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Supreme Court of California
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No. S289391

IN THE CALIFORNIA SUPREME COURT

TOWN OF APPLE VALLEY
Plaintiff and Appellant,

vs.

APPLE VALLEY RANCHOS WATER et al.
Defendants and Respondents.

APPLICATION BY GOLDEN STATE WATER COMPANY TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANT AND RESPONDENT; PROPOSED BRIEF

Court of Appeal, Fourth Appellate District, Division 2
No. E078348

San Bernardino County Superior Court No. CIVDS1600180
The Honorable Donald R. Alvarez

MANATT, PHELPS & PHILLIPS, LLP
Edward G. Burg (Bar No. CA 104258)
*Joanna S. McCallum (Bar No. CA 187093)
David T. Moran (Bar No. CA 217647)
2049 Century Park East, 17th Floor
Los Angeles, CA 90067
Telephone: (310) 312-4000; Facsimile: (310) 312-4224
jmccallum@manatt.com

Attorneys for Amicus Curiae
GOLDEN STATE WATER COMPANY

APPLICATION TO FILE BRIEF OF AMICUS CURIAE

Pursuant to California Rules of Court, rule 8.520(f), Golden State Water Company ("GSWC") hereby applies for permission to file a brief as amicus curiae in support of Defendant and Respondent Liberty Utilities (Apple Valley Ranchos) Corp. A copy of the proposed brief is attached to this application.

GSWC is an investor-owned water utility regulated by the California Public Utilities Commission. GSWC has been providing water service to California consumers and businesses since 1929 and currently provides water service to over 264,000 water customers in 40 water systems situated in 10 counties across California. GSWC owns utility property within the boundaries of multiple public entities that have the authority to condemn private property, and GSWC is a potential target for condemnation by a local public entity, similar to the circumstances presented in the Opinion of the Court of Appeal below and the conflicting decision in *Pacific Gas & Elec. Co. v. Superior Court* (2023) 95 Cal.App.5th 819. The resolution of this case is of critical importance to GSWC, as the Court's decision in this case will govern proceedings if a local public entity seeks to take GSWC's utility property. GSWC submitted a letter supporting the grant of review in this case.

GSWC's proposed brief will assist the Court in deciding the case. The brief presents additional arguments and authorities supporting the conclusion that the proper interpretation of the 1992 amendments to the Eminent Domain Law is that a private owner of utility property may challenge a public entity's right to

take that property in a full evidentiary trial with the trial court acting as the trier of fact. In particular, the brief reviews the background and development of the relevant provisions of the Eminent Domain Law that preceded the 1992 amendments. The pre-1992 history demonstrates the California Legislature's understanding of the statutes when it decided in 1992 to amend certain statutes with respect to takings of utility property. This provides important context for understanding the Legislature's intent with regard to the 1992 amendments.

No party, counsel for a party, or any person or entity other than GSWC and its counsel has made a monetary contribution intended to fund the preparation or submission of the brief, and no party or counsel for a party has authored this brief in whole or in part.

Dated: January 21, 2026 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Joanna S. McCallum
Attorneys for Amicus Curiae GOLDEN STATE WATER COMPANY

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PROPOSED BRIEF OF AMICUS CURIAE

I. INTRODUCTION

This case requires the Court to construe the 1992 amendments to the Eminent Domain Law, Code of Civil Procedure, section 1230.010 et seq.[1] As shown in the briefs of Defendant and Respondent Liberty Utilities (Apple Valley Ranchos) Corp. ("Liberty"), the meaning of the amendments is clear from the plain and unambiguous statutory text. Resort to legislative history is therefore unnecessary.[2]

However, if the Court does look beyond the statutory text to legislative history, it should not review the legislative history of the 1992 amendments in isolation. The backdrop for the Legislature's decision to amend the statutes in 1992 is its understanding of what the Eminent Domain Law meant prior to the amendments.[3] In contrast to the relatively minimal legislative history of the 1992 bill (Senate Bill No. 1757), the

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[1] All undesignated statutory references are to the Code of Civil Procedure.

[2] *Murphy v. Kenneth Cole Prods., Inc.* (2007) 40 Cal.4th 1094, 1103 ("Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation.").

[3] The Court of Appeal's Opinion focuses on principles of deference to "legislative" acts, referring to the quasi-legislative branches of local public entities that may seek to condemn property. To clearly differentiate between those quasi-legislative bodies and the state Legislature that considered and enacted the statutes at issue here, this brief uses the term "Legislature," with a capital "L," when referring to that state body.

legislative history of earlier eminent domain legislation is voluminous. In particular, that prior history includes Assembly Bill No. 11 ("A.B. 11"), the 1975 comprehensive overhaul of the Eminent Domain Law that was the culmination of a rigorous 10-year analysis and recommendation by the California Law Revision Commission. A review of this earlier history of the statutory provisions affected by or related to the 1992 amendments provides useful insight into what the Legislature understood the pre-1992 statutes to mean and what it intended to accomplish by the 1992 amendments, in addition to what the 1992 legislative history itself makes clear.

This brief provides the Court with an overview of that earlier legislative history. In at least three ways, the pre-1992 history confirms that the Court of Appeal's interpretation of the 1992 amendments is incorrect and relies on erroneous assumptions.

First, the Court of Appeal held that the statutory public necessity requirements for a taking are not to be decided by a trier of fact in a full evidentiary trial, even in cases (such as this one) where the Legislature did *not* give the public entity condemnor a conclusive presumption that its adoption of a valid resolution of necessity establishes those requirements. However, the pre-1992 history shows the Legislature understood that the public necessity elements are to be decided by a trier of fact based on the evidence *unless* a conclusive presumption of public necessity applies; in other words, it is the existence of a conclusive presumption that "establishes" these elements and

removes the issue of public necessity from trial. Where the Legislature has not imposed a conclusive presumption, a public entity seeking to condemn private property bears the ordinary burden of proof applicable generally in any civil action. (Motion for Judicial Notice ("MJN"), Ex. 9, p. 120, Assem. Com. on Judiciary, Rep. on Assem. Bill Nos. 11 etc. (1975-1976 Reg. Sess.) 3 Assem. J. (1975-1976 Reg. Sess.) ("Assem. Com. Cmts."), p. 5186 [noting that in "determining issues other than compensation involved in an eminent domain proceeding, the courts have looked to the rules applicable in actions generally" and "other issues of fact or of mixed fact and law are to be tried by the court"].) The Legislature can shift (and has shifted) the burden of proof by imposing non-conclusive (i.e., rebuttable) presumptions in certain circumstances. (§ 1245.250, subds. (b), (c).) However, the Legislature understood that where no special eminent domain statute changes the burdens of proof, the condemnor bears the burden to prove all requirements of a taking, including public necessity.

Second, the Court of Appeal held that takings of utility property, which since 1992 are not subject to a conclusive presumption that the public necessity elements are established by a resolution, may be challenged only on limited grounds subject to highly deferential, mandamus-like judicial review. (§ 1245.255.) The pre-1992 history, however, shows that the Legislature intended section 1245.255 to provide a new and limited basis for a challenge by property owners in cases *subject to a conclusive presumption*. The Legislature did not intend

section 1245.255 to govern or impose any limit on challenges in cases, like this one, that are not subject to a conclusive presumption.

Third, the Court of Appeal held that public entities' takings of property outside their boundaries (extraterritorial takings) are not subject to a conclusive presumption of public necessity because the public entity lacks authority to act outside its own borders and therefore is not engaging in a valid legislative act entitled to deference. However, the pre-1992 history shows that a purported lack of authority is *not* the reason that a conclusive presumption does not apply in extraterritorial cases. Rather, the Legislature's rationale for not according a conclusive presumption of public necessity in extraterritorial takings cases is the recognition that local public entities are not accountable to the public outside of the local public entities' boundaries and lack knowledge of the local conditions in such areas. In seeking to take properties outside their boundaries, public entities therefore could make public necessity determinations that are uninformed and exploitative.

In fact, in many cases, including utility takings, extraterritorial condemnation *is* authorized by statute and *is* a valid quasi-legislative act, and the Legislature still made such takings subject to a non-conclusive, rebuttable presumption of public necessity affecting the burden of producing evidence. (§ 1245.250, subd. (c).) But the Court of Appeal relied on its erroneous interpretation to conclude that the statutory language and case law regarding extraterritorial takings are irrelevant and

provide no guidance in interpreting the nearly identical rebuttable presumption regarding utility takings that the Legislature added to the same statute in 1992.

GSWC respectfully submits that, if the Court looks beyond the plain language of the current statutes, the legislative history discussed in detail below is directly relevant to this Court's analysis of the 1992 statutes at issue here.

II. THE HISTORY AND DEVELOPMENT OF A STATUTE ARE RELEVANT TO INTERPRETING LATER AMENDMENTS TO THE STATUTE

The "overriding purpose" of statutory interpretation is "to adopt the construction that best gives effect to the Legislature's intended purpose." (*Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1183 [citation omitted].) "[T]he words of a statute [are] the most reliable indicator of legislative intent." (*Id.* at 1184 [citation omitted].) The statutory language is "viewed in the context of the statute as a whole" and "with reference to the whole system of law of which it is a part . . . ." (*Ibid.* [citations omitted]; see also *Alianto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 584.)

If a court determines that a statute's language is ambiguous and looks beyond plain language to determine the statute's meaning, the court "examine[s] the entire history of the Legislature's enactment and amendment of the statute." (*Alianto*, 142 Cal.App.4th at 586 [examining the original text of a statute and the evolution of the provision's language as "useful in ascertaining [the provision's] current meaning"].)

There is a "well-established presumption that the

Legislature, when amending a law or enacting a new law, is aware of and takes into consideration existing law." (*Rudick v. State Bd. of Optometry* (2019) 41 Cal.App.5th 77, 87.) "[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'" (*People v. Overstreet* (1986) 42 Cal.3d 891, 897 [citation omitted].) "This principle is especially apt where . . . the later-amended statute . . . is part of the same Act as the existing statute." (*Rudick*, 41 Cal.App.5th at 87; see also *Bouley v. Long Beach Memorial Medical Center* (2005) 127 Cal.App.4th 601, 607 ["The Legislature . . . may certainly be presumed to know the full text of the laws it is amending"].) And "[t]he very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act." (*People v. Perkins* (1951) 37 Cal.2d 62, 63-64 [citation omitted]; see also *Daily v. City of Pomona* (1962) 207 Cal.App.2d 637, 641 ["It is presumed that any statutory amendment works a change in the law."].)

Thus, it is proper to consider the history of an older, unamended version of a statute as evidence of the Legislature's understanding of the statute's meaning prior to its amendment, which provides insight into the Legislature's purpose in amending it. (*Alianto*, 142 Cal.App.4th at 586-587; see also *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1402

[looking to legislative history of a statute as originally enacted to demonstrate the Legislature's pre-amendment understanding of the meaning of the statute].)

An understanding of the meaning of the Eminent Domain Law prior to the 1992 amendment is thus instructive in determining the Legislature's intent in enacting legislation to amend the statute. Moreover, certain provisions of the Eminent Domain Law that bear on the proper interpretation of the amended provisions were not themselves amended in 1992 (§ 1245.250, subdivisions (a) and (c); § 1245.255); thus, the pre-1992 history and development of the law are instructive on the statutes' current meaning.

III. THE EMINENT DOMAIN LAW

A. Current law.

In California, a public entity's exercise of eminent domain is governed by the California Constitution, art. I, § 19, and the Eminent Domain Law, Code of Civil Procedure, section 1230.010 et seq. The Constitution imposes only two limitations: the property must be taken for a "public use" and the property owner must be paid just compensation. (Cal. Const., art. I, § 19; see also *People ex rel. Dep't of Public Works v. Chevalier* (1959) 52 Cal.2d 299, 304, superseded by statute on other grounds.) All other requirements, as well as details regarding establishing public use, are created by statute.

Among the requirements imposed by the Legislature are three "public necessity elements":

> The power of eminent domain may be exercised to acquire property for a proposed project *only if all of the following are established*: (a) The public interest and necessity require the project. (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. (c) The property sought to be acquired is necessary for the project.

(§ 1240.030 [emphasis added].)

Prior to filing an eminent domain action, a public entity must adopt a "resolution of necessity" pursuant to specific requirements as to procedure and contents. (§§ 1245.220, 1245.230-1245.245.) A resolution "shall contain . . . [a] declaration that the governing body of the public entity has found and determined each of" the three public necessity elements. (§ 1245.230, subd. (c).)

The adoption of a valid resolution has an important consequence: in most cases, it relieves a public entity of its burden to "establish" the public necessity elements at trial. (§ 1240.030.) Section 1245.250, subdivision (a) states "[e]xcept as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030 [the public necessity elements]." The concept that a public entity's resolution conclusively establishes public necessity of most takings has been part of the Eminent Domain Law for more than 100 years. (See *infra* Part III.B.1.)

Section 1245.250 itself contains two exceptions to the general conclusive presumption. Subdivision (c) states: "If the taking is by a local public entity and the property described in the

resolution is not located entirely within the boundaries of the local public entity [i.e., extraterritorial property], the resolution of necessity creates a presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of producing evidence." (§ 1245.250, subd. (c).[4]) The concept that a public entity's resolution *does not* conclusively establish public necessity of a taking of extraterritorial property has been part of the Eminent Domain Law since at least 1913. (See *infra* Part III.B.2.)

The other exception was added in 1992, and is the focus of this case. (See *infra* Part III.B.4.) Subdivision (b) provides: "If the taking is by a local public entity, . . . and the property is electric, gas, or water public utility property, the resolution of necessity creates a rebuttable presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of proof." (§ 1245.250, subd. (b).)[5] In the same 1992 bill that created current subdivision (b), the Legislature enacted new section 1235.193, creating a category of "[e]lectric, gas, or water public utility property," defined as "property appropriated to a public use by a public utility, as defined in Section 218, 222, or 241 of the Public Utilities Code." (§ 1235.193.)

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[4] Prior to the 1992 amendment, this provision was subdivision (b).

[5] Subdivision (b) does not apply to "a sanitary district exercising the powers of a county water district pursuant to Section 6512.7 of the Health and Safety Code." (§ 1245.250, subd. (b).)

B. The evolution of the Eminent Domain Law.

For the most part, the current Eminent Domain Law was enacted in 1975. (See *infra* Part III.B.3.) However, a review of the law's evolution is useful to understanding its current meaning.

1. 1872: The Legislature creates the eminent domain statutes.

In 1872, the Legislature enacted a comprehensive Code of Civil Procedure prepared by the Revision Commission, which "followed closely existing laws."[6] (MJN, Ex. 1, p. 19, Annotated Code Civ. Proc. (1872), Preface, p. vi.) The legislation was drafted following an extensive review of the California Civil Practice Act of 1851 and the statutes of other states.[7]

Former section 1241 set forth the "[f]acts necessary to be found by Court before condemnation": "Before property can be taken, it must appear: 1. That the use to which it is to be applied is a use authorized by law; 2. That the taking is necessary to such use; 3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."[8]

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[6] This brief refers to the year that a statute became effective rather than the year it was enacted.

[7] https://www.legintent.com/california-code-of-civil-procedure-statutory-history/

[8] The more necessary public use requirement (now § 1240.610) is also subject to a conclusive presumption in favor of the public entity, with an exception enacted in 1992 applying a rebuttable presumption affecting the burden of proof for a public entity's

(MJN, Ex. 1, p. 29, Annotated Code Civ. Proc. (1872), § 1241, p. 104.) Section 1242 required that the property "must be located in the manner which will be most compatible with the greatest public good and the least private injury . . . ." (*Id.*, p. 33, § 1242, p. 108.)

The statute provided that an action in eminent domain was generally subject to the same procedures as other civil actions. (MJN, Ex. 1, pp. 34-35, Annotated Code Civ. Proc. (1872), §§ 1243-1246, pp. 109-110; see also *id.*, p. 40, § 1256, p. 115 ["Except as otherwise provided in this Title, the provisions of Part II of this Code are applicable to and constitute the rules of practice in the proceedings mentioned in this Title."].)

2. 1913: The Legislature adds a conclusive presumption of public necessity but exempts extraterritorial property.

In 1913, the Legislature amended section 1241, subdivision (2) to require:

> Before property can be taken, it must appear: . . .
> 2. That the taking is necessary to such use [authorized by law]; *provided*, when the legislative

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taking of utility property for the same use. (§ 1240.650, subds. (a), (c).) Many of the points made in this brief about the public necessity elements apply equally to the more necessary public use requirement. However, this brief focuses on public necessity, because those presumptions arise from a public entity's quasi-legislative adoption of a resolution, a fact that was essential to the Court of Appeal's holding. Unlike the presumptions of public necessity, the more necessary public use presumptions are not connected to the resolution or any quasi-legislative act. They arise by operation of statute. (*Ibid.*)

> body of a county, city and county, or an incorporated city or town, shall, by resolution or ordinance, adopted by vote of two thirds of all its members, have found and determined that the public interest and necessity require the acquisition, construction or completion, by such county, city and county, or incorporated city or town, of any proposed public utility, or any public improvement, and that the property described in such resolution or ordinance is necessary therefor, *such resolution or ordinance shall be conclusive evidence; (a) of the public necessity of such proposed public utility or public improvement; (b) that such property is necessary therefor, and (c) that such proposed public utility or public improvement is planned or located in the manner which will be most compatible with the greatest public good, and the least private injury*. . . .

(MJN, Ex. 2, p. 42, Stats. 1913, c. 293, p. 549, § 1 [emphasis added]; see also MJN, Ex. 3, p. 44, Sen. Journal (Apr. 12, 1913) on S.B. No. 706.)

In the 1913 amendment, however, the Legislature specifically carved out extraterritorial property from this conclusive presumption, adding: "*provided*, that said resolution or ordinance shall not be such conclusive evidence in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof." (MJN, Ex. 2, pp. 42-43, Stats. 1913, c. 293, pp. 549-550, § 1.) Until 1992, when the Legislature exempted utility property from the conclusive presumption of public necessity established by a resolution, the sole exception was for extraterritorial takings.

3. 1975: The Legislature comprehensively overhauls the Eminent Domain Law.

In 1975, the Legislature passed A.B. 11, replacing the

existing eminent domain statutes with the new comprehensive Eminent Domain Law. (MJN, Ex. 5, p. 49 et seq., Stats. 1975, ch. 1275, p. 3409.) As discussed below, A.B. 11 largely resulted from the December 1974 Recommendation of the California Law Revision Commission (the "Commission"). (See MJN, Ex. 15, p. 275, Recommendation proposing The Eminent Domain Law (Dec. 1974) 12 Cal. Law Revision Com. Rep. (1974) p. 1601 ("1974 Recommendation").[9]) "These [statutory] changes were recommended by the California Law Revision Commission after it studied our existing eminent domain law and reviewed similar laws of every jurisdiction in the United States, pursuant to legislative direction. In the words of the commission, the new law was intended 'to cover, in a comprehensive manner, all aspects of condemnation law and procedure' and to produce 'a modern Eminent Domain Law within the existing California statutory framework.'" (*City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 65 [citations omitted].)

a. The Commission conducts a decade-long study of eminent domain law and recommends legislation.

In 1965, the Legislature directed the Commission "to study condemnation law and procedure with a view to recommending a comprehensive statute that will safeguard the rights of all parties to such proceedings." (MJN, Ex. 15, p. 300, fn. 1, 1974

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[9] The Commission's Recommendations cited herein are also available at https://clrc.ca.gov/Menu3_reports/publications.html#V12.

Recommendation, p. 1626.)[10] In conducting this study from 1965 through 1974, the Commission was "aided in its task by consultants retained to provide expert assistance and by a special committee of the State Bar [the State Bar Committee on Governmental Liability and Condemnation] appointed primarily to assist the Commission." (MJN, Ex. 15, p. 280, 1974 Recommendation, p. 1606.) It also had "the assistance of numerous persons throughout the state who attended Commission meetings, commented on various aspects of the study, and responded to inquiries or questionnaires, thereby providing the Commission with a wealth of empirical data and contributing materially to the quality of the product." (*Ibid.*) In addition, the Commission reviewed the eminent domain statutes of every state and the Uniform Eminent Domain Code as well as a draft of a Model Eminent Domain Code. (*Id.*, pp. 301-302, 1974 Recommendation, pp. 1627-1628.)

In January 1974, the Commission provided the Legislature with a Tentative Recommendation relating to Condemnation Law and Procedure[11] that "was widely distributed for review and comment." (MJN, Ex. 15, p. 280, 1974 Recommendation,

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[10] This was "an expansion of an earlier direction to make such a study with a view to recommending revisions 'to safeguard the property rights of private citizens'" in 1956. (*Ibid.* [citing Cal. Stats. 1956, Res. Ch. 42, at 263]; see also *id.*, p. 279, 1974 Recommendation, p. 1605.)

[11] MJN, Ex. 14, p. 155, Tentative Recommendation relating to Condemnation Law and Procedure (Jan. 1974) 12 Cal. Law Revision Com. Rep. (1974), p. 1.

p. 1606.)[12] Thereafter, "[t]he comments received from interested persons and organizations [were] taken into account by the Commission in formulating this recommendation." (*Ibid.*) On October 11, 1974, the Commission transmitted its Recommendation to Governor Reagan and the Legislature, explaining "[t]he proposed comprehensive statute is the culmination of the Commission's exhaustive study of condemnation law and procedure . . . ." (*Id.*, p. 300, 1974 Recommendation, p. 1626.)

b. The Legislature enacts A.B. 11.

On December 2, 1974, Assemblyman McAlister introduced Assembly Bill No. 11. (MJN, Ex. 6, p. 108, Assem. Bill No. 11 (1975-1976 Reg. Sess.) as introduced Dec. 2, 1974.) The bill "revises existing statutory provisions relating to eminent domain, to make substantive and clarifying changes, to incorporate recommendations of the California Law Revision Commission . . . ." (*Ibid.,* Legis. Counsel's Dig.) A.B. 11 was the subject of multiple hearings and committee analyses, and was amended eight times before its passage in September 1975. (MJN, Ex. 12, p. 151, Assem. Final History (1975-1976 Reg. Sess.).)

On May 14 and August 14, 1975, the Assembly Judiciary

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[12] The Commission issued three other tentative recommendations relating to conforming changes and takings by state agencies. (12 Cal. Law Revision Com. Rep. 1001, 1051, 1101, available at Printed Reports, Recommendations, and Studies.)

Committee and then the Senate Committee on Judiciary, respectively, issued reports recommending passage of A.B. 11, and providing additional and revised comments to those included in the 1974 Recommendation. Both committees explained that the reports were intended "to indicate more fully [the committees'] intent with respect to Assembly Bill[] 11 . . . . [¶] Except for the new and revised comments set out below, the comments contained under various sections of Assembly Bill[] 11 . . . as set out in [the 1974 Recommendation], reflect the intent of the [committees] in approving the various provisions of Assembly Bill[] 11 . . . ." (MJN, Ex. 9, p. 118, Assem. Com. Cmts., p. 5183; MJN, Ex. 10, p. 135, Sen. Com. on Judiciary, Rep. on Assem. Bill Nos. 11 etc. (1975-1976 Reg. Sess.) 4 Sen. J. (1975-1976 Reg. Sess.) ("Sen. Com. Cmts."), p. 6537.)[13]

While A.B. 11 was under consideration by the Legislature, the Commission continued to participate in hearings and it issued additional supplemental staff memoranda addressing comments raised during the legislative process. In particular, the Commission prepared a detailed memorandum for the

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[13] See *Bonanno v. Central Contra Costa Transit Auth.* (2003) 30 Cal.4th 139, 148 ("Because the official comments of the California Law Revision Commission 'are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it[,]' the comments are persuasive, albeit not conclusive, evidence of that intent." [citation omitted]); *Donkin v. Donkin* (2013) 58 Cal.4th 412, 425, fn. 8 ("Explanatory comments by a law revision commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." [citation omitted]).

Subcommittee on Eminent Domain of the Senate Judiciary Committee for its July 10, 1975 hearing, explaining:

> The interchange of views and the give and take that occurred during the many years this package of bills was being prepared have eliminated the great majority of the objections to the bills. Nevertheless, some important areas of controversy existed when the bills were introduced and additional areas of controversy were created by a series of amendments made in the Assembly. The primary objective of the hearing on July 10, 1975, is to permit interested persons and organizations (to the extent time permits) to present their views concerning the various problem areas in the bills so that these problems can be resolved in a way satisfactory to the subcommittee.

(MJN, Ex. 18, p. 422, Cal. Law Revision Com., Memorandum for Subcommittee on Eminent Domain of Senate Jud. Committee (July 10, 1975), p. 1.)

The transmittal letter seeking Governor Brown's signature on A.B. 11 explained the background and the substantial investment of time by the Commission, the Legislature and its committees, "five expert consultants and a special committee appointed by the California State Bar," "[h]undreds of lawyers and appraisers who practice in this field," and "[r]epresentatives of state and local public entities." (MJN, Ex. 13, p. 153, Assemblyman Alister McAlister, letter to Gov. Edmund G. Brown, Jr., Sept. 12, 1975; see also MJN, Ex. 16, p. 396, John H. DeMoully, Exec. Sec., letter to Gov. Edmund G. Brown, Jr., Sept. 16, 1975.) Governor Brown signed the bill on October 1, 1975.

(MJN, Ex. 5, p. 49, Stats. 1975, ch. 1275, p. 3409.)[14]

4. 1992: The Legislature amends the Eminent Domain Law applicable to utility property.

In 1992, the Legislature made the amendments at issue here. Senate Bill No. 1757, signed into law on September 21, 1992, added sections 1235.193, 1245.250, subdivision (b), and 1250.650, subdivision (c). (See *supra* Part III.A.)

IV. PRE-1992 HISTORY SHOWS THE LEGISLATURE'S INTERPRETATION OF THE EMINENT DOMAIN LAW WHEN IT AMENDED THE STATUTE IN 1992 AND UNDERMINES THE COURT OF APPEAL'S OPINION

When the Legislature amended the Eminent Domain statutes in 1992 to add the new provisions regarding utility property, it is presumed to have intended to change the existing law as the Legislature understood it. (See *supra* Part II.) To the extent the Court finds that the 1992 amendments' plain language is ambiguous, i.e., that it is susceptible to more than one reasonable interpretation, the amendments should be construed in light of not only the clear statutory intent expressed in the legislative history of Senate Bill No. 1757, but also of the

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[14] Section 1245.255, discussed in the Court of Appeal's Opinion and *infra* Part IV.B, was amended in 1978. (See MJN, Ex. 27, pp. 573-574, Stats. 1978, ch. 286, pp. 453-454; MJN, Ex. 28, pp. 576-579, Recommendation relating to Review of Resolution of Necessity by Writ of Mandate (Sept. 1977) ("1977 Recommendation").)

Eminent Domain Law's pre-amendment meaning, discussed below.

A. Before 1992, the Legislature understood that public necessity is to be litigated in an evidentiary trial and decided by a trier of fact—*except* where the Legislature made the presumption of public necessity "conclusive."

The Court of Appeal held that even though the Legislature in 1992 had made resolutions in takings of utility property *not conclusive* of the public necessity elements, these elements are not to be determined in an evidentiary trial before a trier of fact; instead, it held, a property owner may only challenge the condemning entity's findings on those elements on limited grounds and subject to deferential review. (Op., pp. 27-28, 30.) That is erroneous. The Legislature knew and intended that it is the existence of a conclusive presumption that is the sole basis for such extreme deference to a public entity's findings in a resolution. Where the Legislature instead has imposed a rebuttable presumption (as it did in 1992 for utility takings), the rebuttable presumption merely affects the parties' respective burdens at trial; it does not require a court to defer to the public entity's findings.

1. The Legislature intended that ordinary civil trial burdens of proof apply in eminent domain actions unless expressly changed by statute.

Ordinary civil trial procedures and burdens of proof apply in eminent domain proceedings unless the Legislature has specifically created different burdens and procedures by statute.

(§ 1230.040 ["Except as otherwise provided in this title, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings."].) Section 1230.040 "continues the general principle that eminent domain proceedings are to be governed by the same rules as civil actions generally." (MJN, Ex. 9, p. 119, Assem. Com. Cmts., p. 5184, § 1230.040.) This was the rule as far back as the original eminent domain statutes in 1872. (MJN, Ex. 1, p. 40, Annotated Code Civ. Proc., p. 116, § 1256; see also *ibid.*, Note ["The object of this section is to give a trial by jury in every case, if demanded, and when not demanded, a trial by the Court; and to conform the practice in these proceedings as near as practicable to that in civil actions. The advantage in having the practice in different proceedings in the Courts as nearly uniform as possible is manifest."].)

The Assembly comments to section 1230.040 in 1975 reviewed the major areas of the Eminent Domain Law where the Legislature had enacted specific statutes to displace ordinary rules of civil procedure. Discussing the nature of the trial in an eminent domain action, the comments explain:

> [W]ith respect to the method of determining *issues other than compensation* involved in an eminent domain proceeding, the courts have looked to the *rules applicable in actions generally* and have held that Section 592[15] requires that other *issues of fact or*

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[15] Section 592, enacted in 1872, states: "In actions for the recovery of specific, real, or personal property, with or without

> *of mixed fact and law are to be tried by the court. . . .* During the trial, the court has all its normal and usual powers . . . . [P]rovisions in this title regarding the burden of proof or burden of producing evidence with regard to right to take issues include: Section 1240.230 (future use), 1240.420 (remnants), 1240.520 (compatible public use), 1240.620 (more necessary public use), *1245.250 (effect of properly adopted resolution of necessity).*

(MJN, Ex. 9, p. 120, Assem. Com. Cmts., p. 5186, § 1230.040 [emphasis added].) These comments cite *People v. Ricciardi* (1943) 23 Cal.2d 390, 402, which held that "[w]hen the [eminent domain] proceeding comes on for hearing all issues except the sole issue relating to compensation, are to be tried by the court," and *Vallejo & N.R. Co. v. Reed Orchard Co.* (1915) 169 Cal. 545, 555-556, which held that the constitutional requirement of a jury trial to determine compensation "says nothing concerning the mode of determining the other facts necessary to establish the right of the plaintiff to take the property in question. In effect, it leaves the legislature free to provide the method of trial of all questions except that of compensation. The legislative provision on the subject is found in section 592 of the Code of Civil Procedure. . . . [E]xcept those relating to compensation, the issues

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damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code."

of fact in a condemnation suit, are to be tried by the court . . . ."

Where no special eminent domain statute changes the ordinary civil procedure rules, those ordinary rules apply. (§ 1230.040.) In an ordinary civil trial, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code, § 500; see also *id.*, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."]; *id.* § 550, subd. (b) ["The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact."].)

Thus, the Legislature understood that where no special eminent domain statute changes the burdens of proof, the condemnor—the plaintiff in an eminent domain proceeding—bears the burden to prove all requirements of a taking, including public necessity. The public necessity elements must be "established" in order for eminent domain to be exercised; and it is up to the condemning public agency to "establish" them, whether by evidence or (typically) by application of a presumption.

2. The Legislature is free to create different procedural rules for eminent domain cases—*and is free to change them.*

The Legislature in 1992 understood that it had the authority to alter the procedural rules applicable in eminent domain actions as it saw fit. It had already done so in section 1245.250, subdivision (a) (and previously in section 1241),

changing the ordinary burdens of proof with respect to the public necessity elements by making the quasi-legislative body's determination of public necessity conclusive for most takings. (MJN, Ex. 2, p. 42, Stats. 1913, ch. 293, p. 549, § 1; § 1245.250, subd. (a).)[16]

It has long been clear that the conclusive effect of a resolution's findings of public necessity was created by the Legislature. This Court in *Chevalier* repeatedly referenced the statutes as the source of the conclusive presumption, explaining "[i]t is . . . clear that since 1913, *our statutory provisions* (Code Civ. Proc., § 1241, subd. 2; see also Sts. & Hy. Code, § 103) *have placed* the determination of the question of 'necessity' within the exclusive province of the condemning body *by expressly declaring* that the latter's determination of 'necessity' shall be 'conclusive evidence' thereof." (*Chevalier*, 52 Cal.2d at 306-307 [emphasis added]; see also *id.* at 307 ["We therefore hold . . . that the conclusive effect *accorded by the Legislature* to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. . . . To hold otherwise would . . . thwart the *legislative purpose in making* such determinations conclusive"

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[16] The Legislature has altered the default burdens of proof with respect to the right to take throughout the Eminent Domain statutes. (See, e.g., §§ 1240.230, 1240.250, 1240.420, 1240.520,1240.640, 1240.650, 1240.660, 1240.670, 1240.680.)

(emphasis added)].)[17]

The Legislature also understood that, just as it was free to change the ordinary burden of proof by enacting statutes imposing a conclusive effect of quasi-legislative findings in a resolution, it also was free to enact statutes that *expressly did not* impose a conclusive effect. In 1913, when imposing a conclusive effect of a resolution's determination of public necessity for most takings, the Legislature provided "that said resolution or ordinance *shall not be such conclusive evidence* in the case of the taking by any county, city and county, or incorporated city or town, of property located outside of the territorial limits thereof." (MJN, Ex. 2, pp. 42-43, § 1241, subd. (2) [emphasis added]; see also MJN, Ex. 10, p. 139, Senate Com. Cmts., p. 6545, § 1245.250, subd. (a) ["The initial proviso of Section 1245.250 recognizes that there may be exceptions to the uniform conclusive effect given the resolution of necessity," "[o]ne" of which concerned extraterritorial property].) There has never been any question

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[17] See also *id.* at 306 (in rejecting the contention that public necessity findings were judicially reviewable if special defenses were raised (a holding later abrogated by statute, see *infra* Part IV.B), explaining "[t]he failure of some of the cases to recognize such distinction may have resulted from adherence to the language employed in certain earlier cases decided before section 1241 of the Code of Civil Procedure was amended in 1913 to provide that the condemning body's determination of 'necessity' should be 'conclusive evidence' thereof. (Stats. 1913, p. 549.) That amendment, however, definitely brought the law of this state into line with that of the vast majority of other jurisdictions.").

that in a challenge to a taking of extraterritorial property, where a conclusive presumption has not applied since 1913, the challenger is entitled to litigate the question of public necessity in an evidentiary trial.[18]

Finally, the Legislature understood that it could enact a statute altering the ordinary burdens of proof in a takings case and then could by statute *change* that rule to alter the burdens again. In *People ex rel. Dep't of Natural Res. v. O'Connell Bros.* (1962) 204 Cal.App.2d 34, the court considered a rebuttable presumption of public necessity in former Public Resources Code section 5006.1 for takings to establish a public park, providing that "[t]he declaration of the director [of Natural Resources] shall be prima facie evidence: (a) Of the public necessity of such proposed acquisition. (b) That such real or personal property or interest therein is necessary therefor. (c) That such proposed acquisition is planned or located in a manner which will be most compatible with the greatest public good and the least private injury." (*Id.* at 40-41.) The court noted that the Legislature had *changed* a former conclusive presumption and instead made the presumption rebuttable: "As originally enacted in 1947, this section provided that such evidence was '*conclusive*.' **After 12**

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[18] See Op., p. 15 ("A defendant-property owner challenging a public entity's extraterritorial taking is entitled to a full trial during which the trial court may consider extra-record evidence."); see also *San Bernardino County Flood Control Dist. v. Grabowski* (1988) 205 Cal.App.3d 885, 898; *City of Los Angeles v. Keck* (1971) 14 Cal.App.3d 920, 925-926; *City of Carlsbad v. Wight* (1963) 221 Cal.App.2d 756, 761-762.

years of experience, the Legislature apparently decided that it would be better to allow the courts the right to judicially review the proposed taking where it was for the purpose of a public park." (*Id.* at 41 [bold added].)[19] This is exactly what the Legislature did in 1992 with respect to utility takings.

3. The Legislature intended the conclusive presumption in section 1245.250, subdivision (a) to relieve the condemnor of the burden to prove public necessity in a typical taking.

A conclusive presumption establishes the presumed fact and thereby relieves a party of a burden of proof it would otherwise bear on that fact. (*Melendrez v. D & I Inv., Inc.* (2005) 127 Cal.App.4th 1238, 1250, fn. 17 ["A 'conclusive presumption' requires the trier of fact to find the existence of the presumed fact from the existence of the basic fact. An adverse party is not permitted to introduce evidence to contradict or rebut the existence of the presumed fact." (citations omitted)].)[20]

This is what the Legislature intended by enacting the

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[19] The *O'Connell* court pointed out in 1962 that "[n]o such change was made with respect to the condemning bodies specified in section 1241 of the Code of Civil Procedure, whose resolutions or ordinances are conclusive as to the issue of necessity. (Cf. *People v. Chevalier*, 52 Cal.2d 299, 307 [340 P.2d 598].)." (*Ibid.*)

[20] For that reason, "[i]n criminal cases, a mandatory presumption offends constitutional principles of due process of law because it relieves the prosecutor from having to prove each element of the offense beyond a reasonable doubt." (*People v. Laughlin* (2006) 137 Cal.App.4th 1020, 1024 [citation omitted].)

conclusive presumption of public necessity applicable to most takings. Historically, the public necessity of a proposed taking was in most cases a matter determined solely by the public entity's governing body and not subject to judicial decision. (*Chevalier*, 52 Cal.2d at 306-307; MJN, Ex. 1, p. 29, Annotated Code Civ. Proc., p. 104, Notes to § 1241 ["There is no doubt that the Legislature has the power to declare that the taking of the property is necessary or expedient."].) Since 1913, in typical takings cases, the Legislature had given effect to principles of deference to quasi-legislative acts by expressly according a resolution a "conclusive" effect on the matter of public necessity. (MJN, Ex. 2, p. 42, Stats. 1913, ch. 293, p. 549, § 1; § 1245.250, subd. (a); MJN, Ex. 21, p. 525, Cal. Law Revision Com. Staff Memo. No. 71-20 (April 23, 1971), p. 5[21] ["California is one of the few states that has enacted a requirement that public necessity be shown before property can be taken by eminent domain. However, over the years since the 1872 California enactment, the Legislature has added various statutory provisions that make the

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[21] GSWC seeks judicial notice of certain Staff Memoranda prepared by the Commission. While internal memoranda that do not indicate that they were provided to the Legislature may not be directly relevant to legislative intent, they clearly are relevant to the intent of the Commission in considering, drafting, and recommending provisions to the Legislature. (*Estate of Joseph* (1998) 17 Cal.4th 203, 210, fn. 1 ["We must, of course, judicially notice California statutory law. We may also judicially notice matters underlying such law. Including, to our mind, the [Law Revision C]ommission records here." (citations omitted)].)

resolution of necessity conclusive for the great majority of local public entities."].)

The Legislature had long understood that it could give effect to the public entity's primacy on the issue of public necessity through the mechanism of a conclusive presumption of public necessity—a "major policy decision in the right to take." (MJN, Ex. 20, p. 462, Cal. Law Revision Com. Staff Memo No. 70-33 (April 15, 1970), p. 2.) In 1975, the Commission recommended the enactment of section 1245.250, which continued the conclusive presumption of public necessity for all property except extraterritorial property. (MJN, Ex. 15, p. 317, 1974 Recommendation, p. 1643 ["In the great majority of cases, the resolution of necessity of a public entity establishes a conclusive presumption of public necessity. The Commission has weighed the need for court review of necessity questions against the economic and procedural burdens such review would entail and against the policy that entrusts to the legislative branch of government basic political and planning decisions concerning the need for and design and location of public projects. The Commission has concluded that the policy to provide conclusive effect to the resolution of necessity of a public entity is a sound one and should be continued."]; MJN, Ex. 20, p. 477, Cal. Law Revision Com. Staff Memo No. 70-33 (April 15, 1970), Attachment: Hill, Farrer & Burrill, Study on the Right to Take in Eminent Domain prepared for Cal. Law Revision Com., June 20, 1963, p. 8 ["The legislature, by statute and the courts by interpretation, have so narrowed the area for contesting the

condemnor's actions that, today, few public condemnors need concern themselves with the propriety of the proposed taking insofar as its necessity may be urged in a condemnation trial"].)

In recommending statutory provisions to the Legislature, the Commission understood that, like any conclusive presumption, the conclusive presumption of public necessity in 1245.250, subdivision (a) relieves the condemnor of the burden to prove public necessity in an eminent domain proceeding. (MJN, Ex. 24, pp. 561-562, Cal. Law Revision Com. Staff Memo. No. 73-51 (May 15, 1973), pp. 13-14 ["The staff proposes the following uniform set of burdens and presumptions: . . . (2) The plaintiff has the burden of proof on all objections to the right to take. The burden should be one of proof by a preponderance of the evidence. (3) *If the plaintiff is a public entity, it will be aided by presumptions. In certain cases, the resolution of necessity will be given conclusive effect; in others, merely rebuttable effect*." (emphasis added)]; MJN, Ex. 21, p. 522, Cal. Law Revision Com. Staff Memo. No. 71-20 (April 23, 1971), p. 2 ["If the condemner is unable to establish the requisite necessity for the taking, the condemnee can defeat the taking on this ground. . . . The Commission has granted local public entities a conclusive presumption of 'public necessity' if the entity passes a resolution of necessity by a two-thirds vote."].)[22]

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[22] See also Daly, *Eminent Domain: The Application of the California Compatibility Requirement to the Corporate Utility*

In A.B. 11, the Legislature adopted the Commission's Recommendation with respect to section 1245.250, imposing on most takings a conclusive presumption of public necessity established by a resolution.

4. The Legislature understood that in the absence of a conclusive presumption, the question of public necessity was subject to an evidentiary trial, limited only by applicable rebuttable presumptions.

The Legislature further understood that where it chose *not* to accord a public entity a conclusive presumption, the condemnor bore the burden to prove public necessity except to the extent that the Legislature shifted the burden to the challenger by imposing a rebuttable presumption, as it had done with respect to extraterritorial property. It explained that "[§ 1245.250, s]ubdivision [(c)] continues the portion of former Section 1241(2) that denied conclusive effect of a resolution to property lying outside the territorial limits of certain local public entities. Under that provision, necessity and proper location were justiciable questions in the condemnation proceeding. Subdivision [(c)] . . . makes the question whether the proposed project is necessary a justiciable question in such a condemnation

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Condemnor (1968) 20 Hastings L.J. 597, 598-599 & fn. 18 ["The burden of proof as to this [necessity] requirement has been placed upon the condemnor, and this burden must be sustained or the condemnation proceeding will be dismissed. . . . Except, of course, where this requirement is conclusively presumed by statute. See, e.g., Cal. Code Civ. Proc. § 1241(2)." (other footnotes omitted)].)

proceeding." (MJN, Ex. 10, p. 139, Sen. Com. Cmts., p. 6545, § 1245.250 [citations omitted]; MJN, Ex. 15, p. 317, 1974 Recommendation, p. 1643 ["There are certain situations where the necessity of the taking by a public entity should be subject to judicial review. The resolution of necessity should not have a conclusive effect for acquisitions outside the territorial limits of the public entity."].)

Thus, while the Legislature generally made the question of public necessity a quasi-legislative question through use of conclusive presumptions, it could, and did, make public necessity a judicial question where no conclusive presumption applies. In *Chevalier*, this Court cited a Note in The Lawyers Reports Annotated ("L.R.A.") (1909), volume 22, pp. 64-72, for the proposition that the public necessity of a taking is a legislative question, "unless the question of necessity has been made a judicial one, either by the Constitution or by statute."[23] (*Chevalier*, 52 Cal.2d at 306.) That quote appears in the Note under the heading "The judge of necessity," and the subheading "When the courts may judge," which collects five pages of cases holding that a state legislature may delegate the public necessity question to the courts. (See, e.g., 22 L.R.A., p. 72 ["The legislature may delegate to the courts the power to determine the necessity of exercising the right of eminent domain, and when it does, the courts have jurisdiction to pass upon that question" (citation omitted)]; *ibid.* ["the question of the propriety and

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[23] See Appendix. (Cal. Rules of Ct., rule 8.520(h).)

necessity of opening or refusing to open a highway can be properly committed to the decision of a judicial tribunal" (citations omitted)].)

The Note continues: "If a statute authorizing a railroad corporation to acquire, by power of eminent domain, such lands of private owners as may be necessary for the purposes for which the corporation was created, permits a landowner whose property is sought to take issue upon any fact stated in the petition, and requires the court thereupon to hear the allegations and proofs of the parties, and determine the issues, the necessity for taking the land involved is a judicial question, and, if controverted, must be decided by the courts upon the evidence adduced." (*Id.* at 73 [citation omitted].) Where a statute provides that "[t]hose whose property is sought 'may disprove any of the facts stated in the petition,' and the court is 'to hear the proofs and allegations of the parties,' and then to determine[,]" "[t]hese provisions would be unnecessary and unmeaning if the power to pass upon the necessity of the appropriation of the lands by the corporations did not reside in the court." (*Ibid.* [citation omitted].)[24]

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[24] The Note at pp. 73-74 also cites decisions of this Court interpreting former sections 1241 and 1242 as presenting jury questions of public necessity. (See, e.g., *Wilmington Canal & Reservoir Co. v. Dominguez* (1875) 50 Cal. 505, 506 [citing § 592 and former § 1256 to support jury decision on necessity]; *Spring Valley Waterworks v. Drinkhouse* (1891) 92 Cal. 528, 532 ["There is no doubt of the proposition, that before land can be taken for a public use it must appear that the taking is necessary for such

The Legislature created statutes that, in line with these rules, mirror these indicators of a judicial determination. The rebuttable presumption of section 1245.250, subdivision (c) (and, since 1992, section 1245.250, subdivision (b)) permits an owner to try to prove the nonexistence of—i.e., *disprove*—particular facts. (Evid. Code, §§ 604, 606; Black's Law Dictionary (12th ed. 2024) ["Rebut" means "[t]o refute, oppose, or counteract (something) by evidence, argument, or contrary proof."].) The statutes also provide that "[t]he court shall hear and determine all objections to the right to take." (§ 1260.120, subd. (a).)

Further, consistent with its understanding that a condemnor has the burden to prove public necessity unless the Legislature has imposed a conclusive presumption, the Legislature expressly provided that an owner could contest the public necessity elements in cases "where the plaintiff *has not adopted a resolution of necessity that conclusively establishes* the matters referred to in Section 1240.030." (§ 1250.370 [emphasis added].) The Legislature made clear that "Section 1250.370 lists the grounds for objection to the right to take that may be raised only where there is not a conclusive resolution of necessity. Thus, they may be raised . . . against a public-entity plaintiff in cases where it has not adopted a resolution or *where the*

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use. This is a question of fact to be determined by the court or jury in view of all the evidence in the case, and the burden of proof is upon the plaintiff."]; *Santa Ana v. Gildmacher* (1901) 133 Cal. 395, 399 ["the question of necessity is one of fact, to be determined by the jury, in view of all the evidence in the case"].)

resolution is not conclusive." (MJN, Ex. 10, p. 143, Sen. Com. Cmts., p. 6552, § 1250.370 [emphasis added]; see also MJN, Ex. 22, p. 545, Cal. Law Revision Com. Staff Memo No. 72-5 (Jan. 5, 1972), p. 5 [discussing draft proposal: "The defendant may contest the public necessity of the project by a specific denial in his answer if the resolution of the condemnor is not conclusive on the issue of necessity. Where the issue of necessity is for judicial determination, the three aspects of necessity are treated disparately[.]"].)

In a staff memorandum regarding objections to the right to take, the Commission referred to a discussion of affirmative defenses in a "recently published CEB book on California condemnation law," which explained that "[a]cceptability of most of these affirmative defenses [including to public necessity] depends on whether the taking is conclusively presumed to be proper. Such conclusive presumptions are generally found in legislation. If the public agency is armed with the conclusive presumption, the defenses of necessity, abuse of discretion, and greatest public good and least private injury are *not* available. . . . These defenses *are* available when the condemnor does not have the conclusive presumption of necessity." (MJN, Ex. 23, pp. 549, 554, Cal. Law Revision Com. Staff Memo No. 73-46 (April 26, 1973), p. 1 & Ex. 1, p. 3.) In proposing that the Legislature impose a rebuttable, rather than conclusive, presumption for extraterritorial property (a proposal the Legislature adopted), the Commission was aware that:

> Condemnors that only have a prima facie or no presumption in regard to necessity have at times

> been prevented from taking property based upon the lack of sufficient evidence justifying the necessity criteria. Thus, the court has held that, in the absence of a conclusive presumption, the failure of a condemnor to show present or prospective plans or to show that future needs have been properly anticipated prevents it from proceeding in condemnation. Nonetheless, even in situations where the condemnor lacks a conclusive presumption regarding necessity, the landowner still has the burden of showing that the property which the condemnor proposes to take is not reasonably suited or useful for the improvement; and, when necessity is challenged on the proper location of the improvement in order for the condemnee to prevail, he must show that another site would involve an equal or greater public good and a lesser private injury.

(MJN, Ex. 20, pp. 480-481, Hill, Farrer Study, pp. 11-12 [footnotes omitted].)

5. The Court of Appeal's decision is inconsistent with legislative intent.

The Court of Appeal held that in the 1992 amendment, the Legislature intended that a resolution's determination of public necessity would be, if not conclusive, then nearly conclusive. In the court's view, despite the Legislature's 1992 enactment of a rebuttable presumption of public necessity for utility property, the right to take utility property still can only be challenged under the same "gross abuse of discretion" standard applicable to takings subject to a conclusive presumption. (Op., pp. 27-28, 30.) That interpretation cannot be reconciled with the Legislature's understanding of the statutes it was amending.

In 1992, the Legislature created a new category of utility property, and carved that category out of the class of properties

subject to the conclusive presumption of public necessity in section 1245.250, subdivision (a), which had previously included utility property. As to utility property, the Legislature chose to impose a rebuttable presumption affecting the burden of proof. (§ 1245.250, subd. (b).) The Legislature is presumed to have made this change in light of its understanding, as shown above, that the public necessity elements are subject to an evidentiary trial unless a conclusive presumption applies. By removing the conclusive presumption in utility takings, the Legislature removed the sole basis for not conducting an evidentiary trial in which the court decides public necessity.

B. The Legislature understood that section 1245.255 exists in order to permit owners of property *subject to a conclusive presumption* to bring limited challenges.

The Court of Appeal below held that in a utility taking subject to a rebuttable presumption of public necessity, an owner can challenge the right to take only under the parameters of section 1245.255, which provides for a deferential, limited, mandamus-like judicial review of quasi-legislative acts. (Op., pp. 27-28, 30.) That is erroneous. The Legislature knew and intended that section 1245.225 was enacted for the purpose of providing a limited exception to the *conclusive* presumption of public necessity.[25] Where no conclusive presumption applies, it is

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[25] Section 1245.255 was not amended in 1992; thus, its 1975 and 1978 legislative history are directly relevant to show its current

not necessary for an owner to proceed with a limited challenge under section 1245.255; rather, the owner may bring a challenge under any and all of the grounds for objection in sections 1250.360 and 1250.370.[26]

1. Section 1245.255 was enacted to permit a limited challenge to a proposed taking subject to a conclusive presumption of public necessity.

Section 1245.255 was enacted in 1975 and amended in 1978. As originally enacted, it provided in relevant part: "A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body." (MJN, Ex. 5, p. 65, Stats. 1975, ch. 1275, p. 3425.)[27] The 1978 amendment added subdivision (a), and the

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meaning, in addition to show how the Legislature understood it when it enacted other provisions in 1992.

[26] GSWC is not asserting that an owner of property subject to a rebuttable presumption is not permitted to bring a challenge under section 1245.255 if it chooses to do so. But an entity not constrained by a conclusive presumption likely would not choose the more limited avenue of challenge under section 1245.255 over the full evidentiary trial permitted by sections 1250.360 and 1250.370.

[27] As introduced, section 1245.255 referred to a resolution "influenced or affected by abuse of discretion or arbitrary or capricious action by the governing body." (MJN, Ex. 7, p. 112, Assem. Amends. to Assem. Bill No. 11 (1975-1976 Reg. Sess.), amended April 28, 1975, p. 25; MJN, Ex. 8, pp. 115-116, Sen.

statute currently provides in relevant part:

> (a) A person having an interest in the property described in a resolution of necessity adopted by the governing body of the public entity pursuant to this article may obtain judicial review of the validity of the resolution:
>
> (1) Before the commencement of the eminent domain proceeding, by petition for a writ of mandate pursuant to Section 1085. The court having jurisdiction of the writ of mandate action, upon motion of any party, shall order the writ of mandate action dismissed without prejudice upon commencement of the eminent domain proceeding unless the court determines that dismissal will not be in the interest of justice.
>
> (2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title.
>
> (b) A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.

(§ 1245.255; MJN, Ex. 27, pp. 573-574, Stats. 1978, ch. 286, pp. 453-454.)

The Senate Committee comments explained "Section 1245.255 is new. It permits a collateral attack on the *conclusive effect* of the resolution of necessity. Section 1245.255 overrules the case of *People v. Chevalier*, 52 Cal.2d 299, 340 P.2d 598 (1959), insofar as that case precluded a collateral attack on the

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Amends. to Assem. Bill No. 11 (1975-1976 Reg. Sess.), amended Aug. 5, 1975, pp. 25-26.)

conclusive effect of the resolution of necessity." (MJN, Ex. 10, p. 139, Sen. Com. Cmts., p. 6545, § 1245.255 [emphasis added].)

Chevalier itself was concerned only with the effect of a *conclusive presumption* on the ability to challenge the right to take. (*Chevalier*, 52 Cal.2d at 307 ["We therefore hold . . . that the *conclusive effect* accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion." [emphasis added; citation omitted].)

2. The Commission did not propose or support section 1245.255, in part because it viewed the statute as swallowing the conclusive presumption.

The Commission's Recommendation (and A.B. 11 as introduced) did not contain section 1245.255 or any equivalent. Section 1245.255 was added to the bill by Assembly amendment for the purpose of allowing challenges to a taking on certain grounds (such as fraud, bad faith, or abuse of discretion) despite the *conclusive effect* of a resolution's findings of public necessity. (See *infra* Part IV.B.3.) The Commission remained opposed to such an exception because, among other reasons, it effectively could swallow the *conclusive presumption*.

The Commission never expressed any concern about the effect of section 1245.255 on cases *not* subject to a conclusive presumption (at the time, only extraterritorial takings). In fact, the Commission expressly explained that if there were no statutory exception permitting challenges based on abuse of

discretion, that *would have no effect on such challenges in extraterritorial cases*, which were not limited by a conclusive presumption. In a 1971 staff memorandum, the Commission addressed the question of whether to enact a statutory provision that in effect would overrule *Chevalier*'s holding that takings of property subject to a conclusive presumption could not be challenged on the basis of special defenses. (MJN, Ex. 21, p. 521, Cal. Law Revision Com. Staff Memo No. 71-20 (April 23, 1971).) The Commission noted that "[t]his phenomenon [of arbitrary and capricious takings decisions] is nowhere more apparent than in the field of extraterritorial condemnation where a public entity decides to condemn outside its boundaries. In such a situation, there is little or no pressure exerted on the entity to make a decision in the interest of the general public as opposed to a decision in the interest of the entity." (*Id.*, pp. 533-534.) But it pointed out that no exception was necessary in "extraterritorial condemnation situations for which the Commission has determined that the resolution shall not be conclusive." (*Id.*, pp. 534-535.)

The Commission also noted "California does not presently allow challenge to the conclusiveness of the resolution of necessity even if fraud, bad faith, or abuse of discretion is alleged." (*Id.*, p. 525 [citing *Chevalier*].) After giving substantial consideration to a potential exception, and cataloguing "the kinds of situations where a taking should be stopped by a court on the ground of 'fraud, corruption, bad faith, or manifest abuse of discretion,'" the Commission decided against recommending an

exception. It concluded that the situations in which fraud or bad faith were most likely to occur were best addressed, not by a catch-all exception to the conclusive presumption, but rather by specific statutory provisions tailored to those specific situations (e.g., §§ 1240.210, 1240.410, 1250.360, subds. (c), (d), (f)), which already permitted court trials on challenges to the right to take, whether or not there was a conclusive resolution. (*Id.*, pp. 527-528.) Permitting a court to address claimed impropriety in such cases would not interfere with the conclusive presumption of public necessity.

The Commission acknowledged the potential for fraud and arbitrary decisions to take property, but it did not believe that this warranted an exception to the conclusive presumption. "The argument for attack on the resolution of necessity in [such] cases . . . is initially appealing, for judicial review of an administrative decision that is clearly against the public interest will aid in rendering more responsible the agency charged with the public interest; and that, after all, is the purpose for requiring a determination of necessity in the first place." (*Id.*, p. 531; see also *id.*, p. 535 [acknowledging the potential for poor decisions in "areas where there is neither a great deal of expertise in the public nor a great deal of interest; as a result, political pressures for reasonable and accommodating decisions have been lacking," and that "[t]his type of situation, if it occurred, might be appropriate for a challenge to the resolution of necessity on the ground of bad faith"].) Still, it rejected the notion of any statutory exception to the conclusive presumption, concluding

that it is "the task of [the Legislature to] mak[e] administrative agencies more responsive to the public will." (*Id.*, pp. 532-533.)

The Commission was persuaded by the "strong arguments against allowing a challenge to the resolution of necessity on grounds of fraud." (*Ibid.*) Among other reasons:

> The Commission and the Legislature have enunciated a policy that planning decisions are vested in the sole discretion of the administrative agencies. But when an attack is allowed on the ground that the agency has made a grossly unreasonable decision, i.e., it has abused its discretion, the doctrine of administrative independence is eroded. The exception threatens to swallow the rule, particularly if a judge is given discretion to classify a decision he happens to disagree with as "grossly unreasonable." Unless the fraud exception can be given some specific and precisely defined content, there is danger that it will be abused. . . . Additionally, there does not appear to be any way to precisely define the scope of a fraud exception so that it is clear in the cases to which it applies and does not swallow up the rule that planning decisions belong to the administrative planners and not to the courts.

(*Id.*, pp. 536-537.)

The Commission also explained that "[t]he policies at stake here are clear. On the one hand, where the public has delegated authority to administrative agencies to make decisions, there has been increasing concern over the responsiveness of those decisions to the public interest. . . . On the other hand, . . . such abuses appear infrequent, at best. Existence of a challenge may be of marginal value." (*Ibid.*)

3. The Legislature added section 1245.255 as an exception to the conclusive effect of a resolution.

Despite the views of the Commission, the Assembly amended A.B. 11 shortly after it was introduced to add section 1245.255 as an exception to the conclusive presumption. The provision was proposed by the State Bar Committee on Condemnation as an amendment to section 1245.250 while the bill was being considered by the Assembly Committee on the Judiciary. (MJN, Ex. 25, pp. 566-569, Cal. Law Revision Com. Staff Memo No. 75-21 (March 3, 1975), pp. 8-11.) The State Bar Committee passed a motion to provide that resolutions of necessity with a conclusive effect were subject to the same judicial review under a mandamus standard for fraud or collusion as any other governmental action. (*Ibid.*) The State Bar Committee explained that *the conclusive presumption made the exception necessary*:

> Our most fundamental concept of government calls for no governmental action being free of the check and balance of review by the judiciary. The Committee recommends reviewability of resolutions of necessity only in the narrow, but not infrequent, situations where resolutions of necessity have been tainted by fraud or collusion. Grave miscarriages of justi[c]e have occurred *because of the conclusive nature of necessity*. Recent events prove that no branch of government is free from misconduct and no governmental activity should be free of judicial review.

(*Id.*, p. 566 [emphasis added].)

The Commission strongly disagreed with the State Bar

Committee's proposed exception. The Commission explained that its proposed legislation "codifies existing law under" *Chevalier*, whereby a resolution triggering a conclusive presumption could not be challenged for fraud. (*Id.*, p. 568.) The Commission again explained why the proposed exception undermined the conclusive presumption: "The Commission believes that the decision whether to undertake a project, where to place the project, and what property is necessary for the project, is basically a legislative and planning decision. It lies entirely within the sound discretion of the public entity which has been entrusted with the responsibility of making precisely this sort of decision. To allow a judge to substitute his own wisdom for that of the public body, which has made its decision after public hearings and taking into account the needs of the whole community (including environment, budget, recreation, and the like), is to destroy the fundamental separation of legislative and judicial functions." (*Ibid.*)

And the Commission again explained that the areas in which fraud or collusion were most likely to occur were already subject to judicial determination under other statutory provisions to which conclusive presumptions were irrelevant (*id.*, pp. 568-569)—all of which were subject to full evidentiary challenge under section 1250.360 regardless of any conclusive presumption of public necessity. The State Bar Committee responded: "If the Law Revision Commission version of section 1245.250 were adopted, most takings would not be subject to challenge even if admittedly fraudulent or collusive"—i.e., because they were

subject to conclusive presumptions. (*Id.*, p. 569.)

After A.B. 11 was amended to include section 1245.255, the legislative history continues to demonstrate that the exception was directed at takings subject to a conclusive presumption. (See MJN, Ex. 11, p. 146, Floor Statement on A.B. No. 11, p. 2 ["The resolution will be conclusive on matters of public necessity for acquisitions within the boundaries of the public entity except where the property owner shows that the resolution is the result of abuse of discretion or arbitrary or capricious action."]; MJN, Ex. 17, p. 398, Cal. Law Revision Com., Background Material on Eminent Domain Bills (May 5, 1975) ["Section 1245.255 has been added to AB 11 to permit a collateral attack on the resolution of necessity in the eminent domain proceeding on the same grounds as a resolution of necessity may be attacked directly—'abuse of discretion' or 'arbitrary or capricious action.' Upon such a showing, the conclusive effect of the resolution disappears."].)

The legislative history of the 1978 amendment of section 1245.255 also confirms that the statute was intended for takings subject to a conclusive presumption. The bill was proposed based on the Commission's 1977 Recommendation to clarify confusion about the mandamus standard applicable in challenges under section 1245.255. The Recommendation stated: "The findings and determinations made in . . . a resolution are *conclusive* in the eminent domain proceeding except to the extent they were influenced or affected by gross abuse of discretion by the governing body." (MJN, Ex. 28, p. 577, 1977 Recommendation, p. 87 [emphasis added].) It also noted that the conclusive

presumption did not apply to takings of extraterritorial property. (*Ibid.*, fn. 2.) The Legislature enacted the recommended amendment with only minor changes. (MJN, Ex. 27, pp. 573-574, Stats. 1978, ch. 286, pp. 453-454.)

4. The Court of Appeal's decision is inconsistent with legislative intent.

The Court of Appeal held that when the Legislature in 1992 changed the treatment of utility property so that a resolution of necessity *does not* conclusively establish the public necessity elements, the Legislature intended that a utility property owner still should be limited to a challenge under section 1245.255. (Op., pp. 27-28, 30.) This cannot be reconciled with the above discussion showing the Legislature's understanding that section 1245.255 was merely an exception to the effect of a conclusive presumption of public necessity. The legislative history of section 1245.255 demonstrates that, for takings *not* subject to a conclusive presumption of public necessity, a property owner is not limited to challenging a taking under section 1245.255.

C. The Legislature understood that extraterritorial takings are not subject to a conclusive presumption because a public entity lacks accountability and knowledge, not because of limitations on its legislative authority.

The Court of Appeal below recognized that takings of extraterritorial property are subject to a rebuttable presumption of public necessity and may be challenged in an evidentiary trial before a court as trier of fact. But it *erroneously* held that the reason for this treatment is because the public entity's adoption

of a resolution in such cases is not a valid quasi-legislative act, "unless otherwise authorized," and therefore not entitled to the deference ordinarily accorded to valid quasi-legislative acts. (Op., pp. 15-17, 26-27, 29.)

In fact, the Legislature knew and intended that takings of extraterritorial property should be subjected to judicial decision-making concerning the public necessity for the proposed taking for a very different reason: because the public entity lacks accountability to members of the public beyond its boundaries and lacks knowledge of the conditions related to such areas. These factors mean that a public entity is more likely to make inaccurate or exploitative public necessity determinations with respect to extraterritorial property, and they justify removing the traditional deference to the legislative body and vesting the decision of public necessity in a court.

Moreover, the Court of Appeal's conclusion that a court may independently determine public necessity for an extraterritorial taking because extraterritorial takings are generally *not valid* exercises of a public entity's power is illogical. If a public entity lacks the power to take property, it is irrelevant whether a proposed taking is publicly necessary because the taking cannot take place at all. (§§ 1230.020, 1240.020.)

In a 1965 memo, the Commission endorsed excluding extraterritorial takings from the broad conclusive presumption, explaining: "This is a sound limitation because only [in intraterritorial takings] can the persons whose property is being taken have recourse to their own legislative body—the governing

board of the public entity—to protest the taking or to remove those public officers who abuse their power to take property by eminent domain." (MJN, Ex. 19, p. 454, Cal. Law Revision Com. Staff Memo No. 65-44 (July 12, 1965), p. 21.) It later elaborated:

> Where the taking is outside the territorial limits of a city, for example, the normal restraint of political responsibility is relatively ineffective as a means of making the public entity act responsibly. In fact, the situation is one where there is a fair chance that the public entity is acting irresponsibly. It is much easier to avoid political pressures against an undesirable improvement—such as a garbage dump or sewage treatment plant—by locating it outside the city. No one wants it in the city and, if it is located in the city, the voters in that area may react adversely against their elected officials at the next election. Accordingly, the elected officials, rather than select the best site in the city, may choose one outside the city that is not really suitable for the improvement. The courts have recognized this possibility, and there are a number of cases where they have stopped an attempt to condemn property outside the boundaries of a local public entity.

(MJN, Ex. 21, p. 535, Cal. Law Revision Com. Staff Memo No. 71-20 (April 23, 1971), p. 15; see also *id.*, p. 534 [for extraterritorial takings, "there is little or no pressure exerted on the entity to make a decision in the interest of the general public as opposed to a decision in the interest of the entity"].)

In its 1974 Recommendation, the Commission said: "Judicial review of necessity in extraterritorial condemnation cases is desirable since the political process may operate to deny extraterritorial property owners an effective voice in the affairs and decision-making of the local public entity. *For this reason*,

when extraterritorial condemnation is undertaken, a local public entity is denied a conclusive presumption as to the public necessity of its acquisition." (MJN, Ex. 15, p. 317, 1974 Recommendation, p. 1643, fn. 69 [emphasis added].) The Legislature adopted the Commission's recommendation for the rebuttable presumption for extraterritorial takings in section 1245.250, including adopting the Commission's comments as reflecting legislative intent. (Compare MJN, Ex. 15, pp. 364-365, 1974 Recommendation, pp. 1747-1748 with MJN, Ex. 5, pp. 64-65, Stats. 1975, ch. 1275, pp. 3424-3425; see also MJN, Ex. 10, p. 135, Sen. Com. Cmts., p. 6537.)

The Legislature's view is consistent with the case law interpretation of the extraterritorial provision prior to the enactment of section 1245.250, subdivision (c), and "the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'" (*Overstreet*, 42 Cal.3d at 897 [citation omitted].) In *City of Los Angeles v. Keck*, *supra*, 14 Cal.App.3d 920, the court similarly explained why the Legislature had exempted extraterritorial takings from the conclusive presumption of public necessity and "specifically provided that the courts shall pass upon such a taking":

> Where the property is inside the territorial limits, the ministerial officers and legislative body of the condemning agency and the property owners and taxpayers should have full knowledge of conditions, locations, and the public good involved in the proposed improvement. Furthermore, the legislative

> body and, by derivation, their ministerial functionaries, are accountable to those who are property owners and, also, to those who are taxpayers within the territorial limits through the elective process. But where the property sought to be taken is outside and distant from these territorial limits, neither such knowledge nor such accountability may be present.

(*Id.* at 925.)

This is precisely the policy reason that the Legislature in section 1245.250, subdivision (c), made extraterritorial takings subject to a rebuttable, not conclusive, presumption. (See *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 287 [the Legislature's policy concern about lack of knowledge and accountability "is implemented in section 1245.250, subdivision [(c)] which places a significant limitation on an entity's exercise of extraterritorial condemnation"]; see also MJN, Ex. 10, p. 137, Sen. Com. Cmts., pp. 6540-6541, § 1240.050 ["A significant limitation on the exercise of extraterritorial condemnation is that the resolution of necessity of a local public entity is not conclusive where the property to be taken is outside its boundaries. Section 1245.250[(c)]."].)

The Court of Appeal's holding that extraterritorial takings are not subject to a conclusive presumption because the public entity has no jurisdiction to take property outside its boundaries and therefore its resolutions are not valid legislative acts not only is at odds with the Legislature's understanding of the statute, but also makes no sense. An extraterritorial taking, if authorized, is a valid quasi-legislative act. Section 1240.050 states "[a] local public entity may acquire by eminent domain only property

within its territorial limits except where the power to acquire by eminent domain property outside its limits is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers." A public entity either lacks authority for an extraterritorial taking, in which case any attempt to take the property is legally invalid; or the public entity has express or implied authority for the extraterritorial taking, in which case its resolution is a valid, quasi-legislative act. The Court of Appeal's opinion deeming all extraterritorial takings, whether or not authorized, to be acts in excess of a public entity's authority ignores section 1240.050 and the various statutes that expressly grant a public entity the authority to take extraterritorial property. (See, e.g., § 1240.125 [authorizing the taking of extraterritorial property for, among other things, "water, gas, or electric supply purposes"].)

The Court of Appeal correctly acknowledged that a court decides public necessity in an extraterritorial taking. (Op., pp. 15-16.) But if the public entity lacks authority to take the property and its resolution is not a valid quasi-legislative act, then there is no proper role for a court with respect to public necessity. (*Harden v. Superior Court* (1955) 44 Cal.2d 630, 637-638 ["If it appears that there was . . . neither express statutory authority, nor case law, authorizing the city to proceed in eminent domain against property located outside its corporate limits, it would seem that prohibition would lie inasmuch as the trial court would then have no jurisdiction to proceed in the eminent domain action against these petitioners. . . . [The trial

court] would be acting in excess of its jurisdiction in trying an eminent domain action where the municipal corporation seeking to condemn did not have statutory authority so to do."]; see also *Kenneth Mebane Ranches*, 10 Cal.App.4th at 276, 285.)

The Court of Appeal's mistaken view of extraterritorial property takings had a significant impact on its holding regarding utility takings. When the Legislature in 1992 created a rebuttable presumption of public necessity for proposed takings of utility property, it used nearly identical language as that used in the rebuttable presumption for extraterritorial property in the same statute. (§ 1245.250, subds. (b), (c).) The case law regarding extraterritorial property is therefore instructive on the proper interpretation of the utility property amendment. However, the Court of Appeal relied on its misinterpretation of extraterritorial takings as justification to disregard the similar language and the relevant case law.

V. CONCLUSION

GSWC respectfully submits that the material discussed in this brief confirms that the Court of Appeal's interpretation of the 1992 amendments is erroneous. The correct interpretation, articulated in *Pacific Gas & Elec. Co. v. Superior Court*, should be adopted by this Court.

Dated: January 21, 2026 Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

By: s/ Joanna S. McCallum
Attorneys for Amicus Curiae
GOLDEN STATE WATER COMPANY

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c) and (f), I certify that this Proposed Brief of Amicus Curiae contains 13,270 words, not including the Application, table of contents, table of authorities, the caption page, or this Certification page.

Dated: January 21, 2026

MANATT, PHELPS & PHILLIPS, LLP

By: s/ Joanna S. McCallum
Attorneys for Amicus Curiae GOLDEN STATE WATER COMPANY

APPENDIX

THE LAWYERS REPORTS ANNOTATED

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other railroad corporation for several hundred years, or the whole term of its corporate existence, and that the lessee has possession, and is operating the road, does not negative the necessity for appropriating the land sought to be taken. Kip v. New York & H. R. Co. 67 N. Y. 227; Re New York, L. & W. R. Co. 99 N. Y. 12, 1 N. E. 27.

That the erection of a telegraph line along a railroad right of way will cause inconvenience and possibly increase the hazard of railroading, but to no greater extent than it does commonly, does not negative the necessity for condemning part of a railroad right of way for telegraph use. Union P. R. Co. v. Colorado Postal Teleg.-Cable Co. 30 Colo. 133, 97 Am. St. Rep. 106, 69 Pac. 564.

The judgment of a municipal board of alderman, "that the public convenience requires" a certain highway to be laid out, is equivalent to a judgment that it is "necessary." Hunter v. Newport, 5 R. I. 325.

The verdict of a jury that a drain or ditch "will be conducive to the public health, convenience, and welfare, and will be of public benefit and utility," satisfies the requirements of a statute authorizing the establishment of a drain if it is found to be "necessary, and conducive to public health, convenience, or welfare, or of public benefit or utility." Blizzard v. Riley, 83 Ind. 300.

A report of viewers of a private road that there was "occasion" for such road was held, in Re Pocopson Road, 16 Pa. 15, sufficiently to satisfy a requirement of the Pennsylvania statute (act of June 13, 1836, § 12) that "such road is necessary."

A statute requiring commissioners to report that a road laid out by them is necessary for public use is sufficiently complied with when they report that, in their opinion, it will fully answer as a public road, and will accommodate the traveling public, and that they return the same as a public road for public use. Re Road, 4 Brewst. (Pa.) 57.

In considering the question of necessity of exercising the right of eminent domain by authority of the Constitution and statutes, the courts cannot regard the question whether the petitioner for condemnation is seeking to launch an enterprise which will succeed or fail financially. They cannot say that a party shall not carry out an enterprise because, in their judgment, it cannot succeed. Such matters must be left entirely to the discretion and judgment of the promoters. Therefore, whether an enterprise is practicable or can be made financially successful does not enter into the question of necessity. Gibson v. Cann, 28 Colo. 499, 66 Pac. 879.

If a use for which it is sought to condemn private property by right of eminent domain is clearly a public use, and if the property which it is sought to take for that use will to any extent conduce thereto, then the courts have naught to do with the degree of necessity of taking the property, or the extent to which it will help accomplish the public purpose for which it is taken. Those matters belong to the legislature as political questions, and they are not judicial except so far as the legislature may make them so by clothing its agents with judicial powers, or giving the proceedings to condemn the form and substance of judicial process. Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259.

The necessity for taking by condemnation proceedings is shown to exist when a bona fide effort has been made to agree with the landowner upon terms, and he has refused to entertain any proposition whatever. Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

It will be found upon examination, said the court, in Giesy v. Cincinnati, W. & Z. R. Co. 4 Ohio St. 308, that the necessity upon which the proper exercise of the power of eminent domain depends relates rather to the nature of the property and the uses to which it is applied than to the exigencies of the particular case in which it is exercised. Nearly all personal property, in time of peace, is excluded from its operation, because the state can go into the market upon an equal footing with other purchasers, and supply its wants in that manner. But, where lands connected with precise localities are needed for a public highway or any of its necessary appendages, a case of public necessity is established, and it is no objection to the exercise of the power that other lands, equally feasible, can be obtained by purchase.

XIII. The judge of necessity.

a. Primary.

The power to determine whether it is necessary to exercise the right of eminent domain in any case must rest with the state itself. Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333.

The state can determine the necessity for taking private property for the public use, and the courts will not interfere. Poulan v. Atlantic Coast Line R. Co. 123 Ga. 605, 51 S. E. 657.

Although the rights rests upon necessity alone, the sovereign must be the judge of the necessity. St. Louis, H. & K. C. R. Co. v. Hannibal Union Depot Co. 125 Mo. 82, 28 S. W. 483.

Hence, the determination whether a necessity exists lies with the legislature, as the representative of the sovereign power. Appleton v. Newton, 178 Mass. 276, 59 N. E. 648.

The right of eminent domain, according to Butler, J., in Todd v. Austin, 34 Conn. 78, consists of two elements: the right to take, and the right to judge of and determine the exigency and the necessity for taking private property. These rights are both and equally vested in the legislature.

The necessity for taking private property for the public use may be declared by the

legislature. Eastern R. Co. v. Boston & M. R. Co. 111 Mass. 125, 15 Am. Rep. 13.

When the legislature, the representative of the sovereignty of the state, declares that the public necessity or convenience requires the exercise of the right of eminent domain, the courts cannot question the wisdom of the declaration. Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 15 L.R.A. 505, 29 N. E. 1062.

The determination of the legislature upon the necessity of exercising the right of eminent domain is not subject to judicial review. Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475.

With the decision of the legislature that a sufficient necessity exists to justify the taking by right of eminent domain of private property for a use indubitably a public one, the courts will not interfere; at least, not unless the total absence of any necessity is established. Williams v. School Dist. No. 6, 33 Vt. 271.

To the legislature, and not to the courts, has been committed the power to determine when the exigencies of the public demand the taking of private property for public uses, the limit of judicial interference being the duty to declare void acts which clearly violate the fundamental law of the state. Paxton & H. Irrigating Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343.

The decision of the legislature that an exigency exists requiring the appropriation of private property for a public use, and exercising the right of eminent domain, is beyond the judicial power to revise. Haverhill Bridge v. Essex County, 103 Mass. 120, 4 Am. Rep. 518.

The courts cannot sit in judgment upon the determination of the legislature upon the question whether or not the public exigencies demand that the power of eminent domain be exercised. Bankhead v. Brown, 25 Iowa, 540.

From the nature of the case it rests with the legislature to determine when the necessity exists which calls for the appropriation of private property for public use. Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137.

Nearly all the cases hold, asserted Clayton, J., in dissenting in Tuttle v. Moore, 3 Ind. Terr. 712, 64 S. W. 585, that the question of necessity is distinct from the question of public use, and that the former question is for the legislature.

The legislature may determine what private property is needed for public purposes, for that is a question of a political and legislative character. Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; New York, N. H. & H. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070.

Whether it is needful in any case to exercise the right of eminent domain is a question always of a strict political character, not calling for any hearing upon the facts or any judicial determination. Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333.

A legislative act may declare the necessity of appropriating private property to public use, and no other or further adjudication is required. United States v. Oregon R. & Nav. Co. 9 Sawy. 61, 16 Fed. 524.

The legislative branch of the government, in the exercise of its discretion in judging of the necessity of exercising the power of eminent domain, cannot be controlled by any other branch. Dunn v. Charleston, Harp. L. 189.

If a taking of private property is of such a nature that it is or may be founded on a public necessity, it is for the legislature to say whether, in a particular case, the necessity exists. Cary Library v. Bliss, 151 Mass. 364, 7 L.R.A. 765, 25 N. E. 92.

When the legislature acts primarily and authorizes the condemnation of particular property selected by it, the degree of necessity is wholly with the legislature, if any necessity exists at all, and the purpose is a public one. Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259.

The legislature is the judge of the necessity. Parham v. Inferior Ct. Justices, 9 Ga. 341; Dunn v. Charleston, supra.

And it is presumed to be the best judge. Re Brooklyn, 143 N. Y. 596, 26 L.R.A. 278, 38 N. E. 983.

It is the exclusive judge. DeVaraigne v. Fox, 2 Blatchf. 95, Fed. Cas. No. 3,836; Tanner v. Treasury Tunnel Min. & Reduction Co. 35 Colo. 593, 4 L.R.A.(N.S.) 106, 83 Pac. 464; Portneuf Irrigating Co. v. Budge (Idaho) 100 Pac. 1046; Chicago, R. I. & P. R. Co. v. Lake, supra; Sholl v. German Coal Co. 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 199; Waterworks Co. v. Burkhart, 41 Ind. 364; Bennett v. Marion, 106 Iowa, 628, 76 N. W. 844; Riche v. Bar Harbor Water Co. 75 Me. 91; Moseley v. York Shore Water Co. 94 Me. 83, 46 Atl. 809; Talbot v. Hudson, 16 Gray, 417; Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County, 6 Allen, 353; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Moore v. Sanford, 151 Mass. 285, 7 L.R.A. 151, 24 N. E. 323; Cary Library v. Bliss, supra; Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437; Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; County Ct. v. Griswold, 58 Mo. 175; People ex rel. Herrick v. Smith, 21 N. Y. 595; Re Union Ferry Co. 98 N. Y. 139; Re Burns, 155 N. Y. 23, 49 N. E. 246; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Wheeling & L. E. R. Co. v. Toledo R. & Terminal Co. 72 Ohio St. 368, 106 Am. St. Rep. 622, 74 N. E. 209, 2 A. & E. Ann. Cas. 941; Lake Erie, A. & W. R. Co. v. Atlantic & G. W. R. Co. 7 Ohio Dec. Reprint, 364; Smedley v. Erwin, 51 Pa. 445; Edgewood R. Co.'s Appeal, 79 Pa. 257; Darlington v. United States, 82 Pa. 382, 22 Am. Rep. 766; Rochester & P. Coal & I. Co. v. Berwind-White Coal Min. Co. 24 Pa. Co. Ct. 104; Anderson v. Turbeville, 6 Coldw. 150; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Tait v. Central

Lunatic Asylum, 84 Va. 271, 4 S. E. 697; Varner v. Martin, 21 W. Va. 534; Wisconsin Water Co. v. Winans, 85 Wis. 26, 20 L.R.A. 662, 39 Am. St. Rep. 813, 54 N. W. 1003.

In determining whether the exercise of the power of eminent domain be called for in any given case, said the court, in Gilmer v. Lime Point, 18 Cal. 229, it is held by many authorities of great weight that the legislature is the conclusive judge of the public necessity or advantage.

The necessity of taking property for a particular public use is a legislative question, and ordinarily the decision of the legislature upon that question is final. Waterbury v. Platt Bros. & Co. 76 Conn. 435, 56 Atl. 856.

If a use for which private property is desired is, in its nature, a public use, the legislature is the supreme and final judge whether the public necessity or benefit is such as to call for the exercise of the power of eminent domain; whether the time is a fitting one; what particular property to take; and what instrumentalities shall be used to take it. All these are purely matters of discretion, within the exclusive cognizance and jurisdiction of the legislature. Re Townsend, 39 N. Y. 171.

The question of necessity for taking private property for public use is for the legislature. Gardner v. Georgia R. & Bkg. Co. 117 Ga. 522, 43 S. E. 863; Chicago & E. I. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist. 218 Ill. 286, 2 L.R.A.(N.S.) 226, 75 N. E. 892.

Where the use is public in its nature, the question as to the necessity of taking private property in a particular instance, by virtue of the power of eminent domain, is, in its essence, a legislative question. Speck v. Kenoyer, 164 Ind. 431, 73 N. E. 896.

It is an unquestionable principle of constitutional law, said the chancellor, in Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475, that it is the province of the legislature to determine whether the necessity exists or not for exercising the right of eminent domain.

Of the necessity and convenience of all highways, railroads, and other public works and improvements, the government of the state, acting by the legislature for the time being, must necessarily judge and determine. Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 1.

And the judgment of the legislature upon this question of public necessity and convenience in chartering a corporation is conclusive. State v. Noyes, 47 Me. 189.

The decision of the question of the necessity or propriety of exercising the right of eminent domain is political in its nature, and belongs exclusively to the legislative branch of the government. Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Dunham v. Hyde Park, 75 Ill. 371; Hyde Park v. Oakwoods Cemetery Asso. 119 Ill. 141, 7 N. E. 627; Illinois C. R. Co. v. Chicago, 141 Ill. 586, 17 L.R.A. 530, 30 N. E. 1044.

If the purpose is public, the legislature is the judge of the necessity or propriety of appropriating private property by right of eminent domain. State Park v. Henry, 38 Minn. 266, 36 N. W. 874; Giesy v. Cincinnati, W. & Z. R. Co. 4 Ohio St. 308.

The determination by the legislature of the necessity and propriety of taking private property for public use is ordinarily conclusive. New York, N. H. & H. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070.

It is final and conclusive. Malone v. Toledo, 34 Ohio St. 541.

The courts cannot inquire into the necessity or propriety of the exercise by the legislature or its delegate of the right of eminent domain. Tuttle v. Moore, 3 Ind. Terr. 712, 64 S. W. 585.

The question as to the propriety and necessity of legislation, if it only authorizes the taking of private property for public use, is one exclusively for legislative cognizance, and with the exercise of its judgment in that behalf the courts have no power to interfere. State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216.

It is for the sovereign power of the state to determine the necessity and expediency of exercising the power of eminent domain. Harris v. Thompson, 9 Barb. 350.

The courts have no power to review that determination. Ibid.

The government must be the judge of this necessity or expediency. Bonaparte v. Camden & A. R. Co. Baldw. 205, Fed. Cas. No. 1,617.

When not forbidden by the Constitution, the authority to determine the necessity and expediency of exercising the power of eminent domain rests with the legislature. Richland School Twp. v. Overmyer, 164 Ind. 382, 73 N. E. 811.

The legislature is the judge. Langford v. Ramsey County, 16 Minn. 375, Gil. 333.

And the sole judge. Wilson v. Baltimore & P. R. Co. 5 Del. Ch. 524; Stamford Water Co. v. Stanley, 39 Hun, 424.

The question of necessity or expediency is generally one for the determination of the legislature. Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460, affirming 160 N. Y. 225, 54 N. E. 689.

It is a question for the legislature to determine. Ortiz v. Hansen, 35 Colo. 100, 83 Pac. 964; Gillette v. Aurora R. Co. 228 Ill. 261, 81 N. E. 1005; Buffalo & N. Y. C. R. Co. v. Brainard, 9 N. Y. 100; Re Deansville Cemetery Asso. 66 N. Y. 569, 23 Am. Rep. 86; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; Grande Ronde Electrical Co. v. Drake, 46 Or. 243, 78 Pac. 1031; Pittsburgh v. Scott, 1 Pa. St. 309; Quarles v. Sparta, 2 Tenn. Ch. App. 714.

One solely for the determination of the legislature. Brown v. Gerald, 100 Me. 351, 70 L.R.A. 472, 61 Atl. 785.

Exclusively for the legislature to decide. Cozard v. Kanawha Hardwood Co. 139 N. C. 283, 1 L.R.A.(N.S.) 969, 111 Am. St. Rep. 779, 51 S. E. 932.

One that must be determined by the legislature. Chicago, D. & V. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99.

And unless the question has been made a judicial one by the Constitution or statute, it is within the exclusive province of the legislature to determine it. Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

It is a legislative question. Apex Transp. Co. v. Garbade, 32 Or. 582, 62 L.R.A. 513, 52 Pac. 573, 54 Pac. 367, 882.

One resting wholly in the province and descretion of the legislature. Shasta Power Co. v. Walker, 149 Fed. 568.

A political or legislative question. Re Niagara Falls & W. R. Co. 108 N. Y. 375, 15 N. E. 429; Kansas City v. Marsh Oil Co. 140 Mo. 458, 41 S. W. 943; Miller v. Pulaski, 15 Va. L. Reg. 29, 63 S. E. 880; Madera R. Co. v. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27.

One essentially political in its nature. Chicago v. Wright, 69 Ill. 318.

It is a matter resting entirely with the legislature. Call v. Wilkesboro, 115 N. C. 337, 20 S. E. 468.

All questions of expediency and necessity are exclusively committed to the legislative branch of the government. Fohl v. Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423.

Upon the necessity or expediency of exercising the right of eminent domain in taking private property for public use the opinion of the legislature is conclusive. Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Hayford v. Bangor, 102 Me. 340, 11 L.R.A.(N.S.) 940, 66 Atl. 731.

As the question of the necessity and expediency of exercising the right of eminent domain is political in its nature, the determination of the legislature upon it is conclusive. Ryan v. Louisville & N. Terminal Co. 102 Tenn. 111, 45 L.R.A. 303, 50 S. W. 744.

Of the necessity or expediency of exercising the right of eminent domain in the appropriation of private property for public uses, according to Judge Dillon (Mun. Corp. § 600), the opinion of the legislature, or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature, and not judicial. Judge Dillon's views upon this point have often been quoted with approval by the courts. The cases of Chicago, R. I. & P. R. Co. v. Lake, and Hayford v. Bangor, supra, are instances.

Questions of the necessity, expediency, or propriety of exercising the power of eminent domain are questions of general public policy, and belong to the legislative department of the government. State ex rel. Cape Girardeau v. Engelmann, 106 Mo. 628, 17 S. W. 759; Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. 933; Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918.

They are questions essentially political in their nature. Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38.

They are legislative questions. Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802.

Questions which rest wholly in the legislative discretion. Dallas v. Hallock, 44 Or. 246, 75 Pac. 204.

Although Clayton, J., in Tuttle v. Moore, 3 Ind. Terr. 712, 64 S. W. 585, dissented from the opinion of his colleagues, he nevertheless declared that the necessity, expediency, or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, were for the legislative department of the government to decide, and were matters of general public policy.

Whether the purpose to be subserved by the exercise of the right of eminent domain is necessary or wise is for the legislature alone to decide. National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; State ex rel. Baltzell v. Stewart, 74 Wis. 620, 6 L.R.A. 394, 43 N. W. 947.

Judge Dillon's statement (Mun. Corp. § 600), that, if a use for which it is proposed to take private property by right of eminent domain is a public use, or if its public character is so doubtful that the courts cannot pronounce against it as not such as to justify the compulsory taking of private property, the decision of the legislature, embodied in the enactment giving power to condemn the property, that a necessity exists for taking the property, is final and conclusive, was adopted in the following cases: Chicago, R. I. & P. R. Co. v. Lake, and Tuttle v. Moore, supra; Louisville & N. R. Co. v. Louisville (Ky.) 114 S. W. 743.

Although the legislature may judge in the first instance of the necessity and utility of taking private property by right of eminent domain, yet the judgment of the legislature is subject to the corrective judgment of the courts. If the legislature, for example, should enact a statute to transfer the property of A to B, under pretense of public necessity or utility, when no such necessity or utility existed in fact, there can be no doubt but that it would be the right and duty of the judiciary to set that statute aside. Parham v. Inferior Court Justices, 9 Ga. 341.

It is clear from authority, according to the court, in Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259, that even where it is conceded that the use is public, the necessity and extent of the exercise of the power of eminent domain belongs to the legislature, subject to two conditions,—first, that just compensation shall be made; and second, that the property desired to be condemned will conduce, to some extent, to the accomplishment of the public object to which it is to be devoted.

b. Secondary.

1. In general.

The legislature, in providing for the exercise of the right of eminent domain, may

directly determine the necessity for appropriating private property for a particular improvement or public use, and then confer upon a corporation or individuals the power to take it for that purpose, or, it may confer the power to take private property, subject to the decision of some other tribunal upon the necessity for the improvement for which it is to be taken, or of the necessity for taking that property or any part of it for such purpose. Wheeling & L. E. R. Co. v. Toledo R. & Terminal Co. 72 Ohio St. 368, 106 Am. St. Rep. 622, 74 N. E. 209, 2 A. & E. Ann. Cas. 941.

In People ex rel. Herrick v. Smith, 21 N. Y. 595, it was said, and repeated with approval in Wulzen v. San Francisco, 101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353, that the necessity for appropriating private property for the use of the public or the government is not a judicial question. The power resides in the legislature. It may be exercised by means which shall at once designate the property to be appropriated and the purpose of the appropriation, or it may be delegated to public officers, or, as has been repeatedly held, to private corporations established to carry on enterprises in which the public is interested. There is no restraint upon the power except that requiring compensation to be made.

The legislature may delegate the power to determine the necessity for exercising the right of eminent domain. Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475.

It may delegate this power to town or municipal officers. Wisconsin Water Co. v. Winans, 85 Wis. 26, 20 L.R.A. 662, 39 Am. St. Rep. 813, 54 N. W. 1003; Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Quarles v. Sparta, 2 Tenn. Ch. App. 714.

It may leave it to the determination of designated officers or tribunals. Eastern R. Co. v. Boston & M. R. Co. 111 Mass. 125, 15 Am. Rep. 13.

It may delegate it to individuals or to a corporation. Chicago, R. I. & P. R. Co. v. Lake, supra.

If, in a given case, it is plain that the legislature has granted the power to condemn private property for designated purposes, the necessity for its exercise will rest largely in the discretion of the grantee. Gardner v. Georgia R. & Bkg. Co. 117 Ga. 522, 43 S. E. 863.

Corporations clothed by law with full power to exercise the right of eminent domain determine for themselves, in advance, the necessity and occasion for its exercise. Re Lake Erie Limestone Co. 188 Pa. 509, 41 Atl. 648.

The courts will not inquire into the necessity or propriety of the exercise of the right of eminent domain by a corporation clothed with power to condemn property. Schuster v. Sanitary Dist. 177 Ill. 626, 52 N. E. 855.

The question whether it is necessary for a body corporate, clothed with the power to take private property by right of eminent domain, to take a given tract of land to effect the purpose of its creation, is a legislative, and not a judicial, one. Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist. 218 Ill. 286, 2 L.R.A.(N.S.) 226, 75 N. E. 892.

Where the power to determine the necessity for exercising the right of eminent domain has been delegated by the legislature to public or private corporations or public officers or individuals, its exercise is no more subject to judicial review than it would be if the legislature itself had acted directly. Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475.

If a corporation upon which the legislature has conferred the right to exercise the power of eminent domain strictly complies with the statute giving it such power, its decision as to the extent, necessity, and propriety of taking any given property is as conclusive as that of the legislature itself. New York, N. H. & H. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070.

If a use to which lands are to be put is public, the legislature, or the instrumentality which it employs, is the sole judge of the necessity for taking them, unless the statute authorizing their appropriation otherwise provides. Re Fowler, 53 N. Y. 60.

When the legislature grants to a corporation the right to exercise the power of eminent domain, it alone, according to all authority, is the judge of the necessity for the exercise of the right. Savannah, F. & W. R. Co. v. Postal Teleg. Cable Co. 115 Ga. 554, 42 S. E. 1.

In all cases where it is deemed proper to delegate to individuals or to a corporation power to appropriate private property by right of eminent domain, it is competent to delegate the authority to decide upon the necessity or expediency for taking it without submitting the latter to a court or jury. Richland School Twp. v. Overmyer 164 Ind. 382, 73 N. E. 811.

In the absence of any provision in the Constitution or statutes for submitting to a court or jury the question of the necessity or expediency of taking, in any particular instance, land for public uses by right of eminent domain, the decision of the question lies with the body or persons to whom the state has delegated the authority to take. Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437.

The case of Lynch v. Forbes, supra, was said by the court, in Bennett v. Marion, 106 Iowa, 628, 76 N. W. 844, to go no further than to hold that the necessity for an improvement and its location are for the selectmen of the town to determine, and not to involve the appropriation of excessive land, or at variance with their powers.

Inasmuch as the legislature has the constitutional right to take private property for public purposes, if necessary, and to delegate to municipal officers the authority to take it for such purposes, the act of the municipal officers in exercising such a delegated authority is the exercise of a legislative function, and not reviewable by the courts. Hayford v. Bangor, 102 Me. 340, 11 L.R.A. (N.S.) 940, 66 Atl. 731.

The legislature has power to confer upon the officers of public corporations authority conclusively to determine when repairs to streets, highways, drains, and the like are necessary, and it may exercise this power validly without requiring municipal authorities to give notice of intention to order the repairs. Weaver v. Templin, 113 Ind. 298, 14 N. E. 600.

The legislature may constitutionally delegate to public officers power to determine the expediency of laying out highways and of appropriating private property for the purpose. Greenburg v. International Trust Co. 36 C. C. A. 471, 94 Fed. 755.

When it is sought to appropriate private property for a public use by right of eminent domain, and the petition for its condemnation avers the necessity of taking it for such use, in the absence of all contradictory testimony, the courts cannot say that the desired property is not needed. State, Cheyney, Prosecutrix, v. Atlantic City Waterworks Co. 55 N. J. L. 235, 26 Atl. 95.

If a use is in fact public, the necessity or expediency of taking private property for such use by the exercise of the right of eminent domain, the instrumentalities to be used, and the extent to which the right shall be exercised, are not to be determined by the courts. Re Deansville Cemetery Asso. 66 N. Y. 569, 23 Am. Rep. 86.

The use for which private property is to be taken being determined to be a public use, the quantity which should be taken is a legislative, and not a judicial, question for decision. United States v. Gettysburg Electric R. Co. 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

As to what and how much land shall be taken by the grantee of the right of eminent domain rests in the grantee's discretion, which, if exercised in good faith, will not be interfered with by the courts. Gardner v. Georgia R. & Bkg. Co. 117 Ga. 522, 43 S. E. 863.

Every company seeking to condemn land for a public improvement, said the court, in Smith v. Chicago & W. I. R. Co. 105 Ill. 511, must, in a modified degree, be permitted to judge for itself as to what amount is necessary for such purpose. This right is subordinate to all statutory and constitutional restrictions, and to the further limitation that the courts which are authorized to entertain applications of this character have ample power to prevent any abuses of the right by such companies.

This was approved in O'Hare v. Chicago, M. & N. R. Co. 139 Ill. 151, 28 N. E. 923.

And the doctrine was reiterated in Tedens v. Sanitary Dist. 149 Ill. 87, 36 N. E. 1033.

A corporation invested with the power to condemn property must be permitted to judge for itself what amount of land is necessary for its purpose, subject to the authority of the courts to restrain any abuse of power in that respect. Schuster v. Sanitary Dist. 177 Ill. 626, 52 N. E. 855.

It is almost an elementary rule that, where such questions as the necessity or expediency of a municipal improvement are committed to the decision of inferior tribunals, their judgment cannot be judicially reviewed. Bass v. Ft. Wayne, 121 Ind. 389, 23 N. E. 259.

If a municipality seeking to condemn property shows that it is requisite for the construction of a work included by the legislature among the public uses for which the right of eminent domain may be exercised, the inquiry upon the question of necessity is closed. Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

The reasonableness of a municipal ordinance ordering a local improvement, or the necessity for the improvement ordained, cannot be submitted to a jury. Chicago & A. R. Co. v. Pontiac, 169 Ill. 155, 48 N. E. 485.

If the legislature commits to municipal authorities the decision of questions of expediency in exercising the right of eminent domain to take private property for a public use, no ground exists for judicial interference with their decisions upon such matters. State, Slingerland, Prosecutor, v. Newark, 54 N. J. L. 62, 23 Atl. 129.

As the legislature may delegate the power to appropriate private lands for public uses to municipalities and public officers, the necessity for an appropriation by such delegates may not be inquired into by the courts. Re Fowler, 53 N. Y. 60.

It is in the power of the legislature to make the decision of municipal authorities to extend and increase the public water supply conclusive on the question of necessity. Rome v. Whitestown Waterworks Co. 113 App. Div. 547, 100 N. Y. Supp. 357.

Where a municipal corporation takes private property for public use, the jury conclusively decides the question of necessity. State ex rel. Baltzell v. Stewart, 74 Wis. 620, 6 L.R.A. 394, 43 N. W. 947.

To make the decision of municipal officers to extend and increase the public water supply conclusive upon the question of necessity, the intent of the legislature, in the authorizing statute, to make it such, must be clear. Rome v. Whitestown Waterworks Co. supra.

The common council of a municipal corporation in Ohio is said to be invested by statute (Rev. Stat. § 6453) with the power to determine the question of the necessity of an appropriation in all cases where the corporation is authorized to take property for public use. Toledo Consol. Street R. Co. v. Toledo Electric Street R. Co. 6 Ohio C. C. 362.

It was urged in Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475, that it was contrary to natural justice that the determination of the necessity for appropriating private property by right of eminent domain should be left to those who are to exercise the right, because none should be judge in his own cause; and, therefore, the legislature must delegate the power to some court or commission. But, said the chancellor, if the Constitution is silent on the subject, the action of the legislature is final on this head. Such is the view, both of the courts and text writers.

2. By constitutional creation.

All that has been said as to the judge of

the necessity of appropriating private property to public use is predicated of the absence of interfering constitutional provisions. By the Constitution, of course, the legislature itself may be shorn of its power to decide the question of necessity in exercising the right of eminent domain, and the power may be lodged with any tribunal or body. When such is the case, the decisions just cited will either not apply, or will be applicable only to a modified extent.

The Constitution of Michigan, for example, explicitly requires (art. 28, § 2) that, when private property is taken for the use or benefit of the public, the necessity for taking it shall be ascertained either by a jury or by commissioners appointed by a court of record. Kundinger v. Saginaw, 59 Mich. 355, 26 N. W. 634.

The Michigan Constitution, it was said, in Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 457, 11 N. W. 271, allows proceedings to condemn land to be conducted by highway commissioners, in some cases, and by specially appointed commissioners or juries of freeholders, in others; and the inquiry in that state, as elsewhere, is an appraisal or estimate of values, and not a contest on litigious rights, but it includes what is not elsewhere included, an inquiry into the necessity of the proposed taking for public purposes, which was never made by courts, but always heretofore by the legislature or some body, not judicial, of its creation. Had it not been for the specific provisions in the Michigan Constitution, the state could have provided for these inquiries to be made through any medium it chose to select.

This provision, according to the court in Paul v. Detroit, 32 Mich. 108, is not found in Constitutions generally, and was never known in Michigan until the adoption of the Constitution of 1851. Before that, neither jury nor commissioners had any duty to perform except assessing damages, and the prerogative of taking property on their own estimate of its necessity was exercised by legislatures, or those persons or corporations whom they allowed to act in the matter.

The determination of the necessity of taking private property for the public use, it was said, in substance, by the court, in Re Powers, 29 Mich. 504, has sometimes been allowed to be made by legislative or other public agencies. But the Michigan Constitution has taken away this power from all bodies except those indicated; and, in cases like the present (extensions of city streets through private property), the fact of necessity must be found by the jury. The common council, instead of acting judicially or finally on the policy of opening a street over private property which they cannot obtain without adverse proceedings, become no more than petitioners, and the decision rests with the jury, and not with the city.

Under this Constitution, the report of the jurors or commissioners in condemnation proceedings must, in every case, distinctly cover the point of necessity. They must find not only that the particular land is needed for the avowed purpose, but that the purpose itself is of public importance, otherwise the land cannot be condemned. Mansfield, C. & L. M. R. Co. v. Clark, 23 Mich. 519; Grand Rapids, N. & L. S. R. Co. v. Van Driele, 24 Mich. 409.

The return of a commissioner of highways that he laid out or discontinued a highway is insufficient, because it carries no presumption that he determined that there was a public necessity for his so doing, and such a determination is a *sine qua non*. Furman v. Furman, 86 Mich. 391, 49 N. W. 147.

The finding of commissioners appointed to condemn lands, that the taking of them is for the public use, is not equivalent to a finding that it is necessary to take them for such use, and does not satisfy the terms of the Michigan Constitution. McClary v. Hartwell, 25 Mich. 139.

Under that Constitution, proceedings to condemn private property to obtain water power, pursuant to a statute not requiring the necessity for taking it to be passed upon, and under a commission omitting directions to the commissioners to consider that subject, are wholly ineffectual and void. Ibid.

And if, in proceedings by a municipality to condemn land for street purposes, the jury is limited to considering and determining nothing more than the question of compensation, the judgment of condemnation will be void, because of failure to meet the constitutional requirement to ascertain the necessity for the taking. Horton v. Grand Haven, 24 Mich. 465; Arnold v. Decatur, 29 Mich. 77.

That provision of the Constitution does not merely mean that the jury or commission shall ascertain whether or not land sought by a municipal corporation for a public street or alley is necessary for such street or alley, but it requires the necessity for the street or alley itself to be proved. Paul v. Detroit, supra; Grand Rapids v. Grand Rapids & I. R. Co. 58 Mich. 641, 26 N. W. 159; Detroit v. Beecher, 75 Mich. 454, 4 L.R.A. 813, 42 N. W. 986.

A jury in condemnation proceedings to acquire property for street purposes, in determining the necessity for taking any particular parcel of land, must first determine whether the public necessity requires the proposed street for use as a street, and must consider the contemplated improvement as a whole. Kundinger v. Saginaw, 59 Mich. 355, 26 N. W. 634.

It is settled by our own adjudications, said the court, in Parks & Boulevards v. Moesta, 91 Mich. 149, 51 N. W. 903, that the jury must, in all cases, be permitted to pass upon the question of public necessity for the taking of private property, and this does not imply simply the solution of the question whether the property sought will be useful in carrying out an alleged improvement previously determined upon, but also whether the improvement itself is a public necessity.

The object of that provision was to prevent the taking of private property for any purpose not shown to the satisfaction of a jury or commission to be demanded by public necessity. Re Powers, supra.

It is, under that Constitution, a condition precedent to the taking of private property for public uses that the necessity for taking it shall be ascertained by a jury or commissioners. That condition must be complied with before an individual can be compelled to part with the title or possession of his property. Marquette, H. & O. R. Co. v. Probate Judge, 53 Mich. 217, 18 N. W. 788.

It has often happened, said the court, in Grand Rapids v. Grand Rapids & I. R. Co. supra, that juries have been led or allowed to evade their own responsibility in passing on the necessity for the work itself. That is, as we have frequently pointed out, their most essential duty; because, if it is taken for granted the road is to be laid out, the position of the particular parcels on the line is fixed when the road is fixed. The object of the Constitution is to prevent all needless appropriations of private property, which are too often made for ends in which the public are in no strait, and for private fancy or emolument rather than the general welfare.

This case was followed in Detroit v. Beecher, supra.

Judge Cooley, in the opinion of the court in McClary v. Hartwell, supra, disallowing a condemnation of private land for water power purposes because the requirement of the state Constitution (art. 18, § 2), that the necessity for taking private property for the public use or benefit must be established, had not been met, dealt with the contention that a finding that the taking was for the public use was equivalent to finding the necessity for taking it for such use, and said: This is a mistake. It is by no means necessary that private property should be used by the public in every case in which such a use is possible. The state might, perhaps, put to some public use all the private property in its capital town, if it had the power to appropriate it; but it could hardly be insisted that it was needful. . . . The Constitution contemplates the possibility that a disposition may at some time exist to seize property for public uses without any need whatever; and it has guarded against it by providing for an impartial tribunal to whom the question of necessity shall, in every case, be submitted. The finding of necessity cannot, in any instance, be dispensed with, nor can anything be accepted as a substitute for it.

The conclusion of commissioners to condemn private land for railroad purposes, when it rests upon evidence adduced before them, that a necessity, in the constitutional sense, existed for using such property, in Michigan is held to be final, and not to be disturbed by the courts. Port Huron & S. W. R. Co. v. Voorheis, 50 Mich. 506, 15 N. W. 436; Toledo S. & M. R. Co. v. East Saginaw & St. C. R. Co. 72 Mich. 206, 40 N. W. 436; Saginaw, T. & H. R. Co. v. Bordner, 108 Mich. 236, 66 N. W. 62.

3. When the courts may judge.

If a use is a public one, the necessity, propriety, or expediency of appropriating private property for that use is ordinarily not a subject of judicial cognizance. In general, courts have nothing to do with questions of necessity, propriety, or expediency in exercises of the power of eminent domain. They are not judicial questions. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206; Adirondack R. Co. v. New York, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460, affirming 160 N. Y. 225, 54 N. E. 689; New York, N. H. & H. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070; Gardner v. Georgia R. & Bkg. Co. 117 Ga. 522, 43 S. E. 863; Chicago v. Wright, 69 Ill. 318; Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333; Dunham v. Hyde Park, 75 Ill. 371; Illinois C. R. Co. v. Chicago, 141 Ill. 586, 17 L.R.A. 530, 30 N. E. 1044; Chicago & E. I. R. Co. v. Wiltse, 116 Ill. 449, 6 N. E. 49; Hyde Park v. Oakwoods Cemetery Asso. 119 Ill. 141, 7 N. E. 627; Pittsburgh, Ft. W. & C. R. Co. v. Sanitary Dist. 218 Ill. 286, 2 L.R.A. (N.S.) 226, 75 N. E. 892; Mercer County v. Wolff, 237 Ill. 74, 86 N. E. 708; Tuttle v. Moore, 3 Ind. Terr. 712, 64 S. W. 585; Bankhead v. Brown, 25 Iowa, 540; Bennett v. Marion, 106 Iowa, 628, 76 N. W. 844; Moseley v. York Shore Water Co. 94 Me. 83, 46 Atl. 809; Hayford v. Bangor, 102 Me. 340, 11 L.R.A. (N.S.) 940, 66 Atl. 731; Haverhill Bridge v. Essex County, 103 Mass. 120, 4 Am. Rep. 518; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; Holt v. Somerville, 127 Mass. 408; Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437; Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325; Stewart v. Great Northern R. Co. 65 Minn. 515, 33 L.R.A. 427, 68 N. W. 208; Fohl v. Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097; Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423; State ex rel. Utick v. Polk County, 87 Minn. 325, 60 L.R.A. 161, 92 N. W. 216; Simpson v. Kansas City, 111 Mo. 237, 20 S. W. 38; Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1, 63 L.R.A. 301, 73 S. W. 453; Paxton & H. Irrigating Canal & Land Co. v. Farmers & M. Irrig. & Land Co. 45 Neb. 884, 29 L.R.A. 853, 50 Am. St. Rep. 585, 64 N. W. 343; Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475; Harris v Thompson, 9 Barb. 350; People ex rel. Herrick v. Smith, 21 N. Y. 595; Re Fowler, 53 N. Y. 60; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Covington & C. Bridge Co. v. Magruder, 63 Ohio St. 455, 59 N. E. 216; Bridal Veil Lumbering Co. v. Johnson, 30 Or. 205, 34 L.R.A. 368, 60 Am. St. Rep. 818, 46 Pac. 790; Smedley v. Erwin, 51 Pa. 445; Anderson v. Turbeville, 6 Coldw. 150; Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; Williams v. School Dist. No. 6, 33 Vt. 271; Tait v. Central Lunatic Asylum, 84 Va. 271, 4 S. E.

697; Zircle v. Southern R. Co. 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802; Miller v. Pulaski, 15 Va. L. Reg. 29, 63 S. E. 880; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. 17 W. Va. 812.

So far as relates to the question of the utility or necessity of taking private property for public use, the courts have no jurisdiction, and can exercise no control. Anderson v. Turbeville, supra.

The judgment of the legislature, fairly exercised, as to the existence of the exigency which requires private property to be taken for a public use, is not open to revision by the courts. Holt v. Somerville, supra.

We know of no well-considered case, said the court, in Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333, where the courts have undertaken to pass upon the necessity or expediency of the exercise of the right of eminent domain, and are well satisfied that none can be found.

Once it is judicially established that a use is public, it is within the exclusive province of the legislature to pass upon the question of necessity for appropriating private property for that use, unless the question of necessity has been made a judicial one, either by the Constitution or by statute. Bigelow v. Draper, supra.

To the contention of counsel that where, as in the case at bar, the legislature had conferred authority "to take . . . any lands or real estate necessary" for an admitted public use, the question of the necessity, so far as it relates to the land actually taken, is one of fact, to be settled by the court or jury, it was replied by the court, in Lynch v. Forbes, 161 Mass. 302, 42 Am. St. Rep. 402, 37 N. E. 437: "Such has not been deemed to be the law in this state, though it is said, in a work of established authority, that the Constitutions of some of the states require it to be done."

Courts sometimes have jurisdiction to determine the necessity or expediency of appropriating private property for public use, but, said the court, in DeWitt v. Duncan, 46 Cal. 342, it is only by virtue of an act of the legislature conferring it, and is not otherwise derived.

The legislature may delegate to the courts the power to determine the necessity of exercising the right of eminent domain, and when it does, the courts have jurisdiction to pass upon that question. Portneuf Irrigating Co. v. Budge (Idaho) 100 Pac. 1046; Greenburg v. International Trust Co. 36 C. C. A. 471, 94 Fed. 755.

In the last-cited case, the validity of town bonds issued pursuant to a New York statute providing for the construction of highways and bridges in two or more towns of the same county was challenged upon the ground that the authorizing act was unconstitutional. We do not understand, said the court, that the constitutionality of the act is impugned upon any other contention than that it undertakes to devolve upon the court legislative or administrative, instead of judicial, functions. The separation of legislative, executive, and judicial powers is recognized throughout the Constitution as it is in the Constitutions of all other states; and, if the question of the necessity of opening public highways is not a judicial question, the legislature could not commit it to the courts, and the act is clearly void. This is the real inquiry, and, as it appears to us, the only one that requires discussion upon this branch of the case. If the legislature can devolve upon a court the decision of the necessity of an appropriation of property for the uses of a railway (the court had previously cited Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137, and Re New York C. R. Co. 66 N. Y. 407, as authorities that this could be done), it is difficult to understand why this may not be done when the public use is for the purpose of a common highway. No adjudication by the courts of New York, or by any other court, directly in point, is cited for the proposition that the legislature may not confer upon a judicial tribunal the power to determine as to the necessity of the construction of a highway. Inasmuch as such a question can be referred to a municipality or to public officers for determination, the objection to depositing the power with a judicial tribunal can only be found in the consideration that the question is not of a nature to involve the exercise of the judicial function. The objection is met by many decisions of the courts of this state in cases arising under statutes authorizing courts to review the action of commissioners in laying out or refusing to lay out highways. The court thereupon cited several such decisions, all to the effect that, upon appeals to the courts from the acts of highway commissioners, the judicial power to decide upon the need of a highway in any given case had been assumed and exercised as of course. All of these cases, continued the court, necessarily sanction the proposition that the question of the propriety and necessity of opening or refusing to open a highway can be properly committed to the decision of a judicial tribunal. We entertain no doubt that the present act was a constitutional exercise of power by the legislature.

In North Dakota, it was said by the court in Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, the legislature has taken it out of the power of any person or corporation to settle the question of necessity for taking private property for public use by right of eminent domain, and has intrusted the determination of that issue to the judicial branch of the government.

When the legislative grant of the right to exercise the power of eminent domain to a corporation for a use plainly a public one is simply to take private property when necessary for such use, and it is denied, in a condemnation proceeding instituted by such company, that there exists any necessity for taking the property sought to be condemned, the question of necessity lies at the foundation of the proceedings; and, as the power sought to be employed is great, it should be kept in control by the court before which the question arises, and the court should

be entirely satisfied of the need. State, Olmsted, Prosecutor, v. Morris Aqueduct, 46 N. J. L. 495.

Under a statute relating to condemnation proceedings, which provides that the court shall hear the proofs and allegations of the parties, and, if satisfied that the public interest requires the prosecution of the enterprise, and that the lands desired are required and necessary for such enterprise, shall appoint commissioners to ascertain the amount to be paid to the owners, it is the duty of the court to determine, as a question of fact, whether the public interests require the carrying out of the projected enterprise. Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429, 5 L.R.A. (N.S.) 638, 107 N. W. 405, 7 A. & E. Ann. Cas. 1182.

Under a statute providing that if, at the time and place appointed for a hearing upon a petition for a jury to condemn property for a public use, the court or judge to whom it is presented "shall be satisfied by competent proof 'that the land, real estate, premises, or other property so sought to be appropriated are required and necessary'" for the purposes of the enterprise, the necessity for the taking must be established by evidence, or the proceeding must fail. Seattle & M. R. Co. v. State, 7 Wash. 150, 22 L.R.A. 217, 38 Am. St. Rep. 866, 34 Pac. 551.

If a statute authorizing a railroad corporation to acquire, by power of eminent domain, such lands of private owners as may be necessary for the purposes for which the corporation was created, permits a landowner whose property is sought to take issue upon any fact stated in the petition, and requires the court thereupon to hear the allegations and proofs of the parties, and determine the issues, the necessity for taking the land involved is a judicial question, and, if controverted, must be decided by the courts upon the evidence adduced. Rensselaer & S. R. Co. v. Davis and Re New York C. R. Co. supra.

The statute thus referred to (Laws 1869, chap. 260) provided that if, at any time after the construction of any railroad, the railroad company should require for railroad purposes any additional real estate necessary to the operation of the road, it might acquire it by voluntary agreement and purchase, if it could do so, otherwise by condemnation proceedings. In the first-cited case the court, construing this statute, said: It is, we think, the clear construction of the statute, that the court is to determine, upon the application of a railroad company to acquire additional lands for the purposes of its incorporation, the question of the necessity and extent of the appropriation. The plenary power of the legislature over the subject would have authorized it to designate the particular premises which the company might take. The general purpose being public, the legislature could have defined the extent of the appropriation necessary to the public use. But this the legislature has not attempted to do, nor has it delegated to the railroad company the power to determine the necessity for the appropriation of private property for corporate purposes. It has constituted the court a tribunal to hear and determine on the premises. Those whose property is sought "may disprove any of the facts stated in the petition," and the court is "to hear the proofs and allegations of the parties," and then to determine. These provisions would be unnecessary and unmeaning if the power to pass upon the necessity of the appropriation of the lands by the corporations did not reside in the court. The matter is one of judicial cognizance, and the court, in respect of it, exercises a judicial, and not a ministerial, function.

In the case of Rensselaer & S. R. Co. v. Davis, 43 N. Y. 137, this court decided, afterwards said the New York court of appeals, in Re New York C. R. Co. 66 N. Y. 407, that the legislature had not delegated to railroad corporations, by the general railroad law, the power of determining what lands were necessary to be appropriated to their use for the purposes of their incorporation, but that, under that statute, it was for the court to determine, upon the application of a railroad company to acquire lands, the question of the necessity and extent of the appropriation, and that the landowner might contest this question.

The case of Rensselaer & S. R. Co. v. Davis, supra, was distinguished in Re Fowler, 53 N. Y. 60, upon the ground that the general railroad act which governed the decision in the former case permitted the landowner whose property it was sought to take to disprove any of the facts stated in the petition, and required the court to hear the proofs and allegations of the parties, and then to determine; whereas, the controlling statute in the latter case contained no such provisions.

If a statute empowering a municipal corporation, whenever it is necessary, to appropriate private property to a designated public use, does not commit to the municipal authorities the power to decide the question of necessity, it is for the courts to determine it if it is disputed by the landowner. Rome v. Whitestown Waterworks Co. 113 App. Div. 547, 100 N. Y. Supp. 357.

A statute of California (Code Civ. Proc. 1875, § 1241) required it to appear, before private property was taken for public use, that it was necessary to take it for such use. The California courts have held that, under such statute, the necessity for taking private property sought to be condemned is a question of fact, to be determined by a jury. Upon this question, the party seeking to take the property has the burden of proof, and the verdict of the jury is conclusive. Wilmington Canal & Reservoir Co. v. Dominguez, 50 Cal. 505; Spring Valley Waterworks v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; Santa Ana v. Gildmacher, 133 Cal. 395, 65 Pac. 883; Madera R. Co. v. Raymond Granite Co. 3 Cal. App. 668, 87 Pac. 27.

If a statute requires it to appear, before property is taken by right of eminent do-

main, that such taking is necessary for a use authorized by law, then, before condemnation can be had, it must be proven, even where the use is indubitably public, that it is necessary to take the particular property sought for that use. Portneuf Irrigating Co. v. Budge (Idaho) 100 Pac. 1046.

A statute of California (Code Civ. Proc. § 1242) declares that when land is taken for public use, the use "must be located in the manner which will be most compatible with the greatest public good and the least private injury." This makes, it is held, the question of necessity in a given case involve a consideration of facts which relate to the public and also to the private citizen whose property may be injured. The greatest good, on the one hand, and the least injury, on the other, are the questions to be determined, and they are questions for the jury in passing on the question of necessity. Santa Ana v. Gildmacher, supra.

In Colorado, the province of court and jury in condemnation proceedings is defined by the statute of eminent domain (Sess. Laws 1881, p. 164). Sand Creek Lateral Irrig. Co. v. Davis, 17 Colo. 326, 29 Pac. 742.

It was held, in Montana C. R. Co. v. Helena & R. M. R. Co. 6 Mont. 416, 12 Pac. 916, that when railroad companies desire to take or use the roadbeds or rights of way of other railroads through mountain passes, defiles, or cañons not wide enough to permit the construction of more than one track, they are not authorized to be the judges of the necessity of taking or using such roadbeds or rights of way, but that such necessity is a question for the determination of the local county district court.

In Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570, the Northern Pacific R. Co., whose right of way twice crossed, by means of two bridges, in an easterly and westerly direction, the Heart river, from side to side of a horseshoe-like bend, and which desired to do away with such bridges, and substitute solid embankments in their stead, applied for the condemnation of the riparian rights in the loop and of a strip of land across its open end, in order to excavate a new channel to the north through which to send the waters of the stream. The question of necessity was then (perhaps still is) a judicial one by statute in North Dakota, and the necessity for the proposed condemnation was strenuously denied by the landowners. The trial judge found the question of necessity in favor of the railroad company, and the supreme court confirmed it, upon the following line of reasoning: Under the statute it is not essential that the property should be necessary for the construction, it is enough if it is needed for the maintenance and operation of the railroad. The object to be effected by the condemnation proceedings is to put the company in a position to increase the safety of its track by constructing a solid embankment at the two points where the road crosses the Heart river by means of bridges. In the Spring season the safety of these structures is endangered by ice gorges, and the testimony of the engineers tended to show that the danger of injury and destruction to passengers, employees, and freight would be diminished considerably by the change, and that, aside from this, there were liable to be every spring interruptions of traffic by the destruction of one or both of the bridges by moving ice in floods of water. If this is true, the public interests will be subserved by the change, and that can be made only by the condemnation of the property and rights sought. The question is not one merely of economy. The result will not simply save money for the railroad, but will increase the safety of travel. There is no more beneficial purpose for which the power of eminent domain can be exercised than to augment the security of persons and property in the custody of common carriers. Property needed to increase the safety of travelers on railroads is necessary for maintaining and operating such railroads, in the statutory sense.

There are some authorities which assert the power of the courts to pass upon the question of the necessity of taking private property for the public use, in those cases, at least, where the claimant is not the state itself, and the legislature has neither pointed out the property to be taken, nor invested any particular tribunal with authority to determine the question of necessity.

The affirmative is held by a corporation seeking to condemn private property by right of eminent domain to establish when it is denied that the object of taking it is public, and that there is a necessity for appropriating it to that object. Tracy v. Elizabethtown, L. & B. S. R. Co. 80 Ky. 259.

A corporation authorized to condemn private property is not the judge, either of the existence of the necessity, or the public character of the use; both belong to the courts. Ibid.

"It is," declared the court, in Tracy v. Elizabethtown, L. & B. S. R. Co. supra, "erroneous to suppose that the legislature is beyond the control of the courts in exercising the power of eminent domain, either as to the nature of the use, or the necessity to the use of any particular property."

Whether lands which a corporation seeks to appropriate by the power of eminent domain are reasonably necessary or required for a public use by such corporation is a judicial question. Re St. Paul & N. P. R. Co. 34 Minn. 227, 25 N. W. 345.

The owner of land which a corporation seeks to appropriate by right of eminent domain has a right, according to the court, in Re Minneapolis R. Terminal Co. 38 Minn. 157, 36 N. W. 105, at the proper stage of the proceedings, to oppose the taking of his land, upon the ground or contention that the proposed appropriation of it is not necessary for the purposes of the petitioner.

The final determination of the question whether or not it is necessary that a particular piece of land be appropriated to a given public use by a corporation clothed with the power to exercise the right of eminent domain rests with the courts. Riley v. Charleston Union Station Co. 71 S. C. 457, 110 Am. St. Rep. 579, 51 S. E. 485.

If there is no statute providing a way for raising the question of the necessity of taking land sought to be condemned by a corporation to which the legislature has granted the right to exercise the power of eminent domain for certain purposes, and an attempt is made to condemn more land than is needed for such purposes, the aggrieved landowner may invoke the aid of a court of equity to interfere by injunction. Atlantic & B. R. Co. v. Penny, 119 Ga. 479, 46 S. E. 665.

In Stearns v. Barre, 73 Vt. 281, 58 L.R.A. 240, 87 Am. St. Rep. 721, 50 Atl. 1086, landowners whose property was condemned by a municipal corporation for a public water system and supply challenged the necessity for taking their property, and the city replied that the determination of the city council upon the question of necessity was conclusive, because the authorizing statutes denied the landowners an appeal to the courts except on the question of damages; and it was insisted it was clearly within the power of the legislature to leave the matter of the necessity for the taking to the final determination of the city council. Taking up the question thus squarely raised, the court, Munson, J., writing, said: It is said that the action of the legislature in exercising the right of eminent domain is conclusive upon the courts as regards the question of necessity; that, instead of exercising this right directly, the legislature may grant authority to exercise it to any corporation or individual; and that the grantee of this authority may determine whether it shall be exercised, and when and to what extent; that, inasmuch as the property is taken for the public use, and the owner assured of a just compensation, the interest the grantee may have in the taking is of no consequence; that the owner has no constitutional right to be heard upon the question of necessity, and that its reference to a judicial tribunal is a matter of favor, and not of right. Various text-books on the law of eminent domain and the decisions of many states are cited in support of these propositions. It will be well, however, to make some examination of the cases before conceding the entire soundness of these views, at least, in their application to the question presented by this act. After an elaborate and critical examination of the cases in point, and an extended course of reasoning, the conclusion was reached, that, in its last analysis, the question of necessity is for the courts to decide, and that a statute which denies the right to invoke the judicial decision of that question is invalid and so far void.

In Lake Shore & M. S. R. Co. v. New York, C. & St. L. R. Co. 8 Fed. 858, Judge McKennan, conceding that real estate acquired by a railroad corporation for the necessary enjoyment of its franchises could not be taken from it by another corporation by the usual method of appropriation, denied, however, that the extent of the acquisition was conclusively determinable by the directors of the corporation, and questionable only for bad faith as equivalent to fraud. The power of acquisition, said he, is limited by the necessary wants of the corporation, and an exercise of it beyond this limit is not within its protection. I see no reason, then, he added, why this limitation of the power of a corporation to acquire and hold real estate is not as proper a subject of judicial inquiry where alleged encroachments by another corporation are to be determined as the existence of the power itself.

From certain *dicta* in the case of Jockheck v. Shawnee County, 53 Kan. 780, 37 Pac. 621, the supreme court of Kansas appears at that time, at least, to have entertained the opinion that the courts have the power to pass upon the necessity of condemning private property for such public improvements as courthouses, jails, and other county buildings. It did not in that case exercise the power, but its right to exercise it in a proper case seemed to have been assumed. The action was brought to enjoin the county commissioners perpetually from taking private lands held as a homestead to enlarge a courthouse. The land had been condemned upon the application of the commissioners to the district judge, and its value appraised, and the landowners had abandoned their appeal which the statute gave them upon the question of compensation. The statute under which the condemnation proceedings were had merely authorized county commissioners who could not agree with the owners of land for a site for a courthouse, jail, or other county building, or additional ground "necessary for the protection" of any courthouse, etc., to apply to the district judge for the condemnation. The statute contained nothing as to the authority to pass upon the question of necessity, and a supplemental law allowed an appeal only upon the question of compensation and its adequacy. In this particular case, said the court, whether the requisite necessity existed to authorize the taking of the plaintiff's lots was determined by the commissioners of Shawnee county, and by the judge of the district court of that county when he passed on the application presented to him for the appointment of appraisers to make the condemnation. Subsequently in this action the district court of Shawnee county re-examined the proceedings for the condemnation, and, in refusing the injunction prayed for, affirmed that the requisite necessity existed for taking the lots. Under all these circumstances this court will not interfere by declaring that no such necessity existed for this compulsory mode to procure or complete the cite for the courthouse.

In affirming the denial of an application of a street railway company for a judgment that public necessity and convenience required the extension and construction of its line parallel to a railroad, the majority of the court, in Re Shelton Street R. Co. 69 Conn. 626, 38 Atl. 362, Andrews, Ch. J., writing, said: It is only after a judicial finding of common convenience and necessity

that the company becomes invested with the corporate power to construct a railway in the highways from town to town, so as to parallel another railroad, through the combined effect of the general act and the special charter. This phrase, "common convenience and necessity," has no legal meaning except when used to indicate a public necessity which justifies some act affecting the rights of person or property which would not be justifiable if that necessity did not exist. We often speak of public necessity merely as a conducive motive to legislative action, and, so used, it simply indicates that the legislature thought the action, on the whole, to be wise; but, when the contemplated action depends for its validity upon a legislative finding of public necessity, the phrase has an important meaning, although necessarily a somewhat indeterminate one. Such legislative finding in many cases lies wholly in discretion. Public necessity in this sense is that urgent, immediate public need arising from existing conditions, which, in the judgment of the legislature, justifies a disturbance of private rights that otherwise might be legally exempt from such interference. The term is therefore a relative one. It determines in each case that may arise the relation of the duty implied in the broad grant of legislative power to promote, by appropriate action, the interests of the commonwealth, to the limitations of that power, established for the protection of private rights. Ordinarily this is wholly a question of public policy, to be determined by the legislature; sometimes, however, the necessity is one which does not affect the whole body politic the same way, but may or may not exist in different localities, for reasons peculiar to each; the power to put in force the legislative action is then conferred on public or private corporations, to be exercised or not, as the conditions peculiar to each case may warrant. In some such cases the action of the corporation may be legal or void, according as an actual present public necessity exists; and, in determining the property rights of persons affected by such action, the question of public necessity may become involved, when so involved, it is commonly called a question of "public convenience and necessity," or, "common convenience and necessity." In this incidental way courts have been called upon to decide whether conditions existing in a particular case create "a public convenience and necessity" within the meaning of some legislative act. The substantial thing to be decided retains much of the inherent indeterminate character of the original question of public policy; but is limited to the relation of the particular action asked to the legal rights of the person or persons which such action may impair.

c. As to the extent of the estate to be taken.

The legislature has the sole right to determine to what extent the exercise of the power of eminent domain shall be carried. Bennett v. Marion, 106 Iowa, 628, 76 N. W. 844; County Ct. v. Griswold, 58 Mo. 175; Brooklyn Park v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; Re Union Ferry Co. 98 N. Y. 139; Re Rhode Island Suburban R. Co. 22 R. I. 457, 52 L.R.A. 879, 48 Atl. 591; Samish River Boom Co. v. Union Boom Co. 32 Wash. 586, 73 Pac. 670; Varner v. Martin, 21 W. Va. 534.

The extent to which private property shall be taken for a public use in the exercise of the right of eminent domain rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made. Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

It is for the legislature to determine, in the exercise of a sound discretion, what is required by the wants of the people or for the public good. Todd v. Austin, 34 Conn. 78.

It is the function of the legislature to determine in the first instance whether any private property shall be taken for the public use, as well as the extent to which such property may be taken. San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78, 621.

The legislature, in authorizing land to be condemned for a public use which may be permanent, is competent to determine what estate shall be taken, and to authorize the taking of a fee or any lesser estate, in its discretion. Sweet v. Buffalo, N. Y. & P. R. Co. 79 N. Y. 293.

If the use is a public one, the legislature is the exclusive judge of the amount of land and the estate therein which the public end to be subserved requires to be taken. Fairchild v. St. Paul, 46 Minn. 540, 49 N. W. 325.

It is the exclusive judge of the degree and quality of interest which it is proper to take. De Varaigne v. Fox, 2 Blatchf. 95, Fed. Cas. No. 3,836; Challiss v. Atchison, T. & S. F. R. Co. 16 Kan. 117.

The decision of the legislature as to the extent of taking private property for a public use is ordinarily conclusive. New York, N. H. & H. R. Co. v. Long, 69 Conn. 424, 37 Atl. 1070.

It is the exclusive province of the legislature to determine how much of the property of a turnpike corporation is necessary to the public use in laying out a public highway. Hingham & Q. Bridge & Turnp. Corp. v. Norfolk County, 6 Allen, 353.

If the legislature authorizes lands to be taken in fee for the public use, where an easement would doubtless be ample, there is no redress in the courts. Roanoke City v. Berkowitz, 80 Va. 616.

The courts have nothing to do with the degree of necessity or the extent which property sought to be condemned will advance the public purpose. Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

The courts have no power, where it has not been expressly reserved to them, to reexamine the question of necessity or exigency, or the extent to which land may be

taken for a public use. Hayford v. Bangor, 102 Me. 340, 11 L.R.A. (N.S.) 940, 66 Atl. 731.

The courts cannot interfere to limit or control the discretion of the lawmaking power as to the character, quality, method, or extent of the exercise of the power of eminent domain by a person or corporation engaged in promoting a public use, when once it has been determined that such use is a public one. Lake Koen Nav. Reservoir & Irrig. Co. v. Klein, 63 Kan. 484, 65 Pac. 684.

The courts have no right to review the discretion of the legislature in determining to what extent, on what occasions, and in what circumstances, the power to take private property for the public use shall be exercised, if just compensation is made in the manner prescribed by the Constitution. Van Witsen v. Gutman, 79 Md. 405, 24 L.R.A. 403, 29 Atl. 608.

When land is taken for public uses by right of eminent domain, it is for the legislature to decide what estate ought to be taken in order to accomplish its purpose and do justice to all parties. Dingley v. Boston, 100 Mass. 544.

"All this may be true, but the question of the necessity is one for the legislature, and not for the courts," was the reply made by the court, in Challiss v. Atchison, T. & S. F. R. Co. supra, in answer to the contention that an easement was all that it was necessary for a railroad to have in order to enjoy to the fullest possible extent for railroad purposes its right of way, and therefore a statute which gave a railroad company the right to take land from the owner without his consent, in fee simple absolute, by the power of eminent domain, was unconstitutional, because the right to appropriate private property for public use is, and always has been, limited to the actual necessities of such use.

The legislature has a discretion which cannot be controlled by any other department of the government in judging of the extent to which it will exercise the power of eminent domain. Dunn v. Charleston, Harp. L. 189.

It is with the legislature exclusively to determine what estate in lands shall be taken for the public use. Roanoke City v. Berkowitz, supra.

The legislature may, in its discretion, authorize land to be taken in fee simple for a public use, although such use is special, and not necessarily permanent or perpetual. Sweet v. Buffalo, N. Y. & P. R. Co. 79 N. Y. 293; Eldridge v. Binghamton, 120 N. Y. 309, 24 N. E. 462.

The extent to which private property shall be taken for the public use rests wholly in the discretion of the legislature. Dallas v. Hallock, 44 Or. 246, 75 Pac. 204.

It is for the legislature to determine the estate or extent of the interest which the public necessities require in land taken for the public use by right of eminent domain,—whether an estate for years, for life, a mere easement, or a fee absolute or conditional. Malone v. Toledo, 34 Ohio St. 541.

Within the constitutional boundaries, the state, acting through the legislature, may, in exercising the power of eminent domain, proceed at will, and the extent, method, and necessity of exercising the power to take private property for public use may not be interfered with or reviewed by the other departments of the government. People v. Adirondack R. Co. 160 N. Y. 225, 54 N. E. 689, affirmed in 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460.

The power must, of necessity, rest in the legislature, in order to secure the useful exercise and enjoyment of the right of eminent domain, to determine the estate or quantity of interest in the lands taken for the public use,—whether an estate for years, for life, or in fee; whether a right of reversion in any event shall be left to the owner; or whether a mere easement shall be taken, without devesting the owner of the fee and general ownership of the land. Heyward v. New York, 7 N. Y. 314.

The case of Heyward v. New York, supra, was cited in Waterworks Co. v. Burkhart, 41 Ind. 364, as having discussed the question of the jurisdiction of the court to pass upon the necessity of taking, by right of eminent domain, private property which the legislature had authorized to be condemned for a public use, and, it was said, "the language of the court in that case accords with our views."

When a statute authorizes the taking of the fee of land appropriated for a public use, it cannot be held invalid, or that only an easement was acquired by the proceedings under it, on the ground that, in the judgment of the court, the taking of a fee was unnecessary, and the taking of an easement only would accomplish the public purpose which the legislature had in view, for that is a legislative, and not a judicial, question. Sweet v. Buffalo, N. Y. & P. R. Co. supra.

Authority given by statute to a public-service corporation to condemn land "required" rather than "needed" by it makes such corporation the sole judge of what interest in land will be necessary for its operations. Chesapeake & O. Canal Co. v. Union Bank, 4 Cranch, C. C. 75, Fed. Cas. No. 2,653.

In Louisiana, however, the question as to the extent or nature of the estate which is required by the public needs is held to be one of fact; and, it is said, the public can take no more of private property by right of eminent domain, either in quantity or estate, than will suffice the public wants. It can undoubtedly take the fee, if necessary, but, if it is not necessary, it cannot. If a servitude or right of way will answer all the purposes of the public use, then nothing more can be taken. To take more would violate the letter and spirit of the Constitution. New Orleans P. R. Co. v. Gay, 32 La. Ann. 471.

XIV. The blending of public and private uses.

a. The mask of public character.

Whenever it is contended that the power

Supreme Court of California
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Electronically FILED on 1/21/2026 by Tayuan Ma, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **TOWN OF APPLE VALLEY v. APPLE VALLEY RANCHOS WATER**
Case Number: **S289391**
Lower Court Case Number: **E078348**

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MOTION	Motion for Judicial Ntc ISO Amicus Curiae Golden State (Vol. 3 of 5)
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Joseph Bui Greines, Martin, Stein & Richland LLP 293256	jbui@gmsr.com	e-Serve	1/21/2026 12:13:24 PM
Kathy Turner Horvitz & Levy LLP	kturner@horvitzlevy.com	e-Serve	1/21/2026 12:13:24 PM
Patricia Johnson Rutan & Tucker LLP	pjohnson@rutan.com	e-Serve	1/21/2026 12:13:24 PM
Joanna McCallum Manatt Phelps & Phillips LLP 187093	jmccallum@manatt.com	e-Serve	1/21/2026 12:13:24 PM
Bradley Pauley Horvitz & Levy LLP 187298	bpauley@horvitzlevy.com	e-Serve	1/21/2026 12:13:24 PM
Teresa Reed Dippo Munger, Tolles & Olson, LLP 315960	teresa.reeddippo@mto.com	e-Serve	1/21/2026 12:13:24 PM
Maureen Allen Greines, Martin, Stein & Richland LLP	mallen@gmsr.com	e-Serve	1/21/2026 12:13:24 PM
Brad Kuhn Nossaman LLP 245866	bkuhn@nossaman.com	e-Serve	1/21/2026 12:13:24 PM

Gerald Houlihan Matteoni, O Laughlin & Hechtman 214254	gerry@matteoni.com	e-Serve	1/21/2026 12:13:24 PM
Mary Anne Rojas Matteoni, O'Laughlin & Hechtman	maryanne@matteoni.com	e-Serve	1/21/2026 12:13:24 PM
Douglas Evertz Murphy & Evertz LLP	evertz@murphyevertz.com	e-Serve	1/21/2026 12:13:24 PM
Christopher Pisano Best Best & Krieger LLP 192831	christopher.pisano@bbklaw.com	e-Serve	1/21/2026 12:13:24 PM
KARYN JAKUBOWSKI Sullivan Workman & Dee LLP 225410	kjakubowski@swdlaw.net	e-Serve	1/21/2026 12:13:24 PM
Douglas Dennington Rutan & Tucker, LLP 173447	ddennington@rutan.com	e-Serve	1/21/2026 12:13:24 PM
Patrick Rosvall 217468	patrick@brblawgroup.com	e-Serve	1/21/2026 12:13:24 PM
Andrea Abergel	aabergel@cmua.org	e-Serve	1/21/2026 12:13:24 PM
Darren Lee BRB Law LLP	darren@brblawgroup.com	e-Serve	1/21/2026 12:13:24 PM
Charles Cummings Sullivan Workman & Dee LLP 60897	ccummings@swdlaw.net	e-Serve	1/21/2026 12:13:24 PM
Kimberly Howatt California-American Water Company 196921	kimberly.howatt@amwater.com	e-Serve	1/21/2026 12:13:24 PM
Gwendolyn West Greines, Martin, Stein & Richland LLP	Gwest@gmsr.com	e-Serve	1/21/2026 12:13:24 PM
Sarah Banola BRB Law LLP 223812	sarah@brblawgroup.com	e-Serve	1/21/2026 12:13:24 PM
Brigette Scoggins Manatt Phelps & Phillips LLP	bscoggins@manatt.com	e-Serve	1/21/2026 12:13:24 PM
Edward Xanders Greines, Martin, Stein & Richland LLP 145779	exanders@gmsr.com	e-Serve	1/21/2026 12:13:24 PM
Kendall Macvey Best Best & Krieger, LLP 57676	kendall.macvey@bbklaw.com	e-Serve	1/21/2026 12:13:24 PM
Elizabeth Escobedo Nossaman LLP	eescobedo@nossaman.com	e-Serve	1/21/2026 12:13:24 PM
Matthew Currie Golden State Water Company 155737	matthew.currie@gswater.com	e-Serve	1/21/2026 12:13:24 PM
Robert Wright Horvitz & Levy, LLP 155489	rwright@horvitzlevy.com	e-Serve	1/21/2026 12:13:24 PM

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Date

/s/Joanna McCallum

Signature

McCallum, Joanna (187093)

Last Name, First Name (PNum)

Manatt Phelps & Phillips LLP

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