IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CA-01106-SCT

LELAND SPEED — APPELLANT

VS.

DELBERT HOSEMANN, SECRETARY OF STATE OF MISSISSIPPI, AND DAVID WAIDE — APPELLEE

BRIEF OF *AMICI CURIAE* SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, JACKSON, MISSISSIPPI CHAPTER AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, MISSISSIPPI CHAPTER IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The Southern Christian Leadership Conference (SCLC) is a nonprofit civil rights organization dedicated to furthering Christian values and upholding the rights of the poor in Mississippi. It is concerned that economic-development takings disproportionately affect neighborhoods with a high percentage of minority, elderly, and poor residents.

Notably, Ms. Stephanie Parker-Weaver, the Executive Secretary of the Jackson Chapter SCLC, was involved in a previous eminent domain controversy in Canton, Mississippi in 2001. *Bouldin, et al. v. Mississippi Major Economic Impact Authority*, 2001-CA-01296-SCT (Miss. 2002). Ms. Parker-Weaver was the chosen representative of the Bouldin and Archie families during a dispute in which the MMEIA tried to condemn the Bouldin and Archie families' property by eminent domain for the purpose of economic development.[1]

The SCLC filed an *amicus curiae* brief with the U.S. Supreme Court, in the case of *Kelo v. City of New London*, 545 U.S. 469 (2005), arguing that the practice of using eminent domain to transfer property from one private party to another "has and will continue to fall disproportionately upon racial and ethnic minorities, the elderly, and the economically disadvantaged." It also filed an *amicus curiae* brief offering that perspective in an important eminent domain case in the Ohio Supreme Court. See *Gamble v. City of Norwood*, 853 N.E.2d 1115 (Ohio 2006).

Recent studies have confirmed the disproportionate impact of eminent domain on racial and ethnic minorities and the poor with one study finding that "[b]etween 1949 and 1973 ... 2,532 projects were carried out in 992 cities that displaced one million people, two-thirds of

[1] As executive secretary of the SCLC, Ms. Parker-Weaver is not an attorney, but a skilled investigator of civil rights complaints and allegations of racial discrimination. She was authorized by the homeowners to help them obtain information about the then-proposed Nissan automotive plant in order to help these particular property owners understand their rights. She then organized the local community in support of these families.

them African American," making blacks "five times more likely to be displaced than they should have been given their numbers in the population."[2]

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C. and all 50 state capitals, including approximately 3,500 members in Mississippi. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. It has been involved in every attempt at eminent domain reform in Mississippi since the *Kelo* decision, including Mississippi House Bill 803, which was vetoed in 2009, and Initiative 31. Through those efforts it has developed expertise and an understanding of the nuances of the language among reform proposals.

I. INTRODUCTION

In the years since the U.S. Supreme Court decided *Kelo v. City of New London,* 545 U.S. 469 (2005), one of the most controversial Supreme Court decisions of our time, 43 states have passed new laws aimed at curbing the use of eminent domain for private development.

Mississippi is among the seven states that have not enacted any type of eminent domain reform in the wake of *Kelo*. Three attempts have been made: In 2006, two bills were proposed in the House of Representatives but not passed; in 2009, HB 403 passed the House on a 119-3 vote and the Senate unanimously, but was vetoed by Governor Haley Barbour.

In response to the veto of H.B. 403, nearly 120,000 citizens signed the petition to put Initiative 31 (the Initiative) on the ballot. The Initiative regulates the disposition or transfer of property acquired by eminent domain. To avoid conflict with the Mississippi Constitution's Bill

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[2] Mindy Thompson Fulillove, *Eminent Domain and African Americans: What Is the Price of the Commons?*(2007), available at http://www.castlecoalition.org/pdf/publications/Perspectives-Fullilove.pdf (last visited July 18, 2011); *see also* Dick M. Carpenter & John K. Ross, *Testing O'Connor and Thomas: Does the Use of Eminent Domain Target Poor and Minority Communities?*, 46 Urb. Stud. 2447, 2456 (2009), available at http://www.ij.org/images/pdf_folder/other_pubs/testingoconnorfinal.pdf, (last visited July 18, 2011).

of Rights, it does not affect the exclusive authority of the courts to determine what is or is not a public use. It does not prevent any use of eminent domain from occurring, including eminent domain for economic development. Instead, it prohibits certain transfers of property after the property has been acquired by eminent domain.

Leland Speed, the head of the Mississippi Development Authority, has challenged the Initiative.[3] According to Speed, the Initiative violates the Mississippi Constitution of 1890, art. 15, section 273(5)(a), which prohibits "the proposal, modification or repeal" of any portion of the Mississippi Bill of Rights using the initiative process. He alleges that the Initiative unconstitutionally modifies Section 17 of the Bill of Rights by establishing "rights that Mississippi property owners would have when their property is taken for public use," by taking away "judicial control of the determination of what is and is not a 'public purpose'" and by "ruling out" takings for industrial development. Compl. 3-5.

The Initiative does not go nearly so far. It proposes only to stop property taken by eminent domain from being conveyed "to other persons or private businesses for a period of ten years after acquisition" under certain circumstances.[4]

As the Economic Impact Statement attached to the Initiative explains,

> The process of filing and completing eminent domain proceedings is not affected by the Initiative, which has no effect until any property expropriated to transfer to private parties has become vested in the condemnor.[5]

The Initiative limits government authority to transfer the property it has acquired. It does not prohibit any taking whatsoever.

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[3] Although Mr. Speed purports to challenge the Initiative in his personal capacity, the complaint indicates an interest related to his official capacity as executive director of the Mississippi Development Authority when he states that "eminent domain is often required to provide good title for an industrial project." Compl. 4.

[4] Initiative 31, Ballot Summary.

[5] *Id.*, Economic Impact Statement.

The Initiative is not contrary to Section 273(5)(a) and should be permitted to stand for a vote of the people of Mississippi on November 8, 2011.

II. THE INITIATIVE DOES NOT PROHIBIT TAKINGS, DOES NOT CHANGE THE MEANING OF PUBLIC USE, AND DOES NOT ALTER THE BILL OF RIGHTS.

Plaintiff asserts that the Initiative violates Section 17 of the Bill of Rights because it "purports to disqualify certain 'public use' takings." Compl. 1. It does not. "Disqualifying" a taking would mean that the taking was legally prohibited. But the Initiative does nothing to interfere with the use of eminent domain, or to say that certain uses of eminent domain are prohibited. Instead, it interferes with certain transfers of property after condemnation has already taken place.

The Initiative would amend the Constitution such that,

> No property acquired by the exercise of the power of eminent domain under the laws of the State of Mississippi shall, for a period of ten years after its acquisition, be transferred or any interest therein transferred to any person, non-governmental entity, public-private partnership, corporation, or other business entity.[6]

Section 17 of the Bill of Rights requires that private property be taken only for "public use" and only upon "due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law." The determination of public use "shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

It is difficult to see how the Initiative could interfere with judicial decision-making on public use when it does not alter the definition of public use. Further, the language of the Initiative does not kick in to operation until after the exercise of eminent domain and judicial decision-making are over. No taking judged to be a public use by the court could be "disqualified" by the language of the Initiative because it does not, by its terms, disqualify

[6] *Id.*, Ballot Summary.

takings. Rather, the Initiative regulates a matter well outside the scope of the Bill of Rights: Once property is acquired by eminent domain and vested in the state, it regulates the transfer of that government property until the passage of 10 (ten) years.

A. Unlike Vetoed House Bill 803, the Initiative Does Not Prohibit Any Use of Eminent Domain.

The fact that the Initiative neither affects the meaning of public use nor prohibits any taking is underscored by a comparison to H.B. 803, vetoed by Governor Barbour in 2009. Entitled "AN ACT TO AMEND SECTION 11-27-1, MISSISSIPPI CODE OF 1972, *TO PROHIBIT USE OF THE POWER OF EMINENT DOMAIN* FOR CERTAIN PRIVATE, NONGOVERNMENTAL PURPOSES; TO PROVIDE EXEMPTIONS; AND FOR RELATED PURPOSES," House Bill 803 stated, "Notwithstanding the provisions of this chapter or any other provisions of law to the contrary, *the right of eminent domain shall not be exercised*"[7] for particular purposes and with certain exceptions. It flatly prohibited the use of eminent domain in various cases. The language of the vetoed House Bill 803 plainly indicates that, unlike the Initiative, it was meant to prohibit certain uses of eminent domain.

By contrast, the Initiative prohibits no taking. The only effect of the Initiative is to restrict the terms by which the government may dispose of the property it acquires through eminent domain.

The difference is significant. A person subject to eminent domain could have used the vetoed statute as a defense to the condemnation. The Initiative cannot be used to prevent the condemnation—only to prevent a later transfer after condemnation. Under the vetoed bill, the law would allow the owner to retain his property. The Initiative does not.

[7] http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/0800-0899/HB0803IN.pdf (emphasis added).

B. Reform in Other States Demonstrates the Difference Between Prohibiting Eminent Domain, Changing the Meaning of Public Use, and Regulating the Transfer of Property Taken.

Among the states that have enacted eminent domain reform since *Kelo*, at least three broad themes emerge. Many states, such as Nevada and North Dakota, redefined or constrained the meaning of "public use." Other states, including Oregon and Alabama, entirely prohibited the taking of certain types of property or takings for particular purposes. A third category of states, including Maine and Wyoming, enacted limitations on the transfer of property acquired using eminent domain that were similar to the Initiative. And several states, including Florida, enacted a combination of the three types of reform because each addresses a different concern.

If the effect of the Initiative were intended, as Plaintiff asserts, to "take away judicial control of the determination of what is and is not a 'public purpose,'" Compl. 5, or to "prohibit a court from determining that certain projects were for a 'public use'" *id.* at 6., its drafters would have written it to limit the meaning of "public use" just as has been done in dozens of states.[8]

For example, Nevada amended its Constitution by initiative by entirely excluding private-to-private transfers of property *from the definition of public use*. Nevada's Constitution says:

> *Public use shall not include* the direct or indirect transfer of any interest in property taken in an eminent domain proceeding from one private party to another private party. In all eminent domain actions, the government shall have the burden to prove public use.

Nev. Const. § 22(1) (emphasis added). Likewise, North Dakota's law was changed through initiative to read: "Notwithstanding any other provision of law, a *public use or a public purpose does not include* public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health." N.D. Century Code § 32-15-01(3) (emphasis added).

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[8] *See generally,* Castle Coalition, *50 State Report Card Tracking Eminent Domain Reform Since Kelo* (2007), http://www.castlecoalition.org/about/component/content/2412?task=view (last visited July 11, 2011).

Other states categorically prohibit certain types of takings using language that is plainly directed to the condemnation proceeding. For example, an initiative in Oregon, Measure 39, changed the law so that "a public body . . . *may not condemn* private real property," including residences, businesses, or farms if they are intended to be transferred by government to another private party. Or. Rev. Stat. § 35.015(1) (emphasis added). In Alabama, "a municipality or county *may not condemn* property" for various purposes. Ala. Code § 11-80-1(b) (emphasis added).

These and many other states passed laws that explicitly changed the meaning of public use or prevented certain exercises of eminent domain. Initiative 31 does neither.

Several states also chose to create new laws governing transfer of property taken by eminent domain, either instead of, or in addition to, restricting the use of eminent domain. In Wyoming and Maine, for instance, a former owner has a right to buy back property that has not been used (or not been used for the purposes for which it was acquired). These limitations do not prohibit or disqualify takings from occurring, but they may reduce the risk that eminent domain is abused. They are about the disposition of government property acquired through eminent domain. *See* Wyo. Stat. § 1-26-801(d); 1 Me. Rev. Stat. § 815.

Florida directly prohibits certain types of takings, but also separately regulates the disposition of property acquired in ways similar to the Initiative. With various exceptions, Florida officials are able to transfer property to a private party only "if the property was owned and controlled by the condemning authority or a governmental entity for at least 10 years after the condemning authority acquired title to the property." Fla. Stat. § 73.013(g). That limitation is separate and in addition to prohibiting condemnation for certain purposes. Fla. Stat. § 73.014(2) (prohibiting property from being taken to eliminate blight).

Certainly the language of the Initiative has the capacity to frustrate the use of eminent domain by making some later, post-condemnation uses of the property less convenient than some private parties or government officials may prefer. But it does not "propose, modify, or repeal" anything in the Bill of Rights. Unlike reforms in other states, and in opposition to the allegations made by Plaintiff, the Initiative does not "disqualify" takings or affect the judicial determination of public use. Consequently, it does not propose any change to Section 17 of the Mississippi Constitution.

III. A LIMITATION ON THE DISPOSITION OF GOVERNMENT PROPERTY IS NOT A PART OF THE BILL OF RIGHTS AND DOES NOT PROPOSE, MODIFY, OR REPEAL ANY PART OF IT.

A. The Initiative Is Not a Proposal to Change the Bill of Rights.

The Initiative relates to eminent domain but it does not change the rights granted in the Bill of Rights. It is like other constitutional amendments outside the scope of the Bill of Rights that relate to eminent domain or limit the sale of government-owned property.

The Mississippi Bill of Rights includes Sections 5 through 32 of its Constitution. Section 17 pertains to eminent domain and requires the government to use eminent domain only for a public use and to pay just compensation upon acquisition. Nothing in the Initiative affects those basic rights. The mere fact that the Initiative pertains to eminent domain does not make it a proposal to change those rights.

Section 190 of the Mississippi Constitution, for instance, also relates to eminent domain:

> The exercise of the right of eminent domain shall never be abridged, or so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use; and the exercise of the police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or general well-being of the state.

Yet Section 190 is not a part of the Bill of Rights. And although it pertains to eminent domain—the same subject as Section 17 within the Bill of Rights—the latter is not even mentioned in the two cases to have considered Section 190. See *Cities of Oxford et al. v. N.E. Miss. Elec. Power Ass'n*, 59-CA-01261-SCT (Miss.1997); *Alabama & Vicksburg. Ry. Co. v. Jackson & E. Ry. Co.*, 95 So. 733 (Miss. 1922).

Unlike Section 190, the Initiative does not affect the meaning of, nor even contain the words, "public use."

The Initiative bears more resemblance to other amendments to the Constitution regulating the use and disposition of government property, such as Section 95, which is located in the part of the Constitution entitled "Prohibitions:"

> Lands belonging to, or under the control of the State, shall never be donated directly or indirectly, to private corporations or individuals, or to railroad companies. Nor shall such land be sold to corporations or associations for a less price than that for which it is subject to sale to individuals. . . .

Likewise, Section 111, located in the "Miscellaneous" portion of the Constitution, concerns the terms by which the state may sell certain land:

> All lands comprising a single tract sold in pursuance of decree of court, or execution, shall be first offered in subdivisions not exceeding one hundred and sixty acres, or one-quarter section, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate bid for the same in subdivisions as aforesaid; but the chancery court, in cases before it, may decree otherwise if deemed advisable to do so.

The plain language of the Initiative shows that it is a regulation of government-owned property, similar to Sections 95 and 111, both of which are prohibitions outside of the Bill of Rights. It is not a prohibition of eminent domain or an alteration of the rights relating to eminent domain located in the Bill of Rights.

The Initiative not only bears similarities to these other constitutional provisions, but it lacks the common characteristic shared by all of the provisions within the Bill of Rights. The Bill of Rights, at Sections 5 through 32 of the Constitution, share a common theme: They specify the relationship between the individual and government. Other sections of the Constitution, by contrast, pertain to the structure of government, specify the duties of government, the allocation of power among agencies of government, and define rules limiting the use of that power.[9] As a rule limiting the transfer of property owned by government, the Initiative falls outside of the scope of the Bill of Rights. It does not share the Bill of Rights' common characteristic of specifying rights which adhere to citizens or persons, but rather falls outside the scope of the Bill of Rights as a rule that limits a power of government.

B. The Initiative Does Not Grant New Rights to Property Owners.

Plaintiff alleges that the Initiative "purports to establish rights that Mississippi property owners would have when their property is taken for a public purpose." Compl. 5. Once again, this is not so. Once property is acquired by eminent domain and vested in the condemnor, the Bill of Rights is no longer implicated—what the condemnor may or may not do with the property after its acquisition is a not a limit on eminent domain but a regulation of the disposition of government property.

The Initiative does not give the owner the power to prevent the condemnation nor even the right to get his property back. If the government attempts a transfer in violation of the

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[9] The language of Art. 3, Section 9 ("The military shall be in strict subordination to the civil power") may be considered as an exception in which a section of the Bill of Rights relates to the structure of government. But this court has recognized that the provision's implicit concern is the relationship between the individual and the state. See, e.g., *State v. McPhail*, 180 So. 387, 392 (1938) (asserting judicial review on the basis of Section 9 over the governor's ordering out of the National Guard on the premise that "what the members of the militia do or may do in pursuance of such an order, is subject to review by the courts at the suit, or other appropriate legal challenge, of any citizen who can show that he has been unlawfully affected in his private personal or private property rights.").

Initiative, the former property owner will have the exact same right of enforcement as any other member of the public—namely a right to a declaratory judgment under Rule 57 of the Mississippi Rules of Civil Procedure. *See, e.g., Van Slyke v. Board of Trustees of State Insts. Of Higher Learning*, 613 So. 2d 872, 875 (Miss. 1993).

Any member of the public could bring such an action. Mississippi has liberal standing rules akin to "taxpayer standing." See, e.g., *Canton Farm Equip., Inc. v. Richardson*, 501 So. 2d 1098, 1106 (Miss. 1987). It is therefore true that in the event that the Initiative is approved, and in some future case a government official transferred property acquired through eminent domain to a private party within 10 years of its acquisition, some cause of action upon the Initiative may be available.

That cause of action is not, however, a particular right of a "Mississippi property owner" whose "property is taken for a public purpose" and does not show that the Initiative creates any new right affecting Section 17. The right of any taxpayer aggrieved by the conduct of the state and interested in challenging the matter as a private attorney general may do so under the rules of standing applicable in all cases to all Mississippians.

IV. A LAW THAT DISCOURAGES EMINENT DOMAIN DOES NOT NECESSARILY AFFECT THE BILL OF RIGHTS.

Plaintiff is the head of the Mississippi Development Authority and he makes his real interest in this case plain when he objects that the Initiative "contains no exception for takings pursuant to the Mississippi Major Economic Impact Act...or the Regional Economic Development Act . . . ." Compl. 4.

The premise of the complaint seems to be that the Bill of Rights is violated if the Initiative results in fewer takings for economic development. That premise is false. One can imagine any number of statutes that would have the effect of cutting back on the use of eminent domain in Mississippi, none of which would "propose, modify, or repeal" any part of Section 17

of the Bill of Rights. An initiative could, for instance, abolish Mr. Speed's agency. Just like Initiative 31, such an initiative would significantly affect the use of government resources and result in fewer cases of eminent domain, but it would not alter the Bill of Rights.

Recent legislation in California, for instance, substantially altered state funding of redevelopment agencies that use eminent domain. Budget shortfalls required the state government to make difficult choices in order to meet a constitutional obligation to provide certain funding for education.[10] The state government decided that the best means of meeting that requirement was to stop subsidizing local redevelopment agencies and redirect that money to state schools, by passing legislation that requires "counties and cities to close all redevelopment agencies unless they pay a fee to the state."[11] Like the Initiative, the California legislation does not prohibit any takings. And although the legislation has the likely effect of reducing the number of takings for economic development, it does not affect the power of eminent domain: The legislation is a reallocation of government resources among agencies of government. California's experience is instructive because the legal battle that has occurred in California over this legislation is a fight over the distribution of spending between local and state government and the allocation of power among agencies of government and not about the individual rights of its citizens.

Likewise, the number of eminent domain projects, or the total dollars committed to them, in any given year could be curtailed by law without treading on Section 17. Such laws would surely also result in fewer takings, but they would not affect the Bill of Rights.

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[10] Editorial, *Redevelopment Money Bypassing Capitol*, San Diego Union Tribune, Aug. 7, 2011, http://www.signonsandiego.com/news/2011/aug/07/redevelopment-money-bypassing-capitol/ (last visited August 8, 2011).

[11] Alejandro Davil, *California Redevelopment Agencies Fight Back*, Imperial Valley Press, July 22, 2011, http://www.ivpressonline.com/news/ivp-news-california-redevelopment-agencies-fight-back-20110722,0,3868678.story (last visited August 8, 2011).

V. CONCLUSION

For more than five years, legislators and citizens have sought to reform Mississippi's eminent domain laws in response to the U.S. Supreme Court's decision in *Kelo*, in order to secure the right to private property and discourage eminent domain.

In 2009, one attempt passed with the nearly unanimous support of the legislature and was vetoed. Citizens have responded by raising Initiative 31. It has been drawn narrowly, to avoid proposing, modifying, or repealing any right contained in the Bill of Rights or abrogating the proper role of the judiciary. It should be allowed to appear on the ballot to be voted on by the people of Mississippi on November 8, 2011.

THIS the 9th day of August, 2011.

Respectfully submitted,

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