IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No. 4D07-3139

CHRISTIAN ROMANY CHURCH MINISTRIES, INC.,

Appellant,

v.

BROWARD COUNTY, a political subdivision
of the State of Florida,

Appellee.

On Appeal from the Circuit Court, Seventeenth Judicial Circuit,
in and for Broward County, Florida
(Case No. 04-007554.09)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT

STEVEN GEOFFREY GIESELER
Fla. Bar No. 0880981
Pacific Legal Foundation
1002 SE Monterey Commons Blvd.
Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785
Email: sgg@pacificlegal.org
Counsel for Amicus Curiae
Pacific Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Florida Constitution & Statutes

Page

Rules

Miscellaneous

INTRODUCTION

Pursuant to Florida Rule of Appellate Procedure 9.370, Pacific Legal Foundation (PLF) respectfully submits this brief Amicus Curiae in support of Appellant Christian Romany Church Industries, Inc. (Church). Counsel for Appellant and counsel for Appellee have provided consent to PLF's participation as Amicus Curiae. Pursuant to Rule 9.370(a), a motion for this Court's leave to file accompanies PLF's submission of this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation was founded over thirty years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. Headquartered in Sacramento, California, with regional offices including its Atlantic Center in Stuart, Florida, PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and have represented the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have directly represented property owners in the United States Supreme Court in cases such as *Rapanos v. United States*, 126 S. Ct. 2208 (2006), *Palazzolo v. Rhode Island*, 533

U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF participated as amicus curiae in the U.S. Supreme Court in *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005), *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005), *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528 (2005), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), as well as in the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), successfully urging that court to overrule the notorious eminent domain case of *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981).

PLF attorneys frequently represent clients in property rights cases in Florida's state and federal courts, *see Trepanier v. County of Volusia*, 2007 WL 2682133 (Fla. 5th DCA 2007); *Fla. Ass'n of Home Builders v. Norton*, 496 F. Supp. 2d 1330 (M.D. Fla. 2007). PLF attorneys also have represented property owners in this Court, including recently in *Corie v. City of Riviera Beach*, 954 So. 2d 68 (4th DCA 2007), a case arising out of a city's attempt to circumvent Florida's new eminent domain law. PLF attorneys respectfully submit that this experience in property rights cases, and specifically in dealing with Florida eminent

domain law, can assist this Court in its examination of the issues pertinent to this case.

SUMMARY OF ARGUMENT

In 2005, the United States Supreme Court decided the eminent domain case of *Kelo v. City of New London*, 545 U.S. 469. In validating a Connecticut municipality's taking of family homes for private economic redevelopment, the Court cited its reluctance to review in any depth the New London Development Corporation's decision to use its eminent domain power. 545 U.S. at 487-89. While the majority of media and scholarly commentary on the *Kelo* opinion focused on the Court's deference to local governments' determinations of public use, the decision also explained that the Court would "decline to second guess [a local government's] determinations as to what lands it needs to acquire in order to effectuate the project." *Id*. at 488-89. Thus, lost in the cacophony of voices debating public use, most failed to note that the Court also had addressed the question of what Florida law calls necessity.

Therefore, when the *Kelo* Court took pains to "emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power," *Id*. at 489, this

invitation applied not just to questions of public use, but to those of necessity as well.[1] The Court found such restrictions proper if exercised by legislatures or by "state constitutional law." *Id.* On the public use question, the Florida Legislature, and later Florida's voters themselves via constitutional amendment, did their parts to accept the Court's invitation by passing one of the most potent state reforms in the nation. Fla. Const. art. X, § 6; Fla. Stat. §73.014 (2006).

But with regard to the issue of necessity, the Florida Supreme Court anticipated the United States Supreme Court's invitation to provide greater protections. Since 1975, Florida courts have interpreted the state constitution to require no *Kelo*-like judicial deference to government claims of necessity for takings of private property. Instead, courts must employ strict scrutiny when reviewing whether constitutional property rights are violated by insufficient showings of necessity. *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 455 (1975). This Court, then, should apply strict scrutiny to Broward County's assertion that it requires the Church's property for the public purpose set forth in the resolution authorizing the taking.

---

[1] This invitation to the States appears in the paragraph of the opinion directly following that addressing necessity. 545 U.S. at 488-89.

I

FLORIDA COURTS MUST APPLY STRICT SCRUTINY TO GOVERNMENT TAKINGS OF PRIVATE PROPERTY, INCLUDING CLAIMS OF NECESSITY

A. Governments Seeking to Use Eminent Domain Must Prove the Necessity of the Proposed Taking

The statutory provisions governing Florida's eminent domain law make explicit the limitation that only property "necessary for a project" may be condemned by state or local government. Fla. Stat. § 73.015(1) (2006). Thus, in addition to the public use (or public purpose) and just compensation requirements guaranteed by the Constitutions of the United States and the State of Florida, Florida's property owners are protected by statute against government's unbridled use of the eminent domain power. By mandating a nexus between an asserted public purpose and land to be taken in furtherance thereof, the necessity requirement is a crucial bulwark against government overreaching in the eminent domain context. *See Wilton v. St. Johns County*, 123 So. 527, 535 (Fla. 1929).

The controlling case on the question of necessity is the Florida Supreme Court's decision in *Canal Authority v. Miller*, 243 So. 2d 131 (Fla. 1970). In *Miller*, the Court reviewed a proposed taking of private

property to ascertain whether Florida's Canal Authority was overreaching by seeking to take property through eminent domain when the land's owner (and, originally, the Canal Authority itself) claimed that only an easement was needed to further the asserted public purpose. 243 So. 2d at 133. In rejecting the Canal Authority's attempt to seize the property, the Supreme Court, citing cases dating to the 1920s, summarized Florida's necessity law by writing that

> [A]n acquiring authority will not be permitted to take a greater quantity of property, or greater interest or estate therein, than is necessary to serve the particular public use for which the property is being acquired.

Id.

The Court then proceeded to recognize the important role the necessity requirement plays in preventing government's wrongful use of eminent domain: "In order to insure the property rights of the citizens of the state against abuse of the condemning authority's power it is imperative that the Necessity for the exercise of the eminent domain power be ascertained and established." *Id*. Finally, the Court left no doubt as to the final arbiter of the sufficiency of necessity claims, writing that such determination "is ultimately a judicial question to be decided in a court of competent jurisdiction." *Id*.

B. *Baycol* Requires Strict Judicial Construction of Government Claims of Necessity

The idea that government's power to take private property is accountable to authority other than that power itself is among the first recognized by the American judiciary. Less than a decade after our nation ratified the Bill of Rights, Justice Chase wrote for the Supreme Court on the limits of government's power to take private property:

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean . . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.

Calder v. Bull, 3 Dall. 386, 388 (1798). Older still–predating the Republic itself–is the common law principle of cabining, through judicially determined requirements of public use and just compensation, government's power to take property via eminent domain. *See, e.g.*, William Blackstone, *1 Commentaries on the Laws of England* at 134-35 (1765).

So too has the Florida Supreme Court long recognized the dangers of leaving elected officials as the final arbiter of the constitutional propriety of their own eminent domain actions. *See Wilton v. St. Johns*

County, 123 So. at 535. The power to take private property is circumscribed by the Constitution and by statute to safeguard the cherished rights of the individual.

> It is one of the most harsh proceedings known to the law, consequently . . . a strict construction will be given against the agency asserting the power.

Peavy-Wilson Lumber Co. v. Brevard County, 31 So. 2d 483, 485 (1947). In 1975, the Florida Supreme Court made explicit its adherence to this standard. In the seminal case of *Baycol v. Downtown Development Authority*, the City of Fort Lauderdale initiated eminent domain proceedings against private property owners. 315 So. 2d at 452. The Supreme Court, strictly reviewing the taking, looked behind the city's assertions of public purpose and necessity. *Id*. at 457-58. In undertaking this strict examination, the Court found that the city's assertion of necessity–the city argued that once *other* property was taken and redeveloped, the property at issue in *Baycol* would be needed for parking to service it–was insufficient. *Id*. After also finding that the taking was for a primarily private purpose, the Court held that the taking failed to pass constitutional muster. *Id*. at 458-59.

Had the *Baycol* Court merely deferred to the government's "findings" of necessity and public purpose, the property owners'

constitutional rights would have been left at the mercy of a self-interested political body. The Court instead properly placed the burden on the government to establish the two requirements of a valid taking and construed these claims strictly against the condemning authority. *Id*. at 455. In so doing the Court recognized that whether a taking of private property is necessary is "a judicial question for the courts." *City of Lakeland v. Bunch*, 293 So. 2d 66, 68 (Fla. 1974).

Given Florida's constitutional and statutory commitments to property rights threatened by eminent domain, the *Baycol* Court employed the correct standard of review to assess the constitutionality of the proposed taking. While the United States Supreme Court failed to apply meaningful scrutiny to the *Kelo* taking, it did reiterate that standards tougher than the "federal baseline," as established by "state constitutional law," are valid. *Kelo*, 545 U.S. at 489.

A similar understanding of the relationship between federal and state jurisprudence was summarized eloquently by the Florida Supreme Court in *Traylor v. State*:

> Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal charter imposes; they may not, however, place more restrictions on the fundamental rights of their citizens than the federal Constitution permits . . . In any

> given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.

596 So. 2d 957, 961-62 (1992) (citations omitted). The "ceiling" established by *Baycol* incorporates both Justice Chase's conception of the philosophical limits of government's power to take private property, and the common law's assignment to the judiciary of the duty to restrict government's eminent domain actions. More tangibly, *Baycol*'s ceiling controls eminent domain cases in Florida. There exists no opinion that has put a more restrictive gloss on the *Baycol* standard, let alone overruled it. To the contrary, *Baycol*'s standard of review has been cited approvingly (and recently) by Florida's courts. *See, e.g.*, *Rukab v. City of Jacksonville Beach*, 811 So. 2d 727, 730-31 (1st DCA 2002).

C. The *Baycol* Standard of Review Mandates Traditional Strict Scrutiny of Government Takings of Private Property

The standard of judicial review mandated by *Baycol* tracks almost identically the traditional strict scrutiny formulation courts employ to review government acts that threaten fundamental rights and liberties. Strict scrutiny requires a government to prove it has a compelling interest in effecting a given action, and that this compelling interest is achieved by necessary and narrowly tailored means. *See, e.g.*, *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200, 217-20 (1995) (government award of contracts based on race unconstitutional under strict scrutiny analysis); *see also* Stephen J. Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285, 303 (2000) (citing *Baycol*).

Both *Baycol* and traditional strict scrutiny place the burden on the government actor to prove the validity of its action. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002); *Baycol*, 315 So. 2d at 455. It is decidedly not the responsibility of the party challenging an action to initially establish its invalidity. So too does the necessity requirement explained in *Baycol* have a distinct parallel in the "necessary and narrow" means needed to pass strict scrutiny; indeed, the two share not only the same intent—to limit as much as possible governments' exercise of powers that threaten guaranteed rights—but the same verbiage. *Burson v. Freeman*, 504 U.S. 191, 198 (1992) ("familiar" strict scrutiny analysis requires state to show that regulation "is *necessary* to serve a compelling state interest and that it is narrowly drawn to that end") (emphasis added); *Baycol*, 315 So. 2d at 455.

Finally, *Baycol*'s "predominant public use" requirement reflects the "compelling government interest" that must be proven under strict scrutiny analysis. *Burson*, 504 U.S. at 198; *Baycol*, 315 So. 2d at 455. *Baycol* and other courts reviewing government actions with strict scrutiny are clear that guaranteed liberties must be infringed upon only when the most extraordinary of public interests is at issue. As Florida Supreme Court Justice Kogan wrote in *Perkins v. State*, state action is subject to strict scrutiny where it "impinges upon a fundamental right explicitly or implicitly protected by the constitution." 576 So. 2d 1310, 1314 (1991) (Kogan, J., specially concurring).

The right to own and be secure in one's property unquestionably is one of the essential freedoms deserving of the utmost judicial protection. The Florida Constitution recognizes this guaranteed right in no fewer than three places. Article I, Section 2, which enumerates Basic Rights, declares:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess, and protect property.

In order to ensure that the rule of law governs the abrogation of this Basic Right, Article I, Section 9, requires that

> No person shall be deprived of life, liberty, or property without due process of law . . . .

Article 10, Section 6, establishes concrete limitations on the government's power to take private property:

> No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . .

This multifaceted protection of Floridians' property rights reflects the agreement of the state constitution's drafters with the Founders of the federal Republic. A year before the American Revolution, colonial statesman Arthur Lee observed: "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty." *See* James W. Ely, Jr., *The Guardian of Every Other Right* 26 (Oxford Univ., 1992). Lee was right, for it is one's private property that an individual is most free to worship, speak, or associate as he chooses. The chief author of the Constitution, James Madison, recognized this paramount importance when he wrote in 1792 that

> [g]overnment is instituted to protect property of every sort; as well as that which lies in various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his.

James Madison, *Property*, Mar. 29, 1792, reprinted in *The Papers of James Madison* (William T. Hutchinson, et al., eds., Univ. of Chicago Press 1962).

This sentiment was echoed some two centuries later with the *Baycol* Court's establishment of strict scrutiny for takings; if the right to property is not to be protected with the full force of the judiciary, then no right is. Lest there be doubt about the *Baycol* Court's esteem for the principles enunciated by Lee and Madison, it wrote the following:

> [T]he private ownership and possession of property was one of the great rights preserved in our constitution and for which our forefathers fought and died; it must be jealously preserved within the reasonable limits prescribed by law.

315 So. 2d at 455 (footnote omitted). This Court should consider these principles as it reviews with strict scrutiny Broward County's taking of the Church's property, including its claims of necessity.

II

THE LOWER COURT FAILED TO APPLY THE REQUISITE SCRUTINY TO THE COUNTY'S CLAIM OF NECESSITY

On Page 2 of its Order on Second Amended Eminent Domain Petition (Order), the lower court noted that the Church "argues that the County's Resolution does not authorize the use the County intends to

make of the property [and that] the Resolution authorizes a taking only for the construction of the BARC [Broward Addiction Recovery Center] and therefore, the County may not acquire the entire Church property." Order at 2.

This is an essentially correct, though truncated, summary of one portion of the Church's opposition to the taking. The Church argued in the lower court that the County already owned property directly adjacent to the Church's property that is more than sufficient for the BARC facility, should the County wish to move it from its current location in Fort Lauderdale's "Historic Sailboat Bend" area. Order at 2-3. Moreover, the Church submitted that while Resolution 2003-463 (Resolution), authorizing the eminent domain action, lists as its sole public purpose the siting of the new BARC facility, County officials actually decided to take the Church property not for BARC, but instead for potential future use for a sexual assault treatment center. *See* Appellant's Initial Brief at 36-37. Thus the Church, citing to the record, alleges that the County's own Building Director "admitted that if the [sexual assault center] were not constructed, the County could construct the BARC on property it already owns on the west side of the block without taking any of the church property." *Id*. at 37 (citation omitted).

Such claims are absolutely crucial to any judicial determination of necessity, for Florida law permits counties to use eminent domain only for uses or purposes set forth explicitly in authorizing resolutions. Fla. Stat. § 127.02 (2006); *see also* Fla. Stat. § 73.021(7) (petition to exercise eminent domain power must set forth "[a] demand for relief that the property be condemned and taken *for the uses and purposes set forth in the petition*") (emphasis added). Where a taking is properly authorized via resolution, local governments still may not take more property than is necessary to effectuate the purpose set forth in such a resolution. *Canal Auth. v. Miller*, 243 So. 2d 131, 133; *see* Part I(A), *supra*.

Despite this controlling law, and after having cursorily noted the County's opposition on these grounds, the lower court failed to apply the strict scrutiny mandated by Florida law to the County's claim to need to confiscate the Church's property. *See* Part I(B), *supra*. The court failed to address *at all* the Church's argument that the County's eminent domain Resolution demonstrates on its face that taking the Church's property is not necessary to effectuate the Resolution's purpose. Instead, the lower court deferred with little or no investigation to the County's findings on a variety of other issues including the proposed

BARC facility's effects on public safety and proximity to nearby schools. Order at 3-7. This Court should do what the lower court failed to and apply strict scrutiny to the County's claim of necessity.

CONCLUSION

For the foregoing reasons this Court should review the taking of the Church's property with the strict scrutiny mandated by the Florida Supreme Court, interpreting the Florida Constitution.

DATED: September 27, 2007

STEVEN GEOFFREY GIESELER
Fla. Bar No. 0880981

Pacific Legal Foundation
1002 SE Monterey Commons Blvd.
Suite 102
Stuart, Florida 34996
Telephone: (772) 781-7787
Facsimile: (772) 781-7785
Email: sgg@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

I certify that the font used in this brief is Times New Roman 14 point and in compliance with Fla. R. App. P. 9.210(a)(2).

DATED: September 27, 2007

STEVEN GEOFFREY GIESELER
Florida Bar No. 0880981

CERTIFICATE OF SERVICE

I hereby certify that true copies of the Brief Amicus Curiae of Pacific Legal Foundation in Support of Appellant were furnished to the following via first-class mail, postage prepaid, the 27th day of September, 2007:

Lauri Waldman Ross, Esq.
Two Datran Center, Suite 1612
9130 South Dadeland Boulevard
Miami, Florida 33156

Brian P. Patchen, Esq.
Law Offices of Brian P. Patchen, P.A.
1000 Brickell Avenue, Suite 1112
Miami, FL 33131

James Rowlee, Esq.
Broward County Attorney's Office
115 South Andrews Avenue, Suite 423
Ft. Lauderdale, FL 33301

Timothy H. Kenney, Esq.
120 Butler Street, Suite B
West Palm Beach, FL 33407

STEVEN GEOFFREY GIESELER
Florida Bar No. 0880981