No. 04-108

IN THE

SUPREME COURT OF THE UNITED STATES

October 2004

SUSETTE KELO, ET AL.,

Appellants,

v.

CITY OF NEW LONDON, ET AL.,

Appellees.

AMICUS CURIAE BRIEF OF THE TIDEWATER LIBERTARIAN PARTYON THE MERITS IN SUPPORT OF THE APPELLANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Tidewater Libertarian Party (TLP) is an independent affiliate of the Libertarian Party of Virginia and the national Libertarian Party. In eastern Virginia, the TLP boasts a large following dedicated to the principles of personal and economic liberty. [1] The TLP's recent electoral success is unmatched in third party races anywhere in the nation. Libertarian Robert Dean, former chairman of the

[1] This counsel was the sole author of this brief. Research help was provided by fellow TLP members. All of the funds related to the writing and filing of this brief were contributed by TLP's general fund.

TLP, polled 43% of the vote in the 2004 mayor's election in the City of Virginia Beach: the largest city in the Commonwealth of Virginia. The TLP is in the forefront of coming change in Virginia, including the greater protection of private property rights from the dead hand of government.

This brief is filed with the consent of all parties as evidenced by the mutual, unconditioned written consent filed with the Court.

As is well known, libertarians favor the return to American constitutional principles of limited government that formed this nation and prevailed until the 20th Century tide of collectivism invented an all-powerful Congress from whole cloth. One of the traditional constitutional principles the TLP advances is the narrow meaning of the "Public Use" exceptions to private property rights as written in the Fifth Amendment and applied to the States by the Fourteenth Amendment.

In Virginia, the use of the doctrine of eminent domain has not advanced in theory to the kind of practice employed

by the City of New London, Connecticut and by many other localities across the country. Virginia law does not countenance the use of eminent domain for economic reasons except in the instance of clearing "blight". Va. Code Sections § 36-2, § 58.1-3245.1, § 36-55.25, Berman v Parker, 348 U.S. 26 (1954).

However, it may be that an open practice of city-mandated economic redevelopment is preferable in some ways to the narrower basis for legally imposed redevelopment sanctioned by the Berman Court and presently in use in Virginia. "Blight" has become whatever the city can say it is even without a straight face. See Redevelopment: The Unknown Government, Chapter 2, Blight Makes Right (Municipal Officials for Redevelopment Reform, August 1998).

As the cities of Virginia compete in their efforts to force their poor and lower middle-class to simply leave along with their primary education and health-care needs, the legitimacy of the law of eminent domain is cast into doubt.

The money for both the acquiring locality and its favored developer is simply too tempting to allow legal technicalities to get in the way. Conveniently, the Virginia legislature has accommodated the cities' lump sum gold rush by all but prohibiting judicial review of a finding of "blight" by a locality. Virginia Code Sections § 36-27, § 25.1-220. For cities like Norfolk and Portsmouth the choice becomes to either export your poor at a good pace or become a net importer of the poor. See The Slaughter of Cities: Urban Renewal as Ethnic Cleansing (South Bend, St. Augustine's Press, 2004), American Journal of Economics and Sociology, Inc., City Without Slums (Gale Group, January 2001.)

This brief is written to make the case for the broader principle to apply: the principle that real property should never be expropriated from one group of citizens by the government for the private use and enjoyment of other citizens. "Public Use" should be returned to its traditional meaning: only for the construction of government-owned

facilities and public utilities and roadways. The disastrous history of urban redevelopment over the past fifty years could not be better proof that government is ill-suited to the task of grand economic planning: something the Constitution wisely excluded from the enumerated powers of government.

SUMMARY OF ARGUMENT

Civilized societies going back to the time of ancient Rome and Babylon adopted the principle the King himself may not expropriate land except for a legitimate public use and on the payment of fair compensation. These freedoms passed into law so many times in so many places have only recently been abridged by modern government in a stampede to expropriate land on a wholesale basis for transfer to the legislature's favorites. From a small opening aimed at combating the worst housing conditions imaginable, the tide of eminent domain has swelled nationwide to the point today that long-time neighborhoods are never safe from the envy of the powerful and wealthy. Excessive power corrupts: absolutely over time.

The decision in Berman v. Parker, supra, was a sharp departure from the usual protections inherent in the

ownership of land dating more than two millennia. The case should be overruled. There are many possible solutions to curing blight and predatory practices that may well prove more effective than expropriation of land by government has proven to be. To draw a distinction between clearing blight in Washington, D.C. and economic planning in New London, Connecticut is to perpetuate the error made and to confirm the principle that the United States of America has forever left that league of nations that prohibit the forcible expropriation of land for anything other than a legitimate public use.

ARGUMENT

The words of the Fifth Amendment are stark and clear.

> "No person shall be deprived of ... property without due process of law nor shall private property be taken for public use, without just compensation."

At the time the Fifth Amendment was enacted, the reference to eminent domain as part of the provision was a natural one. The reference defines the scope and terms of the one large exception to the absolute rules protecting the private ownership of property. The amendment confirms that real property takings are absolutely necessary at times in order to build large public facilities, to use waterways and to provide for roads. The concept of such a "public use" as a condition of a taking was never conceived to empower the government to expropriate land for purely social-economic reasons, until the Congress of 1945 and the Berman decision.

The traditional American rule limiting the scope of eminent domain could be stated broadly and simply: the government does not have the power to take land from one citizen in order to give the land to another citizen.

There is nothing novel in this, even by the time of the Eighteenth Century.

The Kings of Babylonia (circa 700 B.C.) could not commit a taking of real property even as a dowry for a

Prince. Any taking of real property by the King had to be for a truly public purpose and conditioned on the payment of full compensation. Babylonian and Assyrian Laws, Contracts and Letters, Chapter XVIII, pg. 192 (T. & T Clark, Edinburgh 1904.)

The Roman Emperors after Caesar held dictatorial powers, but there were some limits. Roman law always provided that the power of eminent domain could only be used for public facilities.

According to Suetonius, Emperor Augustus (31 B.C. - 14 A.D.) narrowed his plans to build a forum to avoid the legal impediments with dispossessing the owners of neighboring houses. In the same taking, the Roman Senate sold public lands to pay the sums due to the owners who were forced to sell, rather than refuse prompt payment due to the lack of present funds in the treasury. Questions of Public Law, Vol. 2, Chapter 15, Eminent Domain (At the House of Johannes Van Kerckhem 1737)

The first constitution of sorts arising in Europe following the Dark Ages memorialized the permanency of land ownership. The English Magna Charta, 1215 A.D., provided:

> 52. If anyone has been dispossessed or removed by [the King], without the legal judgment of his peers, from his lands, castles, franchises, or from his right, [the King] will immediately restore them to him; and if a dispute arise over this, then let it be decided by the five and twenty barons of whom mention is made below in the clause for securing the peace....
>
> 56. If [Kings] have disseised or removed Welshmen from lands or liberties, or other things, without the legal judgment of their peers in England or in Wales, they shall be immediately restored to them; and if a dispute arise over this, then let it be decided in the marches by the judgment of their peers ...

This Court in its long history has defined "public use" as:

> " ... government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions, -- as must sometimes be necessary in the case of forts, light-houses, and military posts or roads ....its right to do so may be .... the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or any other authority." Kohl v. United States, 91 U.S. 367, 373 (1876) citing McCullough v. Maryland, 4 Wheat 29 (1819).

In America, all this changed fifty years ago. Berman v Parker, 348 U.S. 26 (1954). In the case, a federal program to eliminate slums in Washington, D.C. sought to take large tracts of residential and commercial property by eminent

domain for later sale or lease to private developers. Congress's plan showed no mercy to local landowners. No matter the condition, usefulness or grace of one's home or business, it was to be expropriated like all of the others, bulldozed and then sold to selected developers.

Speaking for the Court, Justice William O. Douglas swept aside centuries of settled law in the field of eminent domain by finding that land could be forcibly taken from one citizen by the government for the private use and benefit of other citizens. A sign of the times: Justice Douglas declared that "If those who govern the District of Columbia decide that the Nation's Capital should be beautiful ...., there is nothing .... that stands in the way."

Out of the blue, Berman declares that the lawful scope of public use in eminent domain law is a matter entirely for the legislature to determine: not for the courts to review. See contra, Shoemaker v. United States, 147 US. 282, 298 (1892), Monogahela v. United States, 148 U.S. 312

(1893), Sears v. Akron, 246 U.S. 242 (1918), Rindge v. Los Angeles, 262 U.S. 700 (1923), United States v. New River Collieries, 262 U.S. 341 (1923), Old Dominion Co. v. United States, 296 U.S. 49, 60 (1925). The historic special protections in eminent domain law were turned on their head. Land ownership suddenly could be abridged by government based solely on the legislature's view of what would be best for all. Such dictatorial powers were extraordinary under American law at the time of Berman and remain so today. The departure from a traditional constitutional limit on the power of government was especially stark.

By far the better view of Washington D.C.'s post-war urban renewal program came from Circuit Judge Prettyman sitting as a member of the Federal District Court of Columbia who, with two district court judges, conducted the trial of the Berman case. Schneider v. District of Columbia, 117 F. Supp. 705 (DC Dist. 1954.) The lower court held that Congress's plan would have to spare property that was not

deteriorated like the commercial building owned by the Bermans.

Judge Prettyman noted:

" ... the Fifth Amendment authorizes the taking of private property for public use. But here is the end of government power. That the Government may do whatever it deems to be for the good of the people is not a principle of our system of government. Nor can it be, because the ultimate basic essential in our system is that individuals have inherent rights, and as to them the powers of government are sharply limited. There is no general power in government, in the American concept, to seize private property. Hence, it is universally held that the taking of private property from one person for the private use of another violates the due process clauses of the Fifth and Fourteenth Amendments." Id, at 716 citing Missouri Pacific Ry. Co. v. State of Nebraska ex rel Board of Transportation, 104 U.S. 403, 417 (1896), A Treatise

on Constitutional Limitations, Section 1124, et. seq. (Cooley, Little Brown & Co, 8th Ed. 1927).

In the time since Berman, this Court has not directly reaffirmed the principle that real property can be taken by the government in order to be given to others for private development. The decision sometimes considered similar in content to Berman, Hawaii Hous. Auth. v. Midkoff, 467 U.S. 229 (1984), is best viewed as ultimately involving an entirely different matter in substance.

In Midkoff, a land ownership oligopoly was ended by the Hawaii legislature with the only remedy that could be effective and just: forcing the sale of the land to existing tenants if the tenants so apply. Less intrusive attempts at land reform over several generations had failed.

Ending monopolistic practices is a clearly established, proper exercise of governmental power aimed at creating greater economic freedom for all, unlike the practice sanctioned in Berman. But for Berman, the Hawaii legislature undoubtedly would have remedied the land reform

problem by relying on a police power other than eminent domain, quite legitimately.

What has happened since Berman is an explosion of redevelopment planning by government at all levels using the hugely expanded scope of eminent domain law. The tremendous future benefits always invoked in redevelopment planning have proven quite elusory. The end result in redevelopment has often been disappointing: even perverse. See The Art of Revitalization: Improving Conditions in Distressed Inner-City Neighborhoods, (Garland Pub. Co. 2000). The loss to the taxpayers and to the previous landowners have been colossal and, by now, predictable.

If one would believe today that the government is uniquely positioned to create beauty, that person should review the modern architecture of Moscow. Creating a better future is no more within the direct power of government in our 21st Century than it was in any time past. History demonstrates that only economic and personal freedom has ever led to a measurably better future. The government's

forcible purchase of real property for economic reasons is not a social remedy that has much chance of succeeding in its stated goal. There are many other planning remedies that offer a greater prospect for revitalizing blighted neighborhoods for the long-term. [2]

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[2] Without the blunt force of eminent domain for economic reasons, legislatures would be free to find better solutions for ending blight.

The law of condemnation has long combated dilapidating housing by litigating with the people responsible for the problem and forcibly curing the situation in an extreme case. No one could reasonably suggest that such laws requiring property owners to maintain their buildings and improvements in a reasonable way are unlawful. Strict enforcement of a legitimate building code would be the primary tool to end the kind of conditions that Justice Douglas describes in Washington D.C.'s Section B in 1954.

If the legislative concern is the prospect of profiteering by some landowners thereby blocking large developments that require the assembly of numerous parcels, different remedies could be adopted.

Once the assembly of the development site is sufficiently complete and reviewed for its compliance with zoning laws, the

If the Court were to retain the principles of Berman, but decide to reject New London's practice, the distinctions to be drawn between the two cases will do little more than confirm the radical departure Berman represents. The nationwide money stampede through political power-broking would certainly continue, as it does today in Virginia, and eventually prevail in one way or another no matter the protective formulation the Court might conceive.

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remaining land owners could be limited to a sale prices of no more than twice the fair market value of their property. The practice of profiteering in real property development could itself be made a criminal offense, possibly punishable by the loss of the land at issue.

If the issue is health, safety or morals as enumerated in Berman, then the reasonable remedies are also clear. Laws regulating these areas are already enacted and could be changed in ways to meet present circumstances. A government-imposed real property face-lift is hardly a cure for the kinds of human weaknesses that inevitably lead to the creation of slums and its social pathologies.

CONCLUSION

It is past time to end the monopolistic land-use planning practices that have corrupted the legitimate use of the power of eminent domain. Berman should be overruled as well as some of the language in Midkoff. The traditional understanding of "public use" should be invoked anew in this case.

The judgment of the Connecticut Supreme Court should be reversed and final judgment entered in favor of the appellant landowners.

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