SUPREME COURT

STATE OF LOUISIANA

NO. _____

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT,

Respondent,

vs.

VIOLET DOCK PORT, INC., LLC,

Applicant.

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

CIVIL PROCEEDING

BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICAN IN SUPPORT OF ORIGINAL WRIT APPLICATION OF VIOLET DOCK PORT, INC., LLC

Submitted by:

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BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICAN IN SUPPORT OF ORIGINAL WRIT APPLICATION OF VIOLET DOCK PORT, INC., LLC.

STATEMENT OF RELEVANT FACTS AND SUMMARY OF ARGUMENT

The relevant facts in this case are set out in the Original Writ Application of Violet Dock Port, Inc., LLC (VDP), and in the interest of brevity, we will not repeat them here. In this brief, Amicus Curiae Owners' Counsel of America (OCA) focuses on the alternative argument advanced by VDP, that the Court of Appeal erred when it concluded that "fair market value" is the sole method of calculating the compensation owed by St. Bernard to VDP. The Just Compensation Clause of the Fifth Amendment to the U.S. Constitution requires the expropriating agency provide the "full and perfect equivalent" for the property taken. Moreover, when property such as VDP's is unique, the proper measure of compensation under article I, section 4 of the Louisiana Constitution is replacement cost.

ARGUMENT

I. THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT REQUIRES THE "FULL AND PERFECT EQUIVALENT" OF THE PROPERTY TAKEN

More than a century ago, the United States Supreme Court held that the measure of compensation for a taking of private property for public use is "the full and perfect equivalent for the property taken." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1892). In that case, Congress authorized the acquisition of a privately-owned lock. The owner also had the authority to collect tolls from river traffic. Congress appropriated money for compensation, but directed that whatever amount was paid for the taking, it could not include the value of the tolls. The owner appraised the value of the lock and the value of the right to collect tolls at $450,000. After trial, the court awarded the owner $209,000, which in accordance with the statute was the value of the taken lock alone, "not considering or estimating . . . the franchise of this company to collect tolls." *Id.* at 319. The Supreme Court rejected that approach, concluding that calculation of just compensation is a judicial function, and that a legislature can neither establish the

amount to be paid in compensation for a taking, nor dictate the method used to calculate it. *Id.* at 327 ("By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question."). *See also Bauman v Ross*, 167 U.S. 548 (1897) (Just Compensation Clause required owner to be made whole for the loss caused to him by the appropriation); *United States v 564.54 Acres of Land*, 441 U.S. 506 (1979) (owner of condemned property must be made whole, but he is not entitled to more).

While fair market value may be in *many* (or even in *most* cases) the measure of the "full and perfect" equivalent for the property taken, it is not a one-size-fits-all rule, and cannot be limited to "fair market value" when the situation dictates another method would better reflect the realities of making the owner whole and putting him in the same position he was in prior to the taking. For example, in *Kirby Forest Indus. v United States*, 467 U.S. 1 (1984), the Supreme Court noted that fair market value isn't the only measure of compensation, and that other methods of compensation should be employed when the market value is too difficult to ascertain, or when its application would result in manifest injustice. *Id.* at 18, n.14 (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). *See also United States v. Miller*, 317 U.S. 369 (1943) (owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken). The Just Compensation Clause does not dictate a set of inflexible rules, but is an overarching command to make an owner whose property is impressed into public service whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (The Fifth Amendment's Takings Clause is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

The right to be put back into the same pecuniary position as before the taking is a natural consequence of the expropriation, and cannot be limited or restricted by arbitrary rules, mechanically applied. The Court of Appeals deferred to the trial

court's award of just compensation while ignoring the trial court's erroneous application of the law. Had the trial court properly applied the law, and even under a market approach to value, it should have awarded far in excess of its $16 million award as the fair market value of the property. Indeed, in the alternative to recovery of the full replacement costs of its land improvements, VDP urged in the trial court that it be awarded the fair market value of the property under the cost approach, which, in view of the absence of truly comparable sales, was the only viable approach to valuation. All of the testifying appraisers found that, under the cost approach alone, and even applying significant depreciation, the fair market value of the property far exceeded the trial court's award.

The Court of Appeals' rationale is contrary to the U.S. Supreme Court's rulings which hold that the Fifth Amendment has a "self-executing character . . . with respect to compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). This recognition began with Justice Brennan's recognition that "[a]s soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation is triggered." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting on other grounds) (internal citations and quotations omitted). Six years later, Justice Brennan's dissent was adopted by the Court's majority, which held that just compensation must be provided once a taking has occurred. *First English*, 482 U.S. at 315. As Justice Brennan noted, "[t]his Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation must be awarded." *San Diego Gas & Electric Co.*, 450 U.S. at 654 (Brennan, J., dissenting) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking"). A state statute cannot thwart or limit that self-executing right. *Jacobs*, 290 U.S. at 17 (the "right to just compensation could

not be taken away by statute or be qualified"). In other words, the right to recover just compensation for property taken for public use cannot be limited as the Court of Appeals did below.

More recently, the Supreme Court affirmed this "essential principle: Individual freedom finds tangible expression in property rights." *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Court also has observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted). The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society, *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist"), and the U.S. Constitution embraces the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society." John Locke, Second Treatise on Civil Government, XI § 138. James Madison declared, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own." The Complete Madison 267-68 (Saul K. Padover, ed. 1953) *published in* National Gazette (March 29, 1792). The Takings Clause embodies that principle, because, as Justice Holmes reminded us, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

Similarly, other jurisdictions are not bound by rigid rules, and conclude that compensation is measured in each case by what is equitable and will make the property owner whole. *See, e.g., Booras v. Iowa State Highway Comm'n*, 207

N.W.2d 566, 569-70 (Iowa 1973) (remittitur not available in eminent domain to reduce jury's compensation verdict); *State* ex rel. *Humphrey v. Baillon Co.*, 480 N.W.2d 673, 676 (Minn. App. 1992) (calculation of interest on compensation is judicial function, and courts are not bound by statutory interest rates); *Manning v. Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep't*, 144 P.3d 87, 91-92 (N.M. 2006) (rejecting agency's claim it was not liable for regulatory taking because the agency lacked eminent domain power, the court noted, "legislation cannot insulate the state from providing just compensation for takings . . . When a taking occurs, just compensation is required by the Constitution, regardless of state statute"); *Red Springs City Bd. of Educ. v. McMillan*, 108 S.E.2d 895, 900 (N.C. 1959) (Parker, J., concurring) ("[T]he constitutional prohibition against taking private property for public use without the payment of just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation."); *Mitchell v. White Plains*, 16 N.Y.S. 828, 829 (N.Y. Sup. Ct. 1891) ("A remedy for compensation contingent upon the realization of funds from taxation for benefit within a limited assessment district does not meet the constitutional requirement."); *Comm'w of the N. Marianas Islands v. Lot No. 281-5 R/W*, No. 2013-SCC-0006 (C.N.M.I. Dec. 28, 2016) (Commonwealth not protected by sovereign immunity when it fails to pay a condemnation judgment; self-executing Just Compensation Clause prohibits legislature from refusing to appropriate money to pay the judgment after it has taken property).

Because VDP's property was unique in its location and specially tailored to serve its business—fair market value would not be an accurate measure of what was taken from VDP. The appraisers in this case unanimously agreed they could not locate a single comparable sale of lower Mississippi riverfront property with multiple, deep-water industrial docks and highway and railroad access. Thus, the market (and VDP) never had the opportunity to determine the value of such a property on the open market. Consequently, even if fair market value were the

appropriate standard, the trial court ignored the only viable means of determining market value—the cost approach.

II. WHEN EXPROPRIATED PROPERTY IS UNIQUE AND INDISPENSABLY RELATED TO THE BUSINESS, REPLACEMENT COST—NOT "FAIR MARKET VALUE"—IS THE MEASURE OF COMPENSATION

Louisiana law is consistent with the Fifth Amendment, and the Court of Appeals conflicted this Court's ruling in *State* ex rel. *Dep't of Highways v. Constant*, 369 So. 2d 699, 706 (La. 1979), which held that replacement cost is the proper measure of compensation under the Louisiana Constitution if the expropriated property is "unique and indispensable to the landowners' business operations conducted on the site." That case involved the taking of the loading and parking area of a marina in order to construct a new bridge and approaches. *Id.* at 701. This "essentially destroyed the marina business operations on the entire parent tract[.]" *Id.* But the trial court, and the court of appeal, limited the compensation owed by the highway department to the fair market value of the land taken. *Id.* ("Even so, the intermediate court majority felt that the trial court's award for the taking of the loading area . . . could not exceed the conceded market value of the land prior to the taking of the entire parent tract[.]"). Applying the Louisiana Constitution's requirement to compensate the owner "to the full extent of his loss," this Court concluded the provision was meant to "broaden former constitutional concepts of the measures of damages," id., and the purpose of this provision, like the Just Compensation Clause of the Fifth Amendment, is to make the owner economically whole. *Id.* This Court concluded that

> [T]he landowners are entitled to recover the replacement costs of constructing a new loading and parking area for their marina business operations. The evidence so taken does not prove any other method by which the owners may be placed in as good a position pecuniarily as they enjoyed prior to the taking. Without the replacement of their loading area, their marina business operations will be substantially destroyed.

Id at 702. It did not matter that an award of replacement costs might exceed the fair market value of the land. *Id.* ("In view of the constitutional requirement that they be compensated to the full extent of their loss, it is not constitutionally

significant that the award to them will exceed the market value of the property used in their business operations."). The Court correctly noted that the purpose of the constitutional requirement of compensation is to make the owner whole "for any loss he sustained by reason of the taking," and is not restricted to fair market value. *Id.* This Court based the need for replacement value on the unique nature of the property expropriated, and the fact that the parking lot and loading area were unique and indispensable to the owner's marina. Without the lot and loading area, the marina business would essentially be worthless. *Id.* at 703.

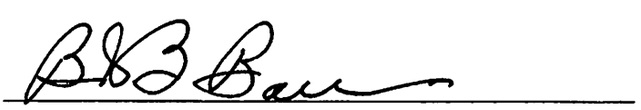
The situation here is much more egregious because St. Bernard isn't merely taking a portion of VDP's land and business as in *Constant*, it is expropriating its entire interest and business for the benefit of Associated Terminals. The amount awarded less than half of what St. Bernard's own expert engineer testified was the cost to replace the improvements alone. VDP's original writ application details the record in this case which demonstrates the unique nature of its land, and how the expropriated property is essential to VDP's business.

CONCLUSION

The Court should grant the original writ application of VDP, and review and reverse the judgment of the Court of Appeal.

DATED: March 10, 2017.

Respectfully submitted,



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VERIFICATION AND CERTIFICATE OF SERVICE

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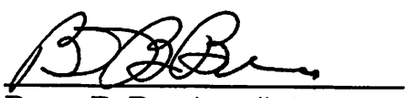

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