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 CONSTRUCTION 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

REPLY BRIEF OF PETITIONERS

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The Respondents have staked out a clear position: "public use" has no substantive meaning. Resp. Br. at 12, 16-18.[1] This novel proposition goes against the most basic rules of constitutional interpretation, as well as every public use case ever decided by this Court. In keeping with their theory that "public use" is just a little spare verbiage, Respondents and their amici offer not one example of a taking that might actually violate the public use requirement.[2] Once it is admitted that private profit and ordinary private land use constitute public use, the idea of private use just doesn't make sense any more.

I. PUBLIC USE ACTUALLY MEANS SOMETHING

This Court's analysis proceeds from the unremarkable proposition that the words in the Constitution are presumed to have meaning. *See, e.g., Wright v. U.S.*, 302 U.S. 583, 588 (1938) ("Every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." (quoting *Holmes v. Jennison*, 14 Pet. 540, 570-71 (1840)). Thus, without overwhelming evidence to the contrary, "public use," too, must have a unique meaning in the constitutional text. It must mean something other than ordinary private use. Pet. Br. 28-29. On some fundamental, bedrock level the examination of the meaning of the English term "public use" must inquire into the actual use to be made of the taken property, and the extent, if any, to which such use is something that society associates with government activities, not just private profits. Respondents' retort to the rather obvious

[1] Citations appear as follows: Respondents' brief – Resp. Br.; Petitioners' merits brief – Pet. Br.; Petitioners' certiorari petition – Pet. Cert.; Appendix to the cert. petition – Pet. App.; Joint Appendix – J.A.; amicus briefs – Br. AC; and trial transcript – Tr.

[2] Indeed, amicus American Planning Ass'n (APA) simply admits that the only way to violate the public use requirement would be to condemn without statutory authorization. Br. AC APA at 24-25. Thus, as long as a statute exists, and it is followed, nothing more is required. This turns the idea of *constitutional* protection on its head.

existence of "public use" in the text of the Constitution is a misinterpretation of history and an attempt to draw nonexistent implications from this Court's decisions.

Respondents contend that colonial history allowed the condemnation of property for private use, and thus public use must have included those colonial practices. Resp. Br. at 29-30. A glance at the sources cited by Respondents, however, reveals that colonial governments did not in fact condemn land for private development. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1260-65 (1996); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Envtl. L. 1, 2, 14-15 (1980); Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 Or. L. Rev. 203, 205-208 (1978). Regulation was common, and there were requirements appropriate to a new land being settled. *See* Hart, 109 Harv. L. Rev. at 1260-1280, 1283. There were limited takings for roads and riparian rights. *See* Meidinger, 11 Envtl. L. at 2, 14-15; Berger, 57 Or. L. Rev. at 205-208. But there was nothing that would undermine the meaning of public use.

Respondents also point to the existence of post-colonial Mill Acts that allowed condemnation of property for manufacturing mills. Resp. Br. at 30-32. Eighteenth century condemnations for grist mills were akin to public utilities, because the mills ground grain for the public. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885). Later Mill Acts often encompassed condemnations for manufacturing mills that were not open to the public, and Respondents cite various cases upholding such acts, while omitting the cases and legislative decisions rejecting such acts or requiring that the mills provide services to the public, often under regulated pricing.[3] The post-colonial history of state

[3] *See, e.g., Sadler v. Langham*, 34 Ala. 311 (1859); John F. Hart, *Property Rights, Costs, and Welfare: Delaware Water Mill Legislation*, 1719-1859, 27 J. Legal Stud. 455, 469-71 (1998); *Loughbridge v. Harris*, 42 Ga. 500 (1871); *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 584-85 (1903); *Jordan v. Woodward*, 40 Me. 317 (1855); *Ryerson v.*

(Continued on following page)

Mill Acts is too divided (and too late) to provide solid evidence of the original meaning of public use.

That conclusion is bolstered by this Court's decision in *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). *Head* involved New Hampshire's General Mill Act – a type of legislation that did not exist when the Fifth Amendment was ratified. Although the plaintiffs had not raised a public use challenge, this Court went out of its way to point out that it was *not* holding that general benefit to the community constituted a public use. *Head*, 113 U.S. at 20-21. Instead, it interpreted the act as a regulation of the interests of competing riparian landowners and thus well within the normal scope of government activities.

Respondents also disingenuously cite to the opinions in both *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) and *Eastern Enter. v. Apfel*, 524 U.S. 498, 545, 554 (1998) as supporting their position that the Takings Clause is really only a "just compensation" clause, with no public use guarantee. In both cases, the owner challenged the lack of compensation (and deprivation of due process in *Eastern Enter.*), not lack of public use, *see* 483 U.S. at 834; 524 U.S. at 517-19, so it is hardly surprising that compensation was the focus of the Court's comments.

II. THESE CONDEMNATIONS ARE NOT FOR PUBLIC USE

As described in the following sections, a potential increase in tax revenues and jobs is not a "public use" within the meaning of the Fifth Amendment. Even if this Court were to conclude that economic development could be a "public use," economic development condemnations are notably less "public" than conventional condemnations

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Brown, 35 Mich. 333 (1877); An Act for the Regulating of Millers in their taking of Tole (May 3, 1726), in *Acts and Laws of the Colony of Rhode-Island* at 142 (1730); An Act for regulating the making of Dams or banks for reserving water, where the same may affect the propertys of other persons (May 29, 1744), in 3 *The Statutes at Large of South Carolina* at 609 (Thomas Cooper, ed., 1838); *Harding v. Goodlett*, 11 Tenn. 41 (Tenn. Err. & App. 1832); *Tyler v. Beacher*, 44 Vt. 648 (1871).

and should be subjected to closer scrutiny. In their opening brief, Petitioners actually presented four different ways that this Court could rule in their favor: (1) trickle-down benefits are not a public use; (2) a condemnation that lacks a reasonably foreseeable use is not a public use; (3) economic development projects particularly need safeguards and minimum standards to ensure public use; and (4) the Connecticut dissent's test. The first two of these do not even require enhanced judicial scrutiny, while the second two do. However, Petitioners would prevail under any of these analyses. In this reply brief, Petitioners address only the first three of these alternatives, as those were the ones addressed by the Respondents.

A. The Use Of Eminent Domain To Gain The Trickle-Down Benefits Of Ordinary Business Violates The Constitution.

The declared purpose of the condemnations at issue in this case is the generation by private parties of "economic development" – increased tax revenues and more jobs.[4] Petitioners have used the descriptor "economic development" condemnations to distinguish those condemnations from redevelopment condemnations, and because that seems to be the most common shorthand used by courts. However, this is somewhat of a misnomer. "Economic development" can refer to any number of programs, activities, and projects. The question is not whether "economic development" as a concept can be a public use. The issue instead is whether the trickle-down,

[4] The NLDC brought its condemnation actions pursuant to Conn. Gen. Stat. Chapter 132, §§ 8-186, *et seq.*, which governs takings for economic development, specifically authorizing eminent domain "to meet the needs of industry and business." Pet. App. 429. Perhaps hoping to add a more public flavor to this case, Respondents point to several "non-economic benefits" that it suggests also may be considered by this Court as purposes for public use. Resp. Br. at 42. Respondents chose the statutes to proceed under years ago and filed their condemnations accordingly. *See* J.A. 6 (condemnation action brought under Chapter 132), and it is four years too late for Respondents to add new purposes now.

consequential "benefits" of ordinary business activities can be called public uses. Respondents point out that Petitioners admit that ordinary businesses often do produce some diffuse benefit to others. Resp. Br. at 23 n.11. Of course they do. In fact, Petitioners admit that any lawful private use of real property can be characterized as having some positive side-effects or incidental public or social benefit. But Petitioners' point, apparently missed by Respondents, is that if such social "benefits" of ordinary business become public uses within the meaning of the Fifth Amendment, then all private lawful uses of land become public uses, thus rendering "public use" absolutely meaningless.[5]

In their opening brief, Petitioners explain why this Court should reject the idea that the tax revenues and jobs that come from ordinary business activity constitute a public use. Pet. Br. 12-17. The recent Michigan Supreme Court decision in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) gives a good, recent explanation of what types of activities constitute public uses and why "economic development" does not. Pet. Br. 18-27. Respondents claim that this Court should discount the *Hathcock* framework, because Michigan uses a different technique of

[5] In terms of economic benefits, local governments already seek to condemn open, undeveloped land for industrial development in the name of taxes and jobs. *See, e.g.*, *Merrill v. City of Manchester*, 499 A.2d 216, 238-39 (N.H. 1985). Respondents are correct that no city has yet condemned a church for Wal-Mart, *see* Resp. Br. at 36-37. They've done it for Costco instead. *See* Pet. Br. at 16; *see also* Br. AC Becket Fund at 4-11 (giving many examples of condemnation of religious and nonprofit institutions for higher tax uses). There are also trickle-down noneconomic benefits. For example, a local government could condemn small independent stores for large chain stores in the name of economic development. A few years later, it could condemn the chain stores in favor of small independent stores, because those have the secondary effect of promoting a greater sense of community. Government already promotes health and fitness, so a city could condemn an apartment building for a private health club. If side effects of ordinary private land uses become public uses under the Fifth Amendment, then all of these would be perfectly constitutional.

constitutional interpretation. In particular, Respondents claim that because Michigan has historically distinguished between "public use" and "public purpose," the *Hathcock* opinion makes a poor model for federal law. Resp. Br. at 33 n.11. Yet Michigan does not require literal use by the public, any more than federal courts do. 684 N.W.2d at 781. The *Hathcock* framework works just as well in categorizing this Court's cases as it does with Michigan cases. Pet. Br. 21-26.[6] Or, as the author of the professors' amicus brief for Respondents put it, "the *Hathcock* Court's three-part categorization of public purpose may prove to be highly effective in establishing new parameters for the field." Robert H. Freilich & Robin A. Kramer, *Condemnation for Economic Development Violates Public Use Clause: The Michigan Supreme Court Overturns Historic* Poletown *Decision*, 27 Zoning & Plan. L. Rep. 1 (2004).

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[6] Respondents characterize several decisions of this Court as supporting their theory that eminent domain can be used for private development. Resp. Br. at 27-28. However, these cases, too, fit neatly into the three *Hathcock* categories. The IOLTA funds in *Brown v. Legal Foundation*, 538 U.S. 216, 239-40 (2002) are classic examples of a public benefit "whose very *existence* depends" on a government program. *See Hathcock*, 684 N.W.2d at 781 (emphasis added). The railroad in *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) involved the transfer of something everyone agrees is a public use – railroad tracks – in one of the mostly highly regulated industries in the country. *See id.* at 411-14 (passenger service had halted due to poor track maintenance; ICC agreed with Amtrak that change in ownership was needed to ensure continuing maintenance). Finally, the pesticide testing information in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), too, falls into the category of heavily regulated industry, and of course the whole area of pesticides has significant public health implications. *See id.* at 992 (noting that FIFRA regulated the use, sale and labeling of pesticides and required that the EPA determine a pesticide would not cause "unreasonable adverse effects on the environment" before permitting its sale). *See also* 7 U.S.C. § 136a (2004). Amicus APA also suggests that several of the Court's other cases do not fit into the categories. Br. AC APA at 8. The amicus is incorrect; the tramway in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) was open to the public. The other three cases were examples of comprehensive state irrigation and water management programs.

Just as this Court could do, the *Hathcock* court identified the three broad categories of eminent domain actions that can be called public uses even though the property will be owned by private parties (necessary coordination, heavily regulated industries, and facts of independent significance).[7] What the first two categories capture is, in essence, that most uses of eminent domain have, historically, been for infrastructure – transportation, utilities, shipping, drainage. While they may be privately owned, they still are significantly more public than ordinary private business ventures. Many infrastructure projects, because of the exigencies of constructing a very large network, require public coordination. *Hathcock*, 684 N.W.2d at 781-82. Others are regulated to such a great degree that they take on a public aspect. *Id*. at 782. Infrastructure projects have a noticeably more public character than ones for private office space or, as in this case, private something or other.

The Respondents and amici suggest that the need for public coordination is just as acute with small private development projects as with infrastructure. That simply is not true. Utilities and transportation networks require hundreds if not thousands of miles of continuous strips of land. Small projects don't. (Or, as the author of the APA amicus brief put it, "shopping centers and commercial office building[] . . . projects entail relatively small amounts of land, are not strictly site-dependent, andoften generate very high gains from trade." Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 81-82 (1986)). Moreover, as everyone knows, private development happens all

[7] *Hathcock* does not "freeze" its constitutional interpretation at the date of constitutional ratification. *See* Br. AC APA at 15-17. It identifies enduring principles, with reference to original meaning, just as this Court does. "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. U.S.*, 199 U.S. 437, 448 (1905), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528 (1985); *see, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (interpreting the Establishment Clause according to "what history reveals was the contemporaneous understanding of its guarantees").

the time, all over the country, without eminent domain. To claim public coordination is necessary and therefore justifies condemnation does not accord with reality.[8]

There is a further problem with Respondents' plea for public coordination of private development – like the rest of Respondents' argument, it has no limiting principle. All cities lack large tracts of undeveloped land, and in most cities, different people own different pieces of property near each other. Although New London is smaller than some other cities, it is comparable in size to, for example, York, PA, Cambridge, MA, Berkeley, CA, and Beverly Hills, CA, all of which are densely developed. According to Respondents' theory, that means public coordination of private development is required in all cities.[9]

Respondents also complain that blight does not fit properly in the category of "facts of independent significance" and that there is no proper distinction between condemnations for blight and for economic development. Respondents claim, oddly, that Petitioners have cited no cases holding that, in blight condemnations, it is the removal of blight that justifies the taking, not the anticipated development. *Compare* Resp. Brf. 25-26 *with* Pet. Br. 24-25 n.22 (citing cases). This concept is practically black letter law. In addition to the cases relating blight law to nuisance, state cases are replete with explanations that it is indeed the intervening event – removal of blight

[8] *See* Br. AC John Norquist at 4-26; Br. AC Goldwater Institute at 5-15. One of the books cited by a Respondent amicus, Andrew Alpern & Seymour Durst, *New York's Architectural Holdouts* (1984), also includes more than 50 examples of developers finding ways to develop in the dense urban environment of New York City, even when eminent domain was not available and some owners refused to sell.

[9] Nor would eminent domain for economic development be limited to "distressed" urban areas. Connecticut's Chapter 132 applies to the entire state, not just distressed municipalities, *see* Conn. Gen. Stat. § 8-186, and the two current examples of economic development projects given by amicus NLC both occurred in relatively rural areas. *See* Br. AC Nat'l League of Cities at 23-28.

– that constitutes the public use. *See, e.g,, Crommett v. Portland*, 107 A.2d 841, 852 (Me. 1954); *Housing and Redev. Auth.v. Greenman*, 96 N.W.2d 673, 680 (Minn. 1959).

And in fact courts from states with judicial decisions forbidding condemnation for economic development have had no trouble distinguishing between economic development condemnations and blight condemnations.[10] All of the state cases holding that economic development is not a public use explicitly distinguish blight. Pet. Cert. Br. at 13-14 (citing cases); *see also, e.g., Sweetwater Valley Civic Ass'n v. City of Nat'l City*, 555 P.2d 1099, 1103 (Cal. 1976) ("it is not sufficient to merely show that the area is not being put to its optimum use, or that the land is more valuable for other uses").

Respondents' confusion between blight and economic development condemnations also accounts for their claim that courts should look at the overall benefits of the entire project, rather than what will replace the condemned property. Resp. Brf. at 22-28. In nearly all public use cases, this Court has looked at what will be taken and what will replace it. *See, e.g., United States v. Carmack*, 329 U.S. 230, 246 (1946) (land to be replaced by U.S. Post Office); *Hairston v. Danville & W. Ry. Co.*, 208 U.S. 598, 608 (1908) (land to be replaced by spur track and storage). The exception to that rule has been blight condemnations. That distinction makes sense, because in blight condemnations, the public use is

[10] Respondents also assert that *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) is not solely about oligopoly and that the statute in *Berman v. Parker*, 348 U.S. 26 (1954) seemed to have purposes other than blight elimination. Resp. Br. at 26-27. Again, Respondents have missed the point. In *Midkiff*, the purpose was breaking up oligarchic land ownership. To do so, it was necessary to have a program that ensured more diverse ownership. The existence of such a program furthered the purpose rather than, as Respondents claim, demonstrating another purpose. In *Berman*, too, the blight clearance and redevelopment took place pursuant to a redevelopment plan, but the controlling purpose of the condemnations was the removal of blight. *See Berman*, 348 U.S. at 28-29 (quoting sections two and four of authorizing act).

the removal of the blighted area, not what is built on the land afterward.

B. Even If This Court Finds That Trickle-Down Benefits Can, Facially, Be A Public Use, These Condemnations Are Still Not For Public Use.

As Petitioners point out in their opening brief, this Court could find that there is no reasonably foreseeable future use of the property, and that alone would be a basis for reversal. Alternatively, Petitioners have proposed a test that draws from existing state case law and requires that the achievement of the public benefits be reasonably certain by looking at contracts and other documents.

1. These condemnations lack any reasonably foreseeable use.

The requirement of a reasonably foreseeable use for condemned property is an established doctrine within eminent domain law. The doctrine was acknowledged and discussed with approval in this Court's decision in *Cincinnati v. Vester*, 281 U.S. 439, 448 (1930), and appears in many state court decisions as well. Pet. Br. 38-39. Respondents make no real attempt to discredit this doctrine. They fail to even comment on the wealth of state case law and try to dismiss *Vester* as only a statutory case, even though it was explicitly informed by constitutional considerations. But, as Petitioners explain in their opening brief, the lack of reasonable foreseeability becomes especially acute in economic development cases like this one. Pet. Br. 36-40. Although reasonable foreseeability follows a distinct line of caselaw, it is also possible to treat it as another form of "rational basis" analysis. Without having a reasonably foreseeable use, it is impossible to say if the use is rationally related to a legitimate government interest.

Respondents claim that the future use of these properties is reasonably foreseeable, but on this matter the facts are completely against them. Petitioners already have detailed some of these facts in their opening brief. Pet. Br. 40-42. Respondents, however, claim that the office

construction on Parcel 3 is reasonably foreseeable because (1) the development plan estimated a need for the space in ten years and (2) the marketing study from the developer also indicated a need for office space. Resp. Br. at 45-46. As to the first point, reasonable foreseeability, like just compensation, is evaluated at the time of condemnation.[11] The evidence at the time of the condemnation, including the marketing study and witness testimony, showed that the new office building on Parcel 3 was not feasible and would not occur unless the market changed. Pet. App. 177-86. Respondents' quotations from the study supposedly showing plans for the office building were actually referring to the renovation of an existing building, "Building 2," on Parcel 1 (no homes are located on Parcel 1) and not to the potential for a building on Parcel 3.[12]

[11] *See, e.g., United States v. Reynolds*, 397 U.S. 14, 16-17 (1970) (evaluating value on date of condemnation); *Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445, 465 (7th Cir. 2002) ("Much like the value of the property taken, 'public use' is to be determined at the time of the taking."); *Heirs of Guerra v. United States*, 207 F.3d 763, 767 (5th Cir. 2000) ("A condemnation is valid if, at the time of the taking, the government's exercise of eminent domain served a valid statutory purpose."); *Blanchard v. Department of Transp.*, 798 A.2d 1119, 1126 (Me. 2002) ("The use must also be public at the time of the taking."); *cf. Cincinnati v. Vester*, 281 U.S. 439, 448 (1930) ("It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation.").

[12] Respondents berate Petitioners for not addressing the marketing study's finding that "rental rate and occupancy trends have been generally positive." Resp. Brf. at 45. The full sentence reads "While rental rate and occupancy trends have been generally positive over the past few years, *market values are still well below replacement cost and new construction is generally not feasible*." J.A. 38 (emphasis added); *see also* J.A. 47 ("The program for the future phases [of office space after the renovation of the existing building] is uncertain"); J.A. 50 ("Considering market conditions . . . new construction of office and/or biotech/bioscience space is not feasible at this time"); J.A. 64 (in Conclusions section, "While new office construction is not feasible at this time, as evidenced by the inability of Shaw's Cove 7 & 8 and Mystic Executive Park to get off the ground," the renovation of the existing Building 2 is still feasible); J.A. 64 (in Conclusions section, "market conditions do not justify construction of

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Respondents simply misread the document.[13]

Regarding the unknown use on Parcel 4A, Respondents' explanation becomes even more floundering. Although they say that it is a small area of land near a park and marina and thus it can logically be used for park support, they also do not say in their brief what use is intended. It may be logical, but they just don't know what it is. Nor did the witnesses who were questioned about it. *See* Pet. App. 345-49. In fact, to the extent that they suggest that it will be used for something related to the existing park, that interpretation is contradicted by the admission that it could also be used as a museum. Resp. Br. at 46 n.24. In short, Respondents had no idea what they were going to do with the homes at the time they condemned the property in 2000, and they apparently still have no idea.

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new commercial space at Fort Trumbull on a speculative basis"). The timeline, Respondents say, shows that the office space could already have been constructed is not very legible, but it can be seen that it lists only the renovation of Building 2 and does not even include new office construction. *See* J.A. 73. The discussion of marketing efforts similarly refers only to Building 2. *See* J.A. 72-76. Respondents' accusation that this litigation has prevented the completion of the project is also utterly unsupported. The developer has had full control of the land slated for the hotel, upscale residential, and commercial renovation, all of which were scheduled to occur long before any development on the property at issue in this lawsuit. *See* J.A. 73.

[13] Respondents' brief contains a number of such factual mistakes. It lists owner-occupied homes but omits the Guretsky family, who also live in their home. *Compare* Resp. Br. 7 *with* Tr. Vol. I, at 84. It claims that William Von Winkle and Pataya Construction own "almost half" of the properties, although together they own five out of the 15 homes. *Compare* Resp. Br. 7 *with* J.A. 3. It also characterizes Von Winkle as an "absentee landlord," although he works on the property, lived in New London at the time of the trial, and has actually lived in one of the condemned homes for the last year. *See* Tr. Vol. I, at 97, 100. They also claim that the state has earmarked $10 million in relocation assistance but fail to note that these are only funds available for relocation *loans* to *all displaced residents in Connecticut*. *Compare* Resp. Br. 7 *with* Conn. Gen. Stat. § 8-336 (2004).

2. These condemnations lack any minimum standards for realization of the purported public benefits.

In their opening brief, Petitioners explain that economic development condemnations deserve enhanced judicial scrutiny in the form of minimum standards for future public benefits, drawing from a body of state case-law as well as the application of higher scrutiny in past cases of this Court.[14] Pet. Br. at 43-46. For reasons that are unclear, both Respondents and amici characterize Petitioners' argument as an attempt to apply the *Nollan/Dolan* "rough proportionality" standard. *See Dolan v. City of Tigard*, 512 U.S. 374, 398 (1994); Resp. Br. at 39-40; Br. AC APA at 20-22. Petitioners made no such argument, and "rough proportionality" has no direct applicability to public use or reasonable certainty. Instead, Petitioners believe that enhanced scrutiny is appropriate where a particular activity creates higher constitutional risk.[15] Pet. Br. 30-36. The Court has used this method in various circumstances. Exactions are one example but by no means the only one. *See, e.g.*, *Eastern Enter. v. Apfel*, 524 U.S. 498, 532-35 (1998) (retroactive legislation disfavored and thus requires close examination); *Payton v. New York*, 445 U.S. 573, 586-87 (1980) (warrantless seizures presumptively reasonable in public places and presumptively unreasonable in home); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 57-60 (1988) (discretion in licensing decisions raise unique threat to First Amendment freedoms, thus subject to greater scrutiny and facial challenge); *Miranda v. Arizona*,

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[14] Respondents claim that Petitioners cited only one case but apparently missed the seven case examples from this Court on the next page. *Compare* Resp. Br. at 40 *with* Pet. Br. 31 n.29. In addition to the other state cases cited, *Opinion of the Justices*, 250 N.E.2d 547, 558-68 (Mass. 1969) discusses the need for "adequate principles, standards, and safeguards" in statutes and contracts.

[15] Thomas Merrill, who authored the brief for the American Planning Association, similarly endorsed heightened scrutiny in the case of private beneficiary takings with high "subjective losses" like in this case. *See also*, Merrill, *supra*, 72 Cornell L. Rev. at 85-88.

384 U.S. 436, 477-78 (1966) (Miranda warnings required in custodial interrogations due to threat of intimidation and coercion, but not required in noncustodial interrogations where same level of threat is not present).[16]

In their opening brief, Petitioners explain why economic development condemnations differ so much from other, more traditional, types of condemnations. Pet. Br. at 18. Respondents haven't even bothered to deny these points, apparently conceding that such condemnations are more likely to lack immediate benefits or reasonably foreseeable uses; that the public benefits, if they occur, are not accomplished by the condemnor but by third parties; and that they are in general riskier entrepreneurial ventures. *See also* Br. AC Nat'l Farm Bureau at 16-23.

Respondents' main objection to Petitioners' specific suggestion of a reasonable certainty test is that they believe it requires economic predictions that courts are ill-suited to make. Resp. Br. at 38-39. Yet Petitioners' test does not require courts to make any such predictions. Instead, it requires courts to look at contracts, statutes, and other documents that courts routinely examine to determine if they set guarantees and standards that provide a reasonable certainty of the benefits used to justify the condemnation. Pet. Br. 43-46.[17]

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[16] The Connecticut Supreme Court dissent took a similar approach. It concluded that *Midkiff* required deference to the facial validity of the statute – in this case, the Connecticut legislative finding that economic development could be a public use for purposes of eminent domain. However, the dissent then also concluded that because such condemnations posed greater constitutional risks than other condemnations, the individualized, as-applied decisions of whether particular condemnations were for public use should receive greater scrutiny. *See* Pet. App. 148-55, 160-61.

[17] Respondents suggest that, because private development projects fall generally in the sphere of economic policy, this Court should not inquire further. Again, a minimal standards test does not require economic judgments, but this Court also need not accept Respondents' assumption that "public use" and "substantive due process" are identical. Unlike the "vague contours" of substantive due process, *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), public use is an explicit and specific provision of the Constitution. *See also County of Sacramento v. Lewis*, 523 U.S. 833, 850

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Respondents' final objection is that even if this Court adopted Petitioners' reasonable certainty test, the homeowners should still lose. Resp. Br. at 41. But Respondents' comments have little if anything to do with the test that Petitioners discuss. Respondents point to state statutes that require certain development plan procedures and environmental studies, but none of the statutes have any actual requirements or standards for the creation of economic development or production of public benefit. Resp. Br. at 43-44. Respondents also point to the supposed oversight of the project by a state funding agency, presumably on the theory that the state agency will make sure everything works out well in the future. But oversight without standards means nothing. Minimum standards "might include a commencement date for the project, a construction schedule, a guaranteed number of jobs to be created, selection criteria for potential developers, financing requirements, the nature and timing of land disposition and a commitment as to the amount received in property taxes as a percentage of assessed value." Pet. App. 188 n.28. Here, there is "no development agreement, no firm timetable for project implementation, no indication as to whether future developers will be offered tax abatements or other incentives . . . , and no indication of possible penalties if developers do not perform as required." Pet. App. 183; *see also Opinion of the Justices*, 250 N.E.2d 547, 560 (Mass. 1969) ("[i]n the absence of adequate statutory guidance and standards . . . and of clear provision for reasonable review of

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(1998) (due process is a "less rigid and more fluid" concept than other provisions of the Bill of Rights). In *United States v. Carolene Products*, 304 U.S. 144, 152-53 (1938), this Court first identified varying levels of scrutiny, including rational basis scrutiny for some unenumerated liberty and property interests. However, even *Carolene Products* notes that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 153 n.4. "Public use" is just such a specific prohibition.

compliance with appropriate standards" the project was not for public use). Reasonable certainty comes from guidelines, contracts, and requirements, not from a promise that someone else will figure it out later.[18]

III. THIS COURT SHOULD GIVE GUIDANCE TO THE STATES ON THIS IMPORTANT FEDERAL CONSTITUTIONAL QUESTION

Respondents and amici assert that the protection of property from takings for private use should be left to the states. They suggest that federal law is not needed, that it will encourage a rush to federal courts, that state courts are curbing any abuses that might occur, and that in any event, abuses will be solved by the democratic process. Resp. Br. at 36-38; Br. AC APA at 12-13. Each of these contentions is deeply mistaken.

The public use requirement is part of the U.S. Constitution, as well as state constitutions. The U.S. Constitution and this Court set the baseline, the floor beneath which private takings may not sink. And in practice, once this Court sets a standard, especially in the public use context, the states follow its guidance. Thirty-three state supreme courts cited *Berman* in approving urban renewal as a public use.[19] If this Court rules in favor of unrestrained takings for private businesses and the trickle-down benefits that flow from them, it can expect state courts quickly to follow suit. The author of the professors' amicus brief for

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[18] The only actual written requirement of any kind that Respondents point out is the requirement that property will be devoted "principally" to the uses in the plan and "in accordance" with the plan. Resp. Br. at 44. That language is no guarantee of anything. For Parcel 4A, as the development plan shows no use for the land, an agreement to follow the plan is meaningless. For Parcel 3, the plan language provides no guarantee that the developer will actually build anything at all. At the time of the condemnation, there was no agreement, no timeline for construction, no standards, and no penalty for nonperformance.

[19] *See, e.g.*, *City of Duluth v. State*, 390 N.W.2d 757, 762 (Minn. 1986); *Levin v. Township Comm. of Bridgewater Township*, 274 A.2d 1, 19-20, 23 (N.J. 1971); *Lindauer v. Okla. City Urban Renewal Auth.*, 496 P.2d 1174, 1176 (Okla. 1972).

Respondents characterized the results of *Poletown* as "catastrophic." *See* Freilich, *supra*, 27 Zoning & Plan. L. Rep. at 1, 3. The Connecticut Supreme Court adopted a standard even more sweeping than *Poletown*, *see* Pet. App. 43-45, and a ruling in favor of Respondents in this case will subject the entire country to such catastrophic impacts.

Amici also argue that if this Court enforces the public use clause, there will be a rush of claimants into federal court as a result. *See, e.g.*, Br. AC APA at 13, 18. This argument is unjustified. First, eminent domain litigation almost always begins when the state files a condemnation complaint in state court, which effectively selects the initial forum. *See, e.g.*, Ala. Code § 18-1A-71 (2004); Mich. Comp. Laws § 213.52 (2004). Second, condemnees usually raise state claims better suited to state court litigation as well as constitutional claims. For example, the homeowners in this case raised several claims requiring the construction of state statutes. *See* Pet. App. 192-93. While state courts are fully capable of hearing claims under state law and the U.S. Constitution, federal courts are usually reluctant to hear cases with predominantly state claims. And federal courts can always abstain if there is an ongoing state condemnation action.

Respondents and amici would have the Court believe that any abusive takings for economic development are being taken care of by state courts. The problems with this analysis are manifest. As discussed in Petitioners' original petition, the states vary widely in their treatment of public use and thus also vary widely in their protection of individual rights. Pet. Cert. 12-14. If this Court declines to place any limits on condemnations for private use, state courts will be much less likely to put a check on abuses. Moreover, any abuses against people of modest means, minorities, and the politically powerless also will rarely make it to court.[20] *See* Br. AC NAACP at 7-12; Br. AC

[20] The Respondents' claim that the political process will remedy any abuses is fatally disconnected from the real world. *See* Resp. Br. at 35-37. Not only are targeted landowners often, as here, individuals or small groups with limited resources and little political clout, but they are often up

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Better Government Ass'n at 18-20. Similarly, homeowners can rarely afford litigation, which is why nearly all appellate public use cases involve businesses. Homeowner cases, when they are brought at all, usually involve pro bono or public interest representation.

IV. PETITIONERS ARE ASKING FOR A LIMITED RESTRICTION ON THE USE OF EMINENT DOMAIN FOR PRIVATE BUSINESS, WHILE RESPONDENTS SEEK UNLIMITED POWERS

Petitioners' standard is not a high one. "Public use" cannot mean simply the ordinary, incidental "benefits" of the ordinary private use of property. Alternatively, when taking for economic development, condemnors should have a use for property and minimal standards for the achievement of the benefits justifying the condemnation. Nor will a ruling in favor of the homeowners work a radical change either on jurisprudence or private development in this country. Courts in only six states currently hold that eminent domain may be used for economic development. Pet. Cert. at 12. This Court has never ruled on the issue. Meanwhile, private development continues apace throughout the country. Respondents and their amici produced no evidence that any of the seven states with judicial decisions forbidding eminent domain for economic development, or any of the states that lack statutory authorization for such condemnations, have suffered any negative consequences or lack of development.

Respondents, of course, claim that development as we know it will grind to a halt. Yet despite all the huffing and puffing, Respondents and amici were able to come up with only a handful of successful economic development projects

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against elected officials backed by well-funded interests seeking to develop their land for corporate profit. Moreover, in economic development condemnations, the success or failure of the project lies many years in the future, probably long after every politician involved has left office. As Justice Marshall noted in dissent in *Vance v. Bradley*, 440 U.S. 93, 114 n.1 (1979), "the time lag between when the deprivations are imposed and when their effects are felt may diminish the efficacy of this political safeguard."

that involved eminent domain. Of the twenty-some projects discussed by amici, which they insist required the use of eminent domain for economic development, nearly all were condemnations in blighted or damaged areas.[21] Of the

[21] Br. AC Nat'l League of Cities et al. at 20, n.23, 22: Susanna Baird, *Don't Dump on Us: 20 Years of Activism for Dudley Group*, Boston Globe, Nov. 7, 2003, at 3 (prior to development, much of Boston's Dudley Street had become an illegal dumping ground for car parts and construction debris); *Estes Park, Colorado Rises to the Challenges of the Next Century*, Nation's Cities Weekly, vol. 16, n.8, Feb. 22, 1993, at 5 (Riverside plaza was developed after a devastating flood that "damaged or destroyed nearly all of the retail businesses"). Br. AC MA Chapter of Nat'l Ass'n of Indus. and Office Properties: Press Release, Mayor Menino, "Chinatown Community Cut Ribbon for the Metropolitan," (Aug. 16, 2004) (Metropolitan Building development in "an area dominated by vacant buildings and a surface parking lot"); http://www.mccahome.com/default.aspx (Boston Convention Center owned and operated by public agency). Neither Colorado nor Massachusetts have statutes that permit condemnation of nonblighted areas. *See Arvada Urban Renewal Auth. v. Columbine Prof'l Plaza Ass'n, Inc.*, 85 P.3d 1066, 1069-71 (Colo. 2004); Mass. Gen. Laws ch. 121C §§ 1, 2. Br. AC California Redevelopment Association at 8-9: As California's law requires that area be blighted, the inability to condemn for economic development alone will not affect California. *See Sweetwater Valley Civic Ass'n. v. City of Nat'l City*, 18 Cal. 3d 270, 277-78 (1976). Br. AC City of New York: *64th St. Residences, Inc. v. City of New York*, 4 N.Y.2d 268, 274 (1958) (Lincoln Center area "substandard and insanitary"); *Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985) (noting the characteristics of Times Square that led to the city's declaration of its blighted state); Br. AC City of New York at 15 (in Brooklyn Metrotech development, "half of the buildings in the area were deemed to be in either 'poor' or 'bad' condition"). Br. AC Mayor and City of Baltimore: The brief itself describes the Inner Harbor as "blighted and unhealthful." *See id.* at 5, 8, 11 & 16-17. Br. AC Conn. Conf. Municipalities: Jim Roberts, *Bridgeport Studying Plans to Develop Industrial Space*, Fairfield County Bus. J., Aug. 21, 1995, at 3 (Bridgeport West End development in area that was "an eyesore"); News Release, Conn. Dep't of Econ. & Cmty. Dev., *North Colony Colony Street Industrial Park in Meriden Wins National Development Award*, Aug. 7, 2001 (Meriden project in abandoned industrial area containing environmentally hazardous substances); Jo Fleischer, *Lacey Manufacturing to Expand into New Quarters in Bridgeport*, Fairfield County Bus. J., Dec. 26, 1994 at 5 (Barnum Street project in "heavily blighted" area); Angela Carter, *City Plans River Street*

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two or three actual "economic development" projects, one, the Mississippi Nissan plant, proceeded without eminent domain. *See, e.g,* Nikki Burns, *Agreement Reached Between State, Black Landowners*, The Mississippi Link, April 17, 2002, at 1 (plant developed without homes when family refused to sell).

A ruling in favor of the homeowners will not disturb the general course of development throughout the country. On the other hand, a ruling in favor of the Respondents will change the law dramatically for home and business owners. Every home and every business, everywhere in the country, will be subject to condemnation if a local government prefers some other private party's use of the property. Or, as counsel for the NLDC put it recently, "We need to get housing at the upper end, for people like the Pfizer employees. . . . They are the professionals, they are the ones with the expertise and the leadership qualities to remake the city – the young urban professionals who will invest in New London, put their kids in school, and think of this as a place to stay for 20 or 30 years." Iver Peterson, *There Goes the Old Neighborhood, to Revitalization*, The New York Times, Jan. 30, 2005, at A25. The condemnations in this case are an act of raw preference for one type of people, one type of housing, and higher tax dollars over the current residents. Cities may seek wealthy residents and higher taxes, but they cannot do so at the expense of constitutional rights. The ruling of the Connecticut Supreme Court paves the way for increasing use of eminent domain for private development. This Court should resist Respondents' urging to read public use out of the Constitution and thereby fundamentally alter the rights of all property owners in the United States.

Renewal, New Haven Register, June 6, 2001 at A3 (New Haven project in area of "vacant and blighted" buildings); *see also Courtesy Sandwich Shop v. Port of New York Authority*, 190 N.E.2d 402, 404-06 (N.Y. 1963) (condemnations for World Trade Center authorized by traditional authority over ports in order to centralize port functions, activities, and services).

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