

SUPREME COURT OF LOUISIANA

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DOCKET NO. 17-C-434

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ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT  
*Plaintiff-Respondent*

VERSUS

VIOLET DOCK PORT, INC., L.L.C.  
*Defendant-Applicant*

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CIVIL ACTION

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On Writ Application from the Court of Appeal, Fourth Circuit,  
Docket Nos. 2016-CA-0096 c/w 2016-CA-0262 and 2016-CA-0331,  
and from the 34th Judicial District Court for the Parish of St. Bernard,  
Civil Action No. 116-860, Honorable Jacques A. Sanborn, Presiding

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BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN  
SUPPORT OF APPLICANT VIOLET DOCK PORT, INC., L.L.C.

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SUPREME COURT  
OF LOUISIANA

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS</i> INSTITUTE FOR JUSTICE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT .....	2
I. IN <i>KELO</i> 'S WAKE, MANY STATE SUPREME COURTS HAVE DECIDED WHETHER THEIR STATE CONSTITUTIONS AND POST- <i>KELO</i> STATUTORY REFORMS PROVIDE MORE PROTECTION AGAINST GOVERNMENTS' USE OF EMINENT DOMAIN THAN DOES THE U.S. CONSTITUTION. ....	2
II. THIS CASE PRESENTS THIS COURT WITH AN OPPORTUNITY TO DECIDE WHETHER THE LOUISIANA CONSTITUTION, AMENDED AFTER <i>KELO</i> , REALLY DOES PROVIDE GREATER PROTECTION TO LOUISIANANS THAN DOES THE U.S. CONSTITUTION....	3
CONCLUSION .....	4
VERIFICATION AND CERTIFICATE OF SERVICE .....	5

## TABLE OF AUTHORITIES

<u>Case</u>	<u>Page(s)</u>
<i>Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery,</i> 136 P.3d 639 (Okla. 2006) .....	3
<i>Benson v. State,</i> 710 N.W.2d 131, 146 (S.D. 2006) .....	3
<i>City of Norwood v. Horney,</i> 853 N.E.2d 1115 (Ohio 2006) .....	1,2
<i>Gallenthin Realty Dev., Inc. v. Borough of Paulsboro,</i> 924 A.2d 447 (N.J. 2007) .....	3
<i>Kelo v. City of New London,</i> 545 U.S. 469 (2005) .....	1,2,3
<i>Rhode Island Economic Development Corp. v. The Parking Co.,</i> 892 A.2d 87 (R.I. 2006) .....	3
<i>Salt Lake City Corp. v. Evans Dev. Group, LLC,</i> 369 P.3d 1263 (Utah 2016) .....	3
<i>St. Bernard Port, Harbor &amp; Terminal District v. Violet Dock Port, Inc.,</i> LLC, No. 2016-CA-0096, 2016 WL 7238987 (La. App. 4 Cir. Dec. 14, 2016) .....	4
<i>State ex rel. Jackson v. Dolan,</i> 398 S.W.3d 472 (Mo. 2013) .....	2
<b><u>CONSTITUTIONAL PROVISIONS</u></b>	
LA. CONST. art. I, § 4 (2006) .....	3,4
<b><u>OTHER AUTHORITIES</u></b>	
Louis "Woody" Jenkins, "The Declaration of Rights," 21 Loy. L. Rev. 9 (1975) .....	3

### **INTEREST OF AMICUS INSTITUTE FOR JUSTICE**

The Institute for Justice (“IJ”) is a non-profit, public interest law firm dedicated to the essential foundations of a free society. As the nation’s leading law firm for liberty, IJ provides pro bono representation to clients nationwide whose core liberties have been infringed by the government. IJ litigates regularly in the area of property rights, and in particular, has significant institutional knowledge on fighting the misuse of eminent domain. The Institute represented the homeowners in *Kelo v. City of New London*, 545 U.S. 469 (2005), the U.S. Supreme Court’s highly controversial decision upholding the use of eminent domain solely for private economic development. The Institute also represented the homeowners in the landmark case *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court rejected *Kelo*, holding that eminent domain for private economic development violates the Ohio Constitution’s Public Use clause. In *Kelo*’s wake, state constitutional protections of property rights are more important than ever. Accordingly, the use of eminent domain at issue in this case is of keen interest to IJ because it involves the limits that the Louisiana Constitution imposes when the government decides to take over private property and the businesses located thereon, and then turns them over to another private party to operate the same business.

## SUMMARY OF ARGUMENT

In *Kelo v. City of New London*, the U.S. Supreme Court held that the Takings Clause of the Fifth Amendment to the U.S. Constitution does not bar governments from using eminent domain to take private property and then turn it over to another private party for economic development.<sup>1</sup> *Kelo* was a dramatic 5-to-4 loss for constitutional rights that virtually removed federal constitutional protection of private property under the Takings Clause. In that case's aftermath, many states either amended their constitutions or enacted statutory reforms in order to ensure that the private-use takings sanctioned by the U.S. Supreme Court would not be permissible. And state supreme courts across the country took up case after case in which they addressed whether their state constitutions (whether amended in light of *Kelo* or not) or post-*Kelo* statutory reforms provide more protection for property rights than the federal constitution provides. Most of these courts have held that their state constitutions or statutes provide greater protection. Now is this Court's opportunity to decide whether the Louisiana Constitution—amended in response to *Kelo*—does the same. This Court should seize that opportunity by granting Violet Dock Port's writ application.

## ARGUMENT

Part I demonstrates that after *Kelo v. City of New London*, many state supreme courts have addressed the issue of whether their state constitutions or post-*Kelo* statutory reforms provide greater protection for property rights than that offered by the federal constitution. Part II demonstrates that this case presents this Court with a similar opportunity that it should now take.

### I.

#### **IN KELO'S WAKE, MANY STATE SUPREME COURTS HAVE DECIDED WHETHER THEIR STATE CONSTITUTIONS AND POST-KELO STATUTORY REFORMS PROVIDE MORE PROTECTION AGAINST GOVERNMENTS' USE OF EMINENT DOMAIN THAN DOES THE U.S. CONSTITUTION.**

Since *Kelo* was decided, several state supreme courts have addressed whether their states' constitutions and post-*Kelo* statutory reforms provide greater protection against governments' use of eminent domain to take private property than the federal constitution provides. The overwhelming trend among state high courts is to answer "yes." *See State ex rel. Jackson v. Dolan*, 398 S.W.3d 472 (Mo. 2013) (strictly construing post-*Kelo* statute against port authority that sought to use eminent domain to expand a port facility); *City of Norwood v. Horney*, 853 N.E.2d 1115, 1139 (Ohio 2006) (striking down a private-use taking and rejecting *Kelo* while recognizing that judicial review "must ensure that the grant of [eminent domain] authority is construed strictly and that any doubt over the propriety of the taking is

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<sup>1</sup> 545 U.S. 469 (2005).

resolved in favor of the property owner"); *Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639, 651 (Okla. 2006) (striking down a taking that benefitted a private utility and holding that the Oklahoma Constitution provides "private property protection . . . beyond that which is afforded . . . by the Fifth Amendment to the U.S. Constitution"); *Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (concluding that the South Dakota Constitution gives property owners broader protection than *Kelo*); *Salt Lake City Corp. v. Evans Dev. Group, LLC*, 369 P.3d 1263 (Utah 2016) (rejecting condemnation for electrical substation under a post-*Kelo* statutory reform because the public use was to be delivered by a private party); *see also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 465 (N.J. 2007) (rejecting taking and holding that the New Jersey Constitution prohibits "government redevelopment of private property solely because the property is not used in an optimal manner"); *Rhode Island Economic Development Corp. v. The Parking Co.*, 892 A.2d 87 (R.I. 2006) (rejecting the taking of a parking garage that the condemning authority planned to use in the identical manner as the property owner)<sup>2</sup>.

Although many other state supreme courts have had the opportunity to address whether their states' laws provide greater protection than the federal constitution against the use of eminent domain in the wake of *Kelo*, this Court has not. As explained below, this Court now has an opportunity to do so.

## II.

### **THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO DECIDE WHETHER THE LOUISIANA CONSTITUTION, AMENDED AFTER *KELO*, REALLY DOES PROVIDE GREATER PROTECTION TO LOUISIANANS THAN DOES THE U.S. CONSTITUTION.**

After *Kelo* and the overwhelming public outcry against that decision, Louisiana strengthened protections for property rights by amending its constitution.<sup>3</sup> And long before *Kelo* was decided, the co-author of the Louisiana Declaration of Rights explained that "no other state constitution places such extensive limitations on the power and authority of government to regulate or expropriate private property." Louis "Woody" Jenkins, "The Declaration of Rights," 21 Loy. L. Rev. 9, 19 (1975). Yet the ruling below allowed St. Bernard Port, Harbor & Terminal District to take the privately-owned port and business of Violet Dock Port so that another private business could operate the port facility—as it was operated by Violet Dock Port—to generate the same revenue Violet Dock Port was previously

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<sup>2</sup> The Rhode Island and New Jersey Supreme Courts' close examinations of the record in order to determine the validity of the takings at issue (not to mention their refusal to take a broad view of what constitutes a "public use") cannot be squared with the *Kelo* Court's emphasis that courts deciding cases under the Takings Clause of the Fifth Amendment should not second guess whether a condemnation is necessary to achieve the condemning authority's stated goals. *Compare The Parking Co.*, 892 A.2d at 104–07 and *Gallenthin Realty Dev.*, 924 A.2d at 465 with *Kelo*, 545 U.S. at 488–89.

<sup>3</sup> *See* La. Const. art. I, § 4 (2006) (prohibiting the taking of property for predominantly private use or to private entities).

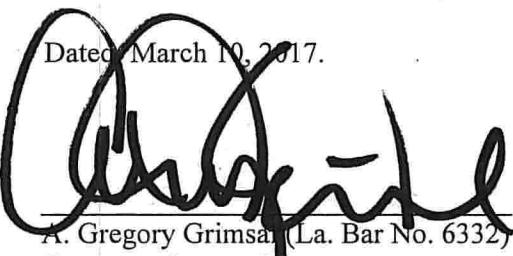
generating. *See St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, No. 2016-CA-0096, 2016 WL 7238987 at \*8 (La. App. 4 Cir. Dec. 14, 2016) (Lobrano, J., dissenting).

As Violet Dock Port has argued, this taking is unconstitutional because, among other reasons, it is barred by the prohibition against the taking of a business enterprise contained in Article I, Section 4(B)(6) of the Louisiana Constitution. In resolving the issue of first impression presented by this case concerning the meaning and scope of this provision, this Court will for the first time be able to decide whether its state constitution serves as a real barrier to *Kelo*-style takings or just a paper one that, like the post-*Kelo* Takings Clause of the Fifth Amendment, governments can easily punch through. The lower courts in this case have made the latter choice. Even if they are right—which they are not—this issue is too important for them to have the last word.

#### CONCLUSION

For the foregoing reasons, the Institute for Justice respectfully requests that this Court grant Violet Dock Port's writ application.

Dated March 10, 2017.

  
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**VERIFICATION AND CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing brief of *amicus* Institute for Justice was served this 10th day of March, 2017, via first-class mail, postage pre-paid to the following counsel of record:

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