ANNUAL REPORT TO THE GENERAL ASSEMBLY

CALENDAR YEAR 2008

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"The system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not."

-Friedrich August von Hayek

The Missouri Office of the Ombudsman for Property Rights is responsible for documenting the use of eminent domain within the state and any issues associated with its use and is charged to submit a report to the general assembly on January 1, 2008, and on such date each year thereafter. This report is respectfully submitted to serve to fulfill the above described statutory duties for the year of 2009.

Respectfully,

Paul Anthony Martin
Ombudsman for Property Rights
The State of Missouri

Office of the Ombudsman for Property Rights

Governor Blunt signed House Bill 1944 creating the position of the Missouri Ombudsman for Property Rights on July 13, 2006. Anthony Martin was appointed as Missouri's first Ombudsman for Property Rights on August 20, 2007. It was on this date that the official organization of this office commenced. The Missouri Office of the Ombudsman for Property Rights consists of only the ombudsman, with no reporting staff or additional employees.

The Missouri Office of the Ombudsman for Property Rights is charged with assisting citizens by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and procedures. The ombudsman is also responsible for documenting the use of eminent domain within the state and any issues associated with its use and shall submit a report to the general assembly on January 1, 2008, and on such date each year thereafter.

The Missouri Office of the Ombudsman for Property Rights is one of only four similar state-level offices in the country. Currently, the only other formal offices are in the states of Utah, Connecticut, and Oregon. The state of Utah has no formal Ombudsman for Property Rights, but has the oldest office in the country, and is staffed with a team of lawyers and administrators. The state of Connecticut has a formally titled Property Rights Ombudsman and a support staff consisting of

one employee. This office has enjoyed the cooperation of the staffs of both of these organizations in establishing Missouri's own version of the office.

In less than seventeen months, the Office of the Ombudsman for Property Rights has made great strides in improving the assistance provided to Missourians facing issues regarding their property rights. These efforts will be discussed in more detail throughout this report.

The Office of Public Counsel

The Office of the Ombudsman for Property Rights was created by House Bill 1944 and, by statute, was placed in the Office of Public Counsel. The Office of the Public Counsel was established in 1975 to represent the public and the interests of utility customers in proceedings before the Missouri Public Service Commission (PSC) and in investor-owned electric, natural gas, telephone, water, sewer and steam heat utilities, including safety issues, adequate and quality service, complaints and disputes, connections and disconnections, and billing and collection practices. The Office of the Public Counsel is independent from the PSC and has a separate budget and staff. The Department of Economic Development director appoints the public counsel who must be a Missouri licensed attorney. While the Office of Public Counsel reviews all utility filings and issues considered by the PSC, the focus is utility rates and regulations proceedings that

affect residential and small business customers. The office takes an active role in cases that propose to increase rates and often makes its own proposal for rate reductions. The office also protects the customers' interests in other PSC cases that touch on such issues as rate design, new area codes, PSC investigations into general industry issues, and rules and regulations governing the rights and obligations of customers and utilities that affect service. Attorneys from the office attend local public hearings where customers comment on PSC cases.

At present, the office has 12 staff members. Five attorneys, including the public counsel, provide the legal representation while 2 public utility accountants and 2 economists provide the technical expertise. In some cases, the office contracts with experts and consultants for specialized expertise. The technical staff and consultants investigate and research regulatory issues and utility operations, prepare reports and exhibits and testify on technical issues in the evidentiary hearings.

Since the Office of the Public Counsel represents the public and ratepayers as a class, the office does not provide specific legal representation of individuals for individual problems. However, the office tries to help customers by contacting the utility or directing them to the appropriate PSC department or government agency. It also comments on utility issues that affect consumers and cooperates

with other state consumer advocates, public interest and consumer groups and organizations to educate the public about consumer rights and to protect the rights of ratepayers. The public counsel's authority to appeal PSC decisions is a significant right. Prior to the establishment of the Office of the Public Counsel, the general public did not have the ability to seek judicial review of adverse PSC decisions.

Use of Eminent Domain in Missouri, 2008

As described above, the Courts Administrator compiles a database of court filings and produces an "annual report" that describes the types of cases filed in each circuit, and further broken down by county. While this database includes condemnation cases and exceptions filed, the only further breakdown of these cases concerns whether the particular condemning authority is either the "state" or "other." At this time there is no further official database describing each specific use of eminent domain.

The relevant table of the Missouri Judicial Report, Annual Report-Supplement for Fiscal Years 2007 and 2008 are included in this report as appendices. At this time, there is no other official database compiled by any state agency. It is a priority of this office to establish a more detailed method for documenting the use of eminent domain in Missouri, and to include such documentation in future reports.

Issues Regarding the Use of Eminent Domain

There is one issue that has dominated most discussions of condemnation law that this office has engaged in over the last seventeen months- the issue that property not found to be blighted may still be lawfully taken for the public purpose of eliminating blight. While House Bill 1944 did give some increased protection to parcels of land not found to be blighted, that protection was minimal at best and insufficient in practice. As the law stands today, an individual property can be free of any finding of blight, yet still be condemned as part of a "blighted area." This is a serious deficiency in Missouri eminent domain reform that should be given significant attention in the 2009 legislative session.

After the recent Missouri eminent domain reform, House Bill 1944, the popular, but inaccurate, opinion was that eminent domain for redevelopment was no longer a threat to Missouri landowners. As described below, the use of eminent domain for redevelopment is still a serious threat to all property in Missouri, not just those properties that fall under one of the many broad definitions of "blight."

Most eminent domain proponents deny the existence of any use of eminent domain for "economic development" in Missouri. This argument is usually evinced by §523.271RSMo, which states that "[n]o condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes." When viewed by itself, it is reasonable to

conclude that §523.271 gives strong protection to private property rights. However, when read in conjunction with §523.274, it is clear that §523.271 does little to protect Missouri landowners.

Section 523.274 requires condemning authorities to consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory definition of blight. If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with the condemnation of any parcels in such area, absent any other issues with the claim. In practical terms, entire neighborhoods may be free of any blighted property and still be considered in a blighted area and therefore subject to condemnation.

This insufficiency was brought to the forefront in 2007 when the Missouri Court of Appeals for the Western District issued its opinion in Allright Properties, Inc. v. Tax Increment Financing Commission of Kansas City, 240 SW 3d 777 (Mo.App. W.D. 2007). The court interpreted §523.274 as requiring the condemning authority to only consider each parcel without requiring the condemning authority to come to any conclusion regarding the blight status of each specific parcel. The court also explicitly sets out the formula for calculating whether a "preponderance" of the redevelopment area is blighted by measuring total square footage of blight in a redevelopment area and comparing it to the square footage of land that is not found to be blighted.

Many parcels of land that are deemed blighted are of significant square footage. Some examples are parking lots, industrial facilities, or wooded areas. After the court's opinion, the weight of these parcels will be determined in square footage, and not as individual parcels. Due to the potential discrepancy of square footage between the average neighborhood lot and the larger blighted lots in the area, the ratio of homes and small businesses not found to be blighted that can be taken for each larger parcel of blighted property may increase dramatically. The likely consequences of this opinion exacerbate the deficiency of Missouri condemnation law in protecting private property from being taken through eminent domain for redevelopment purposes.

In 2009, this office will present detailed recommendations to the general assembly for changes to Missouri statutes in order to provide more acceptable protection for property owners who may face the threat of eminent domain as a direct result of economic development projects thinly veiled as acts for the public good of eliminating blight. Specifically, this office will concentrate on recommending changes that will protect individual parcels of property not found to be blighted under any of the broad definitions of blight available to condemning authorities in Missouri.

Activity of the Office of the Ombudsman for Property Rights in 2008

Many of the activities listed below were also included in the 2007 Annual Report as initiatives for 2008. The activities are included again, often with updates, to show the progress the office has made within the last year to provide better service to Missourians facing the threat of eminent domain, and to stress the continuing importance of these activities in the future.

The quality of the information available to Missourians concerning their property rights will continue to be the factor given the most weight in any decision made concerning the efforts of this office.

The second most prevalent concern is raising the profile of the office in order to reach as many Missourians as possible. House Bill 1944 requires condemning authorities to provide the owners of record of the properties to be acquired by eminent domain with contact information for the Office of the Ombudsman for Property Rights. However, the use of eminent domain begins long before the official letter of intent to acquire property is sent to property owners. Property owners need to be cognizant of their rights before a condemnation notice is issued. This office must continue to work to be included in the public discourse anytime property rights are the topic of discussion. The actions taken in 2007 and 2008 to reach out to as many Missourians as possible, as quickly as possible, are described below.

A. Official Website

Missourians dealing with eminent domain are encouraged to contact this office as early in the eminent domain process as possible. In order to best provide information regarding the eminent domain process there has to be a resource that allows Missourians to easily access as much information as possible, as quickly as possible. This resource also has to be available without the constraints of normal business hours since most working Missourians can not take time out of their workdays to deal with personal matters. In the current internet age this is best accomplished through a website devoted entirely to the eminent domain process in Missouri.

In 2007, the Office of the Ombudsman for Property Rights, with the assistance Department of Economic Development, developed the website www.eminentdomain.mo.gov to provide Missourians with extensive information regarding Missouri eminent domain law. The website has received praise from Missourians and from property rights organizations across the country for its ease of use and breadth of information.

The website includes several links to information regarding condemnation and eminent domain, including: the full text of House Bill 1944 along with links to the codification of the law as Chapter 523 of the Registered Statutes of Missouri, the "Final Report and Recommendations of the Missouri Task Force on Eminent

Domain," and a link to the 2007 Annual Report of this office. Missourians visiting the site can also find contact information for the office as well as a "legislator lookup" tool that allows them to easily access the contact information for their respective legislators.

There have been several recent additions to the website. These recent updates include a "frequently asked questions" portion of the site that is a compilation of the questions most often asked by Missourians facing the use of eminent domain, and a section titled "Blighted Missouri." The "Blighted Missouri" section is comprised of several photos of homes across Missouri that have been targets of eminent domain abuse. The homes included in this section were selected to evince the absurdity of the breadth of the definition of a "blighted area" under Missouri condemnation law.

The website is designed to be easily updated in order to better serve the needs of Missourians as time goes on. In the next year, the site will be further developed in order to provide a more interactive experience to individuals facing specific issues within the purview of eminent domain law.

B. Toll-Free Contact Availability

Even in the internet age, the most frequent contact with this office is still via telephone. With this in mind, the Office of Public Counsel developed a toll-free contact number allowing Missourians to call one number to avail themselves to all

services offered by the Public Counsel. The Office of the Ombudsman for Property Rights is included within these services. Missourians can now call (866) 922-2959 to contact, free of charge, the Office of Public Counsel and, in turn, the Office of the Ombudsman for Property Rights.

C. Outreach: Town Hall Meetings and Community Involvement

In just seventeen months, the office has been able to meet with thousands of Missourians on a face to face level. For the most part, this has been accomplished by the use of town hall meetings and speaking engagements throughout the state. The office has worked with community groups to provide a forum for Missourians to voice their concerns about property rights issues in both their specific geographic areas and across the state. In 2008, attendance at each meeting ranged from 20 to 200 concerned citizens, totaling thousands of Missourians. Many of these meetings have included representatives from both the executive and legislative branches of government. The office has been represented at forums sponsored by organizations such as the League of Women Voters, the Federalist Society, the University of Missouri, the Sons of the American Revolution, and at several meetings of community action organizations across the state. Most importantly, the office has held many neighborhood meetings in the homes of Missourians facing the threat of condemnation. The reaction to these meetings has

been very positive and the meetings should significantly increase in frequency in the next year.

D. Outreach: Institutions of Higher Learning

Property rights should be an important aspect of the educational experience of undergraduate students as they prepare to be the future leaders of Missouri. Today's undergraduate students will be tomorrow's property owners, small business owners, farmers, political leaders, or any combination of the three. Undergraduate students need to achieve a basic level of competence of the eminent domain process and need to understand the effect that it may have on their communities. As the outreach activities of this office increase in the future, so will the efforts of this office to better collaborate with institutions of higher learning in educating young Missourians on the role that property rights have in the prosperity of their communities.

This office has met with a number of professors and other leaders of academic institutions across the state to discuss how to help facilitate a more thorough inclusion of property rights into the educational discourse on undergraduate campuses. Several debates, presentations, panel discussions, and round table discussions are in the planning process for 2009. If successful, these events have the potential to become annual staples of the academic calendar giving

this office a platform to reach young Missourians far into the future, regardless of who holds the office of Ombudsman.

E. Litigation

In 2008, for the first time since its organization, the Office of the Ombudsman acted as amicus curiae to the Missouri Supreme Court. The office joined as amicus curiae in two separate cases; collaborating with the Institute for Justice in City of Arnold v. Homer R. Tourkakis, et al., and joining the Pacific Legal Foundation and the Show-Me Institute in Cortex West Redevelopment Corporation v. Station Investments #10 Redevelopment Corporation, et. al. The two briefs described above are included as appendices to this report.

Conclusion

Organizing a government office is a great task in the best of circumstances. The Missouri Office of the Ombudsman for Property Rights is one of only four similar statewide offices in the country. This afforded few successful templates on which to base the activities and services of this office. Even with such few examples on which to base the office, the remarkable combined efforts of the Office of Governor Matt Blunt, the Office of Public Counsel, and the Department of Economic Development have allowed this office, in less than seventeen months, to reach thousands of Missourians facing the use of eminent domain.

There is much work to be done in the coming year and I look forward to the challenge of providing more efficient service to Missourians facing eminent domain issues and to further assisting Missourians fighting the abuse of eminent domain. I also look forward to working with legislators from across the state to ensure increased property rights protection for all Missourians.

Appendices to the 2008 Report of the Ombudsman for Property Rights

Included below is the annual report compiled by the Office of State Courts Administrator. The specific table included, Table 36, is the relevant section of the report dealing with condemnation filings for Fiscal Years 2007, 2008. The official styling of the report is the Missouri Judiciary Report, Annual Report-Supplement; Table 36.

Also included below are maps detailing the use of eminent domain throughout the state, distinguished by individual county. These maps date back to fiscal year 2005, the year prior to the recent Missouri eminent domain reform.

Finally, the amicus curiae briefs joined by this office have been included in their entirety as a final appendix to the 2008 report.

APPENDIX A

Annual Report, Table 36

Office of the State Courts Administrator

Fiscal Years 2007, 2008

Table 36
Circuit Court, FY 2008
Real Estate Cases Filed by Case Type

Cir. No.	County	Application-Enforce Mechanic's Lien	Ents. Domstc/Condemn./ State	Ents. Domstc/Condemn./ Other	Exception	Fore-Closure	Partition	Quiet Title	Rent and Possession	Unlawful Detainer	Landlord Complaint	Jdt Other	Total Cases Filed
1	Clark	0	0	0	0	0	1	1	0	0	0	0	2
	Schuyler	0	0	0	0	1	1	1	0	0	0	0	3
	Scotland	0	0	0	0	0	1	0	0	0	0	2	3
	Circuit Total	0	0	0	0	1	3	2	0	0	0	2	8
2	Adair	1	0	0	0	0	2	1	0	0	0	4	8
	Knox	0	0	0	0	0	2	0	0	0	0	0	2
	Lewis	0	0	0	0	0	1	0	0	0	0	1	2
	Circuit Total	1	0	0	0	0	5	1	0	0	0	5	12
3	Grundy	0	0	1	0	0	0	1	0	0	0	0	2
	Harrison	0	0	0	1	0	2	0	0	0	0	0	3
	Mercer	0	0	0	0	0	0	1	0	0	0	2	3
	Putnam	0	0	0	0	0	0	0	0	0	0	2	2
	Circuit Total	0	0	1	1	0	2	2	0	0	0	4	10
4	Atchison	0	0	0	0	0	0	1	0	0	0	1	2
	Gentry	0	0	0	0	0	1	0	0	0	0	0	1
	Holt	0	0	0	0	0	1	1	0	0	0	0	2
	Nodaway	0	0	0	0	0	0	1	0	0	0	0	1
	Worth	0	0	0	0	0	1	2	0	1	0	0	4
	Circuit Total	0	0	0	0	0	3	5	0	1	0	1	10
5	Andrew	0	0	0	0	0	2	2	0	0	0	0	4
	Buchanan	0	1	0	0	1	1	20	0	0	2	0	25
	Circuit Total	0	1	0	0	1	3	22	0	0	2	0	29
6	Platte	5	2	5	1	1	4	10	6	4	1	13	52
	Circuit Total	5	2	5	1	1	4	10	6	4	1	13	52
7	Clay	15	2	5	7	6	7	20	0	0	0	12	74
	Circuit Total	15	2	5	7	6	7	20	0	0	0	12	74
8	Carroll	0	0	0	0	0	1	2	0	0	0	0	3
	Ray	0	0	0	0	1	0	0	0	0	0	2	3
	Circuit Total	0	0	0	0	1	1	2	0	0	0	2	6
9	Chariton	0	0	0	0	0	3	5	0	0	0	1	9
	Linn	0	0	0	0	1	4	1	0	0	0	0	6
	Sullivan	0	0	0	0	0	3	2	0	1	0	1	7
	Circuit Total	0	0	0	0	1	10	8	0	1	0	2	22
10	Marion	0	0	0	1	0	3	4	2	0	0	1	11
	Monroe	0	0	0	0	1	2	3	0	0	0	1	7
	Ralls	0	0	0	0	0	2	0	0	0	0	1	3
	Circuit Total	0	0	0	1	1	7	7	2	0	0	3	21
11	St. Charles	28	3	16	16	13	8	18	3	2	0	33	140
	Circuit Total	28	3	16	16	13	8	18	3	2	0	33	140
12	Audrain	0	0	0	0	0	3	2	0	0	0	0	5
	Montgomery	1	0	0	0	0	1	3	1	0	0	3	9
	Warren	6	1	0	4	1	2	3	1	0	0	3	21
	Circuit Total	7	1	0	4	1	6	8	2	0	0	6	35
13	Boone	3	1	5	2	0	1	4	1	1	1	9	28
	Callaway	0	0	0	1	0	3	3	1	0	0	0	8
	Circuit Total	3	1	5	3	0	4	7	2	1	1	9	36
14	Howard	0	0	0	0	1	0	1	0	0	0	1	3
	Randolph	0	0	0	2	0	1	6	1	0	0	0	10
	Circuit Total	0	0	0	2	1	1	7	1	0	0	1	13
15	Lafayette	0	0	0	0	2	2	4	1	0	0	3	12
	Saline	0	0	0	0	0	1	4	0	0	0	1	6
	Circuit Total	0	0	0	0	2	3	8	1	0	0	4	18
16	Jackson	39	4	15	19	46	14	76	5	2	1	106	327
	Circuit Total	39	4	15	19	46	14	76	5	2	1	106	327
17	Cass	13	0	3	0	2	3	7	0	2	6	7	43
	Johnson	4	0	1	0	0	3	7	86	69	0	1	171
	Circuit Total	17	0	4	0	2	6	14	86	71	6	8	214
18	Cooper	1	0	0	3	0	1	1	0	0	0	1	7
	Pettis	0	0	1	3	0	5	6	0	0	0	1	16
	Circuit Total	1	0	1	6	0	6	7	0	0	0	2	23
19	Cole	3	0	0	2	2	3	5	3	4	0	3	25
	Circuit Total	3	0	0	2	2	3	5	3	4	0	3	25
20	Franklin	8	9	0	7	4	3	11	0	0	0	6	48
	Gasconade	0	0	0	1	1	3	3	0	0	0	3	11
	Osage	0	0	0	0	0	2	2	0	0	0	0	4
	Circuit Total	8	9	0	8	5	8	16	0	0	0	9	63
21	St. Louis County	67	1	22	19	68	23	155	4	5	6	93	463
	Circuit Total	67	1	22	19	68	23	155	4	5	6	93	463
22	St. Louis City	46	1	2	0	50	7	87	0	0	0	33	226
	Circuit Total	46	1	2	0	50	7	87	0	0	0	33	226
23	Jefferson	11	3	5	1	8	8	33	2	1	0	23	95
	Circuit Total	11	3	5	1	8	8	33	2	1	0	23	95
24	Madison	0	3	0	4	0	0	5	0	0	0	3	15
	St. Francois	0	2	0	5	0	2	8	2	0	0	7	26
	Ste. Genevieve	0	0	1	0	0	1	3	0	1	0	4	10
	Washington	0	0	0	0	0	0	13	0	0	0	6	19
	Circuit Total	0	5	1	9	0	3	29	2	1	0	20	70

Table 36
Circuit Court, FY 2008
Real Estate Cases Filed by Case Type

Cir. No.	County	Appropriation-Enforce Mechanic's Lien	Emin. Domain/Condemn./ State	Emin. Domain/Condemn./ Other	Exception	Fore-closure	Partition	Quiet Title	Rent and Possession	Unlawful Detainer	Landlord Complaint	Jts Other	Total Cases Filed
25	Maries	1	0	0	0	0	1	0	0	0	0	5	7
	Phelps	1	0	0	0	1	0	4	4	0	0	2	12
	Pulaski	7	0	4	0	1	1	4	1	0	0	3	21
	Texas	1	0	0	0	0	3	10	0	1	0	3	18
	Circuit Total	10	0	4	0	2	5	18	5	1	0	13	58
26	Camden	15	4	0	18	2	4	25	0	0	0	34	102
	Laclede	1	0	0	2	0	2	6	0	0	0	7	18
	Miller	2	0	0	0	2	1	8	0	0	0	6	19
	Moniteau	0	1	0	0	1	1	0	0	0	0	0	3
	Morgan	2	0	0	0	0	2	10	1	0	0	4	19
	Circuit Total	20	5	0	20	5	10	49	1	0	0	51	161
27	Bates	1	0	2	0	2	1	6	0	0	0	4	16
	Henry	0	2	2	0	1	2	6	0	0	0	2	15
	St. Clair	0	0	0	0	0	3	2	0	0	0	2	7
	Circuit Total	1	2	4	0	3	6	14	0	0	0	8	38
28	Barton	0	0	0	0	0	2	0	0	0	0	0	2
	Cedar	1	0	0	0	0	0	2	0	0	0	2	5
	Dade	0	0	0	0	0	0	2	0	1	0	0	3
	Vernon	0	0	0	0	0	2	4	0	0	0	9	15
	Circuit Total	1	0	0	0	0	4	8	0	1	0	11	25
29	Jasper	3	0	4	2	6	2	25	2	1	0	9	54
	Circuit Total	3	0	4	2	6	2	25	2	1	0	9	54
30	Benton	0	0	0	0	0	2	16	0	0	0	5	23
	Dallas	3	1	0	0	1	2	4	0	0	0	0	11
	Hickory	0	0	0	0	0	2	5	0	0	0	0	7
	Polk	13	0	0	0	0	5	3	1	0	0	4	26
	Webster	1	1	0	0	0	1	7	0	0	0	3	13
	Circuit Total	17	2	0	0	1	12	35	1	0	0	12	80
31	Greene	14	1	2	3	2	0	0	1	0	0	46	69
	Circuit Total	14	1	2	3	2	0	0	1	0	0	46	69
32	Bollinger	0	0	0	0	0	0	4	0	0	0	1	5
	Cape Girardeau	3	1	1	9	0	3	7	0	0	2	7	33
	Perry	1	0	1	1	0	0	1	0	0	0	0	4
	Circuit Total	4	1	2	10	0	3	12	0	0	2	8	42
33	Mississippi	0	0	0	0	0	0	3	0	0	0	0	3
	Scott	0	0	0	1	1	3	9	1	0	0	7	22
	Circuit Total	0	0	0	1	1	3	12	1	0	0	7	25
34	New Madrid	0	1	0	0	0	3	7	0	0	0	0	11
	Pemiscot	0	0	0	0	1	3	1	0	0	0	0	5
	Circuit Total	0	1	0	0	1	6	8	0	0	0	0	16
35	Dunklin	1	0	0	0	0	3	2	0	0	0	1	7
	Stoddard	1	0	0	0	1	1	6	0	0	0	5	14
	Circuit Total	2	0	0	0	1	4	8	0	0	0	6	21
36	Butler	1	0	0	0	0	3	9	0	3	0	6	22
	Ripley	0	0	0	0	0	3	7	0	0	0	0	10
	Circuit Total	1	0	0	0	0	6	16	0	3	0	6	32
37	Carter	0	0	0	0	0	2	3	0	1	0	3	9
	Howell	1	0	0	0	1	2	2	0	0	0	8	14
	Oregon	1	0	0	0	0	1	6	0	1	0	2	11
	Shannon	0	0	0	0	0	0	0	0	0	0	0	0
	Circuit Total	2	0	0	0	1	5	11	0	2	0	13	34
38	Christian	19	0	10	0	0	0	9	1	0	0	5	44
	Taney	11	1	1	1	1	3	23	3	0	0	15	59
	Circuit Total	30	1	11	1	1	3	32	4	0	0	20	103
39	Barry	0	0	0	0	1	3	21	0	0	0	8	33
	Lawrence	2	2	0	0	1	0	11	0	0	0	8	24
	Stone	14	0	0	0	0	1	14	0	0	0	12	41
	Circuit Total	16	2	0	0	2	4	46	0	0	0	28	98
40	McDonald	2	0	0	0	0	1	11	0	4	0	16	34
	Newton	1	1	0	0	2	2	13	0	2	0	13	34
	Circuit Total	3	1	0	0	2	3	24	0	6	0	29	68
41	Macon	0	1	0	2	0	1	5	0	0	0	0	9
	Shelby	0	0	0	0	0	3	3	0	0	0	1	7
	Circuit Total	0	1	0	2	0	4	8	0	0	0	1	16
42	Crawford	0	2	0	0	0	1	5	0	0	0	3	11
	Dent	0	0	0	0	1	1	3	0	0	0	3	8
	Iron	0	0	0	0	0	1	2	0	1	0	3	7
	Reynolds	0	0	0	0	1	2	6	0	0	0	2	11
	Wayne	0	1	0	1	0	0	5	0	0	0	6	13
	Circuit Total	0	3	0	1	2	5	21	0	1	0	17	50
43	Caldwell	0	0	0	0	1	0	1	0	0	0	0	2
	Clinton	1	0	1	0	0	2	2	0	0	0	1	7
	Daviess	0	0	0	0	0	1	6	0	0	0	0	7
	DeKalb	0	0	0	0	0	0	0	0	0	0	2	2
	Livingston	0	0	1	0	0	7	1	0	0	0	2	11
	Circuit Total	1	0	2	0	1	10	10	0	0	0	5	29
44	Douglas	0	0	0	0	1	4	4	0	0	0	1	10
	Ozark	0	0	0	0	0	0	6	0	0	0	3	9
	Wright	1	0	0	0	0	4	10	0	1	0	1	17
	Circuit Total	1	0	0	0	1	8	20	0	1	0	5	36
45	Lincoln	2	0	0	0	0	3	11	2	0	0	11	29
	Pike	0	0	1	0	0	1	6	0	0	0	1	9
	Circuit Total	2	0	1	0	0	4	17	2	0	0	12	38
	STATE TOTAL	379	53	112	139	242	252	943	136	109	19	701	3,085

Table 36
Circuit Court, FY 2007
Real Estate Cases Filed by Case Type

Cir. No.	County	Application-Enforce Mechanic's Lien	Emin. Domain/Condemn./ Exceptions	Emin. Domain/Condemn./ State	Emin. Domain/Condemn./ Other	Exception	Fore-Closure	Partition	Quiet Title	Rent and Possession	Unlawful Detainer	Landlord Complaint	JIS Other	SWJIS Other	Total Cases Filed
1	Clark	0	♦	0	0	0	0	1	0	0	0	0	1	♦	2
	Schuyler	0	♦	33	0	0	0	1	1	0	0	0	1	♦	36
	Scotland	0	♦	0	0	0	0	1	0	0	0	0	1	♦	2
	Circuit Total	0	♦	33	0	0	0	3	1	0	0	0	3	♦	40
2	Adair	0	♦	1	0	0	0	1	1	0	0	0	1	♦	4
	Knox	0	♦	0	0	0	0	0	1	1	1	0	2	♦	5
	Lewis	0	♦	0	0	0	0	1	0	0	0	0	2	♦	3
	Circuit Total	0	♦	1	0	0	0	2	2	1	1	0	5	♦	12
3	Grundy	2	♦	0	0	0	0	0	0	0	1	0	0	♦	3
	Harrison	0	♦	0	0	0	0	0	1	0	0	0	0	♦	1
	Mercer	0	♦	0	0	0	4	0	2	0	0	0	1	♦	7
	Putnam	0	♦	0	0	0	0	0	0	0	0	0	2	♦	2
	Circuit Total	2	♦	0	0	0	4	0	3	0	1	0	3	♦	13
4	Atchison	0	♦	0	0	0	0	1	1	0	0	0	1	♦	3
	Gentry	0	♦	0	0	0	0	0	1	0	0	0	0	♦	1
	Holt	0	♦	0	0	0	0	0	1	0	0	0	0	♦	1
	Nodaway	0	♦	0	0	0	0	0	2	0	0	0	1	♦	3
	Worth	0	♦	0	0	0	0	0	0	0	0	0	1	♦	1
	Circuit Total	0	♦	0	0	0	0	1	5	0	0	0	3	♦	9
5	Andrew	0	♦	0	0	0	0	0	4	0	0	0	0	♦	4
	Buchanan	0	♦	0	1	2	0	1	23	0	0	2	0	♦	29
	Circuit Total	0	♦	0	1	2	0	1	27	0	0	2	0	♦	33
6	Platte	8	♦	2	3	2	5	3	12	2	1	1	8	♦	47
	Circuit Total	8	♦	2	3	2	5	3	12	2	1	1	8	♦	47
7	Clay	18	♦	0	9	2	2	4	11	4	1	1	13	♦	65
	Circuit Total	18	♦	0	9	2	2	4	11	4	1	1	13	♦	65
8	Carroll	0	♦	0	0	0	0	1	0	0	0	0	0	♦	1
	Ray	3	♦	0	1	0	2	1	2	0	0	0	1	♦	10
	Circuit Total	3	♦	0	1	0	2	2	2	0	0	0	1	♦	11
9	Chariton	0	♦	1	1	0	0	2	5	0	0	0	0	♦	9
	Linn	0	♦	0	0	1	0	1	2	0	0	0	0	♦	4
	Sullivan	0	♦	0	0	0	0	2	0	0	0	0	3	♦	5
	Circuit Total	0	♦	1	1	1	0	5	7	0	0	0	3	♦	18
10	Marion	0	♦	2	2	5	0	2	1	0	1	0	2	♦	15
	Monroe	0	♦	0	0	7	1	1	3	0	0	0	1	♦	13
	Ralls	0	♦	0	0	0	0	2	3	0	1	0	2	♦	8
	Circuit Total	0	♦	2	2	12	1	5	7	0	2	0	5	♦	36
11	St. Charles	6	♦	6	10	25	18	9	20	1	1	1	16	♦	113
	Circuit Total	6	♦	6	10	25	18	9	20	1	1	1	16	♦	113
12	Audrain	0	♦	0	0	0	0	0	4	0	1	0	0	♦	5
	Montgomery	0	♦	0	0	0	0	1	3	0	0	0	1	♦	5
	Warren	3	♦	0	0	0	1	0	7	0	0	0	5	♦	16
	Circuit Total	3	♦	0	0	0	1	1	14	0	1	0	6	♦	26
13	Boone	7	♦	0	35	7	1	0	3	6	3	0	15	♦	77
	Callaway	1	♦	0	1	0	0	5	3	0	0	0	2	♦	12
	Circuit Total	8	♦	0	36	7	1	5	6	6	3	0	17	♦	89
14	Howard	0	♦	0	0	0	0	1	2	1	0	0	0	♦	4
	Randolph	0	♦	0	1	0	0	1	0	0	0	0	2	♦	4
	Circuit Total	0	♦	0	1	0	0	2	2	1	0	0	2	♦	8
15	Lafayette	3	♦	0	0	0	0	3	4	0	1	0	2	♦	13
	Saline	1	♦	0	0	0	0	4	4	0	0	0	1	♦	10
	Circuit Total	4	♦	0	0	0	0	7	8	0	1	0	3	♦	23
16	Jackson	40	♦	3	22	10	36	9	95	3	0	0	94	♦	312
	Circuit Total	40	♦	3	22	10	36	9	95	3	0	0	94	♦	312
17	Cass	15	♦	0	1	0	1	1	11	1	13	9	6	♦	58
	Johnson	3	♦	1	2	0	1	3	6	88	57	3	1	♦	165
	Circuit Total	18	♦	1	3	0	2	4	17	89	70	12	7	♦	223
18	Cooper	0	♦	0	0	0	0	1	0	0	0	0	0	♦	1
	Pettis	0	♦	1	0	0	0	2	3	0	1	0	3	♦	10
	Circuit Total	0	♦	1	0	0	0	3	3	0	1	0	3	♦	11
19	Cole	5	♦	2	3	2	1	3	3	1	0	0	7	♦	27
	Circuit Total	5	♦	2	3	2	1	3	3	1	0	0	7	♦	27
20	Franklin	8	♦	2	0	6	0	9	16	0	0	0	1	♦	42
	Gasconade	0	♦	0	0	0	1	2	7	0	0	0	2	♦	12
	Osage	0	♦	0	4	1	0	1	0	0	0	0	0	♦	6
	Circuit Total	8	♦	2	4	7	1	12	23	0	0	0	3	♦	60
21	St. Louis County	57	♦	11	26	61	64	24	*	178	*	*	63	♦	484
	Circuit Total	57	♦	11	26	61	64	24	*	178	*	*	63	♦	484
22	St. Louis City	47	♦	2	8	8	31	13	81	0	0	0	18	♦	208
	Circuit Total	47	♦	2	8	8	31	13	81	0	0	0	18	♦	208
23	Jefferson	11	♦	5	11	14	3	13	54	0	2	0	22	♦	135
	Circuit Total	11	♦	5	11	14	3	13	54	0	2	0	22	♦	135
24	Madison	1	♦	0	0	0	0	1	3	0	0	0	4	♦	9
	St. Francois	0	♦	0	0	0	0	8	22	1	1	0	1	♦	33
	Ste. Genevieve	0	♦	0	0	1	0	0	6	0	0	0	2	♦	9
	Washington	0	♦	0	0	0	0	0	17	0	4	0	11	♦	32
	Circuit Total	1	♦	0	0	1	0	9	48	1	5	0	18	♦	83

Table 36
Circuit Court, FY 2007
Real Estate Cases Filed by Case Type

Cir. No.	County	Application-Enforce Mechanic's Lien	Emin. Domain/Condemn./ Exceptions	Emin. Domain/Condemn./ State	Emin. Domain/Condemn./ Other	Exception	Fore-Closure	Partition	Quiet Title	Rent and Possession	Unlawful Detainer	Landlord Complaint	JIS Other	SWJIS Other	Total Cases Filed
25	Manes	0	0	0	0	0	0	0	0	0	0	0	0	2	2
	Phelps	0	2	0	1	0	0	1	2	0	0	0	1	7	14
	Pulaski	1	0	0	0	0	0	0	0	0	1	0	7	4	13
	Texas	0	0	0	0	0	0	1	1	0	0	0	2	13	16
	Circuit Total	1	2	0	1	0	0	1	3	0	1	0	10	26	45
26	Camden	8	♦	2	1	0	21	2	27	0	4	0	21	♦	86
	Laclede	1	♦	0	1	0	0	1	6	0	0	0	4	♦	13
	Miller	3	♦	0	0	0	4	0	12	0	0	0	3	♦	22
	Moniteau	0	♦	1	0	0	1	0	0	0	0	0	1	♦	3
	Morgan	0	♦	0	0	0	1	0	14	0	0	0	4	♦	19
	Circuit Total	12	♦	3	2	0	27	3	59	0	4	0	33	♦	143
27	Bates	0	♦	0	0	0	0	2	4	0	0	0	0	♦	6
	Henry	0	♦	1	0	0	0	4	2	0	0	0	3	♦	10
	St. Clair	1	♦	0	0	1	0	1	3	0	1	0	0	♦	7
	Circuit Total	1	♦	1	0	1	0	7	9	0	1	0	3	♦	23
28	Barton	0	♦	0	0	0	0	0	1	0	0	0	3	♦	4
	Cedar	0	♦	0	0	0	1	0	1	0	1	0	1	♦	4
	Dade	0	♦	0	0	0	0	0	2	0	0	0	0	♦	2
	Vernon	0	♦	0	0	0	0	0	3	0	0	0	3	♦	6
	Circuit Total	0	♦	0	0	0	1	0	7	0	1	0	7	♦	16
29	Jasper	6	♦	0	4	1	3	6	18	2	0	0	8	♦	48
	Circuit Total	6	♦	0	4	1	3	6	18	2	0	0	8	♦	48
30	Benton	0	♦	0	0	0	0	0	11	0	0	0	0	♦	11
	Dallas	7	♦	1	0	0	0	0	4	0	1	0	3	♦	16
	Hickory	0	♦	0	0	0	0	1	3	0	0	0	2	♦	6
	Polk	0	♦	0	0	0	0	0	1	0	0	0	3	♦	4
	Webster	1	♦	1	0	0	0	1	5	1	0	0	2	♦	11
	Circuit Total	8	♦	2	0	0	0	2	24	1	1	0	10	♦	48
31	Greene	3	6	*	*	*	*	*	*	*	*	*	*	16	25
	Circuit Total	3	6	*	*	*	*	*	*	*	*	*	*	16	25
32	Bollinger	0	♦	1	0	0	0	2	0	0	1	0	3	♦	7
	Cape Girardeau	2	♦	4	0	2	0	5	3	1	2	3	8	♦	30
	Perry	0	♦	0	0	0	0	1	2	0	0	0	1	♦	4
	Circuit Total	2	♦	5	0	2	0	8	5	1	3	3	12	♦	41
33	Mississippi	1	♦	0	0	0	0	2	1	0	0	0	0	♦	4
	Scott	0	♦	1	0	1	0	4	6	1	1	0	7	♦	21
	Circuit Total	1	♦	1	0	1	0	6	7	1	1	0	7	♦	25
34	New Madrid	0	♦	0	0	0	0	1	2	0	0	0	1	♦	4
	Pemiscot	0	♦	0	1	0	2	1	1	0	0	0	1	♦	6
	Circuit Total	0	♦	0	1	0	2	2	3	0	0	0	2	♦	10
35	Dunklin	0	♦	0	0	0	1	2	6	0	0	0	3	♦	12
	Stoddard	0	♦	0	0	0	0	4	2	0	0	0	8	♦	14
	Circuit Total	0	♦	0	0	0	1	6	8	0	0	0	11	♦	26
36	Butler	1	♦	1	1	0	0	3	9	0	1	0	3	♦	19
	Ripley	0	♦	0	0	0	0	2	5	0	0	0	4	♦	11
	Circuit Total	1	♦	1	1	0	0	5	14	0	1	0	7	♦	30
37	Carter	0	♦	1	0	5	0	0	1	0	0	0	4	♦	11
	Howell	1	♦	0	1	2	0	0	2	0	0	0	13	♦	19
	Oregon	0	♦	0	0	0	1	0	4	0	0	0	1	♦	6
	Shannon	2	♦	1	0	5	0	1	4	0	0	0	3	♦	16
	Circuit Total	3	♦	2	1	12	1	1	11	0	0	0	21	♦	52
38	Christian	7	♦	0	0	0	2	1	9	0	1	0	2	♦	22
	Taney	11	♦	0	3	4	3	5	41	5	3	0	13	♦	88
	Circuit Total	18	♦	0	3	4	5	6	50	5	4	0	15	♦	110
39	Barry	0	♦	0	0	0	1	6	11	0	3	0	15	♦	36
	Lawrence	1	♦	0	0	1	0	1	18	0	0	1	1	♦	22
	Stone	6	♦	0	0	0	2	2	34	0	1	0	16	♦	61
	Circuit Total	7	♦	0	0	1	3	9	63	0	4	0	32	♦	119
40	McDonald	1	♦	0	0	0	0	1	8	0	1	0	6	♦	17
	Newton	2	♦	1	0	1	1	5	8	0	0	0	8	♦	26
	Circuit Total	3	♦	1	0	1	1	6	16	0	1	0	14	♦	43
41	Macon	0	♦	1	0	0	0	0	5	0	0	0	3	♦	16
	Shelby	0	♦	3	0	0	0	0	5	0	0	0	0	♦	8
	Circuit Total	0	♦	4	0	0	0	0	10	0	0	0	3	♦	24
42	Crawford	0	♦	0	0	0	0	1	5	0	1	0	3	♦	10
	Dent	0	♦	0	0	0	0	2	1	0	0	0	2	♦	5
	Iron	0	♦	0	0	0	0	1	1	0	0	0	3	♦	5
	Reynolds	0	♦	0	0	0	0	0	2	0	0	0	0	♦	2
	Wayne	0	♦	1	0	0	0	1	12	0	0	0	1	♦	15
	Circuit Total	0	♦	1	0	0	0	5	21	0	1	0	9	♦	37
43	Caldwell	1	♦	0	3	0	1	1	0	0	2	0	0	♦	8
	Clinton	3	♦	0	0	0	0	1	1	0	0	0	2	♦	7
	Daviess	0	♦	0	0	0	0	1	5	0	0	0	1	♦	7
	DeKalb	0	♦	0	2	0	1	0	2	0	0	0	0	♦	5
	Livingston	0	♦	0	0	0	0	1	2	0	0	0	0	♦	3
	Circuit Total	4	♦	0	5	0	2	4	10	0	2	0	3	♦	30
44	Douglas	1	♦	0	0	0	0	1	2	0	0	0	3	♦	7
	Ozark	0	♦	0	0	0	0	3	8	0	0	0	3	♦	14
	Wright	0	♦	0	1	0	0	0	5	0	0	0	3	♦	9
	Circuit Total	1	♦	0	1	0	0	4	15	0	0	0	9	♦	30
45	Lincoln	6	♦	0	0	0	0	3	10	0	0	0	3	♦	22
	Pike	1	♦	0	0	0	0	1	5	1	0	0	4	♦	12
	Circuit Total	7	♦	0	0	0	0	4	15	1	0	0	7	♦	34
	STATE TOTAL	317	8	93	160	184	218	225	819	298	115	20	548	42	3,045

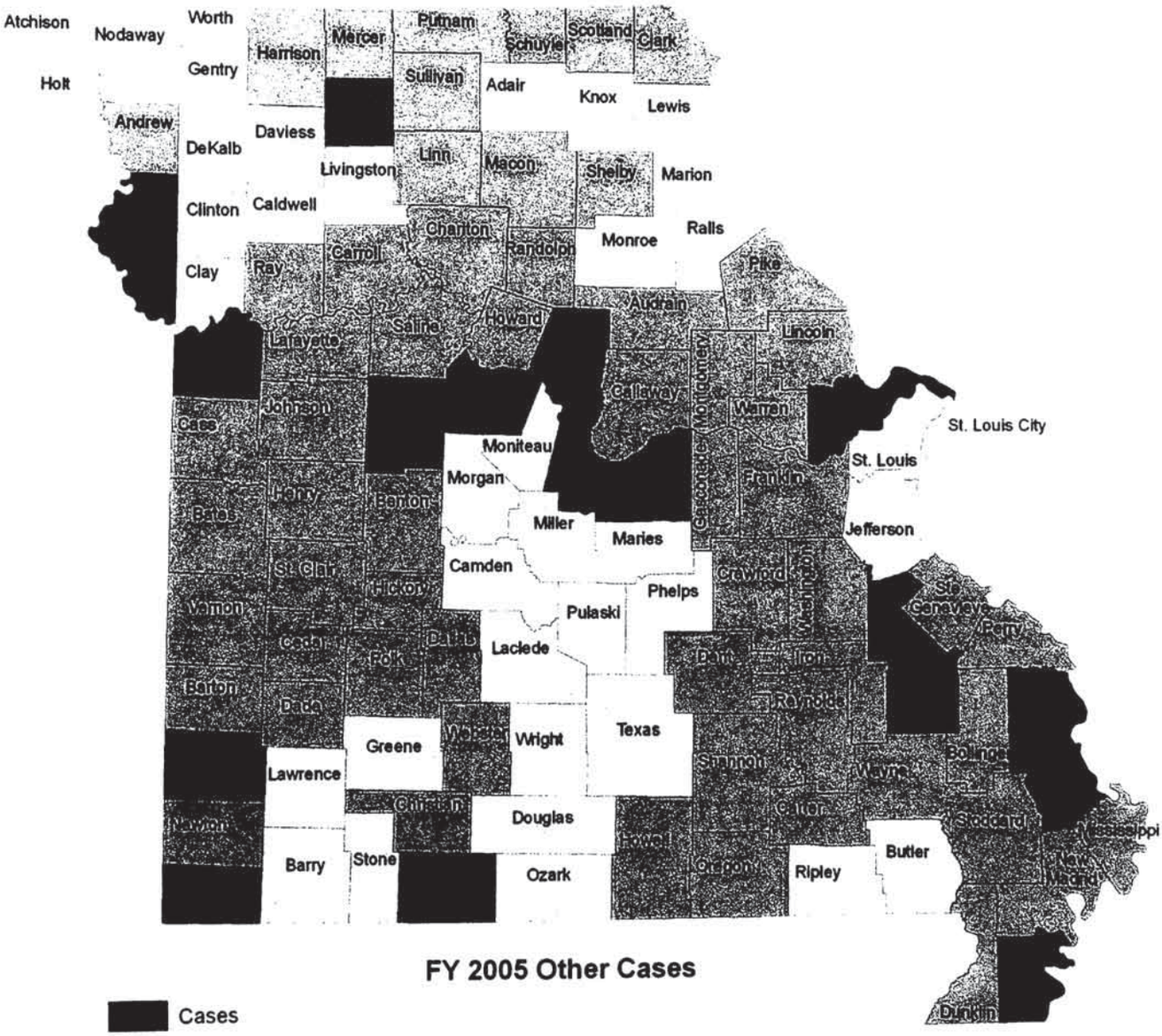
* Case type is unique to the Justice Information System (JIS). This court does not use JIS.
♦ Case type is unique to the Statewide Judicial Information System (SWJIS). This court does not report to SWJIS.
Note: Counties with data in all case types were using both systems during the fiscal year.

APPENDIX B

Missouri Condemnation by County

Fiscal Years 2005-2008

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



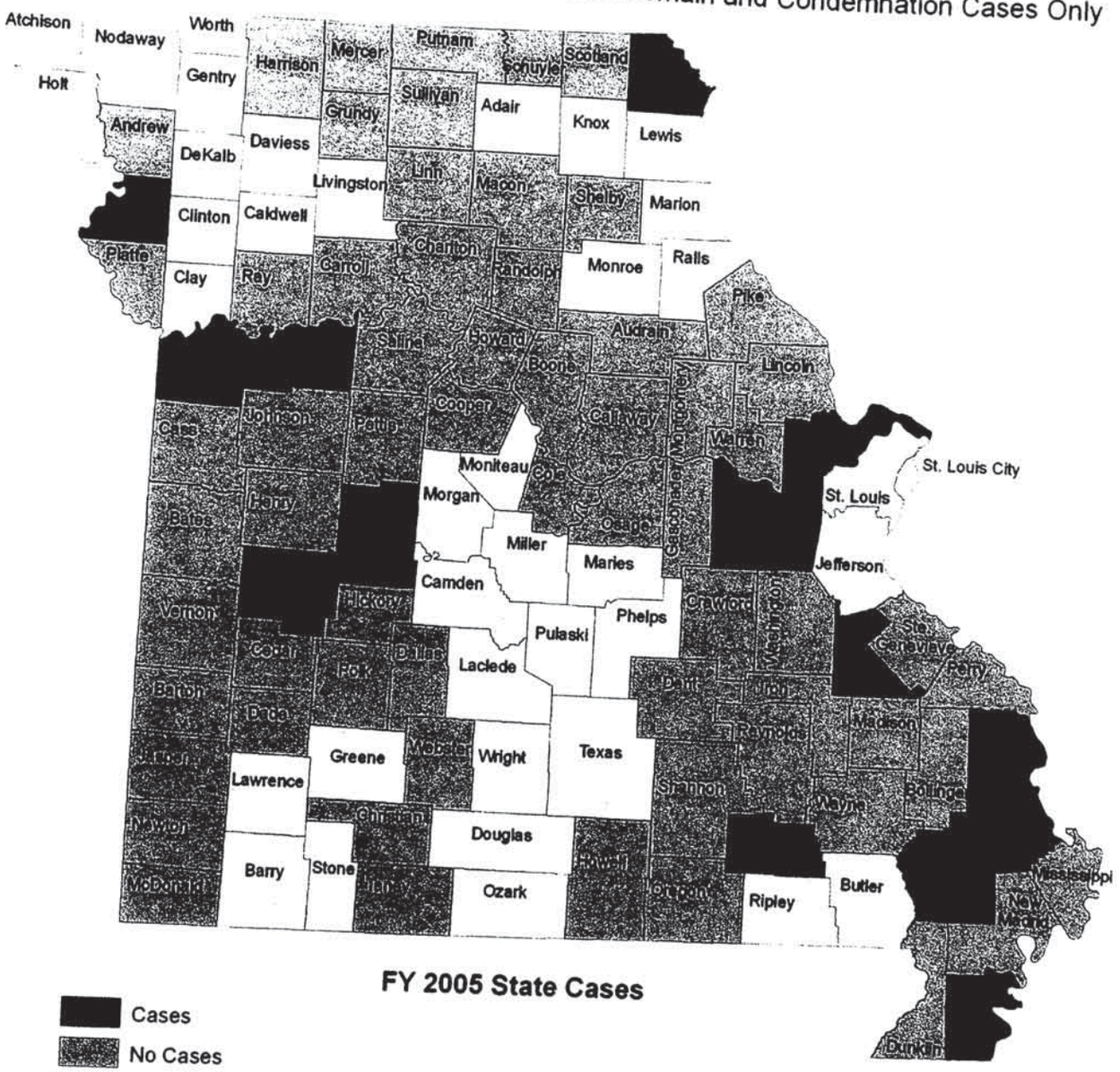
FY 2005 Other Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



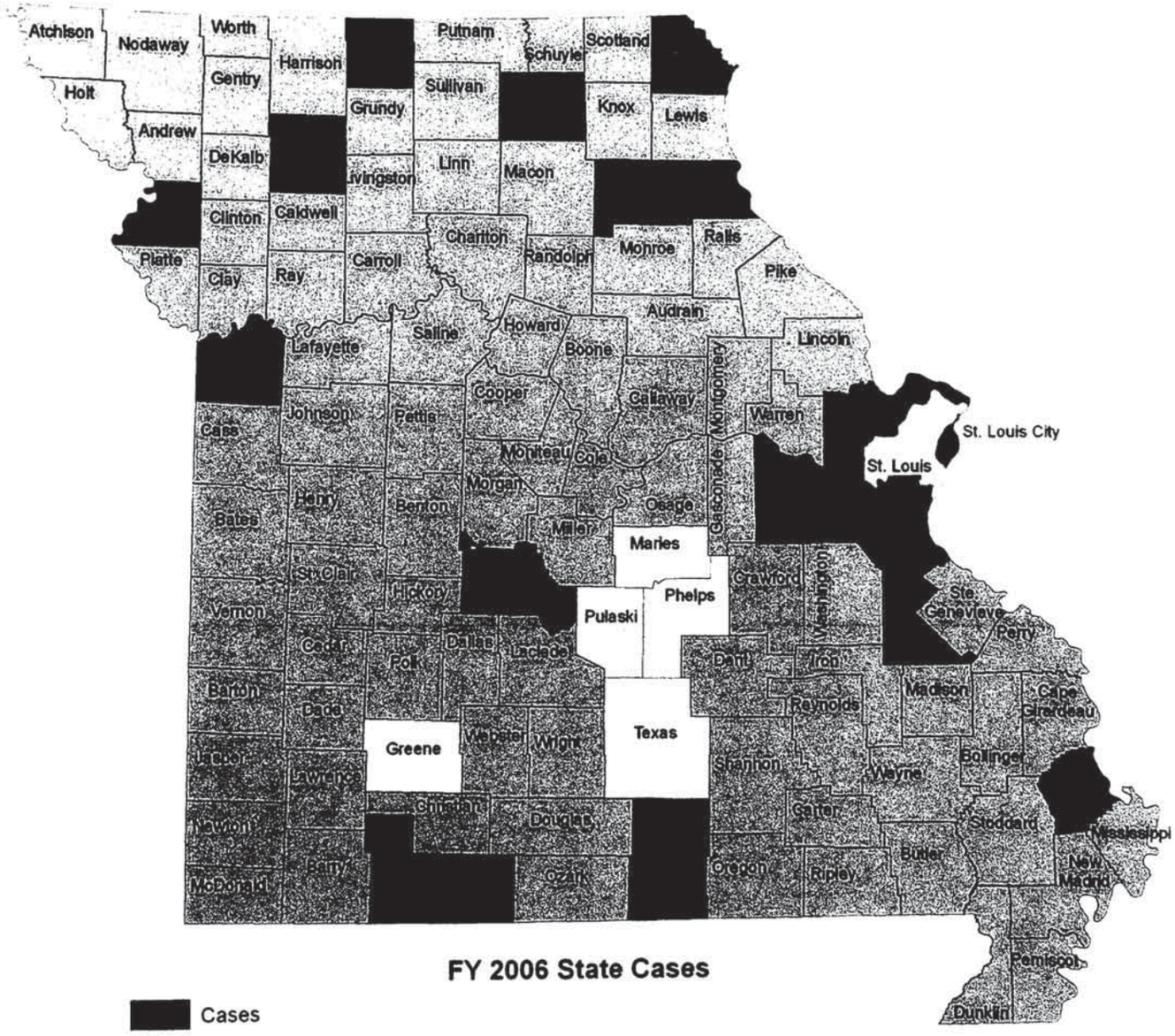
FY 2005 State Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



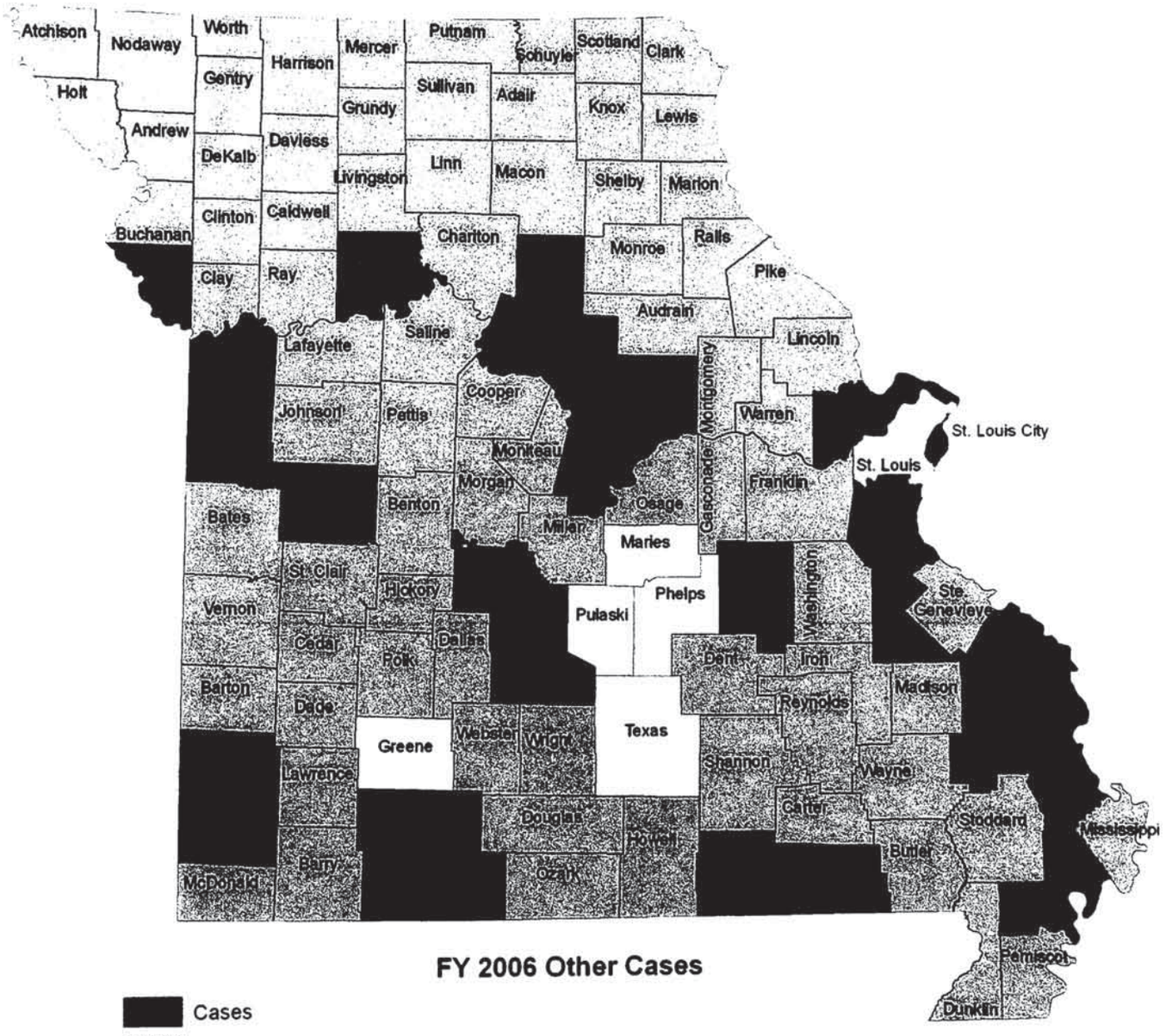
FY 2006 State Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



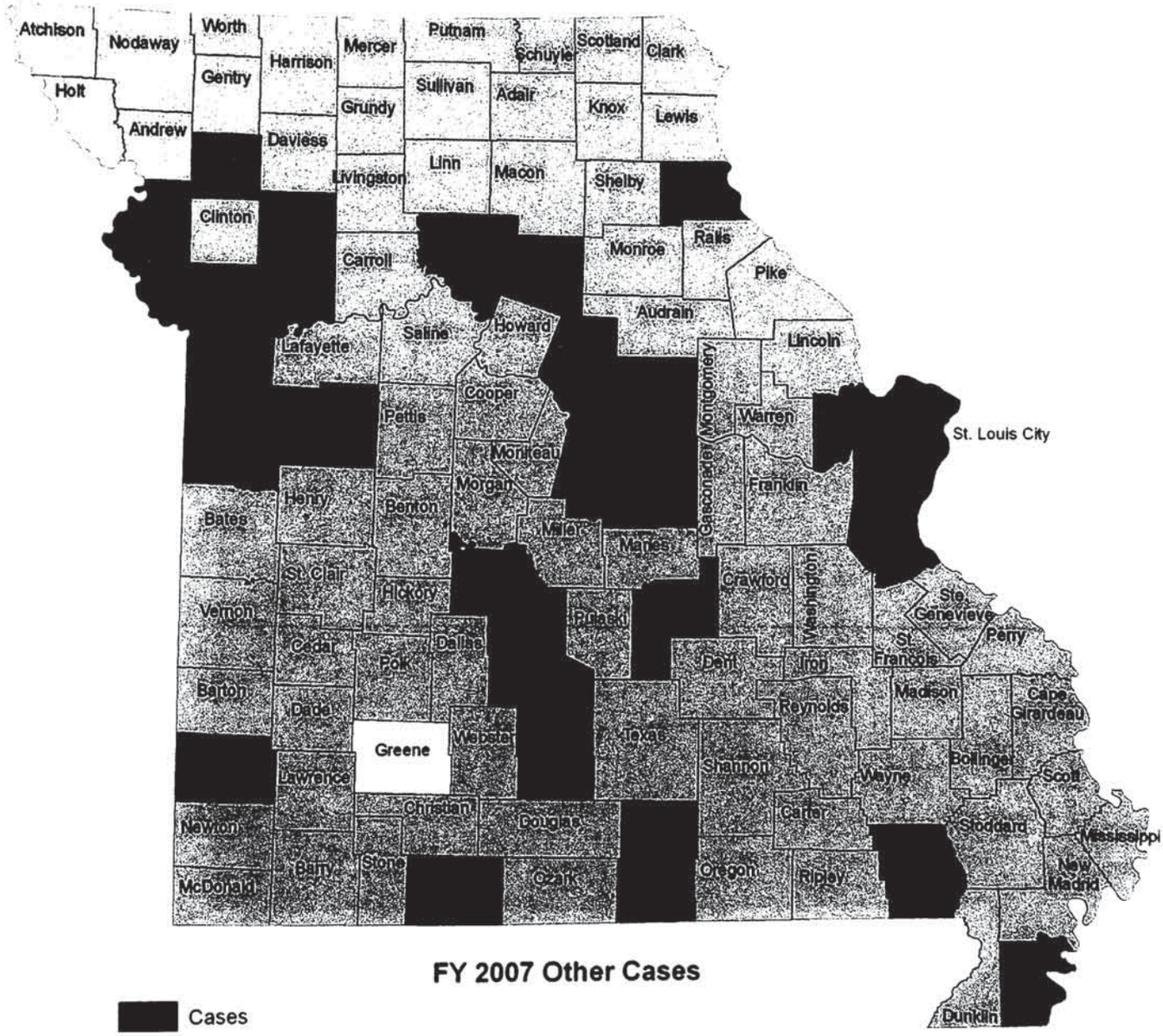
FY 2006 Other Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



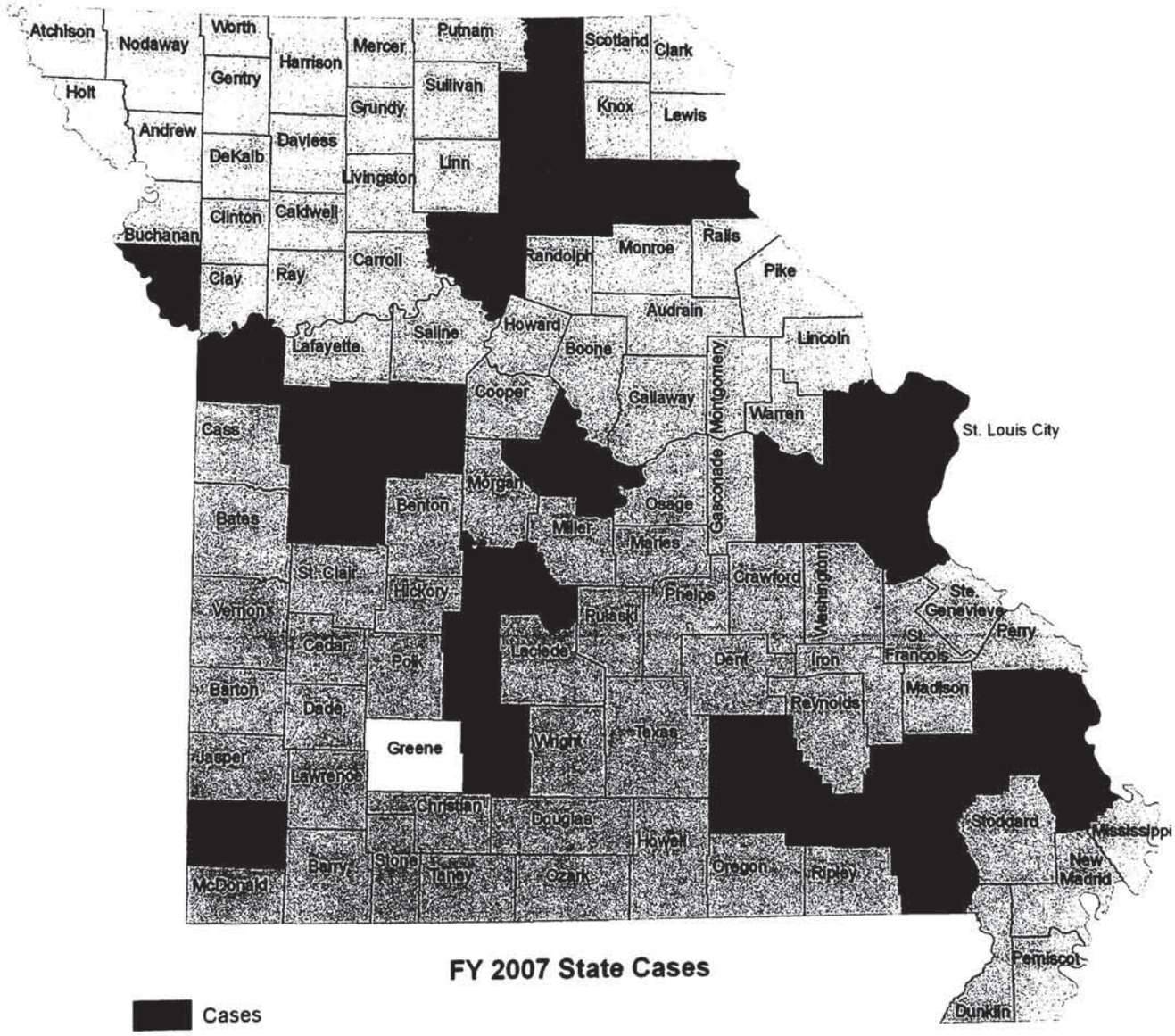
FY 2007 Other Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



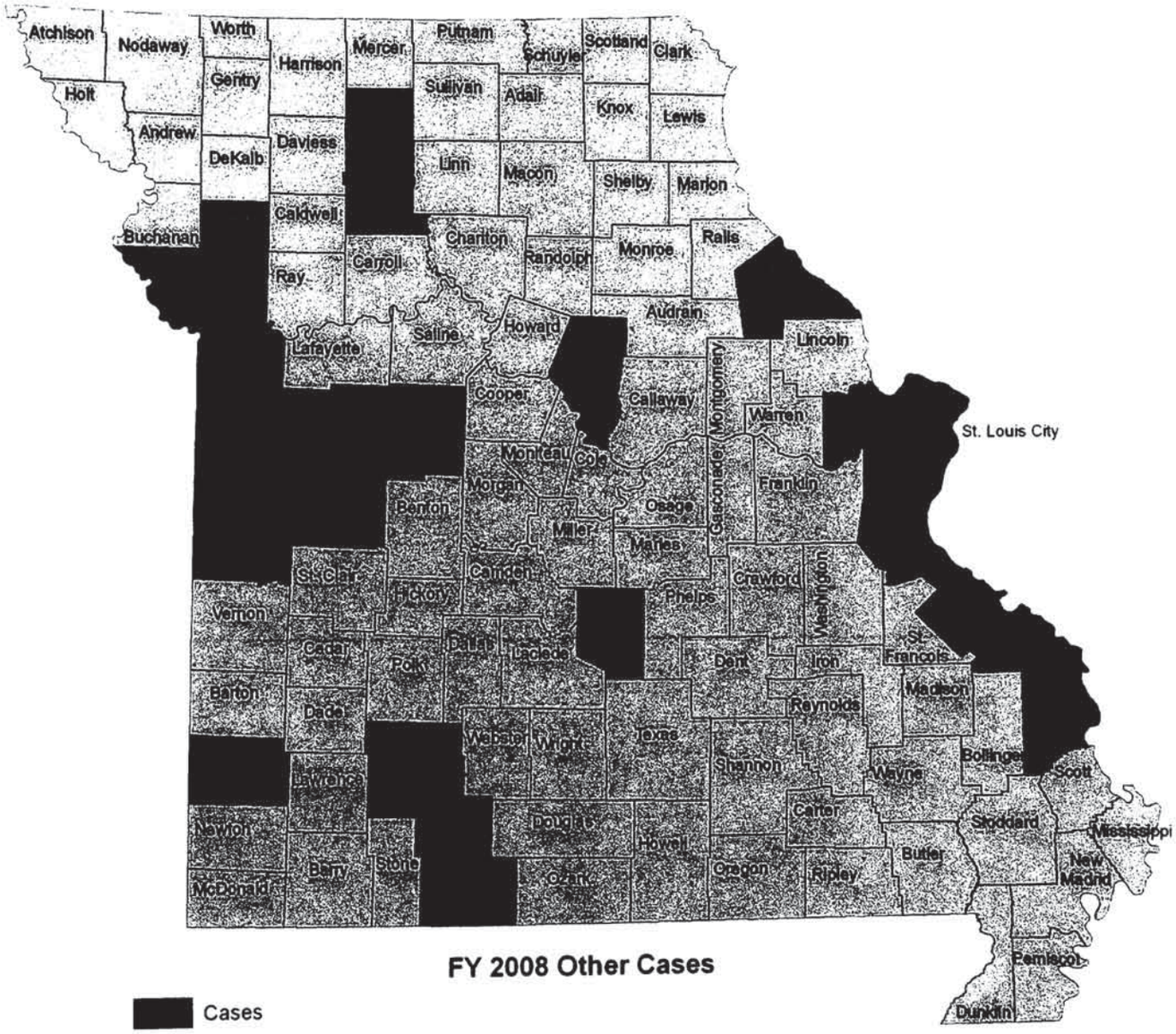
FY 2007 State Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



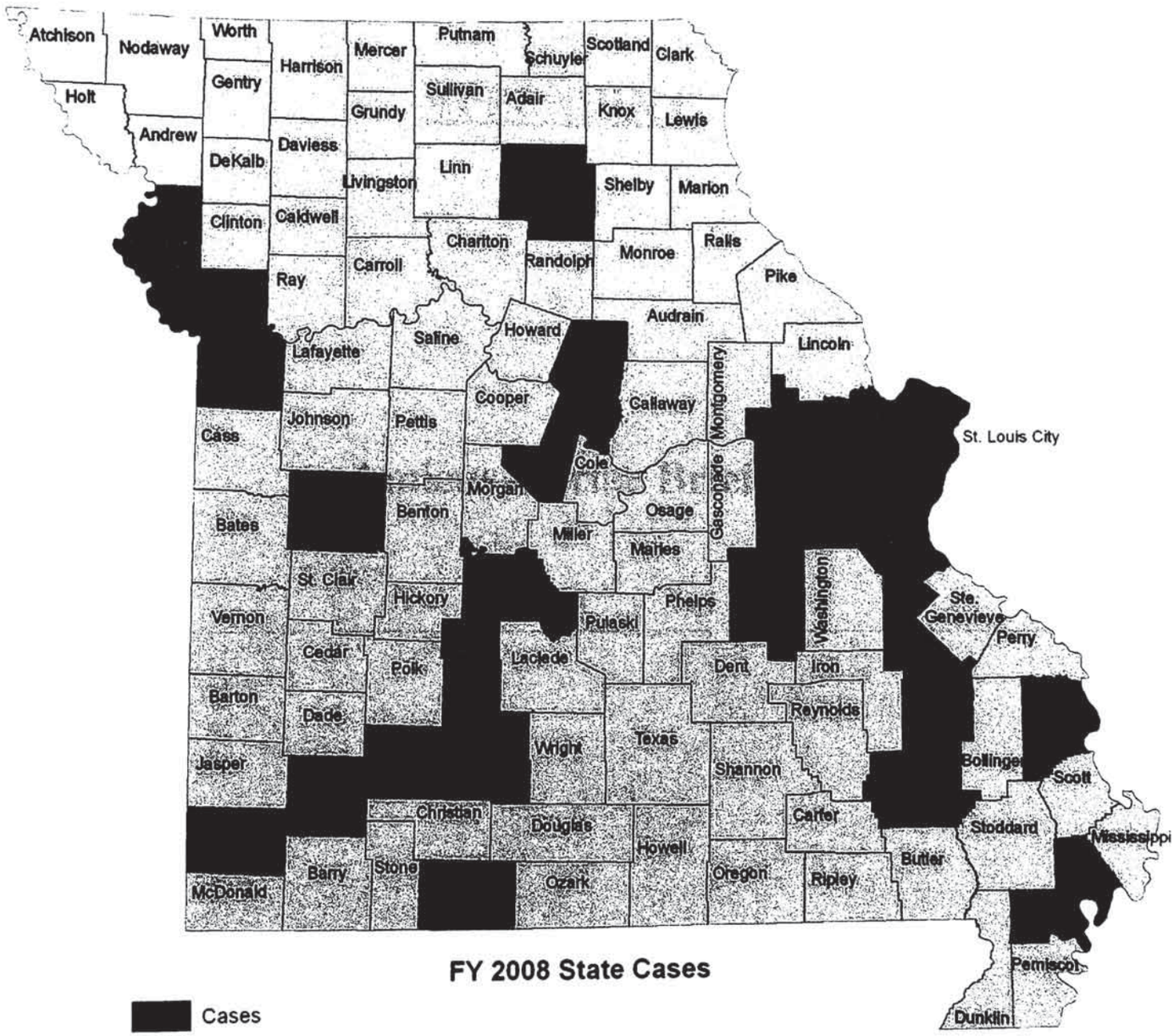
FY 2008 Other Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

Real Estate Cases Filed by Case Type - Eminent Domain and Condemnation Cases Only



FY 2008 State Cases

Cases

No Cases

Case type is unique to the Justice Information System (JIS). This court does not use JIS.

APPENDIX C

Amicus Curiae Briefs

IN THE SUPREME COURT OF MISSOURI

NO. SC88647

CITY OF ARNOLD,
Plaintiff-Appellant,
v.
HOMER TOURKAKIS, ET AL.,
Respondents,
and
AMERENUE, ET AL.,
Defendants.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
The Honorable M. Edward Williams

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE AND THE OFFICE OF THE OMBUDSMAN FOR PROPERTY RIGHTS IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

This brief is presented by both the Institute for Justice and the Office of the Missouri Ombudsman for Property Rights. All parties have consented to the Institute for Justice filing a brief in this matter pursuant to Supreme Court Rule 84.05(f), and all parties except the City of Arnold have consented to the Office of the Ombudsman for Property Rights filing a brief in this matter. Because of the City's objection, the Institute and the Ombudsman are filing a joint motion pursuant to Rule 84.05(f)(3) asking this Court to allow the filing of this brief.

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights" and that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

Among other constitutional issues, the Institute for Justice litigates property rights cases throughout the country in both state and federal courts. For the past decade, the Institute has regularly represented property owners fighting condemnation of their homes or businesses for the benefit of private parties. The Institute represented homeowners from New London, Connecticut, in the controversial case of *Kelo v. City of New London*, 545 U.S. 469 (2005). It was also lead counsel for home and business owners in *City of Norwood v. Horney*,

853 N.E.2d 1115 (Ohio 2006), in which a unanimous Ohio Supreme Court interpreted the Ohio Constitution to forbid takings for private development. The Institute has also filed *amicus curiae* briefs in important eminent domain cases throughout the country, including in the highest courts of Connecticut, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, and Oklahoma, the United States Courts of Appeals for the Fifth and Ninth Circuits, and the U.S. Supreme Court.

The Office of the Missouri Ombudsman for Property Rights was established as part of the Missouri eminent domain reform law passed on May 5, 2006, and signed into law by Governor Matt Blunt.

On June 23, 2005, Governor Blunt appointed a task force to study eminent domain issues in the wake of *Kelo*. The Governor charged the task force with conducting a thorough review of federal and state eminent domain laws to protect Missouri home, farm and business owners from falling victim to government tax grabs. Specifically, Governor Blunt ordered the task force to make recommendations when the proposed public use of the property being acquired by eminent domain is not directly owned or primarily used by the general public. This task force recommended the establishment of the Office of the Ombudsman for Property Rights.

The Missouri Ombudsman for Property Rights is tasked with documenting issues regarding the use of eminent domain across Missouri as well as assisting

citizens by providing guidance to individuals seeking information regarding the condemnation process in Missouri.

INTRODUCTION AND SUMMARY

The City of Arnold, a non-charter city, seeks to use eminent domain to take Homer and Julie Tourkakis's property so that a private developer can build a shopping center. The City claims that the Real Property Tax Increment Allocation Redevelopment Act ("the TIF Act"), Mo. Rev. Stat. §§ 99.800 *et seq*. (2007), allows it to condemn property in a so-called "blighted" area; however, as the trial court correctly ruled, the TIF Act conveys no eminent domain powers to non-charter cities. The trial court's ruling is supported by the fact that, across the country, courts strictly construe purported grants of eminent domain authority against condemnors. Furthermore, if Arnold were to prevail in this case, the specter of condemnations for private use in the name of "blight" removal would, without clear legislative sanction, expand to cover all non-charter cities in Missouri. Accordingly, the decision of the trial court should be affirmed.

STATEMENT OF FACTS

Homer Tourkakis is a long-time small business owner in Arnold.[1] Homer has run his dental office, where his wife Julie works as an assistant, for almost twenty years. In 2005, the City of Arnold, which is a non-charter city, agreed with

[1] This recitation of facts is drawn from the trial court's decision and the briefs filed by the Tourkakises in the trial court.

THF Realty ("THF") that THF would build a large shopping center where the Tourkakis' property now stands. The City labeled the Tourkakis' well-maintained property and the surrounding area "blighted" under the TIF Act. Then, claiming that the TIF Act allowed it to use eminent domain, Arnold filed a condemnation action against the Tourkakises so that it could take their property and transfer it to THF. The Tourkakises did not want to lose their property to eminent domain, so they fought the condemnation. The trial court held that the TIF Act does not grant non-charter cities like Arnold the ability to use eminent domain for "blight" removal, and thus dismissed the condemnation action. This appeal by Arnold followed.

POINT RELIED ON

The opinion of the trial court should be affirmed because, as courts across the country have uniformly recognized, purported grants of eminent domain authority should be strictly construed against condemnors, and a strict construction of the TIF Act does not allow a finding that the Legislature authorized non-charter cities to use eminent domain for "blight" removal under the Act.

Mo. Rev. Stat. § 99.820.1(3) (2007)

Article VI, Section 21 of the Missouri Constitution

Centene Plaza Redevelopment Corp. v. Mint Properties, 225 S.W.3d 431 (Mo. banc 2007)

State ex rel. Missouri Water Co. v. Hodge, 878 S.W.2d 819 (Mo. banc 1994)

ARGUMENT

The opinion of the trial court should be affirmed because, as courts across the country have uniformly recognized, purported grants of eminent domain authority should be strictly construed against condemnors, and a strict construction of the TIF Act does not allow a finding that the Legislature authorized non-charter cities to use eminent domain for "blight" removal under the Act.

A. Courts Across the Country Strictly Construe Statutes That Condemnors Claim Grant Them the Authority to Use Eminent Domain.

In Missouri and across the country, when a government entity such as a city or redevelopment authority asserts that a statute is a legislative grant of power authorizing it to use eminent domain, courts always strictly construe the language of the statute against that entity. *See, e.g., Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431, 434-35 (Mo. banc 2007) (strictly construing definition of "blighted" area in [Mo. Rev. Stat. § 353.020] to include a "social liability" that takes into account the health safety, and welfare of the public rather than economic benefits of future development); *State ex rel. Missouri Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo. banc 1994) ("Statutes delegating this right [of eminent domain] are strictly construed."); Nichols on Eminent Domain § 3.03[6][b] (3rd ed. 2006) (collecting cases from across the country in which grants of eminent domain authority have been strictly construed against condemnors); *see also* the cases cited *infra* on pages 6-9.

Courts in other states routinely apply this rule of construction to statutory language in order to block condemnations in situations where cities or redevelopment authorities have claimed eminent domain authority beyond what has been clearly granted to them by that language. *See, e.g., Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 924 A.2d 447, 464-65 (N.J. 2007) (refusing to construe definition of "in need of redevelopment" in statute so broadly as to allow condemnation of economically unproductive property); *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 339 (Md. 2007) (refusing to allow quick-take condemnation because city failed to demonstrate that it was "necessary" for it to have "immediate possession" and "immediate … title" as required by statute); *Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc.*, 630 S.E.2d 505, 512-13 (Va. 2006) (redevelopment authority could not use eminent domain for blight because its redevelopment plan "contain[ed] authorization for acts beyond those delegated" by statute); *Arvada Urban Renewal Authority v. Columbine Professional Plaza Ass'n*, 85 P.3d 1066, 1072-73 (Colo. 2004) (holding that redevelopment authority did not have statutory authority to condemn property for blight removal because there was not, as required by statute, a new determination that the property was blighted); *Aposporos v. Urban Redevelopment Commission*, 790 A.2d 1167, 1175-77 (Conn. 2002) (holding that redevelopment agency could not use eminent domain because it had not conducted hearing required by statute); *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 154 (Alaska 2002) (holding that city did not meet statutory

prerequisite to exercise of eminent domain authority granted under statute); *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 232-34 (Del. 1987) (holding that parking authority's attempted use of eminent domain was beyond what was conferred to it by statute).

When applying the rule of strict construction, courts often find that cities or redevelopment agencies are relying on statutes that, because they do not provide a clear grant of eminent domain authority, confer no such authority of any kind. *See, e.g., City of Midwest City v. House of Realty, Inc.*, 100 P.3d 678, 690 (Okla. 2004) (holding that city could not use eminent domain for blight removal because the statute upon which it relied did not expressly give it that authority); *GTE Northwest, Inc. v. Public Utility Commission of Oregon*, 900 P.2d 495, 500-01 (Or. 1995) (holding that public utility commission (PUC) could not use eminent domain because "no section of [Or. Rev. Stat. § 759.580] contains an express grant of authority to the PUC to act in eminent domain generally or in regard to LEC's property"); *Board of County Comm'rs of the County of Arapahoe v. Intermountain Rural Electric Association*, 655 P.2d 831, 833-34 (Colo. 1982) (holding that county could not use eminent domain to acquire office space for district attorney because statute did not clearly authorize that use); *City of Little Rock v. Raines*, 411 S.W.2d 486, 491-93 (Ark. 1967) (holding that city could not use eminent domain to take property for an industrial park because neither constitutional provisions nor statutes could be interpreted as granting power to it); *Cowlitz County v. Martin*, 165 P.3d 51, 56 (Wash. Ct. App. 2007) (barring

county's use of eminent domain for the improvement of salmonid fish runs because statute relied upon by county did not grant eminent domain authority to county); *Eighth & Walnut Corp. v. Public Library of Cincinnati*, 385 N.E.2d 1324, 1326-27 (Ohio Ct. App. 1977) (rejecting argument by public library that it could condemn property under certain statutes because those statutes did not authorize use of condemnation power).

Courts strictly construe purported grants of eminent domain authority against condemnors because they recognize that eminent domain is a harsh power whose exercise is in derogation of citizens' property rights and that applying the rule of strict construction prevents government overreaching. *See, e.g., Board of County Comm'rs of Muskogee County. v. Lowery*, 136 P.3d 639, 647 (Okla. 2006) ("We adhere to the strict construction of eminent domain statutes in keeping with our precedent, mindful of the critical importance of the protection of individual private property rights as recognized by the framers of both the U.S. Constitution and the Oklahoma Constitution."); *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 631 N.W.2d 131, 245 (Neb. 2001) ("The power of eminent domain must be exercised in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right.") (internal quotation marks omitted); *Baycol, Inc. v. Downtown Dev. Authority of City of Ft. Lauderdale*, 315 So.2d 451, 455 (Fla. 1975) ("The power of eminent domain is one of the most harsh proceedings known to law. Consequently, when the sovereign delegates this power to a

political unity or agency, a strict construction must be given against the agency asserting the power."); *Orsett/Columbia L.P. v. Superior Court ex rel. Maricopa County*, 83 P.3d 608, 611 (Ariz. Ct. App. 2004) ("[A] policy of strict construction protects private property rights from overreaching by the government.").

Furthermore, the rule of strict construction has an important constitutional dimension: Courts are concerned when political subunits claim eminent domain authority outside of a clearly stated grant of power by a state legislature based on that legislature's finding of a public use. When subunits condemn property outside such a grant, it is less likely that property is actually being taken for a true public use. *See, e.g., Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445, 449-67 (7th Cir. 2002) (local planning commission's use of eminent domain without a determination of public use by state legislature violated Fifth Amendment); *Arvada*, 85 P.3d at 1073; (holding that redevelopment authority lacked statutory authorization to use eminent domain and stating that a lack of a statutorily recognized public purpose for use of eminent domain raises specter of private property being taken for private use). Applying the rule of strict construction lessens that danger by ensuring that only political subunits with clear grants of eminent domain authority can condemn.

B. Strictly Construed, the TIF Act Does Not Grant to Non-Charter Cities the Ability to Use Eminent Domain for "Blight" Removal.

In this case, strict construction of the TIF Act precludes a finding that it gives Arnold and other non-charter cities the power of eminent domain for blight removal. The relevant provision of the statute provides that municipalities may do the following:

> Pursuant to a redevelopment plan, *subject to any constitutional limitations*, acquire by purchase, donation, lease or, as part of a redevelopment project, eminent domain, own, convey, lease, mortgage, or dispose of, land and other property, real or personal, or rights or interests therein, and grant or acquire licenses, easements and options with respect thereto, all in the manner and at such price the municipality or the commission determines is reasonably necessary to achieve the objectives of the redevelopment plan.

Mo. Rev. Stat. § 99.820.1(3) (2007) (emphasis added).

The phrase "subject to any constitutional limitations" signals that the Legislature has not attempted to grant eminent domain authority to non-charter cities, which do not possess inherent authority to use eminent domain for blight removal. For the reasons articulated by the trial court and Homer and Julie

Tourkakis, Article VI, Section 21, of the Missouri Constitution should not be interpreted as allowing the Legislature to grant eminent domain authority for blight removal to non-charter cities. However, even if Article VI, Section 21, of the Missouri Constitution did allow the Legislature to grant to non-charter cities the ability to use eminent domain for blight removal, nothing in that provision could be read as stating that the Legislature *must* grant that authority to non-charter cities. Without such a grant, the constitutional baseline for non-charter cities, in the absence of a clear law providing eminent domain authority for non-charter cities, is a lack of that authority.

Strictly construed, the phrase "subject to any constitutional limitations" is an explicit acknowledgement of that baseline; it recognizes that non-charter cities will not be able to use eminent domain pursuant to the TIF Act. This court should decline Arnold's and its amici's invitation to render the phrase meaningless by reading it out of the statute. *See, e.g., Centene Plaza Redevelopment Corp.*, 225 S.W.3d at 435 (refusing to render the term "social liability" in [Mo. Rev. Stat. § 353.020] meaningless by equating it with "economic liability); *Mayor and City Council of Baltimore City*, 916 A.2d at 347-48 (Md. 2007) (refusing to read out of statute language requiring that City demonstrate that it is "necessary" for it to have "immediate possession" and "immediate … title"); *Norfolk Redevelopment and Housing Authority*, 630 S.E.2d at 512 (refusing to read out statutory language requiring that properties subject to condemnation must be "infeasible of rehabilitation" and to substitute redevelopment authority's plan's use of "appear

infeasible of rehabilitation"). Reading "subject to any constitutional limitations" out of the statute would allow non-charter cities to use eminent domain under the TIF Act for "blight removal" without a clear declaration from the Legislature that, for them, such a use is proper – i.e., does not constitute a private use.

Notably, "subject to any constitutional limitations" does not appear in any of the urban renewal statutes that Arnold and its amici claim would be imperiled by a ruling for Tourkakis: the Land Clearance for Redevelopment Authority Law, Mo. Rev. Stat. §§ 99.300 *et seq.* (2007), The Planned Industrial Expansion Law, Mo. Rev. Stat. §§ 100.300 *et seq.* (2007), and The Urban Redevelopment Corporations Law, Mo. Rev. Stat. §§ 353.010 *et seq.* (2007). Other state supreme courts in similar situations, as part of a strict construction analysis, have found significant the differences between a purported statutory grant of eminent domain authority and other eminent domain statutes, especially when the latter are very similar to one another and the former is an outlier. *See, e.g.*, *City of Midwest City*, 100 P.3d at 689 ("The absence of a grant of authority to condemn property in the Local Development Act is consistent with that Act's absence of protections for landowners [which are found in Oklahoma's other urban renewal laws]."); *Board of County Comm'rs of the County of Arapahoe*, 655 P.2d at 833-34 (presence of express grants of eminent domain authority for other purposes in other statutes indicated that legislature did not intend to grant eminent domain authority for the purpose of acquiring office space in a statute that lacked such a grant). Thus, contrary to the assertion of Arnold and its amici, a strict construction of the

language of the TIF Act here would not have any negative implications for those statutes. Nor would it prevent non-charter cities from using the TIF Act to finance redevelopment projects and acquire properties without using eminent domain. And, of course, charter cities such as Kansas City and St. Louis will certainly be able to continue to use eminent domain to address "blight," a concept whose genesis is rooted in big cities rather than rural or small-town areas.[2]

Furthermore, if the Legislature had intended for non-charter cities to be able to use eminent domain for "blight" removal, then it surely would have, *as it did in the three urban renewal acts mentioned in the prior paragraph*, specified the procedures by which entities that have not received a grant of eminent domain

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[2] *See, e.g., Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 639 (Mo. banc 1966) (describing eradication of slums and blight as "urban renewal" for "great cities" that have grown up as a result of the transition from the agricultural age to the industrial age); Wendell E. Pritchett, The Public Menace of "Blight": Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 16 (2003) (describing origination of the use of the term "blight" by the Chicago school of sociology to describe urban areas: "Cities were like living organisms, the Chicago school argued, and, therefore, urban change occurred in natural patterns. Blight arose around the central business district, in areas that were formerly residential. As cities expanded, these areas became mixed use districts, with industry and commerce.").

authority from another source – i.e., non-charter cities – could exercise that authority.[3] The absence of a grant of authority to non-charter cities in the TIF Act is consistent with the Act's absence of a specification of eminent domain procedures that non-charter cities should follow.

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[3] *See* Mo. Rev. Stat. § 99.460.1 (Land Clearance for Redevelopment Law) ("An authority may exercise the power of eminent domain in the manner and *under the procedure provided for corporations in chapter 523, RSMo, and acts amendatory thereof or supplementary thereto.*") (emphasis added); Mo. Rev. Stat. § 100.420.1 (The Planned Industrial Expansion Law) ("Any authority may exercise the power of eminent domain in the manner and *under the procedure provided for corporations in chapter 523, RSMo, and acts amendatory thereof or supplementary thereto.*") (emphasis added); Mo. Rev. Stat. § 353.130.3 (The Urban Redevelopment Corporations Law) ("An urban redevelopment corporation operating pursuant to a redevelopment agreement with a municipality for a particular redevelopment area, which agreement was executed prior to or on December 31, 2006, may exercise the power of eminent domain in such redevelopment area *in the manner provided for corporations in chapter 523, RSMo; or it may exercise the power of eminent domain in the manner provided by any other applicable statutory provision for the exercise of the power of eminent domain.*") (emphasis added).

C. A Decision in Favor of Arnold Would, Without Legislative Sanction, Expand the Potential For the Abuse of Eminent Domain For Private Use in Missouri.

As noted above, the suggestion by Arnold and its amici that a ruling for Tourkakis would have broad implications that would imperil the existence of Missouri's urban renewal statutes is clearly wrong. However, a decision in favor of the City of Arnold would have broad implications that would adversely impact home and business owners throughout the state who live in non-charter cities. If this Court accepts the invitation of Arnold and its amici to read into the TIF Act a grant of eminent domain authority to non-chartered cities, other non-chartered cities will suddenly – and without explicit authorization by the Legislature – have the green light to use eminent domain for "blight" removal under the TIF Act. Unfortunately, many Missouri cities have a long history of abusing eminent domain by labeling perfectly fine properties blighted so that they can be transferred to private developers who promise to generate more tax dollars. *See, e.g.*, Dana Berliner, Public Power, Private Gain (Institute for Justice, 2003), *available at* http://www.castlecoalition.org/publications/report/index.html, at 117-123; Dana Berliner, Opening the Floodgates: Eminent Domain Abuse in a Post-Kelo World (Institute for Justice, 2006), *available at* http://www.castlecoalition.org/publications/floodgates/index.html. Indeed, since the U.S. Supreme Court's infamous decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which held that private economic development is a "public use"

under the Fifth Amendment to the U.S. Constitution, there have been in Missouri over six hundred instances of filed, authorized, or threatened condemnations for the benefit of private developers. *See* Opening the Floodgates, at 57-65. The definition of "blighted area" in the TIF Act is so broad that it can encompass almost any neighborhood in the state.[4] Fortunately for residents of non-charter cities, however, the Legislature has not, for the reasons explained above,

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[4] Mo. Rev. Stat. § 99.805(1) (2007) defines "blighted area" as:

> [A]n area which, by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.

Notably, unlike in Mo. Rev. Stat. § 353.020 (2007), which was at issue in *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007), a blighted area need not constitute both an economic and social liability under the TIF Act.

attempted to extend the reach of "blight" condemnations to non-charter cities through the TIF Act.

But now Arnold is pushing the legal envelope in order to gain blight-condemnation powers – not through the Legislature, but through this litigation. Another non-charter city, Sugar Creek, a small town located between Kansas City and Independence, is following closely in Arnold's footsteps. Under the guise of seeking to remove "blight," Sugar Creek is preparing to condemn a working-class neighborhood so that a private developer can build a big-box retail complex there. *See* David Martin, *Grocery Sacked*, THE PITCH, May 10, 2007, *available at* http://www.pitch.com/2007-05-10/news/grocery-sacked/full (last visited Nov. 25, 2007); Hugh Welsh, *Attorney Takes Up Cause*, INDEPENDENCE EXAMINER, October 3, 2007, *available at* http://examiner.net/stories/100307/new_204924858.shtml (last visited Nov. 25, 2007). If Arnold prevails in this case, nothing will stop Sugar Creek from moving forward with its plans to enrich its tax base at the expense of its long-term residents.

These residents include Penelope Marth, whose grandfather built several homes in Sugar Creek. She lives in one of the homes, the same one in which her mother was raised. Up the street from Penelope live two widows. Josie Webster, who struggles with health problems, has lived in her home for over twenty years. Eleanor Miller raised five children in her immaculately-maintained ranch home that she has lived in for forty-eight years. Jerry McGinnis, a dump truck driver

who enjoys restoring classic American cars in his large attached garage, lives nearby.

All of these people are proud of their homes and take good care of them but, according to Sugar Creek, they live in a "blighted" area. Much of the evidence of "blight" involves conditions over which residents have no control, such as cracked sidewalks and potholes. *See* Blight Study: *Sugarland at Sugar Creek in* Sugarland Center Tax Increment Financing Plan: Sugar Creek, Missouri (King Hershey, PC 2007), at 9 and 15. Other "blight" factors include off-street parking in front of homes and the fact that, through no fault of property owners, the zoning of their property has changed. *See id.* at 9 and 18. The finding of blight appears to have been a foregone conclusion, especially since the project developer entered into a lease with a grocery store to occupy part of the development before the Tax Increment Financing Plan and blight study were published. *See* Sugarland Center Tax Increment Financing Plan: Sugar Creek, Missouri (King Hershey, PC 2007), at 2.

Like Arnold, Sugar Creek is attempting to rely on the TIF Act as a basis for eminent domain authority for "blight" removal even though the Act does not grant that authority to it. Fortunately, a strict construction of the TIF Act forbids such a result. A decision to the contrary will open the floodgates to more abuse of eminent domain for private use in a state that, unfortunately, has seen more than its fair share.

CONCLUSION

The rule of strict construction of purported grants of eminent domain authority requires that the decision of the trial court be affirmed. The Legislature did not confer eminent domain authority on non-charter cities in the TIF Act. Not only would a ruling for Arnold read the words "subject to any constitutional limitations" out of the TIF Act, it would also expose the residents of all non-charter cities in Missouri to the abuse of eminent domain for private development under the guise of "blight" removal.

Respectfully submitted,

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RULE 84.06(c) AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief contains no more than 4,428 words, excluding the cover, certificate of service, certification required by Rule 84.06(c), and signature block, and was prepared using Microsoft Word. The font is Times New Roman of 13-point type and proportional spacing. A CD-ROM, scanned for viruses and virus free, containing the full text of this brief has been created for the Court and each counsel of record for service accompanying the physical brief.

I hereby certify that a true and correct copy of the foregoing *Amicus Curiae* Brief of the Institute for Justice and the Office of the Ombudsman for Property Rights in Support of Respondents, along with a CD-ROM containing the same was mailed, postage prepaid, to the following counsel of record on the ___day of November, 2007:

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IN THE SUPREME COURT OF MISSOURI

STATION INVESTMENTS #10 REDEVELOPMENT CORPORATION, et al.,
Appellants,

v.

CORTEX WEST DEVELOPMENT CORPORATION,
Respondent.

On Transfer from the Missouri Court of Appeals
Case No. ED90935

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, THE OFFICE OF THE MISSOURI OMBUDSMAN FOR PROPERTY RIGHTS, AND THE SHOW-ME INSTITUTE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF AMICI

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, and individual freedom. PLF attorneys have defended the rights of property owners before the United States Supreme Court and this Court in cases in which government has deprived them of their property, including *City of Arnold v. Tourkakis*, 249 S.W.3d 202 (Mo. banc 2008); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF also participated as amicus curiae in many of the most important recent cases involving the public use limitation on eminent domain. *See, e.g., Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006). In addition, PLF attorneys have published extensive scholarly writings on the abuse of eminent domain. *See, e.g.*, Timothy Sandefur, *Cornerstone of Liberty: Property Rights in 21st Century America* (2006); Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 Chap. L. Rev. 1 (2006); James S. Burling, *Blight Lite*, SH053 ALI-ABA 43 (2003). Because of PLF's experience in the field of private property rights, it can add a unique perspective that will assist this Court's consideration of this case.

The Office of the Ombudsman for Property Rights was established pursuant to state law on May 5, 2006. Paul Anthony Martin was appointed to this position on August 20, 2007, by Governor Matt Blunt. The Ombudsman's Office is legally charged with

documenting issues regarding the use of eminent domain in Missouri, assisting Missouri citizens in understanding their rights in eminent domain cases, and providing guidance to individuals who are seeking information on the condemnation process. The Ombudsman appeared before this Court as amicus curiae in the recent eminent domain case of *City of Arnold v. Tourkakis*, 249 S.W.3d 202 (Mo. banc 2008).

The Show-Me Institute is a non-partisan, non-profit research and educational institute dedicated to improving the quality of life for all citizens of Missouri by advancing sensible, well-researched solutions to state and local policy issues. The work of the Institute is rooted in the American tradition of free markets and individual liberty. The Institute's scholars offer private-sector solutions to the state's social challenges, presenting policies that respect the rights of the individual, encourage creativity and hard work, and nurture independence and social cooperation. By applying those principles to the problems facing the state, the Show-Me Institute hopes to pave the way to a Missouri with a thriving economy and a vibrant civil society—a Missouri that leads the nation in wealth, freedom, and opportunity for all.

The Show-Me Institute has published studies and commentary addressing Missouri municipalities' improper use of eminent domain, and the Institute is dedicated to the proposition that individual property rights are the cornerstone of a stable, free society. Because this case involves the constitutional guarantee of individual property rights, this case is of significant interest to the Institute. The attorneys working for the Show-Me Institute are familiar with the legal issues and facts raised by this case and believe that their public policy

perspective and litigation experience in support of property rights will provide a useful viewpoint when this Court is considering the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When government has the authority to redistribute private property, private interest groups will spend time and effort to convince the government to do so in a manner that is beneficial to them. This problem (called "rent seeking" by economists and "the problem of faction" by America's founders) is one of the primary reasons that constitutions limit legislative authority. Among those constitutional restrictions is the "public use" requirement in eminent domain. By forbidding the Legislature from taking property for the private use of particular groups, the framers of the Missouri Constitution hoped to prevent coalitions of legislative and corporate interests from exploiting eminent domain for private profit at the expense of innocent property owners. *See generally* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689 (1984) (purpose of the public use limitation is to prohibit "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.").

The public use requirement, like other constitutional protections, has eroded over time due to the increasing deference that courts have accorded to legislatures in cases involving property rights. In recent decades, courts have allowed legislatures and administrative agencies to take property and transfer it to private developers for whatever purpose officials claim advances some broadly defined public good. As a consequence, politically influential

private parties benefit at the expense of those home and business owners who lack the political influence necessary for persuading the legislature not to use eminent domain against them. Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 Sup. Ct. Econ. Rev. 183, 220 (2007) ("[T]he political economy of economic development takings ensures that most property owners targeted for condemnation are likely to have relatively weak political influence, while their opponents are likely to be powerful interest groups who are 'repeat players' in the condemnation process."). Unsurprisingly, private developers frequently lobby local governments to declare property "blighted" and thereby a legitimate target for the use of eminent domain.

Given the severe reduction of judicial scrutiny under the Constitution's "public use" requirement, courts must employ a heightened scrutiny to statutory declarations of "blight." Since property is subject to condemnation when it is declared blighted, courts must apply meaningful scrutiny to blight declarations or they will have essentially given up the last control over the use of eminent domain. But meaningful judicial scrutiny over eminent domain is required by the explicit language of Article I, section 28, of the Missouri Constitution, as well as by Missouri common law. Moreover, it is the only opportunity for courts to protect property owners from the abuse of eminent domain to benefit politically connected private interests.

In recent cases, notably *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007) (per curiam), this Court has applied genuine scrutiny to blight determinations. Yet it has not explicitly repudiated the position taken in *State ex rel.*

Dalton v. Land Clearance for Redevelopment Auth. of Kansas City, Mo., 270 S.W.2d 44, 52 (Mo. banc 1954), that legislative declarations are "conclusive" as to whether blight exists or not. This Court should repudiate *Dalton*'s "conclusive" deference in this case. If the judiciary continues to defer on questions of "public use," it must not also defer on questions of whether property is blighted or not. Otherwise, redevelopment agencies—over which voters have little or no real control—will have carte blanche to redistribute private property whenever they decide to do so.

In particular, courts should apply a high standard of scrutiny to declarations of "blight" that are based on so-called "windshield surveys," such as that employed in this case. These "surveys" consist of subjective findings and the most cursory research, and cannot provide a legitimate basis for the use of eminent domain—a governmental power that is highly susceptible to abuse. This Court should make it clear that local governments may not manipulate the process by relying upon dubious blight "findings" in order to justify taking property for the benefit of private developers.

The blight determination in this case cannot withstand meaningful scrutiny. It is comprised of subjective determinations and relies on superficial analysis. It lacks details essential for establishing that the area is a social liability. It is a naked attempt to take private property through eminent domain to transfer it to a private owner in order to "create jobs" and increase the amount of tax revenue to the state—not to eliminate seriously defective neighborhood conditions. The Court should not allow this abuse of eminent domain to proceed.

STATEMENT OF FACTS

Amici PLF, Missouri Ombudsman for Property Rights, and the Show-Me Institute adopt the statement of facts in the Respondent's brief.

POINTS RELIED UPON

I

MISSOURI COURTS MUST EMPLOY A HIGH STANDARD OF SCRUTINY TO DECLARATIONS OF BLIGHT IN ORDER TO DISCHARGE THEIR CONSTITUTIONAL DUTY AND TO PROTECT PROPERTY OWNERS

- Mo. Const. art. I, § 28
- *Kansas City v. Hyde*, 96 S.W. 201 (Mo. 1906)
- *State ex rel. Wagner v. St. Louis County Port Auth.*, 604 S.W.2d 592 (Mo. banc 1980)
- *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007) (per curiam)

II

THIS COURT SHOULD DECLARE "WINDSHIELD SURVEYS" LEGALLY INSUFFICIENT AS GROUNDS FOR DETERMINING THE EXISTENCE OF BLIGHT

• *Gonzales v. City of Santa Ana*, 12 Cal. App. 4th 1335 (1993)

• *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511 (2000)

• *Graber v. City of Upland*, 99 Cal. App. 4th 424 (2002)

ARGUMENT

III

MISSOURI COURTS MUST EMPLOY A HIGH STANDARD OF SCRUTINY TO DECLARATIONS OF BLIGHT IN ORDER TO DISCHARGE THEIR CONSTITUTIONAL DUTY AND TO PROTECT PROPERTY OWNERS

A. The Missouri Constitution and Missouri Common Law Require Courts to Exercise Independent Judgment When Reviewing Declarations of Blight

Article I, section 28, of the Missouri Constitution declares that "when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public." This provision explicitly bars courts from deferring to

legislative determinations that a taking of private property is justified. This Court has recognized that this is a constitutional "mandate," which may not be avoided by the state judiciary. *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 274 n.2 (Mo. banc 2006). Courts must therefore exercise independent judgment when reviewing a taking which will transfer the property to a private owner. *City of Kansas City v. Hon*, 972 S.W.2d 407, 410 (Mo. App. W.D. 1998) ("[W]e, like the trial court, are required to make an independent determination whether the use at issue here is a public use.").

This clause was added to the Constitution in 1875 to prevent the Legislature from becoming essentially the judge of its own powers. If the Legislature may take property for "public use" and may at the same time determine without significant judicial check what uses are or are not public, then it will be free to take any property it likes for any purpose that it simply asserts to be a public use. The authors of the 1875 Constitution were well aware of routine corporate abuses of the eminent domain power. In their day, powerful railroad corporations would use the power of eminent domain for their own benefit. *See* Gideon Kanner, *"[Un]equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 Loy. L.A. L. Rev. 1065, 1135-37 (2007); Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 Wake Forest L. Rev. 237, 259-62 (2006). These railroads made great profits off of taken land, and delegates to the constitutional conventions held in Missouri and other states considered this an injustice. *See, e.g.*, Timothy Sandefur, *Don't Mess With Property Rights in Texas: How the State Constitution Protects Property Owners in the Wake of Kelo*, 41 Real

Prop. Prob. & Tr. J. 227, 237-41 (2006). The Missouri Constitution's requirement that courts exercise independent judgment on the issue of public use was an essential part of limiting the Legislature's power to redistribute land.

At the 1875 Convention, delegate Thomas Gantt explained that this requirement of independent judicial scrutiny would prohibit actions by "the General Assembly if some one [*sic*] covets the vineyard of his neighbor[] to declare that that vineyard may be taken and used as the vineyard of the trespasser and 'that it is hereby devoted to public use.'" 1 *Debates of the Missouri Constitutional Convention of 1875* at 440 (1930). Shortly after that Constitution was ratified, the state's courts also recognized that this heightened judicial scrutiny was intended to "guard[] private property and the rights incident thereto against ruthless invasion, and virtual confiscation under the thin disguise of legal process." *Colville v. Judy*, 73 Mo. 651, 654 (1881). *See also Humes v. Missouri Pac. Ry. Co.*, 82 Mo. 221, 226 (1884) (this provision was written in response to "adjudications by the courts of this State, as well as the current history of the times developing so many devices and schemes by individuals, legislatures and municipalities to obtain private property against the owner's consent for purely private purposes.").

This Court explained in detail the proper role of judicial scrutiny of the public use requirement in *Kansas City v. Hyde*, 96 S.W. 201 (Mo. 1906). "[S]uppose an influential individual, to whom a slice of his neighbor's property would be very convenient, should ask the city council to condemn that property for his use," the Court began. An ordinance taking land for such private uses would obviously be "void on its face." *Id.* at 205. But if, "in order

to give it validity," the city were to declare in the same bill "that the property was to be condemned for a public street, *would such a false recital in the ordinance be conclusive*, would it put the man whose property was to be taken . . . beyond the protection of the constitutional guarantee that their property should not be taken for private use?" *Id.* (emphasis added). The answer was emphatically no: the government may not, "by a false recital in the ordinance, give it a validity which it would not have if it recited the truth." *Id.*

Courts must exercise independent review of condemnation attempts, so that they would not become "a mere tool to do the will of the council, with no power to inquire into the truth of the matter." *Id.*

> What protection has a citizen for his constitutional rights, if the courts cannot look through a sham and see the truth, and how can the courts learn the truth if they must take the recitals in the ordinance as conclusive, and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence and how humiliating would be the attitude of our courts if they were so powerless! But our law is not so lame, and our courts are not so impotent.

Id. Accord, City of Kirkwood v. Venable, 173 S.W.2d 8, 11 (Mo. 1943), *overruled on other grounds, Bueche v. Kansas City*, 492 S.W.2d 835, 839 (Mo. banc 1973) ("Appellant had the right to demand that the court hear the evidence and determine whether or not the purpose of the proceeding was to condemn for a public use or for a private use.").

This guarantee of heightened judicial scrutiny was carried forward into the 1945 Constitution. After the new Constitution went into effect, Missouri courts continued to recognize that this independent judgment requirement remained mandatory. In *State ex rel. State Highway Comm'n v. Curtis*, 222 S.W.2d 64, 68 (Mo. banc 1949), the Court, relying on *Hyde*, explained that "[i]n determining the question of 'public use,' when that question is properly raised, a court may inquire into whether the public purpose stated is the real purpose or merely a sham." *Accord*, *City of St. Louis v. Butler Co.*, 223 S.W.2d 831, 834 (Mo. App. 1949); *State ex rel. Gove v. Tate*, 442 S.W.2d 541, 543 (Mo. banc 1969).

The independent judgment requirement of Article I, section 28, is reinforced by the traditional common law rule under which courts apply rigorous scrutiny to all assertions of eminent domain power. Missouri courts require "strict compliance with the [enabling] statutes" so as to "prevent the taking of private property for a private or non-public use." *State ex rel. State Highway Comm'n*, 222 S.W.2d at 68. Courts will construe "every reasonable doubt" in favor of the property owner in eminent domain cases. *State ex rel. County of St. Charles v. Mehan*, 854 S.W.2d 531, 534 (Mo. App. W.D. 1993), because the power of eminent domain "is one of the most intrusive powers of government." *City of Springfield ex rel. Bd. of Pub. Utilities of Springfield, Mo. v. Brechbuhler*, 895 S.W.2d 583, 584 (Mo. banc 1995).

In short, the Constitution requires, and Missouri precedent reiterates, an independent and heightened scrutiny of eminent domain actions which transfer property from one private owner to another.

B. The Conclusive Presumption Referred to in *Dalton* Violates Article I, Section 28, and Has Been Abrogated

In *Dalton*, 270 S.W.2d 44, this Court acknowledged that the "final determination" of whether an attempted taking actually is for a public use or is for a private use "rests upon the courts." *Id.* at 52. Nevertheless, it stated that when the Legislature declares "that a blighted or insanitary area exists and that the legislative agency proposes to take the property . . . for the purpose of clearance and improvement," such a declaration will be accepted by courts "as conclusive evidence that the contemplated use thereof is public, unless it further appears upon allegation and clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith." *Id.* This language was contrary to the plain language of Article I, section 28, and with past precedent requiring independent judicial review of takings. Although the *Dalton* Court believed this conclusive presumption was required to reconcile the state Constitution with the modern trend of deference to legislatures in cases involving property rights, that was erroneous. Deference does not require total acquiescence in legislative or administrative determinations. In addition, recent cases appear to have abrogated this presumption. *See, e.g., Centene*, 225 S.W.3d at 432 (applying judicial scrutiny to blight determination). Yet the Court has not yet repudiated it explicitly, and it ought to do so now.

Dalton was decided during a period when courts were according legislatures and administrative agencies greater deference in matters involving private property rights. *See* Timothy Sandefur, *A Gleeful Obituary for Poletown Neighborhood Council v. Detroit*,

28 Harv. J.L. & Pub. Pol'y 651, 659-60 (2005). But a degree of deference does not require courts to consider a legislative declaration to be "conclusive evidence." Deference to the legislature or administrative agencies is generally seen as necessary for preserving the proper separation of powers and for ensuring that political decisions are made by those in a position to hear from the various constituencies who might be affected by a decision. Courts are not in a position to balance interests and are not as responsible to voters as are legislatures, and therefore will defer in such cases. Paul Horwitz, *Three Faces of Deference*, 83 Notre Dame L. Rev. 1061, 1079, 1085 (2008). Yet while these arguments have some merit, they cannot warrant complete deference by the courts. Total acquiescence would undermine separation of powers by eliminating an essential check on the legislature and would allow legislators to act arbitrarily, in excess of their legal and constitutional authority. In fact, Justice Stevens, who wrote the opinion of the Supreme Court in *Kelo*, 545 U.S. 469, has repeatedly observed that overly deferential standards of review can deprive litigants of their right to impartial adjudication of their rights. *See, e.g., FCC v. Beach Comm'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring in judgment) ("Judicial review under the 'conceivable set of facts' test is tantamount to no review at all."); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 180 (1980) (Stevens, J., concurring in judgment) ("the Constitution requires something more than merely a 'conceivable' or 'plausible' explanation").

Legislatures can defer to legislative determinations without abandoning their role as enforcers of the Constitution. Courts routinely accord legislatures deference in property rights cases while retaining the authority to independently review the allegations brought by

property owners. Indeed, this was precisely the approach recommended by Justice Kennedy in his concurring opinion in *Kelo*. When a legislature determines that property ought to be redeveloped and that the use of eminent domain is a proper tool for redevelopment, Justice Kennedy urged courts to defer to such a determination. 545 U.S. at 490 (Kennedy, J., concurring). Still, he explained, "[t]he determination that a rational-basis standard of review is appropriate does not . . . alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." *Id.* A court that is "confronted with a plausible accusation of impermissible favoritism to private parties" ought to "treat the objection as a serious one and review the record to see if it has merit." *Id.* at 491. Indeed, he commended the state court in that case for "conduct[ing] a careful and extensive inquiry" into the record to determine whether the taking served a public purpose. *Id.* In short, a policy of deference does not require total acquiescence. *See, e.g.*, *City of Norwood*, 853 N.E.2d at 1139 ("In reviewing an appropriation, we thus act with deference to legislative pronouncements, but we are independent of them.").

For a legislative declaration to constitute "conclusive evidence" that a targeted property is blighted would allow the legislature to exercise apparently boundless power to take property without any judicial oversight at all, in violation of the Constitution. As a judge wrote in one of America's earliest eminent domain cases, such a degree of deference would be "in effect to insist that the power of the legislature is above the power of the constitution." *Bloodgood v. Mohawk & Hudson R.R. Co.*, 18 Wend. 9, 63 (N.Y. 1837). But

the legislature "is not the creator or judge of its own powers, but is the creature of the constitution," and courts must "be guided by the constitution itself," and not by legislative declarations. *Id.*

This Court has also explained that neither legislatures nor administrative agencies may block judicial review of their actions by merely asserting that they were acting constitutionally. In *State ex rel. Wagner v. St. Louis County Port Auth.*, 604 S.W.2d 592 (Mo. banc 1980), a property owner challenged the Port Authority's power to take his property and to issue bonds, on the grounds that the authorizing legislation contained no legislative declaration that the bonds issued would serve a public purpose. Although the Court found that the bonds did serve a public purpose, it explained that legislative declarations to that effect could not alone resolve the question:

> The presence or absence of such wording in a statute is not conclusive of the existence of an essential and governmental purpose . . . . *If it were otherwise, the rule that a legislative determination of public purpose is entitled to great deference would become instead a rule of absolute deference and judicial abdication.*

Id. at 597-98 (emphasis added). Independent judgment by courts is required by the very existence of constitutional limitations on legislative power. Indeed, this Court has declared that "'it is clearly beyond the [legislative power] to prescribe what shall be conclusive evidence of any fact.'" *Borden Co. v. Thomason*, 353 S.W.2d 735, 755 (Mo. banc 1962) (quoting *O'Donnell v. Wells*, 21 S.W.2d 762, 766 (Mo. Div. 1 1929)).

The conclusive presumption accorded to blight determinations in *Dalton* has also not been consistently followed by Missouri courts. Although it was cited with approval in *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385, 388-89 (Mo. banc 1991), it appeared to be abandoned in *Centene Plaza Redevelopment*, 225 S.W.3d at 431-32 (per curiam). There, without mentioning *Dalton*, the Court rejected a blight finding as "not supported by substantial evidence." The Court observed that there was no evidence that there were fire or emergency services calls for most of the properties in the allegedly blighted area, and that there was "no evidence presented regarding any public health concerns" in the area. *Id.* at 434. In the absence of substantial evidence that the area was a social liability, the legislative determination of the existence of blight was rejected, not deemed conclusive. *See also Great Rivers Habitat Alliance v. City of St. Peters*, 246 S.W.3d 556, 565 (Mo. App. W.D. 2008) (applying the substantial evidence test to a blight determination, rather than following that determination as "conclusive").

Finally, the highest courts of Ohio, Illinois, Michigan, New York, and New Jersey have all recently emphasized that while legislatures receive deference in takings cases, that deference cannot be total. As the Ohio Supreme Court put it, "the relative reluctance of courts to intervene in determinations that a sufficient public benefit support[s] [a] taking" does not mean the legislature can "invoke the police power to virtually immunize all takings from judicial review." *City of Norwood*, 853 N.E.2d at 1137. *See also Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 11 (Ill. 2002) ("While we do not question the legislature's discretion in allowing for the exercise of eminent domain power, 'the

government does not have unlimited power to redefine property rights.' The power of eminent domain is to be exercised with restraint, not abandon.") (citation omitted); *Jackson v. New York State Urban Dev. Corp.*, 494 N.E.2d 429, 425 (N.Y. 1986) (substantial evidence standard applicable to determinations of blight is more strict than the "well-nigh conclusive" standard that federal courts apply); *Hathcock*, 684 N.W.2d at 786 ("vague economic benefit stemming from a private profit-maximizing enterprise" is not "a 'public use.'"); *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 464 (N.J. 2007) (applying substantial evidence test to legislative determinations of blight).

New Jersey law is particularly relevant here, given that New Jersey's Constitution, like Missouri's, was amended in the 1940s to specify that "[t]he clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired." N.J. Const. art. VIII, § 3, ¶ 1. The New Jersey courts have held that when determining whether an area is blighted, "a municipality must establish a record that contains more than a bland recitation of applicable statutory criteria and a declaration that those criteria are met." *Gallenthin*, 924 A.2d at 465 (N.J. 2007). *Accord, ERETC, L.L.C. v. City of Perth Amboy*, 885 A.2d 512, 520 (N.J. Super. Ct. App. Div. 2005) (applying meaningful judicial scrutiny to redevelopment determinations.)

A rule like that in *Dalton* which is not consistently followed, is not supported by precedent, runs counter to the Constitution's plain language, and goes farther than necessary to accomplish legitimate constitutional objectives, ought to be repudiated explicitly. *See Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist.*, 223 S.W.3d 131, 136-37 (Mo.

banc 2007); *State v. Shelton*, 267 S.W. 938, 940 (Mo. Div. 2 1924). The *Dalton* "conclusive presumption" goes farther than necessary for the accomplishment of legitimate deference, is not consistently followed by state courts, and directly conflicts with the plain language of Article I, section 28, which requires independent judicial review of condemnations in order to prevent unjustified transfers of property to private developers. This Court should clarify that a legislative determination of the existence of blight is not conclusive evidence of the existence of blight, and that state courts retain the authority to determine, "without regard to any legislative declaration," whether or not a taking of allegedly blighted property actually advances the purposes of the redevelopment statutes.

C. Given the Deference Accorded to Governments in "Public Use" Challenges, Only Heightened Scrutiny of Blight Determinations Can Protect Property Owners Against Eminent Domain Abuse

Since 1954, Missouri courts, like federal courts, have employed a deferential standard of review under the Constitution's public use requirement. There are strong arguments that such a deferential standard ought to be repudiated and that courts should employ heightened scrutiny under this clause. *See, e.g.*, *Hathcock*, 684 N.W.2d at 786 ("[I]f one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."); *City of Norwood*, 853 N.E.2d at 1139 ("A primordial purpose of the public-use clause is to

prevent the legislature from permitting the state to take private property from one individual simply to give it to another.").

But putting that issue aside, it is evident that so long as courts defer with regard to the *constitutional* public use issue, property owners can hope for protection only if courts apply meaningful review to *statutory* blight designations. Without such review, elected officials—or the unelected members of a redevelopment agency—can declare property "blighted" when it is not, and then transfer that property to private developers without being limited either by blight statutes or the Constitution. "By misemploying the extraordinary powers of urban renewal a redevelopment agency [can] capture[] pending tax revenues which it can then use as a grubstake to subsidize commercial development within the project area in the hope of striking it rich." *Regus v. City of Baldwin Park*, 70 Cal. App. 3d 968, 982 (1977).

As redevelopment expert George Lefcoe has recently noted, "[d]evelopers often initiate economic development projects and reach tentative understandings with redevelopment agencies before the agency hires the consulting firm that will find whatever blight the law requires." George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 Tul. L. Rev. 45, 67 (2008).

This is not a matter of conjecture. Redevelopment agencies in Missouri and elsewhere have declared even prosperous neighborhoods"blighted" so as to grant benefits to private developers. *See generally* Colin Gordon, *Blighting the Way: Urban Renewal, Economic*

Development, and the Elusive Definition of Blight, 31 Fordham Urb. L.J. 305, 305-06 (2004) (listing examples). In 2005, officials in Sunset Hills, an area of St. Louis, awarded a contract to a private developer to construct a shopping mall. The city hired a consultant to prepare a report that would provide a basis for a blight determination. But when the firm failed to conclude that the area was blighted, the city hired another consultant who did prepare a blight report satisfactory to the city. Stanley A. Leasure & Carol J. Miller, *Eminent Domain—Missouri's Response to Kelo*, 63 J. Mo. B. 178, 185-86 (2007). The West County Center shopping mall in Des Peres, Missouri's second wealthiest city, was declared blighted despite the fact that it was generating over $100 million in business revenue per year. Josh Reinert, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?*, 45 St. Louis U. L.J. 1019, 1019 (2001).

Abuses are common in other states, as well. In New Jersey, officials in the village of Paulsboro near Philadelphia declared undeveloped wetlands to be "blighted" so that the property could be transferred to a private developer. *Gallenthin Realty*, 924 A.2d at 450. The affluent suburban community of Diamond Bar, California, was declared blighted even though the median household income was $66,000 per year and the average home price more than $300,000. *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 392 (2000). The City of Las Vegas declared a property "blighted" even though it was situated in the wealthy downtown area made up of multimillion dollar casinos—so that it could transfer the property to a developer to construct a parking lot for the casino area. *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1, 11-12 (Nev. 2003). The City

of New York even declared property located in Times Square—perhaps the most valuable real estate in the nation—to be "blighted" so that it could transfer the property to the New York Times Corporation. *West 41st Street Realty LLC v. New York State Urban Dev. Corp.*, 744 N.Y.S.2d 121, 126 (N.Y. App. Div. 2002). Such abuses led one writer to conclude recently that "'blight' has lost any substantive meaning as either a description of urban conditions or a target for public policy. Blight is less an objective condition than it is a legal pretext for various forms of commercial tax abatement." Gordon, *supra*, at 307.

In redevelopment cases, property owners may bring lawsuits to challenge either the statutory determination that a property is blighted, and therefore that it may be condemned, or to challenge the condemnation itself as violating the constitutional public use requirement. Assuming no fatal procedural error exists, property owners have *no other legal defense* against a city's decision to condemn their property and transfer it to private developers. Thus, given the deference already accorded to cities under the constitutional public use requirement, the *only* option left for providing property owners with meaningful protection is for courts to apply meaningful scrutiny to blight designations. If a property owner is entitled to neither of these, she will discover that her constitutionally protected property rights have been replaced by a "matador-like deferential standard" of meaningless rhetoric. Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny,"* 59 Ala. L. Rev. 561, 579 (2008).

This Court has already warned cities to cease abusing their redevelopment powers, *see Centene*, 225 S.W.3d 431, and it ought to reiterate in this case that a determination of the

existence of "blight" must be based on *objective* factors established by *significant* evidence, and not a subjective analysis supported by conclusory assertions or pretext. It is the proper role of the judiciary to determine whether the legislature has exceeded its constitutional and statutory limits. *Star Square Auto Supply Co. v. Gerk*, 30 S.W.2d 447, 462 (Mo. Div. 1 1930). The Missouri Constitution declares that when government fails to protect people's right to "the enjoyment of the gains of their own industry," it has "fail[ed] in its chief design," Mo. Const. art. I, § 2. This Court should therefore ensure that property owners receive serious judicial protection against abusive or manipulative blight declarations.

IV

THIS COURT SHOULD DECLARE "WINDSHIELD SURVEYS" LEGALLY INSUFFICIENT AS GROUNDS FOR DETERMINING THE EXISTENCE OF BLIGHT

A. Without Serious Judicial Scrutiny, Redevelopment Agencies Have No Real Incentive to Substantiate Blight Findings

Given the deference accorded to cities in eminent domain cases, redevelopment agencies have little real incentive to follow rigorous standards when determining the existence of blight. As one writer concluded after reviewing the series of California cases rejecting inadequate blight findings, "[f]or a local agency, the risk of adopting a redevelopment plan in a setting in which it is inappropriate is often outweighed by the need for cash and the potential for cash created through tax increment." R. Bruce Tepper, *A Thousand Points of Blight*, 24 L.A. Law. 34, 40 (2001).

If a redevelopment agency determines that an area is blighted when it is not, a home or business owner in that area must bring an action to challenge that determination. Yet such a challenge is unlikely to succeed because the government receives such a high degree of deference in court. In addition, property owners must pay the costs of legal representation themselves—all while facing the condemnation of their property and the attendant financial losses—while a redevelopment agency's representation is funded by taxpayers and developers. Unsurprisingly, few property owners have the resources necessary to defend their property rights in redevelopment cases. Patricia H. Lee, *Eminent Domain: In the Aftermath of Kelo v. New London, A Resurrection in Norwood: One Public Interest Attorney's View*, 29 W. New Eng. L. Rev. 121, 122-23 (2006).

Moreover, redevelopment agencies are not comprised of elected officials responsible to the voters, but are usually appointees whom dissatisfied voters cannot remove. Amy F. Cerciello, *The Use of Pilot Financing to Develop Manhattan's Far West Side*, 32 Fordham Urb. L.J. 795, 815 (2005) ("[M]any TIF [Tax Increment Financing] projects are administered by redevelopment agencies consisting of officials who are appointed rather than elected. Elected officials effectively are protected against negative voter reaction to TIF projects. Thus, taxpayers essentially are left without a voice in the process."). Indeed, Missouri law creates an exemption from the voter approval requirement in cases involving TIF. Redevelopment projects in Missouri therefore operate with little or no voter control.

It is rare for even a flawed blight determination to be invalidated by a court, and although such invalidation might delay a redevelopment project, it is unlikely to impose the

wholesale loss on the government that a successful condemnation imposes on the property owner. In redevelopment cases, the government enters court with every advantage. Knowing that, it has little reason to employ a rigorous analysis in a blight determination. "Local governments, under cover of vague state laws and beguiled by the prospect of capturing federal grants or a larger tax base, have every incentive to define blight expansively . . . by offering imaginative interpretations of older blight definitions, or by taking advantage of a more recent deregulation of those definitions." Gordon, *supra*, at 315.

The only way to put a brake on the abuse of redevelopment powers is meaningful judicial scrutiny of blight determinations. Without judicial oversight, redevelopment agencies will have what amounts to carte blanche authority to take property and give it to others for whatever purposes they assert to be in the public interest. This cannot be reconciled with constitutional limits on the use of eminent domain or the principle of separation of powers. The judiciary's role, "though limited[,] is a critical one that requires vigilance in reviewing state actions for the necessary restraint." *City of Norwood*, 853 N.E.2d at 1138.

B. Windshield Surveys Are Routinely Abused to Substantiate Improper and Prejudged Determinations of Blight

Consultants hired by cities to prepare reports to support a determination of blight routinely use so-called windshield surveys. Such "surveys" are superficial, subjective, hasty, and insufficient to establish the existence of blight. Moreover, they are routinely abused by officials who are predetermined to declare a neighborhood blighted and are employing

consultants as a pretext to condemn property for private development. Given their inherent shortcomings as well as their susceptibility to abuse, this Court ought to declare such windshield surveys insufficient to support a finding of blight.

A windshield survey is typically prepared by simply driving through a neighborhood, and filling out forms which list various factors. The consultant who prepares such a document may get out of the car and observe structures in the neighborhood from the sidewalk, but does not enter a structure, or observe it from the back yard or from any area not open to a passerby. Windshield surveys typically focus on aesthetic characteristics of a neighborhood, and frequently employ a cursory analysis to buildings in a redevelopment zone. *Relocation: An Investigation into Relocation Under the Federal-Aid Highway Program*, 7 Colum. J.L. & Soc. Probs. 466, 477 n.79 (1971) ("[t]he 'windshield survey' involves an inspection of buildings while cruising around in an automobile.").

The report prepared by Development Strategies in this case is a windshield survey. The "methodology" section declares that the report was based on "fieldwork" of an unknown and undisclosed type in February and March of 2004. *See* Report of Development Strategies, Inc. (Report) at 7. The report's authors inspected structures only "from the exterior," and the consultants also made "a visual inspection" of the streets, curbs, and sidewalks. *Id.* The results are entirely subjective and provide only the most perfunctory analysis. Consider, for example, the findings with regard to buildings in the area. The consultants "rated" the buildings and parcels in this 173-acre zone according to factors that are not explained and reasoning that is not disclosed in the report. Page 20—the only page which addresses

conditions of buildings in the area—contains no explanation or reasoning, and only sketchy raw data. For example, a building qualified as "poor" if it had "[n]umerous critical structural and/or secondary building component deficiencies apparent which could only be corrected with major building renovation, rehabilitation, or repairs." The report contains no other explanation of how the categorization of buildings was undertaken. It does not state what sort of deficiencies qualify as "critical," or how such a determination can be made "from the exterior." The report contains only three photographs of "deteriorating" buildings, but does not explain which categories these buildings fell into—whether they qualify as "poor," or "fair." The report contains no checklists, and no details about any particular structure or parcel. The chart on Page 20 simply *asserts* that many of the buildings in the area are in poor condition. It is fundamentally subjective, and yet it is the *only* discussion of the condition of buildings in the area. This exemplifies the problems with windshield surveys. While the area may indeed be blighted, the report does not provide data or reasoning to substantiate such a conclusion. To rely on such reports threatens the security of property in nonblighted areas as well.

California courts have had extensive experience with windshield surveys, and have repeatedly criticized their use, especially in the past decade. *See Regus*, 70 Cal. App. 3d at 982; *Gonzales v. City of Santa Ana*, 12 Cal. App. 4th 1335 (1993); *County of Riverside v. City of Murrieta*, 65 Cal. App. 4th 616 (1998); *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511 (2000); *Graber v. City of Upland*, 99 Cal. App. 4th 424 (2002). While windshield surveys sometimes include some objective

criteria, they more frequently reflect the personal, subjective conclusions of the consultants and present a misleading image of the neighborhood. These "exterior structural surveys . . . may not result 'in substantial evidence supporting the statutorily required elements of a blighted area.'" *Graber*, 99 Cal. App. 4th at 440 (quoting *Friends of Mammoth*, 82 Cal. App. 4th at 539 n.8).

Gonzales is particularly similar to this case. In that case, as in this, a city declared a neighborhood blighted pursuant to a windshield survey which assigned buildings to one of four categories based on what the consultant estimated would be the cost of bringing the buildings in to full compliance with applicable building and development codes. 12 Cal. App. 4th at 1339. The court questioned the objectivity of the analysis: "[T]he definitions used by the consulting firm do not tell us much. The demarcation line between buildings requiring 'major' repairs and those requiring only 'minor' ones appears drawn to bring the largest possible number into the 'major' category." *Id.* at 1342. The subjective nature of the report's conclusions meant that the court could "not know (and cannot figure out) how many of the roughly 48 percent of the buildings in this category really approach something that is [blighted]." *Id.* Thus the court concluded that "the exterior structural survey . . . [did] not support the blight finding." *Id.* at 1345.

Graber involved a blight declaration that relied on a windshield survey which assigned structures a numerical value on the basis of visual observations from the public right of way only. The report identified only aesthetic problems in the area and failed to provide any evidence that the structures were unsafe or unfit. But

"[p]eeling paint, dry rot, and lack of maintenance need not by themselves result in an unsafe or unhealthy building. The breadth of the definition used in the building survey prevented the town council from determining whether the Project Area could truly be characterized as containing buildings unsafe for human occupancy due to their deteriorated or dilapidated condition."

99 Cal. App. 4th at 442 (quoting *Friends of Mammoth*, 82 Cal. App. 4th at 551).

In *Friends of Mammoth*, the court rejected a windshield survey because it failed to substantiate the conclusion that buildings in the area were blighted or dilapidated. The report rated buildings in the area on whether they exhibited peeling paint, lack of maintenance, doors without weather stripping and an "overall appearance lacking in maintenance." 82 Cal. App. 4th at 552. The court found that this superficial analysis was insufficient to meet the objective criteria for determining the existence of blight. In fact, the report appeared to be an effort by the city to support a predetermination that the area was in need of redevelopment. In words that could be equally applied to this case, the court found that the report's blight finding was "the conclusory type of 'jargon' courts have criticized as making 'no attempt at any specificity; the reasons appear to have emerged from the consultants' word processor without any thought as to why any particular parcel . . .' is blighted under this criterion." *Id.* at 557-58 (quoting *Gonzales*, 12 Cal. App. 4th at 1346).

As these cases indicate, windshield surveys are unreliable, subjective, and routinely abused. This Court should reject their use in substantiating a city's finding of blight. Under the principle of "legal relevance," courts have often disallowed categories of evidence that

have proven untrustworthy or that are routinely abused and manipulated, even where such evidence might be probative when properly used. Although a survey of a neighborhood from a public street might in some cases be an appropriate ingredient in a thorough blight analysis if combined with objective criteria, these windshield surveys have instead been widely abused. They are frequently employed to give an objective mask over fundamentally subjective conclusions, and to serve a predetermined outcome.

"Legal relevance weighs the probative value of the evidence against its costs—unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulativeness. Thus, logically relevant evidence is excluded if its costs outweigh its benefits." *State v. Anderson*, 76 S.W.3d 275, 276 (Mo. banc 2002) (citation omitted). For example, polygraph tests are inadmissible in criminal trials. *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. banc 1980). Likewise, evidence about a defendant's reputation is rarely admissible. *Marschke v. State*, 185 S.W.3d 295, 307 (Mo. App. S.D. 2006). Like these types of evidence, the uncertainty and abuse associated with windshield surveys makes the potential cost of relying upon them outweigh their potential benefit. They "result in confusion of issues, constitute unfair surprise, or cause prejudice wholly disproportionate to the value and usefulness of the offered evidence," *Conley v. Kaney*, 250 S.W.2d 350, 353 (Mo. 1952), and ought to be categorically disallowed.

C. The Subjective Nature of the Windshield Survey in This Case Cannot Be Rescued by the Addition of Subjective Conclusions of City Officials

Like the windshield surveys in *Gonzales* and *Friends of Mammoth*, the report on which the city relied in declaring the property blighted in this case was based on conclusory jargon that does not even make an attempt at specificity. It appears to be a boilerplate analysis which provides no explanation of how a particular building qualifies as "poor," "good," et cetera. It simply lists the subjective opinions of Development Strategies consultants without any linear connection between data and the interpretation of that data. But a subjective opinion does not become objective merely because it is couched in official sounding terminology. *Cf. City of Independence v. Richards*, 666 S.W.2d 1, 8 (Mo. App. W.D. 1983).

The fundamentally subjective nature of the windshield survey is made clear by simply asking whether any given building would qualify as "good," "poor," or "dilapidated," pursuant to an inspection made only from the exterior. Various factors necessary to answering that question are simply ignored in the report. A structure would qualify as "poor" if it exhibited "numerous critical structural and/or secondary building component deficiencies," and if those deficiencies could "only be corrected with major building renovation." Report at 20. What sort deficiency in a structural building component qualifies as critical? The report is silent. Nor does the report declare what kinds of renovations qualify as "major."

In *Richards*, the court found that an ordinance which prohibited persons from accumulating "annoying" or "unsightly" material on property was unconstitutionally subjective. "In the absence of an explicit definition in the enactment itself, an ordinance which leaves the administrator . . . free to regulate the property right of another according to harbored notions of comeliness operates arbitrarily and without reasonable prediction," the court explained. "It posits a 'fickle standard[] of regulation' and fails the test of certainty and definiteness required of such enactments." 666 S.W.2d at 8 (quoting *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 137 S.W. 929, 962 (Mo. 1911)). The report in this case reveals that the city's consultants were free to determine on their own, with no definitions in the report, what categories buildings would fall into and why. The report is simply a list of personal opinions—it is not an objective finding of blight.

Nor is that failure remedied, as the Respondent claims, by the addition of the subjective opinions of city officials themselves. Respondent argued below that the City did not rely solely on the blight study, but also on a PowerPoint presentation by the Redevelopment Agency, as well as the Deputy Director of Planning's views, and the "personal knowledge" of the members of the Board of Alderman. Yet this "knowledge" is also hopelessly inadequate and subjective. First, the PowerPoint presentation consisted of seven slides, which listed recommended actions to the city council but contained no information at all about the area except for a map. *See* Defendants' Exhibit K. Second, there is no indication in the record as to what the purported "independent investigation" on the part of the Planning Commission or the Board of Aldermen entailed. The city's executive

director for development stated that she saw cracked sidewalks, puddles of water in parking lots, broken windows, deteriorating retaining walls, "and razor wire, which indicated to her fear of people breaking into the property." *Cortex West Dev. Corp. v. Station Investments #10 Redevelopment Corp.*, No. ED 90935, 2008 WL 2496962, at *2 (Mo. App. E.D. June 24, 2008). But her statement did not list the number of puddles, the degree or nature of the cracks in the sidewalks, the economic costs associated with broken windows, or any other objective criteria. Beyond what her observations "indicated to her," there is nothing in either the decision below or the brief of the Respondent as to what factors might have been used in the supposedly "independent analysis" of the city. Nor is there any explanation of what "personal knowledge" the city considered sufficient, or why such subjective knowledge should suffice to constitute "substantial evidence" of blight.

The determination of blight in this case is subjective, hasty, and inadequate. If cities may rely on such factors to authorize the seizing of private property through for redevelopment by a private entity, home and business owners will be unable to protect themselves against unjustified takings of their property to benefit private developers who have greater political influence with city redevelopment authorities. This Court should apply meaningful, independent judicial review to blight determinations, reject the use of superficial windshield surveys, and require that redevelopment authorities establish the existence of blight with substantial analysis of objective factors.

CONCLUSION

The judgment of the Court of Appeals should be *reversed.*

DATED: December 4, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 8,487 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Word Perfect.

I also further certify that the accompanying CD filed with the Court has been scanned and was found to be virus free pursuant to Rule 84.06(g).

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I hereby certify that two (2) true and correct copies of the foregoing document on paper and one (1) copy on CD were served by first-class U.S. mail, postage prepaid, this 4th day of December, 2008, to:

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