No. 26-413 FOURTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Plaintiffs/Appellants, v. RITE TOUCH INVESTMENTS, GARY E. STOBEL, SR., AND CORA W. STOBEL, Defendants/Appellees.	**From Craven County** No. 20CVS001534-240

****

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS/APPELLEES RITE TOUCH INVESTMENTS, GARY E. STOBEL, SR., AND CORA W. STOBEL

****

INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

N.C. Constitution

Statutes

Rule

Other Authorities

NATURE OF AMICUS CURIAE'S INTEREST

Pacific Legal Foundation (PLF) is a nonprofit public interest legal foundation organized for the purpose of protecting and preserving private property rights, individual liberty, and economic freedom.[1] For more than fifty years, PLF has represented property owners and amicus participants in property rights cases nationwide, including in North Carolina courts. *See*, *e.g.*, *Town of Apex v. Rubin*, 388 N.C. 236, 919 S.E.2d 111 (2025); *Anderson Creek Partners, LP v. Cnty. of Harnett*, 382 N.C. 1, 876 S.E.2d 476 (2022).

PLF submits this brief to aid the court in understanding the historical and practical environment in eminent domain cases, and how the "make whole" principle underlying the requirement of just compensation rings hollow if a property owner who is sued to take away his or her property is not reimbursed for the actual costs of ensuring the government lives up to its constitutional obligations. PLF believes discussion of these issues will assist the court in understanding and deciding the important issues presented by this case.

---

[1] PLF is a California nonprofit corporation, and has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Pursuant to N.C. R. App. P. 28.1(b)(3)(c), PLF states: (1) this brief was authored by PLF attorneys and no portion was authored by counsel for any party; (2) funding for preparation of this brief was provided by PLF, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person, other than PLF, contributed money that was intended to fund preparing or submitting this brief.

ISSUE

Does North Carolina's Law of the Land Clause, N.C. Const. art. I, § 19, permit a property owner who proves the condemnor's offer of just compensation was constitutionally inadequate to be made economically whole?

SUMMARY OF ARGUMENT

Lofty principles are one thing, reality is another. The North Carolina Constitution promises to indemnify property owners on the target end of the sovereign's "most awesome grant of power."[2] *Dep't of Transp. v. Rowe*, 353 N.C. 671, 679, 549 S.E.2d 203, 210 (2001) (Law of the Land Clause requires returning the property owner to "the same financial position" he was in before the taking.). But this principle rings hollow when it runs into the reality that condemnors' offers are often a fraction of the property's actual value. This puts the owner in an impossible position, forced to choose between two options, neither of which will make him economically whole: (1) go quietly into the night and accept inadequate compensation; or (2) bear the often significant costs necessary to prove what the condemnor should have provided in the first place. Either way, the owner ends up economically worse off than before the taking.

---

[2] *Winger v. Aires*, 371 Pa. 242, 244, 89 A.2d 521, 522 (1952) ("The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land."); *see also City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985); *Harrison Redevelopment Agency v. DeRose*, 398 N.J. Super. 361, 402, 942 A.2d 59, 85 (Ct. App. Div. 2008) ("The power to condemn property 'involves the exercise of one of the most awesome powers of government.'") (quoting *City of Atlantic City v. Cynwyd Invs.*, 148 N.J. 55, 73, 689 A.2d 712, 712 (1997)).

This appeal is an opportunity for this Court to reconcile principle with reality, and to reaffirm that condemnors have special duties of fairness in eminent domain as other courts across the nation have recognized. If the courts accept that it is simply part of the system that property owners are regularly deprived of full indemnity in eminent domain, then the Constitution's promise is meaningless, and it would be understandable if property owners concluded that real justice may be too elusive—too dear in time, spirit, and resources—to merit standing up for their civil rights.

ARGUMENT

I. The "Despotic Power"[3]

Eminent domain is the sovereign's power to force what no free-market participant can do: use the courts to require an unwilling owner to sell his or her property, at a price, which by definition, he or she is not willing to sell. This power is in derogation of "common-law principles" such as the right to keep your own property and exclude others, the sovereign included. *See*, *e.g.*, *Semayne's Case*, 5 Coke R. 91 (K.B. 1604) ("[t]hat the House of every one is to him his (a) Castle and Fortress, as well for his Defence against Injury and Violence, as for his Repose …."); *Marks v. Ackerman*, 39 Haw. 53, 58-59 (1959) (eminent domain statutes are in derogation of the common law) (citation omitted).

The requirement to fully and fairly compensate owners when the sovereign forcibly acquires their property can be traced to Magna Carta's Law of the Land Clause and its other provisions. *See* Chapter 28 of 1215 Magna Carta, *reprinted in*

---

[3] An early Justice of the U.S. Supreme Court described eminent domain as the "despotic power." *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795).

A. E. Dick Howard, *The Road From Runnymeade: Magna Carta and Constitutionalism in America* 387 (1968) ("No constable or other of [o]ur bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment."). That principle crossed the Atlantic with the founding of the American republic, and there was widespread agreement that just compensation represented a fundamental limitation on the government's ability to take property, even in the absence of an express constitutional requirement. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 578-579 (1972); *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162, 167-68 (N.Y. 1816) (finding just compensation is inherently included in general eminent domain principles, even if there is no constitutional requirement); 2 Province and Court Records of Maine 220 (C. Libby ed. 1931) ("[W]here any person suffers Inconvenience relateing to his propriety by the Convenience of the Road, It is to bee valewd [sic] & fully made good by the Townes within whose limits it falls, to all reasonable satisfaction.").

II. Eminent Domain's Indemnity Principle

The same principle—of returning a property owner to "fully made good" position—is a foundation of North Carolina's Law of the Land Clause, N.C. Const. art. I, § 19, whose legal DNA links directly to Magna Carta. *See Johnston v. Rankin*, 70 N.C. 550, 555 (1874) (the Law of the Land Clause's requirement to provide compensation is a "principle … grounded in natural equity"); *see also Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006) (citing *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969)) ("[Eminent domain] is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is still limited by the constitutional requirements of due process and payment of just compensation[.]"); *L & S Water Power, Inc. v. Piedmont Triad Reg'l Water Auth.*, 211 N.C. App. 148, 150, 712 S.E.2d 146, 152 (2011) (the indemnity principle "is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina").

"Just" compensation under the Law of the Land Clause places a practical limit on the government's eminent domain power. *Id.* Just compensation requires that a condemnee "be put in as good a position pecuniarily as if his property has not been taken." *Rowe*, 353 N.C. at 679 (citing *Olson v. United States*, 292 U.S. 246, 255 (1934)); *Lea Co. v. N.C. Bd. of Transp.*, 317 N.C. 254, 260, 345 S.E.2d 355, 358 (1986) (the guarantee of just compensation requires an owner be made whole, to be provided "the full and perfect equivalent of the property taken") (quoting *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923)). It requires returning the property owner to "the same financial position" he was in before the taking. *Rowe*, 353 N.C. at 679. North Carolina's courts have long emphasized that indemnification of the owner is the goal—not merely the value of the property—that matters. The Supreme Court of North Carolina recently affirmed that proposition, holding that "just compensation means 'that persons being required to provide land for public projects are put in the same financial position as prior to the taking.'" *Town of Midland v. Wayne*, 368 N.C. 55, 63, 773 S.E.2d 301, 307 (2015) (quoting *Rowe*, 353 N.C. at 679). *See also Stewart & Grindle, Inc. v. State*, 524 P.2d 1242, 1249-50 (Alaska 1974) (finding the property owners were entitled to recover attorney's fees and costs as part of "just and adequate compensation.").

III. Eminent Domain Cases Are Not Typical Civil Litigation

The obligation to ensure that property owners are made economically whole flows in large part from the grossly uneven playing field inherent in eminent domain actions. For even in the best of circumstances, property owners on the target end of sovereign power are in an unenviable situation because these lawsuits are unlike any other civil litigation. Owners are not accused of any wrongdoing—they have not breached any duty, nor have they repudiated a promise—yet they are hauled into court and named as a defendant. As the California Supreme Court explained:

> Eminent domain, so far as the defendant is concerned, is not based upon any activity on his part. There is no voluntary element in such an action. When the public agency announces its intention to take his property, it is telling the owner that he must sell his property whether he wants to or not.

La Mesa-Spring Valley Sch. Dist. of San Diego Cnty. v. Otsuka, 57 Cal.2d 309, 317, 369 P.2d 7, 12 (1962). Owners must defend a lawsuit simply because they own property the government says it wants. This is why courts do not treat condemnation lawsuits as typical civil litigation, but special proceedings in which someone who has not committed a civil wrong nonetheless ends up as a defendant in a government lawsuit and is forced to expend legal fees and other costs simply to try and keep what is already theirs. *See Torrance Unified Sch. Dist. of Los Angeles Cnty. v. Alwag*, 145 Cal. App. 2d 596, 599-600, 302 P.2d 881, 883 (Cal. Dist. Ct. App. 1956) (an action to take private property is not of the same nature as ordinary civil litigation; there is no defendant alleged to have committed some wrong). The property owner is an entirely innocent party dragged into a lawsuit simply because the government needs (or merely wants) their property. *See*, *e.g.*, *Dade Cnty. v. Brigham*, 47 So. 2d 602, 604 (Fla. 1950) ("[T]he owner of private property sought to be condemned is forced into court by one to whom he owes no obligation[.]").

There is little that an owner can do to stop the taking, even if the property has been owned by a family for generations or is essential to their business, as is often the case. Only by mustering extraordinary proof can owners even mount a public use defense. *See*, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005) (deferential "rational basis" standard of review governs public use challenges).

Moreover, the usual rules in civil cases don't apply in eminent domain. Property owners can be deprived of title and possession immediately without the government first proving its case, regardless of the disruption to their homes, lives, or businesses. *See* N.C. Gen. Stat. §§ 136-103, 136-104 (quick take provisions). There's no statute of limitations limiting when a condemnor brings a lawsuit, and it alone chooses the initiation date; property is always subject to being taken. And if an eminent domain lawsuit is terminated before final judgment—either by the condemnor voluntarily, or by dismissal before judgment—the condemnor is free to simply start all over again and is not bound by the usual rules of preclusion. *See* *Yadkin River Power Co. v. Wissler*, 160 N.C. 269, 76 S.E. 267, 269 (1912) (eminent domain "is not necessarily exhausted by a single exercise of the power"); *Carolina Power & Light Co. v. Merritt*, 41 N.C. App. 438, 441, 255 S.E.2d 225, 227 (1979) (res judicata does not bar subsequent condemnation where condemnor voluntarily abandoned prior attempt).

The vast differences in litigation and bargaining power between the sovereign and property owners means that in a vast majority of eminent domain cases, ensuring that compensation fully indemnifies the owner is the sole opportunity to assure owners they are being treated fairly and with respect by the government and by the justice system. Accepting systematic undercompensation should not be accepted. because in most cases, just compensation is the sole measure of justice, so it must be truly "just."

IV. The Economic Realities of Eminent Domain Litigation

The one-sided nature of condemnation might be tolerable if the data revealed that condemnors most often presented offers to owners that were reasonably close to the fair market value of the property. But the studies, and practice, reflect a dramatically different landscape. *See* Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990 – 2002*, 39 J. Leg. Studies 201, 204 (2010) (study showing that more than 50% of property owners in New York City settled condemnation cases for less than fair market value). In cases where owners do not believe that the condemnor's offer accurately measures just compensation, the owner has two alternatives; (1) forego a challenge and accept less for the property than the Constitution requires; or (2) seek the help of professionals to assert the owner's constitutional rights and argue for compensation that is just.

And the stark but unavoidable reality of litigation is that it costs money. None of the professionals necessary to prove the condemnor's offer is substandard—

appraisers, engineers, land use planners, and legal counsel, for example—work for free. *Brigham*, 47 So. 2d at 605 (property owners are forced to incur additional costs and fees if they want to object to the condemnor's valuation). The Colorado Supreme Court held that an owner must not be made to bear the reasonable costs of proving the value of the land taken. *See Dolores No. 2 Land & Canal Co. v. Hartman*, 17 Colo. 138, 140 (1891) ("It cannot have been the purpose of the constitutional convention to require payment by the owner of costs reasonably incurred in the proceeding whereby his premises are taken."). Consequently, even though the purpose of the constitutional compensation imperative "rests on equitable principles and ... means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken," owners are forced into a choice that should not be acceptable because either path leads to owners being deprived of full economic indemnity. *De Bruhl v. State Highway & Pub. Works Comm'n,* 247 N.C. 671, 678, 102 S.E.2d 229, 234 (1958) (citation omitted). Thus, even if they are successful in obtaining just compensation, those who pursue their rights will, by definition, be undercompensated even if the jury awards them 100% of what they believe the condemnor should have provided in the first place. Because every dollar they must spend on appraisers, engineers, lawyers, and others is a dollar less compensation they realize for their lost property. If these essential transactional costs are placed only on the shoulders of property owners, they will not be returned to the position they were in before the condemnation, and they are, as a consequence, being forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *L & S Water*, 211 N.C. App. at 152 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). *Cf. Brigham*, 47 So. 2d at 605 ("[T]he spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but of all the necessary expenses incurred in fixing that value.") (citing *In Re Water Supply in City of New York*, 125 A. D. 219, 221-22 (N.Y. 1908)).

Failure to indemnify for transactional costs necessary to ensure that the sovereign lives up to its constitutional obligations can make severe undercompensation a systematic problem. In many cases, litigation is expensive, particularly when the government is the plaintiff. A 2010 study found that in cases where one or more types of discovery were reported, the median litigation cost was $15,000 for plaintiffs and $20,000 for defendants. Emery G. Lee & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L. Rev. 765, 770 (2010). These numbers are sixteen years old, so almost certainly undersell the expense of litigation today. If property owners must litigate in order to receive just compensation, but must also bear the costs they are forced to incur to obtain it, they ultimately pay for the taking despite the constitutional guarantee of just compensation. A Louisiana court recently required condemnors to indemnify owners under Louisianans' constitutional right to just compensation. *Bd. of Supervisors of LSU v. Gerson*, 260 So. 3d 634, 653-54 (La. Ct. App. 2018), *writ denied*, 266 So. 3d 292 (La. 2019) (finding that if reasonable attorney's fees are not awarded to a property owner affected by expropriation, the owner would not be placed in the same "pecuniary position" as they would have been had the taking not occurred).

Not only does requiring indemnity serve the very purposes the Law of the Land Clause was designed to advance, it also has immense practical benefits and makes eminent domain law much more fair.

First, it removes the condemnor's perverse incentive to game play, and will make them provide realistic offers. When condemnors understand that they must bear the costs of undercompensation, they have every reason to make good-faith deposits up front. This reinforces the just compensation requirement as a real check on the sovereign's eminent domain power by requiring agencies to realistically assess the true cost of infrastructure and other improvements. It renders the government more judicious in deciding which eminent domain projects are necessary. It also disincentivizes litigation posturing, encourages earlier resolution, and reduces litigation. *See* N.C. Gen. Stat. § 136-119 (requiring indemnity in some DOT cases). Experience under that statute demonstrates the sky does not fall if condemnors must make owners whole.

Second, requiring the government to make the owner whole reinforces the principle behind just compensation that a single or discrete group of property owners should not be forced to pay a disproportionate amount for a public project. *Armstrong*, 364 U.S. at 49 (the point of requiring just compensation is to ensure that the public bears the cost of public improvements). Just compensation disperses the costs of public projects and ensuring reimbursement of costs prevents one or a few owners from paying more than their fair share. Consequently, while federal courts may have set a floor for what must be considered in just compensation calculations, they have not set a ceiling, and North Carolina can and should demand better.

North Carolina's courts should not be blind to the realities of eminent domain litigation. Neither are the courts powerless, and the Supreme Court has long recognized that the law is, at bottom, concerned not only with strict technical adherence, but also with achieving the practical and just result. *See*, *e.g.*, *McCullough v. Scott*, 182 N.C. 865, 109 S.E. 789, 795 (1921) ("The spirit or reason of the law prevails over its letter.").

CONCLUSION

Property owners who have done no wrong should never be worse off economically as a consequence of being forced to sell their property to the public. But failing to indemnify them fully would do just that. This Court should affirm the judgment.

DATED: September 2, 2026.

Respectfully submitted,

/s/ Erin E. Wilcox
ERIN E. WILCOX
N.C. Bar No. 40078
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Tel: (916) 419-7111
EWilcox@pacificlegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief is in compliance with N.C. Rule of Appellate Procedure 28.1(j)(2) in that it is typed in 12-point Century Schoolbook font and contains no more than 3,306 words in the body of the brief, footnotes, and citations included, as indicated by the word processing program, Microsoft Word, that was used to prepare the brief.

DATED: September 2, 2026.

/s/ Erin E. Wilcox
ERIN E. WILCOX

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original Brief Amicus Curiae of Pacific Legal Foundation in Support of Defendants/Appellees Rite Touch Investments, Gary E. Stobel, Sr., and Cora W. Stobel has been filed electronically pursuant to Rule 26(a).

I further certify that a copy of the foregoing Brief was served on the following parties to this Appeal by electronic mail addressed as follows:

John F. Oates, Jr.
James W. Doggett
joates@ncdoj.gov
jdoggett@ncdoj.gov

Jeremy P. Hopkins
jhopkins@cshlaw.com

DATED: September 2, 2026.

/s/ Erin Wilcox
ERIN WILCOX