SUPREME COURT OF PENNSYLVANIA

In the Matter of: Opening a Private Road for the Benefit of Timothy P. O'Reilly Over Lands of (a) Hickory on the Green Homeowners Association, and (b) Mary Lou Sorbara; Gregory E. Burgunder; Ann E. Cain; Don E. Cottrill & Norma J. Cottrill; Joseph K. Cupples; Bart V. Delcimmuto; James D. Dragoo & Linda J. Dragoo; Kimberly M. Fonzi; Brian J. Gallagher & Diane J. Gallagher; Dolores M. Gembarosky; Michael J. Gralish, Jr. & Virginia A. Gralish; James Battista; Jeffery W. Hutchens; Michael Steinberg; George E. Wilmot & Linda M. Wilmot; Harry J. Lee, Jr.; John G. Byrne; S. Greg Malone; Joseph V. Mazur & Kelly L. Poole; Thomas C. Schaal & Patty G. Schaal; Regis G. Niederberger & Kathleen C. Niederberger; Gordon J. Orr; Anne M. Paul; Thomas G. Porter & Melinda D. Porter; Joseph Alan Shrager; Eric H. Rittenhouse & Danielle L. Rittenhouse; Lisa A. Cusick; Jerome Schmier & Carol Falo; Nancy J. Huff; Marcus A. Spatafore & Kristin C. Spatafore; William E. Sprecher & Marcellene Sprecher, and Frank J. Sprecher & Agnes E. Sprecher, Life Estate; Roxanne M. Squillante; Susan C. Stanko; Shanan R. Stewart; Gerald W. Danhires & Linda Danhires; Gregory Taylor; Gianna M. Yeckley; Dennis M. Zamerski & Noreen Zamerski; Betty B. Williams & Leon I. Williams (Co-Trustees); Micheline Stabile; William F. Pitzer; Janet Zewe; Franki R. Colangelo; Karen R. Billingham; Roman M. Hlutkowski; Virginia L. Knaus, Trustee Under Qualified Personal Residence Trust Agreement, dated July 27, 2000; Joan L. Massella; Donna Durkan; Geraldine R. Altenhof; Aprajita Rathore & Ravi Ramamoorthy; James E. Spence & Kathy F. Spence; Tracy West Malone; Jennifer A. Callery; The Judith F. Koblitz Trust; Adrianna F. Viola; Dorothy D. Wagner; Spitzig Living Trust and William A. Spitzig and Marilyn J. Spitzig (Trustees); Sandra Jean Hanson; Thomas C. Skena; Zaraf Moshin; Paul W. Amic & Carole L. Amic; Margaret M. Showalter; James P. Flannery & Patricia C. Flannery; Deborah A. Gertz; Carol L. Schartner; John A. Udischas & Susan C. Udischas; Donna M. Bartko; Kyli J. Martin; Frederick Rapone Sr. & Roberta Rapone; Amy R. Solomon; Richard M. Buck & Barbara L. Buck; Arlene Lipton; William G. Eiler; Catherine M. Smith; David J. Carroll; Mildred K. Fincke; Margaret M. Cornellius; Joseph A. Testa & Margaret J. Testa; Candace L. Salvini; A. Whitney Lobdell & Roberta S. Lobdell; Ronald G. Bauer & Teresa L. Bauer; Anna Marie Cimarolli; Jor R. Palmer & Ann D. Palmer; Rita V. Frizlen; Joseph J. Astorino & Marilyn J. Astorino; Thomas S. Phillips; John A. Gercher; Naomi H. Patton; Stanley A. Hack & Christine E. Hack; Melissa J. Schiller & Melanie M. Schiller; John Schlater & Paulette Schlater; William J. Garrity, Sr. & Patricia Ann Garrity; Archie L. McIntyre; Clarence Joseph Welter & Mara Welter; Lisbeth A. Dineen; Charles W. Fetrow & Margaret A. Fetrow; Jocelyn Breakwell, Mark A. Petrozza & Dorothy M. Petrozza; and Jamie A. Brace, as their interest may appear.

On appeal from an order of the Commonwealth Court of Pennsylvania, No. 2214 CD 2007, affirming an order of the Court of Common Pleas of Allegheny County, No. GD 04-02972 (Eugene E. Fike II, S.J.)

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANTS

PAUL R.Q. WOLFSON
RACHEL L. BRAND
STEVEN P. LEHOTSKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

DANA BERLINER
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320

Of Counsel

HOWARD J. BASHMAN
LAW OFFICES OF HOWARD J. BASHMAN
2300 Computer Drive, Ste. G-22
Willow Grove, PA 19090
(215) 830-1458

Counsel for *Amicus Curiae* Institute for Justice

PAGE INTENTIONALLY BLANK

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF JURISDICTION 2

TEXT OF ORDER IN QUESTION 2

STATEMENT OF SCOPE AND STANDARD OF REVIEW 2

STATEMENT OF QUESTIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATE SUPREME COURTS ARE APPLYING A RIGOROUS PUBLIC USE ANALYSIS AS A MATTER OF STATE CONSTITUTIONAL LAW 4

A. Post-*Kelo*, State Supreme Courts Are Interpreting Their Constitutions To Impose A Stricter Public Use Requirement Than The Constitution Of The United States 5

B. State Supreme Courts Carefully Scrutinize The Alleged Public Uses For Takings Of Private Property 7

C. State Supreme Courts Have Not Created A Special "Roads" Exception To Their Public Use Analyses 8

II. TAKING PRIVATE PROPERTY TO ESTABLISH A PRIVATE ROAD VIOLATES STATE CONSTITUTIONAL PUBLIC USE REQUIREMENTS 10

A. Taking Property For A Private Road Is Not A Taking For A Public Use 10

B. Many State Supreme Courts Have Held Their States' Private Roads Acts To Be Unconstitutional 12

C. Pennsylvania Is One Of A Few States That Has Not Amended Either Its Statutes Or Its Constitution To Address The Constitutional Concerns Raised By Takings For Private Roads 15

D. Private Roads Do Not Primarily Benefit The Public And Are Not Necessary To Advance Any Public Purpose 17

CONCLUSION.....21

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Page

Arnsperger v. *Crawford*, 61 A. 413 (Md. 1905).....14

Bailey v. *Myers*, 76 P.3d 898 (Ariz. Ct. App. 2003).....7, 8

Bankhead v. *Brown*, 25 Iowa 540, 1868 WL 359 (1868).....12, 14, 15

Bashor v. *Bowman*, 180 S.W. 326 (Tenn. 1915).....16

Benson v. *South Dakota*, 710 N.W.2d 131 (S.D. 2006).....6

Board of County Commissioners v. *Lowery*, 136 P.3d 639 (Okla. 2006).....5, 6, 9

Brewer v. *Bowman*, 9 Ga. 37, 1850 WL 1559 (1850).....18

Brown v. *Warchalowski*, 471 A.2d 1026 (Me. 1984).....16, 18

Calder v. *Bull*, 3 U.S. (3 Dall.) 386 (1798).....10

City of Norwood v. *Horney*, 853 N.E.2d 1115 (Ohio 2006).....5, 7, 9, 20

City of Novi v. *Robert Adell Children's Funded Trust*, 701 N.W.2d 144 (Mich. 2005).....9, 11, 12

Clack v. *White*, 32 Tenn. 540, 1852 WL 1909 (1852).....15

Clark v. *Board of Commissioners*, 77 P. 284 (Kan. 1904).....14, 15

Cohen v. *Larson*, 867 P.2d 956 (Id. 1994).....13, 18, 20

County of Hawai'i v. *C&J Coupe Family Limited Partnership*, 198 P.3d 615 (Haw. 2008).....7, 8, 9, 10

County of Wayne v. *Hathcock*, 684 N.W.2d 765 (Mich. 2004).....6, 8, 12, 20

Crowell v. *Benson*, 285 U.S. 22 (1932).....17

Denham v. *County Commissioners*, 108 Mass. 202 (1871).....16

Dickey v. *Tennison*, 27 Mo. 373, 1858 WL 5919 (1858).....15

Estate of W.T. Waggoner v. *Gleghorn*, 378 S.W. 2d 47 (Tex. 1964).....13, 14, 18

Franco v. *National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007).....7

Hawai'i Housing Authority v. *Midkiff*, 467 U.S. 229 (1984).....5

Housing Authority v. *Pennsylvania State Civil Service Commission*, 556 Pa. 621, 730 A.2d 935 (1999) 17

In re Condemnation of Bruce Avenue, 438 Pa. 498, 266 A.2d 96 (1970) 8

In re Forrester, 575 Pa. 365, 836 A.2d 102 (2003) 11, 15, 16, 19

In re Opening Private Road for Benefit of O'Reilly, 954 A.2d 57 (Pa. Commw. Ct. 2008) 9, 18

Kelo v. *City of New London*, 545 U.S. 469 (2005) 1, 5, 8, 20

Latah County v. *Peterson*, 29 P. 1089 (Id. 1892) 16

Lichty v. *Luloff*, 512 N.W.2d 267 (Iowa 1994) 16

Logan v. *Stogdale*, 24 N.E. 135 (1890) 15

McCarran International Airport v. *Sisolak*, 127 P.3d 1110 (2006) 6

Middletown Township v. *Lands of Stone*, 595 Pa. 607, 939 A.2d 331 (2007) 7, 8, 9, 17

Mt. Vernon-Woodberry Cotton Duck Co. v. *Alabama Interstate Power Co.*, 240 U.S. 30 (1916) 8

Nesbitt v. *Trumbo*, 39 Ill. 110, 1866 WL 4369 (1866) 15

Old Dominion Land Co. v. *United States*, 269 U.S. 55 (1925) 8

Osborn v. *Hart*, 24 Wis. 89, 1869 WL 3507 (1869) 15

Phillips v. *Watson*, 18 N.W. 659 (Ia. 1884) 16

Pocopson Road, 16 Pa. 15 (1851) 15

Poletown Neighborhood Council v. *Detroit*, 304 N.W.2d 455 (Mich. 1981) 12

Proctor v. *Andover*, 42 N.H. 348, 1861 WL 2015 (1861) 16

Rhode Island Economic Development Corp. v. *The Parking Co.*, 892 A.2d 87 (R.I. 2006) 7, 9

Roberts v. *Williams*, 15 Ark. 43, 1854 WL 633 (1854) 18

Robinson v. *Swope*, 12 Bush 21, 75 Ky. 21, 1876 WL 8180 (1876) 17

Sadler v. *Langham*, 34 Ala. 311, 1859 WL 738 (1859) 15

Salinas v. *United States*, 522 U.S. 52 (1997) 17

Sherman v. *Buick*, 32 Cal. 241 (1867) 16, 17

Southwestern Illinois Development Authority v. *National City Environmental, LLC*, 768 N.E.2d 1 (Ill. 2002) 7, 8

State Highway Commission v. *Batts*, 144 S.E. 2d 126 (N.C. 1965) 13, 19

Tolksdorf v. *Griffith*, 626 N.W.2d 163 (Mich. 2001) 8, 11, 12, 19, 20

Towns v. *Klamath County*, 53 P. 604 (Or. 1898) 16

Township of West Orange v. *769 Associates, L.L.C.*, 800 A.2d 86 (N.J. 2002) 9

Varner v. *Martin*, 21 W.Va. 534, 1883 WL 3202 (1883) 15, 19, 21

Welton v. *Dickson*, 57 N.W. 559 (Neb. 1894) 15

Witham v. *Osburn*, 4 Or. 318 (1873) 15

CONSTITUTIONS

Ala. Const. art. I, § 23 (1819) 15, 16

Alaska Const. art. VIII, § 18 16

Ariz. Const. art. II, § 17 16

Cal. Const. art. I, § 19 16

Colo. Const. art. II, § 14 16

Ga. Const. art. I, § 3, ¶ II 16

Idaho Const. art. I, § 14 ..... 13, 16

Ill. Const. art. I, § 15 (1870) 15

Ind. Const. art. I, § 21 (1851) 15

Iowa Const. art. I, § 18 (1857) 15

Kan. Const. art. XII, § 4 16

Md. Const. art. III, § 40 (1867) 15

Mich. Const. art. X, § 2 (1963) 6, 12

Mich. Const. art. XIII, § 1 (1908) 12

Miss. Const. art. IV, § 110 16

Mo. Const. art. I, § 28 16

Mo. Const. art. XIII, § 7 (1820) 15

N.D. Const. art. I, § 16 6

N.H. Const. art. 12-a 6

N.Y. Const. art. I, § 7(c) 16

Neb. Const., art. I, § 21 (1875) 15

Nev. Const. art. I, § 22(i) 6

Okla. Const. art. II, § 23 16

Or. Const. art. I, § 18 16

Pa. Const. art. I, § 10 ..... 4, 12, 14, 15

S.C. Const. art. I, § 13(a) 6

Tenn. Const. art. I, § 21 (1870) 15

Tex. Const. art. I, § 17 (1876) 14

Wash. Const. art. I, § 16 16

W. Va. Const. art. III, § 9 (1872) 15

Wis. Const. art. I, § 13 (1848) 15

Wyo. Const., art. I, § 32 16

STATUTES

Ark. Code Ann. § 27-66-401 (2009) 21

Idaho Code § 7-701 (2009) 21

Iowa Code Ann. § 6A.4 (West 2008) 16

Kan. Stat. Ann. § 68-117 (2008) 21

La. Civ. Code Ann. art. 457 (West 2008) 11

La. Rev. Stat. Ann. § 48:491(a) (West 2008) 16

Me. Rev. Stat. Ann. tit. 23, § 3021 (West 2009) 16, 21

Me. Rev. Stat. Ann. tit. 23, § 3022 (West 2009) 21

N.D. Cent. Code § 24-07-06 (West 2008) 16, 21

Neb. Rev. Stat. § 39-1713 (West 2008) 21

36 P.S. §§ 1761 *et seq.* (West 2008) 21

36 P.S. §§ 2731 *et seq.* (West 2008) 2, 4, 17

36 P.S. § 2735 (West 2008) 11

36 P.S. § 2737 (West 2008) 11, 16

36 P.S. § 2761 (West 2008) 11, 16

36 P.S. ch. 4 (West 2008) 17

36 P.S. ch. 5 (West 2008) 17

Wis. Stat. Ann. § 82.27 (West 2009) 21

OTHER AUTHORITIES

Blackstone, William, *Commentaries on the Laws of England* (1765).....11

Coase, R.H., *The Firm, The Market, and the Law* (1988) 21

Harris, Brian R., *Private Road or Public Use*, 80 U. Det. Mercy L. Rev. 149 (2002).....14

Posner, Richard A., *Economic Analysis of Law* (6th ed. 2003).....20

Sackman, Julius L. & Patrick J. Rohan, 2A *Nichols on Eminent Domain* (rev. 3d ed. 1996) 14

Sales, Nathan Alexander, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L.J. 339 (1999).....14

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 531(a) of the Pennsylvania Rules of Appellate Procedure, the Institute for Justice respectfully submits this brief as *amicus curiae* in support of Appellants Hickory on the Green Homeowners Association and the individual landowners represented thereby (collectively "Homeowners Association"). The Institute for Justice is a non-profit, public-interest law firm located in Arlington, Virginia. The lawyers of the Institute are specialists in litigation involving state and federal constitutional issues raised by the use of governmental authority to take private property.

The Institute for Justice litigates property-rights cases raising these issues throughout the country, representing property owners fighting condemnation by the government of their homes or businesses for private development. Lawyers from the Institute for Justice represented the homeowners in *Kelo* v. *City of New London*, 545 U.S. 469 (2005). The Institute for Justice also appears frequently as *amicus curiae* in cases nationwide concerning state and federal constitutional "public use" requirements. To date, the Institute for Justice has submitted *amicus* briefs in cases concerning "public use" issues to the highest courts of California, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Mississippi, Missouri, Nevada, New Jersey, Oklahoma, Rhode Island, and Washington, as well as the Supreme Court of the United States and the United States Court of Appeals for the Second, Fifth, and Ninth Circuits.

The Institute submits this *amicus* brief to provide the Court with a nationwide perspective on the constitutional provisions, judicial decisions, and statutory materials from other States that have considered issues similar to those raised by the Homeowners Association in this appeal. Specifically, this brief will inform the Court regarding (1) current state constitutional law interpreting the scope of the "public use" limitation on state exercises of eminent domain

authority and (2) the rulings of other state supreme courts in cases challenging the constitutionality of private road acts similar to Pennsylvania's "Private Roads Act," *see* 36 P.S. §§ 2731 *et seq.* (West 2008).

STATEMENT OF JURISDICTION

Amicus defers to the jurisdictional statement of Appellants the Homeowners Association.

TEXT OF ORDER IN QUESTION

Amicus adopts the statement of Appellants the Homeowners Association regarding the text of the order in question.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Amicus defers to the statement of Appellants the Homeowners Association regarding the scope and standard of this Court's review.

STATEMENT OF QUESTIONS INVOLVED

Whether Pennsylvania's Private Road Act, 36 P.S. §§ 2731 *et seq.*, is unconstitutional under Sections 1 and 10 of Article I of the Constitution of the Commonwealth of Pennsylvania, or the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Amicus defers to the statement of the case provided by Appellants the Homeowners Association.

SUMMARY OF ARGUMENT

1. In the wake of the Supreme Court of the United States' decision in *Kelo* v. *City of New London*, many state supreme courts are interpreting their respective state constitutions to afford greater protections than the Constitution of the United States against the use of eminent domain to take private property on behalf of private parties. These state supreme courts have

rigorously applied their constitutions' "public use" requirements to exercises of eminent domain to ensure that private property is taken only for public use.

Indeed, state supreme courts have carefully examined the stated reasons for each taking to ensure that they are not pretextual and that the property is actually being taken for a public use. They have declined to recognize any *per se* "roads" exception to their public use analysis, as the Commonwealth Court did below. Rather, in several post-*Kelo* cases state supreme courts have subjected proposals to take private property for building roads to their standard public use analysis, examining the balance of private and public interests served by the proposed taking. Departing from that trend, the Commonwealth Court concluded that a taking of one person's land to establish a "private" road for another person is necessarily a taking for a public use, even if the road is for the exclusive use of a private party and regardless of whether the private benefits of the road vastly outweigh the public benefits. This Court should reject the Commonwealth Court's conclusion that a taking for any kind of road is necessarily a taking for a public use, and instead should join the ranks of the state supreme courts that have applied a careful, rigorous public use standard to analyze takings for the purpose of establishing roads.

2. The taking of one person's property in order to establish a private road—i.e., a road for the private use of the recipient of the road, which the public cannot access— primarily benefits a private party, rather than the public, and, therefore, is unconstitutional. The state supreme courts that recently have addressed constitutional challenges to takings for private roads have uniformly concluded that they are unconstitutional. Even in the late-19th and early-20th Centuries, the majority view of state supreme courts was that "private" roads acts authorized unconstitutional takings of private property for private uses. State supreme courts also have identified several reasons why taking private property to build a private road is not necessary to

achieve whatever incidental public benefits might flow from creating such a road. *Amicus* urges this Court to adopt the reasoning of the state supreme courts that have concluded that private roads acts authorize the taking of private property for an unconstitutional private use, rather than for a permissible public use.

ARGUMENT

The Commonwealth Court in this case declined to subject Pennsylvania's Private Roads Act, 36 P.S. §§ 2731 *et seq.*, to meaningful scrutiny under the "public use" requirement of the Takings Clause of the Constitution of the Commonwealth of Pennsylvania, article I, § 10. Rather, that court concluded that the mere fact that the proposed taking is for a road is sufficient to render the taking permissible. It did so notwithstanding that the property would be used for a private road—not accessible by the general public—rather than for a project that the public could use, enjoy, or access, or from which the public primarily would benefit. The Commonwealth Court's conclusion is out of line with recent developments in the highest courts of other States, which generally have concluded that: (1) any invocation of governmental authority to take private property on behalf of a private party must be rigorously scrutinized by the courts to ensure that the taking is truly for a public use; and (2) there is no *per se* exception to this rule for takings to create a road. *Amicus* submits that under this proper approach to the public use requirement, Pennsylvania's Private Roads Act is unconstitutional, because it authorizes the taking of private property for a use that primarily and predominantly benefits a private party, and not the public at large.

I. STATE SUPREME COURTS ARE APPLYING A RIGOROUS PUBLIC USE ANALYSIS AS A MATTER OF STATE CONSTITUTIONAL LAW

In *Kelo* v. *City of New London*, the Supreme Court of the United States held that a city's invocation of its eminent domain authority to acquire property from unwilling owners for an

economic development project was a permissible taking of private property for a "public use" under the Takings Clause of the Fifth Amendment to the Constitution of the United States. *See Kelo*, 545 U.S. at 484-490. The Court correctly recognized, however, that the States may "impose 'public use' requirements that are stricter than the federal baseline" as a matter of state constitutional law. *Id.* at 489.

A. Post-*Kelo*, State Supreme Courts Are Interpreting Their Constitutions To Impose A Stricter Public Use Requirement Than The Constitution Of The United States

Accepting the Supreme Court's invitation, the highest courts of several States have declined to apply *Kelo* and have held that their state constitutional law provides greater protections against the use of governmental authority to take private property on behalf of other private parties. For example, the Supreme Court of Ohio recently "decline[d] to hold that the Takings Clause in Ohio's Constitution has the sweeping breadth that the Supreme Court attributed to the United States Constitution's Takings Clause" in cases such as *Hawai'i Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984). *City of Norwood* v. *Horney*, 853 N.E.2d 1115, 1136 (Ohio 2006). That court rejected *Kelo*'s holding and, applying a heightened standard of review, concluded that a proposed taking for economic-development benefits "does not satisfy the public use requirement" of Ohio's Constitution. *Id.* at 1123; *see id.* at 1137-1142.

Similarly, the Supreme Court of Oklahoma has held that the Constitution of Oklahoma "provide[s] private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution." *Board of County Comm'rs* v. *Lowery*, 136 P.3d 639, 651 (Okla. 2006). Because Oklahoma's Constitution "place[s] more stringent limitation on government eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution," that court held that the government could not condemn

private land to create an easement for water pipelines to service a private electric-generation plant, as that taking would be an unconstitutional private use. *Id.*

And the Supreme Court of South Dakota has stated that South Dakota's Constitution provides property owners with "more protection against a taking of their property than the United States Constitution." *Benson* v. *South Dakota*, 710 N.W.2d 131, 146 (S.D. 2006) (stating in *dictum* that state constitutional law does not recognize "public benefit" category and permits taking of property only for actual "use by the public"); *see also McCarran Int'l Airport* v. *Sisolak*, 127 P.3d 1110, 1126 (Nev. 2006) (noting that State may "place stricter standards on its exercise of the takings power through its state constitution" and that "[t]he first right established in the Nevada Constitution's declaration of rights is the protection of a landowner's inalienable rights to acquire, possess and protect private property"). *Amicus* is aware of no state supreme court that has adopted the holding of *Kelo* as a matter of state constitutional law.[1]

The post-*Kelo* trend is but a continuation of state judicial decisions from earlier in this decade holding that state constitutions do not permit the taking of private property for economic development or for other uses that predominantly benefit other private parties, rather than the public. *See, e.g.*, *County of Wayne* v. *Hathcock*, 684 N.W.2d 765, 779-787 (Mich. 2004) (invocation of eminent domain for purpose of economic development is unconstitutional,

[1] Several States also have recently amended their Constitutions to forbid takings of private property for economic development and other activities that primarily benefit private parties. *See, e.g.*, Mich. Const. art. X, § 2 ("'Public use' does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues."); Nev. Const. art. I, § 22(1) ("Public use shall not include the direct or indirect transfer of any interest in property taken in an eminent domain proceedings from one private party to another private party."); N.H. Const. art. 12-a ("No part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property."); N.D. Const. art. I, § 16 ("Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business."); S.C. Const. art. I, § 13(a) ("Private property must not be condemned by eminent domain for any purpose or benefit including, but not limited to, the purpose or benefit of economic development, unless the condemnation is for public use.").

because it does not take property for public use); *Southwestern Ill. Dev. Auth.* v. *National City Envtl. LLC*, 768 N.E.2d 1, 8-11 (Ill. 2002) (taking for economic development alone is unconstitutional taking for private use, because it does not advance legitimate public purpose); *see also Bailey* v. *Myers*, 76 P.3d 898, 903 (Ariz. Ct. App. 2003) ("The federal constitution provides considerably less protection against eminent domain than our Constitution provides.").

B. State Supreme Courts Carefully Scrutinize The Alleged Public Uses For Takings Of Private Property

Many state supreme courts vigorously assert their role in interpreting and applying constitutional public use requirements. In both this Commonwealth and many other States, whether a taking is for a "public use" ultimately is a judicial question, and the courts engage in a thorough review to ensure that the "real and fundamental" use behind the taking is a public one. *See Middletown Twp.* v. *Lands of Stone*, 595 Pa. 607, 617, 939 A.2d 331, 338 (2007) (public use cannot be "post-hoc or pre-textual"); *accord County of Hawai'i* v. *C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 638, 644 (Haw. 2008) (Hawai'i constitutional law permits court to "look behind the government's stated public purpose" and to examine whether "the stated purpose might be pretextual"). Especially where, as here, a State takes private property "for transfer to another individual or to a private entity rather than for use by the state itself, the judicial review of the taking is paramount." *City of Norwood*, 853 N.E.2d at 1139. Thus, for example, the Supreme Court of Rhode Island recently held that an alleged public purpose for an economic-development taking was pretextual, and that the taking served only to transfer property to a private corporation at a discounted price. *See Rhode Island Econ. Dev. Corp.* v. *The Parking Co.*, 892 A.2d 87, 104-106 (R.I. 2006); *accord Franco* v. *National Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007) (court may examine whether stated public purpose is in fact pretextual); *Southwestern Ill. Dev. Auth.*, 768 N.E.2d at 8 (similar).

Although "'[t]here is no mechanical formula for determining public use,'" *C&J Coupe Family Limited Partnership*, 198 P.3d at 643 n.32 (quoting *Bailey*, 76 P.3d at 902), state supreme courts addressing the public use requirement have identified three general categories of permissible public uses. *See, e.g.*, *Hathcock*, 684 N.W.2d at 781-83 (noting three categories); *Kelo*, 545 U.S. at 497-498 (O'Connor, J., dissenting) (same). First, the government may take private property for public ownership, such as a taking of property that will be used to establish a police station, a courthouse, or a military base. *See, e.g.*, *Old Dominion Land Co.* v. *United States*, 269 U.S. 55, 66 (1925) (military facility). Second, the government may take private property on behalf of certain private entities, such as common carriers and public utilities, that will permit the public to use the services or facilities offered by those private entities. *See, e.g.*, *Mt. Vernon-Woodberry Cotton Duck Co.* v. *Alabama Interstate Power Co.*, 240 U.S. 30, 32 (1916) (hydro-electric power plant). Finally, under certain circumstances, a taking of property on behalf of a private party might be for a public use if the public, and not a private party, is the "primary and paramount" beneficiary of the taking. *See, e.g.*, *Lands of Stone*, 595 Pa. at 617, 939 A.2d at 337; *In re Condemnation of Bruce Ave.*, 438 Pa. 498, 505, 266 A.2d 96, 99 (1970) (taking has public purpose only where "the public is to be the primary and paramount beneficiary of its exercise") (internal citation and quotation marks omitted); *Southwest Ill. Dev. Auth.*, 768 N.E.2d at 10 (taking not for public use where "members of the public are not the primary intended beneficiaries"); *Tolksdorf* v. *Griffith*, 626 N.W.2d 163, 168 (Mich. 2001) (public purpose must be "predominant interest advanced" by taking of property).

C. State Supreme Courts Have Not Created A Special "Roads" Exception To Their Public Use Analyses

The post-*Kelo* decisions of these state supreme courts have applied the foregoing public-use standards to *all* purported invocations of eminent domain authority to take private property.

See, e.g., *C&J Coupe Family Ltd. P'ship*, 198 P.3d at 642-52; *City of Norwood*, 853 N.E.2d at 1136-1142; *Lowery*, 136 P.3d at 646-652; *Rhode Island Econ. Dev. Corp.*, 892 A.2d at 103-107. Hence, contrary to the decision of the Commonwealth Court in this case, *see In re Opening Private Road for Benefit of O'Reilly*, 954 A.2d 57, 72 (Pa. Cmmw. Ct. 2008), the highest courts in other States have not applied a *per se* rule that a taking of private property for a road—regardless of whether it is a "public" road or a "private" road for the exclusive use of only the intended recipient—is for a "public use." To be sure, a taking of property to build a genuine public road—a road that will be used and accessed by the public at large, that is built and paid for by the government, and that is maintained by the government, rather than a private party—is a taking for a public use. *See, e.g.*, *C&J Coupe Family Ltd. P'ship*, 198 P.3d at 643 n.32 ("Indisputably, public roads have long been recognized as a public purpose for which private property may be condemned."); *Township of W. Orange* v. *769 Assocs., L.L.C.*, 800 A.2d 86, 91 (N.J. 2002) ("[T]he condemnation of private property for use as a *public* road fulfills the public use requirement.") (emphasis added).

But simply because a taking is for a "road," regardless of whether the road is for public or private use, does not make the taking *per se* for a public use. *City of Novi* v. *Robert Adell Children's Funded Trust*, 701 N.W.2d 144, 150 (Mich. 2005) (rejecting argument that "any road project is unquestionably a public use" and concluding that "the single fact that a project is a road does not *per se* make it a *public* road"). This Court already has established that a taking's purportedly legitimate public purpose, such as the creation of recreational space, may be a mere pretext after a careful review of the facts. *See Lands of Stone*, 595 Pa. at 618-21, 939 A.2d at 338-340 (concluding that purported "recreational use" for condemned property was pretextual). "To adopt a *per se* rule for roads under the public use clause," as the Commonwealth Court did

here, "would deprive the court of its judicial function" to examine the record closely in each case to determine whether there is in fact a legitimate public use for the taking of private property. *C&J Coupe Family Ltd. P'ship*, 198 P.3d at 648.

II. TAKING PRIVATE PROPERTY TO ESTABLISH A PRIVATE ROAD VIOLATES STATE CONSTITUTIONAL PUBLIC USE REQUIREMENTS

The central question for this Court is whether a taking of one person's private property for the establishment of a "private"—and not a "public"—road for the exclusive use of another private party is a taking for a public use. The taking of private property for a private road does not fall within any of the three general categories of permissible public uses identified by state supreme courts. Accordingly, the recent decisions of the highest courts of other States have uniformly held that their respective state constitutions forbid taking property to create a private road. These recent decisions are consistent with the view of state supreme court decisions dating from the mid- to late-19th Century, which was that private roads statutes are unconstitutional because they authorize impermissible takings of private property for private uses. This Court should adopt the well-reasoned views of these state supreme courts that have concluded that private roads acts are unconstitutional.

That is especially so because it is not necessary to invoke the sovereign's authority to take private property for *private* roads in order to achieve whatever incidental, derivative public benefit might flow from creating roads. As other state supreme courts have already noted, there are other ways to achieve any such benefits without violating the constitutional limitations on taking private property.

A. Taking Property For A Private Road Is Not A Taking For A Public Use

It is well-established that the government may not use its eminent domain authority to take the private property of A and transfer it to B. *See, e.g.*, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386,

388 (1798); William Blackstone, 1 *Commentaries on the Laws of England* 134-135 (1765). And yet that is precisely what Pennsylvania's Private Roads Act does. A "private roads act uses the state's power of eminent domain to convey an interest in land from one private person to another." *Tolksdorf*, 626 N.W.2d at 168; *see id.* at 169 ("By eliminating the landowner's right to exclude others from his property, the act conveys an interest in private property from one private owner to another.").

The public cannot use or directly benefit from a private road; "as its term implies," a private road is "not open to the general public" but is instead a road for the use (and in the control) of a private person. *In re Forrester*, 575 Pa. 365, 370 n.3, 836 A.2d 102, 105 n.3 (2003) (plurality). A private road is under the control of the private owner; he alone may decide who can use the road, and the public has no right to access or to use the road without permission. *See* 36 P.S. § 2737 (West 2008) (private road available only for "use by the parties petitioning for the laying out of such road"); *id.* § 2761 (West 2008) (individual other than recipient of private road must petition court for "privilege" to use); *see also* La. Civ. Code Ann. art. 457 (West 2008) ("public road is one that is subject to public use," by either public ownership or public "right to use it," whereas "a private road is one that is not subject to public use"); *City of Novi*, 701 N.W.2d at 150 ("[T]he difference between public and private use in the context of roads depends largely upon whether the property condemned is under the direct control and use of the government . . . or . . . in the direct use and occupation of the public at large . . . .") (internal quotation marks omitted). The cost of a private road generally is borne by a private party, not the government, and the private owner, not the government, is responsible for its maintenance. *See, e.g.*, 36 P.S. § 2735 (West 2008). "These considerations mark the great difference between such a road and a public highway, and demonstrate the essentially *private* character of the road."

Bankhead v. *Brown*, 25 Iowa 540, 1868 WL 359, at *5 (1868); *see also City of Novi*, 701 N.W.2d at 151 (road is for "public use" where "[o]wnership, control, and maintenance" rests with public body, and "[t]he public will be free to use and occupy" it).

B. Many State Supreme Courts Have Held Their States' Private Roads Acts To Be Unconstitutional

In light of the private nature of private roads, several state supreme courts have recently held that a statute that permits a private party to take another's property for a private road exacts an unconstitutional taking of property for an impermissible private use. In 2001, the Supreme Court of Michigan held that State's private roads act, which authorized the taking of property for establishment of a private road, to be an unconstitutional taking of property for a private use.[2] *See, e.g., Tolksdorf*, 626 N.W.2d at 165, 168-169 (holding Michigan private roads act unconstitutional "because it authorizes a taking of private property for a predominantly private purpose"). That decision was particularly significant, because at that time Michigan constitutional law still recognized an expansive view of what constituted a "public use." *See Poletown Neighborhood Council* v. *City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (holding that condemnation of private homes for economic redevelopment project of private corporation was taking for public use), *overruled by County of Wayne* v. *Hathcock*, 684 N.W.2d 765, 787 (Mich. 2004). Therefore, Michigan's private roads statute could not pass constitutional scrutiny even as measured against Michigan's formerly low threshold for finding a public use.

[2] Michigan's current constitutional requirement for a public use is substantively identical to that of Pennsylvania. *Compare* Pa. Const. art. I, § 10 ("nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured"), *with* Mich. Const. art. X, § 2 (1963) ("Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."). When Michigan amended its Constitution in 1963, it eliminated a provision of its 1908 Constitution that had expressly permitted the taking of private property for the creation of a private road. *See* Mich. Const. art. XIII, §§ 1 & 3 (1908) (declaring that "private property shall not be taken by the public . . . without the necessity therefor being first determined and just compensation therefor first being made," but permitting that "[p]rivate roads may be opened in a manner to be prescribed by law").

In *Cohen* v. *Larson*, 867 P.2d 956, 959 (Id. 1994), the Supreme Court of Idaho held that a proposed taking of land for a private right of way for inhabitants of a new condominium development was not a taking for a public use, because the private way would not "confer[] a benefit on the public sufficient to entitle a land owner to invoke the power of eminent domain in order to facilitate its accomplishment." The decision in *Cohen* is significant because Idaho has a constitutional amendment expressly declaring that the taking of private property for the creation of a private road that is necessary for the "complete development of the material resources of the state, or the preservation of the health of its inhabitants," is a taking for a "public use." Idaho Const. art. I, § 14. Notwithstanding this provision, the court concluded that the taking of private property to build a private road for a new condominium development was not a taking for a public use. *See Cohen*, 867 P.2d at 958-59.

Two other state supreme courts in the mid-1960s also held that their States' respective private roads acts were unconstitutional. In *State Highway Commission* v. *Batts*, 144 S.E.2d 126, 136-37 (N.C. 1965), the Supreme Court of North Carolina held that the government could not exercise its eminent domain authority to take private property to establish a road for the "substantial and dominant use and benefit" of private parties and for only "incidental and purely conjectural" public use and benefit, because such a taking of property would be for a private use. And the Supreme Court of Texas has held that the invocation of the State's eminent domain authority by a landlocked owner to create a private easement for ingress to and egress from a public road is an unconstitutional taking for a private use. *See Estate of Waggoner* v. *Gleghorn*, 378 S.W. 2d 47 (Tex. 1964). That court held that a statute authorizing a "permanent appropriation" of a private easement for a private party to travel across another person's land is

"unconstitutional and void" under the Texas Constitution "to the extent that it purports to authorize the taking of private property for a private purpose." *Id.* at 50.[3]

Indeed, despite the existence of private roads acts during the colonial era and the early years of the Republic,[4] there has been a significant trend, beginning in the mid-19th Century and continuing to this day, of invalidation of such laws by either state court decision or legislative repeal. Since the mid-19th Century, several state supreme courts have recognized that laws permitting the taking of property to establish a private road not open to the public worked a serious and unjustified intrusion on property rights for a private use and, therefore, were unconstitutional. For example, in one well-regarded decision, *Bankhead* v. *Brown*, 25 Iowa 540, 1868 WL 359, at *5, the Supreme Court of Iowa held that the taking of property for roads "private in their character and not public" is an unconstitutional taking for a private use.

By the early 20th Century, many state supreme courts had come to the same conclusion that their respective private roads acts were unconstitutional because they authorized takings of property for private, rather than public, use. *See, e.g.*, *Arnsperger* v. *Crawford*, 61 A. 413, 415-418 (Md. 1905) ("[W]e are convinced that the best-considered cases are those which hold such statutes to be void."); *Clark* v. *Board of Comm'rs*, 77 P. 284, 285-286 (Kan. 1904); *Welton* v.

---

[3] The text of the Takings Clause of the Constitution of Texas is also very similar to that of the Constitution of Pennsylvania. *Compare* Pa. Const. art. I, § 10, *with* Tex. Const. art. I, § 17 (1876) ("No person's property shall be taken . . . for or applied to public use without adequate compensation being made.").

[4] Contemporaneous with the founding era and extending into the early 19th Century, many States had enacted statutes that permitted the taking of private land for transfer to a landlocked owner to establish a "private" road. *See generally* Julius L. Sackman & Patrick J. Rohan, 2A *Nichols on Eminent Domain* § 7.07[4][i] (Rev. 3d ed. 1996); Nathan Alexander Sales, *Classical Republicanism and the Fifth Amendment's "Public Use" Requirement*, 49 Duke L.J. 339, 376-378 & nn. 177-182 (1999). Although there were variations from State to State, at their core these private roads statutes permitted the owner of a landlocked parcel of land to acquire a private route (known variably as a private "way," "cartway," "road," or "easement") across an adjacent parcel of land to access a public road or highway. *See generally* Brian R. Harris, *Private Road or Public Use*, 80 U. Det. Mercy L. Rev. 149, 152 & n.20 (2002).

Dickson, 57 N.W. 559, 561-62 (Neb. 1894); *Logan* v. *Stogdale*, 24 N.E. 135, 136 (Ind. 1890); *Varner* v. *Martin*, 21 W.Va. 534, 1883 WL 3202, at *23 (1883) ("It is obvious that the purpose of this road as thus declared in the act is a mere private use."); *Witham* v. *Osburn*, 4 Or. 318, 319 (1873); *Osborn* v. *Hart*, 24 Wis. 89, 1869 WL 3507, at *2 (1869) ("[W]e are all clearly of the opinion . . . that the legislature cannot authorize the taking of private property for a private road—which is a mere private use—even if compensation is made therefore."); *Nesbitt* v. *Trumbo*, 39 Ill. 110, 1866 WL 4369, at *5 (1866) (private road act unconstitutional because there cannot "be the slightest pretense in this case that this way was, in any just sense, for public use. It was alone for individual or private use."); *Sadler* v. *Langham*, 34 Ala. 311, 1859 WL 738, at *14 (1859); *Dickey* v. *Tennison*, 27 Mo. 373, 1858 WL 5919, at *2 (1858); *Clack* v. *White*, 32 Tenn. 540, 1852 WL 1909, at *4-5 (1852).[5]

In light of the foregoing authorities, this Court's contemporaneous decision to the contrary in *Pocopson Road*, 16 Pa. 15 (1851), which a plurality of this Court recently described as "insubstantial" and "wholly unsupported by any reasoning," *In re Forrester*, 836 A.2d at 105, was criticized in its own era. *See, e.g.*, *Bankhead*, 25 Iowa 540, 1868 WL 359, at *5 (calling *Pocopson Road* "of doubtful soundness").

C. Pennsylvania Is One Of A Few States That Has Not Amended Either Its Statutes Or Its Constitution To Address The Constitutional Concerns Raised By Takings For Private Roads

Reacting to the decisions of these state supreme courts, some state legislatures eliminated the statutory authority to take private property to establish private roads by granting the public

[5] The Takings Clauses of the Constitutions of almost all of these States at the time of these decisions were substantively identical to the Takings Clause of the Constitution of the Commonwealth of Pennsylvania. *Compare* Pa. Const. art. I, § 10, *with*, *e.g.*, Ala. Const. art. I, § 23 (1819), *and* Ill. Const. art. I, § 15 (1870), *and* Ind. Const. art. I, § 21 (1851), *and* Iowa Const. art. I, § 18 (1857), *and* Md. Const. art. III, § 40 (1867), *and* Mo. Const. art. XIII, § 7 (1820), *and* Neb. Const. art. I, § 21 (1875), *and* Tenn. Const. art. I, § 21 (1870), *and* W. Va. Const. art. III, § 9 (1872), *and* Wis. Const. art. I, § 13 (1848).

the right to use all roads established on property acquired by eminent domain.[6] In those States, all roads established through eminent domain are considered "public" roads. *See, e.g., Lichty* v. *Luloff*, 512 N.W.2d 267, 273-274 (Iowa 1994) (citing *Phillips* v. *Watson*, 18 N.W. 659, 661 (Iowa 1884)); *Brown* v. *Warchalowski*, 471 A.2d 1026, 1029-1030 (Me. 1984); *Bashor* v. *Bowman*, 180 S.W. 326, 327 (Tenn. 1915); *Towns* v. *Klamath County*, 53 P. 604, 606 (Or. 1898); *Latah County* v. *Peterson*, 29 P. 1089, 1089-1090 (Id. 1892); *Denham* v. *County Comm'rs*, 108 Mass. 202, 204-205 (1871); *Proctor* v. *Andover*, 42 N.H. 348, 1861 WL 2015, at *3 (1861). Pennsylvania, however, has not amended its Private Roads Act in this manner. *See* 36 P.S. §§ 2737, 2761. Indeed, a plurality of this Court already has noted that private roads in Pennsylvania are not open to public use. *See In re Forrester*, 575 Pa. at 370 & n.3, 836 A.2d at 105 & n.3.

Other States amended their constitutions during the late-19th and early-20th Centuries to permit expressly the taking of property for establishment of a "private" road.[7] Notably, no State has done so recently. Nor is *Amicus* aware of any decision addressing whether these state constitutional amendments are permissible under the Takings Clause as a matter of federal constitutional law. In any event, unlike these States, Pennsylvania has not amended its Constitution to permit expressly, as a matter of state constitutional law, a taking of private property for the creation of a private road.[8]

---

[6] *See, e.g.*, Iowa Code Ann. § 6A.4 (West 2008); La. Rev. Stat. Ann. § 48:491(a) (West 2008); Me. Rev. Stat. Ann. tit. 23, § 3021 (West 2009); N.D. Cent. Code § 24-07-06 (West 2008).

[7] *See, e.g.*, Ala. Const. art. I, § 23; Ariz. Const. art. II, § 17; Alaska Const. art. VIII, § 18; Cal. Const. art. I, § 19(d), (e)(5); Colo. Const. art. II, § 14; Ga. Const. art. I, § 3, ¶ II; Idaho Const. art. I, § 14; Kan. Const. art. XII, § 4; Miss. Const. art. IV, § 110; Mo. Const. art. I, § 28; N.Y. Const. art. I, § 7(c); Okla. Const. art. II, § 23; Or. Const. art. I, § 18; Wash. Const. art. I, § 16; Wyo. Const. art. I, § 32.

[8] Another approach to the unconstitutionality of a state private roads act is represented by the California Supreme Court's decision in *Sherman* v. *Buick*, 32 Cal. 241, 251-256 (1867), in

D. Private Roads Do Not Primarily Benefit The Public And Are Not Necessary To Advance Any Public Purpose

The Commonwealth Court also erred in concluding that the taking here was for a public use simply because there would be some public benefit from landlocked property owners having access to private roads. A taking of property that will not be put to actual use by the public, such as the taking for a private road here, is a taking for a legitimate "public purpose" *only* if the public will be the "primary and paramount" beneficiary of the taking. *See, e.g.*, *Lands of Stone*, 595 Pa. at 617, 939 A.2d at 337. The public plainly is not the "primary and paramount" beneficiary of a taking for a private road, as a plurality of this Court has already held.

In the 19th Century, a minority of state supreme courts held that their States' respective private roads acts were constitutional, reasoning that although the private roads created thereby were for the actual use of only private parties, the public at large would benefit from facilitating access to landlocked parcels of real property. *See, e.g.*, *Robinson* v. *Swope*, 75 Ky. 21, 1876 WL

---

which that court dubiously invoked principles of constitutional avoidance to construe a private roads act to be a public roads act. Upholding a private roads statute, the California court reasoned that, because "the Legislature has no power to lay out and establish 'private roads,'" the language of California's statute—which referred expressly to only "private road[s]"—nonetheless "must be understood" as creating "public roads." *Id.* at 251-252.

The *Sherman* decision should be recognized only as an extraordinary—and improper—application of the doctrine of constitutional avoidance that this Court should not follow in this case. A court may only prefer an interpretation of a statute that is "fairly possible," *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), in order to avoid deciding a constitutional question. It cannot—as the court nonetheless did in *Sherman*—"press statutory construction to the point of disingenuous evasion even to avoid a constitutional question." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (internal quotation marks omitted). Pennsylvania's Private Roads Act on its face provides for the taking of private property for a "private" road. *See* 36 P.S. § 2731; *compare* 36 P.S. ch. 4 (West 2008) (entitled "public roads in general"), *with* 36 P.S. ch. 5 (West 2008) (entitled "private roads"). Quite reasonably, this Court and other state supreme courts have held that statutes that authorize the taking of property for "private roads" establish roads that are "private" and, thus, are distinct from statutes that authorize the use of eminent domain authority to create "public roads." *See supra* pp. 11-12. Therefore, this Court cannot plausibly construe Pennsylvania's Private Roads Act to authorize the taking of property for a "public" road open for public use in order to avoid the constitutional issues presented in this case. *See Housing Auth.* v. *Pennsylvania State Civil Serv. Comm'n*, 556 Pa. 621, 644, 730 A.2d 935, 948 (1999) ("While we strive to interpret statutes in a manner which avoids constitutional questions, we will not ignore the plain meaning of the statute to do so.").

8180, at *2 (1876) (asserting that private roads advance public purpose because they facilitate "attendance upon elections and the public worship of Almighty God" and enable a citizen access "to a market at which he can buy and sell" and therefore fulfill his social duties); *Roberts* v. *Williams*, 15 Ark. 43, 1854 WL 633, at *4 (1854) (similar); *Brewer* v. *Bowman*, 9 Ga. 37, 1850 WL 1559, at *2 (1850) (similar). The Commonwealth Court adopted this minority reasoning, concluding that creating private roads benefits the public because "otherwise inaccessible swaths of land in Pennsylvania would remain fallow and unproductive." *In re Opening Private Road for Benefit of O'Reilly*, 954 A.2d at 72. The absence of private roads, according to the Commonwealth Court, makes landlocked property "virtually worthless" and undermines the "commerce" and "tax base" of the Commonwealth. *Id.*

The Court should not adopt this flawed reasoning, which represented a minority view even at the time the decisions mentioned above were issued, and which is unsupported by the modern realities of commerce. As several state supreme courts have since recognized, the interest of one private party in maximizing the value of his own private land does not justify the serious intrusion on the property rights of the person over whose land the private road would be built. *See supra* pp. 12-15. Whether and how a private party can gain access to his property "is simply not a matter of public concern one way or another; it is a purely private dispute and, as such, eminent domain is not the appropriate remedy." *Cohen*, 867 P.2d at 959. "The exigencies of particular individuals in the enjoyment of their own property will not in and of themselves suffice to permit state, county, or municipal[] action in appropriating the land of another for road purposes." *Brown*, 471 A.2d at 1029 (use of eminent domain to acquire property for private way not required by necessity is an unconstitutional taking for a private use under Maine's Constitution); *Waggoner*, 378 S.W.2d at 50 (facilitating private owner's profitable use of his

land through creation of private road does "not constitute a public use" under Texas constitutional law); *Varner*, 1883 WL 3202, at *23 (enabling individual to reach, enjoy, and enhance his own property "cannot possibly be regarded as a public use").

Even to the extent that there is some public benefit from allowing a private party to take the property of a neighbor to build an exclusive private road, any public benefit would be far too speculative, incidental, and attenuated to establish a legitimate public use. *See Tolksdorf*, 626 N.W.2d at 168-169; *In re Forrester*, 575 Pa. at 370, 836 A.2d at 105. In this Commonwealth, as in many other States, a taking of property that will not be put to actual use by the public is a taking for a legitimate "public purpose" *only* if the public will be the "primary and paramount" beneficiary of the taking. *See supra* p. 8. A plurality of this Court already has come to the conclusion that the primary beneficiary of the taking of private property to create a private road is the private party who receives the road, and not the public:

> The primary beneficiary of the opening of a private road is the private individual or entity who petitions for such relief. Granted, society as a whole may receive a collateral benefit when landlocked property may be accessed by motorized vehicles, and thus presumably be put to its highest economic use; yet it cannot seriously be contended that the general population is the primary beneficiary of the opening of a road that is limited to the use of the person who petitioned for it.

In re Forrester, 575 Pa. at 370, 836 A.2d at 105.

The plurality's opinion *In re Forrester* is precisely in line with the views of other state supreme courts. For example, the Supreme Court of Michigan likewise has concluded that "[t]he primary benefit under the private roads act inures to the landlocked private landowner" and that "[a]ny benefit to the public at large is purely incidental and far too attenuated to support a constitutional taking of property." *Tolksdorf*, 626 N.W.2d at 169; *see id.* at 165 (taking of property under Michigan's private roads act "primarily benefits a private rather than a public purpose"); *Batts*, 144 S.E.2d at 136 (taking for private way is for "substantial . . . use and

benefit" of private parties and any "use by, or any benefit for, the general public will be only incidental and purely conjectural").

Moreover, if the minimal benefits to the public from connecting landlocked property with public roads were sufficient to establish a "public use," then there would be no meaning to the constitutional requirement. The rationale that the use of private property by a private party "seeking its own profit might contribute to the economy's health . . . . would validate practically any exercise of the power of eminent domain on behalf of a private entity" and would render the public use requirement "impotent." *Hathcock*, 684 N.W.2d at 786; *accord City of Norwood*, 853 N.E.2d at 1141 (similar); *Kelo*, 545 U.S. at 504-505 (O'Connor, J., dissenting) (similar).

Finally, it simply is not the case that privately owned landlocked properties in Pennsylvania would, in the words of the Commonwealth Court, lie "fallow" or "unproductive" without the Private Roads Act. The Commonwealth Court, like the courts in *Robinson*, *Roberts*, and *Brewer*, overlooked the ability of private parties to negotiate a resolution without relying upon the State to settle the matter by force. Indeed, state supreme courts have identified at least two other ways for a private owner of landlocked property to access public roads and highways without resorting to an otherwise unconstitutional taking of private property.

First, the owner of a landlocked parcel could negotiate an easement or a purchase of land with one of the property owners surrounding his parcel. *See generally* Richard A. Posner, *Economic Analysis of Law* 55-56 (6th ed. 2003). Operation of the private roads act short circuits this negotiation, giving the landlocked owner a powerful means to acquire by force "what [he] could not get through arm's length negotiations with [other land owners]." *Tolksdorf*, 626 N.W.2d at 169 (internal quotation marks omitted); *accord Cohen*, 867 P.2d at 859. In the absence of a statutory right to appropriate neighboring land to build a private road, the real estate

market will build in a price discount for a landlocked parcel that does not have access to a public road. Thus, a potential purchaser could obtain an otherwise valuable piece of real estate for a lower price. A purchaser could then use the money he has saved (from the discount) to acquire from a neighbor a voluntary easement across the neighbor's land, or perhaps even to purchase part of the neighbor's land on which to establish a way to a public road. Once that easement or way is established in accordance with the negotiated solution, the land will be "restored" to its full value. Therefore, the private roads act is not necessary to establish access to public roads for landlocked property owners; that access generally can be achieved through the normal operation of real estate markets and through voluntary negotiations among neighbors. *See generally* R.H. Coase, *The Firm, The Market, and the Law* 105-107, 159-163 (1988).

Second, taking property for a "private" road is unnecessary because a State can invoke its "public roads" acts to take private property if there is a legitimate public need for a road. *See, e.g.*, *Varner*, 1883 WL 3202, at *23; *Witham*, 4 Or. at 324. Indeed, Pennsylvania law already provides for such authority, *see* 36 P.S. §§ 1761 *et seq.* (West 2008) (authorizing laying out of public roads), as do many other States, *see, e.g.*, Ark. Code Ann. § 27-66-401 (2009); Idaho Code § 7-701 (2009); Kan. Stat. Ann. § 68-117 (2008); Me. Rev. Stat. Ann. tit. 23, § 3022 (West 2009); Neb. Rev. Stat. § 39-1713 (West 2008); N.D. Cent. Code § 24-07-06 (West 2008); Wis. Stat. Ann. § 82.27 (West 2009). Accordingly, even if a private party cannot obtain a voluntary easement, there is no need to provide the owner of landlocked property with a statutory right to his own personal, private road across his neighbor's property.

CONCLUSION

This Court should hold that Pennsylvania's Private Roads Act authorizes an unconstitutional taking of private property for a private—rather than a public—use, and should vacate and reverse the Commonwealth Court's judgment.

Respectfully submitted,

HOWARD J. BASHMAN
LAW OFFICES OF HOWARD J. BASHMAN
2300 Computer Drive, Suite G-22
Willow Grove, PA 19090
(215) 830-1458

Counsel for *Amicus Curiae* Institute for Justice

PAUL R.Q. WOLFSON
RACHEL L. BRAND
STEVEN P. LEHOTSKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 663-6000

DANA BERLINER
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320

Of counsel

Dated: June 9, 2009

CERTIFICATE OF SERVICE

I, Howard J. Bashman, hereby certify that, in accord with Rules 121 and 2185(a) of the Pennsylvania Rules of Appellate Procedure, one original and 25 true and correct copies of the foregoing Brief of *Amicus Curiae* Institute for Justice were dispatched by First Class United States Postal Service Mail this 9th day of June, 2009 to:

Charles W. Johns, Prothonotary
John Vaskov, Deputy Prothonotary
Supreme Court of Pennsylvania
801 City-County Building
Pittsburgh, PA 15219
(412) 565-2816

I also hereby certify that, in accord with Rules 121 and 122 of the Pennsylvania Rules of Appellate Procedure, two true and correct copies of the foregoing Brief of *Amicus Curiae* Institute for Justice were served this 9th day of June, 2009, by First Class United States Postal Service Mail upon the following counsel for Appellants Hickory on the Green Homeowners Association, *et al.*:

Kevin P. Allen, Esq.
Thorp Reed & Armstrong, L.L.P.
301 Grant Street 14th Floor
Pittsburg, PA 15219-1425
(412) 394-2374

I also hereby certify that, in accord with Rules 121 and 122 of the Pennsylvania Rules of Appellate Procedure, two true and correct copies of the foregoing Brief of *Amicus Curiae* Institute for Justice were served this 9th day of June, 2009, by First Class United States Postal Service Mail upon the following counsel for Appellee Timothy P. O'Reilly:

Dwight David Ferguson, Esq.
William P. Bresnahan, Esq.
William P. Bresnahan II, Esq.

John Francis Dwyer, Esq.
Hollinshead, Mendelson, Bresnahan & Nixon, P.C.
310 Grant Street, Suite 2901
Pittsburgh, PA 15219-2301
(412) 355-7070

I also hereby certify that two true and correct copies of the foregoing Brief of *Amicus Curiae* Institute for Justice were served this 9th day of June, 2009, by First Class United States Postal Service Mail upon the following *pro se* Appellees:

Diane J. Gallagher
Brian J. Gallagher
7043 Clubview Drive
Bridgeville, PA 15107

Karen R. Billingham
7022 Clubview Drive
Bridgeville, PA 15107

Jarett L. Lasker
7079 Clubview Drive
Bridgeville, PA 15107

Richard Marcovitz
Marilyn Marcovitz
7023 Clubview Drive
Bridgeville, PA 15107

Franki R. Colangelo
7030 Clubview Drive
Bridgeville, PA 15107

Gordon J. Orr
7011 Clubview Drive
Bridgeville, PA 15107

Susan C. Stanko
7021 Clubview Drive
Bridgeville, PA 15107

Nancy J. Huff
7025 Clubview Drive
Bridgeville, PA 15107

Candace Salvini
7066 Clubview Drive
Bridgeville, PA 15107

Kimberly Rostron
7057 Clubview Drive
Bridgeville, PA 15107

Howard J. Bashman
Pa. I.D. No. 61029
Law Offices of Howard J. Bashman
2300 Computer Drive, Suite G-22
Willow Grove, PA 19090
(215) 830-1458