Case No. 19-30992

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Violet Dock Port, Incorporated, L.L.C.,

Plaintiff-Appellant,

v.

Drew M. Heaphy, In His Capacity as Executive Director of St. Bernard Port, Harbor & Terminal District, and St. Bernard Port, Harbor & Terminal District,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Louisiana, No. 19-cv-11586 (Lemelle, J.)

BRIEF OF *AMICI CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, AND THE CATO INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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February 10, 2020

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case No. 19-30992,
Violet Dock Port, Inc., L.L.C., v. Drew Heaphy, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Person or Entity	Connection to Case
Kimberly S. Hermann	Counsel to *amici*
Ilya Shapiro	Counsel to *amici*
Trevor Burrus	Counsel to *amici*
Southeastern Legal Foundation	*Amicus curiae*
Cato Institute	*Amicus curiae*
National Federation of Independent Business Small Business Legal Center	*Amicus curiae*

Amicus National Federation of Independent Business Small Business Legal Center (NFIB Small Business Legal Center) is Tennessee nonprofit corporation. It is a 501(c)(3) public interest law firm and is affiliated with the National Federation of Independent Business (NFIB), a 501(c)(6) business association, which supports *Amicus* NFIB Small

Business Legal Center through grants and exercises common control of *Amicus* NFIB Small Business Legal Center through officers and directors. No publicly-held company has 10% or greater ownership of *Amicus* NFIB Small Business Legal Center.

Amicus Southeastern Legal Foundation (SLF) is a Georgia nonprofit corporation. *Amicus* SLF does not have any parent companies, subsidiaries, or affiliates. *Amicus* SLF does not issue shares to the public.

Amicus Cato Institute is a Kansas nonprofit corporation. *Amicus* Cato Institute does not have any parent companies, subsidiaries, or affiliates. *Amicus* Cato Institute does not issue shares to the public.

/s/ Kimberly S. Hermann

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

SLF is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, free speech, and free enterprise in the courts of law and public opinion. For 44 years, SLF has advocated, both in and out of the courtroom, for the protection of private property interests from unconstitutional governmental takings.

The Cato Institute is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited

[1] The parties have consented to this filing. No one other than *Amici* and its counsel wrote any part of this brief or paid for its preparation or submission.

government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Amici have an interest in ensuring that the guarantee of the Fifth Amendment's Takings Clause is enforced throughout the country. Accordingly, *Amici* have consistently filed in regulatory takings cases raising important issues. In the present case the NFIB Small Business Legal Center has a particular interest in ensuring that small businesses receive just compensation for the full value of lands taken through public appropriation. Likewise, SLF and the Cato Institute have a keen interest in advancing proper constitutional doctrine in this case, as it implicates core concerns for the Founding Fathers in ratification of both the Fifth and Fourteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court's recent decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), makes clear that the federal courthouse doors are now open to federal takings claimants. *Knick* ruled that a litigant may pursue a 42 U.S.C. § 1983 action when state actors have taken private property without paying just compensation in violation of the Fifth Amendment to the United States Constitution. That is precisely what the Appellant, Violet Dock Port, Inc., L.L.C. (Violet Dock), alleges in its complaint. Accordingly, this case should be allowed to proceed.

Yet this case presents an interesting question that courts must now address in the wake of the *Knick* decision. The Appellee, St. Bernard Port, Harbor & Terminal District (District), has refused to pay a valid monetary judgment after the Louisiana state courts concluded that the District had failed to provide full compensation when appropriating Violet Dock's real property in 2010. Therefore, the question is: whether a litigant has an actionable Fifth Amendment takings claim in federal court where a public authority has refused to pay a monetary judgment issued by a state court.

Novel as this question may appear at first blush, the fundamentals of our Fifth Amendment takings jurisprudence are well-settled and point to ready answers. The U.S. Supreme Court has repeatedly affirmed the bright-line rule that a confiscation of monetary assets effects a *per se* physical taking. Therefore, so long as a state court monetary judgment constitutes a protected property interest as a matter of state law, a public authority's refusal to pay that judgment necessarily effects a taking—separate from, and independent of, the original unlawful taking that culminated in said judgment. This is because the act of withholding payment (private property) amounts to an expropriation, the same as if a public authority confiscated a bank account.

Amici maintain that Violet Dock has an actionable Section 1983 claim at this time given the District's failure to provide full compensation for the taking of Violet Dock's commercial facilities. Even setting aside the appropriation in controversy during the state court proceedings, this Court should recognize that the District has taken a monetary interest in withholding payment of the state court judgment. The taking of that monetary interest should be viewed as separate and distinct from any

claims litigated in the prior state court proceeding. Accordingly, this case must be allowed to proceed forward to the merits.

ARGUMENT

Violet Dock has stated an actionable takings claim.

A. A state court's monetary judgment constitutes a protected property interest.

The Takings Clause of the Fifth Amendment requires payment of just compensation for any "taking" of private property. *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 321 (1987) ("[W]here the government's activities have already worked a taking . . . no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."). This guarantee against uncompensated takings applies against the states through the Fourteenth Amendment.[2] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241, 255–257 (1897). And it applies with equal force to protect all forms of private property—whether real, personal, or monetary. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (emphasizing that the Takings Clause protects all forms of private

[2] "[T]he Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010).

property on equal terms). Just as a continuing physical invasion of land effects a taking, a government appropriation or seizure of any financial interest effects a *per se* taking. *See Webb's Fabulous Pharmacy, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998); *Brown v. Legal Found.*, 538 U.S. 216, 240 (2003); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612, 614 (2013).

This categorical rule applies just the same here, as this case concerns an entitlement to money. *Cf.*, *In re Stanton*, 2007 WL 776543, at *1 (Bankr. S.D. Tex. Mar. 8, 2007) (explaining that a monetary judgment is "a judgment [that] entitles the Plaintiff to relief . . . through the payment of money"). A monetary judgment from a state court represents a property right in itself, as it is an unqualified right to a defined sum of money. It is no different than the ledger for a private bank account; it entails a right to ready access and use of the money in question, as the owner maintains the right to put that sum to any private use—including the right to invest in other income producing properties or in other pursuits that may yield a return. *See United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("Property is taken in the

constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."); *cf.* 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812) ("[F]or what is [private property] but the profits thereof[?]"). Accordingly, the act of withholding payment on a monetary judgment is functionally the same as seizure of any other financial asset. *See Stop the Beach Renourishment*, 560 U.S. at 713 ("[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing."); *see also Lingle v. Chevron U.S.A.*, 544 U.S. 528, 529 (2005) (emphasizing a functional approach in takings jurisprudence);[3] *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177–78 (1871) (repudiating the argument that government may sidestep the Takings Clause by formally recognizing the owner's continued entitlement to the

[3] The Court in *Lingle* stressed that all of the regulatory takings tests "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle*, 544 U.S. at 539.

property, while, in actuality, a public authority has exerted physical control and dominion).[4]

It bears emphasis that one's property right to a monetary judgment should be distinguished from any rights that might have been asserted in the proceedings leading to that judgment. *See Guilbeau v. Par. of St. Landry*, 2008 WL 4948836, at *10 (W.D. La. Nov. 19, 2008) (recognizing that a judgment "create[s]" a "property right").[5] Once rendered, a state court monetary judgment recognizes an independently cognizable property interest, with resolution of the controversy, in the amount of the final award. The prior dispute has been put to rest, and the prevailing party is then entitled to the award. A party entitled to a monetary

[4] "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government . . . it shall be held that if the government refrains from the absolute conversion of [] property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen . . . instead of the government[.]" *Pumpelly*, 3 Wall. 166 at 177–78.

[5] If there is any doubt as to whether a monetary judgment constitutes a cognizable property interest—protected under the Takings Clause—the question should be resolved on substantive pleadings on the merits. Indeed, the Takings Clause looks to the background principles of state law in determining whether there is a protected property interest at stake. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-32 (1992).

judgment then holds a new, and unqualified, property right—*i.e.*, the right to receive payment. In this sense, a monetary judgment represents a property right akin to a settlement agreement, where one party has acquired a right to receive a settled sum of money.

For that matter, a party entitled to a monetary judgment stands in the same position as any creditor. They hold a protected property right in the value of the outstanding debt and are entitled to immediate payment—or payment for the fair market value of what was taken in the context of an eminent domain judgment. *See Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 2002 WL 31748618, at *4 (E.D. La. Dec. 5, 2002). Therefore, any appropriation of these property rights necessarily implicates the Takings Clause and the categorical rules the Supreme Court applies in physical appropriation cases. *See, e.g.,* U*nited States v. Armstrong,* 364 U.S. 40 (1960) (statute extinguishing a lien constituted a taking); *see also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601–02 (1935) (holding that a bank's property had been taken without compensation by amendments to the Bankruptcy Act, which deprived mortgagees of previously recognized rights); *In re Gifford*, 669 F.2d 468, 471–72 (7th Cir. 1982), on reh'g, 688 F.2d 447 (7th Cir. 1982)

("[S]ubsequent Supreme Court decisions may well refine, but do not destroy the fundamental teaching of *Radford* that Congress may not under the bankruptcy power completely take for the benefit of a debtor rights in specific property previously acquired by a creditor.") (cleaned up).

B. A public authority's decision to refuse payment of a valid monetary judgment effects a *per se* taking under the Takings Clause of the Fifth Amendment.

Failure to pay a monetary award in a timely fashion is functionally the same as converting another's property. At common law, a person is liable for conversion of another's property if they refuse to return it the rightful owner upon request. *See Simon v. Fasig-Tipton Co.*, 652 So. 2d 1351, 1369 (La. App. 3 Cir. 1995) ("Any wrongful exercise or assumption of authority over another's goods, depriving him of the possession (permanently or for an indefinite time) is a conversion."). In the same manner, the Takings Clause categorically prohibits any public authority from taking control of private property without paying just compensation. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a

categorical duty to compensate the former owner . . . .") (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). And in the case of seizure of monetary assets, the Takings Clause requires prompt release as the remedy, in addition to payment of interest for the time the property was wrongfully withheld. *See Bragg v. Weaver*, 251 U.S. 57, 62 (1919) (opining that when property is taken, the Constitution will not tolerate "unreasonable delay" in payment of compensation); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984) (payment is both to cover the value of what has been taken and for payment of interest where "disbursement of the award is delayed").

Here the District acknowledges that Violet Dock has a right to receive payment of the state court's monetary judgment, but argues that it may indefinitely defer payment until a time that it finds more convenient, or until the Louisiana State Legislature provides an appropriation to cover the costs of the outstanding judgment. *Violet Dock Port, Inc., L.L.C. v. Heaphy et al.*, 2:19-cv-11586-ILRL-DMD, Mot. to Dismiss, *14–17 (Aug. 26, 2019). But of course, this would enable the District to withhold payment altogether. To be sure, a public authority will never deem it convenient to pay just compensation under the

Takings Clause.[6] And we can never know whether a state legislature will appropriate funds. The legislature may well refuse. In that case, Violet Dock would have no recourse at all.

That is not the way the Takings Clause works. Contrary to the District's theory, our physical takings jurisprudence holds that indefinite retention of monetary assets violates the Takings Clause. *See, e.g.*, *Hall v. State*, 908 N.W.2d 345, 356–57 (Minn. 2018) (finding unclaimed property statute violated the Takings Clause). Therefore, the fact that the District might *someday* choose to provide payment is beside the point. *See Vogt*, 2002 WL 31748618, at *4 ("[T]he fact remains that the Orleans Levee District has not paid the judgment or more accurately returned the mineral royalties and *has not noted any future plans to do so*.") (emphasis added); *see also Horne,* 135 S. Ct. at 2419 (rejecting the argument that the possibility of discretionary future payment should factor into the physical takings analysis).

Here it may be helpful to consider an analogous situation. Suppose that a federal agency entered private property and erected a storage

[6] With great chutzpah, the District suggests that Violet Dock has no right to insist on immediate payment at the time of its "convenience." This is paramount to a bank saying that an account holder has no right to immediate access to deposited monies.

facility. This would constitute a *per se* taking, even if the agency planned to eventually remove the facility. As the Federal Circuit ruled in a case concerning the Environmental Protection Agency, a physical occupation of private property is deemed sufficiently permanent to effect a taking in the absence of concrete and definitive plans to withdraw in a timely manner. *Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (explaining that an occupation must be considered "permanent" if the government assumes control without indicating "a timetable for withdrawal"). And the same must hold true where a public entity has asserted indefinite control over private financial assets. *See Horne*, 135 S. Ct. at 2426 (finding Takings Clause protections apply to all forms of private property equally). In such case, the owner is entitled to a remedy under the Takings Clause. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[W]here there is a legal right, there is also a legal remedy."); *cf. Monongahela Nav. Co. v. United States*, 148 U.S. 312 (1893) (emphasizing that the question of whether just compensation has been denied is a "judicial question").

C. A consummated takings claim is actionable under 42 U.S.C. § 1983.

The Supreme Court has made clear that a litigant has an unqualified right to pursue a Section 1983 lawsuit where state or local authorities have violated the Takings Clause. *Knick*, 139 S. Ct. at 2168. Accordingly, this case should be allowed to proceed forward to a decision on the merits as to whether there has been a taking. The District Court's decision sidestepped that question, choosing to accept the District's contention that a litigant cannot enforce a "property right created by a judgment against a government entity" on the view that Louisiana law may legitimately provide a shield against payment of just compensation unless and until the legislature appropriates funds. *Violet Dock Port Inc., L.L.C. v. Heaphy*, No. CV 19-11586, 2019 WL 6307945, at *2 (E.D. La. Nov. 25, 2019).

But, it can be no answer that state law precludes a public entity from releasing control of private monetary assets because the Takings Clause imposes a condition on the lawful exercise of state government. *First English*, 482 U.S. at 314. Thus, Louisiana law may regulate and restrict the use of private property in innumerable ways, but it cannot shield a political subdivision of the state from the requirement to pay just

compensation where a taking has occurred. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (explaining that "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation"); *Burnett v. Grattan*, 468 U.S. 42, 55 (1984) ("[T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief."). And, in like manner, our federal jurisprudence holds that states may not impose conditions on a litigant's right to vindicate federal rights in a Section 1983 lawsuit. *Felder v. Casey*, 487 U.S. 131, 147 (1988) (ruling that state "authority does not extend so far as to permit States to place conditions on the vindication of a federal right").

It may be that due process claims seeking enforcement of a state court's monetary judgment are precluded. But takings claims are a different matter. *See Martinez v. California*, 444 U.S. 277, 284 (1980) (holding that state law that immunizes government conduct otherwise subject to suit under Section 1983 is preempted). For one, the Supreme Court has made clear that courts must avoid conflating analysis under

the Takings Clause with the Due Process Clause. *Lingle*, 544 U.S. at 531–32 (expelling due process concepts from federal takings jurisprudence). Thus, there may well be a problem under the Takings Clause even if the courts must uphold the propriety of enacted law as a matter of due process. *See* Luke A. Wake, *Check Your Rights at the Door: Rethinking Confiscatory Regulation*, 68 Drake L. Rev. (forthcoming 2020) (explaining that "otherwise legitimate government powers" may be problematic under the Takings Clause).[7]

To illustrate the point, an enactment severely restricting use of private property will almost invariably withstand constitutional scrutiny under the highly deferential rational relation standard pronounced in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926). This is true even with regard to regulation granting public access on private property. Nonetheless, the Takings Clause imposes a condition on the exercise of such powers in the requirement to pay for a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982). And the same is true here. Even if Louisiana law says that an authority is free to withhold payment until receiving a legislative appropriation, the

[7] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437488.

immutable rule under the Takings Clause is that compensation is owed from the time of the appropriation. *Knick*, 139 S. Ct. at 2171 (emphasizing that a Takings Claim "automatically arises at the time the government takes property without paying for it"); *First English*, 482 U.S. at 321.

As the Supreme Court put it in *Felder*: "A state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability . . . is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." 487 U.S. at 153. Therefore, state law purporting to limit the right to receive just compensation is preempted and "must give way to vindication of the federal right . . . ." *Id.* A contrary rule would allow states to assert immunity from the Takings Clause in contravention of congressional intent and in subversion of the Fourteenth Amendment. *See Balt. & Ohio R. Co. v. United States*, 298 U.S. 349 (1935) (emphasizing that government "may not . . . evade[] or impair[]" the rights protected by the Takings Clause).

CONCLUSION

This Court should reverse the district court and remand with instructions for further proceedings.

Respectfully submitted,

s/ Kimberly S. Hermann

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February 10, 2020

CERTIFICATE OF FILING AND SERVICE

On February 10, 2020, I filed this *Brief of Amici Curiae National Federation of Independent Business Small Business Legal Center, Southeastern Legal Foundation, and the Cato Institute in Support of Plaintiff-Appellant and Reversal* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

s/ Kimberly S. Hermann

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,560 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

s/ Kimberly S. Hermann