

March 25, 2005

The Honorable Chief Justice Robert George  
and Honorable Associate Justices  
California Supreme Court  
350 McAllister Street  
Room 1295  
San Francisco, CA 94102

Re: *Mesdaq v. Superior Court of San Diego County*, No. S132386  
Letter Brief Supporting Petition for Review

Dear Chief Justice George and Associate Justices:

Pacific Legal Foundation (PLF) and Institute for Justice (IJ) file this letter brief as Amici Curiae pursuant to Rule 28(g) of the California Rules of Court. Amici respectfully requests this Court to grant the petition for review filed by Ahmad Mesdaq, in the above-captioned case.

**I**

**IDENTITY AND INTEREST OF AMICI CURIAE  
PACIFIC LEGAL FOUNDATION AND INSTITUTE FOR JUSTICE**

PLF was founded over 30 years ago and is widely recognized as the leading defender of property rights in the nation. PLF engages in research and litigation over a broad spectrum of public interest issues at all levels of state and federal courts, and has appeared as amicus curiae in this Court countless times to defend the constitutional principles of private property rights, limited government, and free enterprise. *See, e.g., Travis v. County of Santa Cruz*, 33 Cal. 4th 757 (2004); *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002); *Hensler v. City of Glendale*, 8 Cal. 4th 1 (1994). PLF has appeared as amicus curiae in important eminent domain cases such as *Wayne County v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), before the Michigan Supreme Court, and *Kelo v. City of New London*, 268 Conn. 1, *cert. granted*, 125 S. Ct. 27 (2004) (No. 04-108), currently pending before the United States Supreme Court. In addition, PLF attorneys have published

extensively on the subject of eminent domain. *See, e.g.*, Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569 (2003); James S. Burling, *Blight Lite*, SH053 ALI-ABA 43 (2003).

The Institute for Justice is a nationally-recognized non-profit legal foundation engaged in pioneering litigation on the subject of eminent domain. It is currently litigating *Kelo v. New London*, 268 Conn. 1, *cert. granted*, 125 S. Ct. 27 (2004) (No. 04-108), before the United States Supreme Court. The Institute represents owners across the country challenging the condemnation of their property for private parties and has filed amicus briefs in eminent domain cases in the Supreme Courts of Connecticut, Illinois, Michigan, Mississippi, Minnesota, New Jersey, Oklahoma, and Nevada, as well as the U.S. Court of Appeals for the Ninth Circuit. *See, e.g.*, *Casino Reinvestment Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. 1998). IJ attorneys have also written extensively on the subject of eminent domain, including preparing *Public Power: Private Gain* (2003), a nationwide survey of economic-redevelopment condemnations over five years.

PLF and IJ attorneys are familiar with the legal issues and facts raised by this case and believe that their public policy perspective and litigation experience in support of property rights will provide a necessary additional viewpoint when this Court considers the petition for review in this case. Amici Curiae particularly wishes to emphasize the standard of review appropriate to determinations of “public use,” and demonstrate that the substantial evidence test requires evidence of ponderable legal significance, that is reasonable, credible, and of solid value, and that anything less would essentially nullify Mr. Mesdaq’s right to judicial review of the Resolution of Necessity, which is specifically protected by Code of Civil Procedure section 1245.255.

## II

### SUMMARY OF ARGUMENT

The issue of eminent domain for economic redevelopment has become a matter of nationwide controversy. *See generally Kelo*, 268 Conn. 1, *cert. granted*, 125 S. Ct. 27. Throughout the country, local officials are exploiting this power to seize property and transfer it to private developers who put the land to private, commercial purposes, even though the United States Constitution, and most state constitutions, limit the use of eminent domain to “public use[s].” The rationale for such takings is that the generalized economic benefits arising from the new use of the property is enough of a public benefit to satisfy the public use requirement.

In this case, Ahmad Mesdaq owns nonblighted, commercially viable real estate in the fashionable Gaslamp District of San Diego. His store, which sells high-quality cigars and coffee, has been targeted by the city’s redevelopment officials for condemnation and demolition, for the benefit of private developers. He seeks to challenge the Resolution of Necessity by which this condemnation

was effected. But in considering his challenge, the trial court held that under the substantial evidence test, a Resolution of Necessity will be affirmed so long as there is any evidence to support the Resolution. This holding exaggerates the proper deference wildly beyond its proper limits and renders meaningless the guarantee of judicial review in Code of Civil Procedure section 1245.255. Moreover, the trial court's decision rests on an interpretation of the "substantial evidence" test which conflicts with the interpretation of other District Courts of Appeal. This Court's review is necessary to set the law straight.

### III

#### **THE *MESDAQ* CASE REPRESENTS A SIGNIFICANT OPPORTUNITY FOR THIS COURT TO CLARIFY CONDEMNATION LAW IN CALIFORNIA AND END EMINENT DOMAIN ABUSE**

##### **A. Eminent Domain Abuse Is a Serious National and Statewide Problem**

The power of eminent domain is one of the most severe confrontations between a citizen and the government, and one with extreme consequences: the possible loss of one's home or business. Eminent domain is also one of the powers of government most prone to abuse. Although the Constitutions of the United States and of California allow condemnations only for "public use" (U.S. Const. amend. V; Cal. Const. art. I, § 19), this power is often exploited by powerful private interests who exploit the government's authority for *private* uses instead.

The public use requirement was devised to prevent "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). It instead limits the government's use of eminent domain to those cases where the public benefits directly, such as in the construction of highways or post offices, projects that the public has the legal right to use.

Unfortunately, in the years since 1954—when *Berman v. Parker*, 348 U.S. 26, 32 (1954), and *Redevelopment Agency of San Francisco v. Hayes*, 122 Cal. App. 2d 777, *cert. denied sub nom. Van Hoff v. Redevelopment Agency of the City & County of San Francisco*, 348 U.S. 897 (1954), were decided—several courts have found that a condemnation satisfies the public use requirement any time the legislature declares that the new use for the property is beneficial to the public. As the Ninth Circuit Court of Appeals once noted:

On urban renewal condemnations . . . the whole scheme is for a public agency to take one man's property away from him and sell it to another. The founding fathers may have never thought of this, but the process has been upheld uniformly by latter-day judicial decision . . . . There may be a lot of policy reasons against the taking of one man's property to sell to another (and sometimes at a loss to the government) but under all modern federal decisions our hands are tied—if the book on the procedure is followed.

*Government of Guam v. Moylan*, 407 F.2d 567, 568-69 (9th Cir. 1969).

Judicial decisions holding that the “public use” requirement is met whenever the Legislature holds that the taking benefits the public has reduced that constitutional provision to a meaningless formality, rather than a substantial protection. Justice Field once observed that “[t]he Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name . . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.” *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866). But under current interpretations of “public use,” the Legislature can ratify any condemnation—even one which simply takes property from a private party and gives it to another, which the Supreme Court claims is unconstitutional, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (“[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.” (quoting *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937)))—merely by passing a formal declaration that the condemnation benefits the public.

The consequence of this expansive reading of eminent domain has been an epidemic of condemnations benefitting private parties. In the years 1998 to 2003, there were approximately 10,000 cases nationwide of people's homes and businesses being condemned or threatened with condemnation for the benefit of private parties. See Dana Berliner, *Public Power, Private Gain* (2003).<sup>1</sup> Of these, 858 were in California, which Berliner describes as “one of the most active states in condemning properties for the benefit of other private parties.” *Id.* at 20.

Some states have begun to resist the expansive interpretation of public use that federal courts embraced. In *Hathcock*, 684 N.W.2d 765, the Michigan Supreme Court rejected the “economic benefit” theory by which redevelopment agencies condemn private property for redistribution to more productive uses:

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<sup>1</sup>Available at <http://www.castlecoalition.org/report/> (last visited Mar. 1, 2005).

[The] “economic benefit” rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if 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.

*Id.* at 482. The Illinois Supreme Court also recently held that although “expanding [one business’] facilities through the taking of [another’s] property would allow it to grow and prosper and contribute to positive economic growth in the region . . . ‘incidentally, every lawful business does this,’” *Southwestern Illinois Dev. Auth. v. Nat’l City Envtl., L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002) (quoting *Gaylord v. Sanitary Dist. of Chicago*, 68 N.E. 522, 584-86 (1903)). Therefore: “[T]o constitute a public use,” the court held, “something more than a mere benefit to the public must flow from the contemplated improvement.” *Id.*

California courts are particularly sensitive to the importance of genuine judicial review when condemnations benefit private parties. For example, in *Sweetwater Valley Civic Assn. v. City of National City*, 18 Cal.3d 270, 276 (1976), this Court specifically rejected the proposition that blight determinations are immune from judicial review. The Court noted that California’s Redevelopment Law places significant limits on the use of eminent domain: “the Legislature made clear its intent that a determination of blight be made—not on the basis of potential alternative use of the proposed area—but on the basis of the area’s existing use.” *Id.* at 278. Mr. Mesdaq’s property, like the property involved in *Sweetwater*, is non-blighted, commercially viable property. Indeed, it is a fashionable, upscale coffee shop which is currently producing income for Mr. Mesdaq. The *Sweetwater* Court found that “economically profitable . . . property constitutes neither an economic nor a social liability. Therefore, it is not blighted.” *Id.* at 279. Mr. Mesdaq wishes to introduce evidence to the same effect in his case, but the ruling below denies him the opportunity. That sort of deference to the Redevelopment Agency is inconsistent with the judicial review guaranteed to Mr. Mesdaq under California statutes and under *Sweetwater*.

This State’s determination that redevelopment authorities should not have unreviewable discretion to condemn property and redistribute it to private parties was also evident in *City and County of San Francisco v. Ross*, 44 Cal.2d 52, 59 (1955). There this Court explained that “The Constitution does not contemplate that the exercise of the power of eminent domain shall secure to private activities the means to carry on a private business whose primary objective and purpose is private gain and not public need.” But if Redevelopment Authorities can condemn property on the basis of *any evidence*, and thereby bar property owners from introducing evidence of their own in showing that the condemnation violates the public use requirement, then this rule will be eviscerated. As the Court of Appeal recently put it, “a local agency’s findings in support of its adopting a redevelopment plan

are not conclusive.... “[C]ourts are required to be more than rubber stamps for local governments.” *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 538 (2000) (quoting *Emmington v. Solano County Redevelopment Agency*, 195 Cal. App. 3d 491, 498 (1987)).

In addition, many commentators and courts in other states have concluded that courts must employ heightened judicial scrutiny when condemnations benefit private parties, as a means of preventing abuse. *See, e.g., Bailey v. Myers*, 76 P.3d 898, 903 (Ariz. 2003) (“[W]hen 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.”); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 459-60 (Mich. 1981), *overruled on other grounds, Hathcock*, 684 N.W.2d at 483 (Mich. 2004) (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.”); Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 93 (1998) (“Scrutiny under the enumerated powers doctrine can limit the rents available through legislation.”); *see also* 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.”).

As the Second District Court of Appeal put it recently, “judicial review of a blight finding is what one would expect given that the purpose of redevelopment is the *remedying of blight*, and redevelopment invokes ‘extraordinary powers . . . .’ ‘The purpose of the [California Redevelopment Law] is to provide a means of remedying blight where it exists. The CRL is not simply a vehicle for cash-strapped municipalities to finance community improvements.’” *Boelts v. City of Lake Forest*, 25 Cal. Rptr. 3d 164, 166 (2005) (quoting *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 407 (2000)).

The abuse of eminent domain requires judicial scrutiny, lest that power be perverted into a scheme whereby authorities take property under unreviewably lax standards of “benefit to the public,” and transfer that property to private groups who exercise greater political influence than the original owner.

**B. The Decision Below Conflicts with Statutes and Court of Appeals Decisions Holding That “Substantial Evidence” Does Not Mean “Any Particle of Evidence”**

The ultra-deferential standard of review that the court below applied to Mr. Mesdaq’s challenge to the Resolution of Necessity, fails to implement the constitution’s protections for private property meaningfully. Requiring a landowner to prove that a Resolution of Necessity is “entirely lacking in evidentiary support,” *Santa Cruz County Redevelopment Agency v. Izant*, 37 Cal. App. 4th 141, 150 (1995), effectively precludes any imaginable challenge to that Resolution, because the presence of “some” evidence can be found for practically any course of action a bureaucracy might take.

Such an extreme level of deference contradicts the mandate of Code of Civil Procedure section 1245.255, which explicitly guarantees a property owner’s right to judicial review of a Resolution of Necessity. The Legislature enacted this section to “relieve[ ] the harshness” of an older law which created a conclusive “presumption” in favor of a Resolution of Necessity. *Huntington Park Redevelopment Agency v. Duncan*, 142 Cal. App. 3d 17, 25 (1983). But if the judicial review provided for in section 1245.255 is obtainable only in the unimaginably rare case where a Resolution lacks any supporting evidence, then the harshness will remain and the statute is rendered a nullity. This Court will not adopt interpretations of statutes which render them null. *See, e.g., Arnett v. Dal Cielo*, 14 Cal. 4th 4, 22 (1996) (“Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.”).

Indeed, as the Third District held in a case challenging the adoption of a redevelopment plan,

[d]efining substantial evidence, one court has well noted: “[I]f the word ‘substantial’ means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with ‘any’ evidence. It must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case . . . .” Accordingly, a local agency’s findings in support of its adopting a redevelopment plan are not conclusive.

*Friends of Mammoth*, 82 Cal. App. 4th at 537-38 (quoting *Estate of Teed*, 112 Cal. App. 2d 638, 644 (1952)). The decision below is in direct conflict with the definition of “substantial evidence” in these cases. Nor is the trial court’s ultra-deference warranted by the substantial evidence test as it is employed outside of the eminent domain context. “‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value.” *Roddenberry v. Roddenberry*, 44 Cal. App. 4th 634, 651 (1996). Under that test, courts “indulge in all *legitimate*

*and reasonable inferences*” based on substantial evidence, *Schild v. Rubin*, 232 Cal. App. 3d 755, 762 (1991), and “construe all *reasonable inferences in favor*” of the previous decision, *In re Julie M.*, 69 Cal. App. 4th 41, 46 (1999) (emphasis added), to determine “if there are *sufficient facts* to support the findings” in question, *In re Matthew S.*, 201 Cal. App. 3d 315, 321 (1988) (emphasis added).

The decision below therefore conflicts not only with decisions of other Courts of Appeals, and with the guarantee of judicial review in section 1245.255, but also with common sense. To allow any particle of evidence—even if it is not reasonable, credible, and of solid value—to shield a government determination from a serious challenge by a litigant armed with legitimate evidence of his own, would be to abdicate judicial review, and abandon citizens to the mercy of bureaucrats who have little trouble conjuring up a particle of evidence to suit whatever determination they choose to make. If a property owner is precluded from introducing evidence as part of a challenge to a Resolution of Necessity, and if a Resolution will be upheld on the basis of “any evidence” whatsoever, judicial review of condemnations will be rendered meaningless.

### CONCLUSION

This Court has warned that “[p]ublic agencies and courts both should be chary of the use of the [California Redevelopment] act” because of the serious threat of eminent domain abuse. *Sweetwater Valley Civic Ass’n v. City of National City*, 18 Cal. 3d 270, 278 (1976) (quoting *Hayes*, 122 Cal. App. 2d at 812). San Diego is now seeking to exploit that act to seize nonblighted, commercially viable property for the benefit of another private party on the grounds that the new use of the property will be more profitable to the city. Mr. Mesdaq’s attempt to prevent this from happening has run into a trial court roadblock: the court’s holding that *any evidence at all* is sufficient to uphold a Resolution of Necessity. That holding deflates his right to judicial review—and destroys his right to property. San Diego’s attempt to benefit a politically-favored private party at the expense of an individual citizen whose property rights ought to be respected by

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his government is typical of cases throughout the state and the nation. This case represents an important opportunity for the Court to address the serious and growing problem of eminent domain abuse. The petition for review should be *granted*.

Respectfully submitted,

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