SUPREME COURT OF LOUISIANA
2018 FEB 14 PM 2 05
CLERK OF COURT

SUPREME COURT

STATE OF LOUISIANA

NO. 2017-C-0434

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT
Respondent

versus

VIOLET DOCK PORT, INC., L.L.C.
Applicant

On Writ of Review to the Fourth Circuit Court of Appeal, No. 2016-CA-0096 c/w 2016-CA-0262 and 2016-CA-0331, and the Thirty-Fourth Judicial District Court, Parish of St. Bernard, State of Louisiana, No. 116-860, Judge Jacques A. Sanborn, Presiding

---

CIVIL PROCEEDING

APPLICATION FOR REHEARING OF VIOLET DOCK PORT, INC., L.L.C.

Submitted by:

RANDALL A. SMITH (#2117)
SMITH & FAWER, L.L.C.
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200

VAL P. EXNICIOS (#19563)
LISKA EXNICIOS & NUNGESSER
1515 Poydras Street, Suite 1400
New Orleans, Louisiana 70112
Telephone: (504) 410-9611

HARRY T. LEMMON (#8311)
400 Mimosa Avenue
Luling, Louisiana 70070
Telephone: (985) 785-0810

W. SCOTT HASTINGS (#25410)
LOCKE LORD LLP
601 Poydras Street, Suite 2660
New Orleans, Louisiana 70130
Telephone: (214) 740-8537

ALAN WEINBERGER (#13331)
HANGARTNER RYDBERG AND TERRELL, L.L.C.
701 Poydras Street, Suite 310
New Orleans, Louisiana 70139
Telephone: (504) 522-5690

Counsel for Violet Dock Port, Inc., L.L.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 3

OBJECTIVE, UNCONTESTED FACTS ESTABLISHED BY THE RECORD 4

I. StBP had an overall plan to take over VDP's property and revenue stream 5

II. StBP specifically planned on usurping VDP's Navy business 6

III. Within months of learning of VDP's imminent bulk cargo operations (whereby VDP would compete with StBP and generate the same type of base rental and throughput fees StBP collects from Associated Terminals), StBP expropriated the Property 8

ARGUMENT 9

I. The Majority erred in applying a manifest error standard of review in determining that StBP's expropriation did not violate the Louisiana Constitution 9

II. The Majority's Fifth Amendment "public use" analysis conflicts with decisions from the U.S. Supreme Court and other state supreme courts 14

CONCLUSION 24

VERIFICATION

TABLE OF AUTHORITIES

Cases:

99 Cents Only Stores v. Lancaster Redevlopmt. Agency, 228 F.Supp.2d 1123 (C.D. Cal. 2001)..18

Ansalve v. State Farm Mutual Automobile Insurance Co., 95-0211, p. 8 (La. App. 4 Cir. 2/15/96), 669 So.2d 1328 12

Berman v. Parker, 348 U.S. 26 (1954) 16, 17, 18, 19

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 465 (1985) 22

Bridges v. Nelson Indus. Steam Co., 15-1439, p. 4 (La. 5/3/16), 190 So.3d 276 ....10, 11

Calder v. Bull, 3 U.S. 386 (1798) 16

County of Hawaii v. C&J Coupe Family Ltd. Partnership, 198 P.3d 615 (Haw. 2008) ...15, 16, 20

Evans v. Lungrin, 97-0541, (La. 2/6/98), 708 So.2d 731 ....9, 14

Exxon Mobil Pipeline Co. v. Union Pac. R. Co., 35 So.3d 192 (La. 2010) 15

Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896) 17, 20

Ferrell v. Fireman's Fund Insurance Company, 94-1252 (La. 2/20/95), 650 So.2d 742 14

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) 16, 17, 19

Hayes Fund for First United Methodist Church of Welsh, L.L.C. v. Kerr-McGee Rocky Mountain, L.L.C., 2014-2592 (La. 12/08/15), 193 So.3d 1110 13

Kelo v. City of New London, 545 U.S. 469 (2005) .... *passim*

Kevin Associates, L.L.C. v. Crawford, 03-0211, p. 15 (La. 1/30/04), 865 So.2d 34 13

LaGrappe v. Progressive Sec. Ins. Co., 2015–0200 (La. 4/14/15), 165 So.3d 71 14

Land v. Kohl's Dep't Stores, Inc., (La. 3/13/17) 212 So.3d 1166 13

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 16

Middletown Township v. Lands of Stone, 939 A.2d 331 (Pa. 2007) 21

Miller v. Fenton, 474 U.S. 104 (1985) 23

Missouri Pacific Railway Co. v. Nebraska, 164 U.S. 403 (1896) 16

Norris v. State of Alabama, 295 U.S. 587 (1935) 22, 23

Ogea v. Merritt, 13-1085 (La. 12/10/13), 130 So.3d 888 ....12, 13

Ornelas v. United States, 517 U.S. 690 (1996) 23

Rhode Island Economic Dev. Corp. v. The Parking Co., L.P., 892 A.2d 87, 96 (R.I. 2006) ..21, 22

Rosell v. ESCO, 549 So.2d 840 (La. 1989) 9, 14

Southwestern Ill. Dev. Auth. v. National City Environ., L.L.C., 766 N.E.2d 1 (Ill. 2002) 20, 21

St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC, 16-96, 16-262, 16-331, p. 8 (La. App. 4 Cir. 12/14/16), 229 So. 3d 626 10

St. Tammany Manor, Inc. v. Spartan Bldg. Corp., 509 So.2d 424 (La. 1987) 20

State v. Estate of Davis, 572 So.2d 39 (La. 1990) 14

State v. Williams, 00-1725 (La. 11/28/01), 800 So.2d 790 20

Thompson v. Keohane, 516 U.S. 99 (1995) 23

United States ex rel. Tenn. Valley Auth. v. Welch, 327 U.S. 546 (1946) 16

Webb's Famous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 17

Winfield v. Dih, 01-1357, p. 8 (La. App. 4 Cir. 4/24/02), 816 So.2d 942 11

Zito v. Advanced Emergency Med. Servs., Inc., 11–2382, pp. 4–5 (La. 5/8/12), 89 So.3d 372 14

Statutes, etc.:

Fifth Amendment of the U.S. Constitution .... *passim*

Louisiana Constitution, art. I, §4 .... *passim*

T. Cooley, *Constitutional Limitations* 1141 (8th ed. 1927) 18

Violet Dock Port, Inc., L.L.C. ("VDP") submits this Application for Rehearing, requesting that this Honorable Court: (1) grant a rehearing to redress the private property rights undermined by this Court's January 30, 2018 majority opinion (the "Majority Opinion"); (2) reverse the lower courts; and (3) hold that the expropriation of VDP's property (the "Property") by St. Bernard Port, Harbor & Terminal District ("StBP") violates Article I, Section 4(B)(6) of the Louisiana Constitution and the Fifth Amendment of the U.S. Constitution for the reasons set forth by the three dissenting Justices of this Court—Weimer, Guidry, and Hughes, JJ.—and for the reasons set forth herein. VDP does not request reconsideration of the Majority's holding on compensation.

INTRODUCTION

Over seven years ago, StBP expropriated VDP's Property and business assets. Today, StBP continues to service VDP's former customers and collect the revenue that formerly belonged to VDP. This is in accordance with StBP's business model presented to the DOTD Port Priority Program in 2008 to obtain funding to acquire the Property. StBP could not have obtained that funding if it had not represented to the DOTD that it would usurp VDP's revenue stream to satisfy the Port Priority Program's required rate of return. StBP's Port Priority Application (the "PPA"), authorized by its five-member decision-making Board of Directors, lays out its plan to collect the same Navy revenue, dockage (*i.e.*, layberthing) fees, rent, and cargo tonnage fees that VDP would be collecting today but for the expropriation. Likewise, StBP's Verified Petition confirms that the expropriation is for the same purposes, and to execute the same plan, laid out in its 2008-2009 Port Priority filings.

Nevertheless, in a 4-3 decision, the Majority permits an astonishing new governmental power—the power to take a fully-functioning private business, use its assets and customer revenues to expand government operations, and share those revenues with a favored private actor. Further, the Majority holds that a local trial judge is the only check on that power, deferring to the trial judge's factual findings unless they are manifestly erroneous. The Majority's analysis overlooks the fact that neither the trial judge nor the Court of Appeals made any factual findings regarding the Constitutionality of the taking or whether StBP took any of VDP's assets "for the purpose of operating that enterprise or halting competition with a government enterprise" in violation of La. Const. art. I, Section 4(B)(6). By deferring to the trial court—which made no factual findings regarding the Constitutional provisions at issue—the Majority has allowed Article I, §4(B)(6) to be stripped of its meaning. The Majority's

decision is also irreconcilable with U.S. Supreme Court precedent, and in conflict with decisions from other state supreme courts on how to review claims that a taking exceeds the government's authority under the Fifth Amendment to the U.S. Constitution.

The Majority's decision has far-reaching implications for the Louisiana economy (as reflected by the support for VDP by *amicus curiae* the Louisiana Association of Business and Industry ("LABI")). VDP wholeheartedly agrees that marine/port business is vitally important to the State of Louisiana. As the long-term owner of one linear mile of the ten miles of Riverfront within StBP's jurisdiction, VDP had contributed to the port industry for decades and had constructed new improvements to expand its thriving business before StBP's expropriation drove it out of business permanently. Likewise, while VDP agrees that the expansion and modernization of the maritime industry has broadened the number and variety of ships traveling the Mississippi River (Op. at 2), at the time of expropriation, VDP's private port was already capable of berthing (by STBP's own admission) "some of the largest cargo ships in the world." L-143(a). By law, private ports are on equal footing with public ports to engage in maritime commerce; the law grants public ports no monopoly on the River.

While the Majority's ruling may directly apply to only one landowner, the ramifications of this ruling are potentially staggering. The result of the Majority's opinion is that a government entity may legally remove from commerce any competitor the taking authority deems a threat so long as it articulates one of the enumerated reasons in Louisiana Constitution, art. I, §4(B)(2) as the supposed purpose for the expropriation. Moreover, a government enterprise could seize commercial assets whenever it deems it beneficial to a listed government purpose. For example, the Port of New Orleans could permissibly expropriate the Hilton or One River Place ostensibly for port expansion, but continue to operate the hotel or condominium association, thereby pocketing the existing revenue stream by declaring it to be necessary to fund the expansion. Compounding this risk, the Majority upholds StBP's expropriation when the plan, from the beginning, was to turn over VDP's property to another private entity, Associated Terminals ("Associated"), through a long-term lease. So, could the Port of New Orleans expropriate the Hilton to lease it to Ritz Carlton? If StBP's taking is Constitutional, then it is difficult to imagine a taking that would be impermissible. The Majority's Opinion suggests no limiting principle. A decision allowing government such broad use of expropriation powers to disrupt private property ownership should not be the law in Louisiana or elsewhere in the United States.

The Majority's Opinion should be withdrawn, because the risk of expropriation for pretextual, private, and anti-competitive purposes is a strong deterrent on private business investment and development in Louisiana (for the reasons explained by Justice Weimer and in the Amicus Brief of LABI). Private businesses will be wary of investing and developing business in this State for fear that they will be subject to government (or as here, joint government/private) expropriation once the business begins to become successful or a threat to other favored competitors. Although the precedential effect of this Court's opinion is not limited to Mississippi River or port industry, the record establishes that, from 2005 until 2011, industry invested $23 billion in private expansions along the Mississippi River from Baton Rouge to the mouth of the River and invested $81 billion in expansion statewide. R. 16-96, V. 17, 4232 (testimony of Dr. Loren C. Scott). As of the date of trial, four of the upcoming major new Mississippi River projects were $2 billion projects. R. 16-96, V. 17, 4236. These enterprises will certainly be wary of the specter of expropriation of their enterprises in view of the Majority Opinion, and potential future investors may choose to go elsewhere.

The risk to private business is exceptionally great if reviewing courts must now, as the Majority holds, give vast deference to a single local trial judge's determination that a governmental taking is legal. This is especially true where, as here, the trial court did not explain how it reached its conclusion that there was no violation of the Constitution. The Constitutional duty of reviewing courts is to ensure that the Constitution is enforced, and that local courts apply the Constitution correctly. Our court system is carefully designed to empower reviewing courts, with multiple judges, to overrule the errors of a lone, local district court judge. The Majority now transforms these local judges into the sole check on governmental power to take private property and business. Louisiana businesses—whether they are generations-old, family farms or billion dollar industrial expansions—must be protected by this Court. Likewise, this Court, as the protector of all constitutional rights, must act now to ensure that the lower courts do not extend this new, overly deferential standard of review to uphold improper government impingement into protected individual liberties and civil rights.

VDP requests that the Court grant rehearing and declare StBP's expropriation unconstitutional.

BACKGROUND

This Court granted writs in part to determine the Constitutionality of StBP's taking of VDP's Property in view of the limitations on the forcible taking of private property set forth in Article I,

Section 4(B) of the Louisiana Constitution and the Fifth Amendment of the U.S. Constitution. In a 4-3 decision, the Majority held that:

> [T]he record demonstrates that the Port's expropriation was for the public purpose "to facilitate the transport of goods or persons in domestic or international commerce" and not for the constitutionally prohibited purpose of operating Violet's enterprise or halting competition with a government enterprise. We therefore affirm the court of appeal holding that the expropriation was constitutional.

(Op. at 1-2).

Justice Weimer and Justice Guidry issued written dissents, in which Justice Hughes joined. Justice Weimer correctly pointed out that there were no factual findings regarding Article 1, Section 4(B)(6) to which the Majority could have deferred. Justice Weimer further determined that multiple legal errors interdicted the factfinding process and mandated *de novo* review.

After examining the history and intent of La. Const. Art. I, Section 4(B)(6) and the 2006 Constitutional Amendments, including Section 4(B)(3), Justice Weimer concluded that the unambiguous language and intent of Section 4(B)(6) was to prohibit takings such as StBP's. Justice Weimer additionally found that the Majority improperly applied a manifest error standard and, by affirming the lower courts, "subject[ed] business interests across Louisiana to increased risk of government takeovers, which has the effect of thwarting private business from initiating economic development that competes with governmental enterprises." (Op. at 18, Weimer, J., dissenting).

Justice Guidry dissented separately, finding that the lower courts committed manifest error in finding that StBP's taking was not "for the purpose of operating that enterprise or halting competition with Port enterprises," because StBP's own "plan was premised on taking Violet Port Dock's assets and operating its existing lay berthing business and nascent cargo handling activities to generate funds to finance a future dry and liquid bulk cargo facility." (Op. at 37, Guidry, J., dissenting).

A rehearing is warranted to protect private businesses in the manner intended by the Legislature and voters in the State of Louisiana, to revive confidence of Louisiana industry in the sanctity of their business interests, to correct several factual errors in the Majority Opinion, and to prevent improper deference to the trial court in a constitutional matter.

OBJECTIVE, UNCONTESTED FACTS ESTABLISHED BY THE RECORD

By deferring to the trial court's alleged findings of fact, the Majority has elevated the subjective testimony of two witnesses (notably, not StBP's ultimate decision-makers) regarding their feelings about Navy ships layberthed at VDP's docks, over the full record, which includes undisputed written

admissions and concrete evidence of StBP's objective actions. Even those witnesses do not deny that StBP contracted to service the Navy ships (through its lessee, Associated) and planned to engage in the same type of dry bulk cargo operations for which VDP had constructed a brand new cargo dock and obtained a Corps permit.

While the taking of VDP's Navy contract is perhaps the most damning evidence of StBP's Constitutional violation, it is only part of the equation. StBP had multiple purposes for the taking, but all required the operation of VDP's business enterprise or "its assets" to generate immediate revenue. StBP's overall plan, as laid out in its Port Priority submissions, relied upon four sources of revenue from VDP's Property: (1) the revenue from VDP's Navy contracts; (2) "dockage" fees (same as layberthing fees); (3) base rent from Associated (same as Vulcan's planned base rent); and (4) throughput dry bulk fees (same as Vulcan's planned throughput fees). R. 16-331, 1263 (admitted as L-142); L-228. VDP's business was not limited to one dock and one pair of Navy ships. Moreover, VDP was undeniably expanding its business to compete directly with StBP, and StBP eliminated VDP as a competitor for any type of marine/port business within mere months of learning of VDP's new Berth 4.

StBP's own documents and testimony established the following objective, uncontested facts:

I. StBP had an overall plan to take over VDP's property and revenue stream.

- In 2007, StBP expressed in writing its desire to gain "control of key riverfront sites," and "systematically position [] itself to take advantage of its strategic location for maritime commerce." L-167. StBP targeted VDP's property as "one of the last major properties on the Mississippi River suitable for cargo transshipment," and began to devise a plan wherein it would "keep [VDP's] military contracts" and revenue stream. L-167, p. 12225.

- In 2007, StBP "targeted" the Property and expressed an urgent need to "take it off the market." L-182; R. 16-96, V.9, 2238-2240.

- Other than property StBP already owned, VDP's Property was the "only piece of property in the entire parish along the Mississippi River that could serve as a deep draft marine terminal," making VDP StBP's only private competitor. R. 16-96, V. 9, 2185, L-125.

- StBP had hundreds of acres of land it could develop and docks it was not using due to lack of repair (see L-139b); yet, instead of developing its own property, it took VDP's.

- VDP owned no other lands and operated no other business enterprise. R. 16-96, V.20, 4820-21.

- There was no other nearby property suitable for Navy ships or for replication of VDP's business. L-125; Tr. 2/1/12, p. 101. Indeed, appraiser Truax reported to StBP in August 2010 that "Market sales of these facilities [such as VDP's] are extremely rare, virtually impossible, to find," thus placing StBP on notice that VDP could not relocate. R. 16-331, V.2, 353; P-27, p. 188.

- StBP sought to acquire VDP's entire business, in addition to its Property, forwarding unsolicited lengthy draft proposals[1] to buy VDP's: (1) "service contracts, management contracts, leasing contracts, and other agreements and contracts;" (2) "any and all federal and state trademark registrations, copyrights, trade names, logos and/or trade dress;" (3) tenant "leases, subleases, rental agreements and other occupancy agreements, whether oral or written and whether or not of record;" and (4) goodwill. R. 16-331, V.1, 100, 124, 127, 130.

- StBP's draft proposals included the assignment of existing revenue, contracts, licenses and permits to StBP, as well as, "all subsequent agreements and contracts." R. 16-331, V.1, 102, 110-111. In other words, StBP urged VDP to agree voluntarily not to compete in the future.

- STBP sought funding to acquire the Property from the DOTD's Port Priority Program in 2008, describing a plan in which it would take and use VDP's existing improvements and revenue stream to meet the rate of return necessary to obtain Port Priority funding. L-142; L-143a.

- In 2008-2009, StBP planned on four sources of revenue from VDP's Property: (1) the revenue from VDP's Navy contracts; (2) "dockage" fees (same as layberthing fees); (3) base rent from Associated Terminals (same as Vulcan's planned base rent); and (4) throughput dry bulk fees (same as Vulcan's planned throughput fees). R. 16-331, 1263 (admitted as L-142); L-228.

- StBP could not have obtained funding to take VDP's property but for its plan to take VDP's existing business revenue. Tr. 2/1/12, p. 168-69, 175, 183-4.

- Contrary to StBP's claim that it was merely expanding its existing operations, VDP's property was six miles away from StBP's other docks, and StBP intended Associated would operate the Property "independently," with no "real connection" to StBP's other business. Tr. 2/1/12, p. 101.

- StBP passed its expropriation Resolution in 2010. It parrots the PPA in stating that, "This project is basically a port expansion project accomplished by acquiring property and assets on the Mississippi River. The port would acquire three heavy duty docks and over 4,200 linear feet of river frontage that would be available for immediate use." Compare R. 16-331, V.1, R. 88 (Resolution) with L-142, p. 12 (Port Priority 11/24/08 Overview).

- In Opposing VDP's Motion to Dismiss, StBP admitted its plan to operate VDP's business assets, but argued that the taking was Constitutional so long as it did not operate VDP's assets "indefinitely," or so long as this was not its "sole purpose." R. 16-331, V. 5, 1035-7. Thus, StBP argued, "while the Louisiana Constitution prohibits an expropriation '*for the purpose of operating that business enterprise*,' it does not prohibit an expropriating authority from temporarily operating an enterprise while it is constructing the improvements that are the purpose of the taking." R. 16-331, V. 5, 1038 (emphasis in original).

II. StBP specifically planned on usurping VDP's Navy business.

- StBP admitted its awareness of VDP's Navy business since at least 2006. R. 16-331, 1054.

- VDP had serviced Navy ships on three separate docks on the Property for decades. L-202; L-204; R.16-96, V.19, 4745-48.

[1] The Draft Purchase Agreements were attached to StBP's Petition and introduced into evidence at the hearing on VDP's Motion to Dismiss and at trial. R. 16-331, V. 1, 100-166; P-7. StBP's proposals could not be construed as genuine offers, given that the proposals were conditions upon subsequent due diligence, vote, and approval by StBP's Board of Commissioners, and contain a provision entitled "Non-Offer," specifying they did "not constitute an offer to buy." R. 16-331, V.1, 110, 117. VDP did not accept any of StBP's proposals, as expressly acknowledged by StBP in its Petition. R. 16-331, V.1, 12.

- In 2008, StBP told the DOTD it would usurp VDP's Navy contract and "the port will derive from this proposed project a lease with the Navy/MARAD in the approximate amount of $550,000 per year for Navy/MARAD ships occupying the berths." L-143a.

- StBP told the DOTD on multiple occasions that it "will **continue to compete** for these MARAD/Navy contracts" and that "**Future contracts** are expected to be in that same range [$550,000 per year]." 2/1/12 Hearing Tr. 37; L-143(a); *see also* Tr. 2/1/12, pp. 11-12; D-Exh. "I;" R. 16-331, 1263 (admitted as L-142) ("the Port **will continue to compete for Navy contracts, as the Violet Site has successfully done for over thirty years**....") (emphasis added).

- StBP advised the DOTD that the Navy would remain on the Property during the ten-year projected revenue period set forth in the PPA, because "VDP has been successful in landing these Navy contracts [via public bid process] virtually continuously for over thirty years." L-125, 142, 143a; Tr. 2/1/12, p. 187; see also Tr. 2/1/12, pp. 13, 104, 106.[2]

- Prior to the expropriation, StBP informed the Navy that it would assume performance of VDP's contract and, before trial, StBP contracted to service the Navy in a contract substantially similar to VDP's. Compare L-204 and P-391; Tr. 2/1/12, pp. 184-85.

- Also prior to expropriation, StBP's appraiser conducted interviews with Navy officials and reported to StBP that:

> Based on the information gathered from interviews with MSC [Navy] officials and with other operators the lease is expected to renew for its full term. Historically, the site has consistently been awarded leases from the MSC/U.S. Navy. . . . . **During the term of the existing lease, there are two additional contracts that are expected to be let. It is the opinion of the appraiser the facility will continue to be awarded at least one contract** as this conforms to the logistic requirements of the MSC/US Navy, as understood by the appraiser.

  R. 16-331, V. 3, 506; P-85, p. 38 (emphasis added).

- Mr. Truax assured StBP that the Navy provided secure, guaranteed revenue and, in view of its historical preference for the Property, its occupancy though the 2018 lease term was "**virtually assured" and** that no new facilities could be built to compete with the Property, explaining:

> **Exercise of the option/renewal periods is considered virtually assured** for several reasons; (1) subject facility meets the particular specifications of the U.S. Navy; (2) the contract lease/rental rates are very competitive and **to develop a new/competing facility would require a rent level in excess of twice the contract rents** and (3) **the U.S. Navy has an established history at this facility** and others of exercising all such options.

  R. 16-331, V.2, 347; P-27, p. 182 (emphasis added).

- The Navy contracts are not passive "leases;" they require active servicing with specially tailored assets (special utilities, docks, etc. inspected and approved by the Navy). See L-204 and P-394 (VDP and StBP Navy contracts); L-201 (certification checklist).

- In Opposition to VDP's Motion to Dismiss, StBP acknowledged:

> Regarding the MSC contract, St. Bernard Port admits that it does not

[2] The Navy had identified the Property's location as one of the "best permanent port locations for surge sealift ships." R. 16-331, V. 3, 679.

> intend to displace the Navy from the Violet Dock Property...St. Bernard Port is willing to enter into a new contract with MSC under identical terms to those in its current contract for use or to be otherwise substituted in place of Violet Dock under the current contract.

R. 16-331, V. 5, 1037 (footnotes omitted.). StBP additionally submitted an affidavit from StBP's Director attesting that:

> St. Bernard Port has made every effort to ensure that MSC's contract for layberth services will not be interrupted by the action of the St. Bernard Port.
>
> a. Prior to filing the Petition the Expropriation, I contacted MSC to notify it of St. Bernard Port's plans to expropriate the Violet Dock Port.
>
> b. St. Bernard Port also provided MSC with copies of all initial pleadings filed by St. Bernard Port in connection with this expropriation;
>
> c. At all times pertinent hereto, St. Bernard Port has assured MSC that its use of Violet Dock Port under its current operations will not be interrupted or affected in any way.

R. 16-331, V. 5, 1055.

III. Within months of learning of VDP's imminent bulk cargo operations (whereby VDP would compete with StBP and generate the same type of base rental and throughput fees StBP collects from Associated Terminals), StBP expropriated the Property.

- Prior to 2010, VDP conducted some cargo operations and charged for the dockage of commercial vessels just as StBP does. R. 16-96, V.19, 4666-68; Tr. 2/1/12, pp. 117-18.

- Associated had previously informed StBP that the Property was "suitable" for (and later marketed the Property for) cargo operations involving "minerals/aggregates" just like Vulcan's cargo. R. 16-96, V.12, 2836, 2972; L-Exh.142.

- Vulcan Materials approached VDP in 2008 about leasing Berth 4 and ten (10) adjoining acres for aggregate bulk cargo operations. R. 16-96, V.20, 4793-4800; P-Exh. 397; L-Exh. 228.

- VDP already possessed Corps of Engineers permits for intensive cargo operations on 4 of its 5 docks. R. 16-96, V.12, 2829; L-116, 121(c)-(d), 150a at STBP 2365, 150b, 158; see L-226 at VDP 145 (noting "[c]argo handling at Berth 1, 2, 4 and 5 may include hazardous and non-hazardous cargoes...").

- In 2010, VDP constructed a new Berth 4 specially designed for aggregate bulk cargo and obtained a new Corps of Engineers permit (for which Vulcan paid). L-Exh. 150a-150b; L-Exh. 226, 228; R. 16-96, V.20, 4793-4800, R. 16-96, V.22, 5312.

- StBP recognized that all three Navy-certified docks could be used immediately and easily be converted to handle at least 450,000 tons of cargo in their first year of operation, while StBP's own docks were in poor shape and would be unable to compete. L-Exh. 26, 125, 130, 143a, 143b, 163; R. 16-96, V.9, 2208, 2213, 2220, 2224-5; Tr. 2/1/12, pp. 88-89, 101, 106, 111-13.

- In 2010, StBP was made aware that VDP was expanding and building new Berth 4 for aggregate cargo use. See P- 28, Truax report, pp. 34, 170-171 (detailing Berth 4 and its proposed use by Vulcan); R. 16-96, V.19, 4714; L-116, L-117.

- On March 15, 2010, the Corps of Engineers sent its Public Notice to StBP and other governmental agencies of VDP's plans for cargo operations on Berth 4. L-150b; R. 16-96, V.20,

4799-4800; R. 16-331, V.2, 426; P-27 (Addenda). Immediately, in early April, StBP instructed its appraisers to investigate the expansion activities on the Property and then ordered a formal appraisal. 16-331, V.1, 172; P-27.

- In his reappraisal dated August 27, 2010, Mr. Truax reported to StBP that "construction of Pier/Berth 4 is almost finished with the property owner reporting substantial project completion anticipated within 60 days." He additionally reported that Vulcan's lease of Berth 4 and ten adjoining acres "has been agreed to in principle... [and] **consummation of this lease agreement is considered probable** as lessee has actually secured the necessary Corps permit and is known to be obliged to move from another area location which can no longer accommodate their operation." 16-331, V.1, 173-5; R. 16-96, V.11, 2730; P-27, pp. 3, 170 (emphasis added). Mr. Truax also provided StBP with the July 23, 2010 Corp permit and drawings of the new cargo facilities. R. 16-331, V.2, 409-421; P-27 (Addenda).

- StBP's second appraiser, like Mr. Truax, conceded that Vulcan's cargo operations were "imminent" in 2010 and thwarted only by StBP's planned expropriation. R. 16-331, V. 3, 506; P-85 (Oubre), pp. 17, 32, 38 ("While the lease was not in place, as of the date of this report, it was reported by the owner/operator that the delay in execution was association with the pending acquisition of the property. Based on the information available the lease was imminent and if not for the pending taking it is assumed that it would be in place.").[3]

- Although StBP passed a Resolution to expropriate months earlier, it waited until December 22, 2010, when VDP's Berth 4 construction was substantially complete, to expropriate. R. 16-331, V.10, 2359-60; R. 16-331, V.1, 8; R. 16-96, V.19, 4721.

These objective facts, not the self-serving subjective testimony of witnesses who benefit from the expropriation, illustrate the purpose of the taking.

ARGUMENT

I. The Majority erred in applying a manifest error standard of review in determining that StBP's expropriation did not violate the Louisiana Constitution.

A. *De novo* review is required where, as here, a legal error interdicts the fact-finding process or where the objective dispositive facts are undisputed.

Chief Justice Johnson confirmed in 1998 that, if a legal error interdicts the fact-finding process, the manifest error standard of review is no longer applicable, and the reviewing court should conduct an independent *de novo* review of the record. *Evans v. Lungrin*, 97-0541, (La. 2/6/98), 708 So.2d 731, 735 (citing *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989)). For example, as in the present case, in *Evans v. Lungrin*, the trial court's reasons for judgment disclosed that it had relied upon incorrect legal principles. Consequently, a *de novo* review was warranted. *Id.* at 736; see also *Becker v. Dean*, 03–2493 (La. 9/18/03), 854 So.2d 864 (*de novo* review was required, even though reasons for judgment cited the correct law, because the court's reasoning illustrated that the law was applied incorrectly).

[3] VDP's President confirmed that the Vulcan lease was thwarted only by the impending expropriation, and VDP and Vulcan agreed to put the lease "on hold" in hopes that the expropriation would be overturned. R. 16-96, V.20, 4834-7.

Similarly, in *Bridges v. Nelson Indus. Steam Co.*, 15-1439, p. 4 (La. 5/3/16), 190 So.3d 276, 279 (cited in Justice Weimer's dissent), this Court found that *de novo* review was required where "a deeper look at the [district] court's reasons for ruling ... reveals an error in [the] legal analysis." Notably, the error in *Bridges* was the trial court's misinterpretation of a long-standing jurisprudential test of "purpose" to mean only "primary purpose," ignoring that the jurisprudential test was not so limited and applied equally to secondary or tertiary purposes. *Id.* at 283. ("[W]e find the lower courts' misunderstanding of the "purpose" test interdicted the fact-finding process, such that the finding regarding the purpose for the purchase of the limestone was the result of an improper legal analysis.").

B. The courts committed legal error that interdicted the fact-finding process by relying upon non-existent findings of fact and relying on factors that either cannot be considered as a matter of law or are irrelevant.

The Majority erred in holding that the manifest error standard applied to its determination of Constitutionality of StBP's expropriation under La. Const. Art. I, Section 4(B)(6). For the reasons set forth by Justice Weimer, *de novo* review was required.

First, neither lower court made any factual findings; thus, the Majority erred by giving deference to non-existent findings. The trial court neither addressed La. Const. art. I, Section 4(B)(6) nor made any factual findings to determine if StBP's expropriation of VDP's "business enterprise or any of its assets" was "for the purpose of operating that enterprise or halting competition with a government enterprise." Instead, it simply recited "St. Bernard Port's stated reason for expropriation" as being "to build and operate a terminal to accommodate transport of liquid and bulk commodities into national and international commerce to or from St. Bernard." R. 16-331, V.7, 1477-78. Likewise, the Fourth Circuit also failed to interpret Article 1, Section 4(B)(6) or apply it to the facts. Instead, the Fourth Circuit summarily rejected the entirety of VDP's constitutional challenge in view of its erroneous legal conclusion that "[t]he constitutional rights of Article I, § 4 that VDP maintains were violated, are subject to the exceptions provided in Article VI, § 21."[4]

Second, the Majority and the Fourth Circuit erred in applying a manifest error standard of review to the trial court's denial of VDP's Motion to Dismiss. In his dissent, Judge Weimer aptly explained why the manifest error standard cannot be applied here:

---

[4] *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 16-96, 16-262, 16-331, p.8 (La. App. 4 Cir. 12/14/16), 229 So. 3d 626.

> "The manifest error standard of review assumes that the trier of fact applied the correct law in arriving at its conclusion." *Winfield v. Dih*, 01-1357, p. 8 (La. App. 4 Cir. 4/24/02), 816 So.2d 942, 948. That assumption is not warranted in this case where the district court's reasons reflect that the court's decision was guided by principles that are either irrelevant to the question of whether the taking violated the private business enterprise protection clause, *i.e.*, whether the taking is for the predominant use or transfer of ownership to a private entity; or expressly prohibited from consideration in connection therewith; *i.e.*, whether port expansion will add revenues and jobs to the local community. Because, as was the case in *Bridges*, the district court's reasons focus on factors which are irrelevant to the question presented and (in the instance of economic benefits) prohibited from consideration by the constitution itself, an error in the court's legal analysis is exposed, requiring *de novo* review. See *Bridges*, 15-1439 at 4, 190 So.3d at 279.

(Op. at 24-25, Weimer, J., dissenting) (footnotes omitted).

Here, the Majority compounded the lower court's errors by relying on irrelevant factors and evidence that are prohibited from consideration, including: (1) a lone concurrence by one Fourth Circuit Judge in denying VDP's rehearing application; (2) economic development considerations prohibited under La. Const. Art. 1, Section 4(B)(3); (3) the federal district court's reasons for remand for lack of subject matter jurisdiction; and (4) irrelevant testimony regarding witnesses' subjective opinions.

First, the Majority erred in apparently relying upon a purported factual finding set forth in a lone concurrence from Judge Love in denying VDP's Application for Rehearing. The Fourth Circuit, in its opinion from which StBP took writs, did not in fact render any factual findings regarding the purpose of the taking under La. Const. Art. I, Section 4(B)(6). Judge Love's concurrence in denial of rehearing presents no findings of fact by the Court of Appeals on the merits of VDP's Constitutional claims.

Second, as explained by Justice Weimer, the Fourth Circuit and the Majority improperly considered economic development as justification for upholding the taking. Article 1, Section 4(B)(3) expressly prohibits this exact analysis.[5]

Third, the federal district court's reasons for judgment on StBP's Motion for Remand for lack of subject matter jurisdiction has no precedential value. Once the federal district court determined it lacked subject matter jurisdiction, it did not and could not rule on VDP's Motion to Dismiss.[6] Indeed, Judge Vance flatly refused to address Article 4(B)(6) or make any factual findings in accordance therewith, explaining that VDP was "asserting a novel issue of Louisiana constitutional law on expropriation,

[5] In opposition to VDP's Motion to Dismiss, StBP agreed that economic benefits could not be considered, stating that "none of these [economic] benefits should be taken into account when this Court determines if there is a public purpose." R. 16-331, V. 5, 1034.

[6] VDP reurged its Motion to Dismiss in state court. R. 16-331, V. 3, 670.

which is best resolved by state courts in the first instance." 16-331, V. 5, 1124. In view of the federal court's statements, any attempt to transform dicta comments—notably, made without the benefit of any discovery or an evidentiary hearing—into a substantive factual determination regarding StBP's purpose for the expropriation is inappropriate. Indeed, even if Judge Vance had attempted to rule on the merits of VDP's Constitutional claims, those rulings would be without effect as a matter of law due to the court's lack of jurisdiction. *Ansalve v. State Farm Mutual Automobile Insurance Co.*, 95-0211, p. 8 (La. App. 4 Cir. 2/15/96), 669 So.2d 1328, 1333.

Fourth and finally, the Majority erred by cherry-picking biased, irrelevant, and incompetent testimony as a basis for upholding the trial court's ruling. The Majority then improperly rendered its own findings of fact and credibility determinations where none had been made previously, opting to believe StBP's Director's testimony that the Navy ships were merely an "afterthought" to its 2010 expropriation and ignoring dispositive record evidence—StBP's own 2008-2009 public submissions to the DOTD—detailing its plans to take over the Navy ships two years before its expropriation. Even if Dr. Scafidel subjectively had no strong feelings about the Navy ships, his subjective feelings and opinions are of no moment. As the Majority recognizes (Op. at 4), StBP's five-member Board of Commissioners makes the ultimate decisions on StBP's behalf. Tr. 2/1/12, p. 166. The only objective evidence of StBP's purpose is laid out in the PPA, the Petition, and related documents. Dr. Scafidel's self-serving testimony that the Navy ships were not subjectively important to him is belied by the undisputed, objective material facts, and the Majority manifestly erred in relying upon his testimony. Moreover, the Majority legally erred in conducting a manifest error review by making its own findings of fact in areas where none existed.

C. The Majority additionally erred in applying the manifest error standard, because the undisputed, dispositive objective facts—as set forth by StBP itself—prove its purpose for the expropriation.[7]

The manifest error standard does not apply where there is no dispute as to the dispositive facts; in that event, the matter is decided as a matter of law, and the review is *de novo*. *Ogea v. Merritt*, 13-

[7] Because VDP reurged its Motion to Dismiss at trial after the close of StBP's case on valuation, any manifest error review of the entire record should have included a review of the evidence admitted at trial that bolsters VDP's Constitutional challenge. R. 16-96, V.16, 3805-7. The Majority apparently relied solely upon the oral testimony offered during the February 1, 2012 hearing, before the bulk of discovery had occurred.

1085 (La. 12/10/13), 130 So.3d 888, 895, n.6; *Kevin Associates, L.L.C. v. Crawford*, 03-0211, p. 15 (La. 1/30/04), 865 So.2d 34, 43. This Court has a long history of embracing these principles.

In the present case, as detailed above, StBP's own admissions establish that its taking violates Art. 1, Section 4(B)(6). StBP consistently stated in its pleadings and Port Priority filings that it planned to take over the Navy contract and engage in the same type of bulk cargo operations that VDP had planned with Vulcan. StBP confirmed in its Verified Petition that its plans for the expropriated Property had not changed since its filing of the PPA. See R. 16-331, V.1, 11 (confirming that the PPA was "based on the above described plans" detailed in the Petition).[8] The Petition describes Phase I of StBP's plan (the only phase that was funded) as simply taking VDP's enterprise's assets, collecting the existing enterprise's Navy revenue stream, and operating VDP's other assets to conduct the same type bulk cargo operations for which VDP had just constructed improvements. R. 16-331, V.1, 7-10, Tr. 2/1/12, pp. 21-22. The Petition additionally identifies VDP's Navy contract and states that StBP "intends to enter into a new contract with the [Navy] for its continued use of the Violet Port...." R. 16-331, V.1, 7-8.[9]

StBP's actions are likewise undisputed: (1) StBP did indeed contract to service the Navy ships (P-391, Navy contract) and continues to service them today; and (2) StBP marketed the Property for bulk cargo operations similar to Vulcan's (*i.e.*, L-320) and continues cargo operations today.

D. Even if the manifest error standard were applicable, it requires a review of the entirety of the record for manifest error.

The manifest error "test requires a reviewing court to do more than simply review the record for some evidence, which supports or controverts the trial court's findings. The court must review the entire record to determine whether the trial court's finding was clearly wrong or manifestly erroneous." *Hayes Fund for First United Methodist Church of Welsh, L.L.C. v. Kerr-McGee Rocky Mountain, L.L.C.*, 2014-2592 (La. 12/08/15), 193 So.3d 1110, 1116; see also *Land v. Kohl's Dep't Stores, Inc.*, (La. 3/13/17) 212 So.3d 1166, 1167 (Crichton, J., dissenting from denial of writs on ground that the court of appeal failed, and should be ordered, to "examine the entire record to determine if the trial court abused its

---

[8] However, StBP did disclose in its Petition its knowledge of new Berth 4, which was not extant at the time of the Port Priority filings. Petition, Par. 23, R. 16-331, V.1, 7.

[9] Although the Majority also cites StBP's Petition for the proposition that the expropriation would "create jobs and benefits," the record establishes that the jobs and benefits were intended to inure only to Associated. See L-143a, p. STBP 1725.

discretion."); accord, *LaGrappe v. Progressive Sec. Ins. Co.*, 2015–0200 (La. 4/14/15), 165 So.3d 71 (Clark and Crichton, JJ., dissenting from denial of writs).

This Court has not hesitated to find manifest error where the record as a whole does not support the trial court's findings. See, e.g. *Zito v. Advanced Emergency Med. Servs., Inc.*, 11–2382, pp. 4–5 (La. 5/8/12), 89 So.3d 372, 375; *Ferrell v. Fireman's Fund Insurance Company*, 94-1252 (La. 2/20/95), 650 So.2d 742, 747 (finding trial court was clearly wrong in accepting witness testimony where "the objective facts contradict[ed] her story and the story itself is internally inconsistent and implausible on its face."). Indeed, even when the factfinder purportedly makes credibility determinations, this Court has consistently held that it and the Courts of Appeal should reverse on grounds of manifest error or clear wrongness "where documents or objective evidence so contradict the witness' story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness' story." *Evans, supra* at 882; *Rosell v. ESCO*, 549 So.2d 840 (La. 1989).

The objective evidence here is more than corroborated by the fact that the Navy ships remain on the Property today, more than seven years after the expropriation. Indeed, StBP represented in its own Petition that the expropriation was intended to fulfill the plan laid out in its PPA. See, e.g. R. 16-331, 1032-33. The DOTD gave StBP $15 million in Port Priority funding to acquire VDP's Property in reliance upon StBP's representations that it would usurp VDP's Navy revenue and dockage fees, and "compete" for future Navy business, in order to achieve the rate of return required by the DOTD to obtain funding. But for the taking of VDP's business, StBP could not have obtained the funding to take VDP's property from it in the first place.

To the extent that the Majority accepted Dr. Scafidel's uncorroborated testimony regarding his subjective feelings over the overwhelming objective and contrary evidence obtained from StBP's own representatives and agents, the Majority Opinion errs and should be corrected. Moreover, it violates the established principle of Louisiana law that requires that "the law governing these [expropriation] proceedings must be strictly construed against the expropriating authority." *State v. Estate of Davis*, 572 So.2d 39, 42 (La. 1990).

II. The Majority's Fifth Amendment "public use" analysis conflicts with decisions from the U.S. Supreme Court and other state supreme courts.

The Majority also erred by using a manifest error review to determine whether StBP's taking met the "public use" requirement of the Fifth Amendment. By doing so, the Majority rejected VDP's

challenges that: "(1) StBP took VDP's Property for pretextual purposes as reflected by StBP's switch in positions on the use of the property; and (2) StBP's taking impermissibly seized a private business and revenue stream for government and another favored actor, Associated Terminals." VDP Merits Br. at 15-16. The U.S. Supreme Court has never applied such a deferential standard to trial court determinations on whether a proper public use was established. The U.S. Supreme Court requires scrutiny of the full evidentiary record, not merely taking the government's word that it is not acting impermissibly. This Court's overly deferential standard of review is irreconcilable with U.S. Supreme Court precedent, and in direct conflict with decisions from the Hawaii, Illinois, Pennsylvania, and Rhode Island Supreme Courts.

A. The Majority applies a manifest error standard of review to reject VDP's Fifth Amendment challenge, yet the trial court made no finding on public use.

The Majority explains: "under both [the United States and Louisiana] Constitutions, any expropriation must be for a 'public purpose' ***and*** provide 'just compensation.'" (Op. at 8) (emphasis in original). "To review these determinations," the Majority "start[s] with the constitutional provisions at issue ... then review[s] the record to determine whether the trial court's factual findings were manifestly erroneous." (Op. at 8). The Majority's manifest error standard is based on *Exxon Mobil Pipeline Co. v. Union Pac. R. Co.*, 35 So.3d 192, 200 (La. 2010), which is a case addressing a taking claim under the Louisiana Constitution. *Exxon* did not involve a claim under the U.S. Constitution, nor does the Majority cite any Fifth Amendment case that actually uses that deferential standard.

Applying this standard, the Majority says the trial court found the taking "was to build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard," which is a purpose that "falls squarely within the constitutional definition of a 'public purpose.'" (Op. at 9). Thus, the Majority affirmed the "public use" finding and dismissed VDP's Fifth Amendment argument in a single sentence, without analysis of the factual record. (Op. at 9). This approach is error.

For starters, as noted above, the trial court did not make the finding cited by the Majority. The Majority's quotation of the trial court's alleged "finding" (Op. at 9) omits the trial court's lead-in statement that this was "St. Bernard's stated reason for expropriation." R. 16-331, V.7, 1477. Repeating the government's statement of purpose is not the same as making a fact finding. *See County*

of Hawaii v. C&J Coupe Family Ltd. Partnership, 198 P.3d 615, 650 (Haw. 2008) (criticizing the dissent for trying to turn a statement of purpose into a fact finding).

Even if such a finding had been made, the controlling authorities do not support giving it deference under a manifest error standard. The U.S. Constitution's "public use" limitation on the government's expropriation power is a legal limitation on authority; it is not a factual determination subject to virtually complete deference to a local trial judge.

B. A manifest error standard is irreconcilable with U.S. Supreme Court precedent on whether a taking exceeds the scope of constitutional authority.

The U.S. Supreme Court holds that the question of whether a taking is a permissible "public use" is "a judicial one." *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946). The role of the courts is "extremely narrow," but it includes determining whether the government actions are within the scope of constitutional authority. *Berman v. Parker*, 348 U.S. 26 (1954). "Once the object is within the authority of [the legislature]," the courts do not judge whether a particular project is desirable or necessary. *Id.* at 33. Courts must still determine whether the governmental action is within the scope of constitutional authority in the first place.

"The 'public use' requirement [of the Fifth Amendment] is thus coterminous with the scope of a sovereign's police powers." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). However, government police powers are not unlimited. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982) ("the government does not have unlimited power to redefine property rights").

In the famous opinion by Justice Chase in *Calder v. Bull*, the Supreme Court recognized—over two hundred years ago—that one such limitation is that "a law that takes property from A and gives it to B...is against all reason and justice." 3 U.S. 386, 388 (1798). The Constitution did not entrust government "with such powers." *Id.* "To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican government." *Id.* at 388-89. That holding still applies today. *See Kelo v. City of New London*, 545 U.S. 469, 477-78 & n.5 (2005).

Another example of an unconstitutional taking in excess of the government's police powers is *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896). There, the Court reversed the Nebraska Supreme Court, holding that government could not force a railroad to allow a private party to build a grain elevator on the railroad's right-of-way, even though the governing authority had

determined that existing storage was insufficient, making an additional elevator necessary for the facilitation of delivering goods in commerce. *Id.* at 413, 417. As here, the theoretical purpose of the taking—facilitating the transportation of goods in commerce—could be a public purpose in some cases; but that did not allow the government to accomplish its goals through an unconstitutional taking that was primarily for the benefit of a private actor.

The U.S. Supreme Court also holds that a government's police powers are not so broad as to allow government to seize private property—even temporarily—for the purpose of raising revenue for the government. See *Webb's Famous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980). In *Webb's Famous Pharmacies*, the Court struck down a Florida statute that allowed counties to keep the interest earned on any funds filed in the registry of the court in interpleader actions. *Id.* Florida already had a separate fee that covered the costs associated with holding funds in the court's registry. Accordingly, the challenged law was solely an attempt to raise extra funds for local government. The Court declared the law invalid, holding that government could not seize revenues (there, interest) that should have accrued to private property holders. *Id.*

When assessing whether a taking is within the scope of governmental authority, the Court has cautioned that "each case must turn on its own facts." *Midkiff*, 467 U.S. at 239 (quoting *Berman*, 348 U.S. at 32). "[W]hat is a public purpose frequently and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned." *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896). The Court should "not assume that various [governmental] statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to … what is a public purpose." *Id.* at 160. Instead, the proper analysis requires the court to "view[] the subject for ourselves," "[t]aking all of the facts into consideration." *Id.* at 160, 164. This approach is followed in *Kelo, Midkiff*, and *Berman*, each of which goes through an extensive analysis of the record before rendering legal conclusions.

Unlike the present case, *Kelo, Midkiff*, and *Berman* all addressed takings in the context of comprehensive redevelopment plans adopted by legislative bodies. *See Kelo*, 545 U.S. at 487 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."); *Midkiff*, 467 U.S. at 233 (comprehensive plan by the Hawaiian Legislature to

break up land oligopolies); *Berman*, 348 U.S. at 28-30, 34-35 (comprehensive plan adopted pursuant to Congressional directives in the District of Columbia Redevelopment Act of 1945). In each case, the Court went through the full record to reach its conclusion, and did not just defer to factual findings from a trial court.

C. The U.S. Supreme Court did not adopt a manifest error standard in *Kelo*.

Kelo shows that the Supreme Court has not adopted a manifest error standard to review the trial court's findings on whether government had an impermissible purpose for the taking. Suzette Kelo contested the taking of her property as being for an impermissible private purpose. The trial court found no evidence of an illegitimate motive, and the Connecticut Supreme Court affirmed in a split decision. The Connecticut Supreme Court Majority applied a clearly erroneous standard of review to the trial court's finding that the taking was for a public purpose, and not an impermissible attempt to benefit private interests. *Kelo v. City of New London*, 843 A.2d 500, 540 (2004). In partial dissent, Justice Zarella rejected the clearly erroneous standard, explaining that the question whether a taking satisfies a public purpose is a question of law, or at least a mixed question of law and fact. *Id.* at 595 (Zarella, J., concurring in part, dissenting in part) (citing 2 T. Cooley, *Constitutional Limitations* 1141 (8th ed. 1927)). Justice Zarella would have reviewed underlying factual disputes for clear error, but the overarching question and conclusions regarding the government's purpose under a *de novo* standard. *Id.*

When the U.S. Supreme Court affirmed the Connecticut Supreme Court's judgment in *Kelo*, it did not adopt the clearly erroneous standard. Instead, the Court avoided the question, explaining there was "no evidence of an illegitimate purpose in this case," even citing Justice Zarella's opinion in support. 545 U.S. at 478, n.6. The Majority explained that "suspicious" takings "can be confronted if and when they occur," and favorably cited cases viewing takings "with a skeptical eye" when the purpose of the taking was pretextual, or where the government did not provide a reasoned explanation for its expropriation decision. *Id.* at 487, n.17. One of the favorably cited cases, *99 Cents Only Stores v. Lancaster Redevelopment Agency*, explains that "[n]o judicial deference is required, for instance, where the ostensible public use is demonstrably pretextual." *See* 228 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001).

Justice Kennedy's concurrence in *Kelo* confirms that closer scrutiny is required here. "A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit." 545 U.S. at 491 (Kennedy, J.,

concurring). Justice Kennedy understood that the Majority opinion which he joined as the decisive fifth vote "does not foreclose the possibility that a more stringent standard of review than that announced in *Berman* and *Midkiff* might be appropriate for a narrowly drawn category of cases." *Id.* He concluded: "while there may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose." *Id.*[10]

The circumstances of this case are not just "suspicious," they present a taking for an admittedly implausible purpose. StBP took VDP's property with an intent to have a previously-selected private marine terminal operator (Associated Terminals) run the facility.[11] Then, StBP said the taking was "to build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard" (Op. at 6), yet when it was time to pay, StBP contended there were "physical limitations that ... rendered the Property unsuitable for very large scale cargo use." (Op. at 7). In other words, the taking was wholly implausible to serve the public purposes StBP claimed.

The procedures employed here are also prone to abuse, thereby requiring closer scrutiny. 545 U.S. at 491 (Kennedy, J., concurring). The trial court initially denied VDP's challenge to the expropriation in a perfunctory order. R. 16-331, V.6, 1338. After VDP gave notice of its intent to seek supervisory writs, and after the Fourth Circuit ordered that it submit written reasons, the trial court issued its two-page per curium that is addressed in the Majority's opinion. R. 16-331, V.7, 1477-78. That two-page order literally just recites StBP's stated purpose for the taking, and then approves it. There is no attempt to resolve any disputed factual issues. Such a perfunctory order should not be entitled to the deference granted by this Court.[12]

---

[10] Construing Louisiana's Constitution to provide ports with broad eminent domain powers can also facilitate eminent domain abuse. Writing in dissent in *Kelo*, Justices O'Connor and Thomas recognized that economic development takings can be harmful to the public interest because they disproportionately impact poor and minority communities—the very people who are the least able to oppose a condemnation action. Specifically, politically connected groups, including large corporations and development firms, would use their powers to victimize the weak if eminent domain could be used for mere economic development. *Kelo*, 545 U.S. at 505, 521 (O'Connor, Thomas, JJ., dissenting).

[11] Although leasing property to a private marine terminal operator may be allowed by the Louisiana Constitution (Op. at 9 n.9 & 11 n.11), that does not supersede the U.S. Constitution's prohibition against takings to further private interests.

[12] The Majority seemingly deems pertinent this Court's 2012 denial of supervisory writs regarding VDP's Motion to Dismiss (Op. at 6); however, the denial of VDP's 2012 writ application has no precedential value and does not affect

At a minimum, this case requires close scrutiny of the full record, without deference to the trial court's alleged findings. Courts are not required to assume that the government statements of purpose are correct, conclusive, or binding. *Fallbrook Irrigation Dist.*, 164 U.S. at 160, 164. However, that is what the Majority did here. The trial court's so-called finding was not an actual finding based on a review of competing evidence. The trial court merely recites what StBP told it. Thus, by applying the manifest error standard to this statement of purpose, crediting only the evidence favorable to that purpose, the Majority is assuming the truth of the government's self-serving statement of purpose.

D. The Majority's approach conflicts with the highest courts of other states.

Not only has the Majority employed an overly-deferential review of the trial court's decision, the Majority's decision also conflicts with decisions of the Hawaii, Illinois, Pennsylvania, and Rhode Island Supreme Courts refusing to defer to trial court findings on public use or purpose.

The Hawaii Supreme Court's decision in *County of Hawaii v. C&J Coupe Family Ltd. Partnership*, 198 P.3d 615 (Haw. 2008), illustrates the conflict. *Coupe* involved a taking that on its face was a "classic" one—the building of roads. *Id.* at 648. Relying on *Kelo*, however, the Court explained that "the government's stated public purpose ... need not be taken at face value where there is evidence that the stated public purpose might be a pretext." *Id.* at 644. "Appellant's argument challenging the validity of the asserted public purpose underlying the condemnation presents a question of constitutional law, which this court review *de novo* under the right/wrong standard." *Id.* at 637. The Court reversed the trial court's decision refusing to look behind the asserted purpose for the taking. *Id.* at 652. Thus, the Hawaii Supreme Court refused to defer to the trial court's "public use" findings under any deferential standards.

The Illinois Supreme Court also holds that "the determination of whether a given use is a public use is a judicial function." *See Southwestern Ill. Dev. Auth. v. National City Environmental, L.L.C.*, 766 N.E.2d 1, 8 (Ill. 2002). "It is incumbent upon the judiciary to ensure that the power of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question." *Id.* Exercising that duty, the court declared invalid a taking of a private business for the purposes of adding public parking for a racetrack. *Id.* at 8-11.

---

this Court's ability to revisit VDP's Constitutional arguments. *St. Tammany Manor, Inc. v. Spartan Bldg. Corp.*, 509 So.2d 424 (La. 1987); *State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790, 795, n.4.

The Illinois Supreme Court's decision is notable, because the Court recognized that saving costs, even if they are substantial, is not a legitimate public use to condemn another's land. *Id.* at 10. The evidence established that the racetrack "could have built a parking garage structure on its existing property rather than develop the land owned by" the party whose property was being expropriated. *Id.* In the present case, the record is undisputed that StBP could have built another dock on its own property to expand, but the cost of doing so was over $30 million. L-143a; R. 16-331; L-12 at 22; V.9, 2210-12. It was unconstitutional for StBP to seek to acquire VDP's property as a lower cost alternative (with added benefit of being "immediately available").

The Pennsylvania Supreme Court also reviews the government's purpose for a taking as a matter of law. *Middletown Township v. Lands of Stone*, 939 A.2d 331, 338 (Pa. 2007). The Court relied on *Kelo* to hold that "without a public purpose, there is no authority to take property from private owners." *Id.* at 337. "In considering whether a primary public purpose was properly invoked, the Court [must look] for the 'real or fundamental purpose' behind a taking." *Id.* The Court held that Middletown Township was authorized to take property only for "recreational use." *Id.* Accordingly, "[r]ecreational use must be the true purpose behind the taking or else the Township did not have the authority to act, and the taking was void *ab initio*." *Id.* at 338. The Court held that the taking at issue was invalid. "It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of a property owner and demand his land for the sake of the public." *Id.* at 340. Applying that teaching here, the fact that StBP articulated a correct standard under the expropriation laws cannot give it carte blanche to take whatever property it wants without substantive, judicial scrutiny of its actions to ensure that StBP was acting in furtherance of a permissible purpose. Otherwise, no expropriation would be impermissible so long as the expropriating authority recites the appropriate statutory or constitutional text.

Finally, the Rhode Island Supreme Court also holds that the question whether a taking is for a public purpose is a judicial question. *Rhode Island Economic Dev. Corp. v. The Parking Company, L.P.*, 892 A.2d 87, 96, 103 (R.I. 2006). When determining whether the government has a legitimate public purpose for a taking, the condemning authority's declaration of purpose is "far from dispositive." *Id.* at 104. The Court views the entire record, and employs a case-by-case analysis. *Id.* at 105. The Court held that a taking "motivated by desire for increased revenues" was not for a legitimate public purpose. *Id.* Thus, the Court reversed a trial court order upholding the taking of a private parking

garage so that the government could use the garage for similar parking operations, thereby shifting private revenues to the government. *Id.* at 108. Similarly, here, it was unconstitutional for StBP to take VDP's property to gain the benefit of revenues from VDP's assets and customers to fund future expansion plans.

The Court should grant rehearing and hold that: (a) the review of whether a taking satisfies the Fifth Amendment's "public use" limitation is a judicial question; and (b) the trial court's findings on purpose are not subject to the overly deferential, manifest error standard of review. On rehearing, the Court should review the entirety of the record (as Justice Weimer did in dissent), and conclude that StBP's taking is unconstitutional.

E. The public use limitation on takings is a constitutional right for property owners that should receive meaningful review.

Even if this Court were to find that there were underlying factual questions presented in the public use analysis, the Court should still not defer to the trial court's public use determination. The U.S. Supreme Court explains that appellate courts have "an obligation to 'make an independent examination of the whole record'" to ensure that constitutional rights are being protected. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 465, 499 (1985). "[W]henever a conclusion of law of a state court as to a federal right and findings of fact are so commingled that the latter control the former, it is incumbent upon [the appellate courts] to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris v. State of Alabama*, 295 U.S. 587, 590 (1935). This doctrine has been applied in a wide variety of cases.

For example, *Bose Corp.* explains how these principles have been applied extensively in cases involving the First Amendment. Appellate courts must conduct an independent review of the record to determine what category of speech is at issue (which controls the level of scrutiny applied), as well as to ensure that protected speech is not suppressed. 466 U.S. at 505. Appellate courts do not defer to fact findings addressing issues of purpose, such as whether a regulation is intended to discriminate based on viewpoint, or whether a speaker has defamed another with "actual malice." *Id.* at 505, 510. Such searching review is necessary "in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 511.

Norris applied this principle and refused to defer to findings of fact made by a local trial court in a case involving racial discrimination in an Alabama County's grand jury and petite jury system. The

trial court made factual findings in favor of the county, and the Alabama Supreme Court affirmed. The U.S. Supreme Court, however, rejected those findings, declaring the Alabama County's system unconstitutionally discriminatory. The Court wrote:

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights.

294 U.S. at 589-90. In other words, the Court would not allow a trial judge to nullify constitutional rights when local biases and prejudice were at issue.

The U.S. Supreme Court has also required more exacting scrutiny of other constitutional rights to ensure that they are not being denied in the name of deference to local court fact findings, including questions under the Fourth and Fifth Amendments regarding whether reasonable suspicion or probable cause exists to support a search, *see Ornelas v. United States*, 517 U.S. 690, 696-99 (1996); whether a suspect is "in custody" for purposes of requiring notice of *Miranda* rights, *see Thompson v. Keohane*, 516 U.S. 99, 112-15 (1995); and whether a suspect's confession was voluntary, *see Miller v. Fenton*, 474 U.S. 104, 110 (1985).

The Fifth Amendment's "public use" requirement is an important protection of private property rights, guarding them against unauthorized governmental action. After *Kelo*, the protections provided under the "public use" requirement have already been eroded to a degree. By making the review doubly deferential—*i.e.*, requiring deference to a local trial judge's application of the already deferential Fifth Amendment standards—this Court would be further stripping the Fifth Amendment's "public use" requirement of its meaning.

F. StBP's taking violates the Fifth Amendment.

There is ample, undisputed evidence in the record establishing that StBP's expropriation violated the U.S. Constitution. Evidence showing the pretextual purpose of the taking—*i.e.*, showing that the taking was to take over VDP's property and business opportunities for their revenues and not to build large scale operations—includes:

- the trial court's finding (recited in the Majority Opinion) that the property was "unsuitable for very large scale cargo use," which was StBP's articulated purpose for the taking (Op. at 7);
- StBP's alleged need for "a liquid cargo facility" (Op. at 3), but the trial court found that "[u]se of this property for as a liquid bulk or dry bulk terminal is limited because of its proximity to school and residential area," R. 16-96 V.7, 1631, and the Louisiana DOTD found that use for a liquid

cargo facility was too "speculative" to be considered in StBP's funding application, *see* StBP's Merits Br. at 3 n.5;

- StBP relied on revenues from the Navy ships that were VDP's customers when forming its development plan and requesting revenues from the State, *see* R-331, V.1, 7-8; L-125, 142, 143a; Tr. 2/1/12, pp. 11-12, 37, 187;

- StBP only had funding for Phase I of its development plan, which consisted of continuing to use the property as-is for 8-10 years, *see* Tr. 2/1/12, pp. 13, 21-22; R. 16-331 V.1, 7-8; and

- there were no engineering studies performed to determine whether StBP's cargo terminal plans were even feasible, *see* R. 96 V.10 at 2280-81; Tr. 2/1/12, pp. 183-84.

Evidence showing that the expropriation was also for the improper private purpose of transferring the property to Associated Terminals for it to run for its own profit includes:

- Associated was always StBP's intended recipient of the Property, *see* 2/1/12 Def. Hearing Exhs. B, C, E, F, G, G-1, I; Tr. 2/1/12, p. 202;

- Associated and StBP had been discussing their use of the property since at least February 2007, when Associated's employee "snuck down" to the Property to inspect its potential for cargo use, *see* L-234; R.16-96, V.12, 2879-80;

- Associated was "concern[ed]" about potential competition from the site, *see* L-234; R. 16-96, V.12, 2879-80;

- StBP agreed that its purpose for acquiring the Property was so that it could be "operated" by Associated "under a net/net lease" to "result in measurable increases in annual revenues to the Port," *see* 2/1/12 Def. Hearing Exh. B; Tr. 2/1/12, pp. 6-7;

- Associated was intimately involved in StBP's plans and funding application process by: participating in all planning meetings (with StBP, its consultant, and DOTD Port Priority representatives) as the anticipated operator of the Property; working "in concert" with the preparer of StBP's PPA to plan its own future cargo operations on the Property, furnishing a "letter stating why they (AT) need the new facility;" providing ten years of revenue and cargo volume projections for VDP's property; providing market analysis for VDP's property; and submitting a signed, written commitment to lease all of VDP's assets as soon as StBP could acquire them, *see* L-26; L-125; L-182, R. 16-96, V. 12, 2238-2239, 2880, 2934; R. 16-96, V. 9, 2209; Tr. 2/1/12, pp. 6-13, 21-22, 27, 29, 35-37, 58, 79, 109, 113, 187; StBP Exh. 5-1;

- Associated would service the Navy ships if StBP asked and would offer to employ VDP's former employees, *see* Tr. 2/1/12, p. 104, 106, 109;

- Although StBP allegedly had not entered into a written lease with Associated at the time of trial, Associated's Director was "confident" that the lease would be executed (it was in fact executed after trial), *see* R. 16-96, V. 12, 2836, 2868; and

- Associated has an exclusive lease on the Property today, and the Navy ships are still there.

When the correct standard of review is applied, there is no question that StBP's expropriation is unconstitutional. StBP's expropriation should even be rejected under a manifest error standard.

CONCLUSION

VDP's requested relief—the return of its Property—does not infringe upon StBP's ability to expand its operations with the limits allowed by law. VDP requests only that this Court enforce the

Constitutional prohibitions set forth in La. Const. Art. I, Section 4(B)(6) and the Fifth Amendment of the U.S. Constitution. If this Court reverses this ruling, it will set the correct precedent of protecting private business in the manner the Louisiana and U.S. Constitution require.

VDP respectfully requests that this Honorable Court grant its Application for Rehearing, reverse its decision upholding Constitutionality of the expropriation, and remand the matter for a determination of attorneys' fees, costs, and any other amounts owed.

Submitted by:

RANDALL A. SMITH, T.A. (#2117)
SMITH & FAWER, L.L.C.
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170
Telephone: (504) 525-2200
Facsimile: (504) 525-2205

W. SCOTT HASTINGS (#25410)
LOCKE LORD LLP
601 Poydras Street, Suite 2660
New Orleans, Louisiana 70130
Telephone: (214) 740-8537

VAL P. EXNICIOS (#19563)
LISKA EXNICIOS & NUNGESSER
1515 Poydras Street, Suite 1400
New Orleans, Louisiana 70112
Telephone: (504) 410-9611

HARRY T. LEMMON (#8311)
400 Mimosa Avenue
Luling, Louisiana 70070
Telephone: (985) 785-0810

ALAN WEINBERGER (#13331)
HANGARTNER RYDBERG AND TERRELL, L.L.C.
701 Poydras Street, Suite 310
New Orleans, Louisiana 70139
Telephone: (504) 522-5690

Counsel for Violet Dock Port, Inc., L.L.C.

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, personally came and appeared Randall A. Smith, who after being duly sworn, did depose and state that the Application for Rehearing, Violet Dock Port, Inc., L.L.C. is true and correct to the best of his knowledge, information, and belief, and that a copy of the above and foregoing has this date been mailed, faxed, and/or emailed to the following:

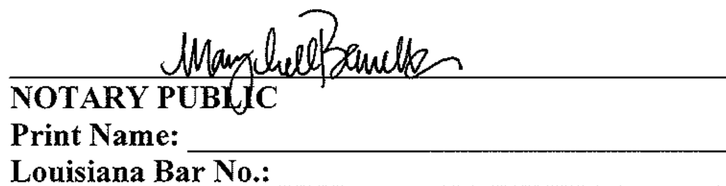
James Garner, Esq.
Joshua Force, Esq.
Ashley Coker, Esq.
Sher Garner Cahill Richter Klein &
Hilbert, LLC
909 Poydras Street, Suite 2800
New Orleans, LA 70112
Counsel for St. Bernard Port, Harbor & Terminal District

Hon. Jacques A. Sanborn
Judge, Division "E"
34th JDC, Parish of St. Bernard
1101 W. St. Bernard Highway
Chalmette, Louisiana 70043

Hon. Justin Woods
Clerk of Court
Louisiana 4th Circuit Court of Appeal
410 Royal Street
New Orleans, Louisiana 70130

RANDALL A. SMITH

SWORN TO AND SUBSCRIBED BEFORE ME,
in New Orleans, Louisiana the 12th day of February, 2018.



NOTARY PUBLIC
Print Name: ____________________
Louisiana Bar No.: ____________________

My commission expires at death.

Mary Nell Bennett, Esq.
Notary ID No. 91676
Parish of Orleans
Statewide Jurisdiction
My Commission is for Life.