IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

No. D045874

AHMAD MESDAQ,
Petitioner,

v.

THE SUPERIOR COURT OF SAN DIEGO COUNTY,
Respondent,

and

REDEVELOPMENT AGENCY OF SAN DIEGO,
Real Party in Interest.

On Appeal from the Superior Court of San Diego County
(Case No. GIC829293, Honorable John Meyer, Judge)

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTRODUCTION AND SUMMARY OF ARGUMENT

Ahmad Mesdaq owns non-blighted, commercially viable real estate in the fashionable Gaslamp District of San Diego. But 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.

Mr. Mesdaq seeks to challenge the Resolution of Necessity by which this condemnation was effected. But in considering his challenge, the trial court held that Mr. Mesdaq may not introduce any new evidence, and that under the substantial evidence test applied to such challenges, a Resolution of Necessity will be affirmed so long as there is any evidence to support the Resolution. But this holding exaggerates the proper deference wildly beyond its proper limits.

" '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), not just any shred of evidence. California Code of Civil Procedure section 1245.255 guarantees a landowner's right to judicial review of a Resolution of Necessity that could result in the taking of that person's land. If any evidence at all is enough to support a Resolution of Necessity, then the guarantee provided in section 1245.255 is rendered meaningless, and Mr. Mesdaq's right to judicial review is an empty

one. That, however, is not the law. The substantial evidence test, while deferential, still requires a court to perform some judgment. The court below employed the wrong standard of review.

Further, the condemnation of Mr. Mesdaq's property for the private use of a developer, violates the California Constitution. The rationale for condemning Mr. Mesdaq's property is that the new user will employ the land more profitably, resulting in economic benefits to the city. But the framers of the California Constitution considered, and specifically rejected, the use of eminent domain to benefit private parties on this "economic benefit" rationale. Instead, they understood that the public use clause of the state's constitution would prohibit the use of eminent domain by private interests, and would limit the use of eminent domain more strictly than does the Federal Constitution.

I

THE PROPER STANDARD OF REVIEW FOR RESOLUTIONS OF NECESSITY IS SUBSTANTIAL EVIDENCE

A. Property Owners Have a Right to Meaningful Judicial Review of Decisions to Take Their Land

The power of eminent domain is one of the most severe confrontations between a citizen and the government, and one with the most 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* use instead. Courts have often permitted this under the rationale that the public use clause is satisfied by the attenuated public benefits resulting from projects that take property from less productive uses, and transfer it to owners who use it more profitably. Under current law, "any use, purpose, or benefit rationally conceived [a]s 'public' " will generally satisfy the public use requirement of the federal Constitution. Joseph J. Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L. Rev. 49, 52 (1999).

Unfortunately, as the Michigan Supreme Court recently noted, this "economic benefit" rationale

> would validate practically *any* exercise of the power of eminent domain on behalf of a private entity . . . . [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.

County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004).

The result of the expansive allowance 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, who use this property for their own profit. *See* Dana Berliner, *Public Power, Private Gain* (2003).[1] For example, in one case, billionaire Donald Trump convinced the government of Atlantic City, New Jersey, to condemn an elderly widow's home to transfer the property to his casino for the construction of a limousine parking lot. 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, 287-88 (2000). In another case, the state of Mississippi condemned 23 acres of land owned by minority homeowners, to transfer to the Nissan corporation, even though the director of the state's redevelopment agency admitted in the *New York Times* that Nissan was not actually part of the project. *See* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California*, 32 Sw. U. L. Rev. 569, 598-99 (2003).

As Professor Donald Kochan explains, "[t]he disappearance of public use as a restraint on [eminent domain] has increased the range of permissible governmental activities and thus has increased the range of goods available for purchase by interest groups." Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 Tex. Rev. L. & Pol. 49, 78-79 (1998). These interest groups seek to exploit

[1] *Available at* http://www.castlecoalition.org/report/ (last visted Mar. 1, 2005).

for their own benefit the government's power to take property from some citizens and give it to others.

The frequency of this phenomenon has led many commentators and courts to conclude that property owners in cases involving condemnations that benefit private parties should have the right to heightened judicial scrutiny. *See*, *e.g.*, *id.* at 93 ("Scrutiny under the enumerated powers doctrine can limit the rents available through legislation.") For example, in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled on other grounds*, *Hathcock*, 684 N.W.2d at 787, the Michigan Supreme Court held that 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." *Poletown*, 304 N.W.2d at 459-60. Likewise, the Illinois Supreme Court recently declared that "[w]hile we do not question the legislature's discretion in allowing for the exercise of eminent domain power, 'the government does not have unlimited power to redefine property rights.' The power of eminent domain is to be exercised with restraint, not abandon." *Southwestern Illinois Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 11 (Ill. 2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982)).

The possibility of abuse requires judicial scrutiny, lest the power of eminent domain be perverted into a scheme whereby authorities take property

under unreviewable, lax standards of "benefit to the public," and transfer that property to private groups who exercise greater political influence than the original owner. As many legal theorists have contended, the deference courts generally give to legislatures in property rights cases must be balanced with a higher scrutiny when condemnations benefit private industries, to prevent the "underlying evil . . . [of] distributi[ng] . . . 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). *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); Jones, *supra*, (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.").

B. "Substantial Evidence" Does Not Mean "Some Atom of Evidence"

As these sources demonstrate, 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 every conceivable 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. But courts do 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.").

Nor is such ultra-deference warranted by the substantial evidence test as explained beyond the eminent domain context. " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." *Roddenberry*, 44 Cal. App. 4th at 651. The substantial evidence test requires the court to exercise *judgment*, albeit judgment which errs on the side of the government: 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). Courts must therefore 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), 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 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.

In *Izant*, 37 Cal. App. 4th at 149, the Court of Appeal cited *Duncan*, 142 Cal. App. 3d at 24, for the proposition that "[a] gross abuse of discretion may be shown by a lack of substantial evidence supporting the resolution of necessity." *Duncan* reveals, however, that this test does require the court to exercise its judgment: "*On the basis of the evidence of the hearings*, which were reconstructed through testimony and documents presented at trial, we conclude that the Duncans failed to demonstrate a lack of substantial evidence to support the Agency findings in the resolution of necessity," the Court held. *Id.* at 26 (emphasis added). "Rather, the Agency's selection . . . was *based on factors* consistent with the Agency's mandate." *Id.* (emphasis added). The *Duncan* Court weighed the evidence to find that there was *substantial* evidence—not "any evidence at all"—to support the Resolution of Necessity in that case. *See also City of Saratoga v. Hinz*, 115 Cal. App. 4th 1202, 1226-27 (2004) (weighing various facts in evidence to determine whether Resolution of Necessity was based on substantial evidence).

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, the judicial review provided for in section 1245.255 will be rendered meaningless.

II

THIS CONDEMNATION IS UNCONSTITUTIONAL UNDER THE PUBLIC USE CLAUSE OF THE CALIFORNIA CONSTITUTION

Although the United States Constitution's public use clause means that " 'one person's property may not be taken for the benefit of another private person without a justifying public purpose,' " *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (quoting *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937)), the Fifth Amendment has provided little protection for property owners whose land is condemned for the benefit of private parties. *See*, *e.g.*, *Kelo v. City of New London*, 843 A.2d 500, 574 (Conn.), *cert. granted*, 125 S. Ct. 27 (2004).

The California State Constitution, however, also includes a public use clause. Cal. Const. art. I, § 19 ("Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner.").[2] An examination of the history and purposes of the state constitution reveals that it places more serious limitations on the exercise of eminent domain which benefits private parties, than does the Federal Constitution. *See further* Sandefur, *supra*, at 632-53.

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[2] This language of this section was modernized by Proposition 7 in 1974. It originally read "Private property shall not be taken or damaged for public use without just compensation having been first made or paid into Court for the owner."

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

Article I, section 24, of the California Constitution declares that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Under that principle, California courts have held that the state's constitution goes farther than the Federal Constitution in the areas of criminal procedure, *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), the right to privacy, *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123 (1980), and freedom of speech, *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, *aff'd* 447 U.S. 74 (1980). The abandonment of serious public use jurisprudence at the federal level does not require a similar abandonment at the state level, particularly given the unique history of California's Constitution.

Just as the federal public use limitation was intended to prevent the politically powerful from using government to live at the expense of weaker parties, one of the foremost purposes of the California Constitution was to protect citizens from powerful combinations of government and corporate interests. In that day, these combinations were primarily between railroad corporations and government. *See* Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 Hastings Const. L. Q. 35, 37 (1989) (California was one of several states where "the startlingly rapid rise of concentrated corporate power, especially in the railroad industry, and the problems associated with cynical partisanship

and corruption in government, had inspired strong political reactions."). Today the same threat of citizens being confronted by powerful combinations of government and private corporations, is posed by redevelopment projects which combine private developers with local authorities armed with the power to condemn private property.

The California Supreme Court has indicated that the "the California [takings] clause 'protects a somewhat broader range of property values' than does the corresponding federal provision," although the Court has usually "construed the clauses congruently." *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 664 (2002). In another property rights case, *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999), the Court noted that in some cases, courts have construed the state constitution as protecting citizens to a greater degree, when federal courts have failed to do so. *Id.* at 973 n.4.

The text and history of the California Constitution reveals that, perhaps more than the Federal Framers, the 1879 framers explicitly sought to prevent the power of eminent domain from being exploited for private uses, and particularly, the private use of corporations. A state's history can—and California's history does—reveal that state constitutional provisions provide greater protections than federal clauses even when similarly or identically worded. *See*, *e.g.*, *American Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307,

325 (1997) ("[T]he California Constitution 'is, and always has been, a document of independent force,' and . . . the rights embodied in and protected by the state Constitution are not invariably identical to the rights contained in the federal Constitution." (citation omitted)); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 817 (1992) ("The founders of a populist frontier state with a tradition of ferocious individualism, like Washington or Oregon, probably intended to carve out a larger sphere of rights . . . . This . . . contemplates potentially different meanings even for constitutions containing identical language. These variations in meaning would stem from variations in the character of the polities, character differences that cause them to embrace as fundamental substantially different values."); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 203 (1998) ("By becoming accustomed to independently examining their state's charter, even when language is substantially similar to language found in the federal Bill of Rights, state courts can become more familiar with their state's constitutional history and become more adept at developing theories of constitutional interpretation."); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 Va. L. Rev. 389, 396 (1998) ("Though the question [of independent state grounds] is generally posed in terms of whether courts should engage in 'independent' interpretation of state constitutions, what is truly at stake is

whether courts will interpret the state constitutions at all. If courts decline . . . they effectively disavow the project of construing their own constitution.").

Indeed, at least three California Supreme Court Justices have urged litigants and courts to develop a stronger independent state constitutional theory. *See*, *e.g.*, Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 Tex. L. Rev. 1081, 1081 (1985); Joseph R. Grodin, *Some Reflections on State Constitutions*, 15 Hastings Const. L. Q. 391, 397 (1988); *San Remo Hotel*, 27 Cal. 4th at 702 (Brown, J., dissenting) ("[T]he takings clause of the state Constitution . . . [prohibits laws] merely designed to benefit one class of citizens at the expense of another . . . [or which] simply shift[ ] wealth by a raw act of government power.").

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

drafters presumably knew the contents of the federal document and deliberately chose to . . . provid[e] greater protection for the property owner." *Id.* at 358-59. The history of the California Constitutional Convention of 1878-79 reveals even stronger grounds than in Washington for reading this state's public use limitation strictly against takings which benefit private interests, such as in this case.

B. The California Constitution's Framers Explicitly Rejected a Broad Reading of "Public Use"

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

The 1879 Constitutional Convention considered the concept of "public use" in at least three instances. In one instance, the Convention considered a proposal which would have forbidden any person in California from owning more than 640 acres of land, and would have confiscated any land beyond that limit upon the owner's death. Sandefur, *supra*, at 644-45. Many delegates denounced the proposition as a violation of property rights and a violation of the public use limitation. For example, Delegate Walter Van Dyke argued that "we cannot divest [people] of their property. It can only be taken from them for public uses, upon just compensation being given. We cannot take their property from them for private uses." E.B. Willis & P.K. Stockton, *Debates*

and Proceedings of the Constitutional Convention of the State of California 1142 (1880). Delegate Marion Biggs explained: "[N]or shall private property be taken for public use, without just compensation. And yet, gentlemen get up on this floor and attempt to deprive men of property that they have accumulated . . . . I consider it confiscation of the darkest dye and deepest hue." *Id.* at 1145. The provision was rejected. *Id.* at 1403.

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

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

> for damages in the case of these quasi public corporations who may take property for their public use.

Id. at 351. The provision to limit eminent domain was adopted, in large part out of frustration at the railroads' exploitation of the power.

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

One primary objection to the proposal was that it would benefit private corporations, in the same way that eminent domain had been used by railroad companies. Delegate Shafter again complained that railroads had been permitted to condemn property on the pretext that they "would carry

passengers, and do this thing and that thing . . . and the Courts held that they . . . [were] not a private use, but . . . a public use." *Id.* at 1028. Shafter opposed extending the power any further:

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

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

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

Id. at 1027. *See also id.* at 1374 (Speech of Mr. Rolfe: "It attempts to give the right away across private property to a private individual . . . . If the State needs the property for a public use . . . then my property can be paid for and taken. But no man's property ought to be subject to be taken for a private use upon any compensation whatever."). As with the other proposals to expand

the power of eminent domain for the benefit of private parties, the Convention rejected the proposal.

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

CONCLUSION

Although no California court has determined the degree to which the state constitution's public use clause differs from its federal counterpart, there are persuasive indications that the state clause restricts eminent domain more stringently than does the Fifth Amendment. Adopted almost a century after the Fifth Amendment, the California state Constitution was written by people with much experience with the use of eminent domain for the benefit of private railroad corporations. The Convention's delegates considered this an abuse, but an inescapable one. Attempts to expand the use of eminent domain for

other private parties—on the grounds that such condemnations would lead to economic benefits to the public—were considered and rejected by the Convention. The delegates believed that "the rights of the citizen as now guarded, as against this great and growing power, should be maintained, so that never hereafter shall the State recede from this position, or place the citizen for an hour at the mercy of [corporations], from whatever source they may come." *Id.* at 349 (speech of Mr. Barnes).

Today's eminent domain threat comes, not from railroads, but from real estate developers and retail corporations. Nevertheless, the public use clause forbids the state from transferring property from one private party to another. The writ of mandate should be *granted.*

DATED: March 1, 2005.

Respectfully submitted,

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 14(C)

Pursuant to California Rule of Court 14(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER, excluding the tables and certificate, contains 4,639 words, as stated in the word count of the computer program used to prepare the brief.

DATED: March 1, 2005.

_____
TIMOTHY SANDEFUR

DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3900 Lennane Drive, Suite 200, Sacramento, California.

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BARBARA A. SIEBERT