IN THE SUPREME COURT OF OHIO

CITY OF NORWOOD,	:	Case Nos. 05-1210, 05-1211
	:	
Appellee,	:	
	:	On Appeal from the
v.	:	Hamilton County Court of Appeals,
	:	First Appellate District
JOSEPH P. HORNEY, et al.,	:	
	:	Court of Appeals
and	:	Case Nos.: C-040683, C040783
	:	
CARL E. GAMBLE, et al.,	:	
	:	
Appellants.	:	

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CLAREMONT INSTITUTE IN SUPPORT OF APPELLANTS

Timothy M. Burke (0009189) (COR)
Gary E. Powell (0037546)
Daniel J. McCarthy (0078388)
Manley Burke LPA
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525
Facsimile: (513) 721-4268
Email: tburke@manleyburke.com
COUNSEL FOR APPELLEE,
CITY OF NORWOOD

Lawrence R. Elleman (0006444)
Mark A. Vander Laan (0013297) (COR)
Richard B. Tranter (0031226)
Bryan E. Pacheco (0068189)
Dinsmore & Shohl LLP
255 East Fifth Street, Suite 1900
Cincinnati, Ohio 45202
Telephone: (513) 977-8247
Facsimile: (513) 977-8141
Email: mark.vanderlaan@dinslaw.com
COUNSEL FOR APPELLEE,
ROOKWOOD PARTNERS LTD.

Dana Berliner (COR)
Scott G. Bullock
William H. Mellor
Robert W. Gall
David Roland
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
Telephone: (703) 682-9320
Facsimile: (703) 682-9321
Email: dberliner@ij.org
COUNSEL FOR APPELLANTS,
JOSEPH P. HORNEY AND CAROL S. GOOCH

Robert P. Malloy (0012269)
Wood & Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202-2409
Telephone: (513) 852-6043
Facsimile: (513) 852-6087
Email: rpmalloy@woodlamping.com
COUNSEL FOR APPELLANTS,
JOSEPH P. HORNEY AND CAROL S. GOOCH

David M. Gareau (0066687)
Michael R. Gareau & Associates, LPA
23823 Lorain Road, Suite 200
North Olmstead, Ohio 44070-2228
Telephone: (440) 777-1500
Facsimile: (440) 777-0107
Email: dgareau@brightdsl.net
ASSOCIATED LOCAL COUNSEL FOR AMICI CURIAE, PACIFIC LEGAL FOUNDATION AND THE CLAREMONT INSTITUTE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

United States Constitution

State Constitution

Page

State Statutes

Rules of Court

Miscellaneous

Page

Page

INTEREST OF AMICUS CURIAE

Pursuant to S.Ct.Prac.R. VI, Section 6, Pacific Legal Foundation (PLF) and The Claremont Institute respectfully submit this brief amicus curiae in support of Appellants Joseph P. Horney, et al.

PLF is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, and individual freedom. PLF attorneys have defended the rights of property owners before the United States Supreme Court and this Court in several cases in which government has deprived them of their property. *See*, *e.g.*, *Kelo v. City of New London* (2005), 125 S.Ct. 2655, 162 L.Ed.2d 439; *State ex rel. R.T.G., Inc. v. State* (2002), 98 Ohio St.3d 1, 780 N.E.2d 998; *Palazzolo v. Rhode Island* (2001), 533 U.S. 606, 121 S.Ct. 2448. PLF also participated as amicus curiae in many of the most important recent cases involving the public use limitation on the eminent domain power. *See*, *e.g.*, *County of Wayne v. Hathcock* (2004), 471 Mich. 445, 684 N.W.2d 765; *Kelo*, *supra*. PLF also participated as amicus curiae in this case in support of the motion for appeal. In addition, PLF attorneys have published numerous articles and papers about the public use requirement. *See*, *e.g.*, Timothy Sandefur, A Natural Rights Perspective on Eminent Domain in California (2003), 32 Sw. U. L. Rev. 569; Timothy Sandefur, A Gleeful Obituary for *Poletown Neighborhood Council v. Detroit* (2005), 28 Harv. J.L. & Pub. Pol'y 651; James S. Burling, Blight Lite (2003), SH053 ALI-ABA 43. Because of PLF's experience in the field of private property rights, it can add a unique perspective that will assist this Court's consideration of this case.

The Claremont Institute for the Study of Statesmanship and Political Philosophy (the Institute) is a nonprofit educational foundation dedicated to restoring the principles of the American Founding to their rightful and preeminent authority in our national life. Through its Center for Constitutional Jurisprudence, the Institute appears as amicus curiae in important constitutional cases. Through its

Center for Local Government, the Institute defends property rights against abuses of the power of eminent domain.

This case raises deep questions about the direction of this Court's eminent domain law and especially about the original meaning of the Public Use Clause. As the Institute will show, one cannot appreciate the original meaning of "public use" and other relevant terms without understanding that they are all part of an intricate design to protect the natural right to property. Scholars affiliated with the Institute have published considerable scholarship on eminent domain or on the natural-rights basis of constitutional property rights, including Thomas G. West, Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America (1997) 37-70, and Eric R. Claeys, Takings, Regulations, and Natural Property Rights (2003), 88 Cornell L. Rev. 1549.

STATEMENT OF THE CASE AND FACTS

The Appellants are property owners in the city of Norwood. They and their neighbors own land that the Rookwood Partners development company wants. Rookwood Partners, which plans a massive project of stores and offices for the property, lobbied city officials to invoke their eminent domain powers against the Appellants and their neighbors, and transfer the property to Rookwood instead. *Norwood v. Horney* (2005), 161 Ohio App.3d 316, 321, 830 N.E.2d 381, 385. Bowing to this request, the city ordered an analysis of the neighborhood, and declared that it was "blighted." Remarkably, the city's analysis found that many property owners were *willing* to sell. But this, the report continued, was all the *more* reason to condemn the land, because if property owners were allowed to sell as they wished, the result would be "piecemeal" development. *Id.* at 322. The city therefore declared the neighborhood "blighted," and "deteriorating," even though it consists of clean, decently maintained homes in an average middle-class American setting. *See* Citizens Against

Eminent Domain Abuse, Norwoodblight.com - Blight Study, *available at* http://www.norwood blight.com/images/block_photos_ pa/index.htm (last visited Nov. 8, 2005).

The city justified its decision to take these homes and transfer the land to Rookwood, on the theory that the economic results of the transfer would be beneficial to the community and, therefore, would be a "public use" under the Ohio Constitution. The Court of Common Pleas permitted the condemnation, and the court of appeals affirmed, holding that "the phrase 'taken for public use' . . . [is] equivalent to the phrase 'taken for the public welfare.'" *Norwood*, 161 Ohio App.3d at 329. Further, the court found that Ohio statutes allow the condemnation of property not only when it is actually dangerous, or crime-infested, but even where the property is simply "deteriorating," *id.* at 328, which in this case meant that homes could be taken on the basis of "safety issues and traffic concerns causing unsafe conditions, the predominance of inadequate street layout and faulty lot layout, and the diversity of ownership." *Id.* at 329.

SUMMARY OF ARGUMENT

This case involves an issue of increasing national importance, and of particular importance in Ohio: whether the state's power of eminent domain may be used to benefit private parties—on the grounds that a different use of the property will result in general public benefits such as "improving the economy" or "creating jobs"—even though the Ohio Constitution only allows government to take property "for public use," Ohio Const. art. I, § 19. This Court has never sanctioned the transfer of property from one private party to another merely because it was considered "deteriorating." *Cf.* Ohio Rev. Code Ann. § 1728.01(E). But this Court is now being asked to allow cities to condemn property on the basis of a definition of economic "deterioration," which would apply to nearly every house in the state. The city's definitions of "deterioration" and "blight" mean nothing more than that the property fails to perform economically to the level that city officials would like it to.

The power to transfer property from one private owner to another through eminent domain is a power dangerously liable to abuse. Due to what economists call the "public choice" effect, or what the American founders called the "mischiefs of faction," private interest groups which stand to benefit from such property transfers tend to invest time and resources in lobbying the government to exercise that power on their behalf. Left unchecked, the public choice effect transforms government into a mere clash of pressure groups, each seeking to use government's coercive power for their own enrichment, rather than in the genuine interest of society. The primary losers in such a competition are those groups which can wield the least political influence—which usually means, the poor, and members of minority groups; groups which are in " 'such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' " *State v. Williams* (2000), 88 Ohio St.3d 513, 530, 728 N.E.2d 342 (citation omitted). These groups have always looked to the judiciary for that protection. "Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many." *State v. Whisner* (1976), 47 Ohio St.2d 181, 209, 351 N.E.2d 750 (quoting *Bd. of Educ. of Cincinnati v. Minor* (1872), 23 Ohio St. 211, 251).

The "public use" requirement in eminent domain and, to a lesser extent, a strict definition of "blight" under Ohio law, helps to put a brake on this public choice effect. In the past, this Court enforced strict definitions of "public use" and "blight" so as to prevent the power of eminent domain from being abused to benefit private interest groups. This was especially important because private interest groups are virtually always able to describe their desired projects as "public benefits" in some way or other. An overly deferential attitude toward exercises of eminent domain—such as that adopted by the court below—enables private interest groups to enrich themselves through the use of eminent domain by adopting a mere pretext of "public benefit."

In recent years, several courts have held that private uses of eminent domain are inconsistent with the public use requirement, and that they tend to benefit the wealthy and powerful at the expense of those with less political influence. Those cases have been correctly decided, and this Court ought to join them, by rejecting the overly deferential perspective adopted below and by enforcing meaningful limits of the definitions of "public use" and "blight."

ARGUMENT

I

TRANSFERS OF PROPERTY TO PRIVATE DEVELOPERS THROUGH EMINENT DOMAIN ARE CONTRARY TO THE ORIGINAL MEANING OF OHIO'S PUBLIC USE CLAUSE

A. The Ohio Constitution's Public Use Clause Originally Prohibited the Use of Eminent Domain to Enrich Private Parties

The Ohio Constitution declares:

> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money

Ohio Const. art I, § 19.

Traditionally, Ohio courts held that in order to satisfy the public use requirement, the public had to actually use, or at least have the right to use, the property that was taken. *See*, *e.g.*, *Reeves v. Treasurer of Wood County* (1858), 8 Ohio St. 333, 345 ([T]he public use clause "clearly prohibits the taking of private property for private use."). Indeed, the court routinely held that the state had no power to take property from one party and give it to another. *See*, *e.g.*, *Buckingham v. Smith* (1840), 10 Ohio 288, 297 ([A]llowing private parties to use eminent domain for their own enrichment

"would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state.").

This enforcement of a strict public use requirement in eminent domain cases flowed from this Court's understanding that government exists to protect the rights of individuals against deprivation by others. "Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many." *Whisner*, 47 Ohio St.2d at 209 (quoting *Minor*, 23 Ohio St. at 251). As America's founders well understood, however, those who want to deprive others of their property can also do so by exploiting government's coercive power for their own gain. James Madison referred to this as the problem of "faction." *The Federalist* No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961). Factions are those groups, "whether amounting to a majority or a minority of the whole," who wish to use government to serve a private "impulse of passion, or of interest," rather than actual public goals. *Id.* The primary purpose of government, therefore, was to ensure not only that private wrongdoers acting on their own were prohibited from violating the rights of citizens, but also to ensure that government itself was not taken over by factions and used for the same private ends. "In a society under the forms of which the stronger faction can readily unite and oppress the weaker," wrote Madison, "anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger." *Id.* at 324.

Unfortunately, private groups can often plausibly describe their desired goals as "public benefits" even when those goals are actually *private* benefits. As Madison explained to James Monroe, terms like "public welfare" generally are too vague to ensure that government keeps within its constitutional limits. There is "no maxim . . . more liable to be misapplied," he wrote,

> than the current one that the interest of the majority is the political standard of right and wrong. Taking the word "interest" as synonymous with "Ultimate happiness," *in which sense it is qualified with every necessary moral ingredient*, the proposition

> is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be the interest of the majority in every community to despoil & enslave the minority of individuals . . . . In fact it is only reestablishing under another name and a more specious form, force as the measure of right.

Letter to James Monroe (Oct. 5, 1786) in The Complete Madison 45 (Saul Padover ed., 1953) (emphasis added). This insight helps explain why the Federal Constitution limited the ability of government to use eminent domain for the benefit of factions, even when those factions described their favored projects as being in "the interest of the majority." It did so by requiring that eminent domain be employed for "public use," and not for mere public benefit. *See*, *e.g.*, *Wilkinson v. Leland* (1829), 27 U.S. (2 Peters.) 627, 658 ("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 . . . . On the contrary, it has been constantly resisted as inconsistent with just principles."). Like its federal counterpart, the Ohio Constitution's "public use" clause was also interpreted as forbidding condemnations that benefitted private parties. *See*, *e.g.*, *Buckingham*, 10 Ohio at 297 ("We know of no instances in which [property] has, or can be taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise . . . .").

As was the case in many states, there were two primary instances in which early courts did allow eminent domain to be used in ways that benefitted private parties: those involving railroads, and those involving laws that allowed landowners to dam streams and flood neighboring land so as to power mills. *See* Timothy Sandefur, A Natural Rights Perspective on Eminent Domain in California, *supra*, at 599-609. But in those cases, courts routinely held that the public use requirement prohibited the government from giving seized property to private businesses outright. Instead, the public use clause required the government to impose restrictions on the recipient of the transferred property which would ensure that the public had a legally enforceable right to use the taken property.

In *Reeves*, for example, this Court held that a condemnation to dig a water-course that benefitted private parties could not go forward where the "statute prescribes no such condition—no such rule of official duty or limit to official discretion; and [where] a ditch may be located and opened upon the lands of individual proprietors solely for purposes of private interest, irrespective of the public welfare." 8 Ohio St. at 346. By imposing strict regulations on recipients of seized property, this Court ensured that condemnations "authorized by the legislature" would serve "the *public welfare*; and that whenever private interests are promoted by the making of ditches, etc., they are merely incidental, when the statute is properly executed." *Sessions v. Crunkilton* (1870), 20 Ohio St. 349, 356.

In any event, the increased profitability of transferred land was never considered to be enough by itself to constitute a "public use" even in cases involving railroads, mills, or similar public projects. In *Chicago & E.R. Co. v. Keith* (1902), 67 Ohio St. 279, for example, this Court held that while the government could condemn land for irrigation, it could only do so where the irrigation would serve "the interest of the public, and that the fact that larger crops could be raised on lands to be benefitted by a ditch was a private, and not a public, interest, and would not warrant the establishment of the proposed ditch." *Id.* at 289 (citing *McQuillen v. Hatton* (1884), 42 Ohio St. 202). For government to take property to provide irrigation to improve the status of particular farmers would "not [be] in the interest of the public, but in the interest of private persons . . . . [It would be] a taking of private property for private use, and therefore in violation of that part of section 19 of the bill of rights which says: 'Private property shall ever be held inviolate, but subservient to the public welfare.' " *Id.* at 290.

In 1922, this Court again declared that "[w]here private property is taken against the will of the owner under the power of eminent domain, it is a prerequisite that possession, occupation, and

enjoyment of the property by the public, or by public agencies, is sought and is necessary." *Pontiac Imp. Co. v. Bd. of Commissioners of Cleveland Metro. Park Dist.* (1922), 104 Ohio St. 447, 459. This rule prohibited the use of eminent domain to benefit particular groups at the expense of others. Takings which benefit private parties contradict the very purposes of government. Where citizens are subject to deprivation for reasons that do not serve the public, but simply increase the wealth of politically successful groups, then the law is fundamentally arbitrary. In such a situation, the law has, in Madison's words, only established force as the measure of right.

B. The Modern "Public Benefit" Interpretation of the Public Use Requirement Allows Private Interest Groups to Exploit Government Power for Their Own Benefit

In the early 1950s, Ohio began to move away from the original meaning of "public use," when it held that the phrase "public use" was synonymous with "public welfare." *State ex rel. Bruestle v. Rich* (1953), 159 Ohio St. 13, 27. On this basis, the legislature could take a person's property whenever doing so was "conducive to the public welfare and a public purpose." *Id.* at 28; *Accord*, *St. Stephen's Club v. Youngstown Metro. Hous. Auth.* (1953), 160 Ohio St. 194, 199. By 1959, a common pleas court held that even taking land to provide off-street parking places near a major league baseball field, so as to prevent the baseball team from moving to another city, was a valid exercise of eminent domain. *Superior Laundry & Towel Supply Co. v. City of Cincinnati* (Ohio Com. Pl. 1959), 168 N.E.2d 445, 447.

It was in *Bruestle*, also, that this Court first held that the elimination of "urban blight" was a legitimate "public use" under the Ohio Constitution. 159 Ohio St. at 23. Just a year later, the United States Supreme Court adopted a similar understanding of "public use" when it, too, held that the Fifth Amendment of the Federal Constitution permitted the use of eminent domain to eliminate blight. *Berman v. Parker* (1954), 348 U.S. 26.

Today, broad definitions of "blight" are eroding the protection that was originally afforded by the public use requirement. This is because private interest groups are virtually always able to describe their desired projects as "benefits to the public" in some plausible way. Courts and legal commentators have long understood that such a vague standard as "economic improvement" could never serve as an appropriate limit on the eminent domain power, because it would allow virtually any private party to use eminent domain to enrich itself. In 1877, the Michigan Supreme Court noted that a public use must be something more than merely "[a] use . . . that, in the opinion of the commission or jury, will in some manner advance the public interest," because "incidentally every lawful business does this." *Ryerson v. Brown* (1877), 35 Mich. 333, 339. Last year, the same court reiterated that principle when it acknowledged that 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." *Hathcock*, 684 N.W.2d at 786. Strict interpretations of "public use" and "blight," therefore, are absolutely essential for preventing private interest groups from exploiting eminent domain for their own enrichment under the pretense that their enrichment "in some manner advances the public interest."

C. The "Holdout Problem" Is Not a Sufficient Justification for the Use of Eminent Domain to Benefit Private Parties

A common rationale for allowing private developers to use eminent domain rather than requiring them to purchase the land fairly, is that projects that might create jobs or boost a city's economy often are stymied by property owners who refuse to sell their land except at exorbitant costs. These "holdout" owners are allegedly able to stall economic growth, even when everyone else

in a neighborhood is willing to sell their land. Therefore, this argument concludes, eminent domain properly forces resistant property owners to sell at a "reasonable" price instead of an inflated one.

But in fact the holdout problem is largely exaggerated. *See* Bruce L. Benson, The Mythology of Holdout as a Justification for Eminent Domain in the Provision of Roads (2005), 10 Independent Rev. 165.[1] There are many examples of major development projects that succeeded without the use of eminent domain, in spite of the alleged danger of holdouts; Disneyland and Disneyworld, for example, as well as highways such as Virginia's Dulles Greenway and State Route 91 in Southern California, were built without the use of eminent domain, even though landowners could have "held out." *Id.* at 172; Tom Bethell, The Noblest Triumph: Property and Prosperity Throughout the Ages (1998) 53. One reason that projects like these succeed is that property owners often have powerful incentives to sell their land for reasonable prices—for example, "an increase in the rental value of [a property owner's] remaining land because of its proximity and access to [a] road can easily be substantially greater than the value of the land that is sold for right-of-way." *Benson*, *supra*, at 170. And in many other sectors of the economy, private businesses have found ways to buy large groups of land or other resources through mechanisms that avoid holdout problems, including blind auctions or other collective bidding schemes. *Id.* at 171-72. The sad fact is that in many cases, redevelopment bureaucrats accuse property owners of "holding out," whenever the owners want more than the lowball figure offered by the government.

True holdouts—people who absolutely refuse to sell their land for any price at all—are rare. Even when they do exist, developers often are able to work around them. When 97-year-old Ramon Rodriguez, a resident of the "Little Mexico" neighborhood of Dallas, Texas, refused to sell his land to Frost Bank, the bank's owners simply built their drive-through around him. Both Rodriguez and

[1] *Available at* http://www.independent.org/pdf/tir/tir_10_2_1_benson.pdf (last visited Nov. 4, 2005).

the bank were satisfied with this arrangement, and until his death in 2004, Rodriguez would sit on his porch and wave at customers and the bank's employees. "The bank people were especially nice to him," his daughter recalls. "And the police would come by and sit with him." Steve Brown, *Dallas Man Who Refused to Sell Home to Bank Dies; House Up for Sale*, Dallas Morning News, May 10, 2004 (2004 WLNR 17897727). In any case, if a property owner decides not to sell, the government should respect that right. Otherwise, property rights are little more than permissions, revokable whenever the government desires. In a sense, all property owners are "holdouts," in that they may choose at any moment to keep the property they have rather than sell it. The freedom to make that choice is the very definition of property rights.

II

ALLOWING A BROADER USE OF EMINENT DOMAIN TO SERVE ECONOMIC DEVELOPMENT LEADS TO "RENT-SEEKING"

When government can take private property in order to give it to other private parties, interest groups will try to commandeer that power to enrich themselves. Modern economists call this behavior "rent seeking," but this is just a modern name for what James Madison referred to as the "mischiefs of faction." *The Federalist*, *supra*, at 81. When government can exercise the eminent domain power to benefit private groups, those groups will compete for the opportunity to wield the state's authority to secure benefits for themselves or to impose burdens on their opponents. *See* James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (1962), 286-87 (Ann Arbor Paperbacks, 1965) ("interest-group activity . . . is a direct function of the 'profits' expected from the political process by functional groups"). Since government officials receive no direct reward for fighting against powerful interest groups in the name of the public good, but are rewarded when they distribute resources in favor of such groups, there is a constant increase in lobbying pressure in favor

of private condemnations. *See* Fred S. McChesney, *Money for Nothing: Politicians, Rent Extraction and Political Extortion* (1997) 22. Further exacerbating the problem is the fact that private negotiations in property disputes often cost a prospective purchaser more than it costs for them to invest in convincing the government to condemn the land. *See* Joseph L. Sax, Takings, Private Property and Public Rights (1971), 81 Yale L.J. 149, 174. After all, if an owner refuses to sell—as in the case at bar—using the government power of eminent domain is a tempting, cheap alternative. By allowing government to transfer property from some users to others, eminent domain becomes a prize in a competition between interest groups, each wishing to enrich itself through private condemnations which they describe as "benefitting the public" in some way.

The looser the definitions of "public use" or "blight," the more severe this problem will become. This Court should not allow these terms to be stretched to such dangerous lengths. In *Bruestle*, this Court found blight elimination to be a legitimate public use because it envisioned cities classifying areas as blighted first, and then seeking out appropriate means to eliminate the blight. 159 Ohio St. at 27. However, in many cases, including this one, the process has been reversed: a land developer who wishes to refashion a parcel of land into something more profitable than its current use suggests to the city that it should classify the parcel as "blighted" or "deteriorating," so that the developer can acquire the property through the city's power of eminent domain. "Corporations, using cities as their personal real estate agents, are proposing the following assignment: 'Find me your most prominent location, get rid of what is on it, help me pay for it, and maybe you will be lucky enough to have me move to your city.' " Jennifer J. Kruckeberg, Note: Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement (2002), 87 Minn. L. Rev. 543, 543. This is exactly what happened in this case. *Norwood*, 161 Ohio App.3d at 321.

The dangers of interest-group competition are especially severe for minority groups and the poor, who tend to suffer disproportionately from a too-broad use of the condemnation power. *See* Wendell E. Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain (2003), 21 Yale L. & Pol'y Rev. 1, 47. Some scholars contend that the word "blight" was invented to describe neighborhoods city officials wish to eliminate so as to sanitize their elitist desire to remove working class and disadvantaged minorities from a city. *See id.* at 17. For example, the Progressive Era Chicago sociologist Ernest Burgess used the term to appear objective and scientific. But his observations regarding the deterioration of Chicago were neither objective nor scientific. He attributed the "speeding up of the junking process" to the "influx of southern Negroes" into Chicago after World War I. Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, in *The City* (Robert E. Park, et al., eds., 1925) 54. Another study conducted in the 1920s concluded that "certain racial and national groups . . . cause a greater physical deterioration of property than groups higher in the social and economic scale." Homer Hoyt, *One Hundred Years of Land Values in Chicago* (1936) 314. These sources indicate that, as Professor Eric Claeys has written, progressive era land use controls were "a polite way of excluding 'undesirable' residents like new immigrants and members of different races." Eric Claeys, Euclid Lives? The Uneasy Legacy of Progressivism in Zoning (2004), 73 Fordham L. Rev. 731, 748. Nor did the racial aspect of eminent domain for economic redevelopment disappear in the decades after the progressive era. Blight elimination in the 1960s and 1970s had such a disproportionate impact on African-Americans that many took to calling it "Negro Removal." *See*, *e.g.*, *Garrett v. Hamtranck* (D. Mich. 1871), 335 F.Supp. 16, 25-27; *see also* Carla T. Main, *How Eminent Domain Ran Amok* (2005), Policy Review. The *Berman* case affords a perfect example of such a disparity; there, 97.5 percent of the 5,012 people displaced by the redevelopment project were African-American. *Berman*, 348 U.S. at 30.

Regardless of whether the modern use of the term "blight" still clings to its nefarious origins, the purpose behind designating a neighborhood as blighted is clear: advocates of urban renewal feel that such neighborhoods should be put to a higher or better use. As sociologist Scott Greer puts it, redevelopment bureaucracies frequently adopt the view that "this land is too good for these people." Scott Greer, *Urban Renewal and American Cities: The Dilemma of Democratic Intervention* (1965) 31. A broad interpretation of the Public Use Clause creates a situation in which bureaucrats will be free to determine that almost any land is "too good" for its current owners. In many cases, those making that determination will do so against racial or economic groups that are perceived as "undesirable."

Wealthy individuals and groups usually are more politically influential than those who are less wealthy. Thus when the public use limitation is eviscerated, the power to take private property tends to fall into the hands of those who are already wealthy or popular, to be used against those who are not. Poor neighborhoods or small businesses are more often condemned than wealthy neighborhoods, because the poor, or unpopular minorities have less political muscle, and tend to live in less aesthetically pleasing neighborhoods. Donald J. Kochan, "Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective (1998), 3 Tex. Rev. L. & Pol. 49, 56. An ever expanding definition of blight leaves the property owner defenseless because a "higher and better use" can almost always be found, regardless of whether the property is truly deteriorating. Luxury condominiums and commercial properties will always have a higher tax base than well-maintained but modest single family homes. It is difficult to imagine a situation in which a politically powerful interest group in favor of a taking would not succeed when the property owner is less influential that the interest group.

For the Court to adopt an overly deferential interpretation of "public use," therefore, and leave the exercise of eminent domain in the unchecked discretion of the legislature, will mean that a person's property rights are only as secure as the person's political influence. In the decades before the broader interpretation of the public use clause took hold, this Court prevented such abuses by strictly construing the power of eminent domain, particularly when it was employed in ways that benefitted private interests. *See*, *e.g.*, *Currier v. Marietta & C.R. Co.* (1860), 11 Ohio St. 228, 231 ("[G]rants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is a delegation of the right of eminent domain—one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property."). But under more recent decisions, once a legislative determination of blight has been made, courts are "zealous in giving such determination by the city great weight." *Eighth & Walnut Corp. v. Public Library of Cincinnati* (1977), 57 Ohio App.2d 137, 147. Thus, in many cases in which interest groups influence the legislature to take property for their own enrichment, the courts will fail to recognize it as an abuse because they will defer to the legislature's assertion. This case represents an important opportunity to prevent such abuses by limiting the extent to which cities may use "blight" or "deterioration" as a justification for condemnations, thus ensuring that eminent domain is not employed on the basis of a nebulous assertion that a neighborhood is "deteriorating" or that a redevelopment project is a "public benefit."

III

THE COURT SHOULD INTERPRET "BLIGHT" STRICTLY, SO AS TO REIN IN THE POLITICAL BREAKDOWN IN EMINENT DOMAIN LAW

Under our system of government the judiciary serves as "an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." *The Federalist* No. 78, *supra*, at 467. In many cases, this means that the judiciary is called upon to intercede when factions have united to unconstitutionally suppress a minority, or to commandeer their property. *See*, *e.g.*, *Washington v. Seattle Sch. Dist. No. 1* (1982), 458 U.S. 457, 486 (recognizing 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.' " (quoting *San Antonio Independent School Dist. v. Rodriguez* (1973), 411 U.S. 1, 28)).

Because private interest groups virtually always can describe their projects as "benefitting the public" in some way or other, it is exceedingly dangerous to apply an overly deferential judicial attitude to condemnations that transfer property to private groups. "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." Jeffery W. Scott, Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to "Public-Private" Takings? (2003), 12 J. Affordable Housing & Community Dev. L. 466, 479. Only by strictly interpreting the terms "public use" and "blight" can this Court prevent the mischiefs of faction and stop private interest groups from profiting through the exploitation of legislative power. Indeed, that is what the public use requirement was designed for. *See* Cass R. Sunstein, Naked Preferences and the Constitution (1984),

84 Colum. L. Rev. 1689, 1690 ("The framers' hostility toward naked preferences was rooted in the fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another."). It is also why these statutes limit the condemnation power to cases of blight—rather than allowing it in cases of mere economic underperformance. "[I]f the requisite finding of blight entails little more than an unchallenged and unchallengeable incantation of a few ubiquitous factors, then landowners may suffer a needless loss of property while the public gains only a dubious redevelopment project." James S. Burling, *Blight Lite*, SH053 ALI-ABA 43. Requiring that government find actual blight, rather than mere economic under performance—or an actual "public use" rather than a mere "public benefit"—before it may seize a citizen's property, is an indispensable check on government's considerable power to declare that a person may no longer keep his or her property.

A. Ohio Is Among the Nation's Leading Abusers of Eminent Domain

Recent research demonstrates that a lack of meaningful restrictions of eminent domain power results in a massive rent-seeking problem. Today, local governments routinely take property to benefit private parties, rendering property rights insecure and placing those with less political influence at the mercy of powerful interest groups. *See generally* Steven Greenhut, *Abuse of Power: How the Government Misuses Eminent Domain* (2004). Dana Berliner's nationwide study, *Public Power, Private Gain* (2003),[2] revealed over 3,700 cases of eminent domain being used to benefit private parties, for their own private profit, over just the years 1998-2003. *Id.* at 2. In Ohio, there were 90 cases of properties being taken and given to private developers. *Id.* at 159.

[2] *Available at* http://www.castlecoalition.org/report/ (last visited Nov. 3, 2005).

Excessive designation of properties as "blighted" in order to transfer them to private developers is the predictable result of the overly broad discretion that cities have to take property as "blighted" or "deteriorating." The Ohio Revised Code defines blight as:

> an area within a municipal corporation, which area by reason of the presence of a substantial number of slums, deteriorated or deteriorating structures, predominance of defective or inadequate street layout, faulty lot layout in relation to size, adequacy, accessibility, or usefulness, unsanitary or unsafe conditions, deterioration of site or other improvements, diversity of ownership, tax or special assessment delinquency exceeding the fair value of the land, defective or unusual conditions to title, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, substantially impairs or arrests the sound growth of a municipal corporation, retards the provision of housing accommodations, or constitutes an economic or social liability and is a menace to the public health, safety, morals, or welfare in its present condition and use.

Ohio Rev. Code Ann. § 725.01(B). Although this language would seem to limit "blight" to describing dangerous or dilapidated property, courts have been unwilling to impose meaningful constitutional limits on the discretion of creative city officials, who are now able to declare almost any property blighted.

One startling example is the case of the city of Lakewood, which, hoping to construct some luxury condominiums, began a condemnation procedure by declaring a clean, well-maintained neighborhood to be blighted. The blight designations rested in part on the facts that the homes in question lacked two-car garages and central air conditioning. Berliner, *supra*, at 166. The resulting outcry reached reporters at CBS' news show *60 Minutes*, which revealed that under these criteria, even the mayor's own home was "blighted." Greenhut, *supra*, at 242-43.

When interpreting definitions of "blight" in Ohio, some Ohio courts even suggested that "blight" may be construed to include buildings or parcels in good condition, but marked by little growth or declining property values. *See*, *e.g.*, *AAAA Enter. Inc. v. River Place Cmty. Urban Redevelopment Corp.* (1991), 74 Ohio App.3d 170. The court in *AAAA Enterprises* held that a blight

designation is, basically, "an evaluation of whether the land is being used in the best and most efficient manner in relationship to the surrounding area." *Id.* at 174. But this is the sort of consideration that ought to be made by private real estate agents or developers; it is not the sort of decision that belongs with the government's political branches. This Court recognized this fact in *State ex rel. City of Toledo v. Lynch* (1913), 88 Ohio St. 71, 96-97, *disapproved on other grounds in Village of Perrysburg v. Ridgway* (1923), 108 Ohio St. 245, when it noted that

> little would remain of the assurance which the Bill of Rights gives to minorities as well as to majorities that "all men . . . have certain inalienable rights, among which are those of . . . acquiring, possessing, and protecting property," and that private property may be taken only for uses which are public, if the proceeds of industry and thrift may be seized for the establishment and operation of moving picture shows and all other imaginable purposes not more frivolous nor more remote from the functions of government.

Likewise, little can remain of these constitutional protections if the property of Ohio's citizens may be seized whenever political officials decide—with virtually unreviewable discretion—that the land is not "being used in the best and most efficient manner."

B. Several Other States Have Adopted More Appropriate Limits on Eminent Domain

The crisis of eminent domain abuse has affected almost every state. *See generally* Berliner, *supra*. As a result, several state courts have recently reexamined their eminent domain authority and found that the power must be restrained within constitutional limits. This Court should join them.

Most notably, in 2004, the Michigan Supreme Court overruled its notorious decision in *Poletown Neighborhood Council v. Detroit* (1981), 410 Mich. 616. That case allowed the city of Detroit to condemn an entire working class neighborhood (called "Poletown" for the number of Polish residents who lived there) and give the land to the General Motors factory to build an auto plant. The GM project meant condemning over 1,000 properties and the homes of 3,438 people.

Pritchett, *supra*, at 48-49; Stephen Jones, Note: Trumping Eminent Domain Law (2000), 50 Syracuse. L. Rev. 285, 295. Yielding to what one judge called "the withering economic clout of the country's largest auto firm," *Poletown*, 410 Mich. at 469 (Ryan, J., dissenting), Detroit authorities ordered the condemnation to be completed at a breakneck pace. *See* Timothy Sandefur, A Gleeful Obituary for Poletown Neighborhood Counsel v. Detroit, *supra*, at 653-54 . The Michigan Supreme Court affirmed the condemnations on the grounds that "public benefit" and "public use" were synonymous terms. Because "alleviating unemployment and revitalizing the economic base of the community" were "essential public purposes," the city could condemn the homes and transfer the land to General Motors for GM's own private profit. *Poletown*, 410 Mich. at 630-31.

In *Hathcock*, 471 Mich. 445, the court unanimously overruled *Poletown*, declaring that the earlier holding had erroneously equated public use with public benefit. *See id.* at 482. Recognizing that "[e]very business, every productive unit in society, does . . . contribute in some way to the commonwealth," *id.*, the court rejected the notion that "public benefit[s] arising . . . [as] an epiphenomenon of the eventual property owners' . . . attempts at profit maximization" could satisfy the public use requirement. *Id.* at 477. That the Michigan Supreme Court unanimously renounced its notorious *Poletown* decision only twenty years after it was announced, suggests how profoundly flawed that decision was. The Michigan model provides a framework for preventing similar abuses in Ohio.

The Illinois Supreme Court also recently held that the public use requirement cannot be satisfied by the economic consequences of a private user's employment of the land. In *S.W. Illinois Dev. Auth. v. Nat'l City Envtl., LLC* (Ill. 2002), 768 N.E.2d 1, the court rejected an attempt by the city authorities to condemn a recycling center in order to, among other things, eliminate blight. *Id.* at 4. It may be true, the court held, that the condemnation would "allow it to grow and prosper and

contribute to positive economic growth in the region," *id.* at 9, but this could not satisfy the public use requirement because "'incidentally, every lawful business does this . . . .' '[T]o constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement.'" *Id.* at 9 (quoting *Gaylord v. Sanitary Dist. of Chicago* (1903), 204 Ill. 576, 584, 586).

Even California courts, which are normally very deferential toward the use of the eminent domain power, are sensitive to the importance of meaningful judicial scrutiny when condemnations benefit private parties. For example, in *Sweetwater Valley Civic Ass'n v. City of National City* (1976), 18 Cal. 3d 270, 276, the California Supreme 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. In fact, even in the case that started the trend of economic development condemnation in California, *City & County of San Francisco v. Ross* (1955), 44 Cal.2d 52, held that the state's constitution "[did] 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." *Id.* at 59. But if redevelopment authorities can condemn property on the basis of mere economic underperformance—which they can label as "deterioration" with virtually no judicial review—this protection could easily be evaded. Thus, as the California 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* (2000), 82 Cal. App. 4th 511, 538 (quoting *Emmington*

v. Solano County Redevelopment Agency (1987), 195 Cal. App. 3d 491, 498). *See also Bailey v. Myers* (Ariz. 2003), 76 P.3d 898, 903 ("[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.").

Like those courts, this Court should take this opportunity to clarify that the "public use" requirement places a meaningful restriction on the power of eminent domain, and that government may not simply transfer property from one private party to another simply on the basis of the economic results of the new owner's management. In particular, the Court should hold that the public use requirement forbids the application of "blight" statutes to property that is merely "deteriorating," or which is simply failing to perform up to the economic standards that government officials would prefer.

CONCLUSION

The decision of the court of appeals should be reversed.

DATED: November 8, 2005.

Respectfully submitted,

_____

David M. Gareau
ASSOCIATED LOCAL COUNSEL
FOR AMICI CURIAE
PACIFIC LEGAL FOUNDATION AND
THE CLAREMONT INSTITUTE

CERTIFICATE OF SERVICE

I certify that a copy of this BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS was sent by ordinary U.S. mail to:

Timothy M. Burke
Gary E. Powell
Daniel J. McCarthy
Manley Burke LPA
225 West Court Street
Cincinnati, OH 45202
COUNSEL FOR APPELLEE,
CITY OF NORWOOD

Lawrence R. Elleman
Mark A. Vander Laan
Richard B. Tranter
Bryan E. Pacheco
Dinsmore & Shohl LLP
255 East Fifth Street, Suite 1900
Cincinnati, OH 45202
COUNSEL FOR APPELLEE,
ROOKWOOD PARTNERS LTD.

Dana Berliner
Scott G. Bullock
William H. Mellor
Robert W. Gall
David Roland
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA 22203
COUNSEL FOR APPELLANTS,
JOSEPH P. HORNEY & CAROL S. GOOCH

Robert P. Malloy
Wood & Lamping LLP
600 Vine Street, Suite 2500
Cincinnati, OH 45202-2409
COUNSEL FOR APPELLANTS,
JOSEPH P. HORNEY & CAROL S. GOOCH

Rich G. Gibson
City of Norwood Law Director
Theodore E. Kiser
Assistant Law Director
City of Norwood
4645 Montgomery Road
Norwood, OH 45212

Chase Manhattan Mortgage
c/o CT Corporation System
1300 East Ninth Street
Cleveland, OH 44114

Lawrence C. Baron
230 East Ninth Street, Suite 400
Cincinnati, OH 45202

State of Ohio
c/o Ohio Attorney General's Office
Cincinnati Regional Office
1700 Carew Tower, 411 Vine Street
Cincinnati, OH 45202

on November 8, 2005.

_____

David M. Gareau
ASSOCIATED LOCAL COUNSEL
FOR AMICI CURIAE
PACIFIC LEGAL FOUNDATION AND
THE CLAREMONT INSTITUTE