SUPREME COURT OF LOUISIANA
NO. 2020-C-01017

BAYOU BRIDGE PIPELINE, LLC
Plaintiff/Petitioner

vs.

38.00 ACRES, MORE OR LESS, LOCATED IN ST. MARTIN PARISH;
BARRY SCOTT CARLINE, ET AL.
Defendants/Respondents

CIVIL PROCEEDING

FROM THE RULING OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL
NO. 19-00565-CA

FROM THE 16TH JUDICIAL DISTRICT COURT
PARISH OF ST. MARTIN
CIVIL CASE NO. 87011-E

HONORABLE KEITH COMEAUX, PRESIDING

DEFENDANT-LANDOWNERS' MEMORANDUM IN OPPOSITION TO APPLICATION OF PETITIONER BAYOU BRIDGE PIPELINE, LLC FOR WRIT OF CERTIORARI

Misha L. Mitchell
La. Bar Roll No. 37506
Atchafalaya Basinkeeper
411 Walnut Street #15255
Green Cove Springs, FL 32043
Tel. (225) 692-1133
Fax. (888) 920-6418
basinkeeperlegal@gmail.com

Pamela C. Spees
La. Bar Roll No. 29679
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel. and Fax (212) 614-6431
pspees@ccrjustice.org

William P. Quigley
La. Bar Roll No. 7769
Professor of Law
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Tel. (504) 710-3074
Fax (504) 861-5440
quigley77@gmail.com

Attorneys for Katherine Aaslestad, Peter Aaslestad, and Theda Larson Wright, Defendant-Landowners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUMMARY OF ARGUMENT IN OPPOSITION

This opposition is filed by three small Louisiana landowners who battled an out-of-state pipeline company which the Third Circuit found "trampled [their] due process rights as landowners" and "eviscerated the constitutional protections laid out to specifically protect those property rights." [1] Petitioner does not seek to overturn the decision of the Third Circuit that it acted "willfully, wantonly, and recklessly" when it wielded the State power of eminent domain over these landowners without following the laws intended to act as a check on that power. Petitioner asks this Court to overturn the award of attorney fees under La. R.S. § 13:5111, a provision of the Louisiana Government Claims Act, for their uncontested illegal acts.

The Third Circuit did not make a radical leap when it ruled that Petitioner was acting as an "agent of the government" for purposes of the fee award.[2] It is neither a novel nor controversial proposition that private entities should be held accountable as state actors when acting under color of state law, or as an agent or instrumentality of government – contrary to Petitioner's dire warnings. There is already a well-developed body of law on the subject which also provides guidance about the scope of rights and liabilities of such entities. In fact, some private entities are already included in the definition of "state agency" in the Louisiana Government Claims Act. *See e.g.,* La. R.S. § 13:5102(A). Indeed, in its writ application, Petitioner advises this Court that it has moved to dismiss a separate case brought against it under 28 U.S.C. §1983 on "the ground that it is not a 'state actor.'" Petitioner's Writ Application at iv, n. 4. The federal court presiding over that matter recently denied Petitioner's motion to dismiss.[3]

Petitioner also argues that La. R.S. § 13:5111 does not apply because the present case somehow does not involve a taking. Petitioner conflates the concepts of inverse condemnation, which is an unintentional, inadvertent taking without due process, versus what happened in this case -- a willful, wanton, and reckless taking without due process. Both are takings, both are due process violations, and both are redressable under La. R.S. § 13:5111, though they come with different damages. The landowners whose rights were trampled ask this court to summarily deny the writ application.

---

[1] *Bayou Bridge Pipeline, L.L.C. v. 38.00 Acres, More or Less, Located in St. Martin Parish, et al,* 19-565, p. 28 (La. App. 3 Cir. 7/15/20); –So.3d—, annexed to Petitioner's Brief as Appendix 1.
[2] *Id*. at 26, 32.
[3] *See Spoon v. Bayou Bridge Pipeline, LLC,* CV 19-516-SDD-EWD, Ruling on Motion to Dismiss (M.D. La. Sept. 29, 2020).

STATEMENT OF THE CASE

The trial court failed to rule on the landowners' reconventional demands for violations of due process resulting from the intentional taking of their property by Petitioner without following the expropriation laws. The Third Circuit remedied that legal error by awarding the landowners damages and attorneys' fees for the flagrant due process violation. The Third Circuit ruled that Petitioner, an out-of-state pipeline company, "trampled" the due process rights of the landowners and "eviscerated the constitutional protections laid out to specifically protect those property rights" when it took their property willfully, wantonly, and recklessly. *Bayou Bridge Pipeline, LLC v. 38.00 Acres,* 2019-565, 2020 WL 4001135, p. 26, 28 (La. App. 3 Cir. 7/15/20).

The taking in this case occurred well before any expropriation proceeding. The Third Circuit based the fee award on La. R.S. § 13:5111, a provision in the Louisiana Government Claims Act, which applies to claims "for compensation for the taking of property by the defendant, other than through an expropriation proceeding" and which requires that an award to the landowner include reasonable attorneys' fees. *Id*. at 32. The Court of Appeal ruled that Petitioner acted "as a private entity qualified as an agent of the government for purposes of La. R.S. 13:5111." *Id.*

ARGUMENT

"'Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" *Wagoner v. Dyson*, 97-606 La. App. 3 Cir. 12/10/97, 704 So.2d 346, 348 (La. App. 3 Cir. 1997) citing *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031 1043, 85 L.Ed. 1368 (1941).

I. Petitioner was Acting as an Agent of the Government.

It is well established in both state and federal law that private entities exercising powers traditionally and exclusively reserved to the state, particularly eminent domain, are considered agents of the government or acting under color of law:

> Under the "public function" doctrine, a private entity becomes a state actor within the meaning of § 1983 when it exercises "powers traditionally exclusively reserved to the State." *Andrews v. Fed. Home Loan Bank,* 998 F.2d 214, 218 (4th Cir.1993) (quoting *Jackson v. Metro. Edison Co*., 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). Eminent domain is just such a power. *Jackson*, 419 U.S. at 353, 95 S.Ct. 449. And so when a private entity exercises eminent domain authority, it becomes a state actor within the meaning of § 1983. *Baldwin v. Appalachian Power Co*., 556 F.2d 241, 242 (4th Cir.1977).

Klemic v. Dominion Transmission, Inc., 138 F.Supp.3d 673, 686 (W.D. Va. 2015). Under this "'public functions' test, the law deems a private actor that 'exercise[s] powers which are traditionally exclusively reserved to the state, such as holding elections or eminent domain,' to be a state actor." *Cox v. State of Ohio,* 3:16CV1826, 2016 WL 4507779, at *7 (N.D. Ohio Aug. 29, 2016) citing *Wilcher v. City of Akron*, 498 F.3d 516, 519 (6th Cir. 2007). Courts have emphasized the state action element in the exercise of eminent domain because it is "traditionally associated with sovereignty." *See Jackson v. Metro. Edison Company*, 419 U.S. 345, 352-353, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (finding a private utility was not a government actor but contrasting that with entities delegated the power of eminent domain). *See also Kohl v. U.S.*, 91 U.S. 367 (1875) (eminent domain described as an inherent power of the sovereign); *Mongrue v. Monsanto,* 249 F.3d 422 (5th Cir. 2001) (private entities expressly delegated the power of eminent domain under Louisiana law qualify as an agent of the government for purposes of establishing constitutional liability for a taking).

Likewise, Louisiana courts have long found that private entities delegated the power of eminent domain to be governmental or quasi-governmental actors. As early as 1917, this Court observed:

> A quasi public corporation may be said to be a private corporation which has given to it certain powers of a public nature, such, for instance, as the power of eminent domain, in order to enable it to discharge its duties for the public benefit, in which respect it differs from an ordinary private corporation, the powers of which are given and exercised for the exclusive advantage of its stockholders….

State ex rel. Coco v. Riverside Irr. Co., 76 So. 216, 218 (1917). *See also, State through Dep't of Transp. And Development v. Chambers Inv. Co, Inc.* 595 So.2d 598 (La. 1992) (finding that use of eminent domain "always involves the taking or damaging of property interests by the state or some alter ego of the state, such as a public utility, that has been delegated the power to condemn."), *Crooks v. Placid Ref. Co.,* 2005-119, p. 10 (La. App. 3 Cir. 6/1/05); 903 So.2d 1154, 1161, *writ denied,* 2005-1756 (La. 1/13/06); 920 So.2d (describing private entities upon which Article 1, § 4 of the Louisiana Constitution of 1974 confers the power of expropriation as "public or quasi public *[sic]* corporations"), *Illinois Cent. R. Co. v. Mayeux,* 301 F.3d 359, 363-64 at n. 18 (5th Cir. 2002) ("all corporations endowed with the power of expropriation are public service corporations" obliged by law to "serve the public without discrimination").

Petitioner's position is self-contradictory. While they sound dire warnings about the hazards of imposing state actor liability on private entities – neither Petitioner nor the Attorney

General quarrel with the award of damages for the due process violation which necessitates state action. *See Fontenot v. Southwest Louisiana Hosp. Ass'n,* 2000-00129 (La. App. 3 Cir. 12/6/00); 775 So. 2d 1111, 1117 ("In order to invoke the due process clause of either constitution, a plaintiff must first show that 'some property or liberty interest has been adversely affected by state action.' . . . 'a private entity can be held to constitutional standards when its actions so approximate state action that they may be fairly attributed to the state . . . .'"). The Attorney General's attempt to invoke *Jojola v. Chavez,* 55 F.3d 488 (10th Cir.1995) also fails. In fact, *Jojola* supports the landowners' position and the Third Circuit's ruling. The Tenth Circuit recognized longstanding law that a private entity acts under color of state law when its action "was made possible because the defendant was clothed with either the actual or apparent authority of the state." *Id.* at 492-93. In that case, the court simply found that the complaint lacked any allegations that the defendant used or misused any state authority in carrying out the acts he was accused of – molestation of a minor student. *Id.* at 494-95.

In contrast, the landowners in this matter alleged and proved that the Petitioner used and misused the authority delegated to it by the state of Louisiana when it willfully violated the landowners' rights to due process.

II. The Third Circuit's Ruling Avoids Absurd Consequences and Best Conforms to the Purpose of the Law.

The Third Circuit's ruling that Petitioner was acting as an agent of the government for purposes of La. R.S. § 13:5111 was well within the realm of its parameters for judicial interpretation. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. La. Civ. Code Art. 9. When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. La. Civ. Code. Art. 10. The restrictive application of the law urged by Petitioner and the Attorney General would lead to absurd consequences. The Third Circuit's application best conforms to the purpose of the law – to redress and deter unlawful takings.

The Third Circuit's decision makes even more sense when considering the operation of separate but related laws. La. Civ. Code Art. 13 (requiring that "laws on the same subject matter must be interpreted in reference to each other"). The legislative history of Art. I § 4 of the

Louisiana Constitution of 1974 reveals that compensation for a legal taking was intended to include attorneys' fees. *See Pipeline Tech. VI, LLC v. Ristroph,* 2007-1210, p. 8 (La. App. 1 Cir. 5/2/08); 991 So.2d 1, *writ denied*, 2008-1676 (La. 10/24/08); 992 So.2d 1037. On the other hand, La. R.S. § 19:201, as Petitioner points out, governs compensation to a landowner where the expropriation was not successful and provides that the landowner is entitled to attorneys' fees in that situation too. If Petitioners' argument were to prevail, it would mean that landowners who suffered a willful taking in violation of their rights to due process would not be entitled to attorneys' fees but those who did not suffer such a violation in the expropriation process would be.

Petitioner and the Attorney General warn of a slippery slope and other dire consequences if Petitioner were to be treated as an agent of government. As set out above, that question has already been answered. Petitioner *is* an agent of the government when exercising – whether lawfully, or unlawfully – the power of eminent domain handed to it by the State of Louisiana. While that makes it accountable for constitutional violations resulting from its abuse of the power of eminent domain, it does not make it a sovereign for all purposes and for all time. *See Moongate Water v. Butterfield Park Mut. Domestic*, 291 F.3d 1262, 1270 (10th Cir. 2002) ("simple possession of sovereign power does not convert a private entity into a state actor. Indeed, that transmogrification occurs only when the entity *exercises* that power") (emphasis in original). *See also, New Orleans Bulldog Soc'y v. Louisiana Soc'y for the Prevention of Cruelty to Animals*, 2016-1809, p. 13 (La. 5/3/17); 222 So.3d 679, 688 (limiting holding that private non-profit was an instrumentality of the government for purposes of Public Records Law to only those documents which pertained to the entity's functions, duties, and responsibilities as outlined in the contract with the City of New Orleans).

III. Landowners' Claims Were for an Unlawful Taking in Violation of Their Rights to Due Process.

Petitioner also argues that La. R.S. § 13:5111 does not apply because the present case somehow does not involve a "taking/inverse condemnation." Petitioner's Writ Application at 8. Petitioner conflates the concepts of inverse condemnation, which is an unintentional, inadvertent taking without due process, versus what happened in this case -- a willful, wanton, and reckless taking without due process. *See Williams v. City of Baton Rouge,* 98-1981 (La. 4/13/99, 7), 731 So.2d 240, 246. Both are unlawful takings resulting from due process violations, and both are

redressable under La. R.S. § 13:5111, though they come with different damages. The Fourth Circuit Court of Appeal has held that La. R.S. § 13:5111 did not apply to a situation where a levee board's actions "did not constitute a wrongful taking prohibited by the Louisiana and United States Constitutions." *Vogt v. Bd. of Comm'rs of Orleans Levee Dist.,* 98-2379, p. 12 (La. App. 4 Cir. 6/9/99); 738 So.2d 1142, 1149, *writ denied*, 99-2024 (La. 10/29/99); 748 So.2d 1166, and *writ denied*, 99-2025 (La. 10/29/99); 748 So.2d 1166. For a claim to be cognizable under the law, it must involve a wrongful taking in violation of the Louisiana and United States Constitutions, as the one in this case unquestionably does.

The Third Circuit held, and Petitioner does not contest, that it intentionally took the property at issue in this matter, destroyed trees, and began construction long before it commenced expropriation proceedings and without the consent of all of the owners – noting that "time is money." Decision at 27, 31. Petitioner was only able to do so because it was cloaked with the authority of state law – a law that it misused while "show[ing] no fear of the consequences of trampling on property owner's constitutionally protected due process rights." *Id*. at 29. *See also, Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226, 241; 17 S.Ct. 581, 586; 41 L.Ed. 979 (1897) (unconstitutional takings are also violations of due process).

Petitioner cites a number of cases which do not support its theory that La. R.S. § 13:5111 does not apply to the present facts because they do not involve a taking of any kind – they simply stand for the proposition that section 13:5111 requires that a taking have occurred without an expropriation proceeding. *See Ristroph,* 991 So. 2d 1 (court did not allow an expropriation)*; Louisiana Intrastate Gas Corp. v. Ledoux***,** 347 So.2d 4, 6 (La. App. 3 Cir. 1977) (court refused to allow expropriations on ground that there was no public or necessary purpose for the pipeline); *Estate of Patout v. City of New Iberia,* 738 So.2d 544, 555 (La. 1999) (finding damages were not incurred "for public purposes" so a compensable taking did not occur); *Whipp v. Bayou Plaquemine Brule Drainage Bd.,* 476 So. 2d 1042 (La. App. 3 Cir. 1985) (the damage to the property did not amount to a taking); *Unlimited Horizons v. Parish E. Baton Rouge,* 99-0889 (La. App. 1 Cir. 5/12/00); 761 So.2d 753 (holding that although taking occurred, La. R.S. 13:5111 was inapplicable because of the three year prescription), *Cf Huckabay v. Red River Waterway Comm'n*, 95-27113 (La. App. 2 Cir. 10/12/95); 663 So.2d 414 (finding the Commission did commit a taking and awarding attorneys' fees).

CONCLUSION

Petitioner was acting as an agent of the government, misusing the power it possessed by virtue of state law and its misuse was "made possible only because it was clothed with the authority of state law." The Third Circuit's award of fees was appropriate. Landowners respectfully request that Petitioner's writ application be summarily denied.

September 30, 2020
Lafayette, Louisiana

Respectfully submitted,

Misha L. Mitchell
La. Bar Roll No. 37506
Atchafalaya Basinkeeper
411 Walnut Street #15255
Green Cove Springs, FL 32043
Tel. (225) 692-1133
Fax. (888) 920-6418
basinkeeperlegal@gmail.com

Pamela C. Spees
La. Bar Roll No. 29679
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel. and Fax (212) 614-6431
pspees@ccrjustice.org

William P. Quigley
La. Bar Roll No. 7769
Professor of Law
Loyola University College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
Tel. (504) 710-3074
Fax (504) 861-5440
quigley77@gmail.com

Attorneys for Katherine Aaslestad, Peter Aaslestad, and Theda Larson Wright, Defendant-Landowners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted via electronic means or federal express to all known parties of this record this 30th day of September, 2020 to the following counsel of record:

Michael B. Donald
811 Main Street, Suite 2900
Houston, Texas
Tele. (713) 437-1800
Fax (713) 437-1810
mdonald@joneswalker.com

Ian A. McDonald
Mary T. Amy
600 Jefferson Street, Suite 1600
Lafayette, LA 70501
Tele. (337) 593-7600
Fax (337) 593-7748
imacdonald@joneswalker.com
mamy@joneswalker.com

Hon. Renee R. Simien
Clerk of Court
Louisiana Third Circuit Court of Appeal
1000 Main Street
Lake Charles, LA 70615

Hon. Becky Patin
St. Martin Clerk of Court
415 St. Martin Street
P.O. Box 308
St. Martinville, LA 70582

Jeff Landry, Attorney General
Elizabeth B. Murrill
Joseph St. John
Louisiana Dep't of Justice
1885 N. Third Street
Baton Rouge, LA 70804
Tele. (225) 326-6766
emurrill@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Archie P. Joseph, Esq.
P.O. Box 1283
Breaux Bridge, LA 70517
ajosephlaw@cox-internet.com

Pamela C. Spees
Attorney for Defendants