No. 76284-8

WASHINGTON STATE SUPREME COURT

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority, d/b/a Sound Transit,

Respondent,

v.

KENNETH R. MILLER and BARBARA I. MILLER, husband and wife, NORTHWEST COMMUNITY BANK, DESIGNATED TRUSTEE SERVICES, INC., BERTRAM P. WEINMAN and MYRA WEINMAN, TRUSTEES OF THE WEINMAN FAMILY TRUST, ALAN J. WYRE and PANSY D. WYRE, MILLER BUILDING ENTERPRISES, INC., a Washington corporation; VIVIAN BARTLETT, PIERCE COUNTY, a municipal corporation, and ALL UNKNOWN OWNERS and ALL UNKNOWN TENANTS,

Appellants.

MEMORANDUM OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE WASHINGTON CHAPTER IN SUPPORT OF MOTION FOR RECONSIDERATION

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INTRODUCTION

In its February 16, 2006 decision, this Court held that Internet notice concerning the legislative determination of the necessity of an exercise of eminent domain satisfies statutory notice requirements because the Internet provides relatively unlimited low-cost capacity for communications of all kinds. *Central Puget Sound Regional Transit Authority v. Miller*, 128 P.3d 588, 2006 WL 367132, at ¶ 20 (Wash. Feb. 16, 2006). This conclusion rests upon a mistaken factual assumption: that the Internet is easily accessible by all members of society. The Court's decision assumes there is no "digital divide" between rich and poor, white and black, young and old.

Studies conclusively demonstrate that the poor, minorities, and elderly have considerably less access to the Internet than other segments of society. Research makes equally clear that these same segments of society are the most likely to be targeted by eminent domain. Thus, the Court's decision allows government to employ a form of notice that largely excludes the very communities with the greatest interest in necessity determinations. Because the Court's conclusion that Sound Transit complied with the notice statute flows from a mistaken assumption, reconsideration is appropriate.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a nonprofit, public interest legal center committed to defending and strengthening the essential foundations of a free society, including private property rights. The Institute believes that "[i]ndividual freedom finds tangible expression in property rights." *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 61, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). The Institute's national office has litigated property rights cases throughout the country and was the lead counsel for the property owners in *Kelo v. City of New London,* __ U.S. __, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005), regarding the condemnation of private property for the benefit of private interests. In the wake of *Kelo,* the Institute has dedicated itself to ensuring that state guarantees to possess one's property free from unfair governmental interference remain vibrant. *See Kelo,* 125 S. Ct. at 2668 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."). The Institute's Washington Chapter places a special emphasis on vindicating those rights protected by the Washington Constitution.

This case concerns the guarantee of sufficient notice to property owners when the government seeks to condemn their property. As such, it is of vital interest to *amicus* Institute for Justice.

STATEMENT OF THE CASE

The Institute adopts the Statement of the Case in Appellents' Opening Brief and the facts discussed in the Motion for Reconsideration.

ARGUMENT

This Court accepted Sound Transit's argument that "[n]otice posted on a public website is just as likely, or more likely, to provide notice to interested or affected parties of the actions to be taken [by the government] as notice published in a newspaper." Br. Resp. at 24-25. This argument ignores two significant facts – first, that eminent domain is disproportionately employed against the poor, minorities, and the elderly, and second, that it is precisely these segments of our society that have the least access to the Internet. As such, for those most likely to have the government seize their property, Internet notice is really no notice at all. To ensure that constitutionally and statutorily required notice is adequate and meaningful, this Court should grant reconsideration.

A. Government Condemnation Has Historically Targeted Racial And Ethnic Minorities, The Elderly, And The Poor

It is beyond dispute that the use and abuse of eminent domain in this country has been consistently and disproportionately directed towards the poor, ethnic and racial minorities, and the elderly. In fact, the destruction of non-white neighborhoods was actually the intent of many

urban planners. The displacement of African-American communities as part of urban renewal and transportation projects was so common that the term "urban renewal" came to be known as "Negro removal." 12 *Thompson on Real Property* § 98.02(e) (David A. Thomas ed., 1994) (quoting James Baldwin). As one commentator notes:

> By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.

Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 Yale L. & Pol'y Rev. 1, 6 (2003).

Throughout the 1950s and 1960s, transportation projects and (often fraudulent) blight designations were used to impose a sanitized view of urban living on established neighborhoods:

> In some instances, the city was re-colonized when the highway tore apart minority communities and city planners re-built infrastructure that did not benefit the shattered neighborhoods. . . . In sum, a governing apparatus operating through housing and the highway machine implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations. The accounts of segregation and isolation continue to this day.

Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine,* 3 J.L. Soc'y 31, 53-54 (2002).

By way of example, large projects in Baltimore and Los Angeles have

destroyed African-American and Mexican communities. *See* Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. Mich. J.L. Reform 689, 727 n.141 (1994).

The attempt to sanitize and reconstruct urban areas was not imposed on racial and ethnic minorities alone. Other groups, such as the elderly, found themselves among the favorite targets of urban planners. *E.g., Bugryn v. City of Bristol*, 63 Conn. App. 98, 774 A.2d 1042 (2001) (concerning seizure of elderly siblings' property to build industrial park); Gordy Holt, *Bremerton woman just won't budge; grandmother is fighting condemnation of her home,* Seattle Post-Intelligencer, Nov. 22, 1999, at A1 (concerning elderly homeowner's displacement for car dealership).

Although such condemnations reached their apex during the urban renewal fad of the '50s and '60s, these segments of our society still find themselves the favorite targets of government bulldozers. *See, e.g.,* Stephen Deere, *Opposing views on city's future; Riviera Beach's growth feud draws national attention*, Fort Lauderdale Sun-Sentinel, Feb. 20, 2006, at 1B (describing efforts by Riviera Beach, Florida, to condemn 5,100 largely African-American homes for hotels, condos, marinas and shops); Dana Berliner, *Condemnations for Private Parties Destroy Black Neighborhoods*, *in Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain* 102 (2003)

(describing efforts to condemn largely African-American neighborhoods in Michigan, New Jersey, Florida, and West Virginia); David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. Times, Sept. 10, 2001, at A20 (describing efforts by Canton, Mississippi to condemn homes owned by African-American families to build a Nissan automobile plant).

The reason the government chose – and continues to choose – these targets is simple. As the Director of the Washington Bureau of the NAACP recently testified to Congress:

> [C]ondemnations in low-income or predominantly minority neighborhoods are often easier to accomplish because these groups are less likely, or often unable, to contest the action either politically or in the courts.

The Kelo *Decision: Investigating Takings of Homes and other Private Property: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (2005) (statement of Hilary Shelton, Director, NAACP Wash. Bureau).

Thus, the poor, the elderly, and racial and ethnic minorities find themselves disproportionately subject to eminent domain, whether legitimate or not. It is therefore especially important that these communities be aware of all aspects of the process by which government condemns private property.

B. These Communities Have Significantly Less Access To The Internet Than Other Parts Of The Population

Sound Transit argued that Internet notice is sufficient because "the public has come to rely on the Internet for information on all sorts of governmental activity in Washington." Resp. Br. at 24. This optimistic assessment is only partially correct – some members of the public rely on the Internet. The evidence is overwhelming that substantial portions of our society do not have access to computers and the Internet and that the information available on the web simply is not available to them.

For instance, the U.S. Census Bureau reported that in 2003, a 62 percent gap in Internet access existed between households with $100,000 or more in family income and those with less than $25,000. Jennifer Cheeseman Day et al., U.S. Census Bureau, *Computer and Internet Use in the United States: 2003* 2 (2005). The problem largely stems from the fact that the poor, the elderly, and racial and ethnic minorities are far less likely to have computers in their homes. In fact, the Bureau found that while 62 percent of Americans had computers in the household, certain groups lagged well behind the rest of the populace:

> 35 percent of households with householders aged 65 and older, about 45 percent of households with Black or Hispanic householders, and 28 percent of households with householders who had less than a high school education had a computer. In addition, 41 percent of one-person

> households and 46 percent of nonfamily households owned a computer.

Id. at 3 (citation and footnotes omitted). High-income households, on the other hand, were much more likely to have computer and Internet access than the general public. *Id.*

In Washington specifically, Internet access and computer use is not as ubiquitous as Sound Transit suggests: 60-65 percent of households have Internet access and 69-74 percent have a computer – hardly omnipresence. *Id.* at 5. Moreover, a report prepared by the City of Seattle Department of Information Technology noted that only half of the City's senior citizens were current computer users. Elizabeth Moore et al., City of Seattle Dep't of Information Technology, *City of Seattle Information Technology Residential Survey Final Report* 49 (2004). The report concludes:

> Seattle still has a significant digital divide. Older Seattleites or those with less income or education are less likely to be current or comfortable technology users . . . . Lower levels of connectivity are also evident among African American respondents, but the gap is not as pervasive as with the seniors and those with less income or education. The top two reasons for not having a computer at home are cost and lack of interest.

Id. at 87.

These statistics refute the cheerful assurances of Sound Transit that Internet notice informs the public. Internet notice can inform <u>some</u> of the

public, but not the people most likely to be subject to eminent domain. For large segments of our population – those most at risk of having their property seized – Internet notice is no notice at all.[1]

C. Notice Is Especially Necessary Because The Court Has Disavowed Any Oversight Of The Necessity Determination

In its decision, this Court made clear that it will not review any aspect of the legislature's determination of necessity and that the legislature has practically unrestricted discretion in determining the length, extent, duration, and location of an exercise of the eminent domain power. *Miller*, 128 P.3d at __, 2006 WL 367132, at ¶ 10. The legislative hearing in which necessity is determined thus becomes vitally important because it is the only time when the condemnee may present evidence concerning necessity and actually have it considered.[2] In such circumstances, effective notice of this legislative determination becomes essential to the

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[1] Indeed, even assuming one has access to the Internet, Sound Transit assumes an amazing amount of sophistication regarding accessing information there. For instance, a resident of Seattle faces potential condemnation from (at least) the United States Government (the Army Corps of Engineers, the Bonneville Power Administration), Washington State, King County, Sound Transit, the City of Seattle, Seattle City Light (for electric service), Puget Sound Energy, Inc. (for gas service), and, until recently, the Seattle Monorail. Half the senior citizens in the City do not have access to any of these entities' websites. The other half are expected to figure out within which jurisdictions they live, monitor the websites for those jurisdictions, and find the information concerning condemnation on the websites – a level of sophistication beyond the ken of even the most devoted government website enthusiast.

[2] Sound Transit argued in this case that because public use was assumed, the trial court, in the public use and necessity hearing, did not need to hear any evidence offered by the Millers. App. Br. at 4. This Court's decision will further embolden claims by municipalities that property owners should have no opportunity to present evidence refuting the necessity of the condemnation.

open workings of government – otherwise, condemnation becomes a secret decision, secretly arrived at.

For those subject to eminent domain, notice of the legislative necessity determination is critical. For this reason, the Legislature required that notice of such hearings be provided to the public. *See* App. Br. at 7-9. Sound Transit has determined that it will provide notice in a manner designed to ensure that the people most likely to be subject to eminent domain do not – and cannot – receive notice of their actions. This is not notice – it is a feint at notice.

CONCLUSION

Because Sound Transit's argument, accepted by this Court, concerning the ability of the public to access the Internet rests on demonstratively false premises, this Court should grant reconsideration, conclude that Sound Transit did not provide statutorily required notice, and reverse the determination of public use and necessity.

RESPECTFULLY submitted this 15th day of March 2006.

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DECLARATION OF SERVICE

I, Yvonne Maletic, declare:

I am not a party in this action. I reside in the State of Washington and am employed by Institute for Justice in Seattle, Washington. On March 15, 2006, I caused to be served a true copy of the foregoing *Amicus Curiae* Memorandum upon the following:

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Yvonne Maletic