
No. SC88453

IN THE SUPREME COURT FOR THE STATE OF MISSOURI

STATE OF MISSOURI *ex rel.*
AMBASSADOR PROPERTIES, L.L.C., and KARL THOMAS,
Relators,

v.

HONORABLE THOMAS C. CLARK, JUDGE,
Circuit Court of Jackson County, Missouri,
Respondent,

HOUSE RESCUE CORPORATION,
A Missouri Not-for-Profit Corporation,
Real Party in Interest.

On Petition from the Circuit Court of
Jackson County, Missouri, at Kansas City
Case No.: 04CV225744

RELATORS' REPLY BRIEF

JAMES S. BURLING, CSB
California Bar No. 113013
Pro Hac Vice
R.S. RADFORD, CSB No. 137533
Pro Hac Vice
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jsb@pacificlegal.org

CYNTHIA CLARK CAMPBELL
No. 25772
Campbell Law Firm
Main Mark Building
1627 Main Street, Suite 420
Kansas City, Missouri 64108
Telephone: (816) 221-7007
Facsimile: (816) 221-4769
E-mail: ccclawfirm@yahoo.com

Counsel for Relators State of Missouri *ex rel.*
Ambassador Properties, L.L.C., and Karl Thomas

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THIS IS THE APPROPRIATE FORUM TO RESOLVE THIS DISPUTE	1
II. KARL THOMAS HAS STANDING TO DEFEND HIS PROPERTY	7
III. HOUSE RESCUE IS IMBUED WITH STATE ACTION	8
IV. THOMAS' SUBSTANTIVE DUE PROCESS RIGHTS ARE VIOLATED	12
V. THE ACT VIOLATES PROCEDURAL DUE PROCESS	17
VI. THOMAS' PROPERTY HAS BEEN TAKEN FOR A PRIVATE USE WITHOUT THE PAYMENT OF JUST COMPENSATION	20
CONCLUSION	22

TABLE OF AUTHORITIES

	Page
Cases	
<i>767 Third Ave. Assoc. v. United States</i> , 48 F.3d 1575 (Fed. Cir. 1995)	21
<i>Am. Mfrs. Mut. Ins. Co. v. Sullivan</i> , 526 U.S. 40 (1999)	10
<i>Baker v. McCollan</i> , 443 U.S. 137 (1979)	13
<i>Berman v. Parker</i> , 348 U.S. 26 (1954)	22
<i>Brody v. City of Mason</i> , 250 F.3d 432 (6th Cir. 2001)	14
<i>Carmack v. Saunders</i> , 884 S.W.2d 394 (Mo. Ct. App. 1994)	3-4
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	13
<i>Covey v. Town of Somers</i> , 351 U.S. 141 (1956)	19
<i>Crum v. Vincent</i> , 493 F.3d 988 (8th Cir. 2007)	19
<i>Eastern Enterprises v. Apfel</i> , 524 U.S. 498 (1998)	14
<i>Flagg Bros. Inc., v. Brooks</i> , 436 U.S. 149 (1978)	10
<i>Front Royal & Warren County Indus. Park Corp. v.</i> <i>Town of Front Royal, Virginia</i> , 135 F.3d 275 (4th Cir. 1998)	14
<i>Jones v. Flowers</i> , 547 U.S. 220 (2006)	17, 19
<i>Kelo v. City of New London, Connecticut</i> , 545 U.S. 469 (2005)	22
<i>Lane v. State Comm'n of Psychologists</i> , 954 S.W.2d 23 (Mo. App. E.D. 1997)	15, 17

	Page
<i>Lingle v. Chevron U.S.A.</i> , 544 U.S. 528 (2005)	13-15
<i>Lockary v. Kayfetz</i> , 917 F.2d 1150 (9th Cir. 1990)	14-15
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982)	21
<i>Lugar v. Edmondson Oil Co</i> , 457 U.S. 922 (1982)	9
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	17
<i>McDonald v. City of Brentwood</i> , 66 S.W.3d 46 (Mo. App. E.D. 2001)	2
<i>Mikeska v. City of Galveston</i> , 451 F.3d 376 (5th Cir. 2006)	14
<i>Miller v. Schoene</i> , 276 U.S. 272 (1928)	21-22
<i>Mottl v. Missouri Lawyer Trust Account Found.</i> , 133 S.W.3d 142 (Mo. Ct. App. 2004)	10
<i>O'Mara v. Town of Wappinger</i> , 485 F.3d 693 (2d Cir. 2007)	14
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	20-21
<i>Pennell v. City of San Jose</i> , 485 U.S. 1 (1988)	14
<i>Robinson v. Hanrahan</i> , 409 U.S. 38 (1972)	19
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	13
<i>Ross v. Ford Motor Credit Co.</i> , 867 S.W.2d 546 (Mo. Ct. App. 1993)	9
<i>State ex rel. Chiavola v. Village of Oakwood</i> , 931 S.W.2d 819 (Mo. Ct. App. 1996)	3

State ex rel. General Motors Acceptance Corp. v. Brown,
48 S.W.2d 857 (Mo. banc 1932) 5

State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell,
426 S.W.2d 11 (Mo. 1968) 2, 6-7

State ex rel. Mason v. County Legislature,
75 S.W.3d 884 (Mo. App. W.D. 2002) 3

State ex rel. Myers v. Shinnick, 19 S.W.2d 676 (Mo. 1929) 4-5

State ex rel. University Park Bldg. Corp. v. Henry,
376 S.W.2d 614 (Mo. App. 1964) 2

Tri-County Paving, Inc. v. Ashe County, 281 F.3d 430 (4th Cir. 2002) 14

Tuthill Ranch, Inc. v. United States, 381 F.3d 1132 (Fed. Cir. 2004) 21

Williams v. City of St. Louis, 783 F.2d 114 (8th Cir. 1986) 11

Wyatt v. Cole, 504 U.S. 158 (1992) 9

State Statutes

447.620, *et seq.* RSMo. 1

447.630 RSMo. 16

447.632 RSMo. 15-16

447.638 RSMo. 20

	Page
447.640 RSMo.	6, 20
473.663 RSMo.	18-19

INTRODUCTION

This case is about whether the application of Missouri's Abandoned Housing Act (the Act) 447.620, *et seq.* RSMo. violates the rights of homeowners such as Karl Thomas and Ambassador Properties, L.L.C., (Thomas) that should be protected by the constitutions of the United States and Missouri. It is not about the purity of the intentions of the amici and it is not about disputed factual allegations surrounding Thomas' deed to the property. Rather, it is about whether the Missouri Abandoned Housing Act is constitutional facially and as applied where Thomas and his predecessors in interest did not receive adequate notice of the court-ordered disposition of the property, where the transfer of the property to a nonprofit corporation violated substantive due process, where the transfer constitutes an uncompensated taking of private property, and where the seizure of private homes by a private entity will constitute an unlawful private taking by an entity acting under color of state law.

I

THIS IS THE APPROPRIATE FORUM

TO RESOLVE THIS DISPUTE

Respondent repeats the argument it made when it initially opposed the petition for writ of mandamus before this Court. The validity of these arguments has not increased. Without this mandamus action, Thomas faces an intolerable circumstance.

He can attempt to protect his property only by availing himself of the procedures of an unconstitutional statute that is incapable of providing him with meaningful relief.

Respondent suggests Thomas could avail himself of the “normal judicial process.” Relator’s Brief at 1. But, after summarily denying Thomas’ Motion for Summary Judgment or in the Alternative, Motion for Judgment on the Pleadings, the trial court stayed all proceedings, saying, “This Court invites appellate authority to review and resolve this legal theory of recovery and defense.” Relator’s Appendix at A167, Court Order of December 15, 2006. Respondent, however, correctly admits that an appeal from a motion for summary judgment is unavailable. Respondent’s Brief at 12. For that reason, Thomas has been compelled to pursue relief through a writ of mandamus.

“It is true that ordinarily mandamus does not lie where other remedies are available. But such other remedies must be adequate and equally efficient.” *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d 11, 15 (Mo. 1968). Moreover, a “writ of mandamus issues only in a case of necessity to prevent injustice or great injury.” *McDonald v. City of Brentwood*, 66 S.W.3d 46, 50-51 (Mo. App. E.D. 2001) quoting *State ex rel. University Park Bldg. Corp. v. Henry*, 376 S.W.2d 614, 617 (Mo. App. 1964). This is such a case. An appeal after enduring the procedures under the Abandoned Housing Act will not alleviate the immediate and irreparable injury suffered by Thomas. Under the terms of the

Abandoned Housing Act, the best possible outcome will be that Thomas can regain his house if he pays Respondent the rehabilitation costs incurred by Respondent, which it alleges to be \$10,000, as well as any additional liabilities or obligations incurred by House Rescue. What is worse, because Thomas has been unable to access his property, it continues to deteriorate and Thomas continues to be subject to civil and criminal charges for its condition. *See* Relator's Brief at 10-11.

While Missouri courts have often, but not always, been reluctant to utilize the mandamus remedy to resolve constitutional issues, the courts have also noted in these cases that other remedies were available. For example, in *State ex rel. Mason v. County Legislature*, 75 S.W.3d 884, 888 (Mo. App. W.D. 2002), the court found “[m]echanisms available to initiate the claim in the appropriate forum include declaratory judgment.” In this case, however, no other mechanism is available that would not entail the utilization of a forum that cannot provide relief.

Likewise, in *State ex rel. Chiavola v. Village of Oakwood*, 931 S.W.2d 819, 825 (Mo. Ct. App. 1996), the petitioner sought first to have the court declare a zoning ordinance unconstitutional and then order the town to allow a particular land use. But in that case there were certainly other avenues for relief that petitioner could and, in fact, did pursue.

The proscription against adjudicating “legal or factual” issues in a mandamus proceeding, as described in *Carmack v. Saunders*, 884 S.W.2d 394, 398 (Mo. Ct.

App. 1994) is inapposite here. *Carmack* involved an elk farmer who had already been compensated for past losses and was seeking compensation for future losses. To litigate those points the court would have had to consider novel legal arguments (for liability for future losses) and factual arguments (what those future losses might be). In this case, first of all, there are no relevant legal issues in dispute. As discussed below, the title question is not before this Court. Moreover, any factual questions that could be resolved under a trial under the Missouri Abandoned Housing Act, such as those relating to the costs that Thomas might have to pay to regain his property, are not before this Court and are not relevant to the relief sought by Thomas. Thomas simply seeks the return of his property and for the trial court to hear his claim for damages. Second, in this case, the legal issues at hand do not concern the law surrounding the specific application of the Act to Thomas' property (such as whether Thomas' property fits the definition of that Act) but instead whether the Act is so fundamentally flawed that it cannot be applied in a constitutional manner to Thomas or anyone else. This is the sort of question for which this Court's jurisdiction is required. There is no other avenue for relief.

Respondent suggests that *State ex rel. Myers v. Shinnick*, 19 S.W.2d 676, 676 (Mo. 1929), which found an appeal of a writ of mandamus that contained constitutional questions to be proper, is distinguishable because the writ was

ultimately dismissed. But it was dismissed “because relator has already obtained the relief he asks for,” *id* at 679, not because of the presence of constitutional questions.

Likewise, in *State ex rel. General Motors Acceptance Corp. v. Brown*, 48 S.W. 2d 857 (Mo. banc 1932) this Court considered a mandamus remedy when the trial court refused to exercise its jurisdiction over a matter. Respondent suggests that the circuit court here “did not dismiss, but considered the constitutional challenges.” Respondent’s Brief at 25. In reality, in the present case, the trial court simply did not address the constitutional issues, finding only that “there is no just reason for delay” and that it “denies all claim and defenses integrated with this legal theory.” Order of December 15, 2006, Relators’ App. at A-167. The “claim and defenses” the court was referring to were specific counterclaims against House Rescue, not the underlying constitutional challenges to the statute. Moreover, the court made it clear that it was not addressing the constitutional challenges to the Act when it expressly invited “appellate authority to review and resolve this legal theory of recovery and defense.” *Id.* This language indicates that the trial court in fact neither reviewed nor resolved these issues.

The relief requested here is not of the style where a party foregoes other available relief and instead seeks a determination of the constitutionality of a statute and then has that determination applied to a specific party. Instead, Thomas here is asking this Court to order the trial court to undo the damage that has already occurred,

based on the inadequacy and unconstitutionality of available remedies. “Mandamus is applicable to compel the doing of that which is right though it may sometimes have the effect of rescinding that which was wrong.” *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell*, 426 S.W.2d at 14-15.

Were Thomas to pursue the futile remedies provided by the Act—giving him an opportunity either to lose his property entirely or pay to Respondent the rehabilitation costs incurred by Respondent, then Thomas would again, in time, be seeking an adjudication by this Court of the issues raised in this proceeding. Nothing would be gained in terms of the resources of Thomas, Respondent, and this Court. The cost of the trial alone would likely exceed Thomas’ investment in the property; the cost of an appeal would be far greater. That Thomas was able to obtain pro-bono assistance in this case does not mitigate the fact that the only procedures open to Thomas and other similarly situated property owners is to participate in a trial that can result only in either the loss of his property or the return of the property after paying considerable sums of money to Respondent and accepting any obligations incurred by Respondent on the property. *See* 447.640 RSMo.

Respondent further suggests that one of the prayers for relief—that this Court order the trial court to set a trial on the question of damages is appropriate because Thomas did not request a trial for damages in the trial court. Respondent’s Brief

at 26. Because the trial court has already rejected all of the possible bases for relief, such a request would be a truly futile act.

Finally, as attested to by the interest of the amici, the issues in this case are of great public interest. The case reflects the tension between the desire of cities to deal with abandoned homes in the most expeditious manner possible and the rights of individuals who own property. The public import of this case is yet another reason why the writ is appropriate. As stated by this Court, “the discretion of the court with regard to the issuance of the writ is sometimes influenced by the ‘public importance’ of the matter.” *State ex rel. Keystone Laundry & Dry Cleaners*, 426 S.W.2d at 15. This is an important case and this Court should proceed with this action in mandamus.

II

KARL THOMAS HAS STANDING TO DEFEND HIS PROPERTY

Karl Thomas quite agrees with Respondent that a petition for a writ of mandamus before the Supreme Court “is not a tool designed to adjudicate questions of fact.” Respondent’s Brief at 1. Despite its recognition that it is not the appropriate forum to resolve factual disputes, Respondent proceeds to paint a scurrilous, and irrelevant, picture of Thomas’ deed, essentially asking this Court to make a factual determination that Thomas’ deed is invalid and that Thomas lacks standing to pursue

the defense of his rights in the home. Respondent's Brief at 27-31. This is neither the time nor the place for these matters to be resolved. To the extent it was necessary, Thomas anticipated and responded to these allegations in Relators' Statement, Brief, and Argument at 22-26. If Respondent has a question about Thomas' deed, and if it has *itself* a cognizable interest in the property, it is fully capable of filing a quiet title action.

All that matters here is that Thomas has made a prima facie case that he paid valuable consideration for the property and that a deed has been properly recorded to that effect. Thomas has standing to pursue this action.¹

III

HOUSE RESCUE IS IMBUED WITH STATE ACTION

In utilizing the Abandoned Housing Act to divest Thomas of his property, House Rescue is imbued with state action to the same extent that finance companies

¹ House Rescue's primary evidence is the Declaration of Latt Copley who claims to have secured a deed for the property for a nonprofit corporation named "Urban Renewal of KC, Inc." Relators' Appendix at A127, Affidavit of Latt Copley. This deed apparently was never recorded and neither Respondent nor Mr. Copley provide any tangible evidence that it ever existed. They are free to produce such if Respondent has an opportunity to file a Quiet Title action.

have been found to be imbued with state action by utilizing repossession statutes to gain title to private and personal property. *See e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); *Wyatt v. Cole*, 504 U.S. 158, 162 (1992); and discussion in Relator's Brief at 52-56. Attention should be specially directed to *Wyatt* which found the state action requirement to be satisfied in *Lugar* as follows:

[The state action] requirement is satisfied, the Court held, if two conditions are met. First, the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Ibid.* Second, the private party must have "acted together with or . . . obtained significant aid from state officials" or engaged in conduct "otherwise chargeable to the State." *Ibid.* The Court found potential § 1983 liability in *Lugar* because the attachment scheme was created by the State and because the private defendants, in invoking the aid of state officials to attach the disputed property, were "willful participant[s] in joint activity with the State or its agents."

Wyatt, 504 U.S. at 162 quoting *Lugar*. *Accord, Ross v. Ford Motor Credit Co.*, 867 S.W.2d 546 (Mo. Ct. App. 1993). Here, House Rescue would have had absolutely no right to enter upon Thomas' property but for a combination of the Abandoned Housing Act and the Order of Possession from the trial court.

Respondent suggests that for state action to exist, state action must be “compelled.” Respondent’s brief at 34, citing *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 164 (1978). Respondent badly misunderstands the decision in *Flagg Brothers*. In that case the plaintiffs asserted that the *private sale* by a private warehouseman of goods belonging to plaintiff was imbued with state action. Unlike the cases cited by Relator (Relator’s brief at 52-56) this was a purely private sale, authorized by the Uniform Commercial Code, that did not use the court system for enforcement. As the Court noted in *Flagg*, the “total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors’ remedies.” 436 U.S. at 157.

Respondent’s error in relying on *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-53 (1999) is self evident for it refers merely to “[p]rivate use of state-sanctioned *private* remedies or procedures.” *Id.* (emphasis added). Here, Thomas is concerned with House Rescue’s utilization of the machinery of the *state* to deprive him of his property.

Finally, Thomas pointed out in Relator’s Brief, at 55-56, that *Mottl v. Missouri Lawyer Trust Account Found.*, 133 S.W.3d 142 (Mo. Ct. App. 2004) is inapplicable because the lack of state action there stemmed from the fact that the decision to participate in the trust account was voluntary on the part of an attorney’s client. 133 S.W. 3d at 147. Respondent now argues that “House Rescue’s decision to pursue

the Abandoned Property was completely voluntary and not coerced by any state actor or state statute.” Respondent’s Brief at 36. Respondent has it backwards. It is *Thomas* who has been involuntarily subjected to the Abandoned Housing Act.

Flagg and Mottl cannot be read to require that an otherwise private party is imbued with state action only when the state forces the party to act in a particular way. Rather these cases are consistent with the principle of *Lugar, Wyatt, and Ross* that when an otherwise private party takes property from another private party, state action is involved if (1) the ability to take the property was created by the state (as it was here); and (2) it is only through the actions of state government that the property could be in fact seized (as occurred here with the order of possession). By utilizing the courts and the Abandoned Housing Act, House Rescue is imbued with state action.

Finally, Respondent argues that *Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986) (finding state action by private redevelopment corporation in condemning private property) does not apply because Missouri “did not delegate powers traditionally exercised by the State of Missouri . . . Instead, the statute gives non-profit corporations the opportunity to seek temporary possession.” Respondent’s Brief at 36. With due respect, the meaning of this purported distinction is unclear. Certainly House Rescue had no right to possession of Thomas’ house without the Act. And, the State surely has regulatory and even confiscatory powers over private

property, it can foreclose for tax delinquencies, and it can abate nuisances. The State, of course, is subject to the due process and takings clauses of the Missouri and United States constitutions. And, by virtue of the fact it is acting pursuant to the color of state law, so too is House Rescue.

IV

THOMAS' SUBSTANTIVE DUE

PROCESS RIGHTS ARE VIOLATED

Amicus argues that abandoned housing is a serious problem in Missouri. But it does not argue that there was a serious problem with Thomas' property. Nor could it, as Thomas was in the process of rehabilitating it when he learned of House Rescue's interest and was forced to stop his efforts by virtue of the trial court's order. Amici describe a parade of horrors including abandoned houses used by drug dealers, prostitutes, and arsonists—uses to which Thomas' property has never been put. Assuming that many abandoned houses create societal problems, that finding would not justify the ouster of owners of properties that do not contribute to these problems, the destruction of the ownership rights of temporarily unoccupied homes, and the taking of private property for private use. The statute sweeps up homes, as in this case, on the basis of the most perfunctory allegations and thus nuisance and non-nuisance property alike. It threatens homes that are in transition but not truly abandoned, but where the owners are unfortunate not to receive meaningful notice of

the state's interest. Where the fundamental right to own and use property is threatened, the Legislature must do more to protect the owners where that right has not been truly abandoned or is not truly creating serious external societal harms.

Respondent begins its discussion of substantive due process by setting out standards that are largely inapposite to this case, such as a claim that the state action must "shock the conscience." Respondent's brief at 37, citing to *Baker v. McCollan*, 443 U.S. 137, 147 (1979). But, the United States Supreme Court has applied different tests for substantive due process cases in accordance with the particular circumstances. Standards such as "shocks the conscience" have been confined to police action cases. Thus, in cases where the state must act expeditiously and without hesitation, as in the context of police work, the Court has set a high barrier. *Baker*, for example, involved allegations of false imprisonment by police. The most recent use of this test was in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), where the "shocks the conscience" standard was applied to a police chase. This standard was most famously applied in *Rochin v. California*, 342 U.S. 165 (1952) (use of stomach pump to extract evidence from defendant).

But the Court has *never* applied this standard to deliberative decisionmaking such as the regulatory or land use context. Instead, it has applied a more searching standard, such as its most recent articulation that a land use regulation violates substantive due process if it "fails to advance a legitimate state interest." *Lingle v.*

Chevron U.S.A., 544 U.S. 528, 534 (2005) (regulation of gasoline service station rents). In other land use and regulation cases the Court has variously applied the “rational basis” test, *see, e.g. Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (retroactive health benefits liability for a coal company), or a test of whether the regulation is “arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt,” *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988) (rent control regulation).

Most federal circuits have recognized this distinction as well. *See e.g. O’Mara v. Town of Wappinger*, 485 F.3d 693, 700 (2d Cir. 2007) (landowner must show permit denial occurred “in an arbitrary or irrational manner.”); *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006) (whether land use regulation rationally related to a legitimate governmental interest); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (whether “County’s actions were arbitrary or irrational”); *Brody v. City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001) (“‘arbitrary and capricious action’ in the strict sense, meaning ‘that there is no rational basis.’”); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Virginia*, 135 F.3d 275, 288 (4th Cir. 1998) (“governmental action offends substantive due process only where the resulting deprivation of life, liberty, or property is so unjust that no amount of fair procedure can rectify it”); *Lockary v. Kayfetz*, 917 F.2d 1150,

1155 (9th Cir. 1990) (“the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary”).

While a Missouri court of appeal has applied a “truly irrational” test in *Lane v. State Comm’n of Psychologists*, 954 S.W. 2d 23, 24-25 (Mo. App. E.D. 1997), this Court must harmonize whatever tests have been used in Missouri against the more recent United States Supreme Court substantive due process case of *Lingle, id.* As explained in Relators’ Opening Brief at 27-31, the taking of Thomas’ property represents a draconian response to problems that could have been remedied in many other ways. There is no “legitimate state interest” in dispossessing individuals of their property unless there is no alternative way to protect public health and safety.

By the time a homeowner learns that a nonprofit has targeted her home, it will be, under the Act, too late. House Rescue argues that all a landowner must do if a nonprofit petitioned for possession would be to “step[] forward . . . [and] adjudicate the matter [in] court.” Respondent’s Brief at 41. (That assumes, unlike the case here, that the owner receives meaningful notice.) But step forward to do what? If the nonprofit can show that the home, for whatever reason, (1) had not been lived in for six months, (2) could be declared a nuisance simply because it was being rehabbed or in a designated blight zone, and (3) if the taxes were a few days behind, a presumption is created in favor of the nonprofit wherein the court “*shall* grant the . . . petition.” 447.632 RSMo. (emphasis added). The only way a landowner might

prevail is “to demonstrate that the plaintiff should not be allowed to rehabilitate the property.” 447.632 RSMo. or to “show cause why such organization should not be allowed to rehabilitate the property.” 447.630 RSMo. But there are absolutely no standards by which this “demonstration” or “show cause” can be made. Thus, even if an owner receives notice and does “step forward,” the owner has the burden of overcoming a presumption against the owner only by utilizing a totally arbitrary test that is devoid of any meaningful standard. This standard is the *sine qua non* of an arbitrary and capricious test, one that is “truly irrational,” devoid of meaning, and violative of substantive due process.

This is especially apparent in the particular application of the Act in the instant case. Thomas had acquired the property, paid the back taxes, and was in the process of rehabilitating the home when he learned that he did not have possession. To take a man’s house because it is abandoned, a nuisance, and behind in the taxes after the owner has taken steps to cure all three of these impediments is truly irrational. Nor could such an action substantially advance a legitimate state interest, as there can never be a legitimate state interest in dispossessing an owner of his property under these conditions.

V

THE ACT VIOLATES PROCEDURAL DUE PROCESS

There are two ways in which the statute violates procedural due process. First, under the test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) the risk of erroneous deprivation is high compared to the value of any additional procedural safeguards. Second, the notice given was inadequate under the test articulated in *Jones v. Flowers*, 547 U.S. 220 (2006).

Respondent argues that due process does not require an “opportunity to cure prior to [the] deprivation of a [constitutionally protected] interest.” Respondent’s Brief at 43. This statement shortcuts the *Mathews* consideration of “additional procedural safeguards.” When a person who is about to be deprived of a property interest can cure the alleged deficiencies immediately, it makes little sense to proceed with the confiscation. Respondent’s discussion of *Lane v. State Committee of Psychologists*, 954 S.W.2d 23 (no due process violation when doctor’s license revoked for malpractice) is misplaced. The notion of “curing” a doctor’s malpractice makes no sense as the malpractice has already occurred and the doctor’s unfitness has been amply demonstrated. The prior bad actions of the doctor, in fact, cannot be cured. But because Thomas had paid the back taxes, was rehabilitating the property (just as House Rescue would do), and had invested his own money to purchase and

fix the property so that it would no longer be abandoned, the lack of any meaningful opportunity to challenge the order of possession violates the standards of *Mathews*.

Thomas, of course, is not asserting he “has a constitutional right to leave [his] property abandoned and posing a ‘substantial threat’ to its neighbors for a period greater than six months.” Respondent’s Brief at 44. Rather, Thomas is asserting that simply because property has not been occupied for six months does not automatically turn it into a “substantial threat” to its neighbors, especially when the owner is in the process of rehabilitation and does not receive notice that the possession is being transferred to a third party.

The more problematic due process violation here is the lack of meaningful notice such that the property, here originally belonging to the heirs of Louise and Charles Lasby, can be taken without either a determination of heirship pursuant to 473.663 RSMo.² or without notice to the heirs. Respondent misapprehends Thomas’

² As noted in Relator’s opening brief, a Determination of Heirship provides certain procedures that must be followed before property can be acquired by a third party:

any person claiming an interest in such property as heir or through an heir may file a petition in the probate division of the circuit court which would be of proper venue for the administration of the estate of such decedent to determine the heirs of the decedent at the date of the

(continued...)

argument when it argues that actual notice is not required to meet the standards of procedural due process. Respondent's Brief at 46-47. Thomas agrees actual notice is not always required. But, where there is a failure to receive actual notice, and where the sender should reasonably have known the notice would not be received, then there may be a violation of procedural due process. For example, in *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) notice was sent when the government knew it would not be received. Here, House Rescue was or should have been aware that the owners of the property were deceased and notice would not be received. Likewise, in *Covey v. Town of Somers*, 351 U.S. 141 (1956) notice to a known incompetent person was deemed inadequate.

Crum v. Vincent, 493 F.3d 988 (8th Cir. 2007) does not support Respondent's argument. There, the state mailed notice three times to Dr. Crum and he actually received notice once and suggested his staff misplaced the other notices. *Id* at 993. Clearly, this did not constitute the sort of "unusual circumstance" where notice by mail is inadequate under *Jones v. Flowers*, 547 U.S. 220. However, under the circumstances of the present case, where the property owners are deceased, *Jones* requires something more than mail and a posting to a home believed to be abandoned

² (...continued)

decedent's death and their respective interests or interests as heirs in the estate. 473.663 RSMo.

and owned by persons who are deceased. And, like *Jones*, the filing by publication is inadequate.

VI

THOMAS' PROPERTY HAS BEEN TAKEN FOR A PRIVATE USE WITHOUT THE PAYMENT OF JUST COMPENSATION

In 2005, after Thomas became involved in this litigation, the Legislature amended 447.640 RSMo. by adding this sentence: "Any party in interest of the property shall present any claim for compensation prior to the entering of the court order conveying title to the organization." This provision, however, does not cure the taking. By the time this provision can be utilized, a property owner such as Thomas will have already suffered a physical invasion type taking. Moreover, when read in light of 447.638 RSMo., which states that the original property owner is not entitled to the return of his property without paying to the nonprofit all of the nonprofit's expenses, it is apparent that any claim for compensation could be offset by the expenses incurred by the nonprofit.

When a property regulation takes some, but not all, the value of property, a court will weigh three factors before determining whether there has been a regulatory taking: the economic impact of the regulation, the owner's investment-backed expectations, and the character of the government action. *See e.g. Palazzolo v. Rhode*

Island, 533 U.S. 606, 617 (2001). In contrast to a partial *Penn Central* style taking, when property is physically invaded by the state or a party acting with authorization of the state, there has been a physical invasion. See e.g. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In the case of a physical invasion, what matters is that the property is occupied, not whether the government had a police power reason for doing so. See e.g. *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1136 (Fed. Cir. 2004) (“the sole question governing physical takings is whether or not the government has physically occupied the plaintiff’s property.”); *767 Third Ave. Assoc. v. United States*, 48 F.3d 1575, 1579 (Fed. Cir. 1995) (“When analyzing takings cases under the Tucker Act, the Court of Federal Claims must assume that the government’s actions are a proper exercise of statutory or regulatory authority.”)

Thomas is arguing here that his property has been subject to a physical invasion, not a *Penn Central* style regulatory taking. For that reason, Respondent’s assertion that the Abandoned Housing Act is a valid exercise of the state’s police power is not relevant. Physical invasion takings can well be valid exercises of the police power. It’s just that if a state wishes to exercise its police power by invading private property it must pay compensation. Nor is this simply a case of government going onto private land in order to abate a nuisance because that is not what is happening here. Instead, the government is transferring the possessory rights and ultimately the title of the property to a third party. In *Miller v. Schoene*, 276 U.S. 272

(1928), the state demanded that blighted cedar trees be removed; it did not take title or give title of the property to third parties.

Finally, this taking is primarily for a private, not public, use. This is the sort of ad-hoc parcel-by-parcel “private transfer” of private property for private redevelopment that was questioned in *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 493 (2005). (Kennedy, J. concurring). While the public purpose of a taking of property is an important consideration, this case does not fit the grand block by block slum clearance referred to in *Berman v. Parker*, 348 U.S. 26 (1954) or even *Kelo*. The taking in this case serves much more a private purpose than a public one.

CONCLUSION

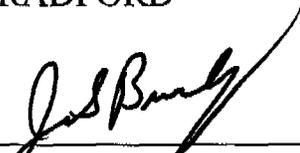
Karl Thomas seeks nothing more than a trial court’s order returning the possession of his property and reimbursing him for his damages. He is entitled to a writ of mandamus from the Court because there is no other meaningful mechanism for relief. The Act may mean well, but as written it is unconstitutional on its face as

applied to Thomas. It is respectfully requested that this Court grant Thomas his requested relief.

DATED: October 15, 2007.

Respectfully submitted,

CYNTHIA CLARK CAMPBELL
JAMES S. BURLING
R.S. RADFORD

By 

JAMES S. BURLING,
California Bar No. 113013
Pro Hac Vice
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jsb@pacificlegal.org

and

Cynthia Campbell, No. 25772
CAMPBELL LAW FIRM
Main Mark Building
1627 Main Street, Suite 420
Kansas City, Missouri 64108
Telephone: (816) 221-7007
Facsimile: (816) 221-4769
E-mail: ccclawfirm@yahoo.com

Counsel for Relators State of Missouri
ex rel. Ambassador Properties, L.L.C.
and Karl Thomas

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), I hereby certify that the foregoing RELATORS' REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, complies with Rule 84.06(b), and contains 5,381 words.

DATED: October 15, 2007.

By



JAMES S. BURLING,

California Bar No. 113013

Pro Hac Vice

Pacific Legal Foundation

3900 Lennane Drive, Suite 200

Sacramento, California 95834

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: jsb@pacificlegal.org

and

Cynthia Campbell, No. 25772

CAMPBELL LAW FIRM

Main Mark Building

1627 Main Street, Suite 420

Kansas City, Missouri 64108

Telephone: (816) 221-7007

Facsimile: (816) 221-4769

E-mail: ccclawfirm@yahoo.com

Counsel for Relators State of Missouri
ex rel. Ambassador Properties, L.L.C.
and Karl Thomas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy and a copy on a CD of the foregoing document was served by first-class U.S. mail, postage prepaid this 15th day of October, 2007, to:

The Honorable Thomas C. Clark, Judge
Jackson County Courthouse
415 East 12th Street
Kansas City, MO 64106-2706
Respondent

Patrick G. Reavey
Reavey Law, LLC
1600 Genessee, Suite 303
Kansas City, MO 64102
Counsel for Real Party in Interest

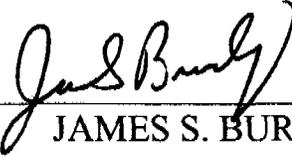
Jeremiah J. Morgan
Tarun Mehta
Bryan Cave LLP
1200 Main Street, Suite 3500
Kansas City, MO 64105
Counsel for Real Party in Interest

Lawrence R. Hamel
1125 Grand Boulevard, Suite 1900
Kansas City, MO 64106
Counsel for Legal Aid of Western Missouri

Gregg Lombardi
Legal Aid of Western Missouri
1125 Grand Boulevard, Suite 1900
Kansas City, MO 64106
Counsel for Amici Curiae Ivanhoe Neighborhood Council, et al.

and a copy was sent by U.S. Mail to:

Jay Nixon, Attorney General
Missouri Attorney General's Office
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102



JAMES S. BURLING