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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, a public body, Plaintiff, v. BETTY L. BLUE and ROBERT B. BLUE, as trustees of the Blue Family Survivors Trust, et al., Defendants.	No. BC348564 **BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANTS** Date: July 18, 2006 Time: 8:30 a.m. Place: Department 47 Judge: Hon. Aurelio Munoz Action Filed: Trial Date:

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INTRODUCTION AND IDENTITY OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the leading defender of property rights in the nation. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, and in particular on the subject of eminent domain as it is used for purposes of economic redevelopment. PLF has appeared as amicus curiae in important eminent domain cases before the courts of California, *see, e.g., Evans v. City of San Jose*, 128 Cal. App. 4th 1123 (2005); *Mesdaq v. Superior Court*, No. D045874 (Cal. Ct. App. 4th Dist. filed Feb. 14, 2005); as well as the courts of other states, *see, e.g., Wayne County v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *Norwood v. Horney*, Nos. 05-1210, 05-1211 (Ohio Sup. Ct. filed July 5, 2005) (pending), *Corie v. City of Riviera Beach*, No. 005799 (Fla. 15th Cir. Ct. filed June 12, 2006), and before the United States Supreme Court, in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). In addition, PLF attorneys have published extensively on the subject of eminent domain. *See*, *e.g.*, Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569 (2003); James S. Burling, *Blight Lite*, SH053 ALI-ABA 43 (2003). PLF's attorneys are familiar with the legal issues and facts raised by this case and believe that its public policy perspective and litigation experience in support of property rights will provide a necessary additional viewpoint when this Court considers the petition for review in this case.

ARGUMENT

I

THIS CONDEMNATION VIOLATES THE PUBLIC USE CLAUSE OF THE CALIFORNIA CONSTITUTION

Although the United States Constitution's public use clause means that " 'one person's property may not be taken for the benefit of another private person without a justifying public purpose,'" *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937)), the Fifth Amendment has provided little protection for property owners whose land is condemned for the benefit of private parties. *See, e.g., Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

The California State Constitution, however, also includes a public use clause. Cal. Const. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner."). An examination of the history and purposes of the state constitution reveals that it places more serious limitations on the exercise of eminent domain which benefits private parties, than does the federal Constitution. *See further* Sandefur, *supra*, at 632-53.

A. The California Constitution Protects Individual Rights More Extensively Than Does the Federal Constitution

Article I, Section 24, of the California Constitution declares "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Under this principle, California courts have held that the state's constitution goes farther than the Federal Constitution in the areas of criminal procedure, *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), the right to privacy, *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123 (1980), and freedom of speech, *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979), *aff'd* 447 U.S. 74 (1980). Thus the federal Constitution's failure to meaningfully enforce the public use requirement does not imply that California courts should do the same with regard to the state Constitution. Indeed, the California Supreme Court has indicated that the "the California [takings] clause 'protects a somewhat broader range of property values' than does the corresponding federal provision," although the Court has usually "construed the clauses congruently." *San Remo Hotel v. City & County of San Francisco*, 27 Cal. 4th 643, 664 (2002). In another property rights case, *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999), the court noted that in some cases, courts have construed the state constitution as protecting citizens to a greater degree, when federal courts have failed to do so. *Id.* at 973 n.4. *See also Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 325 (1997) ("The California Constitution 'is, and always has been, a document of independent force,' and . . . the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution." (citation omitted)).

A distinct California "public use" requirement is buttressed by the text and history of the California Constitution. To a far greater degree than the federal framers, the drafters of California's

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1879 Constitution explicitly sought to prevent the power of eminent domain from being exploited for private benefit, and particularly, the profit of corporations. A state's history can—and California's history does—reveal that state constitutional provisions provide greater protections than federal clauses even when similarly or identically worded.

James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 817 (1992) ("The founders of a populist frontier state with a tradition of ferocious individualism . . . probably intended to carve out a larger sphere of rights . . . . This . . . contemplates potentially different meanings even for constitutions containing identical language . . . . stem[ing] from variations in the character of the polities, character differences that cause them to embrace as fundamental substantially different values."); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 203 (1998) ("By becoming accustomed to independently examining their state's charter, even when language is substantially similar to language found in the federal Bill of Rights, state courts can become more familiar with their state's constitutional history and become more adept at developing theories of constitutional interpretation.").

One of the foremost purposes of the California Constitution was to protect citizens from powerful combinations of government and corporate interests. The authors of the 1879 constitution were primarily concerned with combinations between railroad corporations and government whereby government deprived citizens of their property and economic opportunity in order to benefit politically well-connected railroads in the service of economic "progress." *See* Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 Hastings Const. L.Q. 35, 37 (1989) (California was one of several states where "the startlingly rapid rise of concentrated corporate power, especially in the railroad industry, and the problems associated with cynical partisanship and corruption in government, had inspired strong political reactions."); Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention* 45 (1930) ("As corporate enterprises grew in numbers and in size, and corporate bodies grew in power, the exercise of the power [became] arbitrary, and came into violent conflict with the interests of most men as individuals."). Today the same threat of

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citizens being confronted by powerful combinations of government and private corporations is posed by redevelopment projects which combine private developers with local authorities armed with the power to condemn private property.

The Costco corporation, for example, is one of many large business corporations that regularly profit from the exercise of eminent domain. *See* Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* 191-202 (2004) (detailing Costco's routine exploitation of eminent domain for private profit.) In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), the company persuaded the city council to condemn a nonblighted, commercially viable discount retailer and transfer the property to Costco for its own commercial use, on the theory that the transfer would benefit the public by creating jobs and improving the economy. Likewise, in *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002), the city condemned a successful church's property to transfer to Costco for private commercial use. Costco has also benefited from eminent domain in cases in Lenexa, Kansas; Maplewood, Missouri; Port Chester, New York; East Harlem, New York; Kansas City, Missouri and elsewhere. Greenhut, *supra*, at 196. These cases indicate the degree to which modern "partnerships" between government and private corporations—whereby government's coercive powers are used to give private companies advantages they could never have obtained through noncoercive market transactions—abuse the rights of individuals in a way remarkably similar to the railroad company abuses that gave rise to the 1879 Constitutional Convention.

II

THE CALIFORNIA CONSTITUTION PROHIBITS THE SEIZURE OF PRIVATE PROPERTY TO CONFER ECONOMIC BENEFITS ON PRIVATE PARTIES IN THE NAME OF "PROGRESS"

The framers of California's Constitution understood that the state constitution's public use clause forbade the use of eminent domain to transfer land to private industries, even when doing so might "improve the economy" or create other public benefits.

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The 1879 Constitutional Convention considered the concept of "public use" in at least three instances. In one instance, the Convention considered a proposal which would have forbidden any person in California from owning more than 640 acres of land, and would have confiscated any land beyond that limit upon the owner's death. Sandefur, *supra*, at 637. Many delegates denounced the proposition as a violation of property rights and a violation of the public use limitation. For example, Delegate Walter Van Dyke argued that "we cannot divest [people] of their property. It can only be taken from them for public uses, upon just compensation being given. We cannot take their property from them for private uses." E.B. Willis & P.K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California* 1142 (1880). Delegate Marion Biggs explained: "Nor shall private property be taken for public use, without just compensation. And yet, gentlemen get up on this floor and attempt to deprive men of property that they have accumulated . . . . I consider it confiscation of the darkest dye and deepest hue." Willis & Stockton, *supra*, at 1145. The provision was rejected. Willis & Stockton, *supra*, at 1403.

The debate over another proposal, to reform eminent domain procedures by requiring that compensation be paid before condemnation, rather than after, brought on similar discussion. Sandefur, *supra*, at 643-44. Delegate James Shafer complained of the use of eminent domain to benefit private railroad corporations: "Originally, there was serious question whether railroad corporations had the right of condemnation. This right was at last judicially declared—with many wry faces—upon the sole ground that these corporations were quasi-public; that is, the use to which they devoted property was public, and to the extent of such use they were performing a part of the functions of the State." Willis & Stockton, *supra*, at 350. Delegate C.W. Cross agreed:

> [I]n every State in the Union, the railroad power has been strong enough, whenever it took the matter thoroughly in hand, to control legislation . . . . [R]ailroads are not built for the public good. They are built for private gain, and if any man desires to have the benefit of the railroad he can have it by paying just what the railroad company asks him for enjoying the privilege. This is one difference, or one reason why the rule for laying out a public road and for damages in such a case is not a good rule for damages in the case of these quasi public corporations who may take property for their public use.

Willis & Stockton, *supra*, at 351. The provision to limit eminent domain was adopted, in large part out of frustration at the railroads' exploitation of the power.

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Finally, the Convention considered a proposal allowing landowners to dig irrigation ditches across neighboring privately-owned land. This provision, like the ban on owning more than 640 acres, was objected to as violating the public use limitation. Sandefur, *supra*, at 644-48. Takings for private use, said delegate Caples, "would be in contravention of the fundamental law of the power of eminent domain." Willis & Stockton, *supra*, at 1025. Delegate Morris Estee agreed: "every citizen is equal before the law, and . . . anything that one man owns he owns for all the purposes of ownership, and . . . no private citizen can take it from him for private use." Willis & Stockton, *supra*, at 1027. One delegate who defended the proposal admitted that it would allow the seizure of property for private use: "It is true that [eminent domain] was originally used only for governments, but it has been perverted to corporations, and we propose here to extend it further, and to allow it to be used for private individuals." Willis & Stockton, *supra*, at 1025 (Speech of Mr. Tinnin).

One primary objection to the proposal was that it would benefit private corporations, in the same way that eminent domain had been used by railroad companies. Delegate Shafter again complained that railroads had been permitted to condemn property on the pretext that they "would carry passengers, and do this thing and that thing . . . and the Courts held that they . . . [were] not a private use, but . . . a public use." Willis & Stockton, *supra*, at 1028. Shafter opposed extending the power any further:

> Once open the door and say that the property of A can be transferred to B, simply because somebody or other thinks that B will be benefitted by it, and that B will be more benefitted than A will be injured, and that is the end of all rightful exercise of the power to transfer one man's property to another, and to keep up the process just as long as they please.

Willis & Stockton, *supra*. Delegate Dennis Herrington also warned that the proposal would allow private corporations to seize people's land for their own profit. Willis & Stockton, *supra*, at 1027.

> [W]hat is the power of eminent domain? It is that power by which the State puts into exercise that sovereignty for the public weal, and nothing else. Now you will dwindle it down and drive out all the interests of one private person, and take all the interests of another private person, and put every man's hand against that of his neighbor . . . . ? It makes every man an Ishmaelite as against his neighbor; his hand is against every man's hand and his interest against every man's interest . . . . [E]very man interest will be sought to be enhanced by the use of this power of eminent domain to acquire and filch his neighbor's interest; and not upon the plea of any public benefit that will result, but solely for private use . . . . If you can apply

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> it to water, or the right to use water, why not apply it to every other private interest in the whole State?

Willis & Stockton, *supra*, at 1027. *See also* Willis & Stockton, *supra*, at 1374 (Speech of Mr. Rolfe: "It attempts to give the right away across private property to a private individual . . . . If the State needs the property for a public use . . . then my property can be paid for and taken. But no man's property ought to be subject to be taken for a private use upon any compensation whatever."). As with the other proposals to expand the power of eminent domain for the benefit of private parties, the Convention rejected the proposal.

These sources, and the Convention's decisions to reject proposals for expanding the eminent domain power, reveal that the public use clause of the California Constitution was drafted by people who believed eminent domain must not be "abused in the interests of large and wealthy corporations." Willis & Stockton, *supra*, at 347 (speech of Mr. Howard). The public use clause of the California Constitution therefore must be viewed in a different context than the Public Use Clause of the federal Constitution. The framers of California's Constitution explicitly rejected the notion that general public benefits arising from a condemnation could justify the transfer of property to the private use of for-profit corporations.

III

THE CALIFORNIA CONSTITUTION PROTECTS THE BLUE FAMILY FROM THIS PRIVATE-TO-PRIVATE TRANSFER

The Washington State Supreme Court has already adopted a rationale similar to that amicus proposes. Noting that "[d]uring the Washington State Constitutional Convention in 1889, concern was publicly voiced over the taking of private property for private enterprise," and that "delegates were strongly opposed to various exceptions to the absolute prohibition against taking private property for private use," *Manufactured Hous. Communities of Wash. v. State*, 13 P.3d 183, 189 (Wash. 2000), that court held that the state constitution limited the use of eminent domain in cases benefitting private interests, more stringently than does the Fifth Amendment. "Because the federal constitution predates the state constitution," that Court held, "the state drafters presumably knew the contents of the federal document and deliberately chose to . . . provid[e] greater protection for

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the property owner." *Id.* at 358-59. The history of the California Constitutional Convention of 1878-79 reveals even stronger grounds than in Washington for reading this state's public use limitation strictly against takings which benefit private interests, such as in this case. *Cf.* Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 Wash. L. Rev. 857, 869 n.31 (2000) (noting that Washington's Constitution accepted many compromises on individual rights.)

Although mid-twentieth century decisions such as *Hous. Auth. of Los Angeles County v. Dockweiler*, 14 Cal. 2d 437, 450-52 (1939) and *Redevelopment Agency of San Francisco v. Hayes*, 122 Cal. App. 2d 777, 789 (Cal. App. 1st Dist. 1954), *cert. denied sub nom. Van Hoff v. Redevelopment Agency of City & County of San Francisco*, 348 U.S. 897 (1954), held that government may redevelop neighborhoods by seizing property through eminent domain and transferring it to private owners for their own use and profit, these decisions failed to explain the degree to which the state Constitution prohibits such transfers above and beyond the federal Constitution. Indeed, these decisions appear to rest almost entirely on federal law or the law of other states. *See, e.g., Hayes*, 122 Cal. App. 2d at 789-90 (relying almost entirely on federal law); *Dockweiler*, 14 Cal. 2d at 450, 452 (same).

While no California court has determined the degree to which the state constitution's public use clause differs from its federal counterpart, there are persuasive indications that the state clause restricts eminent domain more stringently than does the Fifth Amendment. Adopted almost a century after the Fifth Amendment, the California state Constitution was written by people with much experience with the use of eminent domain for the benefit of private railroad corporations. The Convention's delegates considered this an abuse, but an inescapable one. Attempts to expand the use of eminent domain for other private parties—on the grounds that such condemnations would lead to economic benefits to the public—were considered and rejected by the Convention. The delegates believed that "the rights of the citizen as now guarded, as against this great and growing power, should be maintained, so that never hereafter shall the State recede from this position, or place the citizen for an hour at the mercy of [corporations], from whatever source they may come." Willis & Stockton, *supra*, at 349 (speech of Mr. Barnes).

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Today's eminent domain threat comes, not from railroads, but from real estate developers and retail corporations. Nevertheless, the public use clause forbids the state from transferring property from one private party to another. The reasons are the same that the 1879 framers had in mind: government's coercive power should be exercised only to protect individuals from the wrongs committed by others, not to promote the economic fortunes of politically powerful groups or to shame neighborhoods in a way that government prefers. The framers of the California Constitution understood these principles to be embodied in the public use requirement they issued in 1879, and that clause ought to be enforced meaningfully today.

CONCLUSION

Amicus curiae Pacific Legal Foundation urges this Court to consider the independent legal significance of the California Constitution's Public Use Clause during the right to take trial.

DATED: July 17, 2006.

Respectfully submitted,

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