STATE OF MICHIGAN

In the Supreme Court

Appeal from the Michigan Court of Appeals

Hon. Peter D. O'Connell, Presiding Justice

COUNTY OF WAYNE, Plaintiff-Appellee, v. EDWARD HATHCOCK, et al., Defendants-Appellants.	Supreme Court Nos. 124070-124078 Court of Appeals Nos. 239438, 239563, 240184, 240187, 240189, 240190, and 240193-240195

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statute

Michigan Constitution

Miscellaneous

SUMMARY OF ARGUMENT

In this case, Wayne County seeks to condemn 1300 acres of land to construct a business park adjacent to Detroit Metro Airport. The park will include a business center, hotel, conference center, and recreation area. The county contended, and the court below found, that the business park would increase tax revenue and generate employment, and that this public benefit satisfied the Michigan Constitution's public use limitation under *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 628 (1981). *See County of Wayne v. Hathcock*, Nos. 239438, 239563, 240184, 240187, 240189, 240190, and 240193-240195, 2003 WL 1950233, *4 (Mich. App. Apr. 24, 2003). But two of the judges, while acknowledging *Poletown* was binding precedent, argued that that case was wrongly decided and ought to be overruled.

They are correct. *Poletown* was hastily written and has led to oppressive and unfair results. *Poletown* created an inequitable policy of corporate welfare, allowing wealthy and powerful interests to take other people's land for their own profit—usually at the expense of the poor and underrepresented. *Poletown* is inconsistent with the history and meaning of the Public Use Clause, which formerly limited eminent domain to cases involving use by the public. Its rationale has been sharply criticized by commentators and distinguished by subsequent courts. This Court should overrule *Poletown* and restore the constitutional protections which ensure that private property cannot be taken to benefit powerful interest groups at the expense of the less powerful.

ARGUMENT

I

THE *POLETOWN* DECISION WAS HASTILY WRITTEN AND DEEPLY FLAWED

In *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. at 628, this Court famously permitted the city to condemn a residential neighborhood and transfer it to General Motors to build a plant to manufacture automobiles for private sale and profit. *Poletown* held, as the court of appeals in this case noted, that "[t]he terms 'public use' and 'public purpose' are synonymous." *County of Wayne v. Hathcock*, 2003 WL 1950233 at 4 (citation omitted). Under that decision, the state's power of eminent domain can be exercised where the property taken is not applied to a public use such as a Post Office or highway, but instead to the private use of a corporation.

In his dissenting opinion, Justice Ryan noted that the case arose "in the context of economic crisis" which reached "calamitous proportions" in Michigan. 410 Mich. at 647. The city of Detroit, he wrote, had "its economic back to the wall," when it was approached by the General Motors Corporation, which sought to condemn the Poletown neighborhood to construct an automobile manufacturing plant. *Id.* at 651. Within only a few months of GM's proposal, the city agreed to condemn the property. *Id.* at 653. Like the city, "[t]he judiciary . . . moved at flank speed." *Id.* at 659. After a hasty trial and appeal, this Court filed its opinion less than two weeks after the case was argued. *Id.* at 659-60. Yet within this short period, the Court was forced to decide "an important constitutional issue having towering implications both for the individual plaintiff property owners and for the City of Detroit and the state alike, to say nothing of the impact upon our jurisprudence." *Id.* at 660. The final *per curiam* decision did not address the history or purpose of the public use limitation, or any possible criteria for limiting abuses of the newly expanded reading of the eminent domain power. Further, it ignored or misconstrued precedent in important ways.

In *City of Detroit v. Vavro*, 177 Mich. App. 682 (1989), the court of appeals addressed a case quite similar to the facts presented in *Poletown*. Detroit sought to condemn property to transfer to Chrysler Corporation to construct an automobile factory. The court held that it was bound by *Poletown*,

but it urged this Court to overrule that decision:

> [D]efendants urge us to adopt the dissenting opinions of Justices Fitzgerald and Ryan. While we agree with those opinions, the doctrine of *stare decisis* requires us to follow the majority decisions of the Supreme Court, even when we disagree with them. In his dissent in *Poletown*, Justice Ryan presaged the fallout from the *Poletown* decision . . . in a well-reasoned, articulate opinion addressing the constitutional invalidity of the majority's decision. A dissenting opinion was also filed by Justice Fitzgerald, who also explained at some length the flaws in the majority's reasoning . . . . [We] hope that the Supreme Court will again take the matter up and correct the wrong done in the *Poletown* decision.

Id. at 684-85. The *Vavro* court was correct. *Poletown* ought to be overruled.

A. The *Poletown* Rationale Renders the Public Use Clause Practically Void

The argument for permitting private takings is that by improving economic conditions generally, the public is benefitted in a general way. But if any general benefit to the public can satisfy the public use limitation—even when such benefits are incidental to a private company's profit and success—then that limitation would be nullified, because *every* successful business provides *some sort* of benefit to the public.

This Court rejected that proposition in *Ryerson v. Brown*, 35 Mich. 333, 339 (1877). That case involved a law allowing a private mill owner to take neighboring property to create a dam to power a flour mill. It held that in eminent domain cases it is "essential that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations." *Id.* at 338. But the Court noted that

> [t]here is nothing in the present legislation to indicate that the power obtained under it is to be employed directly for the public use. Any sort of manufacture may be set up under it, and the proprietor is not obligated in any manner to carry it on for the benefit of the locality or of the state at large . . . . [W]hen a public use is spoken of in this statute nothing further is intended than that the use shall be one that, in the opinion of the commission or jury, will in some manner advance the public interest. But incidentally every lawful business does this.

Id. at 338-39. *See also In re Eureka Basin Warehouse & Manufacturing Co.*, 96 N.Y. 42, 48-49 (1884) ("the fact that the use to which the property is intended to be put . . . will tend incidentally to benefit the public by affording additional accommodations for business, commerce or manufactures, is not sufficient to bring the case within the operation of the right of eminent domain . . . .").

In this case, the court of appeals held that a general benefit to the public, such as the creation of jobs or "improvement" of the county's "business image," satisfies the public use requirement under *Poletown*. But every business does these things. To equate public use with public benefit enables a party to use eminent domain whenever it can convince public authorities that its business enhances the community in some way. Unfortunately, this means that the power to condemn private property will fall into the hands of the most politically influential parties. When meaningfully enforced, however, the public use requirement prevents politically powerful groups from using the state's eminent domain power for their own purposes, and enriching themselves by taking away the property of the less politically successful.

B. The Public Use Limitation Was Intended to Prohibit Government from Redistributing Property from One Private Party to Another[1]

At an earlier point in American history, courts clearly understood the public use limitation to forbid the redistribution of property for private profit. "We know of no case," wrote the Supreme Court, "in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal . . . ." *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829). In *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (1795), Justice

[1] It is not certain that Amici PLF and ACLU Fund of Michigan would necessarily agree on what constitutes a valid public use in the eminent domain context. For purposes of this case, however, both organizations agree that *Poletown* should be overruled.

Paterson explained that the Legislature had no "authority to make an act, divesting one citizen of his freehold and vesting it in another, even with compensation." *Id.* at 310. *See also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("[A] law that takes property from A and gives it to B" would be "against all reason and justice."); *Arrowsmith v. Burlingim*, 1 F. Cas. 1187, 1189 (1848); *Nesbitt v. Trumbo*, 39 Ill. 110, 114 (1866); *Swan v. Williams*, 1852 WL 3103, *6 (Mich. 1852); *Chicago B&Q R.R. Co. v. Chicago*, 166 U.S. 226, 236 (1897).

America's founders believed government existed to preserve the lives, property, and welfare of the people, not to redistribute assets to accomplish the government's purposes. While government could take property for genuinely public projects, such as roads or post offices, it could not take property for anyone's *private* benefit. Because the central purpose of government was to protect people from theft or oppression by others, allowing the state to take property from one person to give it to another would be a "despotic power," *Dorrance*, 2 U.S. (2 Dall.) at 311, morally indistinguishable from robbery. If a majority could take property from the minority whenever it wished, the state would be no better than what Thomas Hobbes described as the state of nature, where "there [can] be no propriety, no dominion, no mine and thine distinct; but only that to be every man's, that he can get: and for so long, as he can keep it." Thomas Hobbes, *Leviathan* 101 (M. Oakeshott ed., 1962) (1651). The framers strove to avoid that state of affairs. *See* The Federalist No. 51, at 292 (James Madison) (Clinton Rossiter ed., 1999) (1961) ("In a society . . . [where] the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger."). *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (explicitly rejecting Hobbesian view of property rights).

While the framers acknowledged that states could take property when it was necessary for public

uses, they repeatedly rejected the idea that the state could take property from some people and give it to others, even if such a redistribution might benefit the public in some indirect way. As James Madison explained,

> there is no maxim . . . more liable to be misapplied . . . than the current one that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "Ultimate happiness," in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be the interest of the majority in every community to despoil & enslave the minority of individuals . . . . In fact it is only reestablishing under another name and a more specious form, force as the measure of right.

Letter to James Monroe (Oct 5, 1786) *in The Complete Madison* 45 (Saul Padover ed., 1953). To avert the danger of majority tyranny was one of the framers' primary concerns. One way to prevent government from redistributing property for the private benefit of political favorites was to limit the power of eminent domain to public uses only. This served as a "rule[ ] of impartiality" by which a "benefit is not confined to one or a few, but is enjoyed by the whole or a majority of the Community." James Madison, *Memorandum on Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments* (c. 1819), *in Madison: Writings* 756, 757-58 (J. Rakove ed., 1999). *Poletown*, however, ignores this rule, and allows private parties to benefit by "despoiling" those who lack the political might to stave off condemnations. This Court should restore the constitutional limits which prevent the government from being used as a tool for the benefit of preferred groups.

C. *Poletown* Confused the Public Use Limit in Eminent Domain with the Public Purpose Limit in Tax and Bond Cases

Poletown, 410 Mich. at 633, cited *People ex rel. Detroit & Howell R.R. Co. v. Salem Township Bd.*, 20 Mich. 452, 480-81 (1870), for the proposition that eminent domain could be used to accomplish anything "which is otherwise impracticable . . . ." But as Justice Ryan noted, that case involved

the taxing power, not the eminent domain power. *Poletown*, 410 Mich. at 663. The two should not be confused.

Eminent domain differs from tax or bond cases because eminent domain cases involve a vital individual right, while taxation or bond cases do not. "[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man." *Dorrance*, 2 U.S. (2 Dall.) at 310. But this is not usually true of the "right" to be free from improper expenditures of government funds. Thus the state is required to meet a higher standard when it seeks to condemn private property than when it merely seeks to issue bonds to raise revenue, or spend money on a public project. *Accord, City of Little Rock v. Raines*, 411 S.W.2d 486, 494 (Ark. 1967) ("That a project is one for which public funds may be expended is not a sufficient basis for finding that use of the property is a public use justifying the taking of private property"). Moreover, as Justice Fitzgerald explained in his *Poletown* dissent, this distinction makes sense in terms of the people's ability to control their own government. Abusing eminent domain to serve private interests "places the burden of aiding industry on the few, who are likely to have limited power to protect themselves . . . the burden of taxation is distributed on the great majority of the population, leading to a more effective check on improvident use of public funds." 410 Mich. at 641.

In this case, the burden of "improving the public image" of Wayne County has been shifted onto the appellant landowners, rather than the whole population. Although the state may compensate landowners for property it seizes, the landowners are rarely able to muster the political strength to oppose the takings at the outset. Taxation and bond issues, by contrast, affect the public at large directly, and allow both sides to mount campaigns, allowing the electorate to make an informed decision.

Before *Poletown*, this Court acknowledged the difference between the "public purpose" doctrine in tax law and the "public use" limitation on eminent domain. Justice Cooley explained that

the state had no authority to take private property for the benefit of another private party, even where doing so might be "convenient." *Ryerson*, 35 Mich. at 341. Such a

> stretch of governmental power . . . would be more harmful than beneficial. It would under any circumstances be pushing the authority of government to extreme limits; and unless the reasons for it were imperative, would be likely to lead to abuses . . . and to breed discords where, in the absence of such legislation, moderate counsels and final agreement might have prevailed.

Id at 342. *See also Sebring Airport Authority v. McIntyre*, 783 So.2d 238, 250-51 (Fla. 2001) (noting confusion between standards in eminent domain and bond cases).

Michigan's famous Supreme Court Justice, Thomas Cooley, who wrote the opinion in *Ryerson, supra,* elaborated, in his treatise on the limits of the police power, that it would be dangerous "to apply with much liberality," the principles of the Mill Act and railroad cases. Thomas Cooley, *A Treatise on Constitutional Limitations on the Police Power of the States* 532 (1868). "It may be for the public benefit" to do a variety of things, wrote Cooley, "but the common law has never sanctioned an appropriation of property based upon these considerations alone; and any such appropriation must be held to be forbidden by our constitutions." *Id.* at 532-33. In short, "*public use* implies a possession, occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the right of the government to seize and appropriate it could exist for any other use." *Id.* at 531.

The *Poletown* Court did not cite *Ryerson* or any other case involving the public use limitation; rather, the Court confused the public use limitation in eminent domain law with the public purpose limitation in tax law. The haste with which the *Poletown* decision was drafted led Justice Ryan to conclude that "the crushing burden of litigation which this Court must address daily did not afford adequate time for sufficient consideration of the complex constitutional issues involved within the two-week deadline the Court set for

itself . . . ." 410 Mich. at 660. Among those errors, the Court confused the public use limitation on eminent domain and the public purpose requirement in taxation or bond cases. Now, after years of experience with the problems resulting from the lenient *Poletown* standard for private condemnations, this Court should correct its error. More thorough consideration of the history and purpose of the Public Use Clause and greater experience with the lenient standard for takings in Michigan and elsewhere should lead this Court to overrule that decision and restore the state constitution's prohibition on taking private property for private use.

D. *Poletown* Ignored Overwhelming Precedent Holding That the State Could Not Condemn Property for Private Uses

Early eminent domain cases reveal only two contexts in which courts allowed condemnations for arguably private uses: the Mill Acts and the railroads. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 599-606 (2003). These cases were, at most, discrete exceptions to the general rule that government may not take property for uses which are not public. Mills and railroads were *public utilities*, provided by government, to which all citizens had equal access. Whatever else these cases may stand for, they do not support the proposition that government may convey property from one private party to another, for the recipient's uncontrolled private use in profit making. Many courts have explained that replacing the term "public use" with "public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement'" would eliminate

> any limitation which can be set to . . . the appropriation of private property . . . . The moment the mode of its use is disregarded and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another . . . we are afloat without any certain principle to guide us.

City of Richmond v. Carneal, 106 S.E. 403, 406 (Va. 1921) (quoting *Bloodgood v. Mohawk and Hudson R.R. Co.*, 18 Wend. 9 (N.Y. 1837)).

Michigan courts followed this rule for many years afterward. In *Board of Health of Portage Township v. Van Hoesen*, 87 Mich. 533 (1891), this Court struck down a law permitting the condemnation of lands to benefit privately run cemeteries, because it "attempts to invoke the exercise of the power of eminent domain for the condemnation of lands, at the instigation of a private corporation, for private uses." *Id.* at 536. The Court rejected the argument that private redistributions of property were permitted if they benefitted society generally:

> It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use; in other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use or to direct its management is conferred upon the public.

Id. at 539. Likewise, in *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48 (1903), this Court upheld a decision prohibiting the condemnation of land to erect a dam to generate power for private use and to run a private transportation company. *Id.* at 51. "Land cannot be taken . . . unless, after it is taken, it will be devoted to the use of the public, independent of the will of the corporation taking it." *Id.* at 53. And in *Shizas v. City of Detroit*, 333 Mich. 44 (1952), this Court reiterated, with numerous citations, the principle that "a taking of private property for uses partly public and partly private is void, where the private use is so combined with the public use that the two cannot be separated." *Id.* at 59.

The *Poletown* Court, however, failed to address this long history of limiting the power of eminent domain. The Court did not explain its refusal to follow *Ryerson*, or Justice Cooley's explanation of the distinction between the "public purpose" limitation on the taxing power and the "public use" limitation in

eminent domain. *Poletown* was therefore inconsistent with the history and purpose of the public use requirement.

II

THE *POLETOWN* DECISION IS FUNDAMENTALLY UNFAIR

A. Under *Poletown*, the Security of Private Property Depends on a Party's Ability to Defend It Politically

1. The Demise of the Public Use Limitation on Eminent Domain Has Led to the Mischiefs of Faction

When government has power to grant burdens or impose liabilities on individuals or groups in society, those groups will organize in order to gain control over government. *See* The Federalist No. 51, at 291 ("Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure."). Modern scholars refer to this as the problem of "public choice." Interest groups attempt to control the apparatus of the state to secure benefits for themselves or to impose burdens on their enemies. *See* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 286 (Ann Arbor Paperbacks, 1965) (1962) ("[I]nterest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups . . . .").

When government can take property to give it to private parties, interest groups will try to commandeer that power to enrich themselves. The force of the state becomes a prize to be won in a political contest. Groups which hope to profit from forced redistributions of property will attempt to influence the government to use eminent domain in their favor. But, properly applied, the public use limitation prevents this by making it impossible for interest groups to profit. As Professor Sunstein notes, the public use limitation is "focused on a single underlying evil: the distribution of resources or opportunities

to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984).

Wealthy individuals and groups are usually more politically powerful than those who are not. This means that when the public use limitation is eviscerated, the power to take private property tends to fall into the hands of those who are already wealthy or popular to be used against those who are not. Poor neighborhoods or small businesses are more often condemned than wealthy neighborhoods, because the poor, or unpopular minorities, have less political muscle. Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 56 (1998). Thus, without a meaningful public use limitation, a person's property rights are only as secure as the person's political influence. This is unequal and unfair. The Michigan Constitution holds that "Government is instituted for [the people's] *equal benefit, security and protection*," Mich. Const. art. I, § 1 (emphasis added), and that "[t]he person, houses, papers and possessions of *every person* shall be secure from unreasonable searches and seizures." *Id.* § 11. Where government can rearrange property on the basis of any asserted benefit to the public, there is no realistic limit on the power of politically influential groups to use mere political skill to deprive innocent citizens of their property.

Justice Ryan warned in his *Poletown* dissent that the power to redistribute property, assumed during the economic crisis of the early 1980s, might continue to be used even after that crisis had passed, in cases where there was no emergency. 410 Mich. at 679-80, 682-84. As illustrated in the next section, that fear has been realized. Indeed, as the concurring judges in the court of appeals here have pointed out, there is no economic emergency in this case. There is "no evidence in the record to establish that there exists any 'economic crisis' in Wayne County" as there was in *Poletown*. Instead, the power of

redistributing property for private benefit is being used simply to "improve the overall appeal of the county," *Hathcock*, 2003 WL 1950233, at *8, and make the county's public image more hospitable to business interests.

2. Eradicating the Public Use Limitation Benefits the Politically Powerful at the Expense of the Poor and Politically Unpopular

In the past 5 years alone, at least 138 condemnation proceedings have been filed in Michigan, to benefit private developers, rather than a public use. Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* 100 (2003), *available at* http://www.castlecoalition.org/report/report.shtml. Another 173 have been threatened. *Id.* Other states reflect a similar trend. Nationwide, over 3,700 properties have been condemned for the benefit of private parties since 1998. *Id.* at 2. In fact, this estimate may be far too conservative, since many condemnations are not challenged by landowners, who often have few resources available to oppose a condemnation. Most eminent domain abuse occurs at the local level; for example, the City of Mesa, Arizona, recently condemned a small automobile shop called Bailey Brake Service, in order to transfer it to a private party to construct a hardware store. *See* Sam Staley, *Wrecking Property Rights*, Reason, Feb. 2003, at 32 (2003 WL 5748895). And the City of Merriam, Kansas, recently condemned a Toyota dealership, in order to sell the land to the BMW dealership next door. Linda Cruse, *Merriam Sells Condemned Property to Baron BMW*, Kansas City Star, Jan. 27, 1999, at 4 (1999 WL 2402262).

Under the rule adopted in *Poletown*, "the public use doctrine is no longer an impediment to interest-group capture of the condemnation power . . . ." Kochan, *supra*, at 51. As a result, "powerful and wealthy special interests [profit by] convincing the state to use its power to displace residents from their homes and businesses." *Id.* at 52.

In the absence of a realistic check on private redistributions through eminent domain, developers have become a new kind of robber-baron, confident that they may take property whenever doing so serves their practically unreviewable reading of public interests. Meanwhile, local authorities have begun to view their role, not as protecting the safety and happiness of the people, but as sculptors of neighborhoods; they decide that a piece of property occupies the wrong economic niche and simply condemn and reconvey it to serve a use they consider more pleasing. *See, e.g.*, *Tolksdorf v. Griffith*, 464 Mich. 1, 10 (2001) ("The taking authorized by the act appears merely to be an attempt by a private entity to use the state's powers to acquire what it could not get through arm's length negotiations with defendants." (citation omitted)); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002) ("[The city's] planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user."); *Hathcock*, 2003 WL 1950233, at *8 ("[The County] simply decided to . . . improve the overall appeal of the county . . . .")

If courts fail to enforce the public use requirement, and instead defer to a local authority's determination that a different distribution of property would be more pleasing, there is no logical limit to the eminent domain power. In cases throughout the nation, wealthy and powerful interests have used this power to benefit themselves at the expense of the poor and unpopular. A quick review of some recent examples demonstrates how weakening the Public Use Clause has led to rampant eminent domain abuse across the country:

> • In *Casino Reinvestment Development Authority v. Banin*, 727 A.2d 102 (N.J. Super. Ct. Law Div. 1998), real estate tycoon Donald Trump persuaded local authorities to condemn an elderly widow's home to make way for a limousine parking lot. *See* Stephen J. Jones, Note: *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L.

Rev. 285, 298-99 (2000).

> • The State of Mississippi recently attempted to take 23 acres of a black neighborhood in the City of Canton, to transfer to the Nissan Corporation, for a truck factory. The Executive Director of the state's Development Authority admitted in the *New York Times* that "It's not that Nissan is going to leave if we don't get that land. What's important is the message it would send to other companies if we are unable to do what we said we would do." David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. Times, Sept. 10, 2001, at A20, *available at* http://query. nytimes.com/gst/fullpage.html?res=9D0DE2DC1738F933A2575AC0A9679C8B63.
>
> • In *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 Fed. Appx. 123 (9th Cir. 2003), the redevelopment agency condemned a discount retailer to make room for the nearby Costco warehouse store to expand. The city admitted that it was willing to go to any lengths—even so far as condemning commercially viable, unblighted real property—simply to keep Costco within the city's boundaries." *Id.* at 1129.

Shocking as these examples are, the use of eminent domain for private profit is quite common. *See further* Frank Aiello, Note: *Gambling with Condemnation: An Examination of Detroit's Use of Eminent Domain for Riverfront Casinos*, 46 Wayne L. Rev. 1639 (2000). Overruling *Poletown* and restoring a meaningful public use requirement in eminent domain cases would help prevent this unfair use of political power.

B. The Relative Bargaining Strength of Parties in Eminent Domain Cases Makes It a Matter of Special Concern for the Courts

One of the primary purposes of the law is to protect the weak against the strong. *Witheral v. Muskegon Booming Co.*, 68 Mich. 48, 58 (1888); *Pfeiffer v. Board of Education of City of Detroit*, 118 Mich. 560, 594 (1898) (Moore, J., dissenting). Yet the exercise of eminent domain often presents a classic David-and-Goliath situation. *See* Jones, *supra*, at 297; *Basin Elec. Power Co-op. v. Lang*, 304 N.W.2d 715, 718 (S.D. 1981) (Henderson, J., dissenting). A condemnee is confronted by the full legal power of the state, asserting a practically boundless authority to take the person's property against her will.

She is exposed to extreme psychological and political pressure, both from the authorities and from neighbors who might benefit from the taking. *Cf. Poletown*, 410 Mich. at 658 (Ryan, J., dissenting). Because a condemnee rarely can afford good legal representation, she will generally acquiesce in the condemnation without bringing a serious challenge to the law. The state, on the other hand, has seemingly limitless resources, both economic and legal, with which to pursue the case. Thus, the party in an eminent domain "transaction" is frequently in an extremely unequal bargaining position *vis-a-vis* the state. *Cf. id.* at 659. For this reason, courts once looked upon the power with great skepticism. *Petition of State Highway Comm'r*, 252 Mich. 116, 123-24 (1930); *In re Rogers*, 243 Mich. 517, 522 (1928); *Poletown*, 410 Mich. at 641 (Fitzgerald, J., dissenting) ("Condemnation places the burden of aiding industry on the few, who are likely to have limited power to protect themselves from the excesses of legislative enthusiasm for the promotion of industry.").

Imbalance of bargaining power has always implicated public policy considerations and justifies careful scrutiny by reviewing courts. *Zurich Ins. Co. v. Rombough*, 384 Mich. 228, 232-33 (1970) (quoting *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 269 (1966)). Unfortunately, the recent trend is for courts to defer to legislative determinations in eminent domain cases. *See Berman v. Parker*, 348 U.S. 26, 32 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). This increased deference has eroded the ability of the Public Use Clause to protect individual rights. The result is precisely what Justice Fitzgerald warned in his *Poletown* dissent: citizens are now subject to the most outrageous confiscation of their property for the benefit of other private interests, with little real chance of redress. 410 Mich. at 639.

Deference under *Poletown* encourages legislatures to redistribute property, because "[a]s judicial deference to legislatures goes up, as it has in recent years, one would expect the demand for legislation by

interest groups to rise as well." Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 Cornell L. Rev. 43, 57 (1988). This perpetuates an unfair form of "corporate welfare" by which unconsenting private parties—often the poor and underrepresented—are forced to subsidize the private profits of the politically favored.

III

MODERN CASES HAVE CRITICIZED *POLETOWN*'S RATIONALE

A. Michigan Courts Have Not Deferred to the *Poletown* Decision

In the years since *Poletown*, Michigan courts have attempted to limit the ability of private parties to exploit the eminent domain power. Indeed, *Poletown* was an aberration, inconsistent with decisions of the past and receiving little deference in subsequent cases.

In *City of Center Line v. Chmelko*, 164 Mich. App. 251 (1987), the court of appeals constricted the degree of deference accorded to condemnations when it rejected the city's attempt to condemn private property to give to a car dealership. Although the city asserted that the taking would benefit the public indirectly, in the manner of *Poletown*, the court rejected this argument. "Any benefit to the public is purely derivative of the primary purpose: the city's continued good relations with Rinke Toyota. While it may be true that the public would derive some benefit from the expansion plans of Rinke Toyota, that would be true of any business." *Id.* at 263-64. The court regarded *Poletown* as strictly limited to its factual context, *id.* at 261, and refused to "interpret *Poletown* to mean that whenever a substantial corporate enterprise needs

room to expand it can . . . induce the local government to destroy smaller interests." *Id.* at 264.

In *City of Lansing v. Edward Rose Realty, Inc.*, 442 Mich. 626 (1993), this Court rejected the use of eminent domain to grant access to a cable television company, on the grounds that the cable company was the primary beneficiary of the power. "Although the city will retain ownership of the easement it proposed to obtain through condemnation," the Court explained, the cable company "will receive more than an incidental benefit . . . . [It] could receive substantial revenue . . . and increased market value of its overall system." *Id.* at 639. The Court acknowledged that cable television brought educational and political benefits to the public, but it emphasized the private company's "extensive private interest" in increased profits. *Id.* at 641.

In *Tolksdorf v. Griffith*, 464 Mich. 1 at 10, this Court struck down the Private Roads Act (MCL § 229.1 *et seq.*) because it authorized private landowners to petition townships to condemn property to create roads for private use, rather than a public use. As with *Edward Rose*, the Court noted that "the act does not impose a limitation on land use that benefits the community as a whole. Instead, it gives one party an interest in land the party could not otherwise obtain . . . . '[A]ny benefit to the public at large is purely incidental [to the private benefit] . . . . '" *Id.* at 10-11 (quoting *McKeigan v. Grass Lake Township Supervisor*, 229 Mich. App. 801, 801 (1998)). *Compare Poletown*, 410 Mich. at 462 (Fitzgerald, J., dissenting) ("[I]n the present case, the transfer of the property to General Motors . . . cannot be considered incidental . . . . It is only through the acquisition and use of the property by General Motors that the 'public purpose' of promoting employment can be achieved. Thus, it is the economic benefits of the project that are incidental to the private use of the property.").

These cases reveal that Michigan courts have tried to resist the use of eminent domain to benefit private actors, even when such takings were justified by claims of a general benefit to the public. This

Court and other courts have noted that public benefits from such takings are only a secondary result of the profits of the private entities that take control of such land and, as a result, such public benefits are merely incidental. Yet this was precisely the situation presented in *Poletown*. This Court should restore the Constitution's protections for property rights by reversing that decision.

B. Courts in Michigan and Other States Have Criticized *Poletown*

Several courts, both in Michigan and elsewhere, have criticized *Poletown* and urged this Court to overrule its decision. *See, e.g.*, *Vavro*, 177 Mich. App. at 687 ("[T]he *Poletown* decision was incorrect and we urge the Supreme Court to take this matter up and overrule *Poletown* and restore the constitutional protections of private property."); *Novi v. Robert Adell Children's Funded Trust*, 253 Mich. App. 330, 343 (2002) (calling Justice Ryan's dissent "persuasive," but noting that *Poletown* is binding precedent).

Very recently, the Illinois Supreme Court rejected the rationale of *Poletown* when it held that the government could not use eminent domain to convey property to a racetrack to expand its parking lot. *Southwestern Ill. Dev. Auth. v. National City Environmental, L.C.C.*, 768 N.E.2d 1 (Ill. 2002). Although the redevelopment agency argued that the expansion of the parking lot would improve business at the racetrack, thus "contribut[ing] to positive economic growth in the region . . . 'incidentally, every lawful business does this.'" *Id.* at 9 (quoting *Gaylord v. Sanitary District of Chicago*, 68 N.E. 522, 525 (Ill. 1903)). The public use limit on eminent domain, was not satisfied by "the economic by-products of a private capitalist's ability to develop land . . . . " *Southwestern Ill. Dev. Auth. v. National City Environmental, L.C.C.*, 768 N.E.2d at 10 (quoting *Southwestern Ill. Dev. Auth. v. National City Environmental, L.C.C.*, 710 N.E.2d 896, 906 (1999) (Kuehn, J., concurring)).

> While we do not deny that this expansion in [a private company's] revenue could potentially trickle down and bring corresponding revenue increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power of the government. Using the power of the government for purely private purposes to allow [a private company] to avoid the open real estate market and expand its facilities in a more cost-efficient manner, and thus maximizing corporate profits, is a misuse of the power entrusted by the public.

Southwestern Ill. Dev. Auth. v. National City Environmental, L.C.C., 768 N.E.2d at 10-11.

In *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979), the Kentucky Supreme Court also rejected the theory that the *Poletown* Court embraced. Using eminent domain "to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections." *Id.* at 5; *accord, Karesh v. City Council of City of Charleston*, 247 S.E.2d 342 (S.C. 1978); *In re Petition of City of Seattle*, 638 P.2d 549, 560 (Wash. 1981).

IV

OVERRULING *POLETOWN* WOULD SIGNIFICANTLY IMPROVE THE ADMINISTRATION OF JUSTICE

A. Poletown Satisfies This Court's Stated Criteria for Overruling a Case

Although courts should generally be reluctant to overrule their prior decisions, the principle of *stare decisis* is not an inexorable command. *Mack v. City of Detroit*, 467 Mich. 186, 203 n.19 (2002); *Robinson v. City of Detroit*, 462 Mich. 439, 463 (2000). This Court has overruled decisions if they are "badly reasoned and inconsistent with a more intrinsically sound prior doctrine and the actual text of the [law in question]." *Mack*, 467 Mich. at 203 n.19. These criteria apply powerfully to the *Poletown* case. *Poletown* was hastily drafted, in the midst of a profound economic crisis; it was badly reasoned and failed

to account for the public choice problems caused by equating the public use limitation with generalized public benefits; it ignored and misinterpreted prior precedents which were exactly on point; and it reduced the Public Use Clause to a practical nullity.

The reasoning of *Poletown* has been "fairly called into question" by repeated criticism by scholars and courts. *Compare Robinson*, 462 Mich. at 464 (quoting *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 627-28 (1974) (Powell, J., concurring)). Nor would overruling *Poletown* threaten legitimate reliance interests. If anything, it would restore the legitimate reliance interest of Michigan's citizens not to have their property seized to satisfy the needs of the politically powerful. It is unlikely that many Michigan citizens are aware that, despite the plain language of their state constitution, their property is liable to be seized by the government and transferred to another owner at any time that public authorities decide the property would be more advantageously used by another. In fact, it seems likely that many of them learn this only after a condemnation. *Compare Robinson*, 462 Mich. at 466. As the *Robinson* Court noted, "if the words of the statute are clear, the [citizen] should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest." *Id.* at 467. This also holds for the Constitution's Public Use Clause. The *Poletown* Court's erroneous interpretation of that clause has disrupted citizens' legitimate reliance on the Michigan Constitution's protection of their property. Therefore, this Court, "rather than holding to the distorted reading because of the doctrine of *stare decisis*, should overrule the earlier court's misconstruction." *Id.*

B. It Is Time to Overrule *Poletown*

Cases endorsing the broad interpretation of the public use requirement have always been accompanied by promises that the power of eminent domain does have limits. *See, e.g., Midkiff,* 467 U.S.

at 240 ("There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use . . . . "); *Poletown*, 410 Mich. at 632 ("All agree that condemnation for a public use or purpose is permitted."). Yet no predictable limit has materialized. Indeed, the situation has only gotten worse.

> When twentieth century courts permitted condemnation of urban land for reuse by private interests, the first step was slum clearance for the improvement of housing. The second was slum clearance with the ancillary purpose of commercial or industrial development. The third was clearance of sound property for arguably more desirable private development.

Laura Mansnerus, Note: *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. Rev. 409, 423 (1983).

Limiting government's power to take property for private use is both proper and manageable. Courts are justifiably reluctant to weigh policy declarations or to interfere in the Legislature's determinations of public policy. *See Poletown*, 410 Mich. at 664. Nevertheless, fundamental limits on government are incorporated into the state's constitution so that this Court can protect the people from violations of their rights which may be sanctioned by the elected branches. Moreover, Justice Fitzgerald suggested a workable understanding of the distinction between cases in which a private party benefits incidentally from a taking justified under the Public Use Clause and those in which the public benefit is incidental to the private use. As he argued, the public purpose to be served by the taking in *Poletown* could only be served through GM's acquisition and use of the property. Without GM's use of that property, the asserted purpose could not be accomplished. Thus the private use was primary and the public use was secondary—which rendered the taking unconstitutional. This Court has endorsed Justice Fitzgerald's interpretation, in *Edward Rose, supra*, and *Tolksdorf, supra*. The economic by-products of a private business' use of property does not satisfy the Public Use Clause.

CONCLUSION

In his dissent in *Poletown*, Justice Ryan noted that it was an "extraordinary case," whose "reverberating clang . . . and jurisprudential impact is likely to be heard and felt for generations." 410 Mich. at 645. He was correct. Most law students read *Poletown* during their first year in law school; it has become the archetype of modern eminent domain law, essentially erasing the Public Use Clause from the Constitution and, with it, a substantial protection for individual rights. This weakening of private property rights benefits powerful interests at the expense of the poor and underrepresented. And in this case it has permitted the County to condemn defendants' land, not for any emergency such as existed in *Poletown*, but merely to improve the business image of the county. To the degree that it holds that such attenuated public benefits satisfy the Public Use Clause, *Poletown* should be overruled, and the decision of the court of appeals *reversed*.

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Respectfully submitted,

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