No. 01-07-00074-CV

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
HOUSTON, TEXAS

FREEPORT ECONOMIC DEVELOPMENT CORPORATION,
Appellant,

v.

WESTERN SEAFOOD COMPANY,
Appellee.

On Appeal from the County Court at Law No. 3 of Brazoria County, Texas
Cause No. CI032664

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE

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IDENTITY AND INTEREST OF AMICUS CURIAE INSTITUTE FOR JUSTICE

The Institute for Justice is a non-profit, public interest law center dedicated to the essential foundations of a free society. The Institute litigates in state and federal courts to restore constitutional limits on the power of government and thereby secure greater protection for individual liberty. The Institute seeks to strengthen the ability of people to control and transfer property and to demonstrate that property rights are inextricably joined to other civil rights. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552, 92 S. Ct. 1113, 1122 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property."). The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights," *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61, 114 S. Ct. 492, 505 (1993), and believes that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests.

To that end, the Institute represents property owners across the country in fighting the abuse of eminent domain. The Institute represented the homeowners in the highly controversial *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655 (2005), in which the U.S. Supreme Court upheld the use of eminent domain for private economic development. The Institute also represented the homeowners in the landmark *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court rejected *Kelo*, holding that eminent domain for private economic development violates the Ohio Constitution's Public Use Clause.

The Institute regularly files amicus curiae briefs in important eminent domain cases and has done so with the highest courts of California, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Jersey, Oklahoma, Oregon, Rhode Island, and Washington. The Institute has also filed amicus curiae briefs on eminent domain issues in the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth[1] and Ninth Circuits.

It is in this light that the Institute for Justice tenders this brief, respectfully urging the Court to prevent the Freeport Economic Development Corporation ("Freeport") from using eminent domain to take the property of Western Seafood Company ("Western Seafood") for private economic development. Pursuant to Tex. R. App. P. 11(c), no fee was paid or is to be paid for the brief's preparation.

STATEMENT OF THE CASE

Amicus Institute for Justice concurs in the Statements of the Case proffered by Freeport and Western Seafood, but it shares Western Seafood's reservations about the argumentative nature of Freeport's Statement of the Case.

ISSUES PRESENTED

1. Whether longstanding judicial interpretation of the Texas Constitution's Public Use Clause, Tex. Const. Art. I, § 17, precludes Freeport's condemnation of private property to make way for a privately-owned and -operated marina.

2. Whether, in holding Freeport's condemnation for a privately-owned and -operated marina was unlawful under Texas law, the trial court was correct to consider statutory eminent domain restrictions that had taken effect a year earlier.

[1] The Institute filed an amicus curiae brief with the Fifth Circuit in the parallel federal action that Western Seafood brought to enjoin Freeport from acquiring its property for the private marina project at issue in this case. *See Western Seafood Co. v. United States*, 202 F. App'x 670 (5th Cir. 2006) (No. 04-41196).

STATEMENT OF FACTS

Although the factual and procedural background of this case is complex, as evidenced by its lengthy treatment in the parties' briefs, the facts necessary to resolve the lawfulness of Freeport's proposed condemnation of Western Seafood's property are few and undisputed.

On August 16, 2004, Freeport, an economic development corporation created by the City of Freeport, filed a condemnation action against Western Seafood, a half-century-old, family-owned shrimp processing business. (Vol. I CR pp. 1-7; RR p. 21.[2]) Freeport sought to take Western Seafood's property and transfer it to another private company for the construction of a privately-owned and -operated marina. (Vol. I CR pp. 1-7; Vol. II CR pp. 284-85.) The purported "public use" for the condemnation, as required by the Fifth Amendment to the U.S. Constitution and Article I, section 17 of the Texas Constitution, was "economic development." (Vol. I CR p. 1.)

On June 23, 2005, while Freeport's condemnation action was still pending in the trial court, the U.S. Supreme Court issued its decision in *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655 (2005) . There, the Court held that, for purposes of the Fifth Amendment's Public Use Clause, economic development—specifically, the possibility of greater tax revenue or more jobs—is a public use that can justify the taking of private property from one owner for transfer to another private owner. 545 U.S. at 484-87, 125 S. Ct. at 2665-67.

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[2] Amicus Institute for Justice adopts the same abbreviations for record citation used in the parties' briefs.

The immediate outrage generated by the *Kelo* decision prompted a quick response from the Texas Legislature. In August 2005, just two months after the decision, the Legislature overwhelmingly passed a bill to prevent *Kelo's* reasoning from undermining property rights protections in Texas. *See* 2005 Tex. Sess. Law Serv., 2d Called Sess. ch. 1 (West). Among other things, the bill created a new chapter of the Government Code, Chapter 2206, that prohibits the use of eminent domain if the condemnation:

- "confers a private benefit on a particular private party through the use of the property";
- "is for a public use that is merely a pretext to confer a private benefit on a particular private party"; *or*
- "is for economic development purposes . . . ."[3]

Tex. Gov't Code § 2206.001(b)(1)-(3) (Supp. 2007) (effective Nov. 18, 2005).

The intent of the Legislature was clear: it sought to codify longstanding *state* constitutional protections for property rights. No reported Texas case had ever interpreted Article I, section 17's "public use" language to allow condemnations for economic development alone, and the Legislature, by its enactment of Chapter 2206, wanted there to be no question that *Kelo*-type takings are barred in Texas. Senator Janek, the author of the legislation, made this clear when he confirmed that its purpose was to codify the "conservative view of what constitutes public use"—specifically, the

[3] An exception to this third prohibition left open the possibility of condemnations where economic development is only "a secondary purpose" resulting from certain slum or blight removal measures. Tex. Gov't Code § 2206.001(b)(3). Freeport did not bring the present condemnation action to eliminate slums or blight, nor has it contended that Western Seafood's property is a slum or blighted area. Rather, Freeport brought this condemnation action solely for economic development purposes. (Vol. I CR pp. 1-7.)

interpretation adopted by the Texas Supreme Court in *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex. 1905), *aff'd*, 204 U.S. 667, 27 S. Ct. 785 (1907)—and to reject the "liberal view of . . . public use" adopted in *Kelo*. S.J. of Tex., 79th Leg., 2d Called Sess. 117 (2005).

The vote on Senator Janek's bill was overwhelming: 19 to 5 in the Senate, and 140 to 1 in the House. *See* 2005 Tex. Sess. Law Serv., 2nd Called Sess. ch. 1 (West). Governor Perry signed the bill into law on September 1, 2005, and it became effective two-and-a-half months later, on November 18, 2005. *Id.*

On June 22, 2006—seven months after Chapter 2206's bar to "economic development" condemnations had become effective—Freeport moved for summary judgment on its right to take Western Seafood's property and transfer it to another private owner for a marina. (Vol. I CR pp. 47-252.) Western Seafood cross-moved, arguing, among other things, that the taking was barred by Article I, section 17 of the Texas Constitution and by Chapter 2206. (Vol. II CR pp. 254-411.)

The trial court agreed with Western Seafood and, on November 29, 2006, granted its, and denied Freeport's, summary judgment motion. (Vol. II CR pp. 459-61.) After resolving outstanding attorneys' fee issues, the court dismissed the condemnation action in its entirety on July 11, 2007. Appellant's App. Tab B.

Freeport is now appealing the trial court's decision regarding the lawfulness of the condemnation. It argues primarily that Chapter 2206's bar to "economic development" takings should not have been applied to its condemnation action against Western Seafood

because the condemnation action was filed before Chapter 2206's enactment.[4] Freeport virtually ignores the fact that past judicial precedent has never allowed takings for the purpose for which it seeks to condemn Western Seafood's property.

SUMMARY OF THE ARGUMENT

In one of the most controversial and roundly criticized decisions in recent memory, *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655 (2005), the U.S. Supreme Court held that "economic development"—specifically, the possibility of greater tax revenues or more jobs—is, under the U.S. Constitution, a "public use" that justifies the taking of property from its rightful owner for transfer to another private owner. As the dissent correctly observed, this decision gave governments across the country a green light[5] to take private property for purely private development:

> The specter of condemnation [now] hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.

545 U.S. at 503, 125 S. Ct. at 2676 (O'Connor, J., dissenting).[6]

There is, however, one thing that *Kelo* got right: state and local governments remain free to enforce more stringent *state-law* restrictions on eminent domain. As the majority noted:

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[4] It is unclear to what extent, if any, the trial court actually relied on Chapter 2206, as the court's summary judgment order does not mention the specific grounds for its ruling.

[5] There is no doubt that Freeport's mayor saw *Kelo* as a green light. On the day the decision came down, he proclaimed, "This is the last little piece of the puzzle to put the project together." *See* Thayer Evans, *Freeport moves to seize 3 properties*, Houston Chronicle, June 24, 2005, at A6.

[6] The dissent's prediction was hardly far-fetched. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (involving municipality's attempt to condemn property of discount retailer in order "to satisfy the private expansion demands of Costco").

> [N]othing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.

545 U.S. at 489, 125 S. Ct. at 2668 (footnotes omitted).

At the time of the *Kelo* decision, Texas was one of the states whose courts had already recognized a stricter "public use" requirement "as a matter of state constitutional law." *Kelo*, 545 U.S. at 489, 125 S. Ct. at 2668. Within two months of the decision, the Texas Legislature reinforced this precedent by codifying it in Tex. Gov't Code § 2206.001, a "state eminent domain statute[] that carefully limit[s] the grounds upon which takings may be exercised." *Kelo*, 545 U.S. at 489. In so doing, the Legislature statutorily proscribed "economic development" takings in Texas, while making clear its view that state constitutional law already proscribed them.

This case concerns the application of these state constitutional and statutory protections to Freeport's proposed condemnation of a thriving, family-owned business for construction of a privately-owned and -operated marina. As in *Kelo*, the purported public use is "economic development"—essentially, the possibility that the private marina will generate economic benefits such as new jobs, higher property values, or increased tax revenues for the City of Freeport.

This Court should affirm the trial court's decision barring this "economic development" taking. The Court has two avenues by which to do so.

First, this Court may hold that using eminent domain to take property from one private owner and transfer it to another, in the hope that the second owner will generate more jobs, higher property values, or some other economic benefit for the government, is not a "public use" under Article I, section 17 of the Texas Constitution. A century's worth of Texas jurisprudence makes clear that such a purpose is not a "public use" under the state constitution. In so holding, this Court would join the ranks of other state courts—including two state supreme courts—that have, in the last two years, flatly rejected *Kelo's* reasoning on state constitutional grounds. *See Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); *see also Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006) (noting that South Dakota courts have consistently applied a stricter definition of "public use" than was adopted in *Kelo* and that the South Dakota Constitution "provides . . . landowners more protection against a taking of their property than the United States Constitution"); *Gallenthin Realty Development, Inc. v. Borough of Paulsboro,* 924 A.2d 447, 460 (N.J. 2007) (rejecting municipality's argument that property may be subject to eminent domain simply because it is "not fully productive" or "operated in an optimal manner"). It would likewise join the many state courts that, even before *Kelo*, rejected economic development as a justification for eminent domain under their respective state constitutions. *See, e.g., County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *Ga. Dep't of Transp. v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1 (Ill. 2002).

Alternatively, this Court may hold that Tex. Gov't Code § 2206.001, which took effect a year before the trial court issued its decision, statutorily bars Freeport's proposed "economic development" condemnation. Contrary to Freeport's assertion, relying on § 2206.001 would not amount to a presumptively prohibited "retroactive" application of the statute. Indeed, applying § 2206.001 would not be retroactive at all, because Freeport has no vested right in Western Seafood's property.

ARGUMENT

I. Texas Public Use Jurisprudence Prohibits Freeport's Condemnation For Economic Development.

When the Legislature enacted Tex. Gov't Code § 2206.001 to statutorily bar "economic development" takings, it did not, as Freeport suggests, concoct a "*new* limit[] on the use of eminent domain authority in Texas." (Appellant's Br. at 21 (emphasis added).) Rather, it codified longstanding judicial interpretation of the Texas Constitution's Public Use Clause, which has never recognized economic development as a public use. Freeport's condemnation, therefore, is unlawful with or without § 2206.001.[7]

A century's worth of jurisprudence makes clear that economic development—that is, the possibility of more jobs, higher property values, increased tax revenues, etc.—is not a "public use" that justifies the taking of property from one private owner for transfer

[7] As amicus Institute for Justice has previously noted, no Texas Supreme Court opinion (or Court of Appeals opinion, for that matter) has addressed the precise issue here: the use of eminent domain to transfer property from one private party to another with the hope that the second party's use of the property might create greater economic benefit for the local government. *See* Br. of Institute for Justice as Amicus Curiae, Western Seafood Co. v. United States, 202 F. App'x 670 (5th Cir. 2006) (No. 04-41196). Nevertheless, and as discussed below, the interpretation that the Texas Supreme Court has given the Public Use Clause does not encompass such condemnations. To hold that the Clause *does* permit them would require a radical expansion of the Court's precedent.

to another. In the seminal case *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex. 1905), *aff'd*, 204 U.S. 667, 27 S. Ct. 785 (1907), the Texas Supreme Court specifically rejected the proposition that, because businesses "promote[] the prosperity and comfort" of the community, eminent domain should be available to aid them:

> [W]e are not inclined to accept that liberal definition of the phrase 'public use' adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain.

Id. at 14.

Borden has remained the touchstone of eminent domain jurisprudence in Texas "throughout the twentieth century" and through today. *See Whittington v. City of Austin*, 174 S.W.3d 889, 897 n.3 (Tex. App.–Austin 2005, review denied). Texas courts have reiterated its interpretation of the Public Use Clause time and again for more than one hundred years. *See, e.g., Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958) ("[W]e have refused to accept the definition adopted by some authorities which makes the phrase mean nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain."); *Whittington*, 174 S.W.3d at 897 n.3 (noting that the Texas Supreme Court has "steadfastly rejected 'that liberal definition of the phrase 'public use' . . . which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business or undertaking'" could be aided (omission in original; quoting *Borden*)); *Malcomson Rd. Util. Dist. v. Newsom*, 171

S.W.3d 257, 267 (Tex. App.–Houston [1st Dist.] 2005, pets. denied) ("The Texas Supreme Court . . . has rejected a definition that means nothing more than public welfare or good or under which any business that promotes the community's prosperity or comfort might be aided.").[8]

In light of *Borden* and its progeny, the Texas Supreme Court has rejected the use of eminent domain where "[t]he only possible public purpose . . . is that of putting . . . products . . . into the economy of the community," *Maher v. Lasater*, 354 S.W.2d 923, 926 (Tex. 1962), or "enabl[ing] . . . [a] commercial enterprise," *Phillips v. Naumann*, 275 S.W.2d 464, 468 (Tex. 1955). There is no reason to believe these cases would have been resolved any differently had the condemning authority simply emphasized the greater tax revenues that might result from "putting . . . products . . . into the economy of the community," or the increase in jobs that might result from "enabl[ing] . . . commercial enterprise." *Maher*, 354 S.W.2d at 926; *Phillips*, 275 S.W.2d at 468.

Even the Legislature, in enacting the statutory prohibition on condemnations "for economic development purposes," Tex. Gov't Code § 2206.001(b), saw itself as simply codifying *Borden* and its progeny. As evidenced by the following colloquy with Senator Janek, Chapter 2206's author, the unambiguous purpose of the legislation was to

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[8] Even other jurisdictions have noted the stricter interpretation of "public use" that Texas courts employ:

> Jurisdictions define "public use" in different ways. Some have adopted a "public benefit" or "public advantage" approach under which any use which serves to . . . encourage industry . . . is a valid public use. Other jurisdictions, including Texas, have adopted a narrower view.

City of Arlington, Tex. v. Golddust Twins Realty Corp., 41 F.3d 960, 965 (5th Cir. 1994) (internal quotation marks and citation omitted).

reinforce *Borden's* interpretation of "public use" and thereby ensure there is no question that *Kelo*-type condemnations are barred in Texas:

> Senator Shapleigh: . . . In . . . the *Kelo* opinion, th[e] court adopted what is in eminent domain circles called a liberal view of what is meant by the phrase of public use, as it pertains to the United States Constitution. In this state, we've always adopted the *Borden* definition, which is the conservative view of what constitutes public use. Is it your intent that the public use definition in *Borden* be adopted and used as a test under this bill?
>
> Senator Janek: It is my intent that we adopt the more conservative approach to what constitutes public use under the Constitution.

S.J. of Tex., 79th Leg., 2d Called Sess. 117 (2005). In short, the principle underlying Chapter 2206 was not, as Freeport suggests, a "new limit[]" concocted by the Legislature. It was a century's worth of public use jurisprudence.

Notwithstanding that fact, Freeport insists that condemnation of Western Seafood's property was permissible under Texas law as it stood before Chapter 2206's enactment. (*See* Appellant's Br. at 28-31.) But the only case Freeport cites for the proposition that economic development is a "public use" under the Texas Constitution is *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959), which has no application here. *Davis* concerned condemnation of structures that were "so unsafe and unsanitary as to be unsuitable for human habitation." *Id.* at 702. It held that such property may be taken and transferred to private ownership if the "primary purpose . . . [is] to clear *slum and blighted areas*," which were found to present an affirmative public harm. *Id.* at 709 (emphasis added).

Freeport did not bring this condemnation action to clear slums or blight. Nor has Freeport contended that Western Seafood's property is a slum or blighted area, or that it in any way constitutes an affirmative public harm to the safety and wellbeing of the community. Indeed, it *could not* make that contention in good faith: Western Seafood has, for "over two generations, . . . provided an excellent product, jobs, and city taxes that have benefited more than a few." *Western Seafood Co. v. City of Freeport, Tex.*, 346 F. Supp. 2d 892, 903 (S.D. Tex. 2004), *aff'd in part and vacated in part on other grounds*, 202 F. App'x 670 (5th Cir. 2006). Rather, Freeport brought this condemnation for economic development alone, believing that a private marina will be more physically attractive and generate more economic benefits than Western Seafood. This is not a public use under the Texas Constitution.[9]

In summary, Chapter 2206's prohibition on condemnations "for economic development purposes" was nothing more than an affirmation of the law as it already existed in Texas. No reported Texas case has ever found economic development to be a "public use." To conclude otherwise—that is, to hold that the mere possibility of more jobs, increased property values, or higher tax revenues justifies condemnation—would be a radical expansion of Texas precedent and of the eminent domain power itself. This

[9] Indeed, other states that recognize slum or blight clearance as a public use under their state constitutions have specifically *rejected* economic development as a public use. *See, e.g., Norwood*, 853 N.E.2d at 1140-41 ("Although we have permitted economic concerns to be considered in addition to other factors, such as slum clearance, when determining whether the public-use requirement is sufficient, we have never found economic benefits alone to be a sufficient public use for a valid taking." (footnote omitted)); *Hathcock*, 684 N.W.2d at 783, 787 (recognizing public use where property is condemned "to remedy urban blight for the sake of public health and safety," but not where it is condemned to "alleviat[e] unemployment and revitaliz[e] the economic base of the community"); *City of Owensboro v. McCormick*, 581 S.W.2d 3, 7-8 (Ky. 1979) (holding that eminent domain may not be used to condemn property and convey it for private development "unless the property lies within an area of land which is blighted as defined by statute").

Court should decline to take that radical step and instead go the way of the Supreme Courts of Oklahoma and Ohio, which have expressly rejected *Kelo's* reasoning in interpreting the "public use" clauses of their respective state constitutions. *See Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Bd. of County Comm'rs of Muskogee County v. Lowery*, 136 P.3d 639 (Okla. 2006); *see also Benson v. State*, 710 N.W.2d 131, 146 (S.D. 2006); *Gallenthin Realty Development, Inc. v. Borough of Paulsboro,* 924 A.2d 447, 460 (N.J. 2007).[10]

II. Chapter 2206 Prohibits Freeport's Condemnation For Economic Development.

Even if this Court concludes that the taking of private property from one person and conveying it to another for economic development is a public use under Article I, section 17, Freeport's condemnation of Western Seafood's property is still prohibited by Chapter 2206's express statutory bar to such condemnations. *See* Tex. Gov't Code § 2206.001(b) (prohibiting, among other things, condemnations brought primarily "for economic development purposes"). While Freeport insists that applying Chapter 2206 is inappropriate because the Legislature did not expressly indicate that it should apply retroactively to actions pending at the time of enactment, that argument begs the question: Would application of Chapter 2206 actually *be* retroactive? Freeport never directly answers that question—it simply assumes the answer is, "Yes," then invokes the

[10] In support of its position, Freeport cites two statutes that characterize "development . . . of the economy" and "development of new and expanded business enterprises" as "public purposes." Tex. Local Gov't Code § 380.002(a); Tex. Rev. Civ. Stat. Art. 5190.6, § 3(a)(1). Freeport, however, cites no case for the proposition that these are "public uses" under Article I, section 17. In any event, "a mere declaration by the Legislature cannot change a private use or private purpose into a public use or public purpose." *Maher*, 354 S.W.2d at 925.

presumption against retroactivity. Case law, however, makes clear that applying Chapter 2206 would *not* be retroactive. Rather, Chapter 2206 is an appropriate, independent basis for rejecting Freeport's condemnation petition.

A. Freeport's Implication Of The Presumption Against Retroactivity Is Misplaced.

"[W]hen a case implicates a . . . statute enacted after the events in suit, the Court's first task is to determine whether [the legislature] has expressly prescribed the statute's proper reach." *Walls v. First State Bank of Miami*, 900 S.W.2d 117, 121 (Tex. App.–Amarillo 1995, writ denied); *see also Quick v. City of Austin*, 7 S.W.3d 109, 131 (Tex. 1999) (as amended upon rehearing) ("Our first task is to determine whether the Legislature has expressly prescribed the statute's proper reach."). Here, the text of Chapter 2206 is silent on whether its bar to "economic development" takings applies to condemnation actions that were pending on its effective date. The Legislature likewise expressed no opinion on the issue. In fact, when asked whether Chapter 2206 would apply to pending actions, Representative Corte, who co-sponsored its enactment, explained:

> We want it to be silent because it was hard to be able to draft the legislation to be either prospective or retroactive . . . . [I]t . . . leaves it open for the courts to determine—if the courts have a case pending right now that's still in the courts, then they may be able to and they may not.

H.J. of Tex., 79th Leg., 2d Called Sess. 186 (2005) (Appellant's Appx. Tab I). Senator Janek, Chapter 2206's author, confirmed that the Legislature was not taking a position: "Because the individual circumstances on any one court case could vary dramatically

from a different court case, I thought that the best course of action was to remain silent; let the courts apply it as they see fit." S.J. of Tex., 79th Leg., 2d Called Sess. 100 (2005) (Appellant's Appx. Tab J).[11]

When there is "no clear indication whether [the Legislature] intended" an intervening statute to apply to pending actions, the court "must turn to [a] second step" and "determine whether the new statute would have a prohibited 'retroactive effect.'" *Walls*, 900 S.W.2d at 121. Only if it would does the presumption against retroactivity come into play. *See id.* ("*If* the statute does have a retroactive effect, *then* the traditional presumption against statutory retroactivity comes into play . . . ." (emphasis added)); *Quick*, 7 S.W.3d at 132 ("Our next step is to determine whether this construction renders the statute retroactive, *thereby* invoking the presumption against retroactivity." (emphasis added)); *Combs v. Comm'r of Social Security*, 459 F.3d 640, 646 (6th Cir. 2006) ("The application of law existing at the time of decision does not violate the presumption against retroactivity *unless* the statute in question has retroactive effects." (emphasis added)). Freeport's position—that the presumption against retroactivity governs, period—puts the cart before the horse.

B. Relying On Chapter 2206 To Bar Freeport's Condemnation Would Not Be A Retroactive Application Of Law.

The critical question, then, is whether application of Chapter 2206 would have a retroactive effect. The answer to that question is, unequivocally, "No." A statute does

[11] The act that created Chapter 2206 contained another section that amended the eminent domain procedures for certain medical-related charitable corporations. The Legislature specifically restricted that amendment to condemnation actions filed after the act's effective date. *See* 2005 Tex. Sess. Law Serv., 2d Called Sess. ch. 1 § 9 (West). Significantly, the Legislature imposed no such restriction on Chapter 2206's application.

not operate retroactively "merely because it [i]s applicable to a case arising from conduct antedating the statute's enactment." *Walls*, 900 S.W.2d at 121; *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S. Ct. 1483, 1499 (1994) ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." (citation and footnote omitted)). Rather, a law operates retroactively "if it takes away or impairs vested rights created under existing laws." *Walls*, 900 S.W.2d at 121.

In the eminent domain context, a condemnor's right to a condemnee's property does not vest until a final, non-reviewable judgment is entered in the condemnor's favor. *See W. Union Tel. Co. v. Louisville & Nashville R.R. Co.*, 258 U.S. 13, 22, 42 S. Ct. 258, 261 (1922) (applying intervening statute to bar condemnation because the "conditions of condemnation" had not yet been "established and adjudicated . . . in final and unreviewable determination"); *see also Walls*, 900 S.W.2d at 122 ("The triggering event for the vesting of a right is the resolution of the controversy or the entry of a final judgment on the claim."); *Houston Indep. Sch. Dist. v. Houston Chronicle Publ'g Co.*, 798 S.W.2d 580, 589 (Tex. App.–Houston [1st Dist.] 1990, writ denied) ("[T]he triggering event for the vesting of a right is the resolution of the controversy and the final determination—not the filing of the suit."); Tex. Prop. Code § 21.065 ("A *judgment* of a court under this chapter vests a right granted to a condemnor." (emphasis added)). Until there is a final, non-reviewable judgment, the condemnor's right to permanent possession is contingent upon resolution of the "right to condemn" issue. *See, e.g., id.* § 21.062 ("If a condemnor . . . has taken possession of property pending litigation and the court finally

decides that the condemnor does not have the right to condemn the property, the court shall order the condemnor to surrender possession of the property . . . .").

Moreover, a condemnor such as Freeport has no vested right in the eminent domain power itself, or in the continuation of a specific eminent domain proceeding. That is because the eminent domain power is a public—not private—right, which exists solely at the Legislature's will. *W. Union Tel. Co*, 258 U.S. at 20-22, 42 S. Ct. at 260-61. As such, it can be altered—or even repealed—by the Legislature at any time, without consequence. *See United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 276, 63 S. Ct. 1047, 1053 (1943) (holding that "[t]he grant of the power of eminent domain is a mere revocable privilege" and that its revocation "is but a recall of a part of [the state's] sovereign power" (citations omitted)); *see also Ex Parte Abell*, 613 S.W.2d 255, 262 (Tex. 1981) ("When the authority granting the right has the power and discretion to take that right away, it cannot be said to be a vested right."); *State Highway Comm'n v. Wieczorek*, 248 N.W.2d 369, 375 (S.D. 1976) ("[O]ur state's condemnation law is a statement of public policy and creates a statutory right in the state, a right that may be taken away as a matter lying solely within the control of our legislature.").

Applying these principles, the U.S. Supreme Court has repeatedly barred condemnation actions because of intervening statutory changes to the condemnor's eminent domain authority—even where, as here, the intervening statute was silent about its application to pending actions. For example, in *Western Union Telegraph Co. v. Louisville & Nashville Railroad Co.*, 258 U.S. 13, 42 S. Ct. 258 (1922), a telegraph company with eminent domain authority filed a condemnation action, only to have the

legislature repeal its eminent domain authority while the case was pending. 258 U.S. at 16, 42 S. Ct. at 259. Even though the repealing act was silent regarding its effect on pending actions, the Supreme Court applied it to bar the condemnation. 258 U.S. at 16-17 & n.1, 22, 42 S. Ct. at 259 & n.1, 261. In so doing, the Court emphasized the fact that eminent domain is a public, rather than private, right, which the legislature is free to alter or repeal any time before a final and non-reviewable judgment is entered in the condemnor's favor:

> The state has the right to say on what terms it will allow its right of eminent domain to be exercised, so long as anything remains to be done by the corporation in order to complete the condemnation of the land. And necessarily, we may add, the state has a right to say upon what property or to what extent the right of eminent domain shall be exercised. . . .
>
> . . . .
>
> Our conclusion, therefore, is that . . . the state could withdraw the power . . . before the conditions of condemnation were established and adjudicated . . . in final and unreviewable determination.

258 U.S. at 21-22, 42 S. Ct. at 260-61 (internal quotation marks and citations omitted); *see also Sears v. City of Akron*, 246 U.S. 242, 250, 38 S. Ct. 245, 248 (1918) (holding that the state "retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken"); *cf. United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (reversing condemnation of foreign ship in light of treaty that was not signed or ratified until after the circuit court had entered judgment allowing the condemnation).

State courts follow the same approach. For example, in *State Highway Commission v. Wieczorek*, 248 N.W.2d 369 (S.D. 1976), the South Dakota's State Highway Commission filed a condemnation action under statutes authorizing the use of eminent domain "to acquire . . . strips of land necessary for the restoration, preservation and enhancement of scenic beauty" along certain highways. *Id.* at 371. While the case was pending, the South Dakota legislature amended the statutes to preclude condemnations for that purpose, but the legislature apparently did not indicate whether the amendment applied to pending actions. *Id.* Like Freeport, the Highway Commission argued that its condemnation action should be governed by the law in place when it was filed. The South Dakota Supreme Court disagreed and barred the condemnation:

> Since the state's enactment of the condemnation right in the plaintiff to acquire premises for 'scenic view,' not a substantive right of a private nature, was an exercise by the state legislature of its sovereign right, the state had the right to say on what terms it would allow its right of eminent domain to be exercised and to say upon what property or to what extent the right of eminent domain shall be exercised. Since the state could have withheld the power from the plaintiff, the state could withdraw that power before its exercise by the plaintiff. And in this case, the exercise of that power by the plaintiff, before the legislative repeal, was not complete, and the right of the plaintiff had not reached a stage of final and unreviewable determination.

Id. at 376; *see also Springfield & Ill. Se. Ry. Co. v. Hall*, 67 Ill. 99, 99 (Ill. 1873) (applying intervening statutory change because the "State has the right to say on what terms it will allow its right of eminent domain to be exercised, so long as anything remains to be done by the corporation in order to complete the condemnation of the land"); *Treacy v. Elizabethtown, L. & B. S. R. Co.*, 3 S.W. 168, 170-71 (Ky. 1887) (applying intervening statutory change because condemnor had not yet established the

"indispensable prerequisite[s]" necessary "before the land could be legally condemned to its use").

A similar question was before the Texas Supreme Court in 2000, when the Court was asked to rule on whether the Legislature's removal of a municipality's eminent domain authority in certain areas amounted to retroactive legislation. *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000). Although the majority avoided answering the question, then-Justice Abbott, joined by Justice Hecht and then-Justice Owen, opined that the legislation was *not* retroactive because it did not impair vested rights:

> [T]he City argues that section 26.179 violates article I, section 16's prohibition against retroactive laws. . . . The City alleges that section 26.179 retroactively impairs its vested rights because the City may no longer . . . exercise its right of eminent domain . . . .
>
> [T]he City makes no attempt to demonstrate how its authority . . . is a vested right. As noted, the City has such authority only because the Legislature chose to grant it in the first place. The City's continued authority . . . is at all times subject to the will of the Legislature.

Id. at 915 (Abbott, J., dissenting) (citations omitted).[12]

These cases make clear that applying Chapter 2206's bar to "economic development" condemnations would not be retroactive and, therefore, is not presumptively prohibited. Freeport simply has no vested right in Western Seafood's property or in the continued maintenance of this condemnation action.

[12] Justice Abbott added that, "even assuming that the City does in fact have a vested right affected by section 26.179, the City's argument fails . . . because section 26.179 is . . . a valid exercise of the police power to safeguard the public safety and welfare." *Id.* at 915 (Abbott, J., dissenting).

Finally, it must be remembered that the very purpose of the presumption against retroactivity is to shield citizens from governmental abrogation of rights. *See Landgraf*, 511 U.S. at 270, 114 S. Ct. at 1500 ("The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact."); 511 U.S. at 266, 114 S. Ct. at 1497 (noting that "retroactive statutes raise particular concerns," including the potential for "retribution against unpopular groups or individuals"). Here, however, Freeport is invoking the presumption as a sword, for the very purpose of destroying the only rights that *are* vested—those of Western Seafood. Applying the presumption in this case would turn the purpose of the presumption on its head. *See Zeolla v. Zeolla*, 15 S.W.3d 239, 242-43 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) (rejecting appellant's argument that issuance of a clarifying order would impair his vested rights and noting that *failure* to clarify would impair *appellee's* rights).[13]

This Court should therefore apply Chapter 2206. Its bar to condemnations "for economic development purposes" governs this case, and Freeport's condemnation of Western Seafood's property is consequently barred.

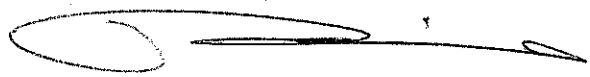
PRAYER

For the foregoing reasons amicus Institute for Justice respectfully urges this Court to affirm the judgment of the trial court.

[13] It is also crucial to remember that the eminent domain power is to be strictly construed, while property protections are to be liberally construed in favor of the property owner. *See State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 649 (Tex. 2001) ("Indeed, the State's eminent-domain power, which could be exercised very oppressively, ought to be, and is, very strictly regulated. This is why we liberally construe the Property Code's protections for the landowner's benefit." (internal quotation marks and citations omitted)). Under the Texas Supreme Court's rules of construction, then, any doubt about Chapter 2206's application should be resolved in Western Seafood's favor.

Respectfully submitted,

INSTITUTE FOR JUSTICE
Washington Chapter



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I hereby certify that on the 8th day of February, 2008, a true and correct copy of the foregoing Brief of Amicus Curiae Institute for Justice was sent by First Class U.S. Mail to the following:

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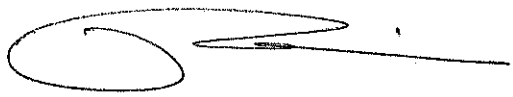

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