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

***Brief Amici Curiae* of Brooklyn United for Innovative Local Development (BUILD), Rev. Herbert Daughtry, and The New York City and Vicinity Carpenters Labor-Management Corporation in Support of Respondents**

SEAN H. DONAHUE
1477 A St., NE
Washington, D.C. 20002
(202) 544-4037

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

Attorneys for Amici Curiae

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INTEREST OF *AMICI CURIAE*[*]

Brooklyn United for Innovative Local Development (BUILD) is a Brooklyn-based community organization committed to promoting economic opportunity, financial self-sufficiency, and prosperity in the socioeconomically depressed communities of our borough. In part because of decades of economic stagnation, Brooklyn's glorious vibrancy has been shrouded by stark social realities: nearly half its African-American men are without jobs, and more of them in prison than college, and over 60% of our children are failing to meet educational standards.

BUILD believes that overcoming the challenges confronted by inner-city communities like Brooklyn's demands a multi-dimensional strategy, part of which is development that generates the jobs, attractive amenities, and business opportunities that are *essential* for combating unemployment, poverty and undercapitalization. We recognize that the use of eminent domain authority can be indispensable to bringing such development – and the enormous attendant community benefits – to fruition.

Rev. Herbert Daughtry is the National Presiding Minister of the House of the Lord Churches. His forty years of involvement in church and community activity have earned him the title "The People's Pastor." Active in the struggle for the integration of schools and for community control of schools in the 1960s, Rev. Daughtry was a leader of the Coalition of Concerned Leaders and Citizens to Save Our Jobs, a 1970s effort which used boycotts to win jobs and services for African Americans from Brooklyn merchants. He is president and founder of the African People's Christian Organization, a member of the Black Leadership Commission on AIDS, and chairman emeritus of the National Black United Front. He also has served as co-chair of the Ministers Against Narcotics and

[*] No counsel for any party authored any part of this brief. No person or entity, other than *Amici* and their counsel made a monetary contribution toward submission of this brief, which is filed with the parties' written consent.

vice chair of the Bedford Stuyvesant Youth in Action Board.

The New York City and Vicinity Carpenters Labor-Management Corporation is a New York nonprofit organization that seeks to promote economic competitiveness in the building and construction industries and expand work opportunities for union carpenters and their employers. Many of its union members live in Brooklyn. Unions built Metrotech, a complex, built on land assembled under eminent domain powers, that included the first Class A office building in Brooklyn since the 1960s and first hotel since the 1920s, and that, in addition to tax revenues and construction employment, has resulted in thousands of permanent jobs for Brooklynites. That project catalyzed private construction that has invigorated the economy for Borough and City residents and built capacity for local minority- and women-owned contractors.

Union labor also built Atlantic Terminal and Atlantic Center, projects that replaced blighted, largely vacant inner city property with a vibrant shopping center – which, in addition to tax revenues and jobs, represented a pioneering effort to attract national retailers and a large supermarket to residents of a poor, predominantly minority neighborhood, who had long been denied the opportunity for high-quality, low-priced food shopping that those in affluent neighborhoods take for granted. This project created 1080 full-time jobs (with benefits), 48% of which are held by people living within two miles.

The Atlantic Yards Project. *Amici* are strongly supportive of Atlantic Yards project, a proposal to replace a blighted site – now largely occupied by rail yards, vacant and industrial property – with a mixed-use development, projected to include 4,000 units of rental housing, including 2,000 set aside for low- and middle-income renters, four office buildings, a sports arena designed by renowned architect Frank Gehry – which would be home to the NBA Nets, the first professional sports franchise to call Brooklyn home since the Dodgers left town in 1957 – along with six acres of open space and a community center.

The project will bring an estimated 10,000 permanent and 15,000 construction jobs, contracting opportunities for minority- and women-owned business, and billions of dollars in net benefits, including $2.8 billion in new net tax revenue to New York City and New York State over 30 years. It will make a real difference for a city where 48.3% of African-American males are unemployed or out of the workforce entirely, more than 1 in 5 households pay half their income on rent, and fiscal problems continue to force cuts in important services.

Amici do not seek to persuade the Court of the wisdom of the Atlantic Yards proposal, the merits of which are being vigorously debated in meetings throughout the community and on the editorial pages of the city's newspapers. Nor do the legal issues before the Court in this case have potential to directly affect the proposed project – which, like Metrotech and Atlantic Center, will be built in a blighted area under State law that, unlike Connecticut's, does not authorize eminent domain exclusively for economic development purposes.

Rather, this Brief is submitted in the hope that our perspective, derived from participation in the urban development process will aid the Court's informed resolution of the issues presented. This experience contradicts many of the assertions advanced by the Petitioner property owners and their *amici*. In particular, while their accounts fairly accentuate the costs that the condemnation power can impose and highlight examples of its misuse (including notorious instances of racial discrimination), the Court should not decide the case on the jarring premise – advanced by Petitioners and repeated in numerous *amicus* briefs – that government promoted economic development projects should be viewed as transferring wealth *from* individuals of modest means *to* the wealthy or that such efforts are opposed by poor and working people and people of color. The purpose of projects like the one at issue is to make a material difference in the lives of residents of economically distressed cities, the vast majority of whom are themselves of

extremely modest means; our experience with similar projects teaches that these purposes can in fact be accomplished.

Summary of Argument

The question at the heart of Petitioners' challenge is, in one sense, an extremely difficult one: when do the public benefits of a project that will revitalize a large section of a distressed city, increase employment opportunity for the city's inhabitants, and provided sorely needed additional tax revenues warrant displacing people who live in the area and would prefer to remain? But the hard questions this case raises are ones of social and economic policy. As a matter of *federal constitutional law*, the questions Petitioners raise have one clearly correct answer: the Fifth Amendment's "public use" language supplies no authority for a federal court to overturn Respondents' State-authorized determination that the public benefits warranted use of the eminent domain power. Rather, the Constitution entitles Petitioners to the same remedy as those whose property is appropriated to build a road or government building (or develop a "blighted" area): Just Compensation.

Rather than have the case decided in accordance with settled precedent, Petitioners ask the Court to announce either of two alternative new rules of constitutional law: (1) a "bright line" rule that the eminent domain power *can never* be used for an economic development project like this one – or (2) one providing that such exercises (but no others) should be subject to heightened judicial scrutiny, whereby any property owner (not merely a homeowner) could obtain an injunction from a federal court if the court were persuaded that the benefits the project was intended to provide were insufficiently "certain."

Both proposals should be firmly rejected. The first is simply an invitation for this Court to unlearn the most basic lessons of judicial restraint – and return to a regime where federal courts presumed to delimit, in the name of the Constitution, the legitimate objects of State government. The specific limitation Petitioners urge would also defy logic: governments would be

categorically without power to pursue large objects that were central to their survival – and a homeowner who could not prevent the government from erecting a municipal parking lot could stop a project, including one broadly supported by her neighbors, that offered vast benefits for the people of the city.

Such results might be tolerated if the Constitution plainly limited condemnation to the construction of government buildings or if this Court had a long history of so construing it – perhaps even if there was long practice of governments confining themselves to such pursuits. But the opposite is true: for this Nation's entire history, legislatures have authorized private condemnation when doing so was to the public advantage; this Court has, for nearly as long, held that "public use" does not prohibit a taking by or transfer to a private party where the government has determined that doing so confers a public advantage – in cases arising from circumstances that are, in every constitutionally meaningful respect, indistinguishable from this one.

This Court should also reject the heightened scrutiny proposal and adhere to the rule that exercises of the eminent domain power are reviewed under the same, highly restrained, standards are exercises of other governmental powers. To the extent the proposal depends on the counterintuitive – and counterfactual – notion that economic development projects, though pursued for public benefit, generally harm poor and working people, that is reason alone to reject it. Moreover, although Petitioners and *amici* catalogue the potential harms and dangers that improvident exercise of eminent domain can cause, the rule they propose is not addressed to those problems, and the dangers they identify are fundamentally no different from those posed under other powers whose exercise is entrusted to political process.

Finally, although Petitioners package their rule as a modest improvement, it is neither modest nor an improvement over current law. It would require courts to decide as matters of law

questions that are both technical and value laden – and would entrust that job to federal courts, making them the forum of choice for individuals who want to stop projects and reversing longstanding, highly salutary practice of resolving "public use" questions in State courts on State law grounds.

ARGUMENT

I. The Fifth Amendment, as Applied to the States through the Fourteenth, Does Not Disable State and Local Government From Taking Property for Economic Development Purposes, When Just Compensation Is Paid

A. Promoting Economic Activity For The Benefit of Its Inhabitants Is a Legitimate Object – and a Fundamental Responsibility – of State and Local Government

1. The federal Constitution and settled American political tradition confer on elected officials and their delegated agencies, rather than on courts, the power to define what public activities serve the public interest. *See U. S. ex rel. TVA v. Welch*, 327 U.S. 546, 551 (U.S. 1946) ("it is the function of Congress to decide what type of taking is for a public use").

Accordingly, this Court has never held that governments' eminent domain powers are limited to particular "categories" of governmental undertakings. Instead, it has interpreted the Fifth Amendment's reference to "public use" as no less "broad and inclusive" than "the public welfare," and has emphasized that the relevant constitutional inquiry is "whether [the eminent domain] power is being exercised for a public purpose." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Governments are free to select the means to fulfill purposes within their broad police powers, whether by taxation and public spending, regulation, or eminent domain, *see National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) ("the public use requirement of the Takings Clause is coterminous with the regulatory power"); *Hawaii Housing Auth. v. Midkiff*, 467 U.S.229, 240 (1984), and whether or not a "public end [is]* * *

better served through an agency of private enterprise than through a department of government," *Berman*, 348 U.S. at 33-34, is likewise for legislative determination.

Petitioners' *per se* rule of governmental disability is redolent of "a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *see Lochner v. New York*, 198 U.S. 45, 57 (1905) (question presented was whether New York statute regulating wages and hours of bakery workers was "within the police power of the state"). This Court long ago abandoned the practice of grading exercises of state police powers against its own view of the proper categories of governmental action, confirming that

> it is not only the right, but the bound and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conductive to its ends * * * [in relation to its] internal police * * * the authority of the state is complete, unqualified, and exclusive

Nebbia v. New York, 291 U.S. 502, 523 (1934)(citation omitted).

In light of this appropriately deferential inquiry, the *Midkiff* Court could accurately observe that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, [this] Court has *never* held a compensated taking to be proscribed by the Public Use Clause." 467 U.S. at 241 (emphasis added).

The object of the eminent domain exercise here – fostering economic development in an area of the State marred by a stagnant economy and underemployment – is, as dozens of this Court's precedents confirm, entirely legitimate, *Brown v. Legal Found.*, 538 U.S. 216, 231 (2003) (equating "public use" with requirement that government action be "legitimate"); *see, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("no

one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry");*West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 393 (1937); *New York Cent. R. Co. v. White,* 243 U.S. 188, 202 (1917); *Chicago, B. & Q.R. Co. v. McGuire,* 219 U.S. 549, 567-69 (1911); *Munn v. Illinois*, 94 U.S. 113, 124-25 (1876).

2. Even if substantive review of legitimate ends of State government were authorized, however, Petitioners' remarkable suggestion that a government's legitimate objectives do not encompass power to promote economic activity, for the purpose of adding jobs to the local economy, increasing revenues available for municipal services, and revitalizing a declining (if not blighted) urban area would be plainly untenable.

In a very real sense, the promotion of economic activity – and prevention of economic degeneration – is not merely *one of* the concerns of State and local government; it is the first one, on which all other "public uses" depend. *Cf. Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) ("The Constitution * * * is not a suicide pact").[1]

a. Economic activity is a prime determinant of a city's vitality – and has a profound effect on the quality of life of its inhabitants and on the life chances of future generations. As the experiences of city after city across the Nation attest, economic stagnation and decline can lead to a painful downward spiral – the departure of jobs and job opportunities reduces the city's tax base, causing cutbacks in services, which induce further disinvestment, further fiscal duress, reductions in essential services, which leads to higher crime and diminished educational opportunity. New business do not form; institutions that can leave for suburbs and other cities do. *See, e.g.*, W.

[1] Local governments "expend tremendous energies maintaining and enhancing their economies." A. Bowman, *The Visible Hand: Major Issues in City Economic Policy* 7 (Natl. League of Cities Working Papers Nov. 1987). Of 326 mayors surveyed, 86% identified economic development as one of their top three priorities, and 36.5% ranked it highest. *See id.* at 8.

WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); CITY OF CAMDEN MULTI-YEAR RECOVERY PLAN, FISCAL YEARS 2001-2003 (Nov. 21, 2001) (describing plight of city that lost population, jobs, and tax base); A. Downs, *The Big Picture*, BROOKINGS REVIEW at 10 (Fall 1998).[2] This specter is especially serious in older cities, such as New London, which are small and unable to tax metropolitan wealth. *See, e.g.*, D. RUSK, CITIES WITHOUT SUBURBS (1993).

b. Petitioners and their *amici* fairly call attention to the genuine burdens borne by individuals displaced by new development, but the human toll of economic stagnation and urban decline is no less worthy of governmental concern. *See, e.g.,* A. Vassallo, *Solving Camden's Crisis: Makeover or Takeover?*, 33 RUTGERS L. J. 185, 190 (2001) ("'Camden leads the nation in statistics that measure the failure of life for children,' including poverty, babies born to a teen-ager, and unmarried mothers") (quoting P. Kerr, *Camden Forces its Suburbs to Ask, What if a City Dies?*, N.Y. TIMES A1 (Sept. 7, 1989); *see also* A. Goldsmith *et al. The Impact of Labor Force History on Self-esteem and its Component Parts, Anxiety, Alienation and Depression,* 8 J. ECON. PSYCH. 494 (1996) (periods of high unemployment associated with increased rates of suicide and increased spouse abuse); F. McKee-Ryan *et al.*, *Psychological and Physical Well-Being During Unemployment: A Meta-Analytic Study*, 90 J. APP. PSYCH. 53 (2005).

[2] Downs explains:

> Core-area poverty concentrations contribute to adverse neighborhood traits that "push" many businesses and middle- and upper income households of all races -- mainly households with children -- out of central cities into suburbs. * * * * A self-aggravating downward fiscal spiral weakens the ability of core-area governments to provide quality public services and results in grossly unequal environments across our metropolitan areas. Such disparities in neighborhoods in which children are raised make a mockery of the American ideal of equality of opportunity.

As the trial court in this case pointed out, although Respondents appear to be "abstract entities,"

> The people behind these abstractions have a dream also. The accomplishment of their dream presents no opportunity of personal gain or favor. Their dream is for their city buffeted for decades by hard times and until recently declining prospects. They hope by this development project and resistance to the plaintiffs' litigation to provide an economic and social uplift for their city--jobs that will provide the underemployed or unemployed new hope, new tax monies so the tax burden on the community can be lifted and new programs and projects for the city that can be realized.

Kelo v. New London, 2002 WL 500238, * 4 (Super. Ct. 2002).

Their "bounden and solemn duty * * * to advance the safety, happiness and prosperity of its people," *Nebbia*, 291 U.S. at 523, requires State and local governments to confront the "social costs" that urban economic distress imposes.

3. Economic development efforts – including projects of the kind at issue in this case – seek to respond to and prevent these destructive dynamics, by broadening and diversifying the local tax base, creating employment opportunities, and revitalizing declining areas and neighborhoods. Although not every project will succeed, *see Midkiff*, 467 U.S. at 242 ("whether in fact the provision will accomplish its objectives is not the question"), *amici* can attest that the benefits can be real and substantial.

4. The size of such projects and the realities of urban land ownership often make them impracticable to accomplish without resort to eminent domain power. Thus, the revitalization of Times Square, the building of Lincoln Center, the construction of World Trade Center – symbols of New York City's resurgence and engines of an economy that benefit millions – could not have been accomplished without eminent

domain power. *See 64th Street Residence, Inc. v. City of New York*, 4 N.Y.2d 268 (1958) (rejecting challenge to Lincoln Center eminent domain); *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379 (1963) (rejecting challenge to condemnation for World Trade Center).

5. Eminent domain is never a first resort, *see infra*, but its availability ensures that no individual property owner can effectively overrule the determination that project – or "hold out" – in the hope of extracting narrow benefits from the condemning authority. *See* Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1081-86 (1995); Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75 (1986).

6. Beneficiaries of such projects, both direct, and indirect, are disproportionately – overwhelmingly – people of "modest means." Pet. Br. 12. By creating job opportunities for local residents, such projects attack what may well be the single greatest contributor to urban misery.[3] Such projects also boost tax revenues that support services such as public hospitals; public education, and affordable housing.[4] And they can have vast, indirect and intangible benefits, such as attracting and retaining residents, businesses, civic and cultural institutions. *See generally* T. BARTIK, WHO BENEFITS FROM STATE & LOCAL ECONOMIC DEVELOPMENT POLICIES? (1991) (concluding that metropolitan economic growth benefits African Americans, the

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[3] "The consequences of high neighborhood joblessness are more devastating than those of high neighborhood poverty. * * * Many of today's problems in the inner-city ghetto neighborhoods -- crime, family disolution, welfare, low levels of social organization, and so on -- are fundamentally a consequence of the disappearance of work." W.J. WILSON, WHEN WORK DISAPPEARS at xii.

[4] In FY2003, $10.4 billion of New York City's budget of about $45 billion was dedicated to social services; children's services; homeless services; programs for the aging, and youth and community development. Citizens Budget Commission, *City of New York Expenditures by Agency* (available at www.cbcny.org/pocket03.pdf).

less educated, and younger workers the most, thereby reducing income inequality).

B. Promoting Economic Development Is A Historic Power of Government

Although their fluidity has been a defining feature of States' lawful powers, *see Welch*, 327 U.S. at 552 ("departure from * * * judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision"), there is nothing novel or suspect about the use of eminent domain – as opposed to taxing, spending, or regulation – to pursue these economic benefits.

1. As Petitioners are constrained to recognize (Br. 18-19), State Legislatures have, throughout the Nation's history, authorized the use of the condemnation power to transfer property from one private owner to another, on the ground that the new owner's use of the land contributed to economic growth or conferred some economic benefit on the community. *See* Harrington, *Public Use and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L. J. 1245, 1247 (2002) ("American legislatures repeatedly used their power of expropriation to effect all manner of social and economic engineering, frequently transferring property from one private entity to another where it was thought that the transfer would effect some greater economic purpose").

Resort to eminent domain for economic development purposes was widespread in colonial times. *Cf. Midkiff*, 467 U.S. at 241 & n.5 (noting colonial antecedents for challenged measure). Indeed,

> Colonial lawmakers often regulated private landowners' usage of their land in order to secure public benefits, not merely to prevent harm to health and safety. Indeed, the public benefits pursued by such legislative action included some that consisted essentially of benefits for other private landowners. Legislatures often attempted to influence or control the development of land for particular productive purposes thought to be in the public good. Legislatures compelled owners of undeveloped land to develop it, beyond what was required by the original grants, and compelled owners of wetlands to participate in drainage projects. Owners risked losing preexisting mineral rights if they failed to conduct their mining with sufficient promptness. Owners of land suitable for iron forges risked losing their land if they declined to erect such forges themselves. In towns and cities, landowners were constrained by measures intended to channel the spatial pattern of development, to optimize the density of habitation, to promote development of certain kinds of land, and to implement aesthetic goals.

Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1282-83 (1996).

Before the Revolution, numerous American colonies enacted measures requiring that vacant or sparsely developed urban land be developed, and providing for the mandatory transfer of the land to a more productive private owner if it was not. *See id.* (citing and discussing statutes). These laws were complemented by others that permitted appropriation of rural land to advance the agricultural (and later industrial) economy. For example, a 1746 Connecticut statute authorized owners of "'lands lying convenient to be improved as a common field" to compel participation by unwilling neighbors, *id.* at 1265 & n.82, and "Connecticut's copper-mine legislation * * * authorized the taking of private property that was already devoted to the desired use – mining – but was not being utilized as expeditiously as the Assembly desired." *Id.* at 1265.

Laws providing for the compulsory transfer of property to private parties for legislatively determined publicly beneficial uses remained common after independence. The relevant legislative finding in this case echoes the rationale articulated in the first case decided under the "public use" clause of the State's

Constitution, *Olmstead v. Camp*, 33 Conn. 532, 1866 WL 927 (Conn. 1866), which held that a private mill owner was permitted, on payment of compensation, to flood his neighbor's land. Acknowledging that the mill owner had no legal obligation to allow the public access to the mill, the court held the "public use" requirement satisfied, because the owner's use of the property was "productive of general benefit." 1866 WL 927 *9. The court explained that "any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community" – not just those for involving "possession, occupation, [and] direct enjoyment, by the public" – should be considered a a taking for public use."[5] "[T]akings of land by private parties for the building of mills or ferries were thought to be every bit as legitimate a use of the eminent domain power as takings to build forts or post offices." Harrington, 53 HASTINGS L. J. at 1298.

Later statutes delegated the States' eminent domain power to private interests for a wide variety of manufacturing projects designed to achieve desirable economic ends. *Id.* at 1254 n.28 (noting that because legislatures were "anxious to attract private investment," they did not attempt to regulate these enterprises as public utilities"). Such measures were upheld by State courts on the ground that "if the proposed improvement tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the community, the use is public." *Jacobs v. Clearview Water Supply Co.*, 69 A. 870, 872 (Pa. 1908).

This Court has consistently rejected challenges to statutes authorizing condemnations for uses deemed to served the public

[5] 1866 WL 927, *9. The *Olmstead* court further reasoned that "such a limitation * * * of this important clause would be entirely different from its accepted interpretation, and would prove as unfortunate as novel." Endorsing a dictionary definition of "use," the court continued, "'Public use' may therefore well mean public usefulness, utility or advantage, or what is productive of general benefit," a construction that had "uniformly been put upon the language by courts, legislatures and legal authorities." *Id.*

interest. *See, e.g., Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 17 (1885) (upholding New Hampshire statute authorizing mill owner to flood upstream land upon payment of compensation, as public use, and citing many such state laws); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30 (1916); *Hairston v. Danville & W. R.R. Co*, 208 U.S. 598 (1908); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527 (1906).[6]

Without a single decision of this Court to point to in support of their position, Petitioners (Br. 21-22 & nn. 18, 19) labor to classify these decisions *rejecting* "public use" claims into "categories" – and then argue that the allegedly defining features of these "categories" are "specific limits" that the decision of the Connecticut Supreme Court (and of the dissenting Justices, who agreed with the majority on this point) ignored.

Even on its own terms, this endeavor is unpersuasive. In an urban setting, a large, centrally located site can be no less a publicly beneficial amenity than was a water mill or a railroad in earlier times, and the "assembly" problems (Br. 21-22) posed by owners who refuse to sell needed parcels are no less real. Nor are the benefits at issue here more "indirect" or derivative than in the case of grist mills, railroad or irrigation ditches. In those cases, the public benefit did not occur upon condemnation, but rather depended on facilities first being built by private parties – and then used, and then those uses actually producing the desired positive spillover effects. *See, e.g., Jacobs*, 69 A. at 872 ("It is the experience of most water companies that the number of patrons at first is small. This is also true as to railroad companies. They frequently exercise the right of eminent

[6] In *Clark v. Nash*, 198 U.S. 361 (1905), this Court rejected the claim that a statute authorizing an "individual to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone" was beyond the legislature's powers. 198 U.S. at 367. Although the only conceivable *direct* benefit was to the defendant landowner, the only public benefit was unstated: interest in land being put to productive use.

domain through great stretches of territory, where there may not reside a single individual at the time to enjoy the public use; but it has never been held that on this account the use was not a public one.").

Petitioners' strained distinctions of *Berman* and *Midkiff* fare no better. To be sure, "'the analogy between a slum and a public nuisance cannot be overlooked,'" Pet. Br. 24 n.22 (quoting *Allydon Realty v. Holyoke*, 23 N.E.2d 665, 668 (Mass. 1939)) – and this Court has recognized that "nuisance-like activity" has a "special status" in takings law, *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 491 n.20 (1987). But its "special" role is *not* to demarcate the outer bound of "public use." On the contrary, nuisance abatement represents the paradigm government purpose that justifies expropriation of private property *without compensation. See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992). Even more important, *Berman* expressly rejected the very "specific limit" Petitioners would impose on that decision, emphasizing that "[i]t is within the power of the legislature to determine that the community should be *beautiful as well as healthy*, spacious as well as clean, well-balanced as well as carefully patrolled." 348 U.S. at 33 (emphasis added).

Likewise, Petitioners' claim that the public benefits in *Midkiff* were realized immediately upon completion of the taking (Br. 26) is belied by the Court's opinion, which (far from requiring "certainty") recognized that the Hawaii Act, "like any other, may not be successful in achieving its intended goals." 467 U.S. at 242. Indeed, in an important sense, the policy pursued in that case and the one at issue here are two sides of the same coin: in *Midkiff*, there were too few landowners; in situations such as this one, the *proliferation* of landowners makes eminent domain necessary; *see* Merrill, 72 CORNELL L. REV. at 75-76 (explaining that holdout problem is akin to monopoly); *Hodel v. Irving*, 481 U.S. 704, 712-13 (1987) ("encouraging the consolidation of Indian lands is a public

purpose of high order"). It would be an extraordinary and ill-advised rule of constitutional law that made power to pursue a policy depend on characterizing the object as combating the "evil" (of fiscal distress or unemployment, or "oligopoly") – or securing the "benefit" of revitalizing a city, increasing tax revenue, or distributing land more equitably. *Cf. Lucas*, 503 U.S. at 1024 ("the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder"); Hart, 109 HARV. L. REV at 1259 (some affirmative use requirements were couched in terms of the community benefit of active use, while others identified the "harm" of "failure to develop").

But whether or not any plausible distinction could be extracted, *Berman* and *Midkiff* were emphatic that the rules they were applying was *not* particular to the facts of the case: *i.e.*, that power was not "specific and limited," but "broad and inclusive," and that the narrow standards of judicial review – the familiar axioms of federal judicial restraint – were generally applicable.

II. More Stringent Federal Review of Eminent Domain Is Neither Necessary Nor Appropriate

Claiming settled rules of judicial review are inadequate to curb abuses of the eminent domain power and appealing to the Constitution's "plain language," Petitioners and *amici* argue that compensated takings for "private economic development" should be subject to heightened scrutiny – and enjoined if a court is unpersuaded of the "certainty" that public benefits will materialize. These contentions are novel and meritless.

A. Working Class and Minority City Residents Would Not Benefit From Constitutional Limits On Economic Development For The Public Benefit

As an initial matter, the basic empirical premise of Petitioners' plea for an abrupt departure from traditional judicial deference is unsupported. Without defending in any way the errors and discriminatory outrages of numerous 1950s and 1960s

urban renewal projects, *see infra* – or minimizing the hardship that displacement can cause, *Amici* strongly disagree with claims that the *benefits* of urban economic development projects inevitably flow toward the affluent and away from the people of modest means. The governmental initiatives Petitioners blithely denigrate are instead among the more important means of addressing some of this Nation's most intractable and pressing social ills.

1. Petitioners' bald assertion, Br. 17, that "the whole idea behind economic development projects is replacing lower-income residents with higher-income ones" is simply false. The "idea" of many (but not all) projects is to promote higher *density* uses – which can readily mean greater housing opportunity for low-income people. *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977); *see also Cuyahoga Falls v. Buckeye Community* Found., 538 U.S. 188 (2003); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995); *Southern Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

For example, the site of the Brooklyn Atlantic Yards project, which consists primarily of vacant and industrial land, currently has approximately 160 units of residential housing, while the proposed project will have some 4,000 units of housing, half of which will be rented out at below-market rates and fully 800 of which will be set aside for low-income individuals – with guaranteed units for all displaced residents and preferences for neighborhood residents.

As numerous judicial decisions attest, property owners often resist such efforts, typically asserting a need to preserve the "character" of the existing neighborhood – a rationale that not infrequently masks hostility to those who would occupy the housing. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *see also AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (affirming injunction barring implementation of industrial park plan adopted as

pretext to thwart affordable housing development).

2. Development projects often bring sorely needed employment opportunity to urban communities. The New London project is expected to result in between (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs; as previously noted, the Atlantic Yards project would far exceed those numbers, with estimates of 10,000 permanent jobs and 15,000 construction jobs.

With the demise of manufacturing employment in Northeastern cities, construction jobs provide the best and often the only realistic opportunity to earn a living wage through blue-collar work. In the area surrounding the Atlantic Yards site, where unemployment rates are high, especially for African-Americans and other members of minority groups. The benefits of employment transcend wages paid, of course, since jobs are a principal engine of virtually all forms of social stability. *See* pp. 8-9, *supra*.

3. Projects bring substantial benefits to residents of immediately affected and surrounding neighborhoods. In sparsely populated areas where vacant land and unused industrial buildings are replaced, the influx of larger numbers of people can improve public safety, transportation, shopping opportunities, and the quality of public services, including public schools for the surrounding area, *see* R. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE (2002) (educational benefits of mixed-income schools), and can be a catalyst for long-needed environmental remediation.

4. Petitioners' scorn for the benefit of increasing municipal tax revenue is completely unwonted. *See* pp. 10-11 & n. 4, *supra*. The services that such revenues provide are expended overwhelmingly for the benefit of poor and middle-income people: public hospitals, public transportation, public education, services for homeless and people with AIDS, and affordable housing initiatives. Broadening the tax base makes municipal

governments less vulnerable to vicissitudes in the business cycles and permits them to keep tax rates low enough to attract other employers. For all these reasons, many community residents and activists – often including residents and owners of directly affected property – support development projects, as do many (but by no means all) of their elected representatives.

5. To be sure, there will be other long-time residents who oppose the same projects – many based on an entirely sincere preference for the existing character of the neighborhood. But as *Amici* can attest, the ranks of project opponents are by no means limited to long-time residents – and include new arrivals, absentee property owners, and those who oppose the project for ideological reasons or because the project's success will adversely affect their own commercial interests. It is a great vice of Petitioners' rule that a tiny minority of property owners could overrule the majority of neighbors, and indeed that *every* property owner (including a would-be developer whose opposition is a matter of narrow self-interest) able to persuade a court that benefits were not "reasonably certain" would be empowered to permanently enjoin a broadly supported project. As developers and project opponents alike well know, delay and uncertainty can defeat meritorious projects.

6. *Amici* do not – and could not – dispute the evidence that racial animus was behind many 1950s and 1960s highway construction and urban development projects, but we challenge the assumption that that experience in any way supports Petitioners' legal argument. The notorious evidence set out in the briefs of Petitioners' *amici* did not arise in the context of economic development condemnation, but rather in condemnations effectuated for highway construction and under blight designations – exercises of the eminent domain power that, under Petitioners' theory, raise no special concern and that their proposed rules do not even purport to reach.[7] Indeed, if

[7] Moreover, in the same jurisdictions where the eminent domain power was perverted for racial purposes, so too were zoning, regulatory, and

there were any substance to Petitioners' claims that economic development projects are inevitably harmful, the rule they seek here – one categorically limiting development to blighted areas – would, by definition, intensify the extent of disproportionate impact on poorer, predominantly minority communities.

7. Without glossing over this deplorable history or underestimating the seriousness of present-day racial discrimination and inequality, *Amici* believe it important to acknowledge the many ways in which the world has changed since – and often in response to – those notorious failures. The federal statutes under which those public development projects were pursued no longer exist, and the federal spending that underwrote them has long vanished. Congress has enacted statutes, *e.g.*, 42 U.S.C. § 4622, that evince concern for the problem of displacement.

Even if today's government officials and administrators were no more enlightened than their predecessors, urban politics has changed fundamentally, because of demographic shifts and the civil rights movement and the Voting Rights Act, meaning that elected officials are far more accountable to poor and minority constituents. *Cf. New York City Bd. of Estimate v. Morris*, 489 U.S. 688, 700 n.7 (1989) (invalidating rules that gave Staten Island residents roughly six times as much representation on governing body as Brooklynites).[8] Perhaps even more important, experience, sometimes bitter, has led community residents and civic leaders to greater awareness of

spending powers – with similarly tragic efficacy. *See Thompson v. HUD*, 2005 WL 27533 (D. Md. 2005) (cataloguing long history of purposeful racial discrimination in mortgage insurance and site selection).

[8] "Today * * * public-development officials operate in a far more constrained environment ** * * And in the new world of urban-development politics, the traditional build-and-grow coalition of government and business can no longer control the process. Too many interest groups exist, and they are able to gain power and voice, however temporary, by exercising procedural rights of review and leveraging the political system. L. Sagalyn, TIMES SQUARE ROULETTE 469 (2001).

and active engagement in land use decision-making.

B. Principles Supporting Restrained Judicial Review Apply To "Public Use" Claims

The arguments of Petitioners and *amici* that the dangers of "eminent domain abuse" require more searching judicial scrutiny give short shrift to the principles underlying judicial deference to the legislature. Indeed the dangers they identify do not support – and in significant respects argue against – the rule they ask the Court to impose. That rule, of course, would be require a *direct* repudiation of many of this Court's precedents.[9]

1. While Petitioners and *amici* repeatedly emphasize – likely correctly – that *homeowners* suffer substantial uncompensated costs from takings, *see, e.g.*, Pet. Br. 1-2, 33-34, that complaint argues for reconsideration of *Just Compensation* law, *see Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), not the "public use" doctrine – and it does not remotely support a rule of special scrutiny for "economic development" takings, as

[9] This Court has in terms rejected heightened judicial scrutiny for privately executed development projects and any suggestion that a "reasonable certainty" requirement be read into the Fifth Amendment. *Berman* explained (348 U.S. at 33-34) that a legislature's conclusion that a "public end may * * * better served through an agency of private enterprise than through a department of government" was not to be gainsaid, and *Midkiff* explicitly disclaimed (467 U.S. at 242) interest in the likelihood or "certainty" that the public benefit sought by the challenged law: "But 'whether in fact the provisions will accomplish the objectives is not the question: the [constitutional requirement] is satisfied if * * * the * * * [state] Legislature rationally could have believed that [the law] would promote its objective'") (quoting *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)); *see also National R.R.*, 503 U.S. at 422 (Constitution is "satisfie[d]" without "need [for] a specific factual determination whether the condemnation will accomplish its objectives"); *Nebbia*, 291 U.S. at 537 ("With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal").

against all others, let alone a "reasonable certainty" requirement.

It is by no means self-evident why an older, longstanding homeowner should or would feel less aggrieved by a (presumably inadequate) compensation award if her home were taken for some noncontroversial governmental use, such as a sewage treatment plant, than if it were put to use for a development project that sought large (but uncertain) benefits – let alone that she would prefer a project that delivered small, but demonstrable benefits. Petitioners' rule – and the entitlement to enjoin takings that do not meet the "reasonable certainty" standard -- is not limited to homeowners (indeed, Petitioners include a partnership that owns multiple parcels of property).[10]

2. Likewise, although Petitioners and *amici* make broad assertions about disproportionate burdens on people of modest means and members of racial minority groups, *but see* p. 10, *supra,* there is no claim of racial discrimination or disparate impact in this case, nor do the rules they seek limited to poor or minority groups homeowners, nor would their rule, if adopted, attach any significance to the racial distribution of benefits or burdens of a given project. *Compare, e.g., Alexander v. Sandoval,* 532 U.S. 275 (2001) (denying private right of action under disparate impact regulations).

Petitioners and *amici* offer no explanation why the impact alleged is specific to exercises of eminent domain for "economic development" purposes, their submissions suggest the opposite – and this Court's cases make clear that such impacts are not unique to the eminent domain power. *See Washington v. Davis,* 426 U.S. 229, 248 (1976) (disparate impact standard "would * * * perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white"); *see also*

[10] In the case of a longstanding resident who *rents* an apartment, Petitioners' rule leaves his landlord with unfettered discretion to sell to the developer, "social costs" notwithstanding.

Sandoval, supra; *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (mem.) (zoning limited minority residents to urban renewal area); *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998) (inequitable use of regulatory power to issue environmental permits).

3. The dangers featured in the briefs on Petitioners' side do not meaningfully distinguish the eminent domain power from powers – to tax, spend, and regulate – that governments wield subject only to traditional, restrained judicial review.

a. As this Court's decisions make clear, deferential review is not premised on the assumption that electorally accountable officials necessarily make wise choices, *see, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 17-18 (1992) ("California's grand experiment appears to vest benefits in a broad, powerful, and entrenched segment of society"), or even that they are especially likely to correct poor choices, *id.* ("ordinary democratic processes may be unlikely to prompt [law's] reconsideration or repeal"), or that the harms imposed by exercises of those powers are insubstantial. *See, e.g., HUD v. Rucker*, 535 U.S. 125 (2002) (sustaining eviction of elderly public housing tenant); *Hahn*, 505 U.S. at 18 (noting arguments that challenged measure "frustrates the 'American dream' of home ownership for many younger and poorer California families").

b. Petitioners' charges are less a case against "eminent domain abuse" than a brief against the *very notion of electorally accountable local government*. After all, governments intent on benefitting the privileged – and indifferent to the interests of its residents of modest means – could have the run of their taxing, zoning, spending, and regulatory powers long before they would need to consider eminent domain.

4. Eminent domain differs from these other powers in ways that would tend to make its improvident exercise *less* likely. First, although compensation may not extend to the full personal costs of dislocation, *see supra*, the requirement that government

pay market-value for taken property provides both a substantial means of mitigating individual burdens, *see Armstrong*, 364 U.S. at 49, and a substantial deterrent to actions that not are not publicly beneficial (indeed, fiscal constraints prevent many takings that would be beneficial).

5. Because condemnees are typically entitled to judicial hearings, and because States afford procedural protections – and impose legal constraints – substantially beyond those under federal constitutional law, condemnations are more costly and uncertain, and therefore less common, than Petitioners' accounts assume. *See generally* Merrill, 72 CORNELL L. REV. at 77-78 (explaining that "the decision whether to use eminent domain should be, from an economic perspective, self-regulating"). These costs are not the only or even the principal deterrents. Experience confirms what theory would predict: the concentrated and visible character of the burdens of eminent domain – as against the diffuse and inchoate public benefits – makes it easier to muster opposition (and controversy, adverse publicity, and litigation) than support for even the most manifestly beneficial projects.

C. Restrained Review Is Supported By the Text, Structure and Original Intent of The Constitution

1. Claims that the "plain language" of the Fifth Amendment calls out for stringent review suffer from a threshold difficulty: the language of the Amendment does not suggest that "public use" is intended as a substantive limitation on government power. These arguments depend on reading the Fifth Amendment *as if* it said "private property shall not be taken **[except]** for public use **[nor]** without just compensation," – and then speculating as to what the Framers understood "public" and "use" to mean. But the actual wording of the Amendment suggest that "public use" is meant as a description of the takings for which compensation must be paid, rather than an independent, substantive limitation on governmental power.

2. Scholarly review of the historical record suggests that this

natural reading is the originally intended one, *i.e.*, that the Framers did not intend the words "public use" in the Fifth Amendment to operate as a substantive, judicially enforceable limitation on the Legislature's eminent domain power. *See* Harrington, 53 HASTINGS L. J. at 1247 ("the idea that courts had the power to supervise legislative expropriations would have been unfamiliar to the members of the Congress who drafted the so-called Takings Clause"); *id.* at 1248 (concluding that "[i]n using the term 'public use' in the Fifth Amendment, the drafters * * * intended to distinguish a certain type of taking which required compensation * * * from those which did not"); *see also* Hart, 109 HARV. L. REV. at 1297 ("the history of colonial land use legislation strongly supports the Court's controversial conclusion that a state's eminent domain power is essentially as broad as its police power").[11]

3. So reading the Fifth Amendment does not mean that "purely private takings" are constitutional or deprive "public use" of independent significance. But it does make clear that there is no warrant for breaking with precedent and imposing stricter scrutiny.

a. Restrained review of "public use" claims does not detract from what has long been identified as the core requirement and primary purpose of the Clause: to mandate compensation so that "some people alone [are not forced] to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment) ("The [Takings]Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge"); *Brown v.*

[11]As Harrington explains, 53 HASTINGS L. J. at 1267-68, modern assumptions that appropriation of property through legislatively authorized eminent domain is *in*voluntary does not take account of widespread understanding that a property owner's "representatives" were agents, authorized to "consent" to a sale to "the public." *See id.* (giving examples from Blackstone's Commentaries, John Locke, and early State Constitutions).

Legal Found., 538 U.S. 216, 235 (2003) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation'") (citation omitted) *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 (1987) (Clause was "designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking"); *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236 (1897).

b. The Constitution does not permit "takings from A to give to B," in any event. This Court and others recognized that legislatures are without power to effect purely private takings in decisions rendered before the Fifth Amendment was "incorporated" against the States, *see, e.g.*, *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158 (1896), arising under a state constitution that had no compensation clause, *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 312 (C.C.D. Pa. 1795), and construing the "public use" language as descriptive, rather than proscriptive, *see Baltimore & O.R.R. v. Van Ness*, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830)); *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.). *See generally* J. Rubenfeld, *Usings*, 102 Yale L. J. 1077 (1997).

c. As Professor Rubenfeld explains, this Court's Takings jurisprudence is broadly consistent with giving "public use" its apparently intended meaning, *i.e.* as a limitation on the obligation to compensate, rather than on the power to take property for the public good. Thus, decisions denying compensation for certain governmental deprivations of property often turn on the absence of "public use." *Compare United States v. Caltex (Philippines), Inc.*, 344 U.S. 149 (1952) (no compensation for property deliberately destroyed by soldiers to prevent its falling into the hands of opposing forces) *with Mitchell v. Harmony*, 54 U.S. 115 (1852) *and United States v. Russell*, 80 U.S. 623 (1871) (mem.) (compensation for property *used* by soldiers). *Compare also United States v. Pewee Coal*

Co., 341 U.S. 114 (1951) (compensation due when mine ordered operated as war-time necessity) *with United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (no compensation for owner whose mines were ordered closed, as wartime measure).

D. Considerations of Federalism Strongly Support Adherence To Deferential Standards of Federal Constitutional Review

Petitioners' assurances that the "sky will not fall," notwithstanding, embracing the rule they propose would have far-reaching, adverse consequences.

1. Although Petitioners emphasize that only a small number of States have adopted economic development condemnation powers on all fours with Connecticut's, they overlook that fact's most obvious significance: it disproves the unrelenting pessimism about the political process that permeates Petitioners' submission. Contrary to the predictions of political and economic theorists that economic development condemnations are irresistible, most States have yet to find it necessary or wise to confer the *power* at issue (let alone exercise it abusively). Petitioners would deny the legislatures of those states the freedom to decide whether to adopt such a rule.

2. Even more serious is the potential to alter the respective roles of State and federal law – and State and federal *courts* – in deciding "public use" disputes.

a. Federal court review has never been the primary limitation on State eminent domain power. Until ratification of the Fourteenth Amendment, the federal Constitution imposed no limitation whatsoever on that power, and this and other federal courts have a consistent record of rejecting "public-use" claims, invoking principles of judicial restraint. *See* pp. 25-27, *supra*. Accordingly, those concerned about reining in the eminent domain power have looked to State courts and State Legislatures for relief. There is no indication such pleas have gone unheard: few States have granted the authority that Connecticut has, and many State courts have read state constitutional limitations more

stringently than this Court has the Fifth Amendment.

b. Almost every "public use" decision discussed by Petitioners and *amici* carried with it closely related, antecedent questions of statutory law. Here, for example, Petitioners made colorable claims that the Connecticut Legislature did not authorize condemnation in the delegation to the NLDC; had the courts ruled for them on those grounds, constitutional decision would not have been necessary. *See Aposporos v. Urban Redev. Comm'n*, 790 A.2d 1167 (Conn. 2002) (reversing condemnation on statutory grounds); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002). When decisions adopt a broad or narrow understanding of legislative authorization, they are subject to debate and revision (or ratification) through the political process.

c. In such litigation, federal constitutional questions arise only after myriad issues of State substantive, procedural, administrative and constitutional law are resolved – all in favor of the exercise of eminent domain. Even when the issue of federal constitutionality is finally joined, matters of state law play an unusually central role. What constitutes "property" is primarily a question with State law, *see Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), and whether a compensable "taking" has occurred and whether for a "public use" can likewise be bound up with local law and local conditions. *See Lucas*, 505 U.S. at 1016 n.7; *Clark*, 198 U.S. at 369 ("the people of a state, as also its courts, must, in the nature of things, be more familiar" with facts bearing on "public use" issue).

d. A rule that entitled every property owner to a determination of "reasonable certainty" as a matter of *federal constitutional law* would make federal court § 1983 suits the first resort for property owners who oppose a particular project. Indeed, because State law claims could not be basis for relief in federal court, *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), plaintiffs would couch their challenges in exclusively federal constitutional terms

E. Petitioners' specific heightened scrutiny proposal, which would read a "reasonable certainty" requirement for economic development takings into the Fifth Amendment, is especially unattractive. Such a rule is not even suggested by the constitutional language. It is hard to see why an action taken for the purpose of securing public benefits should fail if a federal judge is unpersuaded – in disagreement with the responsible government officials – of the "certainty" that the benefits sought will accrue. *See Keystone*, 480 U.S. at 511 n.3 (Rehnquist, C.J., dissenting) ("[O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation").

Judgments about the certainty of future benefits are precisely the kind courts are least equipped to make, *see, e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 308-09 (1997), and while Petitioners do not spell out the proposed rule's operation in any detail, it is hard to see how it could not be biased against projects with longer time horizons and in more marginal areas – *i.e.*, those which are most needed and bring the greatest benefits – and it would necessarily require (federal) courts, *see supra*, to decide questions that are both value-laden and highly technical. *See Midkiff, 467* U.S. at 243 (courts are not the place for "empirical debates over the wisdom of takings").

To raise just the most obvious hypothetical: would the Fifth Amendment authorize an injunction if a court found a project's future employment benefits genuine but its tax revenue projections too uncertain? What if it found both to be sufficiently "certain," but of lesser magnitude than a city's estimates? Under such a regime, proceedings before State and local bodies would invariably be consigned to the role of rehearsal for the main event: a federal court battle of the experts.

Conclusion

The judgment of the Supreme Court of Connecticut should be affirmed.

Respectfully submitted,

DAVID T. GOLDBERG
Counsel of record
99 Hudson Street, 8th fl.
New York, N.Y. 10013
(212) 334-8813

SEAN H. DONAHUE
1477 A St., N.E.
Washington, D.C. 20002
(202) 544-4037

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