SUPREME COURT
STATE OF LOUISIANA

No. 17-C-434

SAINT BERNARD PORT, HARBOR & TERMINAL DISTRICT,
Respondent,

versus

VIOLET DOCK PORT, INC., LLC,
Applicant.

Application for Writ of Certiorari to the Louisiana Supreme Court from the
Fourth Circuit Court of Appeal, No. 2016-CA-0096,
(Consolidated with Nos. 2016-CA-0262 and 2016-CA-0331)
Judges Love, Belsome, and Lobrano,
and from the 34th Judicial District Court, Parish of St. Bernard,
State of Louisiana, No. 116-860, Division "E"
Honorable Jacques A. Sanborn, Judge Presiding

CIVIL PROCEEDING

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF WRIT APPLICANT VIOLET DOCK PORT, INC., LLC

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Pursuant to Supreme Court of Louisiana Rule 12, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Applicant Violet Dock Port, Inc., LLC. This brief amicus curiae is conditionally submitted with the accompanying motion seeking leave to file an brief amicus curiae.

INTEREST OF AMICUS CURIAE

PLF was founded over 40 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF attorneys have participated as lead counsel or amicus curiae in several landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See*, *e.g.*, *Horne v. Department of Agriculture*, __ U.S. __, 135 S. Ct. 2419 (2015); *Koontz v. St. Johns River Water Management District*, __ U.S. __, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, __ U.S. __, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141 (1987). PLF has offices in Florida, California, Washington, and the District of Columbia, and regularly litigates matters affecting property rights in state courts across the country. PLF believes its perspective and experience with property rights litigation will aid this Court in the consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Eminent domain is the sovereign power to take private property without the owner's consent in certain limited circumstances. *See Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 307 (1795) (noting eminent domain's origin in the "absolute despotic power" of the monarch). Because this awesome power operates in derogation of property rights, the nation's founders placed two key restrictions on its exercise: that government shall not take property unless it is for a valid public use and just compensation is paid. U.S. Const. amend. V; La. Const. art. I, § 2; *see also State, Through Dep't of Highways v. Jeanerette Lumber & Shingle Co., Ltd.*, 350 So. 2d 847, 855 (La. 1977). Violet Dock Port's application for a writ of review raises an important issue concerning the protections guaranteed by the Public Use Clause of the Louisiana Constitution. La. Const. art. I, § 4(B). Specifically, the application asks whether the Public Use Clause authorizes government entities like St. Bernard Port, Harbor, & Terminal District (St. Bernard) to expropriate private property solely for "economic development" purposes. For the reasons set forth in the application and Judge Lobrano's dissenting opinion below, it does not. La. Const. art. I, § 4(B)(3) (prohibiting economic development takings). And for the policy reasons argued herein, it *should* not.

A rule allowing the government to expropriate private property for economic development undermines the purpose of the Public Use Clause by endorsing what are effectively prohibited private takings. This point is best exemplified by the United States Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which was met with outrage from a vast majority of Americans, spanning the geographic, political, and social spectrum. Ilya Somin, *The Grasping Hand: Kelo v. City of New London & the Limits of Eminent Domain*, 139 (The University of

Chicago Press, 2015). In that case, the U.S. Supreme Court held that the City of New London could lawfully condemn 115 privately-owned properties and homes in the hopes that private interests would redevelop the neighborhood into an office park with hotels and restaurants, resulting in more property taxes and jobs for the community. In response to that shocking decision, forty-four states—including Louisiana—enacted laws or amended their state constitutions to strengthen protections against that particular type of eminent domain abuse. Dana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L.J. Forum 82, 84 (2015) (citing La. Const. art. I, § 4 (2006)). And seven state high courts rejected *Kelo*'s reasoning in interpreting that their state constitutions do not permit the use of eminent domain powers for private development. *Id.* at 88. Despite this heightened awareness of eminent domain abuse after *Kelo*, the decision below construed Louisiana's Constitution to provide ports with "exceptionally broad" eminent domain power, including the power to take over one private business and hand it over to another private company—all in the name of economic development. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2016-0096, slip op. pp. 4, 6-7 (La. App. 4 Cir. 12/14/16) (construing La. Const. art. VI, § 21 to except public ports from the prohibition against economic development takings).

As demonstrated by *Kelo* and other similar cases, the economic development rationale is frequently used to circumvent the constitutional prohibition against private takings. Moreover, that rationale is easily gamed to benefit the rich and politically connected at the expense of poor and minority communities. This Court should take review of this case to make clear that the Public Use Clause does not allow takings solely for economic development purposes. By construing the Public Use Clause narrowly, this Court will minimize the potential for eminent domain abuse.

ARGUMENT

I

THE COURT OF APPEAL'S DECISION UNDERMINES THE LIMITATIONS THAT THE PUBLIC USE CLAUSE PLACES ON GOVERNMENT EMINENT DOMAIN POWERS

The lower court's conclusion that economic development, standing alone, is a legitimate public purpose eliminates any meaningful protection against eminent domain abuse. Indeed, the plain intent of the Public Use Clause is to guard against private takings.[1] And yet, the argument that economic development is a public purpose rests on the belief that property, once transferred to a new owner, might lead to some economic benefit, like increased employment or tax revenue. Ilya Somin, *The Case Against Economic Development Takings*, 1 N.Y.U. J. L. & Liberty 949, 950 (2005). Without some additional, legitimate public use rationale, nearly any compelled transfer of property from one party to another could be justified as economic development—particularly where property is transferred from a poor owner to a wealthier person. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 170 (Harvard University Press, 1985).

A stark example of this brand of eminent domain abuse arose in 1981, when Detroit condemned the Poletown neighborhood for the benefit of the General Motors Corporation,

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[1] *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-89 (1798) ("[A] law that takes property from A, and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers . . . To maintain that our Federal, or State, Legislature possesses such power, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.").

promising that a new automobile factory would create some 6,000 jobs and alleviate a crushing economic recession. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 458 (Mich. 1981); *see also* Jeannie Wylie, *Poletown: Community Betrayed* (1989). After heated protests and a hurried decision by the Michigan Supreme Court upholding the condemnation for economic development purposes (*Poletown*, 304 N.W.2d at 459), the city razed the established working-class neighborhood to make way for an auto plant that never created the promised jobs. Wylie at 230. Recognizing its mistake years later, the Michigan Supreme Court overruled its much disgraced decision in *Poletown*, the Michigan Supreme Court, explaining:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. Poletown's [economic development] rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Hathcock v. Wayne Cty., 684 N.W.2d 765, 786 (Mich. 2004); *see also City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (citing *Hathcock*'s criticism of economic development positively).

Kentucky and Illinois's Supreme Courts have also concluded that the economic development rationale provides no logical limits on the exercise of eminent domain to accomplish private takings. The Kentucky Supreme Court noted that every new legal business provides some sort of benefit that could be described as economic development. *City of Owensboro v. McCormick*, 581 S.W.2d 3, 8 (Ky. 1979) (quoting 26 Am. Jur. 2d Eminent Domain § 34, at 684-85 (1966)). Thus, if mere

economic development is a public purpose, "there is no limit that can be drawn." *Id.* The Illinois Supreme Court dismissed the economic development rationale by explaining: "If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of [an interest group's] ability to develop land cannot justify a surrender of ownership to eminent domain." *Sw. Ill. Dev. Auth. v. Nat'l City Envtl.*, 768 N.E.2d 1, 10 (Ill. 2002).

The court of appeal's conclusion that economic development, without any meaningful limitation, is a legitimate public purpose follows the same logic as *Poletown*, and if allowed to stand will lead to the very type of private taking that the Public Use Clause is intended to prevent. *See West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 537 (1848) ("The public purpose for which the [eminent domain] power is exerted must be real, not pretended."). Review of this important constitutional question is both warranted and necessary.

II

"ECONOMIC DEVELOPMENT" TAKINGS ARE FREQUENTLY HARMFUL TO THE PUBLIC

Review by this Court is additionally warranted because the court of appeal failed to consider the adverse public consequences of its decision. Beyond the obvious harms resulting from unrestricted eminent domain power, economic development takings are inherently unjust because they encourage private interests to game the government's power to their own benefit and often at the expense of poor and minority communities.

A. The "Economic Development" Rationale Encourages Rent Seeking

In jurisdictions that allow "economic development" takings, state and local governments routinely condemn private property for redistribution to private interests, particularly businesses which use the property for their own profits.[2] Economists call this practice "rent seeking": private interests try to gain control of the eminent domain power and use it for their own benefit at the expense of the public. Thomas W. Merrill, *Rent Seeking & the Compensation Principle*, 80 Nw. U. L. Rev. 1561, 1577 (1986) ("If the prior distribution of wealth can be changed by the state, . . . then the resources of society will be consumed in a factional struggle to capture the state apparatus in order to obtain benefits for one faction at the expense of everyone else."). This practice is problematic because once interest groups gain government powers, they may use them to impose burdens on the public—including small homeowners and small businesses. *See* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (University of Michigan, 1962), The Online Library of Liberty, Sept. 2011, at 206[3] ("interest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups"). In the eminent domain context, interest groups will use their government connections' condemnation power to transfer other people's property to themselves. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 85 (1998).

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[2] For a list of cases where private property has been taken for the benefit of industrial and corporate interests, *see* Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to 'Fulfill their Unique Role'? A Reply to Professor Dyal-Chand*, 31 U. Haw. L. Rev. 423 at 467, nn.185-203 (2009).

[3] http://files.libertyfund.org/files/1063/Buchanan_0102-03_EBk_v6.0.pdf.

Whenever the government is given unrestrained eminent domain power, the stage is dressed for rent seeking. Interest groups will often invest money in lobbying the government to condemn private property because it is cheaper to do so than negotiating with property owners for their land. *See* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 173-74 (1971). Also, "[e]minent domain almost always generates a surplus—a resource's value after condemnation is almost always higher than before. The present compensation formula allocates 100% of this surplus to the condemnor, and none to the condemnee." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 85 (1986). Therefore, interest groups have an incentive to use eminent domain because they stand to profit from its use.

Unfortunately for property owners, rent seeking is difficult to stop because government bodies are willing to capitulate to interest groups in exchange for money and political support. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 230 (1986) ("Interest groups influence the political process by such overt methods as promises of political support, campaign contributions, and outright bribes . . . ."). Moreover, a condemned landowner often lacks the individual stake to mount a counter-lobbying effort against eminent domain abuse because costs are often widely dispersed between many landowners while the benefits are concentrated to favor the rent seeker. *See* Kochan, *supra*, at 81.

Rent seeking is inherently unjust because it results in a citizen losing his or her property based on an interest group's success at lobbying. Professor Cass Sunstein has aptly explained that "government action [should] result [] from a legitimate effort to promote the public good rather than

factional takeover." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1690-91 (1984). The Constitution's framers were hostile towards naked preferences because they feared "that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another." *Id.* Indeed, the state legislature amended the Constitution in order to restrict this type of eminent domain abuse: taking from the politically weak to give to the well connected. *See New Orleans Redevelopment Auth. v. Burgess*, 2008-1020, p. 13 (La. App. 4 Cir. 7/8/09); 16 So. 3d 569, 578-79 (discussing post-*Kelo* debates regarding amending Louisiana's Constitution).

B. "Economic Development" Takings Often Benefit the Wealthy at the Expense of Poor and Minority Communities

Economic development takings are also harmful to the public interest because they disproportionately impact poor and minority communities—the very people who are the least able to oppose a condemnation action. Writing in dissent in *Kelo*, Justice O'Connor discussed how politically connected groups, including large corporations and development firms, would use their powers to victimize the weak if eminent domain could be used for mere economic development. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Justice Thomas similarly observed that the poor are the least likely to "put their lands to the highest and best social use [and] are the least politically powerful." *Id.* at 521 (Thomas, J., dissenting). Accordingly, the poor would be susceptible to condemnation if economic development is a valid public use. Justice Thomas also added that minority communities would be disproportionately harmed by a broad definition of public use, observing that after the Court had first upheld the use of eminent domain to redevelop blighted areas in *Berman v. Parker*, 348 U.S. 26 (1954), cities rushed to draw plans for downtown development.

Id. at 522. Of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, 63% were racial minorities. *Id.*; *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Pol'y Rev. 1, 6 (2003) ("Blight was a facially neutral term infused with racial and ethnic prejudice.").

Considering the demonstrably unfair history of eminent domain use, Justices O'Connor and Thomas's skepticism towards promised economic development was warranted. Indeed, since *Kelo*, new empirical evidence demonstrates that Justices O'Connor and Thomas correctly assessed how eminent domain would devastate poor and minority communities. Dick M. Carpenter & John Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, Urb. Studies, Vol. 46(11), p. 2447, Oct. 2009. Even if explicit discrimination no longer poses major problems, poor and minority communities still face the brunt of eminent domain use. Communities targeted by eminent domain tend to have more ethnic or racial minorities, have less education, and earn significantly less income than surrounding communities unaffected by condemnations. *Id.* at 2455. Those who are displaced by eminent domain use are also more likely to be renters and live at or below the federal poverty line. *Id.* at 2456.

It is not surprising that poor and minority communities are more vulnerable to eminent domain abuses. To begin, it is cheaper to condemn poor people's property. James Freda, *Note, Does New London Burn Again?: Eminent Domain, Liberty & Populism in the Wake of* Kelo, 15 Cornell J.L. & Pub. Pol'y 483, 504 (2006). This fact provides local governments a bad incentive to condemn poor and minority communities because if they "are concerned with improving their tax bases, it simply is not economical to pay attention to the needs or desires of the poor." Paul

Boudreaux, *Eminent Domain, Property Rights, & the Solution of Representation Reinforcement*, 83 Denv. U. L. Rev. 1, 47 (2005). Planning boards are also typically too smart and savvy to target the middle and upper classes because they are more likely to have the resources to challenge actions to acquire their property. *See Grasping Hand*, *supra*, at 101. Therefore, planning boards, if given the power to condemn land for economic development purposes, will continue to target poor and minority groups because, lacking resources, they are less likely to challenge eminent domain abuse. *Id.*

C. Redevelopment Plans Frequently Fail

As a practical matter, government involvement in economic development plans shifts undue risk onto the public because redevelopment plans frequently fail. Gideon Kanner, *We Don't Have to Follow Any Stinkin' Planning—Sorry About That, Justice Stevens*, 39 Urb. Law. 529, 536 (2007). Quite often, government officials sell their redevelopment visions by overestimating the benefits of such projects—sometimes, they do so because they do not understand how certain plans will affect the economy. *Cf. Garrett Johnson, The Economic Impact of New Stadiums and Arenas on Cities*, 2011 U. Denv. Sports & Ent. L.J. 1, 14-15 (2011) (explaining how local officials are often overly optimistic that sporting events will increase revenue for local economy because they do not consider how spending money on sporting events is usually offset by reduced spending in other areas of entertainment). Moreover, redevelopment plans do not necessarily lead to the benefits they promise because there is no legal mechanism to require a condemnor to follow its redevelopment plan. Kanner, *supra*, at 539. After the government or another party acquire condemned land, they will own it in fee simple and "are free to resell it or put it to any lawful use they choose." *Id.* at 540.

Kelo is an example of such a misleading and harmful project plan. Hoping to capitalize on Pfizer's plan to build a nearby facility, New London Development Corporation (NLDC) condemned numerous homes in the Fort Trumbull neighborhood to build new facilities, including a marina, park, hotel, office space, and upscale housing, in hopes of revitalizing an economically depressed area. Shortly after the property owners lost their case at the Supreme Court and surrendered their homes, Pfizer abandoned its plans to operate its New London facility. *Grasping Hand*, *supra*, at 235. Accordingly, NLDC did not carry out their redevelopment plans. *Id.* Nor have other redevelopment plans materialized. *Id.* Eleven years after *Kelo* was decided, the site of the former Fort Trumbull homes sits as an empty lot. *Id.* *Kelo* has become an embarrassment for those involved. Connecticut Supreme Court Justice Richard Palmer—a member of the four judge majority that permitted the condemnation at state court—subsequently apologized to one of the former homeowners, Susette Kelo, for voting to allow the taking. *Id.* at 234. Justice Palmer told Kelo that he "would have voted differently" had he known what would happen to her home and community. *Id.*

Another infamous failed redevelopment project involved Chavez Ravine and the Los Angeles Dodgers. In the 1950s, Los Angeles condemned Chavez Ravine, a Mexican-American community, in order to build low-cost housing. *Kanner*, *supra*, at 545. After the project fell through, Los Angeles did not return the property to the affected homeowners, but gave the land to the Brooklyn Dodgers in order to build a stadium instead. *Id.* Though some homeowners sought to have their property returned since the property was not being used for low-cost housing, they were unsuccessful. *Id.* at 546. The Dodgers went forward and built their stadium, and today, some

of the land from Chavez Ravine remains unused. *Id.*

Steve Anthony's story also shows how eminent domain projects ultimately come down to brute government force, even without a corresponding public benefit. Steve Anthony owned a home across the street from the Hollywood Bowl in California. Wendy Horowitz, *Here Lies Liberty: Steve Anthony and his fight against eminent domain*, Central Library Blog (Apr. 2, 2014).[4] Motion picture industry heavyweights—like Gregory Peck, Mary Pickford, and Walt Disney—wanted Anthony's home for land to build a museum showcasing the history of movies, radios, and television. *Id.* Accordingly, Los Angeles County condemned Steve Anthony's home to give it to the A-list stars. *Id.* After the California Court of Appeal held that condemnation was legal and the United States Supreme Court denied certiorari, *County of Los Angeles v. Anthony*, 224 Cal. App. 2d 103 (1964), *cert. denied*, 376 U.S. 963 (1964), Los Angeles County sheriffs sought to remove Anthony from his home. Horowitz, *supra*. The sheriffs and Anthony were locked in a multiple-week standoff that attracted the surrounding community and media attention. Once the sheriffs were able to make their way into Anthony's home, they arrested him, removed him from his home, and tore down his quaint "storybook cottage"-style house. *Id.* But like so many public use projects, the motion picture museum plans fell through and nothing was ever built on the property. *Id.*

Violet Dock Port's property sits in a similar position as Susette Kelo's home, the homes in Chavez Ravine, and Steve Anthony's home. There is no guarantee that the economic benefits that St. Bernard cited for expropriating Violet Dock Port's property will ever materialize. In the private

[4] http://www.lapl.org/collections-resources/blogs/central-library/here-lies-liberty-steven-anthonys-fight-against-eminent.

market, companies must weigh that risk when deciding whether to purchase an established business. But when companies can use eminent domain to compel the sale of private property they are freed from many of the costs present in a private transaction. Those costs and risks, however, do not simply disappear—they are borne by the former owner of the condemned property and the public at large.

CONCLUSION

This Court should grant the writ to ensure that the Public Use Clause continues to provide meaningful protections to the public and reject economic development as a basis to justify eminent domain.

DATED: March 10, 2017.

Respectfully submitted,

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