FOURTH CIRCUIT COURT OF APPEAL

STATE OF LOUISIANA

Nos. 2016-CA-0096 c/w 2016-CA-0262 and 2016-CA-0331

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

v.

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

On Appeal from Judgments rendered July 31, 2015 and December 1, 2015
by the 34th Judicial District Court for the Parish of St. Bernard
Civil Action No. 116-860
Honorable Jacques A. Sanborn, Judge Presiding

CIVIL PROCEEDING

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

GORDON, ARATA, McCOLLAM DUPLANTIS & EAGAN, LLC
A. Gregory Grimsal (La. Bar No. 6332)
201 St. Charles Ave., 40th Floor
New Orleans, Louisiana 70170-4000
Tel: (504) 582-1111
Fax: (504) 582-1121
Email: ggrimsal@gordonarata.com

Local Counsel for *Amicus Curiae*

INSTITUTE FOR JUSTICE
Arif Panju (TX Bar No. 24070380)*
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Attorney for *Amicus Curiae*
**Pro Hac Vice* Motion Pending

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Case

CONSTITUTIONAL PROVISIONS

STATUTES and LEGISLATION

OTHER PUBLICATIONS

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 on behalf of 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 eminent domain abuse. The Institute represented the homeowners in the highly controversial *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the U.S. Supreme Court upheld the use of eminent domain solely for private economic development. The Institute also represented the homeowners in the landmark *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. Accordingly, the use of eminent domain at issue in this case is of keen interest to IJ and its members.

No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person or party other than amicus, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Court should reverse the ruling below because it, if left standing, will do lasting damage to the Louisiana Constitution's protections against the abuse of eminent domain for private use. Following the U.S. Supreme Court's ruling in *Kelo v. City of New London*[1]—a dramatic 5-to-4 loss for constitutional rights, with sweeping language that virtually removed federal constitutional protection of private property under the Takings Clause—state constitutions, including Louisiana's, became the primary bulwark protecting property rights against a growing number of private-use takings. And across the country, state supreme courts have generally rejected *Kelo* and recognized that their constitutions provide greater protection against these takings than does the federal constitution. Furthermore, they have enforced these protections to stop local governments, emboldened by the *Kelo* decision, from replicating the result of that case.

The rejection of *Kelo* by state supreme courts is a significant national trend, with two components that are especially relevant here. First, state supreme courts have narrowed the sphere of what constitutes a "public use" in the eminent domain context, and have repeatedly rejected condemnations that benefit private parties. Second, and relatedly, these courts have refused to blindly accept local governments' public-use determinations at face value. Instead, these courts rely on

[1] 545 U.S. 469 (2005).

their own scrutiny of record evidence to determine if it supports the existence of a permissible public use, or whether the evidence instead undermines the government's public-use justifications. As discussed below, these are two consistent features that serve as hallmarks of post-*Kelo* state court jurisprudence.

The trial court's decision stands in conflict with the post-*Kelo* national trend. While state supreme courts across the country have narrowly construed what constitutes a permissible "public use," the trial court below sanctioned a taking based on a broad construction of "public use" that hinges on a *private* lessor operating and developing the condemned property. The trial court's seemingly unquestioned reliance on the public-use justifications offered by Respondent St. Bernard Port, Harbor & Terminal District also demonstrates a failure to examine and scrutinize the evidentiary record.

Failing to reverse the trial court would add Louisiana to the very small minority of states—most notably, New York—that embrace the constitutional damage *Kelo* caused. The Institute for Justice respectfully requests that this Court decline Appellee's invitation to do so, and reject the expropriation of Violet Dock Port's property using eminent domain.

ARGUMENT

I. STATE HIGH COURTS HAVE LED A NATIONAL TREND OF REJECTING *KELO*.

As noted above, the anti-*Kelo* trend has two features that are particularly relevant here. First, state supreme courts are generally rejecting *Kelo*'s expansive view of "public use." They are also recognizing that making an independent examination and determination of whether there is an actual public use—as opposed to simply relying on the assertions of condemning government entities—is critical when the asserted public use for the exercise of eminent domain is dependent on, or benefits, a private party.

Section I proceeds with a discussion of the following: In Part A, amicus highlights how, in the wake of *Kelo*, the vast majority of state high courts addressing the definition of "public use" are narrowly construing that term under their state constitutions and post-*Kelo* statutes. Amicus then examines decisions from New York, whose courts have—like the trial court below—adopted the minority view that an expansive definition of "public use," a la *Kelo*, is appropriate. Part B explains how state high courts are generally rejecting *Kelo*-style deference and instead closely scrutinizing the evidentiary record in eminent domain cases, especially where, as here, a taking benefits a private party. Amicus then turns to New York, which again serves as a notable exception because its courts—like the trial court below—have embraced *Kelo*-style deference. In Part C,

amicus explains how this post-*Kelo* national trend finds its roots in pre-*Kelo* jurisprudence. Finally, Part D outlines how state legislatures have supplemented the judicial reaction to *Kelo*, bringing the total number of states that have added protections against private-use takings since *Kelo* to 47. Only three states (New York, Arkansas, and Massachusetts) offer no protections against takings.

A. After *Kelo*, State Courts Increasingly Apply A Narrow Construction Of "Public Use."

In the wake of *Kelo*, several state supreme courts were asked to consider whether uses of eminent domain that conferred benefits to private parties could be squared with their state constitutions. Others were asked to construe newly enacted protections for property owners under post-*Kelo* statutes. The response was overwhelming. State high courts repeatedly rejected *Kelo*-style takings by declining invitations to broadly construe "public use" and sanction takings benefitting private parties. Below, amicus describes the judicial reaction to *Kelo* by state supreme courts that have addressed private takings under the guise of "public use." Sections 1 through 8 illustrate how state high courts limit "public use" post-*Kelo*. Section 9 describes why New York's highest court is the most striking exception to the national trend, with its full embrace of *Kelo*'s broad definition of "public use," an approach consistent with that taken by the trial court below.

1. Ohio

In a resounding repudiation of the U.S. Supreme Court's decision in *Kelo*, the Ohio Supreme Court unanimously held that it violates the Ohio Constitution to take property from homeowners using eminent domain to make way for private redevelopment. *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006). Ohio's high court recognized that "defining the parameters of the power of eminent domain is a judicial function"; accordingly, courts "remain free to define the proper limits of the doctrine." *Id*. at 1137 (citation omitted). Notably, the court held that "economic or financial benefit alone is insufficient to satisfy the public-use requirement"; indeed, "any taking based solely on financial gain is void as a matter of law, and the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community." *Id*. at 1142.

The taking in *Norwood*—as in the case presently before this Court—involved the exercise of eminent domain for economic development resulting in private financial gain. In such situations, "[a] court's independence is critical," and 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 resolved in favor of the property owner." *Id*. at 1139.

2. Oklahoma

The Oklahoma Supreme Court also refused to broadly construe what constitutes a "public use" under that state's constitution and expressly rejected *Kelo*. *See Bd. of Cty. Comm'rs of Muskogee Cty. v. Lowery*, 136 P.3d 639 (Okla. 2006). *Lowery* concerned an effort by a local government to condemn property for a water pipeline benefitting a private utility. The county justified its condemnation in similar fashion to how the trial court here justified the expropriation of Violet Dock Port's property: solely on the ground that the private utility would create jobs and enhance local tax revenue. *Compare id.* at 647–48 *with* R.16-331, V.7, 1477–78. But, the government failed to persuade Oklahoma's high court that private property could be taken using eminent domain for the sole purpose of economic development. *Id*. at 650–51.

In declaring this *Kelo*-style taking unconstitutional, the Oklahoma high court recognized two distinct principles. First, that the court must "yield to [its] greater constitutional obligation [of] protect[ing] and preserv[ing] the individual fundamental interest of private property ownership." *Id*. And second, the court held that "the power of eminent domain should be exercised with restraint," and that what constitutes public use must be "construe[d] . . . narrowly . . . in this context." *Id*. at 647. As a general rule, the high court "construe[s] [its] state

constitutional eminent domain provisions "strictly in favor of the owner and against the condemning party." *Id.* at 646 (citation and quotation marks omitted).

Like the court in *Norwood*, the Oklahoma Supreme Court was particularly troubled by the logic of *Kelo*. The court recognized that by extinguishing any distinction between public and private uses of land, the *Kelo* majority had, in effect, held that every piece of property in the nation, no matter how safely and peaceably used by its owner, is subject to appropriation whenever someone richer comes along promising to devote the land to a higher economic use. The Oklahoma Supreme Court rejected *Kelo* because the state's Public Use clause would be rendered meaningless if private economic uses of land were deemed public as well.

3. Rhode Island

In *Rhode Island Economic Development Corp. v. The Parking Co.*, the Supreme Court of Rhode Island refused to apply an expansive definition of "public use" when rejecting an attempt to condemn an easement over the interior of a privately-owned airport parking facility. 892 A.2d 87, 93 (R.I. 2006). The Rhode Island Economic Development Corporation used its condemnation power in an effort to gain control of the property even though it could have acquired the facility using a purchase option. *Id.* at 104–05. The condemning authority argued the taking was valid because condemnations for airport parking constituted a public

use that could be squared with the state's condemnation statutes. *Id*. at 102. But Rhode Island's high court recognized that "the taking . . . was not a proper exercise of the state's condemnation authority," but rather, "designed to gain control of [private property] at a discounted price." *Id*. at 107. The court refused to "dissect a legislative declaration" to extract a "public use," or "engage in a syllogistic exercise" in order to conclude the taking was valid. *Id*. at 103.

4. New Jersey

In *Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, the town of Paulsboro, New Jersey designated harmless rural land as blighted—as a precursor to eventual condemnation for economic development—because its unimproved condition ostensibly rendered it "not fully productive" under the state redevelopment statute. 924 A.2d 447, 449 (N.J. 2007). Interpreting the state's constitution and condemnation statute, the New Jersey Supreme Court rejected the notion that "public use" is so malleable as to allow the taking of 63 acres of private property merely because the property can be put to a higher economic use. *Id*. at 457–460. The high court recognized that "[i]f such an all-encompassing definition of 'blight' were adopted, most property in [New Jersey] would be eligible for redevelopment." *Id.* at 460.

5. Utah

The Supreme Court of Utah recently invalidated a taking under the state's eminent domain statutes because the claimed "public use" was being accomplished by a third party, not the condemning authority. *See Salt Lake City Corp. v. Evans Dev. Group, LLC*, 369 P.3d 1263 (Utah 2016). Consistent with limiting the government's ability to invoke "public use" to take property, the court reviewed Utah's public-use requirement and concluded Salt Lake City Corp. could not condemn the land it sought: even though the ultimate proposed use of the property was to house an electric substation, it would be a third-party electric company that would be in charge of its operations, and thus its public use. *Id*. at 1267. Utah's high court carefully examined the relevant statutes and concluded that the condemning authority must not only maintain ownership of the condemned property, but also "be in charge of the public use—not a third party." *Id*.

6. Missouri

In 2013, the Supreme Court of Missouri reviewed the "public use" requirement contained in a post-*Kelo* statute, noting the change in law was aimed at "rein[ing] in the 'public use' of economic development approved in *Kelo*." *State ex rel. Jackson v. Dolan*, 398 S.W.3d 472, 478 (Mo. 2013). *Dolan*, as with the case at bar, involved a port authority seeking to expand its capacity using eminent domain. *Id.* at 475. And like St. Bernard Port, Harbor & Terminal District ("St.

Bernard Port") here, the condemning authority in *Dolan* intended to "lease all of the condemned land out to private entities," including to a prospective lessor wishing to develop the condemned property by expanding its operational capacity. *Id.* "None of the facilities would be open to the general public" and "[t]he private entities would receive the income derived from these facilities." *Id.* The high court, recognizing that the condemnor bore the burden of proving its condemnation was not solely for economic development, rejected the taking because the port authority's actions were undergirded by its desire to promote economic development, and nothing more. *Id.* at 480–82.

7. Pennsylvania

The Supreme Court of Pennsylvania narrowly construes "public use" in the eminent domain context. In *Middletown Township v. Lands of Stone*, a township sought to condemn a private farm to purportedly provide public recreational space under a condemnation law that recognized such a purpose to be a valid public use. 939 A.2d 331, 336 (Pa. 2007). But Pennsylvania's high court limits what constitutes a valid "public use" to takings wherein the public is the "primary and paramount beneficiary of [eminent domain's] exercise"; Stated differently, "the *true* purpose must primarily benefit the public." *Id.* at 337 (emphasis in original) (citation omitted). But when it examined the record, the court found that the township's actual purpose was to preserve open space. *Id.* at 338–39. "[I]t [was]

not sufficient that some part of the record support[ed] that recreational purposes were put forth"; rather, courts must find that the asserted justification was "real and fundamental, not post-hoc or pre-textual." *Id*. at 338. Because the evidence showed the true purpose for the taking did not primarily benefit the public, the high court rejected the taking.

8. South Dakota

The Supreme Court of South Dakota also made clear its state constitution contains stricter "public use" requirements than does the U.S. Constitution. *See Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006). In the course of reviewing a regulatory takings challenge to a law that allows the shooting of small game from a public right-of-way, the state's high court went out of its way to address *Kelo*. After noting that *Kelo* recognized the individual states were free to impose stricter "public use" requirements than the federal baseline, South Dakota's high court stated it "has consistently done so." *Id*. The state's long-standing "use by the public test" requires that its courts insist on a "use or right of use on the part of the public or some limited portion of it [.]" *Id*. (quoting *Ill. Cent. R.R. Co. v. E. Sioux Falls Quarry Co.*, 144 N.W. 724, 728 (S.D. 1913)) (alteration in original).

9. New York

New York is an outlier that bucked the national trend and is embracing *Kelo*'s expansive view of "public use." New York's high court provides virtually

no protection against eminent domain. In stark contrast to state supreme courts that narrowly define "public use," New York state courts have instead chartered a *Kelo*-centric path that allows the use of eminent domain for, seemingly, any private use. And as more fully explained in Part II, *infra*, the trial court's decision in the case at bar was much closer to this outlier state than to those forming the overwhelming trend against *Kelo*.

The scope of "public use" in New York has broadened to the point where the state's high court is unwilling to substantively define what public use actually is or, more importantly, what it is not. In *Goldstein v. New York State Urban Development Corp.*, the court reasoned that, when determining whether the properties at issue were blighted and therefore subject to razing for public good, "lending precise content to these general terms has not been, and may not be, primarily a judicial exercise," thus subjecting communities to demolition for the purpose of constructing a basketball arena and high-rises. 921 N.E.2d 164, 172 (N.Y. 2009). Similarly, in *Kaur v. New York State Urban Development Corp.*, the court approved the condemnation of seventeen acres of private property, including the property of small business owners, in order to contribute to the expansion of a private university. 933 N.E.2d 721, 724 (2010). In that case, the court reasoned that benefits such as creating open space and improving the infrastructure of the area were adequate "public use" to justify taking private property for the benefit of

a private enterprise. *Id.* at 729. Further, in *Rocky Point Realty, LLC v. Town of Brookhaven*, the court determined that "[t]he term 'public use' is 'broadly defined to encompass any use which contributes to the health, safety, general welfare, convenience or prosperity of the community,'" i.e., anything, including the enhancement of a golf course. 828 N.Y.S.2d 197, 198–99 (App.Div. 2007).

***

Post-*Kelo*, state supreme courts across the country are narrowly construing "public use" and rejecting takings that benefit private parties. By contrast, the judicial reaction to *Kelo* by New York state courts illustrates the damage a broad construction of "public use" can have on constitutional protections against the abuse of eminent domain for private gain. As explained in Part II, allowing the trial court's decision to stand threatens to replicate that damage here in Louisiana.

B. State Courts Closely Scrutinize Takings That Benefit Private Entities.

Policing takings that confer private benefits requires scrutinizing the evidentiary record and making an independent determination as to whether there exists a permissible "public use." As part of the overwhelming anti-*Kelo* trend, state supreme courts have recognized this fact, and they have largely rejected *Kelo*-style deference. As the cases discussed below make clear, the national trend reflects a refusal to accept a condemning authority's public-use justifications at face value when the exercise of eminent domain benefits a private entity. Instead,

state supreme courts undertake an independent and close examination of the evidence to determine if it supports an allowable "public use." Sections 1 through 8 illustrate how state supreme courts do just that. In stark contrast, New York's failure to do the same is explained in Section 9; this outlier state demonstrates that when courts accept public-use justifications offered by the government at face value—as the trial court below did—there is no check on takings of private property for private gain.

1. Ohio

In *Norwood*, the Supreme Court of Ohio reminded its lower courts that they should not engage in "rote deference to legislative findings in eminent-domain proceedings," but rather, preserve the judiciary's "role as guardian of constitutional rights and limits." 853 N.E.2d at 1138. Ohio's high court refused to displace its own evidentiary inquiry with "speculation as to the future condition of the property" into its decision, and found no public use supporting the taking. *Id*. at 1123, 1146. The lesson of *Norwood* is that meaningful judicial review is essential to preserving our constitutional rights. *Id*. at 1137–40. Courts are not, in other words, beholden to the self-serving characterization that local governments give their own takings.

2. Oklahoma

The Oklahoma Constitution expressly provides that "in all cases of condemnation of private property . . . the determination of the character of the use shall be a *judicial* determination." *Lowery*, 136 P.3d at 647 n.12 (citing Okla. Const. art. 2 § 24) (alternation in original). Accordingly, the Supreme Court of Oklahoma scrutinized the evidentiary record in *Lowery* and concluded the requisite "public use" could only be realized by first sanctioning a taking for "a private use." *Id.* at n.14. The high court refused. Simply stated, on the record before the court, "[t]he law [did] not support such a cart-before-the horse type extension of the [government's] general eminent domain power." *Id.*

3. Rhode Island

Unlike in *Kelo*, the Supreme Court of Rhode Island engages in independent scrutiny of the record to see if an actual public use justifies a taking. For example, the proposed condemnation in *The Parking Co.* involved Rhode Island's high court refusing to blindly accept the Rhode Island Economic Development Corporation's justifications for condemning, and taking over control of, an airport parking garage; instead, the court scrutinized the record to determine whether the claimed public use was a pretext for other motives. 892 A.2d at 104–07. By comparison, the *Kelo* Court emphasized that courts should not second guess whether or not a condemnation was necessary to achieve a condemning authority's stated goals.

545 U.S. at 488–89. Rhode Island courts reject such a deferential approach: "If a legislature should say that a certain taking was for a public use, that would not make it so; for such a rule would enable a legislature to conclude the question of constitutionality by its own declaration." *The Parking Co.*, 892 A.2d at 101 (citation omitted).

4. New Jersey

The Supreme Court of New Jersey also emphasized the importance of courts engaging in an independent evidentiary inquiry regarding a local government's claim that a taking is for public use. "In general, [the government] must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met."[2] *Gallenthin Realty Dev., Inc.*, 924 A.2d at 465 (noting "the net opinion of an expert" is insufficient). In *Gallenthin*, the high court reviewed the record to invalidate the taking of open land on the basis that the property was not "fully productive" and therefore blighted. *Id*. at 460.

5. Utah

The Supreme Court of Utah also undertakes an independent inquiry of evidence in order to discern whether there is a permissible "public use." In *Salt Lake City Corp v. Evans Development Group, LLC*, the high court scrutinized the

[2] New Jersey's high court was also skeptical because the condemning authority failed to consider the public benefits of not exercising eminent domain and allowing the property to remain in its current state. *See id.* at 465.

evidentiary record in order to identify the true public use. The evidence demonstrated that Salt Lake City Corp. entered into an agreement with Rocky Mountain Power in order to obtain property owned by the power company as part of the city's railroad realignment project; in return, the condemning authority agreed to "make an alternative location immediately available that was equally useful for the construction and operation of a substation." 369 P.3d at 1265. To fulfill its obligation, Salt Lake City Corp. decided to condemn privately-owned property. *Id.* at 1266. Relying on its review of the evidence, the high court ordered the property returned because the condemning authority was not in charge of the public use for the condemned land. *Id.* at 1269.

6. Missouri

The Supreme Court of Missouri relied on its scrutiny of record evidence to invalidate a taking under a post-*Kelo* statute that prohibits economic development takings. *See Dolan*, 398 S.W.3d 472. What the record reflected was that the port authority's "desire to promote economic development undergird[ed] all of its actions in [the] condemnation." *Id*. at 482. Among other things, the evidence showed the taking would improve river commerce, but the only manner in which it would do so is "by drawing more economic development into the area." *Id.* at 482. Nothing in the record demonstrated a purpose "that was in addition to economic development," *id.* at 482–83, and thus the taking was rejected.

7. Pennsylvania

The Supreme Court of Pennsylvania made clear that the government cannot justify the use of eminent domain using "mere lip service to its authorized purpose or [by] act[ing] precipitously and offer[ing] retroactive justification[s]." *Middletown Township*, 939 A.2d at 338. In *Middletown Township*, the high court engaged in an independent judicial inquiry and concluded "the record evidence . . . [did] not support the conclusion of the trial court[.]" *Id.* at 333. As a result, the court rejected the taking. *Id. See also In re Opening Private Rd. for Benefit of O'Reilly*, 5 A.3d 246, 249 (Pa. 2010) (scrutinizing the lower court's determination that taking a private road would "unlock[] the resources of landlocked property.").

8. Maryland

Similarly, Maryland's high court also broke with *Kelo*'s refusal to engage in an independent inquiry to see if a taking really was for a "public use." *See Mayor & City Council of Balt. City v. Valsamaki*. 916 A.2d 324 (Md. 2007). After scrutinizing the record, the court held the "evidence, or lack thereof, . . . [was] not sufficient to demonstrate an immediate public interest necessitating the City's use of quick-take condemnation." *Id.* at 352. And even if the case involved the use of regular condemnation, instead of the quick-take condemnation statute at issue, the

court remained skeptical because "the evidence presented below of public use was sparse." *Id*. at 351.[3]

9. New York

In stark contrast to state high courts that closely examine record evidence, New York's high court serves as the striking exception to the national trend with its full embrace of *Kelo*-style deference. As the cases described below illustrate, New York's state courts adhere to a pattern of virtually no scrutiny, and have decided that they will take condemning authorities completely at their word, and dig no further. In *Goldstein*, the court stated that "[i]t is only where there is no room for reasonable difference of opinion . . . that judges may substitute their views as to the adequacy with which the public purpose of blight removal has been made out for those of the legislatively designated agencies." *Goldstein*, 921 N.E.2d at 172. Further, in *Kaur*, the court continued its posture of complete deference by citing *Goldstein*, restating that "[t]he Constitution accords government broad power to take and clear substandard and insanitary areas for redevelopment. In so doing, it commensurately deprives the Judiciary of grounds to interfere with the exercise." *Kaur*, 933 N.E.2d at 730 (quoting *Goldstein*, 921

[3] Of note, the City of Baltimore's attempt to justify the condemnation in *Valsamaki*—by claiming the taking would facilitate "business expansion"—was unpersuasive, *see id.* at 329; this justification is virtually identical to that cited by the trial court in the case at bar, *see* R.16-331, V.7, 1477-78. (expropriation of Violet Dock Port "would be a logical extension of port services").

N.E.2d at 173) (alteration in original). Finally, in *Rocky Point Realty*, the court accepted the "public use" explanation of the town exercising its eminent domain power to enhance a golf course—with no scrutiny—because "the exercise of the eminent domain power here is 'rationally related to a conceivable public purpose.'" *Rocky Point Realty, LLC*, 828 N.Y.S.2d at 199 (citation omitted).

As discussed in Section II, *infra*, the New York approach—unquestioned deference to a condemning authority's "public use" determination—is troublingly consistent with that taken by the trial court in the case at bar.

***

The judicial reaction to *Kelo* demonstrates the necessity of courts engaging in an independent review of record evidence when reviewing public-use justifications. Failing to do so, as exemplified by New York's highest court, opens the door to abuses of eminent domain for private gain.

C. The Post-*Kelo* Trend Has A Strong Foundation In Several Pre-*Kelo* Cases.

Before discussing how state legislatures have supplemented the national trend led by the courts, it is worth noting that this trend may have been spurred on by *Kelo*, but it also finds a strong foundation in several pre-*Kelo* cases—including a case from South Carolina whose facts are very similar to the facts in the case at bar.

In *Georgia Department of Transportation v. Jasper County*, Jasper County sought to condemn 1,776 acres of land on the Savannah River owned by the Georgia Department of Transportation. 586 S.E.2d 853, 854 (S.C. 2003). The condemnor planned to lease all but forty acres of the condemned property to a private stevedoring corporation to facilitate construction of a maritime terminal. *Id*. The trial court—finding the projected industrial development and economic benefit to the county's citizens was sufficient to constitute "public use"—upheld the taking. *Id*. at 855–56. But the high court reversed in a ruling that reflects the two components of the post-*Kelo* trend discussed above.

The court held that "[t]he involuntary taking of an individual's property by the government is not justified unless the property is taken for public use–a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property."[4] *Id*. at 857. And by scrutinizing the evidentiary record, the court demonstrated that the government's justifications for taking property for the proposed marine terminal did not square with the "public use" requirement in South Carolina's constitution:

> The private lessor . . . will finance, design, develop, manage, and operate the marine terminal. The terminal itself will be a gated facility with no general right of public access; access is limited to those doing business with [the private lessor]. [The private lessor] will have agreements with various steamship lines and will charge

[4] In so holding, the court emphasized that "it is the lease arrangement in the context of a condemnation that defeats [the taking's] validity." *Id.* at 857.

> them per container fees for unloading, storing, and delivering. The marine terminal is considered a "public" terminal simply because it will serve different steamship lines as opposed to a single line or cargo interest.

Id.

Finally, the court noted that "[a]lthough the projected economic benefit . . . [was] very attractive, it cannot justify condemnation" because using eminent domain for such purposes "runs squarely into the right of an individual to own property and use it as he pleases." *Id*. at 856 (citations omitted).

Supreme courts in Illinois, Michigan, and Montana also held that their state constitutions barred economic development takings prior to *Kelo* reaching the United States Supreme Court. *See Sw. Ill. Dev. Auth. v. Nat'l City Envtl. LLC*, 768 N.E.2d 1, 9, 11 (Ill. 2002) (holding that a "contribu[tion] to positive economic growth in the region" is not a public use justifying condemnation); *Cty. of Wayne v. Hathcock*, 684 N.W.2d 765, 770, 788 (Mich. 2004) (invalidating economic development takings under the Michigan Constitution); *City of Bozeman on Behalf of Dep't of Transp. of State v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995) (holding that a condemnation that transfers property to a private business is unconstitutional unless the transfer to the business is insignificant and incidental to a public project). The *Kelo* decision simply served as a catalyst that led to even more state high courts narrowly interpreting what constitutes a permissible "public

use" under their state constitutions (and under post-*Kelo* statutes), and greater judicial scrutiny.

D. Post-*Kelo* Legislative Reforms Supplement The Post-*Kelo* National Trend In State Courts.

The judicial reaction to *Kelo* has been supplemented by state legislatures. The vast majority of states have enacted protections greater than that afforded by *Kelo*. Only a handful of states—Arkansas, Massachusetts, and New York—have left their citizens with the non-protection offered by the U.S. Supreme Court. Both components of the post-*Kelo* national trend—narrowly construing "public use" and greater judicial scrutiny—can be seen in post-*Kelo* legislative reforms across the country.

1. State Legislatures Limited "Public Use" After *Kelo*.

In total, forty-four states increased protection against takings for private use after *Kelo* was decided.[5] Of these, thirty states—including Louisiana— moved to tighten the meaning of "public use" or "public purpose."[6] Eleven states—

[5] *See* Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. F. 82, 84 (2015), http://www.yalelawjournal.org/forum/looking-back-ten-years-after-kelo. Of the six remaining states without constitutional or legislative change, the high courts increased protections against takings for private use, leaving only three states—Arkansas, Massachusetts, and New York—as outliers. *See Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007); *Bd. of Cty. Comm'rs v. Lowery*, 136 P.3d 639, 650–52 (Okla. 2006); *Cty. of Haw. v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 636–54 (Haw. 2008).

[6] LA. CONST. art. I, § 4 (only allowing takings for narrowly defined public purposes, prohibiting takings for "predominant[ly]" private use, for transfers to

private entities, or solely economic development, and restricting sale and lease of property for thirty years); MICH. CONST. art. X, § 2 (excluding economic development and tax revenue enhancement from definition of public use); N.D. CONST. art. I, § 16 (economic development is not a public use); S.C. CONST. art. I, § 13 (restricting takings for economic development); ALA. CODE § 11-47-170(b) (municipalities and counties cannot condemn property for private development or "primarily" to increase tax revenue); id. § 11-80-1(b) (same); ALASKA STAT. ANN. § 09.55.240 (listing permissible public uses and prohibits transfer of condemned property to private persons for economic development without legislative authorization or without other limited exceptions); ARIZ. REV. STAT. ANN. §12-1111 (listing permissible public uses, none of which include economic development); COLO. REV. STAT. ANN. 38-1-101(1)(b)(I) ("'[P]ublic use' shall not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenue."); GA. CODE ANN. § 22-1-1(9) (narrowly defining public use and excluding "economic development" from the definition); IDAHO CODE ANN. § 7-701A (prohibiting takings for economic development and private use); 735 ILL. COMP. STAT. ANN. 30/5-5-5 (placing limits and conditions on acquired property being in private ownership or control); IND. CODE ANN. § 32-24-4.5-1 (requiring property to be used for thirty years for public use, narrowly defining public use, and excluding economic development); IOWA CODE ANN. §§ 6A.21, .22 (prohibiting taking of property for private use without owner's consent); KAN. STAT. ANN. § 26-501a (prohibiting takings for the purpose of selling, leasing, or otherwise transferring to a private entity with some exceptions); *id.* §26-501b (allowing taking for economic development if expressly authorized by the legislature and if the legislature "consider[s] requiring compensation of at least 200% of fair market value to property owners"); KY. REV. STAT. ANN. § 416.675(narrowly defining public use and prohibiting takings for economic development); ME. REV. STAT. ANN. tit. 1, § 816 (generally prohibiting takings for economic development, increases in tax revenue, or transfers to private parties); MINN. STAT. ANN. § 117.012 ("Eminent domain may only be used for a public use or public purpose."); MO. ANN. STAT. § 523.271 (prohibiting takings solely for economic development); MONT. CODE ANN. § 70-30-102 (listing permissible public uses and excluding takings solely for economic development); NEV. REV. STAT. ANN. § 37.010 (listing permissible public uses, greatly restricting transfers to private parties, and placing burden on the condemnor to prove public use); N.H. REV. STAT. ANN. 162-K:2.IX-a (narrowly defining public use and excluding economic development); N.M. STAT. ANN. § 3-18-10 (providing that municipalities can only take property for short list of public uses); N.D. CENT. CODE ANN. § 32-

including Louisiana—also changed their constitutions to severely limit the ability of governmental entities to take private property for private gain, with many of these states prohibiting private transfers altogether.[7]

15-02 (same); OR. REV. STAT. ANN. § 35.385 (requiring that condemned property be used for a public purpose for at least a reasonable amount of time); 26 PA. CONS. STAT. ANN. § 204 (limiting circumstances in which property can be used for economic development); S.D. CODIFIED LAWS § 11-7-22.1 (prohibiting takings for the primary purpose of increased tax revenue); TENN. CODE ANN. § 29-17-102 (limiting takings for economic development); TEX. GOV'T CODE ANN, § 2206.001 (same); VA. CODE ANN. § 1-219.1 (narrowly defining public use, excluding economic development from the definition, and preventing taking of surplus property); WIS. STAT. ANN. § 32.03 (6)(b) (generally prohibiting takings when the condemnor "intends to convey or lease the acquired property to a private entity"); WYO. STAT. ANN. § 1-26-801 ("'[P]ublic purpose' means the possession, occupation and enjoyment of the land by a public entity.").

[7] FLA. CONST. art. X, § 6 (2006) (providing that private property taken by eminent domain may not be given to a person or private entity except through three-fifths vote of the legislature); GA. CONST. art. IX, § II, para. V, VII (2006) (providing that takings for redevelopment must be approved by vote of elected governing authority, restricting redevelopment takings to elimination of harm only, limiting eminent domain authority of counties and municipalities, and prohibiting eminent domain by some nonelected authorities); LA. CONST. art. I, § 4 (2006) (prohibiting the taking of property for predominantly private use or to private entities); MICH. CONST. art. X, § 2 (2006) (prohibiting the taking of private property for transfer to private entities for the purpose of economic development or tax revenue, setting compensation for taking principal residences at 125% of fair market value, and placing burden of proof on government to show public use); MISS. CONST. art. 3, § 17A (2012) (prohibiting transfer of taken property to others for ten years after taking); NEV. CONST. art. 1, § 22 (2008) (limiting definition of public use to exclude transfer from one private party to another, placing the burden on the government to prove public use, providing for reversion back to original owner if not used within five years for original purpose); N.H. CONST. Pt. First, art. 12-a (2006) (prohibiting takings for private development or other private use); N.D. CONST. art. I, § 16 (2006) (limiting definitions of public use and public purpose and prohibiting the taking of private property for use of private entities, except for common carriers or utilities); S.C. CONST. art. I, § 13

2. Several State Legislatures Rejected *Kelo*-Style Deference.

State legislatures also recognize the importance of closely scrutinizing the evidence in eminent domain cases. Two related features of the *Kelo* opinion—blind deference and refusal to engage with facts—were expressly rejected by nine state legislatures.[8] These states changed the burden of proof in eminent domain cases, either by requiring that the government prove "public use" or by eliminating deference from the government's assertions.

***

(2007) (prohibiting taking of private property for non-public use); TEX. CONST. art. I, § 17 (2009) (prohibiting taking of property for transfer to private entities for the primary purpose of economic development or tax revenue); VA. CONST. art. I, § 11 (2013) (limiting takings to the purpose of public use and not where the use is for private purposes or economic development).

[8] MICH. CONST. art. X, § 2 (placing on the government the burden of proof by preponderance of the evidence to show public use and by clear and convincing evidence to show blight); VA. CONST. art. I, § 11 (placing on the government the burden of proving public use, with no deference given); ARIZ. REV. STAT. ANN. § 12-1132 (defining public use to be a question for the judiciary; requiring the government to show blight by clear and convincing evidence); COLO. REV. STAT. ANN. 38-1-101 (placing on the government the burden of proof by preponderance of the evidence to show public use and by clear and convincing evidence to show blight); GA. CODE ANN. § 22-1-2 (placing the burden on the condemnor to prove public use); MONT. CODE ANN. § 70-30-111(placing on the government the burden of proof by preponderance of the evidence to show that public interest requires the taking); NEV. REV. STAT. ANN. § 37.010 (placing the burden on the condemnor to prove public use); OHIO REV. CODE ANN. § 163.09 (placing on the government the burden of proof by preponderance of evidence to show that the taking is necessary and for public use); W. VA. CODE ANN. § 16-18-6a (placing on the government the burden to show property is blighted).

Given the post-*Kelo* national trend, and that Louisiana is embracing it within its constitution, it is odd that the trial court went the opposite, outlier direction. But as described below, that's exactly what it did.

II. THE RULING BELOW CONFLICTS WITH THE POST-*KELO* NATIONAL TREND.

Affirming the trial court's ruling would put Louisiana in conflict with the post-*Kelo* national trend. In sanctioning St. Bernard Port's expropriation petition, the trial court below applied the same approach to judicial review espoused by New York state courts—one that seemingly embraces *Kelo*'s elastic construction of what qualifies as "public use" and its complete deference to a condemning authority's findings—an approach that finds little company among the 47 states, including Louisiana, that have increased protections post-*Kelo*. This Court should reverse.

Two aspects of the trial court's opinion are troubling. First, the trial court accepted a public-use justification that points to nothing other than raising government revenue through economic development. *See* R.16-331, V.7, 1477–78. Second, the trial court failed to engage with the facts in the record to support its determination that 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." *Id*. Strangely, the trial court's opinion is devoid of any mention that St. Bernard Port's public-use justification hinges on a pre-expropriation commitment

to have Associated Terminals—a private entity—lease, take over, and operate the entirety of Violet Dock Port's land and operations. *Compare id. with* R. 16-96, V.9, 2209, Tr. 2/1/12 6–10, 13, 21–22, 27, 29, 35–37, 58, 79, 109, 113, 187, StBP Exh. 5-1. Nor does the trial court's opinion reflect an independent review of record evidence; rather, it exemplifies the judicial abdication of *Kelo* that state high courts across the country have rejected. The court accepted St. Bernard Port's justifications for taking Violet Dock Port's property at face value. *See* R.16-331, V.7, 1477–78.

St. Bernard Port's authority to expropriate private property must be construed strictly. Any doubt over the propriety of the taking should be resolved in favor of the property owner, Violet Dock Port. The trial court's one and a half page opinion—and the record it is based on—fails to identify, or support, a fixed and definite right of use for the property that the public could avail itself of. Such "public use" must be one exercisable independent of the will of any private lessor for the property, including the private entity handpicked by St. Bernard Port to immediately take over the property.

What *is* clear is that St. Bernard Port's desire to promote economic development—a plan inextricably intertwined with a pre-planned lease of the entire expropriated property to a private party—is all that appears to undergird its actions to take Violet Dock Port's property. *See* R.16-331, V.7, 1477–78. Such an

exercise of eminent domain would not withstand constitutional scrutiny in state high courts across the country, and it should not in this Court.

***

The abuse of eminent domain by St. Bernard Port confirms what Justice O'Connor, writing in dissent, foresaw in the *Kelo* majority's improvident decision to strip the Public Use clause of any real meaning:

> Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

Kelo, 545 U.S. at 505 (O'Connor, J., dissenting).

It is essential for the Court to enforce the rights in property memorialized in the Louisiana Constitution because the grim reality of eminent domain abuse otherwise means that every home, every business, every farm and every church in the State is vulnerable to the avarice of those who would simply take what they cannot buy. *Id.* at 503.

CONCLUSION

The right to own and be secure in one's property has a distinguished tradition in Louisiana. What St. Bernard Port has done to Violet Dock Port steps outside the boundaries of what the Louisiana Constitution allows, and sanctioning

such a use of eminent domain would put Louisiana in direct conflict with the post-*Kelo* national trend. The Institute respectfully urges the Court to invalidate the expropriation in this case.

Dated this 6th day of July, 2016.

Respectfully submitted,

Arif Panju* (TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Attorney for Amicus Curiae

/s/ A. Gregory Grimsal
A. Gregory Grimsal (LA. Bar # 6332)
Gordon, Arata, McCollam, Duplantis & Eagan, LLC
201 St. Charles Ave. 40th floor
New Orleans, LA 70170-4000
Tel: (504) 582-1111
Fax: (504) 582-1121
Email: ggrimsal@gordanarata.com

Local Counsel for Amicus Curiae

Pro Hac Vice Motion Pending

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief of *amicus* Institute for Justice was served this 6th day of July, 2016, via first-class mail, postage pre-paid to the following counsel of record:

Randall A. Smith (#2117)
L. Tiffany Hawkins (#20855)
Mary Nell Bennett (#32339)
Smith & Fawer, L.L.C.
201 St. Charles Ave., Suite 3702
New Orleans, LA 70170
Tel: (504) 525-2200

Val P. Exnicios (#19563)
1515 Poydras St., Suite 1400
New Orleans, LA 70112
Tel: (504) 410-9611

W. Scott Hastings (# 25410)
Locke Lord LLP
601 Poydras St., Suite 2660
New Orleans, LA 70130
Tel: (214) 740-8537

Harry T. Lemmon (#08311)
650 Poydras St., Suite 2335
New Orleans, LA 70130
Tel: (504) 581-2155

Counsel for Defendant/Applicant Violet Dock Port, Inc., L.L.C.

James M. Garner (#19589)
Peter L. Hilbert, Jr. (#6875)
Joshua S. Force (#21975)
Ashley G. Coker (#30446)
Sher Garner Cahill Richter
Klein & Hilbert, L.L.C.
909 Poydras St., 28th Floor
New Orleans, LA 70112
Tel: (504) 299-2102

Counsel for Plaintiff/Respondent St. Bernard Port, Harbor & Terminal District

/s/ A. Gregory Grimsal
A. Gregory Grimsal (LA. Bar # 6332)
Gordon, Arata, McCollam, Duplantis

& Eagan, LLC
201 St. Charles Ave. 40th floor
New Orleans, LA 70170-4000
Tel: (504) 582-1111
Fax: (504) 582-1121
Email: ggrimsal@gordanarata.com

Local Counsel for Amicus Curiae