Second, after Seaway’s amended petition, Carter’s plan was moot, and Sikes and Carter revised their reports excluding the plan based on Farrar’s assessment that future development of any kind was improbable. The opinion correctly cites the constitutional standard for market value and highest and best use, (App.51-54), but then incorrectly applies a current use standard. This new test ignores this Property’s thirty-year historical use as industrial/rail and dismisses other property-specific facts detailed in both Sikes’ and Carter’s reports, to determine the experts’ opinions were speculative – although Seaway’s expert, Hodge, essentially concurred finding industrial to be one highest and best. (App.55-56). This internal contradiction leads to a confusing and unconstitutional result.

Courts should only decide if an expert’s methodology is sound and the jury decides the weight of the conclusion. *Exxon Pipeline Co v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002). “An expert’s opinion is only unreliable if it is contrary to actual, undisputed facts.” *Cafee Ribs, Inc.*

*v. State*, 487 S.W.3d 137, 144 (Tex. 2016). “[E]xclusion is likely harmful if evidence is ‘crucial to a key issue.’” *Id.* at 145. Here, Sikes and Hodge employed the same methodology but reached different conclusions as to the specific use of rail and whether the remainder was damaged, creating the quintessential, key jury issue. Both opined that the pre-taking value was \$30,000 per acre. (App.63, fn. 26). It is intellectually dishonest to say that Morello used a hypothetical, speculative future use to inflate the before-taking value. The difference in the experts’ opinion was whether the terms of the new easement caused damages to the remainder after the taking under either petition.

The trial court usurped the jury’s role by concluding there were no remainder damages to validate striking essential experts who opined about: (1) the impact to the Property’s remainder value caused by the conditions imposed in the amended petition; (2) Seaway’s motivation for imposing such conditions; (3) the reasonable adaptability of the Property during the term of the abatement agreement. The entry of judgment without trial confirms the exclusion of this expert testimony was crucial and warrants review.

### **B. The Determination of Just Compensation is Preserved for a Jury.**

Our Constitution provides that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. U.S. CONST. AMEND. VII. This necessarily

includes damages to the remaining land caused by the condemnation. To meet constitutional scrutiny, compensation includes both the part taken and any resulting damage to the remainder, i.e., “the value of the land taken and the damages inflicted by the taking[.]” *Campbell v. United States*, 266 U.S. 368, 371, 45 S. Ct. 115, 116 (1924); *see also, County of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004).

The right to a jury trial “shall remain inviolate.” TEX. CONST. ART. 1, § 15. The Texas Supreme Court held: “When there is a question about whether a partial taking caused damages to the remainder the parties are entitled to have the jury decide the issue” including remainder damages. *State v. Petropoulos*, 346 S.W.3d 525, 531 (Tex. 2011). Prior to the decision below, Texas law conformed with the U.S. Constitution.

Failing to apply these canons, however, the courts ignored the deprivation of a jury trial altogether and held that size and the condemnor’s use of taken land are the only factors that matter and failed to value the easement based on the scope of the easement holder’s rights as determined by the terms of the grant. Without considering the impact of the preconditions on the remainder property, the trial court denied Morello just compensation for the taking without the benefit of a jury.<sup>19</sup> The court improperly struck Morello’s experts

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<sup>19</sup> Seaway could have drafted the amended petition consistent with the 1975 easement to preserve the Property and avoid damages. Telling though, is the disparity to overly burden this Property. Seaway knew the impact of the preconditions and dictated language to prevent future development. Morello was

based on a fundamental misunderstanding of the tax abatement agreement and misapplication of the law as it applies to damages in condemnation. Morello was deprived compensation for damages caused by the imposition of preconditions that were not feasible and precluded future development of the Property.

Morello demanded a jury trial and paid the fee but was denied this right when the trial court struck his experts' testimony and entered judgment. That court erred by misunderstanding that especially in condemnation, when the condemnee is being forced to sell on the condemnors schedule, "the amount of [remainder] damages such as these is always more or less uncertain, conjectural, and speculative . . . [but] does not prevent their presentation and adjudication in a condemnation proceeding." *City of La Grange v. Pieratt*, 175 S.W.2d 243, 247 (Tex. 1943). Morello respectfully requests this Honorable Court grant review and reverse the decision below so that these important issues may be presented to a jury under the correct standards.

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deprived his fundamental private property rights without compensation.

### **III. Unchallengeable Eminent Domain Authority Is Unconstitutional When the Court Creates A Special Class of Condemnor To Escape Legislative and Constitutional Limitations and Judicial Review.**

Although the power of eminent domain is substantial it is, none the less, constitutionally circumscribed. *Denbury Green*, 363 S.W.3d at 197. The scope of the legislative grant of eminent-domain power is “strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith.” *Id.* (citing *Coastal States Gas Producing Co. v. Pate*, 158 Tex. 171, 309 S.W.2d 828, 831 (1958) (emphasis added)). When delegated by the legislature to a private entity, such power is granted only to the condemnor’s governing body. See *FKM Parntership v. Board of Regents*, 255 S.W.3d 619, 630 (Tex. 2008). A condemning authority acts “only through its governing body and cannot delegate its eminent domain power.” *Whittington I*, 174 S.W.3d at 900-01 (citations omitted).

Seaway’s Chairman, Bart Moore, testified the governing body never made a determination of how much or what land was necessary for the project but delegated that decision to independent contractors. (App.27). Despite this testimony, the court held “there is no evidence to support Morello’s affirmative defenses.” (App.18).<sup>20</sup> Seaway abdicated its eminent domain authority to determine whether, what and how

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<sup>20</sup> There is substantial evidence in the record that the court of appeals ignored to support each of Morello’s affirmative defenses, should the court grant review.

much to condemn and therefore the condemnation was illegal from the beginning. It is no surprise that the court of appeals discounted this, and all other evidence, to affirm the trial court's grant of summary judgment – no Texas court has affirmed the denial of a right to take challenge in decades. See *supra*, page 16; *Klein ISD*, 739 S.W. 2d 508.

While Morello agrees that pipeline development is important given our country's fast-growing energy needs, economic dynamism and more fundamentally, freedom itself, demand strong protections for individual property rights. *Denbury Green*, 363 S.W.3d at 204. In fact, the obligation to protect and preserve private property rights is one of the most important purposes of government. John Locke, SECOND TREATISE OF GOVERNMENT, Chap. IX, Sec. 124 (C.B. McPherson, ed., Hackett Publishing Co.1980) (1690) (the preservation of property rights is “[t]he great and chief end” of government). Indeed, our Constitution and laws enshrine landownership as a keystone right, rather than one “relegated to the status of a poor relation.” *Dolan v. City of Tigard*, 512 U.S. 374, 392, (1994). Individual, private property rights are “fundamental, natural, inherent, inalienable, not derived from the legislature and as pre-existing even constitutions.” *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). They are a foundational liberty, not a contingent privilege. *Id.* at fn. 34.

This petition calls upon this Honorable Court to establish a benchmark for the unconstitutional use of eminent domain by private condemnors and limit the degree to which private property rights may be

repressed. The bar to challenge eminent domain authority has always been high, but in Texas, based on the opinion of the Texas appellate court, condemnors are no longer subject to meaningful judicial scrutiny.

In Texas, pipeline companies are part of a newly created superior class with unchallengeable power as condemnors of “large-scale projects” and landowners have been relegated to poor relation. The decision provides that once a large-scale project is deemed by the governing body, consideration of landowners’ right need not be accorded. This is so, even though many landowners will be impacted that have yet to be identified.

There is no such thing in the theory of our governments, State and National, as unlimited power in any of their branches. There are limitations of such powers which arise out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

*Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 664 (1874).

The state appellate court’s holding renders a common carrier’s necessity determination for the project



as conclusive, unchallengeable, condemnation authority for necessity of all property taken, annulling the legislative limitation on condemnation power to land that is necessary to achieve the public use. (App.27). Seaway had the initial burden to establish its governing board actually made a determination the particular taking was necessary to advance the ostensible public use. *Whittington I*, 174 S.W.3d at 898 (citing *City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 84 (1940)). Relying solely on the Consent, Seaway could not meet this burden because: (1) Seaway delegated the power to decide what and how much property was necessary and convenient to contractors, which (2) expressly conflicts with Seaway Chairman, Bart Moore’s testimony as to whom the power was delegated by Seaway, and (3) Moore’s further testimony that the governing body preferred to use the existing easement. (App.27).

The court below made law by holding that necessity is proven by a condemning authority’s finding of public use for large-scale projects to take multiple contiguous tracts, even when the necessity of a particular tract is challenged by a landowner. Under this new standard, a common carrier pipeline company’s right to eminent domain can never be challenged, because the necessity of the pipeline supplants examination of the necessity of the land taken. This interpretation of the legislature’s delegation of eminent domain authority to common carrier pipelines also conflicts with *Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 321–23 (Tex. 2017),

which held it is not for courts to undertake to make laws better by reading language into them, absent the necessity to do so to effect clear legislative intent or avoid an absurd or nonsensical result. There is no legislative basis for the creation of a new “large-scale” condemnor class. The trial court’s disregard of Morello’s inviolate property rights and flawed rulings failed to properly limit the scope of Seaway’s eminent domain authority and, at the same time, denied him just compensation in violation of the Fifth and Fourteenth Amendments.

The Court of Appeals assessed the evidence in this case in the context of an erroneous understanding of the law. Morello raised a genuine issue of material fact which warranted determination by a fact finder whether the taking was pretextual. Morello’s evidence tended to indicate the true purpose of the condemnation was to help Seaway profit at Morello’s expense, by undoing an existing expensive contract with which Seaway no longer desires to comply. Morello should have been given and should be accorded the opportunity to prove his case at trial. Unbridled eminent domain authority is unconstitutional, and Texas cannot diminish Fifth Amendment rights of landowners under the guise of judicial discretion or evidentiary exclusion to prevent meaningful judicial review of the scope of eminent domain authority or a jury’s determination of just compensation. The new strictures announced below render compensation under Texas law unconstitutional. For these reasons, Morello requests the petition

for writ of certiorari be granted so that this Court can bring Texas back into the constitutional light.



### CONCLUSION

“For the foregoing reasons, the petition for a writ of certiorari should be granted.”

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