No. 04-41196

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WESTERN SEAFOOD COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants,

CITY OF FREEPORT, TEXAS; and
FREEPORT ECONOMIC DEVELOPMENT CORPORATION

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
Honorable Samuel B. Kent, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

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INTEREST OF AMICUS CURIAE

The identity and interest of Amicus Curiae is set forth in the accompanying motion to file this amicus brief.

SUMMARY OF ARGUMENT

This condemnation violates both the Fifth Amendment of the Federal Constitution and Article I, section 17, of the Texas State Constitution. Although the United States Supreme Court held in *Kelo v. New London*, 125 S. Ct. 2655 (2005), that government has wide discretion to seize property for economic development under the Fifth Amendment, it specifically held that such discretion was not warranted when government transfers property to confer private benefits on " 'a particular class of identifiable individuals.' " *Id.* at 2662 (quoting *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)). Moreover, no majority of the Court decided whether heightened scrutiny should be applied to condemnations that benefit particular, ascertainable individuals. Heightened scrutiny is appropriate in such circumstances, because they involve a breakdown of the normal democratic process, and "implicate[] the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (citation omitted).

In this case, there is an ascertainable private beneficiary to whom the local government intends to give the property it seizes: developer H. Walker Royall, whose companies will employ the property for private profit. The City contends that this transfer will improve the local economy and thus satisfy the Public Use Clause. But neither *Kelo* nor any other case has gone so far as to allow such a plain "'law that takes property from A. and gives it to B.'" *Kelo*, 125 S. Ct. at 2661 n.5 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798)).

Moreover, the condemnation violates the Texas Constitution. The Texas Supreme Court has specifically rejected a broad interpretation of "public use" as "mean[ing] nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain." *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958). Instead, a taking is for a public use only if the public has "some definite right or use in the business or undertaking to which the property is devoted." *Id.*

A review of the history of the Texas Constitution demonstrates that neither the 1845 founders nor the 1875 drafters of Texas interpreted "public use" to mean "public benefit." In particular, the delegates at the 1875 convention were opposed to the government transferring property to private corporations for their own use and profit. Although the Texas Supreme Court held in *Hous. Auth. of Dallas v. Higginbotham*,

143 S.W.2d 79, 84 (Tex. 1940), and *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959), that the term "public use" should be construed liberally, neither those cases nor any other decision by that court has held that economic benefits alone satisfy the Public Use requirement. Rather, those cases held that eradicating dangerous, slum property is a proper governmental function—a proposition which does not cover this case. Neither those cases, nor the original intent of the framers of the Texas Constitution, allow government to seize non-slum, commercially viable property and transfer it to another private owner on the theory that doing so will improve the economy.

ARGUMENT

I

THE CONDEMNATION IN THIS CASE IS NOT VALID UNDER *KELO*

A. This Case Involves the Sort of "One-to-one Transfer" Prohibited Under *Kelo*

In *Kelo*, 125 S. Ct. 2655, the Supreme Court allowed the city of New London, Connecticut, to condemn several properties to carry out what it described as an "integrated" and "carefully considered" plan of civic redevelopment. *Id.* at 2661, 2668. Condemnations undertaken pursuant to a "carefully formulated" master plan, the Court held, do not violate the Public Use Clause of the Fifth Amendment, even though the property is later transferred to another private owner for his own profit.

Id. at 2665. But the Court held that the Public Use Clause *does* prohibit cities "from taking [a person's] land for the purpose of conferring a private benefit on a particular private party," *id.* at 2661, or to confer such benefits "under the mere pretext of a public purpose." *Id.* While confirming that government regulation of the economy is subject only to rational basis review, *Kelo* nevertheless preserves the longstanding rule that a "law that takes property from A. and gives it to B . . . is against all reason and justice," and unconstitutional. *Id.* at 2661 n.5 (quoting *Calder*, 3 U.S. (3 Dall.) at 388). *See also Kelo*, 125 S. Ct. at 2669 ("[T]ransfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.")

Western Seafood's property is being taken simply so that it may be transferred to a private company, operated by millionaire real estate developer H. Walker Royall, whose companies, Briarwood Capital Corporation and Freeport Marina, L.P., will receive the property and employ it for private profit. The City's intention to transfer the property to Mr. Royall's control is not in serious doubt; the director of the City's Economic Development Corporation is an associate of Mr. Royall; the City Manager, Ron Bottoms, testified that the impetus for development came from Mr. Royall's associate even before the City's economic development study was completed. *See* Opening Brief of Appellant at 12; the Defendants told the District Court that Mr. Royall's family (the Blaffers) "were the ones who came forward and said [to the

city], Hey, we'd like to do this development for you," *id.* at 10, and that "Mr. Royall is the principal, the, I guess, person in charge." *Id.* Here, the city "pick[ed] out a particular transferee beforehand," to benefit from the condemnation. *Kelo*, 125 S. Ct. at 2669-70 (Kennedy, J., concurring).

Kelo makes clear that the existence of a "particular class of identifiable individuals," who will benefit from the condemnation makes this case much more likely to qualify as a private, and not a public use. *Id.* at 2662 (quoting *Midkiff*, 467 U.S. at 245). Justice Kennedy's concurring opinion, moreover, was explicitly limited to cases in which the condemnation is "not to serve the interests of . . . [a] private party." *Kelo*, 125 S. Ct. at 2670 (Kennedy, J., concurring).

The rationale of *Kelo* is limited only to cases involving "comprehensive," "deliberat[e]," and "carefully formulated" development plans, 125 S. Ct. at 2665, which do not confer private benefits on " 'a particular class of identifiable individuals.' " *Id.* at 2662 (quoting *Midkiff*, 467 U.S. at 245). The condemnation in this case therefore violates the Public Use Clause.

B. The Existence of a Definite, Ascertainable, Private Beneficiary of the Condemnation Requires Heightened Scrutiny

In *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled on other grounds*, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the Michigan Supreme Court held that a heightened standard of scrutiny

should be applied to cases involving a definite private beneficiary of a condemnation. *See Poletown*, 304 N.W.2d at 459-60 (when a condemnation "benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced"). Likewise, the Arizona Supreme Court has recently declared that "when a proposed taking for redevelopment is challenged on the basis that the taking is for private rather than public use, the anticipated public benefits or advantages from the proposed redevelopment must be carefully scrutinized." *Bailey v. Myers*, 76 P.3d 898, 903 (Ariz. 2003).

The question of heightened scrutiny in private condemnation cases was not settled in *Kelo*. There, four Justices, in the opinion by Justice Stevens, rejected the propriety of such scrutiny. *See* 125 S. Ct. at 2667-68. But Justice Kennedy, who provided the fifth vote for the holding, specifically reserved this question. *See id.* at 2670 (Kennedy, J., concurring). In fact, he specifically declared that courts "confronted with a plausible accusation of impermissible favoritism" should "treat the objection as a serious one" and "conduct[] a careful and extensive inquiry" into the record. 125 S. Ct. at 2669 (Kennedy, J., concurring). The narrowest holding of a Supreme Court decision establishes that decision's precedent. *Marks v. United States*, 430 U.S. 188, 193 (1977). Thus Justice Stevens' opinion rejecting heightened scrutiny is not binding on this Court.

In the context of economic development condemnations, heightened scrutiny is especially warranted by what economists call the "public choice" or "rent-seeking" problem. Whenever government has power to redistribute benefits and burdens between constituents, those interest groups will compete for control of that power, to secure benefits for themselves or to impose burdens on their competitors. *See generally* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 287 (Ann Arbor Paperbacks, 1965) (1962) ("[T]he profitability of investment in [political organization] is a direct function of the size of the total public sector and an inverse function of the 'generality' of the government budget . . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process . . . .").

Unfortunately, rent-seeking tends to favor the wealthy and powerful at the expense of the poor or politically unpopular minorities, and it is difficult for property owners to defend themselves from politically organized advocates of economic development condemnations. Since the benefits will be localized and concentrated, while the costs broadly dispersed, incentives will be skewed toward increased amounts of property distribution. *See id.* at 287-88 (noting "spiral effect" of ever-greater lobbying efforts). Rent-seeking behavior therefore tends to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . ." *United States v. Carolene Products*, 304 U.S. 144, 153

n.4 (1938); *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 81 (1998) ("It is not cost-efficient . . . for a taxpayer to fight a particular piece of special-interest legislation.").

This is why many legal commentators have argued for a more searching standard of review in cases involving condemnations "benefit[ting] specific and identifiable private interests." *Poletown*, 304 N.W.2d at 459-60. *See, e.g.*, Kochan, *supra*, at 93 ("Scrutiny under the enumerated powers doctrine can limit the rents available through legislation."); Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 Vill. L. Rev. 207, 224 (2004) (calling for strict scrutiny of condemnations benefitting private parties); 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 (2000) (same); Nicole Stelle Garnett, *The Public-Use Question As a Takings Problem*, 71 Geo. Wash. L. Rev. 934, 938 (2003) (same); Jeffery W. Scott, *Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to "Public-Private" Takings?*, 12 J. Affordable Housing & Community Dev. L. 466, 479 (2003) ("Judicial deference is justified as long as legislatures and the agencies they create do their jobs properly and strive to honestly serve the public interest. However, when powerful entities

hijack the machinery of eminent domain and use it to serve their private ends, the courts must step in.").

An example of appropriate heightened scrutiny in a condemnation benefitting private parties is *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), which declared that a city's attempt to condemn a discount retailer and transfer the property to Costco, violated the Constitution. The court found that, unlike the sort of general redevelopment plan which the Supreme Court later considered in *Kelo*, the condemnation of the 99 Cents store was adopted solely to serve Costco's interests. *See, e.g., id.* at 1129 ("[T]he *very reason* that Lancaster decided to condemn 99 Cents' leasehold interest was to appease Costco. Such conduct amounts to an unconstitutional taking for purely private purposes."). The *99 Cents Store* court found that, in a case involving a private transfer of property through eminent domain, a heightened level of scrutiny was appropriate:

> If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a "public use," and if those officials could later justify their decisions in court merely by positing "a conceivable public purpose" to which the taking is rationally related, the "public use" provision of the Takings Clause would lose all power to restrain government takings.

Id. at 1129 (quoting *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (en banc)). *Accord, Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*,

218 F. Supp. 2d 1203 (C.D. Cal. 2002). *Kelo* cited *99 Cents Stores* with approval. *See Kelo*, 125 S. Ct. at 2667 n.17.

II

THIS CONDEMNATION VIOLATES THE TEXAS CONSTITUTION'S PUBLIC USE CLAUSE

A. This Court Must Consider Western Seafood's State Constitutional Claim Separately from Its Federal Claim

As the Supreme Court recognized in *Kelo*, state constitutions can provide greater protections for property owners than the Federal Constitution. *See Kelo*, 125 S. Ct. at 2668. Some state supreme courts have interpreted the terms "public use" as requiring something more than that a condemnation merely benefit the public in some general sense. *See, e.g., Hathcock*, 684 N.W.2d at 786 ("[I]f one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like.").

As this Court has recognized, Texas has "adopted a narrower view" of the public use clause than the federal courts have. *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 965 (5th Cir. 1994). The Texas Constitution does now allow condemnations which simply " 'encourage industry, or promote the general public welfare.' " *Id.* (quoting Daniel B. Benbow, *Public Use as a Limitation on the*

Power of Eminent Domain in Texas, 44 Tex. L. Rev. 1499, 1500 n.8 (1966)). Although the Texas Supreme Court has held that eradicating slums satisfies the "public use" clause of the state constitution, *see Higginbotham*, 143 S.W.2d at 84; *Davis*, 326 S.W.2d 699, that court has never held that economic development alone qualifies as a public use. In fact, it has "refused to accept the definition adopted by some authorities which makes the phrase mean nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain." *Pate*, 309 S.W.2d at 833. Under the Texas Constitution, the test for determining whether a taking satisfies the public use clause "is to see if there results to the public some definite right or use in the business or undertaking to which the property is devoted." *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 475 (Tex. App. 1983).

Both the original intent of the Texas public use clause and more recent judicial interpretations reveal that economic development takings violate the public use clause of the Texas Constitution. In fact, a state's history can reveal that state constitutional provisions provide greater protections than federal clauses even when they are similarly or identically worded. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M.L. Rev. 199, 203 (1998); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 817 (1992). *See further Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 326 (1997) ("[E]ven

when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical . . . ."); *State v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986) (setting forth six criteria for determining when state constitution offers greater protection than federal Constitution).

Thus, even if this condemnation were constitutional under *Kelo*, this Court must consider Western Seafood's claim under the state constitution separately, taking into consideration the unique experiences of Texas legal history. *See also Pierson v. State*, 177 S.W.2d 975, 977 (Tex. Crim. App. 1944) ("The Constitution is to be construed as a whole with a view of ascertaining the intent of its framers.").

B. The 1845 Texas Constitution Adopted an "Actual Use" Theory of "Public Use"

The Texas Constitution should be interpreted "in accordance with the obvious intent of those who enacted [it]." *Bell v. Indian Live-Stock Co.*, 11 S.W. 344, 345 (Tex. 1889). The Texas Constitution's "public use" clause originated in 1845. *See* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 Tex. Tech L. Rev. 1089, 1127 (1995). At the state's first Constitutional Convention, a committee appointed to draft a bill of rights proposed that the clause read "nor [may] vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made." William F. Weeks, *Debates of the Texas*

Convention 22 (1846).[1] But Delegate Armstrong of Jefferson County—an attorney who had served in the legislature of the Republic of Texas and would later serve at the Constitutional Convention of 1868—moved to amend this proposal to read, "and no person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person." *Id.* at 95. Armstrong explained that "he thought the necessity apparent of changing the phraseology, if not of striking out: so as not to leave points undetermined which it is intended to establish. The terms in the report were liable to dispute at the best." *Id.* Armstrong's motion was agreed to, *id.* at 96, and his wording was finally adopted. The clause remained unaltered throughout the constitutions of Texas until 1876, which modified it slightly but retained the "taken or applied to public use" language. Thus the Texas framers explicitly chose to avoid a relaxed standard of "public utility," and to adopt instead a strict standard of "public use," so as to avoid leaving anything "undetermined."

That Armstrong's measure was understood as requiring a strict standard of "public use" is also revealed by the comments of Delegate John Hemphill, who was the Chief Justice of the Texas Supreme Court at the same time that he served as a delegate to the 1845 Convention, and is called "the John Marshall of Texas."

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[1] *Available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1845debates/00000008.pdf (last visited Dec. 13, 2005).

University of Texas, *The Handbook of Texas Online*.[2] Hemphill explained that the clause should not require that compensation come before condemnation because this would "do[] away with the whole benefit of the provision" governing the eminent domain power. Weeks, *supra*, at 95. He went on to explain what the "whole benefit" of eminent domain was: "All persons . . . acquainted with military operations . . . well know the necessity that frequently exists of making use of private property, cattle, horses, powder and lead, and any other articles necessary for the defense of forces in the field." *Id.* at 95-96. Hemphill's military example demonstrates that he regarded the power of eminent domain as limited to such traditional public uses as military installations or supplies. Military necessity was the original concept of eminent domain. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 571-72 (2003).

Neither Hemphill nor any other delegate referred to the "public use" limitation as allowing takings for economic development or other semi-private or private uses. Rather, Hemphill pointed out that "[t]he terms employed in the Constitution of the United States and others are these: 'nor shall private property be taken for public use without just compensation.'" Weeks, *supra*, at 96. Hemphill was probably familiar with the controlling case-law regarding "public use" in 1845. At that time, the term

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[2] *Available at* http://www.tsha.utexas.edu/handbook/online/articles/HH/fhe13.html (last visited Dec. 13, 2005)

prohibited the transfer of property to private parties. *See Varick v. Smith*, 5 Paige Ch. 137 (N.Y. Ch. 1835); *Bloodgood v. Mohawk & Hudson R.R.*, Lock. Rev. Cas. 118 (N.Y. 1837); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829) ("we know of no case, 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."); *see also Hearn v. Camp*, 18 Tex. 545, 1857 WL 5003, at *4 (1857) (per Hemphill, C.J.) ("The lands of an individual cannot be taken for public use without compensation, much less can they be wrested from one man and given to another; neither directly, nor indirectly.").

There were two instances in which condemnations benefitting private parties were allowed under the case law of other states in 1845: the Mill Act cases and the railroad cases. Under these cases, private investors could seize neighboring land to construct railroads or watermills. These cases were highly contentious, and courts that allowed these condemnations did so only because mills and railroads were regulated public utilities, not wholly private corporations. *See, e.g., Boston & Roxbury Hill Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 477 (1832); *Swan v. Williams*, 2 Mich. 427, 434-36 (1852). "*[S]trictly private corporations*" for which "the *private interest* of the corporators is the primary object," could not employ the power of eminent domain, *id.* at 435, but railroads were semi-public agencies, which, while they did lead to "private emolument on the part of the corporators," were really

created by the government for "public utility, and [the] private benefit, instead of being the occasion of the grant [of the charter of corporation], is but the reward springing from the [public] service." *Id.* at 436. Thus railroads could employ eminent domain, but only because they were public utilities. *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45, 75 (N.Y. Ch. 1831) ("[T]he owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without reasonable excuse, upon being paid the usual rate of fare," and legislature could "regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill.").

The theory that "public use" referred to the social benefits arising from a private corporation's improved business was not part of the law in 1845. Instead, the government could take property for semi-private industrial pursuits only when the government regulated those pursuits as public utilities. But if government enriched private individuals, the condemnation was invalid under the public use clause. *See, e.g., Varick*, 5 Paige Ch. 137 (legislature could create canal system and mills for public use, but is forbidden from "taking the property of one citizen and selling it to another").

C. The 1875 Constitutional Convention Did Not Regard Business Subsidies as Public Uses

The 1845 public use clause remained unchanged through the Civil War and Reconstruction periods. In 1876, however, the clause was changed slightly. This alteration demonstrates even more that private industrial use of the eminent domain power was not regarded as a public use by the framers of the Texas Constitution.

Almost every state called a Constitutional Convention in the last half of the nineteenth century. Lawrence Friedman, *A History of American Law* 302 (1973). Among the reasons for this political unrest was the challenge presented by railroads and other large-scale industrial concerns. *See, e.g.*, Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention* 45-65 (Da Capo 1969) (1930). Texas was no different. The 1875 Convention was dominated by agrarian reformers led by "[t]he state Grange, a grass-roots farmer's organization," Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 St. Mary's L.J. 771, 776 (1990), which sought to curb government abuses which had benefitted large railroad corporations.

At the 1875 Convention, the "public use" clause was altered so as to provide more protective methods of compensation. *See Debates in the Texas Constitutional Convention of 1875* 237-38 (Seth Shepard McKay ed., 1930). Although the Convention did not debate the meaning of "public use" directly, the delegates who

discussed this alteration referred only to the use of eminent domain for "making roads," *id.* at 238, a traditional, actual public use.

As was true in 1845, the case law of 1875 held that the term "public use" only permitted condemnation where the property would be used by government buildings, public highways, public utilities, or regulated common carriers. *See, e.g., Smith v. Taylor*, 34 Tex. 589, 1871 WL 7451, at *11 (1870) (land may be "condemned for the use of government"); *Jones v. Keith*, 37 Tex. 394, 1873 WL 7279, at *4 (1872) (eminent domain may be used for ferries and highways); *City of Paris v. Mason*, 37 Tex. 447, 1873 WL 7299, at *3 (1872) (eminent domain may be used to construct streets). *Cf. Miller v. Burch*, 32 Tex. 208, 1869 WL 4801 (1869) (city exceeded its authority by condemning property which had become a slum; "If the common council may make such an ordinance in respect to the comparatively valueless stable of the plaintiff, why not a like one to be executed on the most elegant and costly edifice . . . ?" *Id.* at *2). There is no case from the pre-1875 period suggesting that eminent domain could be used to transfer private property from one owner to another for purposes of economic development.

Moreover, the debates reveal that, more generally, the delegates did not view it as a proper governmental function to seize private property and transfer it to private parties for their economic benefit. Article XIV of the Constitution drafted at this convention was devoted to the granting of government-owned land to private

corporations. In the debate over this section, delegates explained at length their belief that government's power to enrich private corporations, particularly railroads, should be subject to strict limitations.

As proposed, the section gave the Legislature "no power to make any grant . . . of public money to any individual . . . or . . . corporation whatsoever," except in cases of "public calamity." McKay, *supra*, at 116. When Delegate Arnim proposed also to prohibit granting *land* to private groups, a long debate ensued over the state's policy of subsidizing the construction of railroads by land grants. *See, e.g., id.* at 117-133, 267-271. The land in question was not, as in this case, the property taken from private owners, but vacant land owned by the state. Nevertheless, the debate was long and heated. Proponents of "land donations" argued that railroads could not be built without them, and that railroads had increased the state's prosperity. *See, e.g., id.* at 127-28 (Delegate Flournoy referring to "the great economical progress of the age in railways."); *id.* at 402-03 (Delegate West: "railroads had also brought into market the public lands and the lands held by private individuals."). Opponents contended that railroads had failed to construct lines in a timely manner and had squandered government grants. *See, e.g., id.* at 132 (Delegate Robertson: "Our lands are gone; our school funds are gone, and yet we are called on to extend this [railroad charter].").

Proponents of land grants admitted that corporations had abused their powers, but argued that such abuses could be remedied through regulation. Delegate Flournoy explained that "the secret necessary" to the operation of railroads "and the protection of the State, is to keep them now and forever under the political control of the State, to regulate their actions, prevent discrimination, limit freights and fare, and to consider them as a part of the utilized power of the State." *Id.* at 128. *See also id.* at 133 (Delegate Dohoney: "He would admit that [land donation] had been abused by the last three Legislatures, but the friends of [a prohibition] should correct these abuses and not strike at the policy itself.").

Delegate Flournoy, who supported reform, rather than abolition, of land grants, proposed amending the section to allow grants "by general law alone," *id.* at 133. Ultimately, a compromise was reached. Delegate Crawford proposed "that no lands should ever be granted except in a manner prescribed by general laws, and that no law should be passed granting any citizen or class of citizens of any of the public lands or privileges not equally belonging to other citizens." *Id.* at 418. This proposal was narrowly adopted, *id.*, and although it was eliminated on reconsideration, *id.* at 421, the final language adopted by the convention held: "The Legislature shall have no power to grant any of the lands of this State to any railway company" except on

certain conditions, and that "[t]he Legislature shall pass general laws only, to give effect to the provisions of this section." Tex. Const. art. XIV, § 3 (1876).[3]

The "general laws" requirement was common to nineteenth century constitutions, and contemporaneous lawyers understood the term as requiring the legislature "to make laws for the public good, and not for the benefit of individuals." Thomas Cooley, *A Treatise on Constitutional Limitations* 129 (1868). As Chief Justice Hemphill had explained in 1847, a general law was distinguished from a special law in that general laws were "general public laws, binding all the members of the community under similar circumstances," while special, or "partial or private laws" only "affect[ed] the rights of private individuals, or classes of individuals." *Janes v. Reynolds' Adm'rs*, 2 Tex. 250, 1847 WL 3538, at *2 (1847) (citing *State Bank v. Cooper*, 10 Tenn. 599, 1831 WL 1032, at *4 (1831)).

The debate over land grants reveals that the 1875 Convention did not consider the granting of government-owned land to private parties for private profit to be a legitimate government pursuit. This, in turn, demonstrates that the "public use" requirement was not seen as allowing government to take property and transfer it to private companies for profit. The exception to this rule was only in cases of regulated public utilities such as railroads. "An *essential feature* of a public use is that the

[3] This section was repealed in 1969.

public may enjoy its benefits, and, if it be an undertaking for the performance of services, command the services." *Mangan v. Texas Transp. Co.*, 44 S.W. 998, 1001 (Tex. Civ. App. 1898) (emphasis added).

D. Early Texas Court Decisions Did Not Permit Condemnations for "Public Benefit"

As the delegates to the 1875 Convention were likely aware, condemnations of private property for railroad construction had been long upheld as a "public use," despite the fact that railroads stood to profit from such condemnations. *See, e.g., Buffalo Bayou, Brazos & Colorado R.R. Co. v. Ferris*, 26 Tex. 588, 1863 WL 2747, at *8 (1863). But such railroad cases do not establish that the Texas "public use" clause is satisfied when a condemnation merely benefits the public in some general way.

In *Mangan, supra*, the court of civil appeals upheld a condemnation to construct a railroad which would be used by brewery companies in shipping their wares. *Id.* The court found that this satisfied the public use requirement because "the public has an equal right with the two breweries mentioned in the petition to enjoy the benefits of appellee's proposed road and command its services." *Id.* Although condemnations for railroads would benefit private companies, "such statutes have been upheld upon the grounds that the roads, when constructed, were charged with the duties of common carriers and were, therefore, public highways." *Id.* (citing

cases). *This* is the difference between the railroad cases and cases, like this one, in which eminent domain is used solely for the private welfare of private corporations.

In *Kyle v. Texas & New Orleans Ry. Co.*, 3 Willson 518, 1889 WL 1464 (Tex. Ct. App. 1889), the court held that a condemnation to construct a private spur line to a railroad violated the public use clause. Railroads could use eminent domain, explained the court, but "only . . . where the [taken] property is required for the purposes of the incorporation or the transaction of its business," and not " 'for the construction of an independent branch road to subserve only mere private interests.' " *Id.* at *4 (citation omitted). Unlike the brewery road allowed in *Mangan*, the private spur line in *Kyle* was not accessible by the public, and was "exclusively in the interest of and for the private benefit of private parties and of the corporation." *Id.* at *5. *Cf. Barrett v. Metcalfe*, 33 S.W. 758, 759 (Tex. Civ. App. 1896) (law allowing riparian owner to divert upstream water for private irrigation was unconstitutional taking of downriver owners' property for private use).

Again, the rule in *Mangan* was the basis of the decision in *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex. 1905), *aff'd per curiam*, 204 U.S. 667 (1907). There, the challenged law allowed irrigation companies to construct canals across private land via eminent domain. The court held that the state constitution forbids "purely private corporations and associations of persons for the carrying on of businesses wholly private: from "tak[ing] private property for use in

such businesses, without being required to assume any duty to, or to respect any right in, the public." *Id.* at 14. The *Borden* court specifically rejected "that liberal definition of the phrase 'public use' adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain." *Id.* Instead, the public use clause only allowed the use of eminent domain "when there results to the public some definite right or use in the business or undertaking to which the property is devoted." *Id. See also Dallas Cotton Mills v. Industrial Co.*, 296 S.W. 503, 505 (Tex. Com. App. 1927) ("*A sine qua non* of a lawful taking . . . is that the professed use be a public one in truth. Mere fiat . . . pronounced by the Legislature . . . does not make that a public use which is not such in fact.").

E. Texas Cases Permitting Slum Eradication Condemnations Do Not Warrant Economic Development Condemnations

The Texas courts' refusal to adopt a liberal interpretation of "public use" continued until 1940, when, in an abrupt reversal, the court declared that "cases from our jurisdiction demonstrate[] that this court has adopted a liberal view concerning what is or is not a public use." *Higginbotham*, 143 S.W.2d at 84. Remarkably, the *Higginbotham* Court went on to quote the language from *Borden* which explicitly rejected such a holding, and then asserted that "[t]he public use [in *Borden*] arose out

of the general benefit to the state through the reclamation of arid lands for agriculture by irrigation, which would otherwise be lost to the state." *Id.* at 85. But this was not true. *Borden* like *Kyle* and *Mangan*, adopted a moderate "actual use" standard whereby a condemnation satisfied the public use clause *only* where the condemning party was subject to the sorts of regulations that would guarantee "to the public some definite right or use in the business or undertaking to which the property is devoted." *Borden*, 86 S.W. at 14. *See also West v. Whitehead*, 238 S.W. 976, 977-78 (Tex. Civ. App. 1922) (railroads are public uses only because they are "a highway, or a common carrier, and open to the promiscuous and uniform use of the public").

The *Higginbotham* court misconstrued over a half century of Texas law in another important way. It relied heavily on cases involving the expenditure of tax funds: *Goodnight, et al. v. City of Wellington*, 13 S.W.2d 353 (Tex. Comm'n App. 1929), and *Davis, et al. v. City of Taylor*, 67 S.W.2d 1033 (Tex. 1934). In this respect, *Higginbotham* parallels the Michigan Supreme Court's infamous *Poletown* decision, which also confused cases involving the expenditure of tax funds with cases involving the use of eminent domain. *See Poletown*, 304 N.W.2d at 457-59; *cf. id.* at 472-75 (Ryan, J., dissenting) (pointing out difference between public purpose in tax cases and public use in eminent domain cases).

In *Goodnight*, for example, the court upheld the use of government funds for the establishment of a city musical band, on the grounds that this was a "public

purpose." Notably, the term "public purpose" is found in Article VIII, section 3, which is the clause the *Goodnight* court discussed. 13 S.W.2d at 354. That case contained no reference whatsoever to eminent domain, which is governed by Article I, section 17. Even more remarkably, the *Goodnight* court itself relied on the principle of "*in pari materia*," and "consider[ed] other parts of the constitution" to determine the meaning of "public purpose" in Article VIII, section 3. *Goodnight*, 13 S.W.2d at 354. Applying that principle here would reveal that the framers of the Texas Constitution used "public purpose" when referring to expenditures, but "public use," when referring to eminent domain, leading to the conclusion that these terms mean something different. *City of Taylor*, likewise, involved spending government funds to establish a chamber of commerce, which the court rightly upheld as a "public purpose" under Article VIII, section 3. The case had absolutely nothing to do with eminent domain or the "public use" requirement of Article I, section 17. *See City of Taylor*, 67 S.W.2d at 1034 (citing Article VIII, section 3; not discussing eminent domain). As Justice Fitzgerald wrote in his dissent in the *Poletown* case in Michigan: "What constitutes a public purpose in a context of governmental taxing and spending power cannot be equated with the use of that term in connection with eminent domain powers." *Poletown*, 304 N.W.2d at 463. At the very least, "a review of the cited cases"—*Goodnight* and *City of Taylor*—did anything *but* "demonstrate[] that [the

Texas Supreme] court has adopted a liberal view concerning what is or is not a public use." *Higginbotham*, 143 S.W.2d at 84.

Higginbotham's weaknesses aside, the case did not establish a warrant for condemnations for general economic development. Even after *Higginbotham*, the Texas Supreme Court reiterated that it "refused to accept the definition adopted by some authorities which makes the phrase mean nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain." *Pate*, 309 S.W.2d at 833. The court cited *Higginbotham* in this paragraph. Notwithstanding that case, however, "property is taken for public use only when there results to the public some definite right or use in the business or undertaking to which the property is devoted." *Higginbotham*, 143 S.W.2d at 179.

Higginbotham was therefore specifically limited to the eradication of slum property, which is different from the use of eminent domain for generalized economic benefits. In the case of slum eradication, as the Michigan Supreme Court recently put it, "the selection of the land to be condemned is itself based on public concern . . . meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land . . . satisfy the Constitution's public use requirement." *Hathcock*, 684 N.W.2d at 782-83. But in the case of economic development condemnations, the transfer is said to be a public use because it will

"allow [the new owner] to grow and prosper and contribute to positive economic growth in the region." *Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002). The problem with the latter rationale is that " 'incidentally, every lawful business does this,' " *id.* (quoting *Gaylord v. Sanitary Dist. of Chicago*, 68 N.E. 522, 525 (Ill. 1903)), meaning that it would justify a condemnation of virtually any property for virtually any reason. Texas courts have never gone so far, even in *Higginbotham*.

The Texas Supreme Court again upheld the condemnation of slum property in *Davis*, 326 S.W.2d 699. There, the court found that the original intent of the 1875 public use clause was to allow condemnations of property "for resale to private individuals." *Id.* at 704. To support this assertion, the *Davis* court cited *Smith*, 34 Tex. 589. But in *Smith*, the land was condemned to construct a state capitol building, and, fifteen years later, excess land which had not been used for that purpose was later sold at a public auction. *See Smith*, 34 Tex. 589, 1871 WL 7451, at *11. The case contains no suggestion that the government could legitimately seize land from a private party and transfer it to another for economic development.

Whatever its flaws, the *Davis* decision did not hold that economic development improvement alone could satisfy the public use requirement in eminent domain cases. Like *Higginbotham,* that case involved "slum and blighted areas which constitute a serious and growing menace" to society by "contribut[ing] substantially and

increasingly to the spread of crime, disease, and juvenile delinquency." *Davis*, 326 S.W.2d at 703. By contrast, in *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962), the Texas Supreme Court cited *Davis* while holding that a city could not condemn property to establish a road which would serve only to allow a landowner easier access to the marketplace. *See Maher*, 354 S.W.2d at 926 ("The only possible public purpose conceivable which the road in this case can serve is that of putting the products of the soil and the range of Section 331 into the economy of the community."). Even under the rule announced in *Davis*, a city could not "condemn a highway across [one person's] ranch in order to enable [another person] to establish a fishing camp or other commercial enterprise on his land. To do so would be taking private property for a private purpose.'" *Maher*, 354 S.W.2d at 926 (quoting *Phillips v. Naumann*, 275 S.W.2d 464, 468 (Tex. 1955)). In fact, the Texas Supreme Court has never declared economic improvement to be sufficient to satisfy the Public Use Clause of the state constitution.

CONCLUSION

Direct transfers of property between private parties for private profit violate not both the Public Use Clause of the Federal Constitution and the public use clause of the Texas State Constitution. The decision below should be *reversed*, or, in the alternative, this Court should certify the question of state law to the Texas Supreme Court.

DATED: January 13, 2006.

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I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT was filed with the Clerk this 13th day of January, 2006, in both printed form and electronic form on a diskette, via Federal Express; and that two printed copies, and one electronic copy on a diskette, were served this day via first-class mail, postage prepaid, upon each of the following:

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