

No. 17-____

IN THE
Supreme Court of the United States

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

v.

ST. BERNARD PORT, HARBOR, & TERMINAL DISTRICT,
Respondent.

**On Petition for a Writ of Certiorari to the
Louisiana Supreme Court**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The St. Bernard Port, Harbor & Terminal District used its eminent domain power to seize Petitioner's fully-functioning and profitable private port facility to lease it to another private port operator to operate in a similar manner, even taking over Petitioner's customers in the process. The taking was not part of a comprehensive redevelopment plan, nor was Petitioner's property blighted or causing any public harm. The intended private recipient of the property was intimately involved in all aspects of the taking from its earliest planning stages, to the local government's applications for state funding, to taking over operations on the property post-taking.

The Louisiana Supreme Court, relying on *Kelo v. City of New London*, 545 U.S. 469 (2005), upheld the taking by holding "this expropriation satisfies the broad definition of public purpose under federal law." The questions presented are:

1. Did the Louisiana Supreme Court err when it held that the Fifth Amendment's "public use" requirement is a question of fact to be resolved in the trial court, subject only to a manifest error review on appeal?
2. Do the Fifth and Fourteenth Amendments prohibit government from taking a fully-functioning private facility with the intent to lease it to another private entity to operate, with the revenues earned from those operations to be shared by both the local government entity and its favored private actor?

**PARTIES TO THE PROCEEDING AND
RULE 29.6 DISCLOSURE**

Petitioner Violet Dock Port, Inc., L.L.C. (“Violet”) is not a publicly held entity, does not issue stock, and does not have a parent corporation.

Respondent St. Bernard Port, Harbor, & Terminal District (“St. Bernard”) is a public corporation and political subdivision of the State of Louisiana. La. Rev. Stat. 34:1701, *et seq.*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE	ii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
INTRODUCTION.....	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION..	14
I. THERE IS A WELL-DEVELOPED CONFLICT REGARDING THE PROPER STANDARD TO REVIEW A TRIAL COURT’S “PUBLIC USE” DETERMINATION UNDER THE FIFTH AMENDMENT	14
A. State Supreme Courts Disagree on the Standard that Should Be Applied	14
B. The Louisiana Supreme Court’s Man- ifest Error Standard Is Irreconcilable With this Court’s Precedent.....	18
II. REVIEW IS WARRANTED TO PROVIDE GUIDANCE AND TO RESOLVE CONFLICTING AUTHORITIES REGARDING THE SCOPE OF GOVERNMENT TAKINGS POWERS POST- KELO.....	21

TABLE OF CONTENTS—Continued

	Page
A. This Court Recognizes Constitutional Limits on Government Authority to Take Private Property.....	21
B. State Supreme Courts Disagree Over the Limits on Government Takings Powers.....	24
C. This Case Presents the Type of Suspicious, Pretextual, and Private Taking that Should Be Unconstitutional Even Under <i>Kelo</i>	26
III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THESE EXCEPTIONALLY IMPORTANT ISSUES OF CONSTITUTIONAL LAW.....	31
CONCLUSION	34
APPENDIX	
APPENDIX A: Opinion, No. 2017-C-0434 (La. Jan. 30, 2018).....	1a
APPENDIX B: Order Denying Rehearing, No. 2017-C-0434 (La. March 13, 2018).....	47a
APPENDIX C: Opinion, No. 2016-CA-00096 (La. 4th Cir. Dec. 14, 2016).....	49a
APPENDIX D: Order Denying Rehearing, No. 2016-CA-00096 (La. 4th Cir. Feb. 8, 2017)	76a
APPENDIX E: Judgment Allowing the Taking, No. 116-860 (34th Jud. Dist. Ct. for St. Bernard Parish, La. Feb. 15, 2012).....	84a

TABLE OF CONTENTS—Continued

	Page
APPENDIX F: Reasons for Judgment Allow- ing the Taking, No. 116-860 (34th Jud. Dist. Ct. for St. Bernard Parish, La. March 21, 2012)	86a
APPENDIX G: Final Judgment, No. 116- 860 (34th Jud. Dist. Ct. for St. Bernard Parish, La. July 31, 2015).....	89a
APPENDIX H: Reasons for Judgment on Compensation, No. 116-860 (34th Jud. Dist. Ct. for St. Bernard Parish, La. Sept. 25, 2015)	92a
APPENDIX I: Lease Commitment Letter from Associated Terminals to St. Bernard, November 20, 2008.....	99a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001).....</i>	27
<i>Berman v. Parker, 348 U.S. 26 (1954).....</i>	<i>passim</i>
<i>Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1985).....</i>	20
<i>Calder v. Bull, 3 U.S. 386 (1798).....</i>	21, 22
<i>Cincinnati v. Vester, 281 U.S. 439 (1930).....</i>	18
<i>County of Hawaii v. C&J Coupe Family Ltd. Partnership, 198 P.3d 615 (Haw. 2008).....</i>	15, 16
<i>Courtesy Sandwich Shop, Inc. v. Port of New York Auth., 190 N.E.2d 402 (N.Y. 1963)</i>	24
<i>Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).....</i>	19
<i>Federal Trade Commission v. Raladam Co., 283 U.S. 643 (1931).....</i>	8
<i>Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).....</i>	<i>passim</i>
<i>Kelo v. City of New London, 545 U.S. 469 (2005).....</i>	<i>passim</i>
<i>Kelo v. City of New London, 843 A.2d 500 (Conn. 2004).....</i>	15, 19

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	21
<i>Middletown Township v. Lands of Stone</i> , 939 A.2d 331 (Pa. 2007).....	16, 17
<i>Miller v. Fenton</i> , 474 U.S. 104 (1985).....	20
<i>Missouri Pacific Railway Co. v. Nebraska</i> , 164 U.S. 403 (1896).....	22, 28
<i>National Railroad Passenger Corp. v. Boston and Maine Corp.</i> , 503 U.S. 407 (1992).....	23
<i>Norris v. State of Alabama</i> , 294 U.S. 587 (1935).....	20
<i>Omnia Commercial Co. v. United States</i> , 261 U.S. 502 (1923).....	23
<i>Ornelas v. United States</i> , 517 U.S. 690 (1996).....	20
<i>Penn-Central Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978).....	2
<i>Rhode Island Economic Dev. Corp. v. The Parking Company, L.P.</i> , 892 A.2d 87 (R.I. 2006)	17, 24
<i>Southwestern Ill. Dev. Auth. v. National City Environmental, L.L.C.</i> , 768 N.E.2d 1 (Ill. 2002).....	16, 25

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Thompson v. Keohane</i> , 516 U.S. 99 (1995).....	20
<i>U.S. Bank, N.A. v. Village at Lakeridge, L.L.C.</i> , 138 S. Ct. 960 (2018).....	20
<i>United States ex rel. Tenn. Valley Auth. v. Welch</i> , 327 U.S. 546 (1946).....	18
<i>Webb’s Famous Pharmacies, Inc. v. Beckwith</i> , 449 U.S. 155 (1980).....	22, 23, 28
 CONSTITUTIONS	
U.S. Const. amend. I	20
U.S. Const. amend. IV.....	20
U.S. Const. amend. V	<i>passim</i>
U.S. Const. amend. XIV	2, 20, 21, 33
La. Const. art. I, § 4(B)(1)	32
La. Const. art. I, § 4(B)(2)	32
La. Const. art VI, § 21	32
 STATUTES	
28 U.S.C. § 1257	1
 OTHER AUTHORITIES	
Jeff Benedict, <i>Little Pink House</i> (2009)	31
2 T. Cooley, <i>Constitutional Limitations</i> (8th ed. 1927)	15

TABLE OF AUTHORITIES—Continued

	Page(s)
James W. Ely, Jr., <i>The Guardians of Every Other Right: A Constitutional History of Property Rights</i> (3d ed. 2008).....	31, 32
Richard A. Epstein, <i>Kelo v. City of New London Ten Years Later</i> , <i>National Review</i> (June 23, 2015).....	31
Ilya Somin, <i>The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain</i> (Univ. of Chicago Press 2015).....	30, 31, 32, 33
John Paul Stevens, <i>Judicial Predilections</i> , 6 Nev. L. J. 1 (2005).....	32
George F. Will, <i>Hollywood’s Newest Action Star: The Constitution’s Takings Clause</i> , <i>Washington Post</i> (April 18, 2018)	31

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The Louisiana Supreme Court's opinion is reported at 239 So.3d 243 (La. 2018), and is reprinted at Pet. 1a-46a. The Louisiana Supreme Court's order denying Violet's application for rehearing is not reported, and is reprinted at Pet. 47a-48a.

The Louisiana Fourth Circuit Court of Appeals' opinion is reported at 229 So.3d 626 (La. 4 Cir. 2016), and is reprinted at Pet. 49a-75a. The Court of Appeals opinion denying rehearing is not reported, and is reprinted at Pet. 76a-83a.

The trial court's judgments and reasons are not reported. The judgment upholding the taking is reprinted at Pet. 84a-85a. The trial court's per curiam opinion is reprinted at Pet. 86a-88a. The final judgment on compensation is reprinted at Pet. 89a-91a. The trial court's reasons for its final judgment on compensation is reprinted at Pet. 92a-98a.

JURISDICTION

The Louisiana Supreme Court entered its opinion on January 30, 2018, Pet. 1a, and denied Petitioner's timely motion for rehearing on March 13, 2018, Pet. 47a. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part:

nor shall private property be taken for public use, without just compensation.

U.S. Const. amend V. This provision applies to state entities by operation of the Fourteenth Amendment. *See Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 122-23 (1978).

INTRODUCTION

This case squarely presents issues that have plagued the lower courts since *Kelo* regarding how a court should evaluate whether a taking violates the Public Use Clause when property is taken from one owner to turn it over to another previously-selected private owner outside the confines of an integrated redevelopment plan.

Petitioner is a private company that, for several decades, owned and operated a thriving, debt-free private port on the Mississippi River near New Orleans. The port was a one-of-a-kind property with deep water, five heavy duty docks, related improvements, seventy-five acres of land, levee protection, and one linear mile of river, rail and state highway frontage. Petitioner had housed and serviced United States Military Sealift Command (“Navy”) ships at its port for decades and was expanding to capture the skyrocketing cargo trade.

Respondent is a local government entity that owns a public port several miles upstream. In 2007, Respondent started a plan to acquire Petitioner’s private port to turn it over to its hand-picked private

entity, Associated Terminals (“Associated”). In 2008-2009, in funding applications seeking Louisiana Port Priority Program grants, Respondent disclosed its plan to: (1) acquire the private port and lease it to Associated, (2) service Petitioner’s existing customers, and (3) expand into the same type of cargo business that Petitioner was cultivating. Respondent represented that the private port was a turn-key facility that could be used “immediately.”

Before the taking, Associated executed a letter of intent with Respondent to lease the entirety of the private port once it could be acquired. Associated’s lease commitment letter (attached as Appendix I) emphasizes that acquisition of Violet’s property was “vital to the continued growth in cargoes being handled by Associated” because Associated was already “operating at capacity” at the facility it leased from St. Bernard. Pet. 99a. Associated focused on growing its own business, but was willing to pay St. Bernard rent if Violet’s property was acquired. Pet. 101a.

By upholding this expropriation of a private port facility to lease it to another pre-selected private entity, the Louisiana Supreme Court expanded the scope of governmental takings authority beyond that allowed under *Kelo v. City of New London*, 545 U.S. 469 (2005), in two significant ways.

First, the Louisiana Supreme Court undermined the role of the judiciary as a check against the misuse of government takings powers. The court held that a trial court’s determination that a taking satisfies the Fifth Amendment’s “public use” requirement is a finding of fact subject only to a manifest error review on appeal. Pet. 10a, 13a. Using that standard, the court gave deference to the trial court’s conclusions that (a) Respondent’s taking was for the public use

“to build and operate a terminal to accommodate transport of liquid and solid bulk commodities in national and international commerce to and from St. Bernard,” and (b) the taking was “not for use by, or transfer of ownership to any private person or entity.” Pet. 86a-87a. By invoking the manifest error standard, the Louisiana Supreme Court ignored all findings and evidence that contradicted the trial court’s “public use” determination, including (a) the trial court’s later factual finding that there were physical limitations associated with the property that made it “unsuitable for very large scale cargo use,” which was the stated purpose for the taking, *see* Pet. 9a, and (b) the undisputed evidence that, since the inception of its plan to acquire the property, Respondent intended to flip Petitioner’s property to Associated, a hand-picked private entity, under a long term lease, *see* Pet. 101a.

This Court has never sanctioned a manifest error standard to review a trial court’s Fifth Amendment public use determination. The post-*Kelo* public use analysis is already deferential to government decisions to take property. There is no good reason to make the analysis doubly-deferential by making the local trial court the final arbiter of whether a taking is constitutional. The Louisiana Supreme Court’s decision is in direct conflict with decisions from the highest courts of Hawaii, Illinois, Pennsylvania, and Rhode Island, and is also inconsistent with this Court’s precedent. This case presents an ideal vehicle to resolve this important issue of law given that the Louisiana Supreme Court’s Fifth Amendment analysis was based on the standard of review, rather than an analysis of the full record.

Second, the Louisiana Supreme Court’s decision vastly expands governmental takings powers, granting the

power to take and operate a fully-functioning private business to raise revenues for the government and its favored private actor. This Court has never approved a taking like this one. This case presents the type of “suspicious” one-to-one taking of property outside of a comprehensive redevelopment plan that the *Kelo* Majority said should be “confronted if and when they arise,” *see* 545 U.S. at 487, and that Justice Kennedy said might trigger closer scrutiny of the legitimacy of the public purpose asserted, *id.* at 492-93 (Kennedy, J., concurring). The Louisiana Supreme Court’s decision directly conflicts with those of the highest courts of Rhode Island and Illinois, and is inconsistent with this Court’s precedent.

In *Kelo*, the Court rejected application of bright-line rules in favor of fact specific analysis. 545 U.S. at 487. As a result, property owners, courts, government, and scholars have been left to speculate about whether there is any limit left on the scope of government authority. This case present an excellent opportunity to provide clarity on the limits of government takings powers, to show that there are limits on the scope of government power post-*Kelo*, and to resolve several conflicts in the law regarding the proper interpretation of the Fifth Amendment.

STATEMENT OF THE CASE

1. Petitioner Violet is a closely held company that built a private port facility in St. Bernard Parish, Louisiana, over the course of several decades by reinvesting the profits from its operations into the infrastructure on the property. Pet. 92a. Violet began by purchasing a 75-acre parcel of land along the Mississippi River, which had one mile of deep water, riverfront access and corresponding state highway and rail access. Pet. 4a-5a. Violet built five heavy duty

docks on the Mississippi River, and added related infrastructure to handle its customers' needs. Pet. 5a, 34a.

For decades, Violet had successfully bid on contracts to layberth and service Navy ships, including LMSR's (large, medium speed, roll-on, roll-off ships), that at 950 feet long, by 106 feet wide, are some of the largest cargo ships in the world. Pet. 5a. Violet had designed its docks and improvements to meet the Navy's detailed specifications regarding security, utilities, engineering, and parking. Pet. 5a. Three of Violet's five docks were inspected by the Navy and certified to berth multiple Navy ships simultaneously. Pet. 5a n.3. At the time of the taking in 2010, Violet was layberthing and servicing two Navy ships under a contract renewable through 2018, and likely would have obtained additional Navy contracts but for the taking.

Although three of Violet's docks were designed for Navy use, all could easily be converted to cargo use. At the time of the taking, Violet had almost finished rebuilding Berth 4 to expand its cargo capacity and had obtained the necessary Corps of Engineers permits to engage in intensive cargo operations. Pet. 35a. Violet planned to lease ten acres of land to a well-known national company, Vulcan Materials, to transload and store aggregate bulk cargo using Violet's docks. Pet. 35a, 40a-41a. The imminent lease between Violet and Vulcan Materials was thwarted only by the taking.

2. Respondent St. Bernard Port, Harbor, & Terminal District ("St. Bernard") owns a public port, known as the Chalmette Slip, six river miles from Violet's property. For more than a decade, St. Bernard leased the Chalmette Slip's docks to Associated, a private entity, which acts as St. Bernard's exclusive marine terminal operator. *See* Pet. 3a-4a.

Due to increasing market demand, St. Bernard and Associated wanted to expand. Pet. 4a. St. Bernard estimated that it would cost between \$30 and \$40 million to build a single new dock at its existing facility. Ex. L-125 at 20. So, it looked for other properties to acquire. St. Bernard targeted Violet's property, viewing it as "a national asset for transportation and manufacturing," in view of the "finite" and "limited" nature of land suitable for a port along the Mississippi River. Exs. L-139b at 1005 & Ex. L-230. St. Bernard believed Violet's property would be "attractive to importers of bulk commodities due to its location on the river which translates into lower transportation costs." Ex. L-143(a) at 2. (These characteristics also explain why Violet was already expanding its cargo capacity). St. Bernard believed that it could acquire Violet's property at a price far below what it would take to build new facilities at the Chalmette Slip. St. Bernard thus "targeted" Violet's property as early as 2007 and expressed an urgent need to "acquire the property and take it off the market." Exs. L-167 at 12225 & Ex. L-182 at 26546.

To fund the acquisition of Violet's property, St. Bernard applied to Louisiana's Port Priority Program. Pet. 35a. In its 2008 and 2009 submissions seeking a Port Priority grant, St. Bernard represented that its engineers and representatives had inspected the property and believed it could be used for cargo operations "immediately." Pet. 87a. St. Bernard also admitted its intent to take Violet's existing business and customers to generate revenues to fund its future plans, explaining:

in the short term, it is expected that the marine terminal operator [Associated] will take over the existing Navy concessions and

possibly compete for future contracts as a means of securing immediate revenues from the site.

Tr. (2/1/2012) at 12. St. Bernard represented that it “will continue to compete for these MARAD/Navy contracts,” and expected average annual revenues from those contracts of around \$550,000. Pet. 35a. These revenues were significant because, although St. Bernard allegedly had a three part plan to develop Violet’s property into a large scale cargo facility, St. Bernard was seeking funding only for Phase I of the plan, which was to continue to use Violet’s property as is and service the Navy ships for 8-10 years, while generating revenues for future expansion. Pet. 36a, 39a. In other words, St. Bernard intended to use a business model similar to what Violet had used for decades—reinvesting revenues from operations to fund expansion of the facility. Pet. 37a, 45a, 73a.

Violet was also planning to compete directly against St. Bernard for cargo (and St. Bernard knew this), which is why Violet built Berth 4, agreed to lease part of its property to Vulcan, and worked with Vulcan to obtain the necessary permits for those operations. Pet. 35a, 40a-41a. Violet acknowledges that St. Bernard had more robust cargo operations than Violet before the taking, but there is no factual dispute that Violet was a growing competitor (and potential competitor) in the cargo market. Violet and St. Bernard were in competition. *See Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 649 (1931) (“The word ‘competition’ imports the existence of present or potential competitors.”).

3. Associated was a principal participant in planning St. Bernard’s acquisition of Violet’s property. As noted above, Associated is a private entity that, at the

time of the taking, had operated St. Bernard's Chalmette Slip as St. Bernard's exclusive marine terminal operator for many years. Pet. 3a-4a. Associated started discussing the acquisition of Violet's property with St. Bernard as early as 2007, more than three years before the taking.

Associated was involved at every step of the acquisition of Violet's property. It "fully participated in the development of the Long Term and Short Term Site Plans for the Violet terminal, which are shown in the Port Priority application." Pet. 101a. Associated explained it needed the property because it was "operating at capacity," was in "need [of] additional space now to store dry bulk product," and was "aware of opportunities to handle new cargoes which we have determined would be suitable for the Violet facility." Pet. 101a. Associated wanted to grow its business and hire more employees, but it needed "the addition of the new facility at Violet." Pet. 102a-103a. Thus, Associated committed to lease the entirety of Violet's property and guarantee an annual rent to St. Bernard, as soon as it could be acquired. Pet. 101a-102a. Associated also assured St. Bernard that it could earn additional revenues by charging "dockage" and "throughput" fees based on Associated's activities. Pet. 101a-103a. Although the official lease between St. Bernard and Associated had not been executed at the time of the taking, Associated was "confident" the lease would be executed (and it was soon after trial).

4. St. Bernard attempted to purchase Violet's property through a voluntary sale, but no agreement was reached. St. Bernard then initiated expropriation proceedings in the 34th Judicial District Court, St. Bernard Parish, Louisiana. Pet. 6a. In its Petition, St. Bernard stated that its plans for Violet's property

had not changed since its filing of the Port Priority submissions. Phase I of its plan (the only phase that was funded) was simply to take Violet's existing property and conduct the same type of business thereon, namely servicing the same Navy ships for at least eight years and using Violet's other assets to conduct the same type of bulk cargo operations for which Violet had just constructed improvements. Pet. 6a, 36a. Thereafter, St. Bernard stated its hope to complete Phases II and III and build a large scale bulk cargo facility, but there were no funds for those subsequent phases and no assurances they would ever be completed.

Violet contested the taking under both the U.S. and Louisiana Constitutions. In rejecting Violet's constitutional challenges, the trial court accepted St. Bernard's "stated reason for expropriation," which was "to build and operate a terminal to accommodate transport of liquid and bulk commodities in national and international commerce to and from St. Bernard." Pet. 32a, 86a-87a. The court further adopted other representations made by St. Bernard in its resolutions of expropriation and its pleadings that:

- the property was "available for immediate use,"
- "the expropriation will not affect the use by [the Navy] for its vessels should [the Navy] elect to continue use,"
- "[t]he contemplated construction and use of the property will bring needed revenues into the community," and
- "the predominate use of the property would be by the public, not for use by, or for transfer of ownership to any private person or entity."

Pet. 87a. The trial court ignored the undisputed evidence showing Associated's principal role in planning the taking, and St. Bernard's intent (expressed both before and after the taking) to have Associated operate the property post-taking. *See* Pet. 99a, 101a. In a conspicuous omission, the trial court did not even mention Associated's name when making its findings.

When it was time to compensate Violet for the taking, St. Bernard switched its position regarding the purposes for which the property could be used, convincing the trial court that "[u]se of this property as a liquid bulk or dry bulk terminal is limited," and "[t]he limited amount of uplands of the property would not support a large scale cargo terminal." Pet. 37a, 40a, 97a. The trial court accepted St. Bernard's argument that the property could not be used for the purpose for which it was taken due to physical limitations such as the water depth in the Mississippi River and the proximity to a school and residential neighborhood, which were attributes that had not changed since the taking. Pet. 97a. The trial court concluded that the highest and best use of the property was "continued use as layberthing and a limited intermodal container terminal." Pet. 98a. Thus, the court awarded Violet \$16 million for its property, which was the exact amount offered by St. Bernard. Pet. 89a.

The trial court never attempted to reconcile its conflicting findings: (a) that it was constitutional to take Violet's property for the purposes of building a large scale bulk cargo terminal, but (b) when it was time to award compensation for the taking, finding that physical attributes (that existed at the time of the taking) limited the use of the property as a large scale liquid bulk or dry bulk cargo terminal.

5. The Louisiana Fourth Circuit Court of Appeals affirmed the taking in a divided decision. Two judges voted to uphold the taking, noted Violet’s challenge to the taking under the Fifth Amendment, but offered no explanation as to why they rejected that challenge. Pet. 55a. In dissent, Judge Lobrano found the taking unconstitutional under the Louisiana Constitution, making it unnecessary for her to reach the question under the U.S. Constitution. Pet. 70a-75a.

6. The Louisiana Supreme Court upheld the taking in a 4-3 decision. The majority explained: “under both [the United States and Louisiana] Constitutions, any expropriation must be for a ‘public purpose’ **and** provide ‘just compensation.’” Pet. 10a (emphasis in original). “To review these determinations, we start with the constitutional provisions at issue. We then review the record to determine whether the trial court’s factual findings were manifestly erroneous.” Pet. 10a (internal citations omitted). Applying that standard, the majority explained that the trial court’s judgment was based on the:

factual determination that the Port’s purpose for expropriation 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.”

Pet. 13a. The majority recognized Associated’s intended role to be the operator of Petitioner’s property post-taking. Pet. 7a. But without much factual analysis, the majority held:

Based on the record before us, we cannot say that the trial court’s finding was manifestly

erroneous, and we therefore affirm the finding that this expropriation was for a public purpose.

Pet. 13a. Thus, the majority summarily rejected Violet's Fifth Amendment challenge, holding: "that this expropriation satisfies the broad definition of public purpose under federal law." Pet. 13a. "The Port's plan to lease the Property to another entity to operate does not change our analysis." Pet. 15a n.11.

7. Justice Weimer authored a dissent attacking the majority for its "perfunctory and, in the end, erroneous manifest error review." Pet. 23a. The dissenters would have held the taking unconstitutional under the Louisiana Constitution, which made it unnecessary for them to address the limits of the U.S. Constitution. Nevertheless, in language equally applicable to Violet's claim under the U.S. Constitution, Justice Weimer explained the problem:

In this case, to the extent it can be argued that the district court made a factual finding with respect to the "purpose" for the expropriation, it appears the court simply accepted at face value the Port's stated reason for expropriating Violet's property without considering the effect of that taking. Such an analysis is constitutionally deficient, as the myopic focus on the Port's stated reason for the expropriation without any examination of the effect of the taking would allow the Port, or any expropriating authority, virtually unfettered authority to expropriate property as long as it professed an ostensible proper motive for the taking.

Pet. 32a. The dissenters viewed St. Bernard's taking as "eliminating private competition" for St. Bernard and Associated. Pet. 42a.

Justice Weimer provides a thorough summary of the factual record in his dissent. Pet. 34a-43a. The dissenters would have reversed even under a manifest error standard of review. Pet. 39a-40a, 45a.

8. The Louisiana Supreme Court denied Violet's application for rehearing, Pet. 47a, and remanded the case to the court of appeals to reassess the compensation owed to Violet because the trial court's award was based on a legally erroneous standard. Pet. 21a. The judgment upholding the taking against Violet's constitutional challenge is final for all purposes and ripe for this Court's review.

Violet files this Petition because it seeks return of its property. Unless the taking is overturned, Violet is out of business due to the actions of its competitors, St. Bernard and Associated.

REASONS FOR GRANTING THE PETITION

I. THERE IS A WELL-DEVELOPED CONFLICT REGARDING THE PROPER STANDARD TO REVIEW A TRIAL COURT'S "PUBLIC USE" DETERMINATION UNDER THE FIFTH AMENDMENT.

A. State Supreme Courts Disagree on the Standard that Should Be Applied.

The scope of judicial review in takings cases should not depend on the fortuity of the state where property is located. Nevertheless, states have reached conflicting decisions regarding the extent of appellate review for takings. This Court should grant review to resolve this conflict.

1. The Supreme Courts of Louisiana and Connecticut hold that the trial court’s “public use” finding under the Fifth Amendment is a question of fact subject to a manifest error or clear error standard of review on appeal. The Louisiana Supreme Court’s reasoning is set forth on pages 12-13 above.

The Connecticut Supreme Court adopted the clear error standard of review for a trial court’s public purpose findings in *Kelo v. City of New London*, 843 A.2d 500, 540 (Conn. 2004), *aff’d on other grounds*, 545 U.S. 469 (2005). The court applied that standard to the question whether a taking was for a public purpose, or was an impermissible attempt to serve a private interest. *Id.* Justice Zarella dissented from that holding, and would have reviewed the public use finding as a question of law or, at least, a mixed question of fact and law. *See id.* at 595 (Zarella, J., concurring in part, dissenting in part) (citing 2 T. Cooley, *Constitutional Limitations* 1141 (8th ed. 1927)).

2. The Supreme Courts of Hawaii, Illinois, Pennsylvania, and Rhode Island recognize that the question whether a taking is for a “public use” is a judicial question that receives a *de novo* review on appeal.

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—to build a road. *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 reviews *de novo* under the right/wrong standard.” *Id.* at 637. The Court reversed the trial court’s decision that refused to look behind the asserted purpose for the taking. *Id.* at 652. Thus, the Hawaii Supreme Court did not 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.*, 768 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 the taking of a private business for the purposes of adding public parking for a racetrack. *Id.* at 8-11.

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.

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 104-05. 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. In Rhode Island, it would have been unconstitutional for St. Bernard to take Violet’s property to gain the benefit of revenues from Violet’s assets and customers to fund future expansion plans.

3. If meaningful appellate review is applied here, St. Bernard’s taking should be reversed. The trial court deferred to St. Bernard’s stated purpose for the taking when entering its finding, and also found that the taking was “not for use by, or for transfer of ownership to any private person or entity.” Pet. 87a. Then, the Louisiana appellate courts deferred to the trial court’s judgment. But the fact that St. Bernard articulated a permissible justification to take property cannot give it carte blanche to take whatever it wants without substantive, judicial scrutiny of its actions. It also does not license St. Bernard to take private

property with the intent of transferring possession and use of it to a private actor, as St. Bernard did when it took Violet's property to lease it to Associated. Associated's letter executed well before the taking is sufficient in itself to question the legitimacy of the trial court's findings. *See* Pet. 99a-104a. If this taking is constitutional, almost no taking would be barred by the Fifth Amendment so long as the expropriating authority recites the appropriate statutory or constitutional text.

B. The Louisiana Supreme Court's Manifest Error Standard Is Irreconcilable With this Court's Precedent.

There are at least three strong indicators from this Court's decisions that should require rejection of the manifest error standard. First, when this Court has upheld takings against public use challenges, it has examined the full factual record, without giving deference to lower court factual determinations. Second, this Court did not adopt the Connecticut Supreme Court's deferential appellate review standard in *Kelo*. Finally, even if the public use determination were treated as a question of fact, it should still receive *de novo* review as a fact with constitutional significance. Regardless of the standard employed, courts, government, and property owners will all benefit from a clear articulation of the standard of review that should be applied.

1. This Court holds that the question whether a taking is for a permissible "public use" is "a judicial one." *United States ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946); *see also Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("the question what is a public use is a judicial one"). 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.” *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239 (1984). (quoting *Berman v. Parker*, 348 U.S. 26, 32 (1954)). “[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 proper analysis requires the court to “view[] the subject for ourselves,” “[t]aking all of the facts into consideration.” *Id.* at 160, 164. 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.

In case after case, the Court has performed an extensive review of the factual record, even when upholding takings as in *Kelo*, *Midkiff*, and *Berman*. The Court has never given short-shrift to a Fifth Amendment public use challenge by deferring to a lower court’s factual findings.

2. When this Court affirmed the Connecticut Supreme Court’s judgment in *Kelo*, it did not adopt or use the clearly erroneous standard that had been applied by the Connecticut Supreme Court Majority. See 843 A.2d at 540. To the contrary, the Court addressed the issues presented as a matter of law. The Court also recognized that some cases may need to be viewed “with a skeptical eye,” *Kelo*, 545 U.S. at 487, n.17, or using “a more stringent standard of review than that announced in *Berman* and *Midkiff*,” *id.* at 493 (Kennedy, J., concurring). Thus, *Kelo* is not

precedent supporting the standard of appellate review applied by the Louisiana Supreme Court.

3. Even if this Court were to relegate the Fifth Amendment's "public use" requirement to a question of fact, it should still receive *de novo* review on appeal because of its constitutional implications. As this Court recently reaffirmed:

In the constitutional realm . . . we have often held that the role of appellate courts "in marking out the limits of [a] standard through the process of case-by-case adjudication" favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record.

U.S. Bank, N.A. v. Village at Lakeridge, L.L.C., 138 S. Ct. 960, 967 n.4 (2018).

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. 485, 499 (1985). This rule has been applied to review factual questions *de novo* in a wide variety of constitutional cases involving at least the First, Fourth, Fifth, and Fourteenth Amendments. *See id.* at 505, 510-11 (First Amendment); *Ornelas v. United States*, 517 U.S. 690, 696-99 (1996) (probable cause and reasonable suspicion); *Thompson v. Keohane*, 516 U.S. 99, 112-15 (1995) (custodial interrogation); *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (whether a suspect's confession was voluntary); *Norris v. State of Alabama*, 294 U.S. 587, 590 (1935) (constitutional claims of discrimination in the grand jury and petit jury system).

This constitutional fact doctrine should be applied to the Fifth Amendment “public use” analysis to ensure that property owners receive meaningful judicial review when their property rights are under attack.

II. REVIEW IS WARRANTED TO PROVIDE GUIDANCE AND TO RESOLVE CONFLICTING AUTHORITIES REGARDING THE SCOPE OF GOVERNMENT TAKINGS POWERS POST-KELO.

A. This Court Recognizes Constitutional Limits on Government Authority to Take Private Property.

The power to take private property for public use is broad, but 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”). The Court has held that takings powers are “coterminous with the scope of a sovereign’s police powers.” *Midkiff*, 467 U.S. at 240. But as shown by the 5-4 decision in *Kelo*, that holding has generated much disagreement. *See Kelo*, 545 U.S. at 519 (Thomas, J., dissenting) (“[m]ore fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States”); *id.* at 502 (O’Connor, J., dissenting) (“the police power and ‘public use’ cannot always be equated”). Following *Kelo*, many question whether the Fifth and Fourteenth Amendments still impose a “public use” limitation on takings. *See id.* at 506 (Thomas, J., dissenting) (“the Court has erased the Public Use Clause from our Constitution”).

Kelo did not expressly overrule any of this Court’s precedent. Thus, pre-*Kelo* limitations on government power should still apply.

For example, in the famous opinion by Justice Chase in *Calder v. Bull*, the Court recognized that one

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*, 545 U.S. at 477-78 & n.5.

Another example of a government exceeding the scope of its 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 to facilitate delivery of goods in commerce. *Id.* at 413, 417. That the theoretical purpose of the taking—facilitating the transportation of goods in commerce—could be a public purpose in some cases did not allow the government to achieve its goals through unconstitutional means that were for the benefit of a private actor.

In *Webb’s Famous Pharmacies, Inc. v. Beckwith*, the Court held that 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. 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 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 this Court has upheld the use of broad takings powers, it typically has done so in cases seeking to solve problems, involving traditional exercises of police powers such as addressing blight, *Berman*, 348 U.S. at 28-30, 34-35, breaking up land oligopolies, *Midkiff*, 467 U.S. at 233, removing obstructions to rail lines, *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 412 (1992), or acquiring steel for use during war, *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923). *Kelo* extended the outer limits of takings powers, recognizing that government could take private property for economic development purposes in the context of implementing a comprehensive redevelopment plan that was viewed as benefiting the community as a whole. *Kelo*, 545 U.S. at 484, 487.

No decision from this Court has ever upheld a taking like the one the Louisiana Supreme Court upheld here—taking and operating a private business to use its revenues to fund government expansion, and share those revenues with a favored, already-identified private actor. If this taking is upheld, there truly will be no constitutional limit on the purposes for which property may be taken.

B. State Supreme Courts Disagree Over the Limits on Government Takings Powers.

The Louisiana Supreme Court's decision conflicts with decisions from the highest courts of other states prohibiting government from taking property for the purposes of usurping business opportunities, raising revenues, and saving expenses.

1. Government should not be allowed to take over private businesses to satisfy the government's "desire for increased revenues." See *Rhode Island Economic Dev. Corp. v. The Parking Company, L.P.*, 892 A.2d 87, 96, 103 (R.I. 2006); see also *Courtesy Sandwich Shop, Inc. v. Port of New York Auth.*, 190 N.E.2d 402, 404 (N.Y. 1963) (holding that condemnation "for the production of revenue" is "beyond what can be constitutionally permitted.").

The Rhode Island Supreme Court adopted that rule when it declared it was unconstitutional for a local airport authority to take a private parking garage on neighboring property. *Rhode Island Economic Dev. Corp.*, 892 A.2d at 96, 103. Although the airport authority intended to make some changes to the way the garage would be operated (*i.e.*, converting from valet to daily parking), the garage was still going to be used for parking post-taking, but with the revenue going to the airport authority instead of the private property owner. *Id.* The court held there was no permissible public purpose served by seizing a private business so that government could make similar use of the property to earn revenues for itself. *Id.*

The Louisiana Supreme Court's decision directly conflicts with that of the Rhode Island Supreme Court. Here, St. Bernard took Violet's property with a stated

intent to use it for eight to ten years in a manner similar to Violet's use. Pet. 36a, 39a. St. Bernard admitted its intent to raise revenues from Violet's former customers, such as the Navy, to fund future development of the property. Pet. 35a. This type of taking would not be allowed in Rhode Island, and should not be allowed in Louisiana or anywhere else.

2. The Louisiana Supreme Court's decision also conflicts with the Illinois Supreme Court's decision in *Southwestern Ill. Dev. Auth. v. National City Environmental, L.L.C.*, where the court held that it was unconstitutional for a racetrack to use its takings authority to condemn private land to build a parking garage. 768 N.E.2d 1, 8 (Ill. 2002). 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, but it would have cost more to do so. *Id.* The Illinois Supreme Court held that saving costs, even if they are substantial, is not a legitimate public use to condemn another's land. *Id.* at 10.

In the present case, saving costs was a significant factor in St. Bernard's decision to take Violet's property. St. Bernard could have built another dock on its own property to expand, but the cost of doing so was more than \$30 million. Ex. L-125 at 20. St. Bernard should not be allowed to take Violet's property in an effort to save its own redevelopment costs or to avoid the hassles and delays associated with construction of a new facility on its own land.

3. Allowing a taking of the type at issue here opens the door to takings for mere convenience. For example, if government can take a private business to operate it for the same or similar purposes, what stops a governmental entity that wants a new office building

from simply seizing someone else's building, thereby avoiding the costs, hassles, risks, and delays of its own construction? Or if government may take property to raise revenues, what would stop the Port of New Orleans from seizing the Hilton Hotel bordering the Mississippi River and cruise ship terminals to house people waiting for cruise ships, while raising revenues for the Port in the process? Here, post-taking, St. Bernard even suggested it would have been willing to lease part of Violet's property back to Violet to allow it to layberth ships, of course in return for a rental fee payable to St. Bernard.¹ Does government have the power to seize private property, only to make it available to the original landowner for a fee? Review should be granted to clarify that government does not have such wide-ranging power to interfere with private property rights.

C. This Case Presents the Type of Suspicious, Pretextual, and Private Taking that Should Be Unconstitutional Even Under *Kelo*.

St. Bernard's taking exceeds the scope of authority recognized in *Kelo*. Under *Kelo*, a taking will not be allowed "under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit." 545 U.S. at 478. In his concurrence, Justice Kennedy emphasized that "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden." *Id.* at 490 (Kennedy, J., concurring). This case presents the type of suspicious, pretextual

¹ See Appellee's Brief in the Louisiana Supreme Court at 13.

taking that the *Kelo* Majority said must be stopped “if and when they occur.” *Id.* at 487.

1. Unlike *Kelo*, *Midkiff*, and *Berman*, which all involved takings in the context of a broader redevelopment plan, this case presents a one-to-one taking where a private actor was the intended beneficiary of the taking from the inception of the plan to acquire the property. Associated was involved at every step of the process, helping St. Bernard scout property, assisting in preparing St. Bernard’s application for funding from the State of Louisiana, testifying at trial on behalf of St. Bernard, and promising to lease and operate the property once it could be acquired. Pet. 99a-101a. Post-taking, Associated is now operating and receiving revenues from Violet’s property.

The present case is analogous to *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), which was cited by the *Kelo* Majority as an example of a suspicious taking that likely was unconstitutional. *See Kelo*, 545 U.S. at 487 n.17. In *99 Cents Only Stores*, a local government attempted to take a small retail store to enable Costco to expand. 237 F. Supp. 2d at 1128-30. Costco was involved in the decision to take the property, including the selection of what property to take. *Id.* Costco was also the intended recipient of the property post-taking. *Id.* The court held that the taking was unconstitutional. *Id.*

The decision from the Louisiana Supreme Court is irreconcilable with *99 Cents Only Store*. Regardless whether a taking is intended to benefit a national retailer like Costco, or a marine terminal operator like Associated, the taking is unconstitutional.

2. The Louisiana Supreme Court's decision is also irreconcilable with this Court's decision in *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896), where the Court held that government could not force a private landowner to allow another private entity to build facilities and operate on its lands. Had St. Bernard used its regulatory power to force Violet to allow Associated to conduct operations from Violet's property, this case would be indistinguishable from *Missouri Pacific Railway Co.* But here, St. Bernard has gone further, not just demanding accommodation of another private party on Violet's land; St. Bernard has removed Violet from its own land to enable Associated to take over operations thereon. Thus, review is warranted here to reconcile the Louisiana Supreme Court's decision with binding precedent from this Court.

3. The fact that St. Bernard was only going to lease the property to Associated, rather than transfer ownership to Associated, does not change the result. It highlights the conflict between the Louisiana Supreme Court's decision and this Court's precedent. St. Bernard's plan, from the beginning, was to retain ownership of Violet's property and receive a share of the revenues earned from the operations Associated conducted. As this Court recognized in *Webb's Famous Pharmacies, Inc.*, raising revenues for the government is not, in itself, a permissible public purpose to justify the taking. 449 U.S. at 164-65. Thus, setting aside the extra revenue St. Bernard hoped to receive, this case presents a classic example of taking private property from one party (Violet) to give it to another (Associated) to run. Government should not have the right to transfer property from one private party to another, even when government thinks the recipient will make better use of the property. *See Kelo*, 545

U.S. at 503 (O'Connor, J., dissenting) (recognizing that government should not be able replace “any Motel 6 with a Ritz Carlton”).

4. In his concurrence in *Kelo*, Justice Kennedy explained that some takings cases may require “a more demanding standard of review than that announced in *Berman* and *Midkiff*.” *Id.* at 493 (Kennedy, J., concurring). “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 so trivial or implausible, that courts should presume an impermissible private purpose.” *Id.* at 493 (Kennedy, J., concurring). This is such a case.

Although St. Bernard said it was taking Violet’s property for the public purpose of building a large-scale cargo operation to facilitate the transportation of goods and services in commerce, St. Bernard has admitted that such use was implausible when trying to minimize the compensation due to Violet. St. Bernard has discounted its development plans for the property as being a “conceptual plan” that “potential buyers . . . would not view as feasible at the Property.”² Although St. Bernard allegedly had a three phase plan for development, Phase I called for continued use of Violet’s property for eight to ten years with minimal changes. St. Bernard did not have any engineering studies to show whether Phases II or III were even feasible. It also had no funding to implement those phases. When deciding whether to extend funding to St. Bernard, the State of Louisiana considered Phase III too speculative to be considered.

² See Appellee’s Brief on Compensation at 6, filed in the Louisiana Fourth Circuit Court of Appeals on April 18, 2018.

Based on this evidence, the trial court concluded that “[u]se of this property as a liquid bulk or dry bulk terminal is limited,” and “[t]he limited amount of uplands of the property would not support a large scale cargo terminal.” Pet. 97a. In other words, St. Bernard had taken Violet’s property for a purpose that was not feasible to accomplish. And in the process, it transferred control over the property to another private actor, Associated.

Justice Kennedy explained that the taking in *Kelo* did not require more demanding scrutiny because the taking was “in the context of a comprehensive development plan,” with “projected economic benefits [that] cannot be characterized as *de minimis*,” and “the identities of most of the private beneficiaries were unknown at the time the city formulated its plan.” *Id.* at 493 (Kennedy, J., concurring). Here, St. Bernard targeted a single piece of property to acquire, offering no evidence of a comprehensive development plan. When it was time to pay the bill for the taking, St. Bernard argued, and the trial court found, that the proposed benefits of the taking were unlikely to materialize because the property was not capable of being used for large scale cargo operations. Finally, from the beginning, St. Bernard knew the identity of the private actor that would receive the benefits of the taking—Associated.

“The question of what qualifies as a pretextual taking has bewildered lower courts in the wake of *Kelo*.” Ilya Somin, *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain* 114 (Univ. of Chicago Press 2015). This case provides the ideal fact pattern to explain when a taking requires more demanding scrutiny and should be held unconstitutional post-*Kelo*.

**III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE
THESE EXCEPTIONALLY IMPORTANT ISSUES OF
CONSTITUTIONAL LAW.**

Resolution of the scope of government authority to take private property is an issue of exceptional importance. Thirteen years after *Kelo*, the decision expanding the scope of government power remains controversial and the subject of much public attention. Its story is covered in books and film. See Jeff Benedict, *Little Pink House* (2009) (film released in 2018). And leading scholars believe *Kelo* was wrongly decided. See, e.g., Somin, *supra* at 4; Richard A. Epstein, *Kelo v. City of New London Ten Years Later*, *National Review* (June 23, 2015) (calling *Kelo* “truly horrible”).

One fundamental flaw with precedent like *Kelo* allowing expansive takings powers is that it “has eliminated the ‘public use’ requirement of the Fifth Amendment as a check on the power of government to appropriate private property by means of eminent domain.” James W. Ely, Jr., *The Guardians of Every Other Right: A Constitutional History of Property Rights* 156 (3d ed. 2008). Political commentators, like George Will, are still writing about the impact of *Kelo*, explaining it “virtually erased the Constitution’s circumscription of government’s eminent domain powers.” George F. Will, *Hollywood’s Newest Action Star: The Constitution’s Takings Clause*, *Washington Post* (April 18, 2018). These criticisms echo the words of Justices O’Connor and Thomas in dissent. *Kelo*, 545 U.S. at 494 (O’Connor, J., dissenting) & 506 (Thomas, J., dissenting).

The *Kelo* Majority responded to these concerns by emphasizing that “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” *Id.* at 489. Soon thereafter, Justice Stevens said that “the public outcry that greeted *Kelo* is some evidence that the political process is up to the task of addressing such policy concerns” John Paul Stevens, *Judicial Predilections*, 6 Nev. L. J. 1, 3 (2005). There has been a political backlash against *Kelo* that resulted in many states enacting new legislation purporting to limit takings powers: “No other Supreme Court decision has ever led to such a broad legislative reaction. And, arguably, none has been so widely unpopular.” Somin, *supra*, at 3. But those legislative efforts have proven to be “symbolic” and “ineffective.” *Id.* at 141; *see also* Ely, *supra* at 158 (“the effectiveness of these measures . . . remains uncertain”).

This case illustrates how the political branches have failed to protect property owners in the wake of *Kelo*, which highlights the need for a judicial check against government takings powers. After *Kelo*, Louisiana amended its Constitution to outlaw takings “(a) for predominate use by any private person or entity, or (b) for transfer of ownership to any private person or entity.” La. Const. art. I, § 4(B)(1). But at the request of public ports, marine terminal operators, and other special interest groups, Louisiana adopted exceptions to those prohibitions, and it included an expansive list of purposes for which private property could be taken. *See Id.* § 4(B)(1) (“Except as specifically authorized by Article VI, Section 21 . . .”); *Id.* § 4(B)(2) (listing the purposes for which property can be taken); La. Const. art VI, § 21 (granting expropriation authority and the power to sell or lease property to public ports and many other political subdivisions). The Louisiana

Supreme Court's decision in this case shows that, despite the public reaction to *Kelo*, Louisiana does not provide meaningful protection to private property owners when targeted for acquisitions by its public and private competitors in the market. Professor Somin has detailed similar problems in many other states that enacted post-*Kelo* reforms. *See, e.g., Somin, supra* at 145-53.

Constitutional rights should not be left to the near complete control of the political branches, which are subject to being influenced by powerful special interest groups. *See id.* at 175. This Court's Public Use jurisprudence has created "an unusual anomaly." *Id.* "In sharp contrast to its treatment of nearly every other individual right enacted in the first ten amendments, the Court's decision in *Kelo* allows the very same government whose abuse the Public Use Clause is intended to constrain to define the scope of the rights that are protected." *Id.*

This Court should grant review to restore the Public Use Clause as a substantive limitation on takings powers. At a minimum, the Public Use Clause should not be relegated to a mere fact question, such that the propriety of government takings will evade meaningful judicial scrutiny and appellate review. Review of the Louisiana Supreme Court's decision is urgently needed to avoid rendering the Public Use Clause of the Fifth and Fourteenth Amendments meaningless.

CONCLUSION

Petitioner respectfully requests that the Court grant the petition, reverse the judgement of the Louisiana Supreme Court, and order the return of the Property to Violet.

Respectfully submitted,

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June 11, 2018

APPENDIX

1a

APPENDIX A

SUPREME COURT OF LOUISIANA

[Filed Jan. 30, 2018]

No. 2017-C-0434

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH CIRCUIT,
PARISH OF ST. BERNARD

/s/ Weimer, J. dissents & assigns reasons.

/s/ Guidry, J. dissents and assigns reasons.

/s/ Hughes, J., dissents for the reasons assigned by
Weimer and Guidry, JJ.

CRICHTON, Justice

Although the Louisiana Constitution generally restricts the government from expropriating private property, it provides broad exceptions for public port authorities. To Louisiana’s maritime industry, public ports are critical. Due to market demands and increasing global competition, public ports must expand in order to compete. The Louisiana Constitution therefore provides that the government can expropriate property for “[p]ublic ports . . . to facilitate the transport of goods or persons in domestic or international commerce.” La. Const. art. I, § 4(B)(2)(b)(vi).

We granted the writ in this matter to determine whether St. Bernard Port, Harbor & Terminal District’s (the “Port”) expropriation of property owned by Violet Dock Port, Inc., L.L.C. (“Violet”) on the Mississippi River satisfies the “public purpose” requirement of art. I, § 4(B)(1) of the Louisiana Constitution and, further, whether it violates the business enterprise clause of art. I, § 4(B)(6) of the Louisiana Constitution. For the reasons that follow, we find that the 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. However, we also find the trial court made a legal error in setting the just compensation due to Violet under art. I, § 4(B)(1), and further find that the court of appeal failed to correct that error. We therefore remand this matter to the court of appeal solely for the purpose of fixing the amount of just compensation based on the

evidence in the record and in accordance with the principles set forth in this opinion.

BACKGROUND

Maritime trade is a primary mode of transport for national and international commerce. In the last century, the maritime industry has expanded and modernized. This includes advancements such as containerization and other improvements that have ushered in super tankers and mega ships. In other words, more and larger ships now transport greater amounts of cargo. Such advancements have made public ports, like the St. Bernard Port, a virtual necessity. To accommodate these changes, ports must expand and adapt.¹

The Port, a public cargo facility in St. Bernard Parish,² has consistently experienced an increased demand for cargo handling since at least 2001. Through a lease with a Marine Terminal Operator

¹ See generally Brief for Lake Charles Harbor & Terminal District, Greater Baton Rouge Port Commission, Plaquemines Port, Harbor and Terminal District, Board of Commissioners of the Port of New Orleans, Greater Lafourche Port Commission, Madison Parish Port Commission, Terrebonne Port Commission, Greater Krotz Springs Port Commission, the Port of South Louisiana, the Vinton Harbor & Terminal District, West Calcasieu Port, Caddo-Bossier Parishes Port Commission and Lake Providence Port Commission as Amici Curiae Supporting Respondents St. Bernard Port, Harbor & Terminal District at 4-6 (collecting sources).

² The Port is a deep-water public port and a political subdivision of the State of Louisiana. La. R.S. 9:1102.1; 34:1701, *et seq.* The Legislature has given the Port's board the power to develop, maintain, and promote the commerce and traffic of the port district within St. Bernard Parish, thus facilitating the transport of goods in domestic and international commerce. See La. R.S. 34:1703.

(“MTO”), Associated Terminals, the Port handles several types of cargo, and has remained one of the busiest ports in the country. For example, from 2007-2009, the Port’s cargo included 37% of all the ferro alloys imported into the United States, 37% of the barite, 10% of the urea, and 3% of the potash. However, the Port began experiencing a shortage of space, and its customers requested both additional space and a liquid cargo facility. Ultimately, by 2008, the Port was operating at near capacity, and determined that if it could not meet its customers’ demands, its operations would suffer. As a result, the Port sought to expand in order to meet these growing needs.

To support its expansion, the Port identified approximately 75 acres of land along the Mississippi River (the “Property”). The Port began, as early as 1985, the arduous process of locating suitable property. Seven or eight different sites were investigated, and factors such as having a nearby railroad and land for ingress and egress of trucks were paramount. Compared to other sites along the river, the Property had many of these critical attributes. The Port determined that the Property’s relatively straight segment and deep water could handle large cargo ships better than other sites. Further, there was enough land between the nearby levee and the existing rail line for the Port to place a cargo facility. At other sites, the levee was too close to the rail line, which would require the Port to relocate the rail line in order to build a cargo facility. According to a representative from Associated Terminals, the Port’s MTO, there was no other space in St. Bernard Parish where a bulk terminal facility could be constructed on the river.

Violet, a limited liability company, owned the Property. At the date of the expropriation, the Property had

five berths, which were used for berthing and mooring vessels (*i.e.*, what a Violet representative described as a “parking lot for ships”) and topside repairs.³ Violet also had a contract with the Military Sealift Command, a civilian branch of the United States Navy (the “Navy”), to layberth and service oceangoing ships. In the ten years before the expropriation, Violet’s cargo operations were described as “negligible.”

A five-member Board of Commissioners, appointed by the Governor, makes decisions for the Port.⁴ In 2007, the Port offered \$10 million to purchase the Property, which Violet rejected. In 2008, the parties tentatively agreed to a sale of the property for \$14 million. Based on this agreement, in order to purchase and develop the property, the Port applied for funding to the Louisiana Department of Transportation & Development’s Port Priority Program. In 2010, the Port was awarded a \$15 million grant to acquire the Property.

The Port then had the Property reappraised and, as a result, informed Violet it would pay the newly appraised fair market value of \$16 million. Violet rejected the Port’s offer, and instead sought \$35 million. After this, negotiations failed, and the Port initiated the expropriation proceedings.

³ In 2007, the Property consisted of four docks—three that were inspected and certified by the Navy for layberthing military ships and one that had deteriorated. In early 2010, Violet began constructing a fifth berth that would handle cargo. The construction of this fifth berth began in 2010, several years after Violet initially agreed to sell the Property to the Port.

⁴ La. R.S. 34:1702(A).

PROCEDURAL HISTORY

The Port initiated this expropriation on December 22, 2010, under the quick-take expropriation provisions of La. R.S. 19:141, *et seq.* and deposited \$16 million into the registry of the district court. According to the petition, the expropriation was for the purpose of expanding the Port's current port facilities to handle dry-bulk and liquid-bulk commodities. The petition stated the construction of development of the Property would occur in three phases and take approximately eight to ten years to complete. During that time, the petition stated the Port intended to "enter into a new contract with [the Navy] for its continued use of the Violet Port during Phase I of the acquisition and development of the [Property]." The petition further stated the expropriation would "create jobs and benefits to the citizens of St. Bernard Parish."

Violet thereafter removed the case to federal court and moved to dismiss the petition for expropriation. Violet's primary basis for alleging federal jurisdiction was under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). *See St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 809 F. Supp. 2d 524, 529 (E.D. La. 2011) (Vance, C.J.) ("*St. Bernard Port Federal*"). Because of Violet's contract with the Navy, Violet argued the Port's expropriation was for an act under color of federal law.⁵ *Id.* at 531. However, to trigger federal jurisdiction, Violet needed to prove there was a causal nexus between the expropriation and Violet's federal activity with the Navy contract. *Id.* Chief Judge Sarah Vance rejected

⁵ Section 1442(a)(1) permits removal only when "[t]he United States or any agency thereof . . ." is "sued in an official or individual capacity for any act under color of such office."

this argument, finding that Violet failed to prove this nexus:

Although Violet asserts that [the Port] is, in fact, expropriating the property primarily to take over performance of its contract with the [Navy], that argument does not explain [the Port's] expropriation of the entirety of Violet's property, as Violet's contract with [the Navy] implicates only one of Violet's five berths and only a fraction of the 70 acres [the Port] seeks to expropriate. Nor has Violet submitted anything, other than its own characterization, to suggest that acquisition of the [Navy] property was the primary motivating cause of this 70 acre expropriation.

Id. at 531 (footnote omitted). The federal court remanded the case to state court. *Id.* at 538.

Following remand, the trial court held a hearing to consider the public purpose of the expropriation. The trial court heard testimony, reviewed the evidence, and evaluated the credibility of the witnesses. At the hearing, Violet again argued that the Port's true purpose in expropriating the Property was to take over the Navy lease. The Port contended otherwise. According to the Executive Director of the Port: "As far as the lease with the Navy . . . it's an afterthought. . . . [T]hat's certainly not one of our goals." Similarly, a representative from Associated Terminals, the Port's MTO, stated: "[T]he best news for [us] is that the Navy would leave, because we want the use of the berth to handle cargo, and that's the best berth, the one that they're [the Navy] presently tied to." He further stated: "We're not in the ship berthing business. We're in the cargo business." In contrast, Violet's representative stated that in the decade before the expropriation

it had handled “probably no cargo. . . . There may have been some negligible cargo.”

After the hearing, the trial court rejected Violet’s argument that the expropriation was for the purpose of taking the Navy lease. In granting the Port’s petition, the trial court stated that the Port took the Property 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.” This judgment was based on the trial court’s firsthand credibility determinations after hearing testimony from various witnesses. Among these was of the Port’s Executive Director, who testified about the Port’s need for space. According to his testimony, the Port’s cargo tonnage in the previous ten years had grown sevenfold. Consistent with this evidence, the trial court also stated the expropriation was a “logical extension of port services in St. Bernard.” From this ruling, Violet applied for writs of certiorari. Both the Fourth Circuit Court of Appeal and this Court denied Violet’s writ applications. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 12-0417 (La. App. 4 Cir. 5/16/12); 12-1122 (La. 5/30/12), 90 So. 3d 419.

The case proceeded to a trial on valuation. The trial court found just compensation to be \$16 million.⁶ At trial, the Port’s experts testified that the highest and best use of the Property was continued layberthing plus limited aggregate operations, valuing the Property at \$16 million. Violet’s experts maintained that the highest and best use of the Property was as a cargo

⁶ This July 31, 2015 judgment came after a trial, completed piecemeal, beginning on September 24, 2013 and concluding on November 11, 2014.

facility. Violet argued that it should be compensated between \$51 million and \$67 million.⁷ The trial court rejected the highest and best use and valuation opinions of Violet's experts, citing physical limitations that it alleged rendered the Property unsuitable for very large-scale cargo use, including: (a) water depth at the docks; (b) proximity to school and residential areas; (c) limited amount of uplands available for cargo; and (d) configuration of the Property. Consequently, the trial court found just compensation to be \$16 million.

On appeal, a divided court of appeal panel affirmed. As to the Port's petition for expropriation, the majority stated: "Although the authority granted to the ports of Louisiana in the expropriation of private property is exceptionally broad, it is supported by the constitution and statutes of the State." *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 16-96, 16-262, 16-331, p.7 (La. App. 4 Cir. 12/14/16) ("*St. Bernard Port*"), 229 So. 3d 626. In affirming the trial court's just compensation award, the majority found the record supported the trial court's ruling. *Id.* at p.10. It further noted that [w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." *Id.* One judge dissented, finding that the expropriation was unconstitutional. *Id.* at p.15 (Lobrano, J., dissenting). After Violet sought rehearing, the court of appeal denied the request. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 16-96, 16-262, 16-331, p. 7 (La. App. 4

⁷ To this Court, Violet argued that "just compensation" is \$28,764,685.00 or \$41,084,000.00, which were values that Violet derived from testimony of the Port's experts, having apparently abandoned the conclusions of its own experts.

Cir. 2/8/17), – So. 3d – (“*St. Bernard Port II*”), 2017 WL 526160.

This Court granted Violet’s writ application. 17-0434 (La. 5/26/17), 221 So. 3d 853.

DISCUSSION

Authorization for expropriations by a government body—and important limitations placed upon those authorizations—are found in both the federal and state constitutions. *See South Lafourche Levee Dist. v. Jarreau*, 16-0788, 16-0904, p.8-9 (La. 3/31/17), 217 So. 3d 298, 305, *cert. denied*, 138 S. Ct. 381, – U.S. – (10/31/17). More specifically, the Fifth Amendment of the United States Constitution, made applicable to the states pursuant to the Fourteenth Amendment, provides: “No person shall . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.” Likewise, the Louisiana Constitution provides “[p]roperty shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation” La. Const. art. I, § 4(B)(1). Therefore, under both Constitutions, any expropriation must be for a “public purpose” *and* provide “just compensation.”

To review these determinations, we start with the constitutional provisions at issue. *Arrow Aviation Co., L.L.C. v. St. Martin Parish Sch. Bd. Tax Sales Dept.*, 16-1132, p.4 (La. 12/6/16), 218 So. 3d 1031, 1035 (“When a constitutional provision is plain and unambiguous and its application does not lead to absurd consequences, its language must be given effect.”). We then review the record to determine whether the trial court’s factual findings were manifestly erroneous. *See Exxon Mobil Pipeline Co. v. Union Pac. R. Co.*, 09-

1629, p.12 (La. 3/16/10), 35 So. 3d 192, 200 (“Whether the expropriator’s purpose is public and necessary is a judicial determination that will not be reversed on appeal absent manifest error.”).

Public Purpose

In 2005, the United States Supreme Court decided the case *Kelo v. City of New London*, 545 U.S. 469 (2005) which expressly upheld a taking for economic development purposes.⁸ Following *Kelo*, in 2006, voters of Louisiana approved a constitutional amendment enumerating permissible “public purposes” for a political subdivision to expropriate private property. As amended, art. I, § 4 provides, in pertinent part:

Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or

⁸ In *Kelo*, the Supreme Court held that the city of New London’s proposed development plan to revitalize an economically distressed city, including its downtown and waterfront areas, qualified as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the United States Constitution.

entity; or (b) for transfer of ownership to any private person or entity.

(2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, “public purpose” shall be limited to the following:

* * *

(b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:

* * *

(vi) *Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.*

* * *

(6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. . . .

(Emphasis added.)

In other words, the Louisiana Constitution expressly includes “public ports” as an enumerated “public purpose.” Specifically, a public purpose is defined as “[p]ublic ports . . . to facilitate the transport of goods or persons in domestic or international commerce.” La. Const. art. I, § 4(B)(2)(b)(vi).⁹

⁹ Public ports are granted additional constitutional authorization to expropriate property for the development of port facilities. Under art. VI, § 21(A), public ports can acquire land through expropriation and lease that land. This permits public ports to lease the expropriated property to another entity that physically handles the operations—a standard practice in the maritime

Consistent with the authority given to public ports to expropriate property, the trial court made a factual determination that the Port's purpose for expropriation 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." This purpose falls squarely within the constitutional definition of "public purpose" for public ports. La. Const. art. I, § 4(B)(2)(b)(vi). Based on the record before us, we cannot say that the trial court's finding was manifestly erroneous, and we therefore affirm the finding that this expropriation was for a public purpose. We also find that this expropriation satisfies the broad definition of public purpose under federal law. *See Kelo*, 545 U.S. at 479 ("Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

Business Enterprise Clause

Violet also argues that, even if there was a "public purpose" here, the expropriation violates La. Const. art. I, § 4(B)(6), known as the "business enterprise clause." The legislature did not change this provision as part of the 2006 amendments. La. Const. art. I, § 4(B)(6) states:

(6) No business enterprise or any of its assets shall be taken *for the purpose of operating* that enterprise or halting competition with a government enterprise. However, a munic-

industry. *See also* La. Const. art. I, § 4(H)(1) (exempting "leases or operation agreements for port facilities" from the general prohibition in art. I, § 4(H)(1) that prohibits the State and its political subdivisions from selling or leasing property which has been expropriated).

ipality may expropriate a utility within its jurisdiction.

(Emphasis added.)

The business enterprise clause requires the court to determine if the expropriation was “for the purpose of operating an enterprise or halting competition with a government enterprise. On this point, the court of appeal majority held that the trial court was not manifestly erroneous in holding that the business enterprise clause does not apply here from a *factual* standpoint. Violet contests this holding, contending that the Port’s expropriation was either to take Violet’s revenue stream from the Navy lease or to halt competition with Violet’s cargo operations, which it suggests were growing.¹⁰

First, Violet argues that the purpose of the Port’s expropriation was to take over Violet’s revenue stream from the Navy lease. Yet testimony at trial was that the Navy lease was “an afterthought.” Testimony further indicated that the “best news” for the Port’s operation would be to use the Navy berth to further expand cargo operations. Our conclusion is buttressed by the fact that the lower courts and the federal court rejected similar arguments. *See St. Bernard Port I*, 229 So. 3d at 632 (“Violet Dock argues that the real

¹⁰ Violet also argues, as did the dissenting judge in the court of appeal, that the majority erroneously found the business enterprise clause to be limited by La. Const. art. VI, § 21. In other words, they claim the court of appeal erroneously held that any expropriation falling under art. VI, § 21 is exempted from every provision of art. I, § 4(B). But the majority never made such a holding, instead making a factual determination regarding the purpose for the expropriation. To the extent that the court of appeal opinion could be read otherwise, that interpretation is erroneous. *See St. Bernard Port I*, 229 So. 3d at 631-32.

purpose for the taking was so the Port could continue to operate its layberthing and cargo facility and obtain the Navy contracts in violation of La. Const. art. I, § 4(B)(6). . . . We disagree.”); *St. Bernard Port II*, 2017 WL 526160, at *1 (on rehearing) (“[W]e found that the facts and circumstances presented by this case simply did not satisfy the requirements of the restrictions of La. Const. art. I, § 4(B)(6).”); *St. Bernard Port Federal*, 809 F. Supp. 2d at 531 (“Nor has Violet submitted anything, other than its own characterization, to suggest that acquisition of the [Navy] property was the primary motivating cause of this 70 acre expropriation.”). We likewise do so here.¹¹

Violet argues that the purpose of the Port’s expropriation was to halt competition. Though Violet argues its cargo operations were growing, the record shows that Violet’s cargo operations were “negligible” and that it did not compete with the Port. Instead, generally speaking, the businesses of Violet and the Port were not comparable. Violet was in the layberthing business; the Port was in the cargo business. The record supports the trial court’s conclusion that the Port experienced an increasing demand for maritime cargo operations, was at capacity, and sought to expand its cargo operations.

To review the judgment we examine the entire record, but we will not set aside the trial court’s judgment in absence of manifest error. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). Here, the trial court’s judgment followed an evidentiary hearing, where the

¹¹ The Port’s plan to lease the Property to another entity to operate does not change our analysis. Indeed, the Louisiana Constitution expressly anticipates such a lease. La. Const. art. VI, § 21 (A)(c).

trial court examined evidence, evaluated the credibility of multiple witnesses, and weighed the probative value of these assertions. As this Court has stated:

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.

Id. at 844. Based upon our consideration of the record before us, we do not find the trial court's judgment to be manifestly erroneous or clearly wrong. We therefore affirm the lower court's judgment granting the Port's petition to expropriate.

Just Compensation

As noted above, the Louisiana Constitution provides that any expropriation must be for a "public purpose" and provide "just compensation." La. Const. art. I, § 4(B)(1). It further states: "In every expropriation or action to take property pursuant to the provisions of this Section, . . . , the owner shall be compensated to the full extent of his loss." La. Const. art. I, § 4(B)(5). There is no specific formula set forth by the Legislature to aid courts in determining the "full extent of loss." The Constitution states only: "Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually

incurred by the owner because of the expropriation.”
*Id.*¹²

La. R.S. 19:9 provides limited guidance as to how to determine the “full extent of the loss.” It states that the basis of the assessment of value of the property to be expropriated “shall be the value which the property possessed before the contemplated improvement was proposed, without deducting therefrom any general or specific benefits derived by the owner from the contemplated improvement or work.” La. R.S. 19:9(A). *See also Exxon Pipeline Co. v. Hill*, 00-2535, 00-2559, p.7 (La. 5/15/01), 788 So. 2d 1154, 1159-60.¹³ The legislature and courts have developed rules that accept fair market value of the property as a relevant consideration in determining just compensation. *Id.* *See also West Jefferson Levee Dist. v. Coast Quality Constr. Corp.*, 93-1718 (La. 5/23/94), 640 So. 2d 1258, 1277, *cert. denied*, 513 U.S. 1083 (1995). Fair market value, in turn, has consistently been defined as the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to law. *Id.* In assessing the fair market value of an expropriated property, the Court considers the most profitable use to which the land can be put by reason of its location, topography, and adaptability. *Exxon Pipeline*, 00-2535, 00-2559, p.8, 788 So. 2d at 1160. This is known as the “highest and best use” doctrine. *Id.*

¹² For a discussion of the legal history of this provision, see *Exxon Pipeline Co. v. Hill*, 00-2535, 00-2559, p.6 (La. 5/15/01), 788 So. 2d 1154, 1159.

¹³ *See also id.*, 00-2535, 00-2559, p.18, 788 So. 2d at 1165-66 (Knoll, J., concurring) (“Because of the important public policies and fundamental rights involved in expropriation cases, it would be helpful if the Legislature took action to clarify standards for valuation under La. R.S. 19:9.”).

Determining the “highest and best use” of land in expropriation cases involves several factors, including scarcity of the land available for that use and the use to which the property was being put at the time of the taking. *Id.* (setting forth various factors for courts to consider). See also *State, through the Dept. of Highways v. Bitterwolf*, 415 So. 2d 196, 199 (La. 1982), *State, through the Dept. of Highways v. Constant*, 369 So. 2d 699, 702 (La. 1979). It is “well established” that the current use of the property is presumed to be the highest and best use and the burden of overcoming that presumption by proving the existence of a different highest and best use based on a potential, future use is on the landowner. *Exxon Pipeline*, 00-2535, 00-2559, p.8, 788 So. 2d at 1160. Where a landowner overcomes the presumption, the landowner is entitled to compensation based on a potential use of the property, even though the property is not being so utilized at the time of the taking, provided he can show it is reasonably probable the property could be put to this use in the “not too distant future.” *West Jefferson Levee Dist.*, 640 So. 2d at 1273.

In summary, in this case, the use to which Violet was putting the Property at the time of the expropriation—here, layberthing—is presumed to be the Property’s highest and best use. Violet may overcome this presumption by demonstrating, by a preponderance of the evidence, that the property could be used in a different, more valuable way, that the potential use is not speculative, and that it could be undertaken in the “not too distant future.” *Exxon Pipeline*, 00-2535, 00-2559, p.8-9, 788 So. 2d at 1160-61; *West Jefferson Levee Dist.*, 640 So. 2d at 1273. Here, the trial court found that Violet did not overcome that presumption.

Turning to the standard by which we review the trial court's findings, in an expropriation proceeding, the trial court's factual determination as to the value of the property will not be disturbed in the absence of manifest error. *West Jefferson Levee Dist.*, 640 So. 2d at 1277. "However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence." *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So. 2d 731, 735. *See also West Jefferson Levee Dist.*, 640 So. 2d at 1278. Legal errors occur when a trial court applies incorrect principles of law and those errors are prejudicial; when such a prejudicial legal error occurs, the appellate court is required to review the record and determine the facts *de novo*. *Evans*, 640 So. 2d at 735.

Here, we find the trial court used the incorrect standard for evaluating experts' valuation testimony. Explaining why it accepted the Port's expert testimony rather than Violet's, the court stated: "It is the opinion of this Court that it does not have the discretion to 'split the baby' and arrive at a valuation somewhere in between" the two expert opinions. This is erroneous. A trier of fact is not required to make a binary choice and accept one side's testimony in its entirety, but is instead empowered to weigh strengths and weaknesses of expert testimony. To the extent the trial court held otherwise, this is legal error. *See West Jefferson Levee Dist.*, 640 So. 2d at 1277 ("The opinions of experts regarding valuation are advisory and are used only to assist the court in determining the amount of compensation due in an expropriation case."). *See also, e.g., State, Dep't of Transp. & Dev. v. Schwegmann Westside Expressway, Inc.*, 95-1261, p.6-

7 (La. 3/1/96), 669 So. 2d 1172, 1176 (“[A] trier of fact does not have to accept in toto the testimony of any one group or group witnesses.”).¹⁴ Further, this error was prejudicial to Violet insofar as the trial court set just compensation in the exact amount put forward by the Port’s experts.

The court of appeal compounded this error by failing to identify it and conduct a *de novo* review. *St. Bernard Port I*, 229 So. 3d at 634-35 (noting that “we cannot find that the trial court was manifestly erroneous or clearly wrong in its ruling that \$16,000,000 was just compensation for the property”). Instead, the court of appeal noted the general proposition that a factfinder has “broad discretion” in determining weight to be given to expert testimony. *Id.* While this is, of course, a correct statement of the law, it overlooks that the trial court was apparently operating under an incorrect belief about the extent of its ability to exercise that broad discretion.

In summary, we find that the lower courts erred in the determination of just compensation. We therefore remand this matter to the court of appeal solely for the purpose of fixing the amount of just compensation based on the evidence in the record and in accordance with the principles set forth in this opinion. *See Gonzales v. Xerox Corp.*, 320 So. 2d 163, 165 (La. 1975) (remand to appellate court, rather than trial court, is appropriate when the appellate court has all the facts

¹⁴ We note that this does not change the general rule that the trial court has “much discretion in evaluating and determining the weight to be given to each expert.” *West Jefferson Levee Dist.*, 640 So. 2d at 1277. But here, the trial court’s apparent misconception that he could not “split the baby” was prejudicial to Violet, insofar as it limited what the trial court believed to be just compensation due to Violet under the law.

before it); *Buckbee v. United Gas Pipe Line Co.*, 561 So. 2d 76, 87 (La. 1990). See also *Exxon Pipeline*, 00-2535, 00-2559, p.18, 788 So. 2d at 1166 (Knoll, J., concurring) (“[V]aluation of property in expropriation cases is an open question and each case should be judged on its own under its individual facts and circumstances. Inadequate and inaccurate valuations run rampant and we must strive to find valuations that serve the purpose of protecting property rights while allowing public interests to be served.”). Although this Court, like the court of appeal, has appellate jurisdiction of both law and fact and may perform an independent review and render judgment on the merits, see La. Const. art. V, § 5 (C), we prefer that the court of appeal perform the first appellate review of the entire record under the correct rule of law. *Buckbee*, 561 So. 2d at 87.

CONCLUSION

We affirm the court of appeal’s holding that the expropriation was constitutional. However, we reverse the court of appeal’s holding on the amount of just compensation due to Violet under art. I, § 4(B)(1), after finding that the trial court made a legal error in its determination of just compensation and the court of appeal failed to correct that error. We therefore remand this matter to the court of appeal solely for the purpose of fixing the amount of just compensation based on the evidence in the record and in accordance with the principles set forth in this opinion. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

SUPREME COURT OF LOUISIANA

No. 2017-C-0434

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL FOURTH CIRCUIT,
PARISH OF ST BERNARD

WEIMER, J., dissenting.

With all due respect, I find the majority opinion unfortunately eviscerates the long, significant history the citizens of Louisiana have embodied within La. Const. art. I, § 4(B)(6) to protect private business from takeover by the government. The majority opinion thereby subjects 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. While agreeing that the determination of whether the St. Bernard Port, Harbor & Terminal

District (“the Port”) expropriated the property and port facilities owned by Violet Dock Port, Inc., LLC (“Violet”) for the purpose of operating that port facility or halting competition with the Port is, to an extent, fact-based, I find that legal errors committed by the district court interdicted the fact-finding process, necessitating *de novo* review. I additionally find that the perfunctory and, in the end, erroneous, manifest error review compounds the legal error of the district court, exposing to serious erosion the conscious, concerted efforts to protect private business enshrined in our constitution. Therefore, I respectfully dissent from the majority opinion.

Historical Background

While the resolution of this case centers around the meaning and application of a singular provision in the constitution, the historical context should be considered in evaluating this *res nova* issue.

The citizens of Louisiana have long maintained, through the constitutional provisions they ratified, that the situations in which the government can expropriate private property are greatly limited. Providing a guarantee prominently positioned in the second section of the Bill of Rights, the 1921 Constitution indicates: “Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid.” La. Const. 1921 art. I, § 2.

With the enactment of the most recent constitution, this protection was enhanced. Under the 1974 Constitution, expropriation requires not merely a “public purpose,” but a “public and necessary purpose.” La. Const. 1974 art. I, § 4(B). In addition, the amount of

compensation owed is not limited to “just and adequate compensation,” as in the 1921 Constitution, but expanded to encompass compensation to “the full extent of [the owner’s] loss.” *Id.* Furthermore, in a provision specifically directed to the issue at hand, a third protection was added. *See id.*

While prohibitions against government engaging in commercial enterprise had been enshrined in constitutions dating back over one-and-a-quarter centuries (*see* the 1879 Constitution),¹ the 1974 Constitution, consistent with its intent to provide increased protection to private interests from governmental takings, added a new prohibition, currently found in La. Const. art. I, § 4(B)(6). This prohibition, which I refer to as the “private business enterprise protection clause,” provides in relevant part:

No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise.

The clause represents “the first provision in any state constitution to prohibit the government from seizing the means of production,” Louis Woody Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9, 24 (1975), and evidences a clear and unambiguous choice by the electorate to curtail government efforts to take business property or the business itself.

¹ *See, e.g.*, La. Const. 1879, art. 56: “Nor shall the State, nor any political corporation thereof[,] assume the liabilities of any political[,] municipal, parochial, private[,] or other corporation or association whatsoever; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein. . . .”

With the above-detailed protections added to and enshrined in Article I, § 4, the 1974 Constitution “goes beyond other state constitutions, including our 1921 Constitution, and the federal constitution in limiting the power of government to regulate private property.” *State v. 1971 Green GMC Van*, 354 So.2d 479, 486 (La. 1977).

However, the citizens of Louisiana did not stop there, demonstrating an adamant and emphatic determination to protect private business from government takeover. When property rights protected by the federal constitution were seemingly eroded by the United State Supreme Court’s ruling in *Kelo v. City of New London*, Connecticut, 545 U.S. 469 (2005), the Louisiana electorate responded by enshrining additional protections in our state constitution. *See* 2006 La. Acts 851, § 1 (approved September 30, 2006). These protections include a prohibition from taking property “for predominant use by” or “transfer of ownership to any private person,” and the inclusion of a more “limited” definition of “public purpose.” *See* La. Const. art. I, § 4(B)(1)(a) and (b); *Id.*, § 4(B)(2). Furthermore, in a rejection of the core holding of *Kelo*, the Louisiana electorate added the following prohibition: “Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose. . . .” La. Const. art. I, § 4(B)(3).

As evidenced by the above, Louisiana has a long and storied history of protecting private property interests from undue governmental interference. Nowhere is that strong interest more evident than in the protections extended under La. Const. art. I, § 4(B)(6), protections unique to Louisiana, but entirely consistent

with the core principles underlying Louisiana's interest in protecting private property rights.

It is the meaning and application of La. Const. art. I, § 4(B)(6) that is ultimately at issue in this case, an issue which is *res nova* in this court, but not without guidance for its resolution. Foremost among the guiding principles is the dictate that the starting point in interpreting constitutional provisions is the language of the provision itself and that, when the language of a constitutional provision is clear and unambiguous, that language must be given effect. *Louisiana Department of Agriculture and Forestry v. Sumrall*, 98-1587, pp. 4-5 (La. 3/2/99), 728 So.2d 1254, 1258. In this case, no party contends that the language of Article I, § 4(B)(6) is ambiguous or susceptible to multiple interpretations. Therefore, to evaluate the provision, it is not necessary to look behind its clear language. However, for the purpose of placing the constitutional provision in its historical context, it is relevant to note that secondary sources confirm the clear intent behind the words of the enactment.

As explained by Delegate Jenkins, the co-author and floor sponsor of Section 4(B)(6), the provision "was clearly intended to counter what delegates perceived as excessive interference by government in the economy and the growing possibility that government would attempt to take over certain business enterprises." Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. at 24.² Given this purpose, "the provision should

² Delegate Jenkins's assessment was echoed by another convention delegate, J. Burton Willis, who queried: "Isn't this a case of private enterprise against government ownership?" To which Delegate Jenkins replied: "I think it is." (Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, vol. VI, 39th day, Aug. 30, 1973, 1048).

be broadly interpreted to prevent both direct and indirect efforts to seize any private industry.” *Id.*

Of course, as acknowledged by Delegate Jenkins and as evidenced in its language, the prohibition contained in Section 4(B)(6) is not absolute, and certain expropriations may have the effect of terminating a business enterprise, as, for example, when a highway right-of-way results in the taking of property belonging to a grocery store, causing it to go out of business. *Id.*, 21 Loy. L. Rev. at 25. In such cases, *the purpose of the expropriation is crucial. Id.* Pursuant to Section 4(B)(6), “[a]ny effort to use the power of eminent domain to take over an existing business or seize its assets in order to create a similar government enterprise or to put an enterprise out of business in order to improve the competitive advantage of a government enterprise is unconstitutional.” *Id.*

The Litigation

With this historical context in mind, it is appropriate to turn to the instant case in which, using the “quick-take” provisions of La. R.S. 19:141, *et seq.*, the Port expropriated Violet’s privately owned port facility. Violet filed a motion to dismiss the petition for expropriation, arguing, among other things, that the taking violated La. Const. art. I, § 4(B)(6). Following an evidentiary hearing, the district court denied the motion to dismiss based on a finding that the taking served a public purpose. In a per curiam issued in connection with that ruling, the district court reasoned:

Export of goods and commodities through the port is one of the basic industries of St. Bernard Parish. The acquisition of the Violet terminal would be a logical extension of port

services in St. Bernard. The port would acquire heavy duty docks and forty two hundred (4200 LF) linear feet of Mississippi River frontage available for immediate use. Thirty eight (38) acres of presently undeveloped uplands would be available for cargo storage. The contemplated construction and use of the property would bring needed revenues into the community which is still recovering from the effects of the 2005 hurricanes and provide needed employment to its citizens. The predominant use for the property would be by the public, not for use by, or for transfer of ownership to any private person or entity. The Court is apprised that the expropriation will not affect the use by MSC ["Military Sealift Command"] for its vessels should MSC elect to continue that use.

Standard of Review

The majority opinion maintains that the district court's per curiam represents a determination "that the business-enterprise clause does not apply here from a *factual* standpoint" and, thus, the district court's ruling is subject to manifest error review. *St. Bernard Port, Harbor & Terminal District v. Violet Dock Port, Inc., L.L.C.*, 17-0434, slip op. at 10, 12 (La. 1/30/18) (emphasis in original). I respectfully disagree, believing that a more careful analysis in light of the historical context or "a deeper look at the [district] court's reasons for ruling . . . reveals an error in [the] legal analysis, requiring this court to conduct a *de novo* review of the record." See *Bridges v. Nelson Indus. Steam Co.*, 15-1439, p. 4 (La. 5/3/16), 190 So.3d 276, 279.

Even a cursory review of the district court's per curiam reveals that it contains no factual findings or legal determination regarding the primary reason cited by Violet for its contention that the taking is unconstitutional—that it violates La. Const. art. I, § 4(B)(6)'s prohibition against the taking of a business enterprise or any of its assets for the purpose of operating that enterprise or halting competition. Indeed the per curiam makes no mention of the private business enterprise protection clause or any factual findings relating thereto. Instead, the per curiam focuses solely on considerations prompted by Section 4(B)(1); *i.e.*, whether the taking is for the predominant use or transfer of ownership to any private entity.³ Furthermore, it focuses on economic factors—needed revenues and employment—that are expressly prohibited from consideration in determining public purpose by Section 4(B)(3).⁴

³ La. Const. art. I, § 4(B)(1) provides:

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into the court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

⁴ La. Const. art. I, § 4(B)(3) provides:

Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging or property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.

“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;⁵ 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 279.⁶

By focusing on La. Const. art. I, § 4(B)(1), and its admonition that, except as specifically authorized by

⁵ The majority opinion, in footnote 9, specifically acknowledges the irrelevance of this consideration in the case before this court, pointing out that the prohibition of La. Const. art. I, § 4(B)(1) against taking or damaging property for predominant use by any private person or entity is subject to the exception found in Article VI, § 21(A), which permits public ports to acquire land through expropriation and lease that land to a private entity for management of the operations. *St. Bernard Port*, slip op. at 9 n.9.

⁶ In essence, the situation presented here is akin to an improper jury instruction: the district court’s *per curiam* reflects that it improperly instructed itself as to the applicable legal principles, interdicting the fact-finding process and necessitating *de novo* review. *See, e.g., Picou v. Ferrara*, 483 So.2d 915, 918 (La. 1986).

La. Const. art. VI, § 21, no property shall be taken for predominant use or transfer of ownership to any private entity, the district court elevated the general language of that provision over the specific language of Article I, § 4(B)(6), making *no* findings with respect to the central issue presented here—whether the taking violates the private business enterprise protection clause. The majority opinion, I believe, falls into similar error. In focusing on the provisions of Article I, § 4(B)(2)(vi), which define a “public purpose” to include expropriation by public ports to facilitate the transport of goods in commerce, the majority opinion elevates this broad general expropriatory authority over the specific qualifying limitation embodied in Section 4(B)(6), in effect untethering the Port’s taking authority from the limitation of the private business enterprise protection clause. However, Section 4(B)(6) is a limitation on the “public purpose” definition of Section 4(B)(2)(vi), and it specifically counsels that the taking of a business enterprise for the purpose of operating or halting competition with that enterprise is not a legitimate “public purpose.”

As Delegate Jenkins’ comments indicate, the purpose of the expropriation is crucial to the determination of whether there is an unconstitutional taking within the meaning of Section 4(B)(6). In assessing whether the taking is for a purpose consistent with the constitutional strictures of this provision, certain principles of interpretation apply. Because “expropriation proceedings are in derogation of the right of individuals to own property, the law governing these proceedings must be strictly construed against the expropriating authority.” *State v. Estate of Davis*, 572 So.2d 39, 42 (La. 1990). This strict construction against the expropriating authority is consonant with the broad interpretation of Section 4(B)(6) urged by

Delegate Jenkins, given that Section 4(B)(6) has as its similar aim the protection of private business enterprise against excessive government interference. In addition, “every clause in a written constitution is presumed to have been inserted for some useful purpose, and courts should avoid a construction which would render any portion of the constitution meaningless.” *Succession of Lauga*, 624 So.2d 1156, 1166 (La. 1993).

In this case, to the extent it can be argued that the district court made a factual finding with respect to the “purpose” for the expropriation, it appears the court simply accepted at face value the Port’s stated reason for expropriating Violet’s property without considering the effect of that taking.⁷ Such an analysis is constitutionally deficient, as the myopic focus on the Port’s stated reason for the expropriation without any examination of the effect of the taking would allow the Port, or any expropriating authority, virtually unfettered authority to expropriate property as long as it professed an ostensible proper motive for the taking. This would be true even if the stated purpose also had the effect of enabling the expropriating authority to take over and operate a private enterprise, or halt private competition, rendering Section 4(B)(6) meaningless.

It is precisely this type of analysis of Section 4(B)(6) that Delegate Jenkins cautioned against when he offered as an example of a taking prohibited by Section 4(B)(6), the expropriation of apartments or rental homes for the purpose of constructing public housing.

⁷ The per curiam declares: “The St. Bernard Port’s stated reason for expropriation 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.”

See Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. at 25. The parallels to that example are evident in this case. Here, pointing to La. Const. art. I, § 4(B)(2)(b)(vi), which defines “public purpose” to include continuous public ownership of property by public ports “to facilitate the transport of goods . . . in domestic or international commerce,” the Port seeks to expropriate for the stated purpose of enhancing and expanding its role as a market participant in the port service industry, property belonging to a private participant (Violet) in the same industry. However, this type of taking runs squarely afoul of Section 4(B)(6) and the protection of private enterprise from fear of governmental takeover that this constitutional provision was intended to promote.

Undeniably, public ports have been granted expropriation powers under the constitution to facilitate the transport of goods in commerce. Unquestionably, public ports are significant economic engines, that work to support trade, enable Louisiana’s energy and agricultural industries to further enhance the economy, and provide employment and business opportunities to local, regional, and the state’s economies. However, private enterprise does likewise. Ports are granted substantial authority to operate, but ports cannot take over an on-going private business to operate that business or to end competition. In Section 4(B)(6), the people of this state have made a conscious decision to limit governmental interference with private enterprise, and that limitation must be respected. Moreover, it can only be respected (and effectuated) by an examination not only of the stated reasons for expropriation, but of the effect of that taking as well.

De novo review

The ultimate question presented in this case is one that is directed by the language of Section 4(B)(6): whether Violet's business enterprise or any of its assets was taken by the Port for the purpose of operating that enterprise or halting competition with the Port enterprises. At the hearing on the motion to dismiss, Violet contended that the Port's taking runs afoul of both prongs of Section 4(B)(6). According to Violet, the Port took its property for the purpose of operating its layberthing enterprise and also for the purpose of operating its docks for bulk cargo in the future (a venture in which Violet had engaged and into which it was expanding), thereby halting competition from Violet. The testimony and evidence on this point was extensive, with both sides presenting opposing views and conflicting testimony. Nevertheless, at the conclusion of the process, certain facts were undisputed.

Violet owned one mile of the ten miles of river-front property within the Port's jurisdiction on which it had constructed a facility consisting of five docks and related infrastructure. For decades, Violet had contracted with the United States Military Sealift Command ("the Navy") to layberth and service ocean-going Navy ships. While layberthing for Navy (and some commercial) vessels was Violet's primary operation, it did perform some repair and cargo operations at its docks.

In 2006, due to a growing demand for cargo services, the Port found itself operating at capacity and in need of expansion. The Port identified Violet's property as being best suited for its expansion needs and contacted Violet to discuss purchasing its property. In 2007, the parties tentatively agreed on a purchase price. To

facilitate the purchase, the Port applied for funding through the Louisiana Department of Transportation and Development's Port Priority Program. A Port Priority Application ("PPA") was submitted in 2008 seeking the maximum grant of \$15 million to purchase the property. In its application, the Port represented that the Violet property was best and ideally suited for the transfer and storage of dry and liquid bulk commodities, and that development of the property for this purpose would take place in three phases. In a letter submitted in connection with the application, the Port identified the Navy contract and represented to DOTD that "the [P]ort 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," that it will "continue to compete for these MARAD/Navy contracts," and that "the annual net revenue from the Navy contracts at the Violet site has averaged \$550,000 [and] [f]uture contracts are expected to be in that same . . . range." In essence, the Port represented that the Navy contract could be figured in to DOTD's required rate of return for funding the project. Based on the Port's representations, DOTD awarded it the requested funding.

Ultimately, the negotiations for the sale of the property were unsuccessful. In the interim, however, Violet continued to operate and commenced efforts to expand its own cargo operations at its facility, obtaining permits to allow more cargo operations and constructing a new berth for cargo use. Violet also

entered into an option agreement with Vulcan Materials for lease of the new berth and ten adjoining acres to transload and store aggregate bulk cargo.⁸

In December 2010, the Port filed its petition for expropriation. In that petition, the Port averred that the property was necessary and suitable for bulk cargo operations. It described the plans for the Violet facility as taking place in three phases. The petition identifies the Navy contract and avers that during Phase I of the development, “[t]he St. Bernard Port intends to enter into a new contract with the Military Sealift Command for its continued use of the Violet Port.”

Violet filed a motion to dismiss the expropriation proceeding, challenging its public purpose. At the hearing on the motion, the Port offered testimony that Violet’s property was the only property in the area suitable for handling large-scale bulk cargo operations. It offered its Port Priority submissions and testimony related thereto. The Port acknowledged that it intended to take over the Navy contract and continue to service the Navy ships on the property for at least 8 to 10 years, although it contended that the contract was an “afterthought” and “not one of our goals.” The Port reiterated its three-phase plan for development of the Violet facility, but acknowledged that Phase I, the only phase that was actually funded, was simply to acquire the property and enable Associated Terminals, its Marine Terminal Operator, to occupy and use the site for stevedoring operations.

The district court denied Violet’s motion to dismiss the expropriation proceeding, and the case moved to the just compensation trial. By the time of this trial, the Port had contracted with the Navy for continued

⁸ The option expired without being exercised by Vulcan.

layberthing at the former Violet site. Ironically, it contended, and the district court found, that the highest and best use of the property was not for large-scale cargo operations, as the Port had previously contended when taking the property, but that the highest and best use of the property was layberthing coupled with a limited intermodal container terminal—essentially, a continued use of the property as it was being used by Violet.

Whether viewed at the granular level (focusing on the scope of Violet’s layberthing and cargo operations) or at a broader level (focusing on the role of both the Port and Violet as operators of riverfront port facilities), it appears from the foregoing undisputed facts that the Port’s taking in this case is unconstitutional within the meaning of La. Const. art. I, § 4(B)(6). The facts establish that the Port obtained \$15 million from the state to facilitate the purchase of Violet’s property and that it planned to take and use Violet’s assets and existing customer revenue (the Navy contract) as interim financing to fund the expansion of cargo operations. The facts likewise establish that while Violet’s cargo operations were “negligible,” they were not non-existent, and Violet was making its own efforts to expand into the cargo handling arena, in competition with the Port. The PPA, the petition for expropriation, and the testimony at trial all establish that the Port intended to enter into a contract with the Navy for its continued use of the Violet port during Phase I of its port development plan. Thus, while the Port maintains that it was and is not in the layberthing business, the facts disclose that layberthing the Navy ships was an integral part of its plan, it effectuated that plan, and it is still performing layberthing services today, which include the Navy contract.

When a governmental entity takes and uses private business property or assets to generate revenue in ways similar to a private enterprises's prior operations, or when a governmental entity necessarily will use the property or assets as part of its own business plans, that taking is one "for the purpose of operating that enterprise" within the meaning of Section 4(B)(6). Furthermore, when the taking will necessarily allow a governmental entity to increase its market share and prevent a growing or potential competitor from entering into the market or expanding its business, the taking is for the purpose of "halting competition with a government enterprise."

Under the facts in this case, reviewed *de novo*, the district court erred in denying Violet's motion to dismiss the petition for expropriation, as that taking is unconstitutional under Section 4(B)(6).

Manifest Error Review

As indicated, ports are extremely important economic engines for the state; this fact is undeniable. However, the people of this State have made a conscious, concerted commitment, at every opportunity (particularly when Section 4(B)(6) was adopted in 1974 and again in 2006 when further restrictions were imposed post-*Kelo*), to protect private ownership against government takeover of the means of private production. It is this longstanding, fundamental constitutional principle that is at stake in this case. Furthermore, while I remain convinced that *de novo* review is warranted due to the errors in the district court's legal analysis, even should the manifest error rule be applied to the factual findings (that the district court clearly did not make), I would find any "factual" determination that the taking in this case was not for the purpose of operating Violet's port facility or

eliminating competition from Violet is manifestly erroneous.

Certainly, under the manifest error rule, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). However, where documents or objective evidence so contradict a witness's story, or the story itself if so internally inconsistent or implausible on its face that a reasonable factfinder would not credit the witness's story, a reviewing court may well find manifest error. *Id.* at 844-45. Indeed, while deference should be accorded to the factfinder, because appellate courts have a constitutional duty to review both law and facts, they have the right and obligation to determine whether a district court judgment is clearly wrong based on the evidence. *See Ambrose v. New Orleans Police Dept. Ambulance Service*, 93-3099, p. 8 (La. 7/5/94), 639 So.2d 216, 221. This concept is particularly applicable when this court evaluates a *res nova* constitutional issue.

In this case, the uncontradicted *objective* evidence demonstrates the pretextual nature of the Port's *subjective* contention that the taking was not for the purpose of assuming Violet's layberthing operations with the Navy, and that layberthing operations were an "afterthought." This objective evidence—in a nutshell—is found in the Port's PPA submitted to DOTD (in which it represented that the Navy contract could be figured into DOTD's required rate of return for extending funding to the Port), in the petition for expropriation (in which the Port avers that it "intends to enter into a new contract with the Military Sealift Command for its continued use of the Violet Port"), and in the fact that the Port, after the quick-taking,

entered into a contract with the Navy and continues to this date to perform the same layberthing operations once conducted by Violet.⁹

The same analysis holds true for the Port's contention that the taking was not for the purpose of eliminating competition from Violet because Violet's cargo operations were "negligible" and the Port was not in the "layberthing" business and thus did not compete with Violet. The objective facts demonstrate that while the Port contends the expropriation was motivated solely by its need to expand its cargo operations, and that the Violet property was the only property suitable for expansion and creation of a liquid cargo facility, once the taking was effected and valuation was at issue, the Port "flipped the script" and argued that the highest and best use of the property was not for large-scale cargo operations, as it had previously contended, but for layberthing coupled with a limited intermodal container terminal—essentially, a continued use of the property exactly as it was being used by Violet. The *subjective* contention that the taking was not for the purpose of taking over Violet's business enterprise is belied by the *objective* reality of what has occurred.

The facts, as acknowledged in the majority opinion,¹⁰ establish that while Violet had historically not been engaged in large-scale cargo operations, Violet was actively expanding into that area, having constructed a new berth that would handle cargo and

⁹ Testimony by Port officials that the Navy could "just sail away" proved incorrect. The Navy has not sailed away in the seven years since the expropriation occurred, and the Port still receives the income Violet previously enjoyed.

¹⁰ See *St. Bernard Port*, slip op. at 3 n.3.

having entered into an option contract with Vulcan Materials for lease of the new berth and ten adjoining acres to transload and store bulk cargo. In other words, the facts establish that while Violet had not been an active competitor for bulk cargo in the past, it had—like the Port—recognized and acted on the expanding market need for bulk cargo operations, bringing it into competition with the Port, a competition which was effectively “nipped in the bud” and eliminated through the taking.¹¹ Again, the *subjective* contentions of the Port are contradicted by the *objective* reality of what has occurred.

The majority opinion, in finding no manifest error in the district court judgment denying the motion to dismiss the expropriation, relies heavily on the federal district court judgment remanding this case to state court following its removal to federal court. *St. Bernard Port, Harbor, & Terminal Dist. v. Violet Dock Port Inc., LLC*, 809 F.Supp.2d 524 (RD. La. 2011). It quotes from the federal ruling, which found that Violet submitted nothing, “other than its own characterization, to suggest that acquisition of the [Navy] property was the *primary motivating cause* of this 70 acre expropriation.” *See St. Bernard Port*, slip op. at 5 (emphasis supplied) (quoting *St. Bernart Port*, 809 F.Supp.2d at 531). This quote suggests—apart from factual disputes—a legal interpretation of Section 4(B)(6) that is at odds with its plain language. In other words, the federal district court seems to advocate for a “substantial factor” or “primary purpose” test for interpreting the mandate of Section 4(B)(6). Such an approach is fraught with danger, as a port would always have the option to take over private property

¹¹ The language of the constitution does not address the level or degree of competition.

as long as it professed a “primary” purpose of expanding commerce, even if its purpose also had the effect of eliminating private competition. Such an interpretation would render La. Const. art. I, § 4(B)(6) largely meaningless. Regardless, ultimately, this court is the final arbiter of the meaning of this state’s constitution, an obligation which we should not yield on a *res nova* issue.

At issue in this case is the decision of the people, as evidenced through the constitution, to protect private enterprise from governmental overreach. I would caution, therefore, against an approach that focuses myopically on the details of the respective “operations” of what are, at their core, both commercial ports in determining whether there is a violation of Section 4(B)(6). Such an approach runs the proverbial risk that one will lose sight of the forest for the trees and, in the process, render the protections of Section 4(B)(6) meaningless.

While I sympathize with sentiments that this case should be limited to its facts, one cannot ignore the legal ramifications that arise from application of those facts. Will the Port (or another public port) next argue that it can expropriate a private port engaged in liquid cargo storage operations because the Port does not currently engage in liquid cargo storage operations and, thus, does not “compete” with a port engaged in such? Will it be able to argue that its “primary” purpose is not to assume the liquid cargo operations, but to expand its bulk cargo operations at that location? Any parsing here ignores what actually, objectively occurred. The Port took the Violet property and assumed its operations while ending competition, violating both the letter and spirit of Section 4(B)(6).

Ultimately, on the facts of this case, the result of the majority opinion is not what was contemplated by the citizens of Louisiana when they demonstrated in the constitution a consistent and concerted effort to safeguard private entities from takeover by the government.

The people of Louisiana repeatedly made judgments that shield private business from the government's entry into the marketplace by taking over an ongoing business or ending competition. The people of Louisiana effectively provided a safeguard for private ownership and for the means of production in the fundamental law of this state. The Port is not without a remedy. If the government wants to enter the marketplace and take over an ongoing business, it must act like any other business; it must purchase the ongoing business at a mutually agreeable price. The constitution is clear—the government cannot simply take a private business to operate the business or to end competition.

For these reasons, I respectfully dissent.

44a

SUPREME COURT OF LOUISIANA

No. 2017-C-0434

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

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TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH CIRCUIT,
PARISH OF ST. BERNARD

GUIDRY, J., dissents and assigns reasons.

I respectfully dissent from the majority holding today that the St. Bernard Port's taking of Violet Dock Port's private property was a constitutionally authorized expropriation under the facts in the record before us. Although the St. Bernard Port is granted broad powers under La. Const. art. VI, § 21, an important limitation on those powers is set forth in La. Const. art. I, § 4, specifically La. Const. art. 4(B)(6). That article provides as follows: "No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with

a government enterprise. . . .” It is a well-established legal principle that because “expropriation proceedings derogate from the right of individuals to own property, the law governing these proceedings is strictly construed against the expropriating authority.” *State v. Estate of Davis*, 572 So.2d 39, 42 (La. 1990). I disagree with the majority’s conclusion there was no manifest error in the trial court’s determination that Violet Dock Port’s business enterprise or any of its assets were taken by the Port for the purpose of operating that enterprise or halting competition with Port enterprises. The Port’s own expropriation 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. Accordingly, I would reverse the judgment of the trial court.

46a

SUPREME COURT OF LOUISIANA

No. 2017-C-0434

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

CONSOLIDATED WITH

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT VERSUS VIOLET
DOCK PORT, INC., LLC

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL, FOURTH CIRCUIT,
PARISH OF ST. BERNARD

Hughes, J., dissents for the reasons assigned by
Weimer and Guidry, JJ.

APPENDIX B

SUPREME COURT OF LOUISIANA

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #13

FROM: CLERK OF SUPREME COURT
OF LOUISIANA

On the 13th day of March, 2018, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

APPLICATION(S) FOR REHEARING DENIED:

2016-KH-0949 STATE EX REL. JOHN ESTEEN v.
STATE OF LOUISIANA (Parish of
Jefferson)

WEIMER, J., would grant and assigns
reasons.

GUIDRY, J., would grant.

CLARK, J., would grant.

2017-C-0434 ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT v. VIOLET
DOCK PORT, INC., LLC C/W ST.
BERNARD PORT, HARBOR &
TERMINAL DISTRICT v. VIOLET
DOCK PORT, INC., LLC C/W ST.
BERNARD PORT, HARBOR &
TERMINAL DISTRICT v. VIOLET
DOCK PORT, INC., LLC (Parish of
St. Bernard)

WEIMER, J., would grant.

GUIDRY, J., would grant.

HUGHES, J., would grant.

48a

2017-CA-1340 DAVID CARVER v. LOUISIANA
DEPARTMENT OF PUBLIC SAFETY
(Parish of E. Baton Rouge)

2017-B-1473 IN RE: JOSEPH G. PASTOREK, II
HUGHES, J., would grant.
CRICHTON, J., would grant.

49a

APPENDIX C

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

[Filed Dec. 14, 2016]

No. 2016-CA-0096

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0262

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0331

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT.

versus

VIOLET DOCK PORT INC., LLC

APPEAL FROM ST. BERNARD 34TH JUDICIAL
DISTRICT COURT NO. 116-860, DIVISION "E"
Honorable Jacques A. Sanborn, Judge

Judge Roland L. Belsome

(Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS

James M. Garner

Peter L. Hilbert, Jr.

Joshua S. Force

Ashley G. Coker

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AFFIRMED AS AMENDED

December 14, 2016

This appeal, arises from the trial court proceedings of a quick-take expropriation of Violet Dock Port, L.L.C.'s ("VDP") property initiated by and for the benefit of the St. Bernard Port, Harbor & Terminal District ("the Port"). The subject property consists of approximately 75 acres of land; 22 acres of batture, 38.5 acres of upland property, and 4,238 linear feet of frontage along the Mississippi River as well as a 4-acre parcel across La. State Hwy. 46 ("the Property").

VDP was a privately owned industrial port facility with one mile of water frontage on the Mississippi River in St. Bernard Parish. VDP built the facility, which included five heavy-duty docks and related infrastructure. VDP's improvements were designed to berth and service ocean-going ships for the United States Navy. VDP had held contracts with the Navy for many years. The docks were also used for topside repair, and commercial vessel layberthing.

Procedural History

In 2007, the Port offered to purchase the Property and VDP declined. After years of failed negotiations, the Port expropriated the Property on December 22, 2010, and deposited the estimated just compensation of \$16,000,000 into the registry of the court. In response, VDP challenged the public purpose of the expropriation. After conducting an evidentiary hearing, the trial court found that the taking served a

public purpose.¹ Later, the Port filed an Amended Petition for Expropriation in which it added claims against VDP alleging damages for debris material being buried on the Property, among other things. Based on those claims, the trial court ordered that \$1,900,000 of the \$16,000,000 was to remain in the registry of the court. VDP withdrew the balance of the funds.

The matter proceeded to trial to determine the value of the Property as well as the Port's claim for damages on the allegations that debris had been dumped and buried on the Property after the expropriation date. The trial court rendered its judgment finding that the value of the Property was \$16,000,000, the trial court denied the Port's claim for damages for debris removal, and VDP was awarded judicial interest on the \$1,900,000 in funds that had remained in the registry of the court.² Subsequent to the judgment being issued, both the Port and VDP filed motions to recover attorney's fees and costs. The trial court denied both parties' motions.³ This appeal and cross-appeal followed. The appeals challenge each of the three judgments.

Assignments of Error

On appeal VDP maintains that the trial court erred in finding that the taking was constitutional and thereafter finding the value of the Property to be \$16,000,000. In addition, VDP asserts that if this Court were to overturn either of those rulings by the trial court it would be statutorily eligible for attorney's fees and costs.

¹ March, 21, 2012 Judgment.

² July 31, 2015 Judgment.

³ December 1, 2015 Judgment.

The cross-appeal filed by the Port contends that the trial court erred in denying its claims for damages regarding buried debris, erred in awarding judicial interest on the \$1,900,000 that remained in the registry of the court, erred in excluding testimony of an expert economist, and also erred in failing to award costs and attorney's fees.

Standard of Review

In an expropriation case, the trial court's factual determinations are subject to the manifest error standard of review, while legal determinations are reviewed de novo, and evidentiary rulings are subject to the abuse of discretion standard.⁴

March 21, 2012 Judgment (Public Purpose)

Through the Louisiana Constitution and state statutes, the Port is granted the express right to expropriate private property.⁵ For the taking to be constitutional it must be for a public purpose and the landowner must be paid just compensation.⁶ After conducting an evidentiary hearing on the issue of public purpose only, the trial court determined that the Port had established a valid public purpose for the expropriation of the Property pursuant to La. R.S. 34:1705 and 1708. More specifically, the trial court found that the "[e]xport of goods and commodities through the port is one of the basic industries of St Bernard Parish. The acquisition of the Violet terminal would be a logical extension of port services in St. Bernard." The trial court also reasoned that the

⁴ See *State, DOTD v. Restructure Partners, L.L.C.*, 07-1745 (La.App. 1 Cir. 3/26/08), 985 So.2d 212.

⁵ See, La. Const. Art. I, § 4 and Art. VI, § 21.

⁶ La. Const. Art. I, § 4.

contemplated construction and use of the property would bring employment to the citizens of St. Bernard Parish.

VDP argues that the Port's expropriation was not for a public purpose and therefore violated its constitutional protections as a private landowner. Specifically, it maintains that the trial court erred in upholding the Port's taking of the Property because the expropriation was in violation of La. Const. Art. I, §§ 4(B)(1), (2), (3), and (6),⁷ La. R.S.

⁷ The pertinent provisions of § 4, Right to Property read as follows:

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. *Except as specifically authorized by Article VI, Section 21 of this Constitution* property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

(2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "*public purpose*" shall be limited to the following:

* * *

(vi) *Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.*

* * *

(3) Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.

* * *

34:1708⁸ and U.S. Const. amend. V.⁹ VDP cites to several constitutional violations, but more specifically contends that the taking did not meet a public purpose and the Port was not authorized to expropriate the property. VDP argues that the real purpose for the taking was so the Port could continue to operate its

(6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality, may expropriate a utility within its jurisdiction.

La. Const. Art. I, § 4 (emphasis added).

⁸ La. R.S. 34:1708 states:

A. The board is authorized to acquire by purchase, donation, expropriation, appropriation, or otherwise any lands in the district needed for railways, wharves, sheds, buildings, canals, channels, and other facilities required for the operation of the board and to be owned and operated by the board except those pipelines in operation on May 1, 2008. The board may also provide that payments for such lands be made out of funds under its control not otherwise specifically appropriated.

B. The board is further authorized to receive by gift, grant, donation or otherwise, any sum of money, aid or assistance from the United States, the state of Louisiana, or any of the political subdivisions thereof, for the purpose of carrying out the objects and purposes of this Chapter.

C. In addition to its power to acquire such property in the various modes set out hereinabove, the board shall also have power to expropriate property within the district in the same manner applicable to Louisiana State University and Agricultural and Mechanical College and the Department of Transportation and Development under the provisions of R.S. 19:141 *et seq.*

⁹ Amendment V of the takings clause mandates that just compensation be paid for private property taken for public use.

layberthing and cargo facility and obtain the Navy contracts in violation of La Const. art. I § 4(B)(6). For these reasons, VDP claims the taking was unconstitutional. We disagree.

The State of Louisiana created the Port as a public corporation and political subdivision to regulate domestic, coastwise, and intercoastal commerce and traffic.¹⁰ La. R.S. 34:1705¹¹ establishes the authority and

¹⁰ La. R.S. 34:1701.

¹¹ La. R.S. 34:1705 reads:

A. (1) The board of commissioners of the St. Bernard Port, Harbor and Terminal District shall have the sole power to regulate, pursuant to R.S. 34:1703, the domestic, coastwise, and intercoastal commerce and traffic of said district and all commerce and traffic within the district including cargo bound for and/or in, and/or coming out of international commerce where such commerce and traffic is conducted by or through a facility wholly owned by the district.

(2) The board of commissioners of the St. Bernard Port, Harbor and Terminal District shall also have and exercise the powers granted to deep water port commissions, pursuant to R.S. 9:1102.1 in all cases where riparian owners of property on navigable rivers, lakes, or streams within said district desire to construct wharves, buildings, or improvements on the batture or banks owned by them, which are designed for and/or used for such commerce and traffic domestic, coastwise, or intercoastal commerce, including cargo bound for and/or in and/or coming out of international commerce where such is conducted by or through a facility wholly owned. by the district.

B. The board of commissioners of the St. Bernard Port, Harbor and Terminal District shall have the right to enter into any and all contracts and agreements with the parish of St. Bernard, the board of commissioners of the Port of New Orleans, and any other public subdivisions or authorities relative to any and all

jurisdiction of the Port, and 1708¹² provides the manner in which the Port can acquire property. The Legislature has bestowed broad discretion and authority upon the Port to support its efforts to maintain and further development of its operations.¹³

The constitutional rights of Article 1, § 4 that VDP maintain were violated, are subject to the exceptions provided in Article VI, § 21. Section 21 provides in pertinent part:

matters which lie within the jurisdiction of the district and the board of commissioners thereof.

¹² La. R.S. 34:1708 states:

A. The board is authorized to acquire by purchase, donation, expropriation, appropriation, or otherwise any lands in the district needed for railways, wharves, sheds, buildings, canals, channels, and other facilities required for the operation of the board and to be owned and operated by the board except those pipelines in operation on May 1, 2008. The board may also provide that payments for such lands be made out of funds under its control not otherwise specifically appropriated.

B. The board is further authorized to receive by gift, grant, donation or otherwise, any sum of money, aid or assistance from the United States, the state of Louisiana, or any of the political subdivisions thereof, for the purpose of carrying out the objects and purposes of this Chapter.

C. In addition to its power to acquire such property in the various modes set out hereinabove, the board shall also have power to expropriate property within the district in the same manner applicable to Louisiana State University and Agricultural and Mechanical College and the Department of Transportation and Development under the provisions of R.S. 19:141 *et seq.*

¹³ *See*, La. R.S. 34:1701 *et seq.*

(A) Authorization, *In order to* (1) induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area and thereby the state, (2) provide for the establishment and furnishing of such industrial plant, (3) *facilitate the operation of public ports*, or (4) provide movable or immovable property, or both, for pollution control facilities, the legislature by law may authorize, subject to restrictions it may impose, any political subdivision, *public port commission, or public port, harbor, and terminal district to:*

* * *

(b) acquire, through purchase, donation, exchange, and expropriation, and improve industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances, including public port facilities and operations which relate to or facilitate the transportation of goods in domestic and international commerce; and

(c) sell, lease, lease-purchase, or demolish all or any part of the foregoing

La. Const. Art, VI, § 21 (emphasis added).

The trial court was presented evidence of the Port's intention to maintain the current use of the Property initially, with a comprehensive plan to expand the facility to include a dry and liquid bulk cargo operation. In *Board of Comm'rs of Port of New Orleans v. City of New Orleans*, this Court acknowledged the important role that ports fulfill for the State and the local communities stating, "a healthy port generates local jobs and industry and associated local consump-

tion.”¹⁴ This Court further recognized that the health of the Port rest with its ability to be competitive and the maintenance and development of the Port provides “a great public benefit to the people of Louisiana.”¹⁵

Although the authority granted to the ports of Louisiana in the expropriation of private property is exceptionally broad, it is supported by the constitution and statutes of the State. Accordingly, we do not find that the trial court was manifestly erroneous or committed legal error in determining that the Port’s expropriation of the Property was for a public purpose.

July 31, 2015 Judgment (Property Valuation / Debris Damages)

VDP asserts that the trial court erred when it awarded only \$16,000,000 for the Property. Additionally, the Port argues that the trial court erred by not awarding damages for the debris removal and further erred in limiting expert testimony and awarding interest on the funds that were held in the registry of the court.

Property Valuation

Once the trial court found that the expropriation served a public purpose, it then had to determine the valuation that would provide just compensation to the landowners. In accordance with the constitutional provisions governing expropriations, a property owner must be “compensated to the full extent of his loss”¹⁶ Commonly in expropriation cases, just compensation is determined by the fair market value of the property.

¹⁴ 15-0768, p. 8 (La.App. 4 Cir. 3/16/16), 186 So.3d 1282, 1287.

¹⁵ *Id.*

¹⁶ La. Const. Art. I § 4

When making a fair market value determination in an expropriation case, the highest and best use of the property must be established. Several factors are considered in a highest and best use analysis including:

Market demand, proximity to areas already developed in a compatible manner with the intended use, economic development in the area, specific plans of business and individuals, including action already taken to develop the land for that use, scarcity of the land available for that use, negotiations with buyers interested in the property taken for a particular use, absence of offers to buy the property made by the buyers who put it to the use urged, and the use to which the property was being put at the time of the taking.¹⁷

Additionally, the presumption is that the use at the time of expropriation is the highest and best use. However, that presumption can be overcome if the landowner proves that the property could realistically be used in a more valuable way in the not too distant future.¹⁸

The trial court's reasons for judgment outlined the evidence relied upon to determine the appropriate value to place on the Property, starting with the ongoing negotiations between the Port and VDP. The first offer made by the Port in 2007 was for \$10,000,000, which was based on an appraisal that was performed on behalf of the Port and with VDP's approval. VDP rejected that offer and eventually countered with \$14,000,000, and the Port accepted

¹⁷ *Exxon Pipeline Co. v. Hill*, 00-2535, 00-2559, p. 8 (La. 5/15/01), 788 So.2d 1154, 1160 (citations omitted).

¹⁸ *Id.*

that price. There were seine issues an VDP's conditions and terms which, prevented the Port from moving forward. Then in 2010, after another appraisal was performed, the Port offered \$16,000,000, and VDP countered with \$35,000,000.

At trial several expert opinions were presented regarding the value of the Property. VDP's experts valued the property from \$51,000,000 to \$67,437,449,¹⁹ while both of the Port's appraisers arrived at a market value of \$16,000,000. Generally, fair market value is considered the price a buyer is willing to pay based on all likely uses of the property, but those uses cannot be "speculative, remote or contrary to law."²⁰ In assessing the experts' opinions and reports, the trial court noted that VDP's experts' analysis proved to be "questionable," "flawed," and at times "inaccurate." When evaluating expert opinions, the fact finder has broad discretion in determining the effect and weight to be given expert testimony.²¹ The fact finder can either accept or reject any or all of an opinion expressed by an expert.²²

In further evaluation of the evidence presented, the trial court considered the physical constraints of the Property.²³ Taking into account the condition of

¹⁹ These values were based on the property being developed into a multimodal, heavy-cargo, international trade facility.

²⁰ *Exxon Pipeline*, 788 So.2d. at 1160 (citing *West Jefferson Levee Dist. V. Coast Quality*, 93-1718 (La. 5/23/94), 640 So.2d 1258).

²¹ *Cooper v. Bouchard Transp.*, 12-086, p.6 (La.App. 4 Cir. 3/27/13), 140 So.3d 1, 7 (citations omitted).

²² *Id.*

²³ The trial court stated, among other things, that limitations exist as to the type of cargo that could be stored due the Property's proximity to a school and residential area. The trial court also

the Property at the time of the expropriation and the possible uses that were realistic in the “not too distant future,” the Port’s appraisers testified that their appraisals took into account the highest and best use of the Property as being a layberthing facility with some topside repair, and limited cargo operations. The trial court concluded that the Port’s experts presented a solid analysis based on credible facts and presumptions.

The appropriate review of the trial court’s factual findings in civil cases is the manifest error-clearly wrong standard.²⁴ On appeal, it is this Court’s function to review the record in its entirety to see if the trial court’s factual conclusions were reasonable.²⁵ If the record supports the factual determinations, this Court cannot reverse those findings merely because we would have found differently.²⁶ Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be manifestly erroneous or clearly wrong.²⁷ Thus, upon a thorough review of this record, we cannot find that the trial court was manifestly erroneous or clearly wrong in its ruling that \$16,000,000 was just compensation for the Property.

found that the Property was limited due to its configuration, which included several acres of land that was not owned by VDP.

²⁴ *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 14-2592, p. 8-9 (La. 12/8/15), 193 So.3d 1110, 1115-16 (citations omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Exclusion of Expert Economist's Testimony

In this assignment, the Port seeks to have this Court overrule the trial court's decision to exclude Dr. Timothy Ryan's expert opinion, regarding the market value of VDTs business and earnings. Evidentiary rulings by the trial court are reviewed under an abuse of discretion standard.²⁸

In ruling to limit the testimony, the trial court referred to an earlier ruling made in the case where it was determined that Dr. Ryan, an economist, could not testify as to the valuations and appraisals of the Property. The record indicates that Dr. Ryan's testimony was to be limited to his area of expertise which did not include evaluating the value of businesses or real estate. Therefore, we do not find that trial court abused its discretion in limiting the testimony.

Damages for Debris Removal

The Port sought damages for the removal of what Was characterized as debris under La. C.C. art. 2315.

The record contains substantial testimony and photographic evidence regarding the fill on the Property. VDP did not dispute the fact that fill had been spread throughout the property dating back to the 1980s. Donald Dieudonne, the corporate representative for VDP, testified that VDP had been receiving fill for decades and using it to raise some of the lower areas of the Property. He claimed that after the expropriation the practice of receiving fill continued until the Port objected in June of 2012. Mr. Dieudonne's

²⁸ 727 *Toulouse, L.L.C. v. Bistro at the Maison De Ville, L.L.C.*, 12-1014, p. 19 (La.App. 4 Cir. 8/21/13), 122 So.3d 1152, 1163 (citing *In re Succession of Holzentahl*, 12-0211, p. 8 (La.App. 4 Cir. 9/26/12), 101 So.3d 81, 87).

testimony was that once the Port objected VDP did not authorize any further fill to be deposited.

Mr. Dieudonne's statements were not directly contradicted. A review of the testimony and evidence presented, failed to establish with any certainty the quantity of fill that was deposited after the expropriation or that VDP continued to authorize such activity after the Port objected. Additionally, there was no evidence indicating the Property was damaged or that removal was required.

Further there is no precedent set for allowing the Port to offset its purchase price for the remediation of the Property after the purchase. To the contrary, in *State, DOTD v. Todd*, the court denied DOTD's cause of action for reimbursement for a remediation required by the Department of Environmental Quality to remove contaminated soil and ground water on expropriated property.²⁹

Consequently, this Court cannot find error with the trial court's determination that the Port did not prove its claims for damages against VDP.

Interest

The Port maintains that the trial court erred in awarding VDP judicial interest on the funds that remained in the registry of the court. The Port relies on La. R.S. 19:155, to argue that the award of judicial interest on funds deposited in the registry of the court, in an expropriation case, is statutorily prohibited.³⁰ Under the facts of this case, we disagree.

²⁹ 01-0374 (La.App. 3 Cir. 12/4/02), 834 So.2d 1114.

³⁰ La. R.S. 19:155 reads:

Although the Port deposited the estimated just compensation of \$16,000,000, it later requested that the trial court withhold \$1,900,000 of the deposit pending the outcome of a claim against VDP for an offset. It was approximately three years later that the trial court determined that the Port could not prove it was owed an offset. The landowners were deprived of the use of funds that were deposited as estimated just compensation for the expropriation, due to the Port's filing of a claim for offset. Effectively, it was as if the money was never deposited. As such, it is subject to the statutory 5% annual interest provided for by La. R.S. 19:155, less any interest accrued while on deposit. Accordingly, the trial court's ruling in this respect is amended.

December 1, 2015 Judgment (Costs and Attorney's Fees)

The Port challenges this judgment arguing that the trial court erred in not awarding costs to the Port because it offered the true value of the Property prior to the beginning of the litigation. Further, the Port argues that the trial court erred in denying attorney's fees based upon VDP's bad faith litigation.

For the Port's argument regarding its entitlement to costs including expert costs, it relies on La. R.S. 19:12. At the time of the filing for expropriation, in 2010, La. R.S. 19:12 provided that "[i]f a tender is made of the

The judgment rendered therein shall include, as part of the just compensation awarded, interest at the rate of five per centum per annum on the amount finally awarded as of the date title vests in the plaintiff to the date of payment; but interest shall not be allowed on so much thereof as has been deposited in the registry of the court.

true value of the property to the owner thereof, before proceeding to a forced expropriation, the costs of the expropriation proceedings shall be paid by the owner.”

The amended version of the statute which went into effect on August 1, 2012, reads, “[i]f the highest amount offered prior to the filing of the expropriation suit is equal to or more than the final award, the court may, in its discretion, order the defendant to pay all or a portion of the costs of the expropriation proceedings.”

The obvious difference in the two versions of the statute is the discretion given to the trial court. However, for this case we need only focus on the condition that is consistent in both, which is that a tender must occur “prior to” or “before” the filing of the expropriation.

The jurisprudence is clear, because the assessment of costs pursuant to La. R.S. 19:12 impacts the landowner’s guaranteed right to just compensation under La. Const. Art. 1, § 4, the statute must be strictly construed.³¹ According to Black’s Law Dictionary, a tender is defined as an unconditional offer of money.³² Although it is undisputed that there were ongoing negotiations for the Property over many years, all offers prior to the \$16,000,000 offer are irrelevant to the assessment of costs. Also, undisputed is that the deposit of \$16,000,000 in the registry of the court was not made prior to the institution of the suit. In reviewing the record and more specifically the testi-

³¹ See, *South Central Bell Tel. Co. v. Marsh Inv, Corp.*, 344 So.2d 6 (La.App. 4th Cir. 1977); *Southern Natural Gas Co. v. Poland*, 406 So.2d 657 (La.App. 3rd Cir. 1989); and *Louisiana Gas Purchasing Corp. v. Sincox*, 368 So.2d 816 (La.App. 2nd Cir. 1979).

³² Black’s Law Dictionary 1606 (9th ed. 2009).

mony of Mr. Dieudonne, the offer from the Port for \$16,000,000 contained numerous conditions and terms favoring the Port, including the ability to withdraw from the sale with a full refund of the deposit. A strict reading of the statute together with the applicable jurisprudence and the facts surrounding the offer to purchase in this case, we find it was not a tender for the purpose of assessing costs.

Attorney's Fees

In addition to requesting costs, the Port also seeks to recover attorney's fees pursuant to La. C.C.P. art. 863(B).³³ The Port maintains that VDP pursued the

³³ La. C.C.P. art. 863 (B) reads:

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading, and that to the best of his knowledge, information, and belief formed after reasonable inquiry, he certifies all of the following:

(1) The pleading is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.

(2) Each claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.

(3) Each allegation or other factual assertion in the pleading has 'evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

(4) Each denial in the pleading of a factual assertion is warranted by the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

68a

litigation in bad faith because they were well aware that the Property was only worth \$16,000,000.

The trial court, in its discretion, declined to award costs to the Port in accordance with La. R.S. 19:12. Additionally, the trial court specifically found that VDP did not act in bad faith by pursuing this litigation. Therefore, there was no violation of article 863, and attorney's fees were denied. We find no error in the trial court's ruling.

Conclusion

For the reasons discussed, the trial court's ruling regarding judicial interest on VDP's \$1,900,000 that remained in the registry of the court at the Port's request is affirmed as amended to reflect that interest is due in accordance with La. R.S. 19:155 with an offset for any interest already received. In all other respects the rulings of the trial court are affirmed.

AFFIRMED AS AMENDED

69a

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

No. 2016-CA-0096

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0262

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0331

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

versus

VIOLET DOCK PORT INC., LLC

LOBRANO, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent from the majority's opinion. Because expropriation laws must be strictly construed against the expropriating authority,¹ and the Louisiana Constitution expressly prohibits the taking of a business enterprise,² I find that the Port's taking of VDP's Property is clearly unconstitutional. Thus, I would remand this case to the district court for a return of title and determination of necessary compensation for the time the Port has possessed VDP's Property as required by La. R.S. 19:160.

The majority interprets La. Const. art. VI, § 21's authorization allowing public ports to exercise eminent domain to be an unrestricted exception to La. Const. art. 1, § 4's protections from the unchecked use of eminent domain. This interpretation is fundamentally incorrect. La. Const. art. I, § 4 grants private property rights to every person subject to reasonable statutory restrictions and the reasonable exercise of the police power. *See New Orleans Redevelopment Auth. v. Burgess*, 2008-1020, p. 10 (La. App. 4 Cir. 7/8/09), 16 So.3d 569, 577. La. Const. art. VI, § 21 serves only to authorize public ports to exercise eminent domain to accomplish their public purpose, "*subject to restrictions it [the Legislature] may impose.*" Nothing in La. Const. art. VI, § 21 grants public ports unfettered and unrestricted exercise of their eminent domain power.

This misreading appears to result from improperly applying La. Const. art. I, § 4(B)(1) to the business

¹ *State, through the Dep't of Transp. and Dev. v. Estate of Davis*, 572 So.2d 39, 42 (La. 1990).

² La. Const. art. I, § 4(B)(6).

enterprise exception provided in (8)(6). La. Const. art. I, § 4(B)(1) reads as follows:

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. *Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity* (emphasis added),

This provision prohibits the taking of property for predominant use by any private person or entity or for transfer of ownership to any private person or entity unless that taking is “authorized” by La. Const. art. VI, § 21.

La. Const. art. VI, § 21, entitled “Assistance to Local Industry,” begins with the word “Authorization.” It reads, in relevant part, as follows:

A) Authorization. In order to (1) induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area and thereby the state, (2) provide for the establishment and furnishing of such industrial plant, (3) facilitate the operation of public ports, or (4) provide movable or immovable property, or both, for pollution control facilities, the legislature by law may authorize, subject to restrictions it may impose, any political

subdivision, public port commission, or public port, harbor, and terminal district to:

* * *

(b) acquire, through purchase, donation, exchange, and expropriation, and improve industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances, including public port facilities and operations which relate to or facilitate the transportation of goods in domestic and international commerce; and

(c) sell, lease, lease-purchase, or demolish all or any part of the foregoing.

Together, La. Const. art. I, § 4(B)(1) and La. Const. art. VI, § 21 authorize the Legislature to allow public ports to exercise eminent domain powers that may include the taking of private property for use or transfer of ownership to another private entity, which but for La. Const. art. VI, § 21 would be prohibited.

However, both of these articles are subject to the business enterprise exception provided in La. Const. art. I, § 4(B)(6), which reads; in relevant part:

(6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. . . .

Whereas La. Const. art. I, § 4(B)(1) specifically references La. Const. art. VI, § 21 as an exception, La. Const. art. I, § 4(B)(6) contains no exceptions. The majority, by finding that La. Const. art. VI, § 21 is an exception to La. Const. art. I, § 4(B)(6), treats (B)(6) as a subpart of (B)(1) rather than as the separate provision it clearly is. There is simply nothing in La.

Const, art. VI, § 21 that abrogates or otherwise limits La. Const. art. I, § 4(B)(6). Given that (B)(6) is not a subpart of (B)(1), I am bound to consider the restrictions imposed by La. Const. art I, § 4(B)(6) in determining whether the Port acted constitutionally in its taking of VDP's property. I find it did not.

As acknowledged by the majority, “[t]he trial court was presented with evidence of the Port’s intention to maintain the current use of the Property initially . . .,” In actuality, the record establishes that the Port planned to have Associated Terminals, another private entity, operate VDP’s facility as it was operated by VDP for eight to ten years in order to allow Associated Terminals to raise funds to expand the Property’s dry and liquid bulk cargo capacity. The taking of VDP’s business enterprise in order for the Port’s favored business, Associate Terminals, to use VDP’s Property to produce the same revenue VDP was previously generating is a clear violation of La, Const. art. I, § 4(B)(6). The taking of a business enterprise in order for government or its chosen beneficiaries to produce revenue is exactly the kind of violation of property rights La. Const. art. I, § 4(B)(6) exists to prevent. Should the majority’s interpretation stand, a public port convinced that it can make better use of a private business enterprise’s assets will be empowered to usurp that private business enterprise and fashion it into a revenue maker for government. One practical effect of that decision would be to stifle future port development by private businesses, who would be unwilling to take the risk that a public port could, at any time, take that private investment by expropriation.

The Port argues that La. Const. art. I, § 4(B)(6) is not violated because VDP’s business enterprise allegedly

will not be operated by Associated Terminals in perpetuity. This argument fails to render the taking constitutional. expropriation ‘proceedings are in derogation of the right of individuals to own property, and as a result, the laws governing these proceedings must be strictly construed against the expropriating authority. *Davis*, 572 So.2d at 42, Interpreting La. Const. art. I, § 4(B)(6) strictly against the Port, because the expropriation plan involved operating VDP’s business to generate funds to finance a future dry and liquid bulk cargo facility, I must find that the Port seized VDP’s business enterprise for the purpose of operating VDP’s business enterprise.

Any interpretation of La. Const. art. VI, § 21 that grants public ports unfettered rights to expropriate private property exceeds the authority that has been bestowed by the Legislature and the citizenry of this State. The Louisiana Constitution was carefully crafted to balance the needs of public ports to facilitate the transport of goods or persons in domestic or international commerce with the right of Louisiana’s citizens to be secure in their ownership of private property. To undo this balance from the bench is to reach beyond the authority of a judge.³

³ As explained in *Hoag v. State*, 2004-0857, p. 4 (La. 12/1/04), 839 So.2d 1019, 1022:

Our state constitution divides governmental power into separate executive and judicial branches and provides that no one branch shall exercise powers belonging to the others. La. Const., art. II, §§ 1, 2. This trichotomous branching of authority furnishes the basis for the existence of an inherent judicial power which the legislative and executive branches cannot abridge. *Singer, Mailer, Levine, etc. v. LSBA*, 378 So.2d 423 (La. 1979); *Saucier v. Hayes Dairy Products*, 373 So.2d 102, 109, 114 n. 3 (La. 1979). Likewise, the

75a

For these reasons, I respectfully dissent from the majority opinion.

judicial branch is prohibited from infringing upon the inherent powers of *the* legislative and executive branches. *LaBauve v. Louisiana Wildlife and Fisheries Comm'n*, 289 So.2d 150, 151 (1974).

76a

APPENDIX D

COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

[Filed Feb. 8, 2017]

No. 2016-CA-0096

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0262

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0331

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT INC., LLC

77a

APPEAL FROM ST. BERNARD 34TH JUDICIAL
DISTRICT COURT NO. 116-860, DIVISION "E"
Honorable Jacques A. Sanborn, Judge

Judge Roland L. Belsome

(Court composed of Judge Terri F. Love, Judge Roland
L. Belsome, Judge Joy Cossich Lobrano)

LOVE, J., CONCURS AND ASSIGNS REASONS

LOBRANO, J., DESSENTS AND ASSIGNS
REASONS

ON REHEARING

James M. Garner
Peter L. Hilbert, Jr.
Joshua S. Force
Ashley G. Coker
Eric J. Blevins
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78a

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REHEARING DENIED

FEBRUARY 8, 2017

Rehearing Denied.

79a

COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

No. 2016-CA-0096

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0262

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0331

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT INC., LLC

LOVE, J., CONCURS AND ASSIGNS REASONS

I respectfully concur in the majority's decision to deny rehearing. I find the following:

VDP is correct in stating in its Application for Rehearing that La. Const. art. I, § 4(B)(6) provides that “No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise . . . a municipality may expropriate a utility within its jurisdiction.” However, the trial court found that “the purpose of operating that enterprise or halting competition” was not the Port’s primary motivation in expropriating VDP’s property.

This Court previously found that La. Const. art. I, § 4(B)(1) was designed “merely” to prevent “expropriations *initiated* with the goal of transferring private property to a specific recipient, rather than as a bar to expropriation with a legitimate basis that may include a subsequent transfer.” *New Orleans Redevelopment Auth, v. Burgess*, 08-1020, p. 21 (La. App. 4 Cir. 7/8/09), 16 So. 3d 569, 584. This Court found that “[t]he potential subsequent transfer of the blighted property to third parties who are private entities is incidental to the duty of a municipality to remove a public threat to the health and safety of its occupants.” *Id.* Accordingly, this Court held that the expropriation of blighted property that would later be sold to a private party for rehabilitation was not violative of La. Const. art. I, § 4(B). *Id.*, 08-1020, p. 23, 16 So. 3d at 585.

Likewise, the trial court in the present matter found that “[t]he St. Bernard Port’s stated reason for expropriating 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.” Further, the trial court reasoned that the expropriation was a “logical extension of port services in St. Bernard.” The majority then held that

the trial court was not manifestly erroneous for so finding.

Therefore, the majority did not find that La. Const. art. VI, § 21 exempted “public port takings from the prohibitions contained in La. Const. art. I, § 4(B)(6)” as VDP claims. Rather, we found that the trial court was not manifestly erroneous in finding that the Port’s primary motivation was not to operate VDP’s enterprise or halt competition by expropriating VDP’s property. We did not “render Section 4(B)(6) meaningless through judicial interpretation,” as asserted by VDP. Rather, we found the facts and circumstances presented by this case simply did not satisfy the requirements of the restrictions of La. Const. art. I, § 4(B)(6).

82a

COURT OF APPEAL FOURTH CIRCUIT
STATE OF LOUISIANA

No. 2016-CA-0096

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0262

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., LLC

Consolidated With:

No. 2016-CA-0331

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT INC., LLC

LOBRANO, J. DISSENTS AND ASSIGNS REASONS.

I respectfully dissent from the denial of rehearing for the reasons I previously assigned when dissenting

83a

in *St. Bernard Port, Harbor & Terminal Dist, v. Violet Dock Port, Inc., LLC*, 2016-0096, p.15 (La. App. 4 Cir. 12/14/16), – So.3d–, 2016 WL 7238987, at *1, *8, I would grant the rehearing.

84a

APPENDIX E

34TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. BERNARD
STATE OF LOUISIANA DIVISION "E"

FILED: FEB 15 2012 CLERK: /s/ Gwen S. Loze

—————
No. 116-860
—————

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

versus

VIOLET DOCK PORT, INC., L.L.C.
—————

JUDGMENT

This matter came to be heard on Wednesday, February 1, 2012, on defendant's VIOLET DOCK PORT, INC., L.L.C., Motion to Dismiss Petition for Expropriation.

PRESENT: JAMES M. GARNER & ASHLEY G. COKER, Attorneys for Plaintiff, St. Bernard Port, Harbor & Terminal District

RANDAL A. SMITH & VAL P. EXNICIOS, Attorneys for Defendant. Violet Dock Port, Inc., L.L.C.

After considering the pleadings, testimony of the witnesses, admitted evidence, and argument of Counsel:

IT IS ORDERED, ADJUDGED AND DECREED that VIOLET DOCK PORT, INC., L.L.C.'s Motion

85a

to Dismiss Petition for Expropriation, is hereby
OVERRULED AND DENIED.

READ, RENDERED AND SIGNED this 15th day of
February, 2012 in Chalmette, Louisiana

/s/ Jacques A. Sanborn
JUDGE JACQUES A. SANBORN
DIVISION "E"

PLEASE SERVE ALL PARTIES

A TRUE COPY

Lena R. Torres

CLERK OF THE COURT
PARISH OF ST BARNARD
STATE OF LOUISIANA

By: /s/ Lisa L. Borden
Deputy Clerk

FEB 15 2012

APPENDIX F

34TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. BERNARD
STATE OF LOUISIANA DIVISION "E"

FILED: _____ DEPUTY CLERK: _____

No. 116-860

ST. BERNARD PORT HARBOR & TERMINAL DISTRICT

versus

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

PER CURIAM

St. Bernard Port, Harbor & Terminal District ("St. Bernard Port") is a public corporation and political subdivision created by the State of Louisiana to regulate domestic, coastwise and intracoastal traffic in St. Bernard Parish. La. R.S.34:1701; 1703(A). Violet Dock Port, Inc., L.L.C. ("Violet") is a limited liability company that own about seventy (70) acres of property located about six (6) miles from St. Bernard Port's existing facility. Violet has contracted a portion of the property for use as berths by United States Navy vessels operated by the Military Sealift Command ("MSC"), a civilian branch of the United States Navy. MSC possesses the option to renew that contractual agreement.

On December 22, 2010, after failed negotiations to acquire the property consensually, St. Bernard Port filed and served Violet with a petition to expropriate Violet's facility pursuant to La. R.S 19:2, and paid estimated compensation of sixteen million \$16,000,000.00 into the Court's registry. The St. Bernard Port's stated

reason for expropriation 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.

Export of goods and commodities through the port is one of the basic industries of St. Bernard Parish. The acquisition of the Violet terminal would be a logical extension of port services in St. Bernard. The port would acquire heavy duty docks and forty two hundred (4200 LF) linear feet of Mississippi River frontage available of immediate use. Thirty eight (38) acres of presently undeveloped uplands would be available for cargo storage. The contemplated construction and use of the property would bring needed revenues into the community which is still recovering from the effects of the 2005 hurricanes and provide needed employment to its citizens. The predominant use for the property would be by the public, not for use by, or for transfer of ownership to any private person or entity. The Court is apprised that the expropriation will not affect the use by MSC for its vessels should MSC elect to continue that use.

In accord with the foregoing, the Court finds St. Bernard Port's petition for expropriation of the Violet facility well founded in fact and warranted by Law. La. R.S. 34:1705, 1708. The Court **OVERRULES** the motion to dismiss filed by Violet, and **GRANTS** the said Petition.

The Court declines to stay the expropriation. See, La. R.S. 9:13; 114 ("no party to an expropriation shall be entitled to or granted a suspensive appeal"); 19:148 ("[T]he plaintiff shall be entitled to enter upon and take possession of the property upon the deposit of the estimated compensation. If any building is located wholly or partially upon the property described in the

88a

petition, the court may postpone the right of entry for any period not to exceed thirty days from the date on which the last of any party defendant was served with this notice.”)

READ, RENDERED AND SIGNED on this 21st day of March, 2012 at Chalmette, Louisiana.

/s/ Jacques A. Sanborn
JACQUES A. SANBORN

89a

APPENDIX G

34th JUDICIAL COURT
FOR THE PARISH OF ST. BERNARD
STATE OF LOUISIANA
DIVISION "E"

FILED: JUL 31, 2015 CLERK: /s/ Emily Carlin

No. 116-860

ST. BERNARD PORT, HARBOR, AND TERMINAL DISTRICT,

versus

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

JUDGMENT

This matter came before the court on December 16, 2014, for final conclusion of all aspects of trial. Trial had begun on September 24, 2013, and was tried in parts due to scheduling conflicts among counsel and the Court.

PRESENT FOR PLAINTIFF: James Garner, et al
for St. Bernard Port, Harbor, and Terminal District

PRESENT FOR DEFENDANT: Randall Smith, et al
for Violet Dock Port, Inc., L.L.C.

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein, in favor of Violet Dock Port, Inc., L.L.C. and against St. Bernard Port, Harbor, and Terminal District in the full sum of SIXTEEN MILLION AND NO/100THS (\$16,000,000.00) DOLLARS. This sum is subject to a credit to St.

Bernard Port, Harbor, and Terminal District of any sums of money deposited into the registry of this Court with Clerk of Court in anticipation of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the St. Bernard Port, Harbor, and Terminal District against Violet Dock Port, Inc., L.L.C. in the full sum of THIRTY SEVEN THOUSAND AND NO/100THS (\$37,000.00) DOLLARS plus legal interest thereon from date of judicial demand in regards to its claim for rental value of the property by Violet Dock Port, Inc., L.L.C. for a period of approximately three (3) months.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that legal interest from date of judicial demand, shall be due by St. Bernard Port, Harbor, and Terminal District to Violet Dock Port, Inc., L.L.C. on any sums deposited by St. Bernard Port, Harbor, and Terminal District into the registry of this Court with the Clerk of Court that were ordered to remain in the registry pending the outcome of this trial.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that St. Bernard Port, Harbor and Terminal District's claim for removal of construction debris or fill was insufficiently proven and is therefore DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of Violet Dock Port, Inc. L.L.C. for any scrap metal remaining on the property was not proven sufficiently to the Court's satisfaction and is therefore DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any claim for attorney fees and/or costs of the Parties shall be determined at a hearing on a Rule of Show Cause filed on behalf of either Party.

91a

CHALMETTE, LOUISIANA, this 31 day of July, 2015.

/s/ Jacques A. Sanborn

JUDGE

PLEASE SERVE ALL PARTIES

92a

APPENDIX H

34th JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. BERNARD
STATE OF LOUISISANA
DIVISION: "E"

FILED: SEP 25, 2015 CLERK: /s/ Emily Carlin

—————
No. 116-860
—————

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,
versus
VIOLET DOCK PORT, INC. L.L.C.

—————
REASONS FOR JUDGMENT

VIOLET DOCK PORT, INC., LLC was the owner of the property which is the basis of this case. The property, approximately seventy five acres of land (including uplands, levee, and batture), lies on the east bank of the Mississippi River in St. Bernard Parish. During the many years Violet Dock Port Inc. (VDP) owned the property, VDP had constructed several docks or piers on the river for docking, or berthing, of ships. Mr. Joseph Ruppel, the president of VDP for about thirty years was also the president of Boland Marine Manufacturing Co., a maritime repair business operating throughout the New Orleans area down to the mouth of the Mississippi River. Boland Marine leased docks from VDP at the subject property to perform repairs on vessels docked there. VDP also leased several docks to the US Navy for layberthing of its ships.

Most of the shareholders of VDP, besides Mr. Ruppel, were also associated with or worked for Boland Marine. As such, the owners of VDP were very familiar with, and relatively sophisticated, as to general maritime industry on the lower Mississippi River.

The St. Bernard Port, Harbor & Terminal District (The Port) became interested in the subject property in the late 1990's and early 2000's. This interest by The Port increased to the point to where The Port had some discussions with a representative of VDP about a sale of the property.

In late 2006, early 2007, The Port had an appraisal (with approval of VDP) completed resulting in an offer by the Port to purchase the property for ten million dollars. In March 2007, VDP rejected the ten million dollar offer. However, in April 2007, VDP communicated to the Port that it wanted 14 million dollars for the property nonnegotiable. Within a month The Port agreed to the 14 million dollar figures. VDP demanded a non-refundable deposit to secure an agreement. The Port could not legally agree to the non-refundable deposit.

There was another appraisal performed in 2010 and The Port offered \$16,000,000.00, which was eventually rejected by VDP, who then asserted a sale price of \$35,000,000.00.

These two appraisals were performed by Mr. Michael Truax who was initially agreed upon by VDP.

The Port then initiated these expropriation proceedings. The Port deposited the \$16,000,000.00 in funds into the registry of the Court, and the case proceeded to trial on the expropriation, which was eventually granted by this Court.

The Court's task in this part of the case was to come to the determination of which side's experts' evaluations were the most reliable based upon the facts and proper analyses. The valuations of the plaintiff's experts differed greatly from the evaluations of the defendant's experts. It is the opinion of this Court that it does not have the discretion to "split the baby" and arrive at a valuation somewhere in between. The Court, after weighing all the evidence, testimony, opinions, and reports has come to a conclusion that the Port of St. Bernard's experts and appraisers performed a more credible analysis (based upon real facts and data) than did those experts of VDP.

The Court was bound to the legal concept that the subject property be assessed at its "highest and best use" considering the size, location, improvements, but importantly, whether the highest and best use was (1) legally permissible; (2) physically possible; (3) financially feasible; (4) maximum productivity.

VDP's experts testified that the property could be used as a dry or liquid bulk facility. Because of the property's close proximity to an elementary school and a residential area, any such use as a liquid tank terminal or dry bulk cargo terminal which included toxic or semi-toxic materials would be automatically eliminated.

Additionally, there is a "cut out" portion of property, several acres in size that sits in the middle of the subject property which was not owned by VDP, and therefore would greatly hinder the development of the property as a whole, due to this somewhat fragmentation.

The trial of this case was long in duration and required to be completed piecemeal over an extended

period of time. There were a few important factual issues, but predominately was a contest of expert opinions and differing analyses.

Some factual issues included the actual condition of the docks, the amount of landfill deposited on the site, the actual water depth of the river at the fender line of the docks, and whether VDP's offer to sell the property for \$14,000,000.00 was a serious offer to sell.

VDP relied on several experts, including Mr. Joseph Jacquet (engineer), economist Loren Scott, and appraisers Dr. Wade Ragas and Heyward Cantrelle.

In the end, Dr. Ragas and Mr. Cantrelle, after using several different analyses, arrived at valuations of the property between \$51,000,000.00 and \$67,437,449.00.

The Port's expert appraisers, Mr. Oubre and Mr. Truax testified at trial the property's value to be \$16,000,000.00.

Both sides' experts, as part of their analyses, cited many "comparables." None of the comparables closely matched the subject property (approximately 39 acres of uplands and 4200 linear feet along the Mississippi River). There were one or two comparables somewhat close in proximity on the river. One property, the AMAX property, was located down river from the subject property, in Plaquemines Parish.

AMAX differed from the subject property in that it had only one dock, but included other infrastructure for industrial use. But AMAX included about 350 acres of uplands available for variable uses. This property sold for \$11,500,000.00 in 2012.

Most of the other comparables varied greatly in size, configuration and allowable uses.

Also, VDP's own 2009 "balance sheet" reflected a value of approximately \$8,000,000.00 for the land and docks – minus depreciation of approximately \$5,000,000.00.

The real question became which experts' opinions were based upon solid analysis, given the condition and possible use of the property and economic considerations. Importantly, the question was which experts were more credible based upon facts and/or credible presumptions.

The Court's Judgment was that Mr. Jacquet's testimony and opinions were seriously flawed. For example, his estimates for an open, dilapidated workshed and an office constructed from an old house placed on top of shipping containers were \$600,000.00 and \$200,000.00, respectively. Mr. Jacquet's opinion also included other inventory, such as a boiler valued at \$300,000.00. The boiler should not have been included in the property, and VDP sold it for \$50,000.00 (one-sixth of Jacquet valuation), Jacquet also included other items that were not present or items on the adjacent Meraux property.

The credibility of Mr. Jacquet's analysis and opinions was therefore questionable. VDP's expert appraiser, Dr. Ragas, relied heavily upon Mr. Jacquet's findings, including in his valuation moveables (included in Jacquet's opinion) that did not form part of the property. By not performing a more thorough investigation or review, Dr. Ragas' analysis was flawed.

The Court noted that Dr. Ragas evaluation was revised and reduced several times before trial after he was made aware that several of his extraordinary assumptions were not accurate, or did not exist (dredging of the lower Mississippi River to 50ft, extension of

the Meraux lease, the structural soundness of the docks to berth Panamax or Post Panamax vessels).

Dr. Ragas also did not take into account the functional obsolescence of the property having five (5) docks servicing approximately forty (40) acres of uplands. in plain terms, there are far too many docks for so little land. No large-scale operation could be developed at this site to service the number of docks – other than layberthing.

VDP's other appraiser, Mr. Cantrell, included in his analysis and opinion comparables which had larger uplands – which are obviously not present at this site. Mr. Cantrell also changed his opinion from his original report after being supplied with Mr. Oubre's opinion. Mr. Cantrell also relied upon Mr. Jacquet's inventory, which, in this Court's opinion is discredited. Mr. Cantrell even admitted that if items included by Jacquet (and considered within his own valuation) were not part of the property, then his opinion would be incorrect.

The Court came to several conclusions:

- 1) The Mississippi River may not be dredged to 50 ft. in the foreseeable future (or not at all), thus excluding deeper-draft ships (Panamax and Post Panamax) from utilizing the property's docks.
- 2) Use of is property as a liquid bulk or dry bulk terminal is limited because of its proximity to school and residential area.
- 3) The limited amount of uplands of the property would not support a large scale cargo terminal.
- 4) The configuration of the property with the inset of the non-owned parcel ("cut out") limits the uses of the property.

5) The “Meraux lease” adjacent to dock 1 may or would not be renewed, thereby greatly reducing the uses of dock 1.

6) An extraordinary amount of capital investment in infrastructure in the property would be needed to justify a value of \$51,000,000.00

7) The property could be used partially as some type of “container” terminal, but it would probably require enlargement of the ramps and docks to accommodate the loading/unloading of the containers.

8) There are too many docks for such a limited amount of land which results in a serious functional obsolescence.

9) The Court should only consider those uses that are reasonably to occur in the not too distant future.

The Court decided that the valuation opinions of the Port’s experts (\$16,000,000.00) were more reliable than those of the experts of VDP and that the highest and best use for the property was continued use as layberthing and a limited intermodal container terminal.

READ, RENDERED AND SIGNED IN
CHALMETTE, LOUISIANA THIS 23 DAY OF
September, 2015.

/s/ Jacques A. Sanborn
JUDGE JACQUES A. SANBORN
34th JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

PLEASE SERVE ALL PARTIES:

99a

APPENDIX I

Associated Terminals
Stevedoring & Logistical Services
Associated Terminals, L.L.C.
1342 Highway 44
Reserve, Louisiana 70084
Telephone: (985) 536-4520
Facsimile: (985) 536-4521
www.associatedterminals.com

November 20, 2008

Dr. Robert Scafidel
St. Bernard Port, Harbor, and Terminal District
P. O. Box 1331
Chalmette, Louisiana 70044

RE: Violet Dock Facility

Dear Dr. Scafidel:

This letter should serve to outline Associated Terminals' commitment to lease and operate the Violet Dock terminal, which is being acquired and redeveloped by the St. Bernard Port Harbor and Terminal District. This facility is vital to the continued growth in cargoes being handled by Associated Terminals at the Port of St Bernard. It is, also, an important element in the economic recovery of St. Bernard Parish.

At the present time, we are operating at capacity at the Chalmette Slip marine terminal, where we are the Marine Terminal Operator (MTO). The 40,000 SF Dry Bulk Storage Facility, built through funding assistance from the Port Priority Program and put in service less than two years ago, is already at capacity. We have had to decline cargoes for storage a number

100a

of times in the past year. In order to serve our clients we have resorted to utilizing barges and rail cars for short term storage, increasing the cost to our clients, and we're out of places to put additional barges or rail cars. At times, virtually every square foot of ground storage is being used.

Associated Terminals has seen incredible growth in tonnage throughput since becoming the MTO in 2002. Starting from 974,414 net tons in 2002, tonnages have increased to 4,124,737 net tons in 2007, and we are projected to reach 4,200,000 net tons in 2008, as shown below:

<u>Year</u>	<u>Total Net Tons Handled</u>
2002	974,415
2003	2,540,080
2004	1,958,663
2005	1,520,520
2006	3,704,857
2007	4,124,738
2008	4,200,000 (projected)

Associated Terminals has had the good fortune to have been named the MTO for the Galveston, TX Bulk Terminal. From that vantage point, and from conversations with the customers we are serving in Texas, we have become aware of opportunities to handle new cargoes which we have determined would be suitable for the Violet facility, including bulk cargoes such as specialty ores, iron and scrap-iron substitutes, minerals/aggregates, and liquid fertilizer cargoes.

Currently, we have no room to handle these additional cargoes at the facilities we lease in St. Bernard Parish.

We understand the limitations of the Louisiana Port Construction and Development Program, insofar as we know that the Port cannot purchase the Violet Site and construct a new Dry Bulk Storage Facility and a new liquid bulk dock and tank farm, all under the auspices of a single Port Priority Application. Full development of the new terminal will be accomplished in phases over a number of years. But, from our perspective, we need additional space now to store dry bulk product on the ground, in rail cars, and in barges. The Violet Site offers us the opportunity to do that in the short term, with a minimum of capital investment, other than the cost of acquiring the existing facilities. Associated Terminals has fully participated in the development of the Long Term and Short Term Site Plans for the Violet Terminal, which are shown in the Port Priority application.

Consequently, Associated Terminals is prepared to guarantee annual rent to the Port of St. Bernard of \$750,000 for the lease of the entire site, the existing facilities, and the short term improvements resulting from this Port Priority project.

Additional annual revenues to the Port, generated from stevedoring and storage activities performed by Associated Terminals at this facility, are projected to be:

<u>Port Charges</u>	<u>Annual Amount</u>
Dockage	\$274,176*
Dry Bulk Throughput	<u>22,500**</u>
Total	\$296,676

102a

* Estimate based on thirty-six annual vessel calls by ships averaging 28,000 Gross Revenue Tons (GRT) and an average stay of four days. The tariff is \$0.34/net ton/day.

** Estimate based on 450,000 tons annual throughput. The tariff is \$0.05 per form.

Total annual revenues to the Port derived from stevedoring and storage operations are estimated to be \$1,046,676 under the Short Term Site Improvement Plan.

Associated Terminals has enjoyed sustained job growth over the past five years largely as a result of expansion of port facilities funded by the Port Priority Program. Shown below is the full time employment growth for Associated Terminals at our St Barnard facilities.

<u>Year</u>	<u>Employment</u>
2003.....	82
2004.....	103
2005.....	122
2006.....	128
2007.....	185
2008.....	186

This job growth has been entirely spurred by the continued expansion in facilities and capabilities at the Arabi Terminal. These projects have been funded through a combination of port, state and private funds. Additional terminal job growth and associated payroll

103a

expected to result from the addition of the new facility at Violet is forecast as follows:

<u>Projected Employment at Violet, by Category</u>	<u>Number</u>	<u>Payroll</u>
Stevedores @ \$50,000 per year	25	\$1,250,000
Maintenance Personnel @ \$50,000 per year	4	200,000
Clerks @ \$40,000 per year	4	160,000
Equipment Operators @ \$50,000 per year	<u>6</u>	<u>300,000</u>
Total	39	\$1,910,000

Further, Associated Terminals will also purchase the following equipment to facilitate the operation of the Violet Terminal's docks and supporting facilities:

<u>Type of Equipment to be Purchased</u>	<u>Amount</u>	<u>Cost</u>
Track-mounted crane	1	\$1,250,000
Cat 966 size wheel loaders	1	200,000
Forklift	4	200,000
Miscellaneous Shop Machinery		<u>120,000</u>
Total Equipment investment		\$1,770,000

Associated Terminals has enjoyed a good relationship with the Port of St. Bernard and with the Louisiana Port Construction and Development Program. We look forward to working on this exciting new

104a

opportunity for the State of Louisiana and St. Bernard Parish. If there is any more that we can do to assist the progress of this project, please don't hesitate to call.

Sincerely,

/s/ Gary W. Poirrier
Gary W. Poirrier
Senior Vice President