No. 04-108

In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUTION LIMITED PARTNERSHIP, and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF OF CASCADE POLICY INSTITUTE, AMERICAN ASSOCIATION OF SMALL PROPERTY OWNERS, GRASSROOT INSTITUTE OF HAWAII, JAMES MADISON INSTITUTE, JOHN LOCKE FOUNDATION, ILLINOIS POLICY INSTITUTE, INDIANA POLICY REVIEW FOUNDATION, OREGONIANS IN ACTION LEGAL CENTER, PIONEER INSTITUTE, SUTHERLAND INSTITUTE, and TENNESSEE CENTER FOR POLICY RESEARCH, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER PUBLICATIONS

INTEREST OF THE *AMICI CURIAE*[1]

All the *amici* are non-profit organizations which have, as one of their prime public policy objectives, the protection of private property rights. They are therefore all keenly interested in the outcome of this case. The *amici* are:

Cascade Policy Institute is a non-profit public policy research organization based in Portland, Oregon. Its mission is to explore and advance public policy alternatives that foster individual liberty, personal responsibility, and economic opportunity, including the protection of private property rights.

American Association of Small Property Owners is a nonpartisan, nonprofit corporation that has been working since 1993 for the right of small property owners to prosper freely and fairly – to make possible the American dream of building wealth through real estate. Based in Washington, DC, AASPO has chapters or affiliates in more than 25 states.

Grassroot Institute of Hawaii is a state-based free-market think tank that works to protect individual rights, including the right to private property.

James Madison Institute is a Florida-based research and educational organization engaged in the battle of

[1] Pursuant to Rule 37.3, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

ideas. The Institute's ideas are rooted in a belief in the U.S. Constitution and such timeless ideals as limited government, economic freedom, federalism, and individual liberty coupled with individual responsibility.

John Locke Foundation is a nonprofit, nonpartisan think tank that studies public policy issues at the state and local government. Key areas of interest include state fiscal policy, education, regulation, transportation, and property rights.

Illinois Policy Institute is a state based free market oriented think tank in Springfield, Illinois. The Institute's mission is to preserve and strengthen critical societal institutions in Illinois.

Indiana Policy Review Foundation's mission is to marshal the best thought on governmental, economic and educational issues at the state and municipal levels. It seeks to accomplish this in ways that exalt the truths of the Declaration of Independence, especially as they apply to the interrelated freedoms of religion, property and speech.

Oregonians In Action Legal Center, based in Tigard, Oregon is a nonpartisan, non-profit, public interest law center focusing on litigation to protect the constitutional rights of landowners from excessive and increasingly burdensome federal, state, and local regulations. The Legal Center successfully represented the Petitioner in the United States Supreme Court case *Dolan v. City of Tigard*, and recently filed a Petition For a Writ of Certiorari with the United States Supreme Court in *Rogers Machinery Company, Inc. v. City of Tigard and Washington County*.

Pioneer Institute is an independent, non-profit organization that specializes in the support, distribution, and promotion of research on market-oriented approaches to Massachusetts public policy issues.

Sutherland Institute is a non-profit, non-partisan, Utah-based public policy research institute whose goal is to encourage public policy solutions that allow private initiative to flourish, and that support private property rights and personal responsibility.

Tennessee Center for Policy Research is an independent, nonprofit, and nonpartisan research organization dedicated to providing concerned citizens, public leaders, and government officials with expert empirical research and timely free market solutions to public policy issues of the day. The Center encourages solutions to public policy issues grounded in individual liberty, competition, personal responsibility, and the social capital of community bonds to achieve a freer and more prosperous Tennessee.

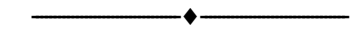
SUMMARY OF ARGUMENT

This Court's standard of review in regulatory takings cases should be applied in eminent domain cases. The reasons that call for heightened scrutiny when a regulatory taking is alleged apply with equal force when the government seeks to condemn private property through its eminent domain powers. While the public purposes that might be served by eminent domain are the same as those that might be served through the general police power, the eminent domain power is limited by the public use

requirement of the 5th Amendment. This limitation serves to protect property owners from being singled out, recognizes that fair market value will often not make property owners whole, assures that the fundamental right to exclude will not be violated without a compelling public purpose, and guards against the abuse of public authority and the corruption of our democratic process.

Reliance on heightened scrutiny in eminent domain cases will not significantly handicap the government in the pursuit of its legitimate purposes. Numerous states have applied heightened scrutiny on the basis of their reading of either the 5th Amendment or of the comparable provisions of their own constitutions. Notwithstanding their heightened scrutiny in public use cases, all of these states have been able to promote economic development, protect their environments, and pursue other public purposes in competition with the other states in the Union.

In reviewing the claims of property owners under the public use limitation of the 5th Amendment, this Court should demand that governments utilize the least burdensome means available. In the instant case, this Court should find that the City of New London has exceeded its legitimate authority in condemning the petitioners' property for immediate lease to private developers. Individual lives and livelihoods should not be so easily sacrificed to the profits of other private parties and the abstract prospect of economic development and increased tax revenues.



ARGUMENT

I. HEIGHTENED SCRUTINY OF PUBLIC USE CLAIMS IN EMINENT DOMAIN CASES WILL BETTER MEET THE JUDICIAL RESPONSIBILITY TO PROTECT INDIVIDUAL LIBERTIES WHILE RESPECTING THE CONSTITUTIONAL PREROGATIVES OF THE LEGISLATIVE BRANCH.

A. PUBLIC USE AND JUST COMPENSATION CLAIMS WARRANT THE SAME HEIGHTENED STANDARD OF JUDICIAL REVIEW.

Judge Diarmuid O'Scannlain suggested in *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1167 (9th Cir. 1997), that, in light of this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court might take the opportunity to reconsider what has come to be understood as a total deference standard articulated in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). While the instant case can and should be decided for Petitioners by simply clarifying that the deference required by *Midkiff* is with respect to legitimate state purposes, not means of achieving those purposes, this Court has an opportunity in this case to provide a clear and concise explanation of the limitations on the eminent domain power imposed by the "public use" requirement.

In *Midkiff* this Court stated that the "[public use] requirement is coterminous with the scope of a sovereign's police powers." 467 U.S. at 230. This suggests that any end the state may promote pursuant to the police power is an end the state may seek to achieve through the means of eminent domain. But this is demonstrably not the case.

For example, the state clearly has the power to redistribute wealth among its citizens in the interest of alleviating poverty (as it does through a progressive income tax), but few would suggest that an American state or the United States can engage in forced purchases of private land to be subdivided and granted to the poor as home sites; or that city center condominiums can be acquired by eminent domain for the purpose of giving them to the homeless. And if such actions to benefit the poor cannot be accomplished through eminent domain, surely the government does not remedy the constitutional shortcoming by selling the taken land to those who can afford it in the interest of promoting economic development.

The eminent domain power is coterminous with the police power in the sense that it can only be used for ends within the police power. But this does not mean that the eminent domain power can be used for every end within the police power. The compensation requirement of the 5th Amendment is one of several limits (e.g., due process and equal protection) on the means that may be employed in pursuit of the ends inherent in the police power. That is, where the government takes property as a means to achieve its legitimate police power ends, it must pay just compensation. The public use requirement of that same amendment must be understood as a limit on the use of compensated takings. Otherwise the "public use" language is superfluous. As Judge O'Scannlain states in questioning the "conceivable public purpose" test of *Midkiff*, 467 U.S. at 230, "[i]f the Clause is to have any effect at all, it must mean that a court will not feign blindness when it sees through a patently transparent legislative recital that a taking is for a public use." *Richardson*, 124 F.3d at 1168.

Judge O'Scannlain observes in *Richardson* that the state can pursue its legitimate ends through regulation, eminent domain and acquisition of properties from willing sellers. 124 F.3d at 1167. In a free society, we should prefer that all property acquisitions by government be the result of arms length market transactions. But where government needs to acquire numerous parcels (as in the case of a public road) or where a specific parcel is needed (as in the case of the preservation of an historic structure), the public good can be thwarted by property owners who hold out for a price far in excess of fair market value. The eminent domain power exists to counter this "holdout problem." But the necessity of resorting to the extreme power of eminent domain where individual property owners would otherwise take unfair advantage of their fellow citizens and taxpayers does not justify the use of that power in the pursuit of every public purpose. Indeed, the fact that it is a coercive act by government should result in the taking of extra precautions in its use. That is the purpose of the "public use" limitation of the 5th Amendment.

Because the eminent domain power has deep roots and has been widely used for the entire history of our Constitution, it is all too easy to see it as unexceptional and not extreme. Indeed it is often suggested that a property owner is made whole when fair market value is paid for taken land. But a moments reflection reminds us that, although commonly employed, eminent domain is among the most coercive powers available to our governments. A fair market price is not everyone's price. Some may come out ahead, in the sense that they would have been willing to sell for less. Some will find that the price paid is fair. But others will be paid less than they were

willing to sell for. "Whether because of a sentimental attachment to his property or a conviction that the property is actually worth more than what the market will currently bear, a landlord might choose not to sell, even at the 'fair market value.'" *Richardson,* 124 F.3d at 1168. Similar variations exist in every market, but, absent eminent domain, those whose price is too high do not sell. It is often the case with property, particularly residences, small businesses and family farms, that owners will not sell at any price others are willing to pay. This behavior, which some economists might describe as irrational, may reflect the importance of family roots and an attachment to place. To force such owners to sell at fair market value is a deep personal affront – a taking of what may be the most important thing in their lives.

This does not mean that eminent domain is never appropriate, nor does it deny that it will be difficult to distinguish the holdouts from those who truly would not sell at fair market price. But it does mean that we should minimize the risk of eminent domain being used against some individuals to benefit other individuals rather than the general public. The "public use" requirement serves that end by restricting the use of eminent domain to public acquisition for public ownership or clearly public purposes.

B. HEIGHTENED SCRUTINY FOR THOSE SINGLED OUT[2]

The "public use" limitation on eminent domain serves individual liberty and constrains the abuse of government power by assuring that voters (and taxpayers) will bear the costs of government property acquisitions. When the public does bear the costs of government action it is appropriate for the courts to be deferential to the democratic process for the reasons suggested many years ago by Justice Stone in *United States v. Carolene Products*, 304 U.S. 144, 152, fn4 (1938).[3] But where, as in the instant case, government acts as an intermediary in the forced transfer of property from one private owner to another, there will be no cost to the voters who will therefore be less attentive to their democratic responsibilities. In such cases, property owners become like the discrete and insular minorities protected in other areas of constitutional law by heightened scrutiny.

Yet the *Midkiff* ruling has come to represent minimum scrutiny, if any scrutiny at all, in contrast to the heightened scrutiny this Court has applied in recent cases brought under the "just compensation" clause of the 5th Amendment. Judge O'Scannlain explains in *Richardson* why "[i]t may be time for . . . [this] Court to reconsider *Midkiff*." "The underlying thrust of the *Nollan-Lucas-Dolan* decisions

[2] The "singling out" problem exists when "the government singles out a private party, in the sense that the government's aims could have been achieved in many ways but the means chosen placed losses on an individual. . . . " Saul Levmore, *Takings, Torts, and Special Interests*, 77 VIRGINIA L. REV. 1333, 1344-45 (1991).

[3] For an elaboration of the *Carolene Products* theory of heightened judicial scrutiny see JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

– increasing the scrutiny of regulations to determine if they go 'too far' (enough to require compensation) – is inconsistent with Midkiff's sweeping deference." There is, notes Judge O'Scannlain, a "tension between these two lines of authority." 124 F.3d 1150 at 1167.

The *Carolene Products* rationale for varying levels of scrutiny helps explain this Court's reliance on heightened scrutiny in the *Nollan, Lucas* and *Dolan* cases. A central point made in each of these cases is that individual property owners ought not have to bear the costs of widely shared public benefits.[4] When this appears to be the case, the courts will demand that the state demonstrate an "essential nexus" between a legitimate state interest and the regulation, *Nollan*, 483 U.S. at 837, and a regulatory impact "roughly proportional" to the impact of the regulated property use, *Dolan*, 512 U.S. at 395-96. Without such nexus and proportionality, it is determined to be unfair to impose the costs on one or a few property owners. Where the costs are widely spread among those who will also benefit from the government's action, there exists what Justice Holmes called "reciprocity of advantage,"

[4] "The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization." *Nollan,* 483 U.S. at 841. "Surely, at least, in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life,' in a manner that secures an 'average reciprocity of advantage' to everyone concerned. (Citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) *Lucas*, 505 U.S. at 1018-1019. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " (Citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) *Dolan*, 512 U.S. at 384.

meaning that costs are approximately offset by benefits. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922). In these reciprocity of advantage cases (like much general zoning or building code regulation), it is also reasonable to defer to the democratic process since costs as well as benefits are widely distributed.

The just compensation and public use requirements of the takings clause should receive parallel interpretations. Where the public will share the costs as well as reap the benefits of government action, as in public acquisition and reciprocity of advantage cases, a deferential standard of review is appropriate. But where the costs will be borne by a few while the many enjoy the benefits, as in the instant case and regulations like those in *Nollan, Lucas* and *Dolan,* a proper respect for individual rights requires a higher standard of review.

C. THE FUNDAMENTAL RIGHT TO EXCLUDE

The "public use" limitation further serves individual liberty and constrains the abuse of power by underscoring the difference between a regulation that reduces property value by limiting its permitted uses and a government mandate that a property owner can no longer exclude others. As this Court found in *Dolan*, it is no less an unconstitutional taking for government to mandate public access to private property as it is for the government to occupy the property as its own. Even if there is no measurable economic loss for the property owner, there is, in both cases, a loss of the fundamental right to exclude. "[This] Court emphasized [in *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)] that the servitude took the landowner's right to exclude, 'one of the most essential

sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

Government can achieve many if not most of its legitimate purposes through regulation that may or may not require compensation depending on the case by case analysis required by this Court's takings jurisprudence. Where compensation is required the government will have effectively acquired one or more of the sticks in the property rights bundle, but the property owner will generally retain ownership including the right to exclude. The "public use" clause requires that government or public use be necessary to achieving a public purpose before resorting to the more extreme measure of eminent domain. Regulation, though often burdensome and sometimes requiring compensation, is less burdensome on property owners than is the forced sale of eminent domain. This Court has often held that where legitimate government action impacts on individual rights, the government is required to resort to a less burdensome means if one is available.[5] The "public use" clause should be understood as requiring the government to pursue the less burdensome means of regulation where actual public use is not required to achieve a public purpose. By insisting on this interpretation of the "public use" clause, this Court is not second guessing the legislature on what constitutes a public

[5] E.g., *Hodgson v. Minnesota*, 497 U.S. 419, 455 (1990) (minor's welfare can be protected by "less burdensome means" than a two parent notification requirement for abortion); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) ("state interest may be served with lesser burden on constitutionally protected activity"); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (state must show that no alternative would avoid substantial infringement on 1st Amendment rights).

purpose. Rather, this Court would simply limit the government to constitutionally permitted means, just as it does in interpreting the equal protection and due process clauses of the same Amendment.

D. PROTECTING AGAINST ABUSE AND CORRUPTION

The heightened review of *Nollan, Lucas* and *Dolan* serves to protect against the unfair or inappropriate use of the regulatory process to benefit politically influential individuals or interests. Because virtually every regulation results in winners and losers, an essential function of judicial review must be to assure that these gains and losses are the incidental result of political give and take, and not the intended result of influence or corruption. The majority in *Richardson* saw "nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated." 124 F.3d at 1158. Judge O'Scannlain agreed that "there is less reason to be suspicious of a fully compensated taking than an uncompensated one, [but] more deference is not absolute deference." "The public use requirement, . . ." he went on to say, "[forces] the government to prove that it is upholding the public welfare and not merely transferring wealth to a class of persons with a stronger political voice." 124 F.3d at 1168.

Dissenting in the decision below, Justice Zarella argued that the majority decision "represents a sea change in the evolution of the law of takings because it blurs the distinction between public purpose and private benefit and cannot help but raise the specter that the power will be

used to favor purely private interests." *Kelo v. City of New London*, 843 A.2d 500, 575 (Conn.2004). Professor Nicole Stelle Garnett suggests that "[b]y demanding that a condemning entity link the means by which it seeks to acquire land, a court may well uncover 'ulterior' purposes for the exercise of eminent domain."[6]

These ulterior motives have surfaced in some of the cases in which courts have questioned the total deference understanding of *Midkiff*. Costco sought to have the Landcaster Redevelopment Authority condemn the space owned by 99 Cents Only Stores. The Authority complied because they were fearful of Costco's relocating to another city. *99 Cents Only Stores v. Landcaster Redevelopment Authority*, 237 F.Supp.2d 1123, 1126 (C.D.Cal. 2001). New Jersey has followed suit in refusing to allow Donald Trump to use condemned property for a limousine holding lot. *Casino Reinvestment Development Authority v. Banin*, 727 A.2d 102,103 (N.J. Super.Ct.Law Div. 1998). Here the court reaffirmed the established principle that where the real purpose of the condemnation is other than the stated purpose, the condemnation may be set aside. *Township of West Orange v. 769 Associates*, 800 A.2d 86, 94 (N.J. 2002) citing *Banin*, 727 A.2d at 104.

In a world of intense competition among cities and states for business development, the risks of unfair influence or corruption of democratic processes are very real. The instant case also evidences the influence that private interests can have on legislative outcomes to the detriment of other, less influential, private parties. Large developers

[6] Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEORGE WASHINGTON L. REV. 934, 963 (2003).

and businesses can easily exercise undue influence on governments desperate for employment opportunities and a larger tax base. Individual property owners have only the courts to protect them from these powerful forces. As Professor Cass Sunstein has written,"[t]he careful scrutiny of the means-ends connections operates to 'flush out' impermissible ends."[7]

II. STATES WHOSE COURTS APPLY HEIGHTENED STANDARDS OF REVIEW IN EMINENT DOMAIN CASES UNDER THE 5TH AMENDMENT OR THEIR OWN CONSTITUTIONAL PUBLIC USE REQUIREMENT HAVE SUCCESSFULLY MET THEIR RESPONSIBILITIES TO PROPERTY OWNERS AND TO THE GENERAL PUBLIC WELFARE.

The experiences of several states in different regions of the country demonstrate that a heightened standard of review in eminent domain cases does not prevent government from achieving its legitimate purposes. Several states, and a few lower federal courts, have limited the use of eminent domain to public acquisition of property for public retention and use or where the act of condemnation itself will achieve a legitimate public purpose. In other words, they have interpreted "public use" to mean public use, not "public purpose."

"Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext." *Cottonwood Christian*

[7] Cass Sunstein, *Lochner's Legacy*, 87 COLUMBIA L. REV. 873, 878 (1987).

Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203, 1229 (C.D. Cal.2002). Delaware, Florida, Illinois and Montana courts have agreed with this thinking and imposed a heightened standard of review in 5th Amendment eminent domain cases. The Delaware Court first expressed "very gravest doubt[s]" as to whether the state could condemn because property was "not used in the most efficient or economical manner." *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 484-485 (Del.1987). The same court later imposed heightened scrutiny to determine whether the asserted public purpose is primary or incidental to the use of eminent domain. *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 231 (Del. 1987). Florida, Illinois and Montana courts also review eminent domain challenges to determine if the public purpose is primary or incidental to the condemnation itself. If public benefit could not exist but for the private use, then the private purpose is primary and the public purpose is incidental. In the words of the Florida Court, the "tail cannot wag the dog." *Baycol, Inc. v. Downtown Development Authority*, 315 So. 2d 451, 456 (Fla. 1975). If public benefit is incidental then it is not sufficient to sustain a finding of a public use. *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 768 N.E. 2d 1, 10-11 (Ill. 2002). In assessing whether condemnation for private use exceeds the eminent domain power, the Montana Court does not defer to the legislature but weighs the public and private costs. *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995).

Arkansas, Maine, Massachusetts, Michigan, New Hampshire, South Carolina and Washington courts have all found the 5th Amendment protections, as set forth in

Midkiff, inadequate and have interpreted their respective state constitutions to require greater judicial scrutiny. Arkansas, Maine, South Carolina and Washington hold that if the public benefit would not exist but for the private use, then the private use is primary and the public purpose incidental. *City of Little Rock v. Raines*, 411 S.W.2d 486, 494 (Ark. 1967); *Opinion of the Justices*, 131 A.2d 904, 907-908 (Me. 1957) (beneficial "in a broad sense" does not mean there is any direct public use); *Georgia Department of Transportation v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); *Petition of Seattle*, 638 P.2d 549, 556-557 (Wash.1981) ("If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked."). Washington went even further in finding that although preserving dwindling housing stocks for a particularly vulnerable segment of society provides a "public benefit," this public benefit does not constitute a public use. *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183, 196 (Wash.2000).

Similarly, the South Carolina Constitution prohibits the state from condemning land solely for purposes of developing commercial or residential areas. *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956). Like Montana, Massachusetts and New Hampshire employ a balancing test to compare public and private benefits. *Opinion of Justices*, 250 N.E. 2d 547, 558 (Mass. 1969); *Appeal of City of Keene*, 693 A.2d 412, 416 (N.H. 1997); *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H.1985) ("If the social costs exceed the probable benefits, then the project cannot be said to be built for a public use."). In *Merrill* the loss of open space that benefitted the public health outweighed any possible economic incentives. *Id.* at 217-218.

In all of these states, the New London plan to condemn private property for the express purpose of promoting economic development by the resale of the property to a private developer would require the courts to give heightened scrutiny in determining whether or not the plan is a public use for the purposes of the 5th Amendment. All of these states distinguish condemnation for the removal of blight or other public nuisances from the encouragement of private economic development that will incidentally benefit the public. All of these states have concluded that the public use requirement of the 5th Amendment takings clause, or the comparable provision of their state constitution, is not satisfied by the sole public purpose of economic development.

The most significant state court decision in recent years is *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), in which the Michigan Supreme Court overturned *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *Poletown* had been widely relied upon by other courts and commentators on the 5th Amendment for the proposition that courts should give total deference to legislative determination of what constitutes a public use for the purposes of the 5th Amendment and the many identical and similar state constitutional provisions.

In *Poletown*, the Michigan Court stated that "[t]he United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms 'well-nigh conclusive.'" 304 N.W. 2d at 459 (quoting from *Berman v. Parker*, 348 U.S. 26, 32 (1954). This same language was quoted by this Court in *Midkiff*, 467 U.S. at 239, in concluding that *Berman* was correct in finding that the judicial role "in reviewing a legislature's judgment of

what constitutes a public use . . . is 'an extremely narrow' one." 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Upon reconsideration in 2004, the Michigan Supreme Court came to a conclusion more consistent with the history and purpose of the public use limitation on the power of eminent domain.

Writing for a Court that was unanimous in overruling *Poletown*, Justice Young observed that "*Poletown's* 'economic benefit' rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity." 684 N.W.2d at 482. Rather than accept that the "public use" clause of the 5th Amendment imposes virtually no limits on the eminent domain power, while not also concluding that private property could never be condemned for private use, the *Hathcock* Court articulated three exceptions to a general prohibition against condemnation for such private use.

> (1) where "public necessity of the extreme sort" requires collective action [e.g. highways, railroads, canals, and other instrumentalities of commerce]; (2) where the property remains subject to public oversight after transfer to a private entity [e.g. a highly regulated industry like a utility]; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred [e.g. slum clearance or removal of blight]. 684 N.W.2d at 783 (quoting from *Poletown*, 304 N.W.2d at 478 and 480, Reyerson, J. dissenting).

These exceptions to a general requirement of public use, as distinct from public purpose, are consistent with the theories set forth in Part I *supra*. Condemnations rooted in public necessity will normally affect numerous

land owners and are thus more likely to be scrutinized for public legitimacy in the democratic process. The private beneficiaries of such condemnation are also generally of the category noted in the second exception – private entities subject to public oversight. This public oversight assures that the condemned property will continue to be used for public purposes and not diverted to private ends. The third exception covers situations where private property owners are imposing significant costs on the public through neglect or poor management. The imposition of these costs on the public, like a public nuisance, warrants appropriate public response which in some cases will be condemnation.

This Court should review its *Midkiff* decision with the same critical eye the Michigan Court brought to the even older *Poletown* case. By being somewhat less deferential to legislative determinations of public use, this Court can achieve a better balance between the state's ability to serve the public interest and the interests of private property owners who are the foundation of American freedom and prosperity.

There is little doubt that the State of Michigan will continue to prosper economically notwithstanding the overruling of *Poletown*. Indeed there is good reason to believe that the expanded protection of private property resulting from the new rule of *Hathcock* will have net benefits for the economy of Michigan. Secure and clearly defined property rights are critical to private investment in the maintenance and development of land and other natural resources. This Court's decisions in *Nollan, Lucas* and *Dolan* reflect a recognition that government interference with property rights is not only unfair but a disincentive to private investment and initiative. These disincentive

effects result from straightforward calculations of risk, but also from what Professor Frank Michelman has described as "demoralization costs."[8] Professor Garnett demonstrates that these demoralization costs are not limited to uncompensated takings.

> For a number of reasons, compensation does not always eliminate these demoralization costs in the eminent-domain context . . . the measure of damages awarded in an eminent-domain proceeding – namely, the fair market value of the property – frequently fails to make property owners "whole," especially with respect to subjective losses. (At 944-945)

Professor Garnett also notes that many non-subjective costs are also not included in fair market value compensation. "[T]he fair-market-value award may also fail to make displaced property owners whole with respect to relocation expenses, good will associated with a business's physical location, or, importantly, the cost of replacing the condemned property." (At 948)

As the Michigan Supreme Court has recognized in its *Hathcock* opinion, these realities call for heightened judicial review of eminent domain actions – review that can be accomplished without interfering with the legislature's exclusive determination of the public interest. As Justice Holmes reminded us in his oft quoted language from *Pennsylvania Coal*: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

[8] Frank Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

cut than the constitutional way of paying for the change." 260 U.S. at 416. Surely Justice Holmes' admonition has application with respect to every constitutional protection of individual rights. Heightened scrutiny to assure that individual liberties receive due respect in the face of the immense powers of the state should be the rule in eminent domain cases as it is in regulatory takings cases.

CONCLUSION

As part of an ambitious development plan for the Fort Trumbull neighborhood, the City of New London has condemned homes and small businesses that are the life and lifeblood of their owners. The condemned land is to be owned by the New London Development Corporation and leased for ninety-nine years to private developers. This Court should agree with Petitioners that this taking of their land for transfer to other private interests is a violation of their rights under the public use clause of the 5th Amendment. The City of New London will remain free to promote economic development by other constitutional means, but use of the eminent domain power to coerce the effective sale of property by one private party to another infringes the most fundamental principles of the United States Constitution and should be invalidated by this Court.

Respectfully submitted,

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