In the Supreme Court of the State of Nevada

MASS LAND ACQUISITION, LLC, a Nevada limited liability company,

Petitioner,

vs.

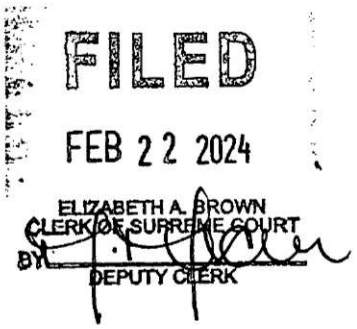
FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR STOREY COUNTY; and THE HONORABLE JAMES E. WILSON, JR., district judge,

Respondents, and

SIERRA PACIFIC POWER COMPANY, a Nevada corporation, d/b/a NV Energy,

Real Party in Interest.

Case No. 85693



BRIEF OF AMICUS CURIAE SOUTHWEST GAS CORPORATION

JOEL D. HENRIOD (SBN 8492)
EGLET ADAMS EGLET HAM HENRIOD
400 S 7th St Suite 400
Las Vegas, NV 89101
(702) 450-5400

Attorney for Southwest Gas Corporation

24-00435

NRAP 26.1 DISCLOSURE

Undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Southwest Gas Corporation is a wholly owned subsidiary of Southwest Gas Holdings, Inc., a publicly traded corporation. No other corporation holds more than 10% of its stock.

Southwest Gas Corporation is represented in this matter by Joel D. Henriod of Eglet Adams Eglet Ham Henriod.

DATED this 20th day of February 2024.

EGLET ADAMS EGLET HAM HENRIOD

By: */s/ Joel D. Henriod*
JOEL D. HENRIOD (SBN 8492)
400 S 7th St Suite 400
Las Vegas, NV 89101
(702) 450-5400

Attorney for Southwest Gas Corporation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Other Authorities

IDENTITY OF AMICUS, STATEMENT OF INTEREST, AND AUTHORITY TO FILE

Amicus Southwest Gas Corporation ("Southwest Gas") incorporates by reference the statement of its identity and interest in this appeal as stated in its "Motion for Leave to File Amicus Curiae Brief," and requests leave to submit the following brief pursuant to that motion and NRAP 29(c).

Amicus Southwest Gas generally agrees with the points and authorities raised in the other amicus briefs submitted in this matter and does not wish to burden the Court by belaboring any of those arguments. Southwest Gas seeks to emphasize a few other noteworthy points and nuances for the Court's consideration.

ARGUMENT

Respectfully, the Court must reject Petitioner's simplistic contention that a taking by any private entity whatsoever is necessarily barred under Article 1, Section 22(1) of the Nevada Constitution. First, it is incumbent that Section 22 as a whole be afforded a reasonable

construction.[1] And that entails coherently reading "private party" in Section 22(1) in light of the definition of "government" in Section 22(8), which expressly contemplates and accounts for the continued role of a "private entity that has the power of eminent domain," such as utilities and other common carriers. Second, the historical context of PISTOL corroborates that voters would not have anticipated nor intended that common carriers be precluded from employing eminent domain. Third, since the scope of "private party" in Section 22(1) is at least ambiguous, the Court should consider the likely consequences of adopting Petitioner's interpretation, which presage significant and harmful impacts to Nevada consumers.

I.

THE SCOPE OF "PRIVATE PARTY" IS CURBED BY THE DEFINITION OF "GOVERNMENT" THAT INCLUDES COMMON CARRIERS

Petitioner's proposed interpretation of subsection 22(1)—*to wit*, that "private party" necessarily encompasses every private entity in any circumstance whatsoever—might be attractive in its minimalism. But

---

[1] Throughout, all references to "Section 22" refer to Nev. Const. Art 1, Sec. 22. "PISTOL" (the campaign acronym for "Peoples Initiative to Stop the Taking of Our Land") also refers to the voter initiate that formally became Section 22.

it is ultimately wrong. As one appellate court pithily explained "the plain meaning approach must not be confused with myopic literalism." *O'Connell v. Walmsley*, 156 A.3d 422, 426 (R.I. 2017). Petitioner's proposed interpretation of Section 22(1) is untenable for failure to account for the rest of Section 22, much less the broader legal backdrop.

A. Rules of Statutory Construction Apply to Constitutional Provisions and Voter Initiatives

"The rules of statutory construction apply to the interpretation of a constitutional provision." *City of Sparks v. Sparks Mun. Court*, 129 Nev. 348, 359, 302 P.3d 1118, 1126 (2013), quoting *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). That includes Constitutional provisions resulting from ballot initiatives. *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1008, 363 P.3d 1168, 1171 (2015).

The key to interpreting an initiative is to ascertain and effectuate the electorate's intent. *See White v. Warden, Nev. State Prison*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980). "The Court looks first to the plain language of the provision, and, if the meaning of that language is unambiguous, does not look beyond it, unless it is clear the ordinary meaning was not intended by the drafters." *City of Sparks*, 129 Nev. at

359, 302 P.3d at 1126; *see Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020).

Nevertheless, "[i]n determining the meaning of a specific provision of an act [or initiative] . . . the act should be read as a whole." *Nevada Tax Comm'n v. Bernhard*, 100 Nev. 348, 350–51, 683 P.2d 21, 23 (1984); *Washoe Broad. Co. v. Neuhoff*, 102 Nev. 464, 466, 726 P.2d 338, 339 (1986). The Court gives meaning to all parts, "so as not to render superfluous words or phrases or make provisions nugatory." *Clark Cty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012). "Individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." *O'Connell*, 156 A.3d at 426.

Where parts appear to conflict with each other, the Court will strive to harmonize them to the extent it does not violate the voters' intent. *Piroozi*, 131 Nev. at 1012, 363 P.3d at 1174.

B. "A Private Entity that Has the Power of Eminent Domain" Acts as the "Government" Under Section 22(8), Not as a "Private Party" Under Section 22(1)

In reading Section 22 as a whole, as required by rules of statutory construction, this Court should hold that the meaning of "private party"

in Section 22(1) is curbed by the definition of "government" in Section 22(8). And the State maintains the prerogative to delegate its inherent sovereign power to a "private party that has the power of eminent domain[.]" *See* Sec. 22(8).

1. Section 22(8) Acknowledges and Accommodates the State's Prerogative to Delegate its Power of Eminent Domain to Private Common Carriers

PISTOL defined the "government," in what is now Section 22(8), as including private entities with eminent domain power, for all purposes under the amendment:

> For all provisions contained in this section, *government shall be defined* as the State of Nevada, its political subdivisions, agencies, any public or private agent acting on their behalf, and any public or private entity that has the power of eminent domain.

Nev. Const. Art. 1 Sec. 22(8).

In Nevada, only particular private entities may exercise the power of eminent domain and only in the context of performing their *public* functions. *See* NRS 37.0095. Generally, eligible private delegees of eminent-domain power include common carriers that offer service to the public at large—*e.g.*, railroads (NRS 37.230), airports (NRS 37.010(l)), and monorails (NRS 37.010(m)), public utilities and energy providers

(NRS 37.010), etc. Furthermore, they are licensed and regulated in the services they provide, the rates they charge, and the exercise of powers entrusted to them—just as NV Energy and Amicus Southwest Gas are accountable to the Public Utilities Commission of Nevada.

The power of eminent domain "is an attribute of sovereignty" and "requires no constitutional recognition." *Schrader v. Third Judicial Dist. Ct.*, 58 Nev. 188, 73 P.2d 493, 495 (1937). Importantly here, that inherent power includes the sovereign's prerogative to delegate the power "to private corporations, to be exercised by them in the execution of works in which the public is interested." *Id.*; *Penn East Pipeline Co.*, LLC v. New Jersey, 594 U.S. ___, 141 S. Ct. 2244, 2251 (2021) (The power of Eminent Domain "can be exercised either by public officials or by private parties to whom the power has been delegated").

Even assuming Petitioner is technically correct that Section 22(8) does not *grant* powers of eminent domain per se, the argument is unavailing because such rights preexist inherently in the sovereign power of the state (Pet. at 14). Section 22(8) expressly acknowledges the sovereign's ability to delegate eminent-domain powers to private

entities and is reasonably construed to accommodate it.[2] Note the usage of present tense in the phrase "private party that ***has*** the power of eminent domain" in Section 22(8). In the context of a constitution, which establishes a framework for government going forward, the plain meaning of "has" demonstrates a recognition that private parties will continue to have such powers delegated to them in the future—and appropriately so.

PISTOL's reference to private parties with power of eminent domain in the definition of government cannot be disregarded as mere coincidence. First, as a canon of construction, this Court assumes the *voters* were aware of this body of law. 1 NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 4:9 (7th ed. 2006) ("when an electorate enacts or amends an initiative ... courts presume it has knowledge of existing law, including legislation

---

[2] Pursuant to the general/specific canon, to the extent Section 22(1) and Section 22(8) are deemed to conflict, then the general rule set out in Section 22(1) must yield to the specified definition of "government" designed to apply "for all provisions contained in this section." 1 NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 4:9 (7 th ed. 2006) ("if two statutes or provisions conflict, the general statute or provision must yield to the specific statute or provision involving the same subject").

and relevant judicial decisions."). Second, the *framers* of PISTOL certainly knew it. Indeed, the PISTOL framers likely were influenced by Justice Clarence Thomas's dissenting opinion in *Kelo*, in which he castigated the US Supreme Court majority for condoning transfers of property to private parties for their private use, in contrast to the Constitutionally appropriate practice of exercising eminent domain to facilitate infrastructure of common carriers whose infrastructure constitute "public uses in the fullest sense of the word because the public [can] legally use and benefit from them equally." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 512-13 (2005) (J. Thomas, dissenting).

2. *It is Absurd to Deem an Entity Both the "Government" and a "Private Party" Simultaneously*

Petitioner's strained interpretation of PISTOL also defies common sense when the amendment is read as a whole. *See Nevada Tax Comm'n v. Bernhard*, 100 Nev. at 350–51, 683 P.2d at 23 (1984) ("[i]n determining the meaning of a specific provision of an act [or initiative] . . . the act should be read as a whole"). PISTOL presents a dichotomy of interests with government on one side versus landowners and "private

parties" on the other. It would be absurd to deem an entity both a private party (under Section 22(1)) and the government (under Section 22(8)) simultaneously. "This Court will avoid constructions that would lead to an absurd result." *City of Henderson v. Wolfgram*, 137 Nev. 755, 757, 501 P.3d 422, 424 (2021). When a "private entity" such as NV Energy is acting in the shoes of the government by taking property by eminent domain for public utility infrastructure pursuant to NRS 37.010, as contemplated in Section 22(8), it is not a "private party" under Section 22(1).

That is not to say, however, that an entity such as NV Energy is exempt from the prohibition of Section 22(1). Whether a "private entity has the power of eminent domain" as provided under Section 22(8) depends entirely on the use to which the taken property will be dedicated, specifically, a public use. *See* NRS 37.0095; 37.010. NV Energy could not wield the power of eminent domain to take property for its own private use and does not propose to do so here where a public use project is at issue.

II.

THE HARMONIOUS CONSTRUCTION OF SECTION 22 IS CONSISTENT WITH THE HISTORICAL CONTEXT OF PISTOL

The historical context of PISTOL indicates no intention by the voters to preclude the use of eminent domain for infrastructure of common carriers such as public utilities.

A. The Court Must Consider PISTOL's History, Public Policy, and Reason to Determine the Voters' Intent

Even assuming the meaning of "private party" in Section 22(1) is not *plainly* curbed by the definition of "government" in Section 22(8), the term is at least ambiguous. As such, the Court should "construe it according to that which reason and public policy would indicate [] Nevada voters intended." *See Harper v. Copperpoint Mut. Ins. Holding Co.*, 138 Nev. Adv. Op. 33, 509 P.3d 55, 62 (2022), quoting *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 31, 434 P.3d 287, 289 (2019).

"To determine the voter intent of a law that was enacted by a ballot initiative, this court has considered that ballot's explanation and argument sections," *Piroozi*, 131 Nev. at 1011, 363 P.3d at 1173, as well as "the provision's history, public policy, and reason to determine what

the voters intended." *City of Sparks*, 129 Nev. at 359, 302 P.3d at 1126; *see also Harper*, 138 Nev. Adv. Op. 33, 509 P.3d at 62. "The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification." *City of Sparks*, 129 Nev. at 359, 302 at 1126, quoting *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010).

B. Reacting to *Kelo* and *Pappas*, the Concern Was Using Eminent Domain to Condemn Properties for Private Use

As discussed in NV Energy's answering brief (Ans. at 21-22), the official explanation and arguments circulated to describe PISTOL to the voters referred to the controversial holdings of the US Supreme Court's decision in *Kelo* and the Nevada Supreme Court's opinion in *Pappas*—specifically, condemning property for private use. Nothing in any of that material would give a reasonable voter the impression that PISTOL would prohibit common-carrier utility companies from taking property to expand infrastructure dedicated to public use.

The reference to *Kelo* in the ballot material is particularly interesting. If one were to read the dissenting opinions in that famous case and assume that PISTOL was designed to counteract the majority

opinions, it would be understood that eminent domain takings by common carriers for public use would remain permissible.

Two dissenting opinions were authored in *Kelo*. Both criticized the majority for expanding the reach of eminent domain to allow transfers to private parties for their private use. Both dissenting opinions also confirmed the Constitutional propriety of condemning property for transfer to private parties for *public use*. Justice O'Connor's dissent explained it was "straightforward and uncontroversial" that "the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium." *Kelo*, 545 U.S. at 494-99 (per J. O'Connor, dissenting, joined by C.J. Rehnquist and J. Scalia).

Justice Thomas wrote a separate dissent urging the Court to abandon its recent "public purpose" test in favor of simply enforcing an originalist meaning of "public use." *Kelo*, 545 U.S. at 512-21. Illustrating the point, he contrasted the transfer of property to private parties for private use justified by an amorphous "public purpose" test (improperly in his view) to properly using eminent domain to acquire

land by common carriers for public use. *Id.* Justice Thomas's dissent refers to private common carriers as "quasi-public entities" and their infrastructure as "'public uses' in the fullest sense of the word because the public could legally use and benefit from them equally." *Id.* at 512-13.

The Nevada Supreme Court's holding in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 119 Nev. 429, 76 P.3d 1 (2003), was similar to the US Supreme Court's decision in *Kelo*, and also became a focus of attention in the PISTOL campaign. In *Pappas*, Justice Leavitt authored a dissent along the lines of Justice O'Connor's in *Kelo*, writing: "The government's taking of property and giving it to another for a *private use* is unconstitutional and void." *Pappas*, 119 Nev. at 452, 76 P.3d at 17 (J. Leavitt, dissenting).

Because PISTOL was an apparent backlash against the majority opinions in *Kelo* and *Pappas*, it is counter-intuitive to imagine the 2008 Nevada voters intended the simplistic and illogical reading that Petitioner advances. It flies in the face of the dissenting opinions in *Kelo* and the uncontroversial history of employing eminent domain for infrastructure development by private entities for genuine public use.

After all, it is the public that uses the electricity, gas, water, telephones, etc., supplied by public utilities via infrastructure on property that occasionally must be taken by eminent domain. There is no reason to believe 2008 voters intended to disrupt that longstanding and widely-accepted construct.

It is much more reasonable to infer that the majority of 2008 voters shared the view of the dissenters in *Kelo* and *Pappas*, especially since PISTOL was described as a repudiation of those majority opinions. Further, reading PISTOL as a whole would not have led voters to believe the proposed amendment would conflict with the *Kelo* and *Pappas* dissents. (See above.)

Here, to be clear, this case does not concern a taking or transfer for anyone's private use.

III.

THE LIKELY CONSEQUENCES OF PETITIONER'S INTERPRETATION WOULD BE SIGNIFICANT AND HARMFUL TO CONSUMERS

"Where the meaning of a particular provision is doubtful, the courts will give consideration to the effect or consequences of proposed constructions." *Nevada Tax Comm'n*, 100 Nev. at 350–51, 683 P.2d at 23. "If the language of the provision fairly permits, the courts will avoid

construing it in a manner which will lead to an unreasonable result." *Id.*

It is not hyperbolic to anticipate one or more consequences would likely follow from precluding the use of eminent domain by public utilities. In simplest terms, the cost of building linear infrastructure to deliver electricity, gas, water, telephone, and internet service, etc., depends largely on the length of infrastructure over distance. The expense of a project is often proportional to the amount of materials and labor necessary to span a distance. So, to manage project expenses that ultimately are passed on to consumers in rates charged, utilities seek to design and construct their facilities safely, efficiently and, when practicable, following relatively straight lines (or shortest distances) .

Despite good faith efforts by utilities to reach agreement with affected property owners, eminent domain is occasionally necessary to gain space for that infrastructure when a property owner either refuses to sell rights out of principle for any amount or opportunistically insists on an above-market price. If utilities were precluded from using the tool of eminent domain, one or more potential outcomes seems nearly certain:

1. *Rates will increase* substantially because the cost of infrastructure will rise dramatically when utilities cannot take the shortest or most efficient path and must instead redesign and build around uncooperative landowners.

2. *Rates will increase* substantially because the cost of acquiring property rights for infrastructure is subject to "holdout" owners demanding prices exceeding fair market value because they know the utility's only alternative will be to build around them or forgo the project. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 74–75 (1986) ("Without an exercise of eminent domain, ... owner[s] would have the power to hold out .... If even a few owners held out, others might do the same.").

3. Then—as a potential cascading effect of those spiking costs—it is foreseeable that local *governments may need to municipalize* utilities in order reestablish the critical tool of eminent domain. And forcing municipalities into the energy business would entail further taxes, bonds, salaries and benefits for hundreds of new public employees, *etc.*

That is not doomsaying. It seems inevitable—a simple function of geometry, arithmetic, and logic. And it is appropriate for the Court to consider it. *See Nevada Tax Comm'n*, 100 Nev. at 350–51, 683 P.2d at 23 ("Where the meaning of a particular provision is doubtful, the courts will give consideration to the effect or consequences of proposed constructions.").

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's conclusion that the taking is permissible.

DATED this 20th day of February 2024.

EGLET ADAMS EGLET HAM HENRIOD

By: */s/ Joel D. Henriod*
JOEL D. HENRIOD (SBN 8492)
400 S 7th St Suite 400
Las Vegas, NV 89101
(702) 450-5400

Attorney for Southwest Gas Corporation

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify this brief complies with the 3,500-word limitation of NRAP 29(e) and NRAP 21(d) because it contains only 3,197 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 20th day of February 2024.

EGLET ADAMS EGLET HAM HENRIOD

By: */s/ Joel D. Henriod*
JOEL D. HENRIOD (SBN 8492)
400 S 7th St Suite 400
Las Vegas, NV 89101
(702) 450-5400

Attorney for Southwest Gas Corporation

CERTIFICATE OF SERVICE

I certify that on February 20, 2024, I submitted the foregoing "Brief of Amicus Curiae Southwest Gas Corporation" for filing *via* the Court's eFlex electronic filing system, and therefore electronic service was made in accordance with the master service list.

/s/ Makaela Otto
An Employee of Eglet Adams
Eglet Ham Henriod