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,

vs.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE FARM BUREAU FEDERATIONS OF THE FOLLOWING STATES: CALIFORNIA, CONNECTICUT, FLORIDA, INDIANA, IOWA, KANSAS, LOUISIANA, MICHIGAN, NEW HAVEN COUNTY, NEW JERSEY, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, TEXAS, UTAH, AND VIRGINIA IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION, CALIFORNIA FARM BUREAU FEDERATION, CONNECTICUT FARM BUREAU FEDERATION, FLORIDA FARM BUREAU FEDERATION, INDIANA FARM BUREAU FEDERATION, IOWA FARM BUREAU FEDERATION, KANSAS FARM BUREAU FEDERATION, LOUISIANA FARM BUREAU FEDERATION, MICHIGAN FARM BUREAU FEDERATION, NEW HAVEN COUNTY FARM BUREAU FEDERATION, NEW JERSEY FARM BUREAU FEDERATION, NEW YORK FARM BUREAU FEDERATION, NORTH CAROLINA FARM BUREAU FEDERATION, OHIO FARM BUREAU FEDERATION, OKLAHOMA FARM BUREAU FEDERATION, PENNSYLVANIA FARM BUREAU FEDERATION, RHODE ISLAND FARM BUREAU FEDERATION, TEXAS FARM BUREAU FEDERATION, UTAH FARM BUREAU FEDERATION, AND VIRGINIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

With the joint written consent of the parties filed with the Clerk of the Court, the American Farm Bureau Federation and the state farm bureau federations listed above respectfully submit this brief as *amici curiae*.[1]

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[1] Counsel for *amici curiae* authored this brief in whole and no other person or entity other than *amici*, their members or counsel have made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-for-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5.5 million member families. The state farm bureau federations appearing here as *amici curiae* are constituent members of AFBF, representing the interests of farmers and ranchers in their respective jurisdictions. Notably, they include the Connecticut Farm Bureau Federation, representing the state where this case arose.

These *amici curiae* have a direct stake in the outcome of this case. The decision of the Connecticut Supreme Court in *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004) allows the condemnation of private land merely because a government agency believes it can obtain greater economic benefit by having different private owners develop the land for different private uses.

The farmer and rancher members of *amici curiae* own and lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. As valuable as that land is to our members and to the rest of the country, however, it will often be the case that more intense development by other private individuals or entities for other private purposes would yield greater tax revenue to local government. Thus, each of our

members is threatened by the decision below with the loss of productive farm and ranch land solely to allow someone else to put it to a different private use — unless the decision below is reversed and Connecticut and other states are told that "public use" does not include the kind of purely economic transfer attempted by the City of New London.

In order to protect the property rights of its members, AFBF and various of its state affiliates have participated as *amici curiae* in this Court in support of landowners in recent Fifth Amendment cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); and *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302 (2002).

In recent times, various governmental agencies have experienced budget problems. In the face of diminishing funds, such agencies have sought other ways of augmenting their treasuries. One way — exemplified by the decision below — is to condemn private land thought to be producing less tax revenue than it could and transfer it to other private parties who represent that they will redevelop the land in a way that produces more income to the government. The sparsely developed lands of farmers and ranchers are particularly vulnerable to such takings.

American farmers and ranchers need the protection of the Fifth Amendment if they are to find economically feasible ways to use their land and remain

in the agriculture business — the business of feeding the American populace.

The *amici* AFBF and its constituent state members have a vital interest in this Court's reversing the decision of the Connecticut Supreme Court and affirming the Fifth Amendment's limitation that the "awesome" power of eminent domain[2] be used only to acquire property for *public* use, not for *private* economic development.

SUMMARY OF ARGUMENT

1. Eminent domain is an *in rem* proceeding. Thus, the government's intent in engaging in the process is irrelevant. To say, as did the court below, that private redevelopment is a public use because the city's intent was to benefit the municipal financial base, is a fiction that has no constitutional basis.

2. Judicial review of whether property is being taken for public use must be real review in order to vindicate the constitutional guarantee that "public use" is the only basis for exercising that power. Deference to legislative decision-making that is so abject as to accept at face value whatever justification a municipality puts forth is no judicial review at all. It is its antithesis.

3. Government agencies should focus their attention on governing, not on speculative real estate

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[2] Courts have repeatedly so characterized the power to compel private citizens to yield their land to the government. (E.g., *Winger v. Aires*, 89 A.2d 521, 522 [Pa. 1952]; *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 156 [Cal. App. 1985].)

ventures. The decision below exemplifies an unfortunate recent trend by municipalities to attempt to balance their budgets by entering into what amount to high risk partnerships with "redevelopers," i.e., people who will take over land condemned by the government and convert it into some commercial or industrial use that is touted as a higher generator of taxes and jobs than the uses currently being made. The municipal portion of the investment is made by acquiring private property through eminent domain and then transferring it to other private citizens for less than its acquisition price. Often such bargain prices are coupled with tax abatements. If the project doesn't perform as advertised, the agency — and all its taxpayers — suffers. When the only task of the agency is to acquire non-blighted private property so it can be transferred to (and "redeveloped" by) another private party, there is no "public use."

4. When this Court approved the broadening of the public use concept to include the acquisition, clearance and redevelopment planning for seriously deteriorated slums in *Berman v. Parker*, 348 U.S. 26 (1954), it did so on the expressed belief that the property owners being displaced would receive full compensation for their losses. That has not proven to be true. Whatever the rationale might be for imposing strict (or even "harsh," to use this Court's word) valuation rules when the property will be put to use for an actual public works project (a city hall, a post office, a highway), there is no justification for doing so when the project is merely a private development designed to make a profit for its private developers.

I

EMINENT DOMAIN IS AN *IN REM* PROCESS. THUS, THE GOVERNMENT'S *INTENT* IN ENGAGING IN THAT PROCESS IS NOT RELEVANT. THE ONLY THING THAT IS RELEVANT IS WHAT THE GOVERNMENT ACTUALLY DOES.

Eminent domain is not based on intent; it is based on — and judged by — action. The key in the context at bench is not what the government *says* it *intends* to do with property it seeks to condemn, but what it *actually does* with that property.

For example, during World War I, Congress enacted legislation to permit the President to control coal use and price until the war's conclusion. After the war, an official purportedly acting pursuant to this wartime legislation seized coal and paid less than its market value. On the former owner's suit, the government pointed to the presidential order setting the price. This Court disregarded the *words of the order* which invoked a statute that had run its course with the war's conclusion and focused instead on the government's *action*. As this Court put it, "[t]he incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment." (*Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [1925].)

The government's attempted explanation of its intent to operate under a specific authority was, in a word, irrelevant. What counted was its action, and its action demanded a constitutional resolution — one that examined reality. It lacked constitutional authority.

More recently, the State of Washington sought to change a rule regarding title to oceanfront land that had been owned by the federal government before statehood. This Court held that the question was a matter of federal law and that the State could not change federal law. As Justice Stewart put it, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967]; Stewart, J., concurring; emphasis in original.)[3]

Or, as this Court summarized succinctly, "Condemnation proceedings are in rem . . . ." (*U.S. v. Petty Motor Co.*, 327 U.S. 372, 376 [1946].)[4]

In the context at bench, the question is whether the government is actually taking property for public use, not whether it harbors some general intent to act in the public interest. If the facts show that the taking is not for a public use, that should end the matter. As shown in the next section of this brief, a condemning agency is not entitled to a free pass merely because it is

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[3] See also *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 652-653 (1981); Brennan, J., dissenting, but apparently expressing the substantive view of a majority of the Court [see 450 U.S. at 633-634; Rehnquist, J., concurring.]

[4] For the same reason, when property is valued in eminent domain, the personal needs, wants, desires, or plans of the owner are irrelevant. As an *in rem* process, all that matters is the objective view of the market. (4 Nichols on Eminent Domain § 12.04[2], p. 12-97 [rev. ed. 1998].)

able to draft a condemnation resolution that mouths the appropriate magic words about "public use."

Berman v. Parker, 348 U.S. 26 (1954) is wholly consistent with this view. There, the legislative determination focused wholly on the objective facts of municipal deterioration and the grossly substandard state of the housing in the target area. (348 U.S. at 30.) In light of those objective facts, Congress decided that redevelopment of the area on a wholesale scale was essential. The blight was so broadly spread that waiting for individual buildings, or even blocks, to be dealt with would not resolve the problem.

Thus, the problem in *Berman* was the objective deterioration of the neighborhood on a scale that did not admit of individual or piecemeal resolution. In light of that, Congress concluded that governmental intervention was required. The resolution to the slum problem was for government to condemn the entire area, raze the structures, prepare the area for redevelopment, and simultaneously plan the redevelopment. It was the slum clearance that was the "public use."

None of that involved any subjective determination or examination of governmental "intent." It dealt wholly with governmental action. Indeed, it was the property owner challenging the taking of his land who *tried unsuccessfully to inject intent* into the proceedings. He argued that the government's intent was to take his property so it could turn it over to some other citizen for private use.

This Court refused to buy that argument. It held simply that the public use was ridding that part of Southwest Washington of an awful combination of slum factors — an issue that Congress decided had to be

resolved by the government itself because of the enormity of the task of both assembling the land and planning for its reuse. *How* that public use was accomplished — by the government itself, or through the recruitment of private industry — was held irrelevant. (348 U.S. at 35-36.) In other words, because the creation, planning, and assembly of the project area was itself a public use, Congress' decision to have the reconstruction be a giant public works project or one concluded by private parties was not relevant to the case.

It is not relevant here either. The key to *Berman* was that — before any property titles were transferred into private ownership — there was a legitimate public use in redeveloping a notorious slum. ***The point here is that there was no legitimate public use in New London in the first place.*** This project is simply a recent example of a city seeking to go into the real estate market to make money. Its purpose is to change individual land ownerships so a favored owner (with a municipally preferred use — at least the preference *du jour*) could own and develop the property, with the city then anticipating getting its cut by way of increased tax revenues.

Others have amply briefed the predicate issue: this kind of redevelopment is no public use at all. The point being made here is that whether the city intended to benefit the populace in general by engaging in a process it believes would create jobs and increase the tax base is a smokescreen. It is not relevant to a determination of whether a use proposed as part of an eminent domain project is, in fact, a public use. As a matter of objective fact, this one is not. And it shouldn't be treated like one.

II

A MERE GOVERNMENTAL STATEMENT THAT PROPERTY IS BEING TAKEN FOR "PUBLIC USE" CANNOT BE ACCEPTED ON FAITH. JUDICIAL INQUIRY IS REQUIRED.

As shown *ante*, any focus on the government's intent is improper *ab initio*. Even a well-intended municipality may not transgress Constitutional limitations. The Connecticut court not only committed that error, it compounded it by accepting uncritically — for the sake of "deference" to legislative choice — the city council's mere statement that its prime intent was to benefit the public by increasing the city's economic development.

Reasoned deference is one thing; abject abdication of legitimate judicial inquiry is something quite different. And quite wrong.

As Justice Holmes explained for this Court, "[t]he greatest weight is given to the judgment of the legislature, *but it always is open* to interested parties to contend that the legislature has gone beyond its constitutional power." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [1922].)

The problem in this case is that the Connecticut Supreme Court refused to recognize such limits; it upheld a system of virtually unreviewable deference to municipal declarations of public use. With respect, the city's simple statement that it would rather have a more economically "productive" use made of property already being put to legitimate use by its owners is not

legitimate governmental planning; it is an outright municipal land grab.[5]

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court ended years of debate and confusion in the lower courts when it reaffirmed that the remedy for a regulatory taking was just compensation. The defendant county and its many *amici* had voiced fears that any rule allowing constitutional challenge to land use regulations and thus requiring adherence to the Fifth Amendment's just compensation clause would cripple municipalities' ability to govern. This Court's rejection of those hyperbolic pleas was clear and instructive:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; *many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities*, and the Just Compensation Clause of the Fifth Amendment

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[5] The Justices of this Court have recognized that there is nothing sacrosanct about those who occupy desks in city halls, or any reason to differentiate their legal responsibilities from other government employees. As Justice Brennan aptly put it: "After all, if a policeman must know the Constitution, then why not a planner?" (*San Diego Gas & Elec. Co.*, 450 U.S. at 661; Brennan, J., dissenting [see *ante*, p. 7, fn. 3].)

is one of them." (*First English*, 482 U.S. at 321; emphasis added.)[6]

Indeed, the obvious point of the Bill of Rights is to "limit the flexibility and freedom of governmental authorities," as all of its provisions are designed to secure individual rights against governmental incursions. One of those provisions is the Fifth Amendment's restriction of the power of eminent domain (an otherwise inherent attribute of sovereignty) to takings "for public use." That intended limitation needs enforcement to make it real. As Justice Frankfurter explained for this Court in a *statutory* context: "Statutes . . . are not inert exercises in literary composition. They are instruments of government." (*U.S. v. Shirey*, 359 U.S. 255, 260 [1959].) Surely, the Constitution is entitled to equal dignity.

Perhaps underlying that conclusion — and highly pertinent at bench — is this Court's repeated recognition that, when the governmental interest is financial, its actions must be viewed warily. (See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [". . . complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money . . . ."]; *United States v. Winstar Corp.*, 518 U.S. 839, 896 [1996] [". . . statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of

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[6] In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court flatly rejected, as contrary to settled Fifth Amendment law, a city's contention that its decisions could not be judicially "second-guessed."

meeting its legitimate public responsibilities to private parties"]; *United States v. Good Real Property*, 510 U.S. 43, 55-56 [1993] [careful examination "is of particular importance . . . where the Government has a direct pecuniary interest in the outcome of the proceedings."].)[7]

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) the Court warned government regulators not to attempt to evade the Constitution's strictures through inventive wordplay: "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841.) There is no reason why scrutiny of the public use requirement in that same clause should receive any less respect.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) is instructive. Viewing a statute that contained numerous "legislative findings" to support its conclusion (see 505 U.S. at 1021, fn. 10), this Court stressed that what is important is *not* the voiced legislative rationale (because that would always justify the government act unless the legislature had "a stupid staff" incapable of using the proper magic words to

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[7] It thus seems appropriate to note that Professor James Buchanan (whose *amicus curiae* brief supported the Petition for Certiorari at bench) received the Nobel Prize in Economics for demonstrating that, for all the familiar platitudes about public interest, government officials act in pursuit of their perceived self-interest, the same as private parties. (See James M. Buchanan & Gordon Tullock, *The Calculus of Consent* [1962].)

justify action [505 U.S. at 1025, fn. 12]), but whether the underlying facts actually support the legislative result. Remanding the case to give the State an opportunity to defend its legislative handiwork, this Court "emphasize[d] that to win its case, South Carolina must do more than proffer the legislature's declaration . . . or [its] conclusory assertion . . . ." (505 U.S. at 1031.)

The same analysis recommends itself in the "public use" context. It is easy for a city council to use words *saying* that its action is designed to enable a "public" use of private property, but the proof of that assertion requires more than superficial examination to vindicate the Constitution's primacy.

This Court's refusal to abdicate judicial review was aptly phrased many decades ago:

> "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; [and] that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases . . . . Under our system of government, such a conclusion is obviously untenable. . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression." (*Sterling v. Constantin*, 287 U.S. 378, 397-398 [1932].)

Whether government action complies with the Constitution is a question for the judiciary — and has been since *Marbury v. Madison*, 1 Cr. 137 (1803).

The rule adopted below pays no more than lip service to this Court's venerable history of judicial review. The Connecticut Supreme Court concluded that "responsible judicial oversight" will do "much to quell the opportunity for abuse of the eminent domain power." (*Kelo*, 843 A.2d at 586.) But that court's actions show that there will be no "responsible judicial oversight" in Connecticut or in any other state that adopts its rationale. For the Connecticut Supreme Court simply accepted uncritically the city's assertion that its patent condemnation to convert one private land use by one group of citizens into an opportunity for a different private entity to make a different type of private development was a genuine "public" use and thus a legitimate exercise of the power of eminent domain.

The Connecticut rule denies any real enforcement of the Fifth Amendment's "public use" limitation. It ought to be overturned.

III

THE POWER OF EMINENT DOMAIN SHOULD NOT BE A MEANS FOR GOVERNMENT TO ENGAGE IN RISK-TAKING, ENTREPRENEURIAL VENTURES.

Cases like this are a far cry from *Berman v. Parker*, 348 U.S. 26 (1954), the half-century old decision in which this Court concluded that it was a valid "public use" to condemn a horribly blighted area

— an area that ranked low in every measurable category except crime rate and disease, where it topped the charts — for the purpose of slum clearance and transformation into something productive and beneficial to the community.

The case at bench involves no blight. The City of New London made no pretense of asserting that the homes in this neighborhood were substandard in any ordinary meaning of the term; they simply produced less of a municipal tax base than a more intense commercial/industrial use could provide.

Thus, a ruling that places programs like New London's outside the constitutional pale does not threaten the ability of municipalities to continue engaging in legitimate programs of slum clearance (or blight elimination, as it is more generally called today).

This case involves something quite different, i.e., municipalities that view themselves as entrepreneurs, or at least partners in entrepreneurial endeavors that might — with an emphasis on the "might" — redound to their municipal economic benefit. They also might not.

And there's the rub. Government is not supposed to be a player in the entrepreneurial game. Government agencies and officials may look longingly at some of the financial gains registered by private entity developers and wish that they could realize similar returns for their municipal treasuries. But that is not the business of government.

Government is designed to provide essential services to the populace that the populace is not well equipped to provide for itself. *Laissez faire* review, like that authorized by the Connecticut Supreme Court, has

emboldened municipalities to dabble in the risk-takers' market. As one court described it:

> "By misemploying the extraordinary powers of urban renewal a redevelopment agency captures pending tax revenues which it then *can use as a grubstake to subsidize commercial development in the project area in the hope of striking it rich.* Such schemes contemplate borrowing money by issuing bonds on the strength of assured future tax revenues, money which is then used to acquire, improve and resell property within the project area at a loss as an inducement to business enterprises such as K-Mart to locate within the project area rather than in the neighboring communities." (*Regus v. City of Baldwin Park*, 139 Cal. Rptr. 196, 204-205 [Cal. App. 1977]; emphasis added.)

The law should not encourage municipalities to act in this fashion.[8] What cities end up doing is essentially entering into partnerships based on guesses

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[8] This leads some to all sorts of strange and illegal games. See, e.g., *99¢ Only Stores v. Lancaster Redev. Agency*, 60 Fed. Appx. 123 (9th Cir. 2003) (attempt to condemn discount store in order to turn property over to larger discount store); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (attempt to condemn vacant land planned for church facility in order to transfer to "big box" store); *Lancaster Redev. Agency v. Dibley*, 25 Cal. Rptr. 2d 593 (Cal. App. 1993) (attempt to pervert law intended to provide low income housing in order to finance "business park").

about the future tax stream from a proposed development and betting their anticipated tax revenue in a high stakes developmental poker game. In order to make such projects work, however, cities often end up selling the properties to redevelopers at far less than their cost to the cities, and then granting tax write-offs as additional inducements. By the time they finish, the new tax revenues that were supposed to pay for the project have gone up in smoke:

> "In essence, the tax revenues are used as subsidies to attract new business. The immediate gainers are the subsidized businesses. The immediate losers are the taxpayers and government entities outside the project area, who are required to pay the normal running expenses of government operation without the assistance of new tax revenues from the project area." (*Regus*, 139 Cal. Rptr. at 205.)

Worse than that, some cities have engaged in destructive entrepreneurial competition with other municipalities, in an effort to lure businesses to cross municipal borders and bring their tax dollars with them. In other words, their projects do not create new jobs and new taxes; they merely shift them from one locality to another. That serves no general public interest:

> "[U]nrestricted use of development powers fosters speculative competition between municipalities in their attempts to attract private enterprise, *speculation which they can finance in part with other people's money*. When the extraordinary powers of legislation designed to combat blight and renew decayed urban areas

> are used as a fiscal device to promote industrial, commercial, and business development in a project area that is merely underdeveloped rather than blighted, competitive speculation may be turned loose." (*Regus*, 139 Cal. Rptr. at 204 [1977]; emphasis added.)[9]

This case is the proverbial "Exhibit A." The city of New London never even pretended that this residential neighborhood is blighted, asserting only that it is less intensely developed than it might be and thus, less productive of tax revenue than it might be. But aside from the kind of rosy projections often seen at the outset of large-scale development projects, it is uncertain what the outcome will be.

> "The promoters of such projects promise that in time everyone will benefit, taxpayers, government entities, other property owners,

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[9] An illustration of such "competitive speculation" appeared in *99¢ Only Stores*, 60 Fed. Appx. 123. There, the record showed that two adjacent cities engaged in such cutthroat competition to attract businesses from each other that they eventually entered into a "treaty" precluding such competition to staunch the municipal blood-letting. See also Frank Clifford, "Pirating the Auto Retailers," Los Angeles Times, Nov. 9, 1990, p. A1, describing the predatory practices of adjoining cities in the competition for auto dealers (and their sales taxes). Noting that the heat of competition often makes cities offer terms so friendly that the anticipated tax revenues are far less than originally budgeted. "The rules of the auto mall war are simple. Raid your neighbor's dealers before he raids yours." (*Id.* at A40.)

> bondholders; all will profit from increased future assessments on the tax rolls, for with the baking of a bigger pie bigger shares will come to all. But the landscape is littered with speculative real estate developments whose profits have turned into pie in the sky . . . ." (*Regus*, 139 Cal. Rptr. at 205.)

Speculative development projects are the province of private enterprise, not government.[10] It is one thing for private entrepreneurs to "litter the landscape" with failed ideas. That is endemic to the capitalist system. Entrepreneurs are risk-takers by definition — some win, some lose. Not so the government, which has no legitimate business gambling public funds on speculative projects.

As government agencies have more and more often sought to reap the rewards of such entrepreneurial development, more of them have contributed to the littered landscape. A recent New York Times article, for example, reports that since 1957, some 300 to 400 major shopping malls have been destroyed, locked up, or converted to other uses. (Peter T. Kilborn, "An Enormous Landmark Joins Graveyard of Malls," New York Times, Dec. 24, 2003, p. A10.) Such malls are a favored land use of redevelopers using the cities' power of eminent domain for their land acquisition.

Some of the more highly publicized condemnations for purely private use provide vivid

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[10] Government bonds, for that reason, pay lower interest rates than speculative "junk" bonds because they are close to risk free. Thus, people are willing to invest in them for a lower rate of return.

illustrations of the dangers to the municipal fisc from such risk-taking.

— *Item*: The City of Yonkers, N.Y., was pressured by the Otis Elevator Co. for space to expand its facilities. The company threatened to leave town if not accommodated. The city agreed and condemned land for Otis. (*City of Yonkers v. Morris*, 335 N.E. 327 [N.Y. 1975].) After expansion, Otis left town anyway, leaving the city holding a very empty bag when the courts refused to provide any remedy. (*City of Yonkers v. Otis Elevator Co.*, 844 F.2d 42 [2d Cir. 1988].)

— *Item*: The City of Detroit, of course, provided the classic illustration of all that is wrong with using the eminent domain power to benefit private parties. It responded to a threat similar to that of Otis Elevator. Detroit's threat came from General Motors, which said it would move its Cadillac assembly plant if Detroit didn't provide it with space. Detroit capitulated and acquired, and then transferred to GM, 465 acres formerly occupied by a thriving community that included 1200 households, 16 churches, more than 100 businesses, a U.S. post office, and a 278-bed hospital. The acquisition cost was some $200 million; the sale price to GM was $6.5 million. GM's promise was 6000 new jobs.[11] But no

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[11] In fact, the Poletown plant was designed to consolidate manufacturing — already being done in Detroit — employing 10,000 workers. Assuming Poletown produced 6000 jobs, that would be a net loss of 4000 for the area. (See William Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 Pace L. Rev. 231, 263, fn. 182 [1984].) It turned out to be worse.

more than 3000 ever materialized. (See *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 [Mich. 1981]; Armond Cohen, *Poletown, Detroit: A Case Study in "Public Use" and Reindustrialization* [Lincoln Inst. of Land Policy 1982].)

Poletown was finally overruled nearly a quarter of a century later when the Michigan Supreme Court held that such condemnation could not satisfy any concept of public use. (*County of Wayne v. Hathcock*, 684 N.W.2d 765 [Mich. 2004].)

— *Item*: The City of New York sought to prevent the New York Stock Exchange from moving to New Jersey by offering to buy a building site, provide construction funds, and give the company tax breaks. Total cost to the public would have been about $1 billion. The deal fell through, but not before the existing tenants had been evicted from the proposed site and the city was stuck paying the landlord $1 million per month in compensation for that loss, plus a $22 million deposit that was forfeited. (Charles V. Bagli, "45 Wall St. Is Renting Again Where Tower Deal Failed," New York Times, Feb. 8, 2003, p. B3.)

— *Item*: In the frenzy to attract new businesses, an Illinois agency actually advertised in the general media that it would condemn any property desired by someone who would redevelop it. (See *Southwestern Illinois Dev. Agency v. Al-Muhajirum*, 744 N.E.2d 308, 309 [Ill. App. 2001].) The Illinois Supreme Court put a stop to that, commenting acidly that it was unseemly for government agencies "to act as a default broker of land . . . ." (*Southwestern Illinois Dev. Agency v. National City Environmental*, 768 N.E.2d 1 [Ill. 2002].)

Cases like these have spawned a recent outpouring of justified criticism both in legal commentaries and in the general press.[12] This growing volume of such criticism has led even general magazine commentary to denigrate the constitutional power of eminent domain. As one commentator noted scornfully, "eminent domain [is] a legal term meaning 'we can do anything we want.'" (Steve Lopez, "In the Name of Her Father," Time Magazine, July 14, 1997, p. 4.) It shouldn't be.

The point is simply this: government agencies are not equipped to engage in the kind of risk-taking that

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[12] See, e.g., Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate a "Public-Private Taking" — A Proposal to Redefine "Public Use,"* 2000 L. Rev. Mich. St. U. Detroit Coll. L. 639; Stephen Jones, *Note, Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L. Rev. 285 (2000); Joseph J. Lazzarotti, *Public Use or Public Abuse?*, 68 U.M.K.C.L. Rev. 49 (1999); Laura Mansnerus, *Note, Public Use, Private Use and Judicial Review in Eminent Domain*, 58 N.Y.U.L. Rev. 413 (1983); John Gibeaut, *The Money Chase*, ABA Journal, March 1999, p. 58; Dean Starkman, "Condemnation Used to Hand Business to Another," Wall St. Journal, Dec. 2, 1998, p. A1; Eric Felton, "Kiss Your House Goodbye," Reader's Digest, March 2001, p. 135.

is endemic to the entrepreneurial process. They don't do it well and, when they try, they fail as often as not.[13]

The Connecticut Supreme Court dismisses cases like these as being "particularly egregious" governmental lapses that courts are capable of rejecting. (*Kelo*, 843 A.2d at 536.) But they are more than that. They are the result of the permissive attitude exemplified by the decision below that has emboldened local government agencies to overstep the constitutional bounds in a search for the entrepreneur's pot of gold. If this Court makes it plain that such ventures are not allowed, by putting the concept of "public" back in "public use," government agencies will get back to the business of governing, rather than speculating in real estate.

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[13] See Louis Uchitelle, "States Pay for Jobs, but It Doesn't Always Pay Off," New York Times, Nov. 10, 2003, p. A1, describing how Indianapolis paid $320 million to lure United Airlines into building an aircraft maintenance center there, only to see United walk away from it leaving the city more than empty handed: it lost its aircraft maintenance center and also forfeited the anticipated tax revenue. See also *Community Redev. Agency v. Force Electronics*, 64 Cal. Rptr. 2d 209 (Cal. App. 1997) (agency unable to pay condemnation judgment after an improvident redevelopment deal fell through and asked leave to pay over time; constitution forbade time payments); *Los Angeles Unified School Dist. v. Trump Wilshire Assocs.*, 50 Cal. Rptr. 2d 1682 (Cal. App. 1996) (agency unable to pay condemnation judgment and forced to abandon).

IV

WHEN THIS COURT SWEEPINGLY UPHELD THE USE OF EMINENT DOMAIN IN *BERMAN V. PARKER*, IT BELIEVED THAT THE PRIVATE PARTIES DISPLACED FOR THE PUBLIC GOOD WOULD BE JUSTLY COMPENSATED FOR THEIR LOSSES. THE REALITY IS OTHERWISE.

In *Berman*, this Court expressed its confidence that government agencies could be trusted to wield the power of eminent domain wisely. History has not been altogether kind to that thought (as noted in many of the briefs filed in this case)[14] but, in any event, the Court believed that landowners being displaced would be protected:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." (*Berman*, 348 U.S. at 36.)

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[14] Indeed, the sad truth began to manifest in the immediate aftermath of *Berman* itself. Where this Court had been told that the slums of Southwest Washington, D.C. would be razed, with one-third of the replacement housing to be low-cost, renting for $17 per room (see 348 U.S. at 30-31), the reality is that the entire area was built out with fancy office buildings, co-ops, restaurants, and a shopping center.

That made it sound as though the Court believed that property owners being displaced for projects that would not be occupied by public buildings (the classic "public uses") would at least be fully compensated for their troubles. Indeed, the Court's earlier opinions were sweeping in their description of the just compensation guarantee. (E.g., *Seaboard Air Line R. Co. v. U.S.*, 261 U.S. 299, 306 [1923] [property owner to be put "in as good a position pecuniarily as if the property had not been taken"]; *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 196 [1910] ["the question is, What has the owner lost?"]; *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 124 [1950] ["word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'"]; *U.S. v. Cors*, 337 U.S. 325, 332 [1949] ["political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice"].)

It has not turned out that way. If the condemning agency and its *amici curiae* in *Berman* convinced the Court that full compensation would be provided, it wasn't true. (See, e.g., *Community Redev. Agency v. Abrams*, 126 Cal. Rptr. 473, 483, fn. 9 [Cal. 1975] [saying that this Court's concepts are "panoramic," making up in "idealism" what they "lack[] in universal application"].)

Assuming any justification for compensation rules described as "harsh" (*U.S. v. General Motors Corp.*, 323 U.S. 373, 382 [1945]) when property is taken for actual public facilities that will be used by, and serve, the general public, there is none when the property will be turned over to private redevelopers for the purpose of generating their own profits. Such profit

making projects generate ample funds and ought to pay their own way.

CONCLUSION

The Ninth Circuit made the point with abundant clarity:

> "If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use', and if those officials could later justify their decision in court by merely positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings." (*Armendariz v. Penman*, 75 F.3d 1311, 1321 [9th Cir. 1996] [en banc].)

That is plainly where this Nation is headed if the decision below is allowed to stand. It is one thing to conclude (as this Court did in *Berman*) that clearing a notorious slum is a legitimate public use, regardless of the tools chosen by government to redevelop the area after clearance. In the same vein, the public use concept probably has room for the occasional need to deal with an aberration like the unique and oligopolistic title holding scheme dealt with in *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

However, if the concept of "public use" can be stretched to such an extent that a government agency need only declare that it is furthering some public goal by taking unoffending property from one private owner

to give to another for a redevelopment that will hopefully generate increased tax revenues, then the concept has lost all meaning.

These *amici curiae* pray that the Court reverse the decision below and declare that the Fifth Amendment's "public use" limitation has real meaning.

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